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RE: Planning and Conservation League comments on the Draft Environmental Impact Report, *Monterey Amendment to the State Water Project Contracts (Including the Kern Water Bank Transfer) and Associated Actions as Part of a Settlement Agreement (Monterey Plus)*, SCH# 2003011118 (“Draft Monterey Plus EIR”)

Dear Ms. Brown:

This letter is to provide comments on the Department of Water Resources’ Draft Monterey Plus EIR (DEIR), a document whose preparation PCL has actively sought and anticipated for more than a decade. When finalized, this EIR will be used as the decision-making document framing a decision by DWR on the so-called Monterey Amendments. If such amendments to the contracts governing the operations of the State Water Project were adopted and implemented, they would result in a drastic contractual restructuring of the State Water Project, now 47 years old. Our comments here do not speak extensively to the legality (or not) of this proposed decision to modify provisions of the contracts governing operations of the State Water Project, which are based on and carry out directions specifically adopted by the voters of California. This letter focuses on the environmental review document, and its adequacy.

In the litigation that compelled DWR’s preparation of this EIR, PCL sought to ensure that DWR—the only entity with the statewide duty to manage and administer the State Water Project¹—would correct the profound errors of process and substance that fatally infected the

¹ DWR’s State Water Project duties, as envisioned by Governor Pat Brown and approved by the voters of California, are codified in the Burns-Porter Act, Wat. Code, §§12930, *et seq.* They also formed the basis for the prototype State Water Project validated by the California Supreme Court in *Metropolitan Water District v. Marquardt* (1963) 59 Cal. 2d 159. No Court has yet addressed the validity of the Monterey Amendments, whose final status necessarily awaits DWR’s decision-making.

Central Coast Water Authority’s review and approval of the 1995 EIR supporting the Monterey Amendments. In *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892 (“*PCL v. DWR*”), the Third District Court of Appeal unanimously vindicated PCL and its co-plaintiffs² on both grounds. Pointing to “the...contractors and the members of the public who were not invited to the table” in the negotiations that led to the Monterey Agreement, the Court held that “CEQA compels process...a meticulous process designed to ensure that the environment is protected.” (83 Cal.App.4th at 905, 911.) Recognizing the “aura of unreality” surrounding discussions of the State Water Project, which has historically been unable to deliver even half the amounts referenced in Table A of the State Water Project contracts³, the court found that CCWA’s EIR “failed to meet the most important purpose of CEQA, to fully inform decision makers and the public of the environmental impacts of the choices before them.” (*Id.* at pp. 913, 920.)

PCL entered into a 2003 Settlement Agreement⁴ with the expectation that DWR would counteract these historic errors and find “an effective way to cooperate” with the plaintiffs and other stakeholders in the preparation of an EIR fully complying with CEQA. DEIR, ex. D, and Exh. 3-A. Section III of the Settlement Agreement therefore confirmed, and elaborated on, DWR’s EIR duties as previously recognized by the Court of Appeal. *Id.* at pp. 9-15.

The Settlement Agreement also made clear that the final outcome of the Monterey Amendments remains unwritten, so that DWR’s new environmental review is not directed, even in part, at a *fait accompli*. While the Monterey Amendments are presently effective, they are effective only under an *interim* court order, made under Public Resources Code section 21168.9. The interim effectiveness of the Monterey Amendments will expire once DWR makes its new decision on all project components, recorded in new Notice of Determination, and files its return to the superior court’s writ of mandate.⁵ Once DWR completes an adequate environmental review, it is DWR’s prerogative, and its duty as State Water Project manager, to render an entirely new final decision, and to choose which path to follow: the “Monterey Plus” project, the “no project” alternative, or one of the project alternatives reviewed in the EIR.

Since the Settlement Agreement went into effect (more than four years ago), PCL has participated in more than two dozen meetings of a Monterey Amendments EIR Committee, seeking to ensure that the EIR would produce a thorough and genuine CEQA analysis of the Monterey Plus actions. The EIR is the “heart and soul”⁶ of both CEQA and the Settlement

² The co-plaintiffs were Plumas County Flood Control and Water Conservation District, one of the 29 state water contractors, and the Citizens Planning Association of Santa Barbara County.

³ See, e.g., DEIR, Appendix C (Long Term Water Supply Contract between DWR and Kern County Water Agency), § 6 and Table A.

⁴ DEIR, Appendix D.

⁵ DEIR, Appendix D, §§ II, V.F, VII.C; ex. 3-A.

⁶ *PCL v. DWR*, 83 Cal. App. 4th at p. 911.

Agreement. Regrettably, DWR’s Draft EIR falls far short of what CEQA requires from DWR. In short, the EIR is simply not adequate under CEQA. First, the DEIR does not adequately address specific concerns raised by the court in *PCL v. DWR*, including DWR’s clear duty to analyze and disclose the consequences of implementing pre-Monterey article 18(b). That provision of the contract (which the Monterey Amendments would eliminate) requires DWR to reconcile contract amounts with the “humbler, leaner reality”⁷ of deliverable supplies—prior to its elimination.

Second, the DEIR threatens a litany of potential new CEQA violations. To mention just several key problems:

- It improperly inserts key components of the Monterey Amendments into the project baseline, distorting the ability of the EIR to compare the project with the “no project” and project alternatives.
- It improperly uses an optimization model, CALSIM II, in a manner that effectively excludes the possibility of operating the project in a manner that would reduce rather than increase exports from the imperiled Bay-Delta Estuary, and fails to disclose project impacts to that estuary.
- It summarily rejects feasible alternatives and mitigation measures that would meaningfully address project objectives without requiring damaging and unlawful levels of new pumping.
- It fails to disclose the institutional and environmental consequences of transferring to local interests the ownership of a key part of the State Water Project—the Kern Water Bank, the world’s largest underground storage facility—without any effective statewide accountability, and fails to study alternatives aimed at restoring that accountability.
- It evades, rather than engages, the “common-sense notion that land use decisions are appropriately predicated in some large part on the available water supply,”⁸ thereby avoiding an analysis of the project’s contributions to sprawl and environmentally destructive new growth.
- It avoids a required discussion of the project’s creation of new “paper water” arising from a variety of sources, including the redefinition of article 21 “interruptible” water, administrative changes to the State Water Project, and overstatement of feasible deliveries in DWR’s biennial Reliability Reports.⁹
- It fails to address the environmental consequences of the Monterey Amendments’ financial restructuring of the State Water Project.

⁷ *Id.* at p. 914, n. 7.

⁸ *PCL v. DWR*, 83 Cal. App. 4th at p. 915.

⁹ PCL and its co-plaintiffs provided many of these comments to DWR in connection with its work on the Monterey EIR committee. Attachment A to these comments compiles some of these comments, which were not adequately addressed in the DEIR, or were simply ignored. These comment letters are therefore incorporated by reference in these comments, with the request that DWR specifically respond to them. We also incorporate comments made on behalf of PCL at public hearings.

- It recognizes the major problems that climate changes poses for the State Water Project generally, only to evade full assessment of project-related climate changes and defer the task to the very local decision-makers who will need to rely on DWR’s programmatic assessment.

Finally, DWR must address these deficiencies at a critical juncture in California's water history, and make its final decision based on conditions as they exist in 2008, not 1995. The depth of the environmental crisis the State Water Project now faces deserves special emphasis. For the first time ever in 2007, the State Water Project’s pumps were turned off temporarily to avoid an environmental catastrophe. Separate lawsuits have undercut DWR's ability to operate as in the past, without state permits and without federal biological opinions to justify continued pumping. Climate change, by the current estimations of DWR, could substantially cut project availability by mid-century. Moreover, California now faces the worst drought conditions it has experienced since the early 1990s.

These conditions underscore the crucial importance of delivering a Final EIR that fulfills, rather than avoids, the mandates of *PCL v. DWR* and the Settlement Agreement. In other settings, including Delta Vision, the California Water Plan, and recent reports and actions on climate change, California has commenced the difficult and necessary task of bringing to water policy a new era of realism that transcends the “build it and the water will follow” dictum of a previous generation.¹⁰ Yet the DEIR seems conspicuously disconnected from the state’s direction in other settings, to the point that “the plaintiffs” are chided for even suggesting alternatives that are sustainable and would not cause additional injury to the Delta.¹¹ To meet the hydrological, ecological and legal demands of our time, the Final EIR must rise to the occasion, rather than resorting to evasion.

Specific Comments

I. The DEIR evades key concerns raised by the Court in *PCL v. DWR*.

A. *PCL v. DWR* must serve as the starting point for DWR’s EIR responsibilities.

As detailed below, the DEIR in key respects simply attempts to explain away, rather than directly address, the key holdings of the Court of Appeal in *PCL v. DWR*. The EIR must, as a starting point, analyze the substance of the court of appeal’s decision in *PCL v. DWR* and ensure that its new project assessment is consistent with the Third District’s analysis in that case. The key components of the ruling are as follows

- **Lead agency requirement**

¹⁰ R. Kanouse, “Water Supply Planning and Smart Growth,” in C. Davis, *et al.*, *Navigating Rough Waters* (American Water Works Association, 2001), p. 84. See also E. Rarick, *CALIFORNIA RISING* (2005), p. 213 (quoting Governor Pat Brown’s statement that “I wanted to build a water project, and worry about the philosophy of land use later on”).

¹¹ DEIR, pp. 11-6, 11-7.

Holding that CCWA erroneously acted as lead agency, the court ruled that CEQA required DWR, the only entity with the requisite “statewide perspective and expertise,” to assume its proper role as lead agency in preparing a new EIR. (83 Cal. App. 4th at p. 907.) The Court noted the interconnected nature of the statewide project that the Monterey Amendments would transform: “[T]he allocation of water to one part of the state has potential implications for distribution throughout the system. DWR is painfully familiar with the problems plaguing the Delta and the possible impacts of the Delta Accord, an agreement between the federal and state governments on the Kern Fan Element.” (*Id.*)¹².

- **“No project” alternative**

The court also held that the CCWA EIR was fatally defective under CEQA for failing to analyze implementation of pre-Monterey state water contract terms, and particularly the permanent shortage provisions of article 18(b), as part of the EIR’s no-project alternative. Under the contracts that the Monterey Amendments would change, a permanent shortage occurs when the state is unable to reliably to deliver the full 4.23 million annual acre-feet (MAF) of previously-labeled “entitlements” listed in Table A of the project contracts. In that case, article 18(b) requires the state to make a proportional reduction of each contractor’s amount listed in Table A, to match the available supply. The court held that an adequate EIR must analyze the impacts of eliminating these provisions.

- **“Paper water” problem**

The relationship between so-called “entitlements” and land-use planning was central to the court’s holding that the EIR failed to address the “no project” alternative. The court connected this error to the risk of statewide land-use decisions made on the basis of “paper” water entitlements not grounded in real, deliverable water. The court openly criticized the false expectation that the State Water Project will deliver on its full “entitlement” level of 4.23 million acre-feet when the project’s historic capability, evidenced in DWR’s own data, has only been roughly half this level. The ruling therefore noted the “huge gap between what is promised and what can be delivered.” (83 Cal.App.4th at 908.)¹³.

- **Validation procedure**

¹² As described in section V below, the Kern Fan Element is an approximately 20,000 acre-foot property on an alluvial fan, and the site of the Kern Water Bank, the world’s largest groundwater storage facility. Article 52 of the Monterey Amendments call for DWR to relinquish control of the bank to the Kern Country Water Agency, which held the bank for only one day before retransferring it to a privately controlled joint powers agency, the Kern Water Bank Authority. Whether any statewide accountability will accompany the bank’s operation is a key issue for DWR’s new project decision.

¹³ With respect to the “humbler, leaner reality” of project capability, the Court also noted the implicit assumption in the Monterey Amendments’ financial restructuring of the State Water Project (article 51) that key facilities originally envisioned for the SWP will not be built. (*Id.* at 914.)

In addition to ruling for the plaintiffs on these CEQA claims, the court of appeal found that the plaintiffs had properly initiated a proceeding to question the substantive validity of the Monterey Amendments, including DWR's transfer of a 20,000-acre conservation and storage facility—the Kern Water Bank. . The court rejected a procedural challenge based on the theory that nonparty state water contractors were indispensable to the validation challenge. (83 Cal. App. 4th at pp. 920-926.)

- **Scope of the new EIR**

DWR must prepare an entirely new EIR as lead agency addressing the project as a whole. In *PCL v. DWR*, the Court of Appeal opined that it “need not hypothesize on the remaining issues” presented by the plaintiffs—such as the presence of a faulty project definition and the inadequate study of the Kern Water Bank’s divestment—“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.*” (83 Cal. App. 4th at p. 920 (emphasis added).)

B. Fundamental flaws in the DEIR undermine DWR’s fulfillment of its lead agency duties recognized in *PCL v. DWR*.

As the court-directed lead agency with “principal responsibility “ to carry out and approve the project (Pub. Res. Code, § 21067), DWR has an inherent responsibility to render a cohesive EIR that serves as the requisite environmental “alarm bell” in accordance with CEQA. The court recognized this obligation in *PCL v. DWR*, observing:

The lead agency must independently participate, review, analyze and discuss the alternatives in good faith ... Moreover, the agency's opinion on matters within its expertise is of particular value ... As the process continues, "the lead agency may determine an environmentally superior alternative is more desirable or mitigation measures must be adopted ... In sum, the lead agency plays a pivotal role in defining the scope of environmental review, lending its expertise in areas within its particular domain, and in ultimately recommending the most environmentally sound alternative.

(*PCL v. DWR*, 83 Cal. App. 4th at p. 904 (citing *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 736-737).)

As elucidated further below, the current DEIR is not written in a way that will allow DWR to fulfill its lead agency obligations as required under CEQA. The DEIR consistently masks impacts and confuses readers. The DEIR obscures project impacts by presenting no project alternatives that include components of the proposed project. It fails, in other words, adequately to distinguish the proposed project from continued current conditions. The DEIR also limits options for decision makers by failing to provide alternatives distinguishable from the proposed action. These flaws prevent a sufficient analysis of the impacts and implications of moving forward with the proposed project. By limiting the outcomes of the alternatives included in the DEIR, and thus constraining the range of potential management decisions, the DEIR

attempts to absolve DWR of its decisional responsibilities as a lead agency. Therefore, the DEIR prevents DWR from fulfilling the lead agency role as defined and anticipated by the court in *PCL v. DWR*.

C. The DEIR fails to analyze the No Project Alternative as directed in *PCL v. DWR* and the Settlement Agreement

1. *PCL v. DWR* and the Settlement Agreement establish clear standards for the assessment and review of the no project alternative.

CEQA requires that the no project alternative address “existing conditions” 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.” (14 Cal. Code Regs. §15126(e)(2).) That requirement compels DWR in its new EIR fully to study the consequences of enforcing the terms of pre-Monterey water supply contracts prior to eliminating them.

To overcome the prejudicial error noted in the appellate ruling, DWR must “fulfill its mandate” in the new EIR “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 915.) Article 18(b) is the single most controversial aspect of the Monterey Amendments; controversy over its enforcement was the “driving force” behind the Monterey negotiations. (*Id.* at p. 908.) While the original contracts for the State Water Project (SWP) estimated the delivery capacity of the fully constructed SWP to be 4.23 million acre-feet of water, the contracts also anticipated the likelihood that this estimate could be wrong or fail to eventuate. The original contracts prudently included a safety valve in article 18(b), which would allow contracts to be reconciled with the “humbler, leaner reality” of SWP capacity. (*Id.* at p. 914, n.7.) The court of appeal recognized the need for such a safety valve, observing the “huge gap” between SWP entitlements and existing supplies connecting that holding to the risk of planning decisions grounded in “paper” rather than real, deliverable water.¹⁴

Because the Monterey Amendments, if adopted, would eliminate article 18(b), it is incumbent on DWR to come to terms with its “paper water” problem before finalizing that change to the project contracts. (*Id.*) The EIR must directly evaluate reduced Table A allocations resulting from application of that article. As a useful starting point, DWR should carefully review and perform the analysis requested in public comments referenced in the Third District’s opinion. (*Id.* at 908, 915.)¹⁵

¹⁴ “Paper water,” the court observed, was “always an illusion,” steeped in the “unfulfilled dreams” of a water culture that had fostered an inflated expectation of what could be delivered. (*PCL v. DWR* (2000) 83 Cal. App. 4th 892, 914 fn. 7.)

¹⁵ As one comment accurately suggested, the EIR “must include a parametric analysis of alternative levels of a lowered project yield tested by use of DWR’s simulation model to establish which level of yield provides for the maximum reliability of deliveries given some tolerable threshold for failure to meet requests (i.e., with what frequency will Article 18(a) be

Section III.C.2 of the Settlement Agreement provides further guidance. It provides that the new EIR shall include “[a]s part of the CEQA-mandated ‘no-project’ alternative analysis, an analysis of the effect of pre-Monterey Amendment SWP contracts, including implementation of article 18 therein. This analysis shall address, at a minimum, (a) the impacts that might result from application of the provisions of article 18(b) of the SWP Contracts, as such provision existed prior to the Monterey Amendments, and (b) the related water delivery effects that might follow from any other provisions of the SWP Contracts.” As PCL informed DWR in its March 28, 2003 scoping comments, two of the “other” contract provisions inevitably related to this assessment are articles 18(a) and 21, which prior to Monterey required, respectively, that agricultural contractors endure the first cutbacks in water allocations in times of temporary shortage and receive the first allocations in times of surplus.

The environmental effects of proportional reductions in Table A amounts, as calculated in the no project assessment, must be directly compared to those of the proposed project. As the court of appeal made clear in *PCL v. DWR*, neither claims of “infeasibility” nor purported legal disagreements can serve as an excuse for avoiding comparison of the environmental consequences of the no project alternative and the project. (*PCL v. DWR*, 83 Cal.App.4th at 918.

2. A dispositive error undermines the integrity of the DEIR’s “no project” assessment.

The DEIR recognizes that if pre-Monterey article 18(b) were enforced, Table A amounts would be reduced to less than half their original levels—1.9 million acre-feet— to reflect the firm yield of the SWP. However, the DEIR assumes that this reduction in Table A would not tangibly reduce actual water deliveries, because water not delivered under Table A would be delivered as “surplus” water under article 21 of the pre-Monterey SWP contracts. In numerous passages, the DEIR offers variations on this same basic premise.¹⁶

This premise, the key to the DEIR’s refusal to take article 18(b) reductions seriously, is startlingly close to reasoning in CCWA’s decertified 1995 EIR that the Court of Appeal expressly rejected. CCWA’s EIR posited that “[i]f Table A entitlements were adjusted, less entitlement water would be delivered and *more surplus water would be delivered pursuant to*

invoked and with what consequences). All this can be accomplished without modification of the existing contracts.” (83 Cal. App. 4th at 908.)

¹⁶ See, e.g., DEIR, p. 2-16 (implementing article 18(b) “would not ... have altered the amount of water that the Department delivered to the contractors in the many years when more than the minimum SWP yield was available in the SWP system. Instead, such water would have been delivered to contractors under Article 21”); p. 4-5 (with the elimination of article 18(a)’s agriculture-first shortage provision, “it no longer mattered whether a shortage was a temporary one or a permanent one, since the allocation of available supply would be the same in either situation”); p. 6-54 (“the altered allocation procedures provided for by Articles 18 and 21 result primarily in a shift in deliveries from one contractor to another and do not affect total deliveries”).

Article 21. The total amount of water would be *essentially unchanged.*” (*PCL v. DWR*, 83 Cal. App. 4th at p. 929 (emphasis added).) The court specifically addressed this assumption, stating:

This response does little more than acknowledge the paper commitment to build SWP facilities and the obvious fact that the hopes and dreams upon which the entitlements are based do not create a greater annual supply of water. None of the commenters suggested that implementation of article 18, subdivision (b), altered the contractual and political commitment to complete the SWP. They did, however, suggest that the elimination of paper water would impact land planning decisions that might reduce the need for as many SWP facilities. Under that scenario, article 18, subdivision (d), might not be invoked nor would surplus water under article 21 be tapped and exhausted.

(*PCL v. DWR*, 83 Cal. App. 4 h at p. 919.)

For multiple reasons, this premise in the DEIR is as baseless now as it was when the failure of DWR to address this key issue resulted in the judicial decertification of the 1995 EIR. First, the DEIR simply assumes as a foregone conclusion something that was very much in doubt. In 1994, prior to the initial enactment of the Monterey Amendments, the California Research Bureau (CRB) prepared a paper analyzing twenty options for changing the State Water Project’s repayment system, one of which (Option 5) called for the implementation of pre-Monterey article 18(b) (CRB Report).¹⁷ The report found that “[t]here is no guarantee” that implementing article 18(b) “would ‘create’ any surplus water. If the DWR implemented Article 18(b), they might also change how it operates the SWP reservoirs. They might decide, for example, not to distribute ‘surplus’ water and instead decide to store the water for distribution as entitlement water in another year.”¹⁸

Second, the analysis incorrectly assumes that demand for SWP water in the Monterey and non-Monterey scenarios would be the same. That assumption is untenable, because The Monterey Amendments, if adopted, would fundamentally change the definition of Article 21 water. In particular, those amendments delete the pre-Monterey proviso in article 21(g)(1) that “the State shall refuse to deliver such surplus water to any contractor” to the extent that “the State determines that such delivery would tend to encourage the development of an economy within the area served by a contractor which would be dependent upon the sustained delivery which would be dependent upon the sustained delivery of water in excess of the contractor’s maximum entitlement.”¹⁹

¹⁷ Dennis O’Connor, FINANCING THE STATE WATER PROJECT: OPTIONS FOR CHANGE (CRB, August 1994). This CRB Report is included as Attachment B to these comments.

¹⁸ Attachment B (CRB Report), p. 21.

¹⁹ See DEIR, p. 2-17; DEIR, Appendix C (Amendment No. 1 to Kern Contract, p. 9). Metropolitan Water District’s pre-Monterey contract included this language in Article 21(g)(1). The Monterey Amendments delete this language. DEIR, Appendix C (Amendment No. 23 to Kern contract, p. 13).

Third, other Monterey Amendments-related managerial changes also could profoundly affect the demand for article 21 water. These include the removal of limitations on access to storage facilities, and the creation of a “turnback pool,” which allows the contractors to sell their unused Table A amounts, acting as though the water resources of the state, which belong to the public, are actually the private property of the contractors. In short, the Monterey Amendments clearly removed constraints that would have limited demand for SWP water and capacity to accept SWP water. Yet the DEIR, recycling reasoning that discredited the 1995 EIR, assumes that these contract provisions are meaningless and have no bearing on demand or capacity to receive water.

Fourth, the DEIR fails to recognize that perceived and explicit disclosure of water reliability can impact demand for SWP water and the use of that water. The shortage provisions (article 18 (a) and 18 (b)) of the pre-Monterey SWP contracts recognized that the reliability of water fluctuates. The contracts also reflected the reality that the level of reliability necessary for certain uses also fluctuates. The pre-Monterey contracts attempted to reconcile water reliability and water allocation with article 18 (a) and 18 (b). The pre-Monterey SWP contracts recognized that water availability would fluctuate according to hydrology, area of origin demand, and environmental needs. Therefore, only a limited amount of water could be reliably delivered during drought and other shortages. The original contract provision of article 18(a) reflected that municipal contractors require a higher reliability of water than agricultural contractors. Thus, article 18(a) provided that level of reliability by providing municipal contractors a preference for water in drought and short term shortage.

In short, the existing (pre-Monterey) contracts recognized that article 21 water, the least reliable category of water under the contract, is unsuitable for use as a prolonged source of supply. Municipal contractors could not depend on sources of unreliable water in the same manner that they depend and use reliable sources, because doing so would put people, businesses and the environment at significant risk. Indeed, the risk that municipal contractors may inappropriately approve permanent development based on unreliable water is the essence of “paper water.”²⁰ Like the invocation of article 18(b), article 21(g)(1)’s prohibition against founding permanent economies on vulnerable “surplus” water provided a powerful “safety valve” against paper water-based development. It provided decision-makers with a clear understanding that deliveries beyond the SWP’s minimum yield are unreliable. In such a case, municipal water agencies would be legally and contractually restricted from relying on water in excess of the estimated minimum yield of water for development, as well as for prolonged supplies. By contrast, the Monterey Amendments—provisionally under the present implementation, and permanently under the proposed project—would remove these safeguards.

Yet the DEIR fails to analyze the impacts of these realities. Instead, the DEIR assumes that all water provided by the SWP, either Table A, article 21 or otherwise would be used in the same manner and would procure equal demand regardless of the explicit disclosure of reliability

²⁰ “Paper water always was an illusion. “Entitlements” is a misnomer, for contractors surely cannot be entitled to water nature refuses to provide or the body politic refuses to harvest, store and deliver.” (*PCL v. DWR* (2000) 83 Cal. App. 4th at p. 914, n. 7.)

by the state. The DEIR is thereby assuming that SWP contractors are able to utilize very unreliable water.²¹ in the same way they demand very reliable water. This assumption is not supported by analysis and is not supported by law. In short, the current DEIR attempts to recycle the same skewed logic that led to the 1995 EIR's specious dismissal of the "paper water" problem.²²

II. The DEIR fails to provide an accurate, stable and finite definition of the proposed project.

A. CEQA demands an accurate, stable and finite project definition that addresses the "whole of the action" under review.

Leading CEQA decisions have long since recognized that "an accurate, stable and finite project definition is the *sine qua non* of an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles (III)* (1977) 71 Cal.App.3d 185, 199.) The CEQA process cannot "freeze the ultimate proposal in the precise mold of the initial project; indeed, new and unforeseen insights might emerge during the investigation, evoking revision of the original proposal." (*Id.*)

Precision and consistency in a lead agency's characterization of the project under review also reinforces related principles of CEQA: that the project must embrace the "whole of the action" (14 Cal. Code Regs., § 15378(a)); and that assessments in an EIR may not be used to justify a decision already made. In sum, CEQA "compels an interactive process of assessment of environmental impacts and responsive modification which must be genuine." (*County of Inyo v. City of Los Angeles (VI)* (1984) 160 Cal.App.3d 1178, 1185.)

B. The DEIR substantially understates the scope of the Monterey Amendments' proposed restructuring of the State Water project, and does not explain the source of authority for that proposed restructuring.

The description of the proposed project provides a very abbreviated summary of the changes in the SWP that would accompany the permanent adoption and implementation of the Monterey Amendments – in other words, those changes that would become permanent if the project were approved. Adopting what might be termed a "greatest hits" format, the analysis is limited to five bullet points, a few clarifying paragraphs, and a title line for all the remaining parts of these complex amendments. DEIR, §§ 4.3-4.4, pp. 4-2 to 4.8. Similarly, the background paper on the SWP is limited to a brief description of several articles, divorced from their legal and institutional context. DEIR, Ch. 2, pp. 2-1 to 2-19.

²¹ See, e.g., DWR, 2005 RELIABILITY REPORT, p. 15 (article 21 water is "highly unpredictable and unreliable").

²² *PCL v. DWR*, 83 Cal. App. 4th at p. 914.

These cursory discussions fail to illuminate critical aspects of the SWP that relate to the project's essential mission and statewide environmental accountability, and how this system would be fundamentally changed if the Monterey Amendments become permanent. In the deliberations that framed the SWP, the Governor, DWR, and the Legislature created a water project to enable the state to more evenly to distribute scarce water supplies, which the state controlled as a common good. To develop that resource, DWR and the Governor's office developed--and the Legislature and people approved--a system unique in the country. Unlike the federal Central Valley Water Project, where the federal government paid all project costs, the SWP focused upon water as a public good that belonged to the people.²³

Authorization of the SWP therefore was premised on an understanding that the voters of California would therefore decide on whether they agreed to the distribution of water in the SWP. If they agreed to that redistribution, the voters would agree to back an issuance of bonds to construct the project with the provisos that (1) agencies contracting for the water would pay back the costs of constructing the project solely for the *right* to have water delivered to them through the project's facilities; and (2) although agencies would repay the costs of constructing the project, the facilities and the water would continue to belong to the State, as a *public* resource.²⁴

The project framers also anticipated that the state water project would operate based upon long-term water service contracts that would remain in effect until the retirement of all water resources development bonds no sooner than 2035. These contracts would be unique, in that they were based upon: (1) DWR's inherent responsibility to manage the state's water resources fairly and equitably; (2) the principle that all contractors were to be treated equally; (3) the provision that any agency or district in California could contract with the department for water service; and (4) a trusteeship requiring the project to be constructed and managed for the good of the people of California.²⁵

²³ See P.A. Towner, *Brief History of the Negotiation of Water Supply Contracts for the State Water Project*, presented to the California Water Commission (Dec. 3, 1976).

²⁴ *Ibid.*

²⁵ The objective of the state water project to operate for the good of the people of California became part of the Bond Act. Once the Act was passed, it was incorporated into the Water Code (Wat. Code, §12930, *et seq.*) Governor Brown signed the prototype long-term water service contract with Metropolitan Water District just before the 1960 election. (Rarick, *supra*, at p. 221.) To further ensure that the people of California would not be responsible for repaying the bonds used to construct the facilities, DWR required agencies with which it contracted to have taxing authority, so that if the agency could not meet its payments to DWR, it would be required to tax residents to make these payments. (Wat. Code, §12937.) Conversely, if the SWP were "sold" into private ownership, it would potentially threaten the tax-exempt status of the project's general obligation bonds. Attachment B (CRB Report), p. 51.

To develop and secure approval of the state water project, DWR and the Governor first prepared a “statement of principles” for the long-term water service contractors.²⁶ These principles are derived from the “utility theory,” which Governor Brown described to the Legislature as recognizing “our obligation to insure that water will be available to meet the proper demands of every part of the State.”²⁷ These principles were the ones used to promote the project to California voters, and those principles reflected project sponsors’ understanding that voters would not vote for project financing to support water facilities they did not own or control. Moreover, those principles specified that DWR would be acting as an agent and trustee of the people to manage water resources for the good of all Californians. After preparing these principles, the framers prepared and secured voter approval of the Burns-Porter Act.²⁸

The SWP thus was premised on a fundamental *quid pro quo*: its contractors would benefit from project operation, but the public always would control the project itself, and the project’s works truly were to be part of a “state” water project, which would be publicly owned and operated for public benefit. After securing passage of the Bond Act, DWR and the Governor determined the redistribution patterns of water throughout California based on estimated need and secured the water rights for those areas in the amount of estimated need until 2035, the end of the project repayment period. They also negotiated with agencies throughout California for water service contracts. The amount of water these agencies could expect to receive over the life of the project was subject to limitations, including limitations from water rights permits, climatological and environmental conditions. The contracts were to extend until 2035. The Department could not predict all conditions affecting water conditions until 2035. Consequently, state water service contracts were written so that DWR could not be held responsible for water it could not deliver provided that it made reasonable attempts to do so.²⁹

On their face, key features of the Monterey Amendments, if made permanent, would differ sharply from the central tenets of the SWP contracts as originally framed, approved, and validated by the voters, shifting a substantial degree of control from SWP to the contractors. To name several examples:

²⁶ Cal. State Senate Fact Finding Committee on Water Resources, Partial Report, *Contracts, Financing, Cost Allocations for State Water Development* (March 1960), pp. 51-52.

²⁷ E.G. Brown, Water Message to Legislature, Cal. Sen. J., Vol. 1 (1959) 222, 224-225. The Governor’s principles constituted a “contemporary administrative directive, which was known to the voters at the time of the election,” and were also accepted by the Legislature. (*Goodman v. County of Riverside*, (1983) 140 Cal. App. 3d 900, 907-908.)

²⁸ Wat. Code, § 12930, *et seq.*

²⁹ Under the state water project, contractors “are obligated to pay for their contractual entitlements of water” from the project, “*whether the water is delivered or not.*” (*PCL v. DWR*, 83 Cal. App. 4th at p. 899.)

- Major changes in article 18 would remove the temporary shortage provision requiring “agriculture first” cutbacks (article 18(a)) and the permanent shortage provision requiring Table A amounts to be reconciled with available supplies.
- Article 51 transforms the financial structure of the SWP, allowing the contractors “a rebate for the costs previously assessed for facilities that have never been built.”³⁰
- Article 52 facilitates the transfer of the Kern Water Bank property to local control, in exchange for the “retirement” of 45,000 acre-feet of Table A amount that two agricultural contractors-- Kern County Water Agency and Dudley Ridge Water District—had no assurance or reasonable expectation of ever receiving in deliverable water.
- Article 53 authorizes the transfer of 130,000 acre-feet in new agriculture-to-urban transfers, eases requirements for other transfers, and allows the transportation of water in state facilities to other contractors, or entities other than non-contractors.
- Article 54 provides for local control and management of the two terminal reservoirs.
- Article 55 allows contractors to transport non-project water in SWP facilities at the lower costs referenced in the SWP contracts.
- Article 56 allows contractors to sell water outside their service areas.

Collectively, these changes far exceed any other changes in the project’s history. At present, the Monterey Amendments are proceeding under the authority of the Sacramento Superior Court’s interim order under Public Resources Code section 21168.9.³¹ But the DEIR never identifies the source of authority to make the amendments permanent. DWR should address these changes in light of Water Code section 12397(b)(4), the source of DWR’s contracting authority, which provides that “[s]uch contracts shall not be impaired by subsequent acts of the Legislature during the time when any of the bonds authorized herein are outstanding and the state may be sued with respect to said contracts.” DWR should indicate the source authority, if any, for the project as proposed to become permanent without the approval of the Legislature, or of the voters of California.

This issue of authority cannot be marginalized as a mere “legal” issue divorced from the environmental consequences of the project. Rather, on a host of environmental issues discussed in these comments, a foundational question is for whose benefit the project exists, the people of California or the State Water Contractors. The answer to this question may have profound consequences for the environment, particularly in times of water scarcity. DWR’s clarification of its source of authority may therefore help illuminate whether its approach to managing the SWP can proceed consistently consistent with its duties as CEQA lead agency.³²

C. The DEIR does not adequately clarify the “uses of the EIR.”

³⁰ *PCL v. DWR*, 83 Cal. App. 4th at p. 914, n.7.

³¹ Settlement Agreement, Appendix 3-A.

³² *PCL v. DWR*, 83 cal. App. 4th at 903-907.

When finalized, the EIR will be used primarily by DWR, as lead agency, to decide whether to approve, modify, or disapprove the components of the proposed project: the Monterey Amendments and the further actions described in the Settlement Agreement. The DEIR summarizes the proposed project in Chapter 4, which also briefly describes the Monterey Amendments and the Settlement Agreement. As required by the writ of mandate issued by the Superior Court to implement the decision of the Court of Appeal in *PCL v. DWR*, “upon completion and certification of the new EIR, Respondent DWR shall make written findings and decisions and file a Notice of Determination identifying the components of the project analyzed in the EIR, all in the manner prescribed by sections 15091-15094 of the CEQA guidelines.”³³

Despite some helpful language, the DEIR’s section of the “intended uses of this EIR (DEIR, § 1.2) contains one phrase that is ambiguous. It indicates that DWR as lead agency, and the State Water Contractors as responsible agencies, will use the EIR to “decide whether to *continue* operating under the proposed project: the Monterey Amendment and the Settlement Agreement, as described in Chapter 4, or to decide to implement one of the alternatives to the proposed project.” (*Id.* at p. 1-1 (emphasis added).

The Monterey Amendments are presently proceeding only under an interim order that will expire following DWR’s new Notice of Determination and return to the writ. The use of the word “continue” should not suggest that the default condition will be to make that interim operation permanent, or that DWR’s approval decision on the “Monterey” part of the Monterey Plus project can be relegated to the past tense.

Instead, DWR must determine, based on its assessment of project impacts, alternatives, and mitigation measures, whether to (a) approve and execute the Monterey Amendments as initially proposed in 1994 and approved and executed in 1995; (b) approve and execute the Monterey Amendments and the further actions described in the Settlement Agreement; (c) approve and execute the Monterey Amendments as further modified in response in response to the analysis in and public comment on the present EIR; (d) approve and execute an alternative to the Monterey Amendments; or (e) approve no project at all. The EIR will also be used to determine whether or not to authorize the permanent transfer of the Kern Fan Element, and to proceed with the 41,000 acre-foot Kern/ Castaic transfer as part of the final project.

The Superior Court’s writ of mandate requires DWR’s *de novo* determinations and actions, because at present no project elements have been approved, except for the Superior Court’s interim order under Public Resources Code section 21168.9. The exercise of that discretionary power cannot vitiate the fundamental CEQA duties of lead and responsible agencies to precede their final project decisions by the completion and certification of a valid EIR. The EIR will thus be used to DWR to meet these requirements of law and proceed once the section 21168.9 order ceases to be in effect.

PCL requests that the EIR specifically address each of the following questions, which it raised more than a year ago in a letter to the DWR Director:

³³ Settlement Agreement, Appendix 3-A.

1. Once DWR has completed and certified its EIR, will DWR make a new decision on all components of the project, recorded in a new notice of determination?
2. If DWR makes a new project decision, will that decision determine whether or not DWR will approve and execute the Monterey Amendments?
3. If DWR makes a new project decision to approve a project that includes the Monterey Amendments:
 - a. Will the decision consider a no project alternative that includes no actions taken under the Monterey Amendments?
 - b. Will the decision determine whether or not to adopt alternatives to the Monterey Amendments?
 - c. Will the decision determine whether or not to adopt mitigation measures for any significant impacts of the Monterey Amendments?
 - d. Will the decision determine whether to authorize the permanent transfer of the Kern Fan Element?
 - e. Will the decision determine whether or not DWR approves of water deliveries under the 41,000 acre-foot Kern/Castaic transfer?³⁴

III. The DEIR’s “aura of unreality”³⁵ undermines its ability to meaningfully address the distinct environmental consequences of the project.

³⁴ The 1999 contracts framing this agriculture-to-urban transfer were not the subject of a validation challenge. However, those transfer contracts were expressly based upon the Monterey Amendments, whose final authorization remains unknown, and DWR has never approved the transfer outside of the Monterey Amendments, which would subject it to the pre-Monterey agricultural deficiency provisions of article 18(a) and undermine its reliability to support urban uses. (See Attachment C (2002 letter of Castaic’s counsel).) The Los Angeles Superior Court decertified Castaic’s stand-alone 2004 EIR in May 2007 (*Planning and Conservation League v. Department of Water Resources* (LASC No. BS 098724.)) While Los Angeles Superior Court Judge James Chalfant characterized the 1999 transfer contracts as “final,” he recognized that DWR could still take actions that could “undermine” the ability of the transfer to deliver water. *Id.* at p. 13. He also relied partially on representations of DWR’s counsel that DWR had the discretion to take steps that might curtail deliveries under the transfer. *Id.* at p.20 All parties except for DWR have appealed that decision, and it is pending in the Second District Court of Appeal. In addition to fully studying the Monterey-associated impacts of this sprawl-supportive transfer and appropriate mitigation, the EIR should fully consider PCL’s proposed alternative that would consider alternative dispositions of its water. In a time of statewide water shortage, the need for DWR’s careful evaluation is particularly acute.

³⁵ *PCL v. DWR*, 83 Cal. App. 4th at p. 912.

A. The DEIR analysis is predicated upon a defective environmental baseline.

Without the development of an adequate baseline condition, “analysis of impacts, mitigation measures and project alternatives becomes impossible.” (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 953.)³⁶ The baseline for these assessments must be based on an analysis of “real conditions on the ground,” rather than mere opinion or narrative. (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App. 4th 99, 121.)

The DEIR accurately notes that that the baseline for assessment here is “complicated” by the implementation of the Monterey Amendments before 2003, when DWR issued its Notice of Preparation.³⁷ Nonetheless, a series of glaring errors undermine the baseline’s integrity to serve as the basis for assessing the project’s environmental impacts.

First, the DEIR states that the baseline has been “*adjusted to include events that are expected to occur over time*” that it assumes are “not related to the Monterey Amendment and the Settlement Agreement.”³⁸ That “adjustment” constitutes an error of law under CEQA. It is the “no project” alternative, rather than the baseline, that, in addition to existing conditions, must account for “what would be reasonably expected to occur in the foreseeable future if the project were not approved, based upon current plans and consistent with available infrastructure and community services.” CEQA Guidelines, § 15126.6(e)(2). But the “no project” alternative is “not the baseline for determining whether the project’s proposed impacts may be significant, unless it is identical to the existing environmental setting analysis which does establish that baseline.” *Id.* at 15126.6(e)(1). Here, where the “no project” analysis is much more complex, and by no means “identical” to the environmental setting, there is no basis for making these forecasting adjustments to the baseline, and the resulting mistake fatally infects the comparison between the baseline and impact assessment.

Second, the baseline does not accurately reflect pre-Monterey contract provisions that set limitations for contractors, and thus does not accurately reflect constrained demands or capacity

³⁶ See also CEQA Guidelines, § 15125(a) (the environmental setting will “normally constitute baseline physical conditions by which a lead agency determines whether an impact is significant”); DEIR, p. 5-1.

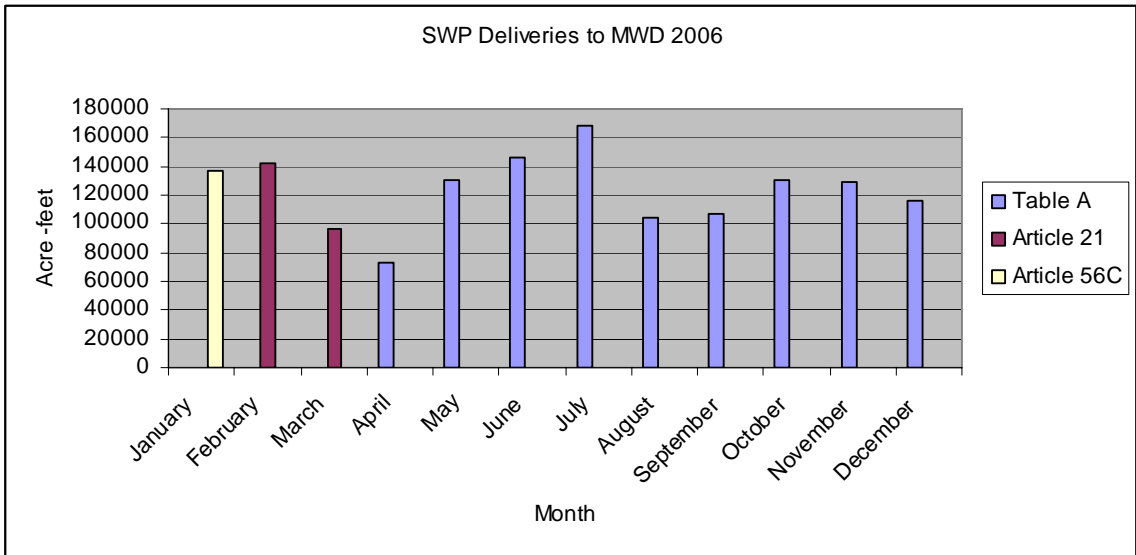
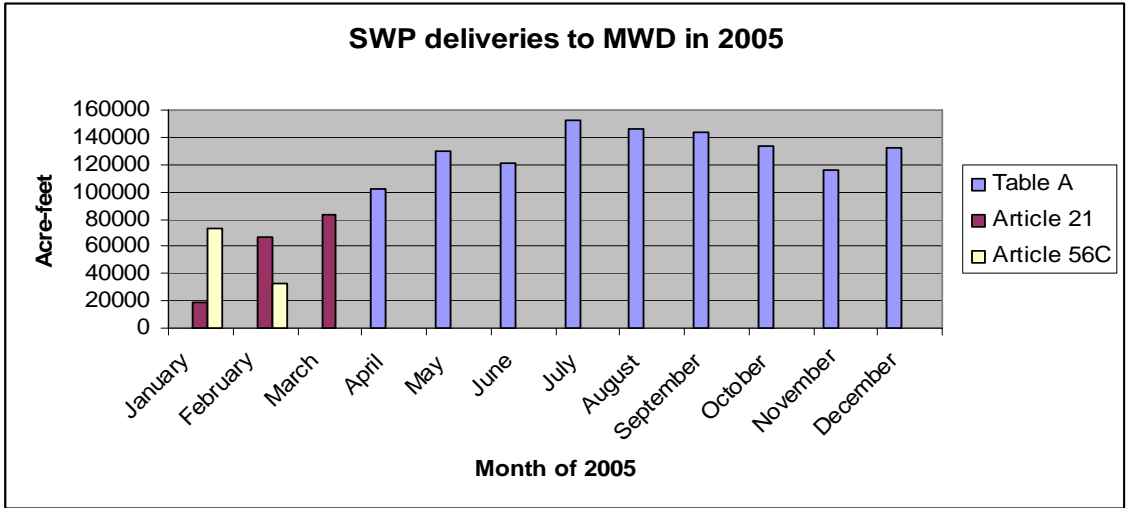
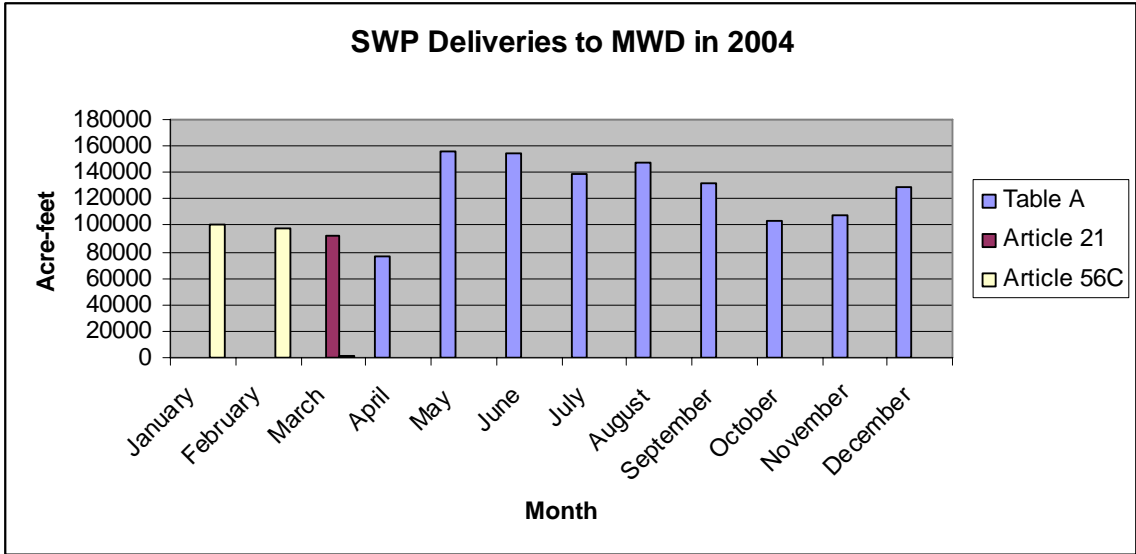
³⁷ The DEIR inaccurately lists the Monterey Amendments’ implementation date as 1995. DEIR, p. 5-2.

³⁸ DEIR, p. 5-2 (emphasis added); see also DEIR, p. 3 (postulating that “other changes and transfers” alleged to be “unrelated” to the Monterey Amendment, have occurred or are anticipated to occur by 2020). Although DWR attempts to project baseline and project conditions through 2020, the project involves changes to SWP project contracts that will remain effective until 2035. DWR’s impact assessment does not demonstrate why it fails to make reasonable attempts to take account of the additional 15 years of project impacts.

to accept SWP water under pre-Monterey contracts. These provisions, changed under Monterey as noted above, include the following:

- The pre-Monterey contracts precluded SWP contractors from storing water outside of their own service areas. This provision limited contractors' capacity to accept SWP water to the real-time customer demands plus the amount of water that could be stored in facilities within the contractors' service areas. Eliminating this provision in the Monterey Amendments significantly expanded storage options available to contractors, and thereby enhanced contractors' capacity to take water. Yet the DEIR assumes that the baseline water demand is the same as demands when such limitations are not applied to contractors (as in the proposed project).
- The baseline also does not reflect how Article 21(g) (1) of the pre-Monterey contracts precluded the use and therefore demands for Article 21 water. As noted above, Article 21 (g) (1) prevents the state from delivering "surplus" water where it determines that it would contractor to the extent that the State determines that such delivery would tend to "encourage the development of an economy within the area served by sustained delivery of surplus water." This article established a specific limiting provision for delivery of Article 21 water, and the baseline should assume that DWR would implement it and withhold delivery of water where appropriate. By contrast, the Monterey Amendments have been in effect on an interim basis without that limitation. Several contractors now have economies that are dependent on continued delivery of Article 21 water. According to tables provided by DWR for water years 2004 and 2005, some urban contractors now take Article 21 and carry-over water in the winter months while taking little or no Table A supplies and take Table A supplies later in the year (see tables below). This indicates that some contractors are using Article 21 supplies to sustain the hard demands of their service area in winter months.³⁹

³⁹ In fact, review of the historic deliveries of article 21 water demonstrates that municipal demands for Article 21 water supplies have *increased* since implementation of the Monterey project. Such use would have been prohibited under the pre-Monterey contracts. This increased demand for article 21 water should not be included in the baseline. The EIR should further analyze whether proposed contract amendments have indeed resulted in hardened demand for article 21 water, and corresponding shifts in delivery, demand, and request patterns for Table A supplies.



Source data provided electronically to Mindy McIntyre by DWR staff in 2007

Third, the baseline inappropriately excludes an accurate analysis of allowable operations under the current regulatory setting. The baseline does not include operational constraints of the federal Endangered Species Act (FESA) and the California Endangered Species Act (CESA). As detailed further in section III.B, *infra*, recent state and federal court rulings have determined that SWP operations as modeled in the DEIR do not comply with either CESA or FESA, and are therefore illegal.⁴⁰

Fourth, the DEIR fails to recognize climate change in the baseline (and in the analysis of alternatives). The DEIR incorrectly states that too little is known about climate change to warrant incorporation of findings into the baseline and alternative. Rather, the DEIR provides a cursory discussion of climate change in a separate section of the EIR⁴¹. This assertion is contradicted by numerous studies and findings, including research published by DWR well before the release of the DEIR.

DWR has prepared and released significant information on climate change impacts to the SWP system and to California water resources. The Department's own "Progress on Incorporating Climate Change into Water Management," outlines several feasible scenarios for climate change. CEQA does not require definitive information prior to incorporation into analysis. Indeed, as noted by the Intergovernmental Panel on Climate Change, it is very unlikely that future California hydrology will be the same as past hydrology:

The IPCC (2001) ranked the confidence limits of major impacts to water resources due to observed and projected climate change as very high (0.95-1.00), high (0.67-0.95), medium (0.33-0.67), low (0.05-0.33), and very low (0.00-0.05). There is high confidence that the timing and amount of runoff is changing, and very high confidence that watersheds with substantial snowpack will experience major changes as temperature continues to rise. The impacts of this trend are a decrease in available water resources in California, primarily during the summer months, and a potential increase in wintertime floods. There is high confidence that California's Sierra Nevada will experience a continued trend of decreased snow accumulation

⁴⁰ See, e.g., *Natural Resources Defense Council v. Kempthorne* (E.D. Cal. 2007), 2007 U.S. Dist. LEXIS 42263 (existing and planned future operations in the Central Valley Project and State Water Project may jeopardize the Delta Smelt, creating ESA compliance problems. While the baseline excludes compliance with these state and federal endangered species laws, the DEIR simultaneously relies on the FESA process to mitigate for many of the significant impacts of the proposed project. However, the DEIR provides no analysis to demonstrate that the FESA process is capable of mitigating these impacts.

⁴¹ See DEIR, Ch. 12, addressed in section of these comments, *infra*.

and earlier snowmelt (e.g. Lettenmaier and Gan 1990; Jeton et al. 1996; Miller et al. 1999; Wilby and Dettinger 2000; Knowles and Cayan 2002; Miller et al. 2003).⁴²

In fact, and as discussed further below, widely available data demonstrate that climate change is already occurring in California, with trends of declining snowpack and earlier annual peak runoff.⁴³ Numerous studies, listed in attachment D to these comments, address climate change and its effects on water resources in California are available. Despite this overwhelming body of evidence of current and future climate change, the DEIR ignores climate change in the baseline and in all alternatives. Instead, the baseline and all alternatives are based on past hydrology.

In sum, the DEIR's baseline fails to provide an accurate basis for comparison of environmental impacts associated with the proposed project or other alternatives. The baseline must be adjusted to reflect the pre-Monterey SWP contracts, pre-Monterey SWP operations and the impacts of climate change. Without such adjustments, the baseline is an inadequate reference from which to determine the impacts of the proposed project and project alternatives.

B. The DEIR fails to reflect the current regulatory framework, and in particular the impact of the Delta Smelt/OCAP decision on the delivery reliability of the SWP.

DWR's final decision on the "Monterey Plus" must reflect and address SWP and environmental conditions as they exist now, rather than freezing them in 1995 or 2003. The recent ruling invalidating the biological opinion for the Delta Smelt is one of the most significant current environmental constraints for the SWP. Yet the DEIR fails to incorporate the impact of this decision in alternatives analysis or recognize this significant decision in Section 6.3 (Changes in SWP Operations Since 1995 Unrelated to the Proposed Project). The federal court's

⁴² *California Climate Change, Hydrologic Response, and Flood Forecasting*, Norman L. Miller Earth Sciences Division, Berkeley National Laboratory, Berkeley, California, USA. Presented at the International Expert Meeting on Urban Flood Management 20-21 November 2003, World Trade Center Rotterdam, The Netherlands April 30, 2004.
http://www.lbl.gov/Science-Articles/Archive/assets/images/2004/Apr-30/California_Flooding.pdf

⁴³ *Potential effects of global warming on the Sacramento/San Joaquin watershed and the San Francisco estuary*. Noah Knowles and Daniel R. Cayan, *Geophysical Research Letters*, VOL. 29, NO. 18, 1891, doi:10.1029/2001GL014339, 2002, <http://natypete.andradedowns.googlepages.com/knowles2002.pdf>; No. 119. Effects On Water Resources: Monitoring Snowmelt Runoff And Sea Level for Climate Change, Maurice Roos, California Department of Water Resources, presented at the U.S. Climate Change Science Program (CCSP) workshop on November 14-16, 2005, in Arlington, Virginia http://www.climatechange.gov/workshop2005/posters/P-WE2.8_Roos.pdf

summary judgment decision was issued on May 25, 2007, many months before the DEIR and the final ruling has now been issued.⁴⁴

DWR has publicly recognized the impact of the Delta Smelt ruling outside of the DEIR. DWR's Chief of Project Operations Planning Branch, John Leahigh, stated that under the interim remedy actions proposed by the United States Fish and Wildlife Service (USFWS), SWP 2008 deliveries would be reduced anywhere between 8% (91,000 AF) to 27% (305,000 AF) from a baseline delivery of 1.15 MAFY in a dry year; and from between 8% (252,000 AF) and 31% (305,000) from a baseline of 3 MAFY in an average year. (Attachment F, *NRDC v. Kempthorne*, Doc. 398, Declaration of J. Leahigh, dated July 9, 2007, at ¶¶ 6. 36-37.)

While the ruling initially imposed an interim remedy only, it is reasonable to expect that the next biological opinion will impose permanent restrictions that are similar or more stringent to the interim remedy. It is very unlikely that the USFWS will issue a biological opinion significantly similar to the pre-ruling opinion. Given this likelihood, the EIR should reflect the operations imposed by the court in the Delta Smelt ruling. Indeed, the ruling demonstrates that existing operations, as modeled in the DEIR, are not lawful. The Delta Smelt ruling will alter the way the proposed project can be implemented. The interim remedy imposed by the court restricts winter and spring SWP pumping in the Delta. Such restrictions will necessarily impact deliveries of Article 21 water, as well as Turnback Pool transfers. Any conclusions included in the DEIR regarding deliveries of Article 21, Turnback Pool water and other water deliveries in the winter and spring are now inaccurate. The EIR must recognize the Delta Smelt ruling, and fully incorporate it into the environmental analysis for the project.⁴⁵

C. The DEIR improperly uses CALSIM II as the principal tool to analyze baseline condition and environmental impacts.

The DEIR relies on CALSIM II to analyze the impacts of water allocation and deliveries under the baseline, the proposed project and the alternatives. CALSIM II results are relied upon to estimate SWP delivery and export impacts as well as to derive environmental impacts on the Delta and upstream tributaries. While CALSIM II may be a sophisticated and useful modeling tool for certain purposes, it is inappropriate for determining environmental impacts and for estimating impacts in export and deliveries. It has been criticized by a panel of expert reviewers for several weaknesses, including its lack of amenability to proper calibration. (See A. Close, *et al.*, *A Strategic Review of CALSIM II and its Use for Water Planning, Management and Operations in Central California* submitted to California Bay Delta Authority Science Program, December 4, 2003.

⁴⁴ Attachment E, *NRDC v. Kempthorne*, 1:05-cv-1207 (EDCA), Doc. 560, Interim Remedial Order Following Summary Judgment and Evidentiary Hearing, dated Dec. 14, 2007, Attachment F, *NRDC v. Kempthorne*, Doc. 323, Order Granting In Part and Denying In part Plaintiffs' Motion for Summary Judgment, dated May 25, 2007.

⁴⁵ The EIR also needs to discuss the *time of year* in which cutbacks of pumping will be necessary to achieve the restoration of the Delta Smelt. The timing of these cutbacks may well occur in spring and winter, ordinarily a heavy period for SWP pumping.

In addition, CALSIM II assumes foresight on the part of operators, and thus assumes that operators will not take actions that will result in later violations of environmental standards or other operating constraints. This assumption can lead to great underestimation of environmental impacts, for in the real world operators do not have such foresight and thus may make decisions without realizing the consequences ultimately resulting from those decisions.

Furthermore a recent analysis has revealed additional flaws in the statistical basis for CALSIM II. (“Analysis of CALSIM’s Statistical Basis,” by Arve Sjøvold, December 28, 2004, previously provided to DWR).

CALSIM II predictions are only as accurate as the data and assumptions that are plugged into the model. Here, those assumptions may be wrong; for example, the DEIR assumption that future water flow patterns will be similar to those that have occurred in the past is inconsistent with the ample literature on the substantial effects of global warming on California water flows. These input data errors and uncertainties further undermine the ability of the DEIR’s modeling analysis to make the kind of predictions necessary to support a genuine analysis of impacts.

Because CALSIM II is an optimization model that does not necessarily reflect options available to water operators, it may predict levels of exports. However, federal and state water quality and endangered species laws and regulations probably would prohibit such high export levels for water quality problem. The DEIR assumes that future water exports from the Delta will be nearly twice the historic average. Yet this prediction fails to recognize that DWR has chronically failed to meet water quality standards in the Delta under historic operations, and significant environmental degradation has taken place under such conditions, resulting in new regulatory actions. In light of the recent pelagic organism declines in the Bay Delta Estuary, and resulting rulings invalidating the biological opinion for Delta smelt, it is prudent to ensure the DEIR modeling assumptions predictions are conservative, rather than “optimizing” to ensure assumed deliveries would not violate conditions of the Federal Clean Water Act, the Federal or California Endangered Species Acts, or any other environmental permit condition, regulation, standard, or law.

Finally, the DEIR’s presentation of modeling results is flawed. Throughout the DEIR, modeled predictions—for example, statements that salmonid mortality will increase by a certain percentage—are presented as though certain, and discussion of possible error or of ranges of possible outcomes is almost entirely absent. The models used cannot possibly produce such certainty, however; at best, they can predict, given a certain set of data and assumptions, a range of possible outcomes, with some outcomes potentially more probable than others, and with all predictions limited by both known and unknown sources of error. An accurate discussion of the DEIR’s modeling results therefore cannot provide certain predictions, and instead should show the range of possible outcomes. By omitting both possible sources of error and potential outcome ranges, the DEIR projects a false certainty that the impacts of the project will be relatively small. Indeed, if the modeling results were properly presented, with ranges of outcomes fully described, the study might show that the models actually predict that significantly larger impacts are entirely capable of occurring.

PCL does not argue that models should never have been used to inform the analysis in the DEIR. But the CALSIM II used cannot possibly provide a near-certain conclusion that significant environmental effects will not occur, or will be fully mitigated especially when both common sense, existing knowledge of the Delta system, and the analyses of other agencies all indicate the extremely high likelihood of such impacts. Indeed, PCL believes that if modeling results were properly reported, they would indicate the reasonable likelihood of significant impacts.

As participants in the EIR Committee process, PCL has previously submitted comments expressing our concerns regarding the adequacy of CALSIM II for analyzing baseline conditions and assessing environmental impacts. The DEIR has not adequately addressed our previous comments, and we resubmit those comments on CALSIM II by reference to the DEIR.

If DWR includes CALSIM II model analyses in future EIR drafts, we request clear explanations and justification of all assumptions made in the CALSIM II model runs. In addition, we request that DWR explicitly state when findings are based on post processing and when findings are based on direct model results. When findings are based on post processing, the rationale behind these post-processing decisions should be clearly articulated.

V. The DEIR fails in its duty to analyze the transfer, development and operation of the Kern Water Bank, and alternatives that would restore its public accountability.

A. DWR must independently study, and exercise its own judgment on, the “transfer, development and operation” of the Kern Water Bank.

As provided in the settlement agreement, “the new EIR shall include an independent study by DWR, as the lead agency, and the exercise of its judgment regarding the impacts related to the transfer, development and operation of the Kern Water Bank” in light of existing environmental permits. (Section III.F.) That study “shall identify SWP and any non-SWP sources of deliveries to the Kern Water Bank.” (*Id.*) The EIR must provide this analysis to ensure compliance with the agreement and the requirements of CEQA.

The 2003 Settlement Agreement, which allows the Monterey Amendments to proceed on an interim basis, that “KWBA shall retain title to the KWBA lands. KWBA may continue to operate and administer the KWB lands including the water bank, subject to restrictions herein.”⁴⁶ The agreement also provides that “[t]he restrictions in this Section V shall become final only upon (1) filing of the Notice of Determination following the completion of New EIR, (2) discharge of the writ of mandate in the underlying litigation as provided below, and (3) conclusion of all litigation in a manner that does not invalidate any Monterey Amendment (or any portion thereof) or the Kern Fan Element Transaction.”⁴⁷

⁴⁶ Settlement Agreement, § 5.A.

⁴⁷ Settlement Agreement, § V.F.

B. The DEIR's study methods are too narrow to support DWR's independent judgment on the future of the Kern Water Bank.

DWR's final decision addressing ownership and operation of the world's largest groundwater storage facility, the one million acre-foot capacity Kern Water Bank located west of Bakersfield, raises critical issues involving public trust accountability and environmental responsibility. The various stakes involved in the bank's operation—financial, institutional and environmental—are of immense importance to California's future. Built to capacity, the groundwater bank is capable of delivering 240,000 acre-feet of water per year, enough to supply the needs of roughly 500,000 households.⁴⁸

The facility is also crucial because of its location, providing storage to the southern San Joaquin Valley.⁴⁹ When developed, the Kern Fan Element, in combination with the provisions of the proposed project allowing storage outside an SWP service area, significantly increase SWP contractors' capacity to accept water from the Delta.

But the DEIR's draft study on the Kern Water Bank (DEIR, Appendix E) says very little that would alert the reader to momentous environmental significance of DWR's forthcoming decision. The "methods" section of that study (DEIR, Appx. E, p. 5) suggests a possible reason for its benign assessment. Of the three sources of information noted in the study, the only information source that does not come directly from the Kern agencies, KCWA and KWBA, is that DWR contacted personnel from the California Department of Fish and Game and the United States Fish and Wildlife Service. That focus is far too narrow. The substantial environmental issues associated with the loss of statewide environmental accountability over the bank require a more probing analysis that could not be addressed simply by consulting wildlife and fisheries agencies, and it is DWR, as SWP manager, that must provide that analysis. As detailed below, even if the KWBA has been a responsible steward of the Kern Fan Element property that holds the bank, the concerns that arise from the decision for the bank to serve local rather than statewide interests would persist.

DWR's narrow study methods are surprising, because the broader issues surrounding the transfer, development and operation of the Kern Water Bank have been the subject of major public controversy, addressed in the media⁵⁰ and in reports that are referenced and discussed nowhere in the DEIR. One of those reports, prepared by Public Citizen, contends that while the

⁴⁸ In August 1996, one day following DWR's transfer of the bank to Kern County Water Agency in its interim implementation of the Monterey Amendments in 1996, KCWA retransferred the bank to the Kern Water Bank Authority (KWBA), which consists of five local public water agencies and a private mutual water company.

⁴⁹ Sandino, *California's Groundwater Management Since the Governor's Commission Review: The Consolidation of Local Control* (2005) 36 MCGEORGE L. REV. 471, 489 n. 171.

⁵⁰ M. Arax, *Massive Farm Owned by L.A. Man Uses Water Bank Conceived for State Needs*, Los Angeles Times (online), December 19, 2003.

KWBA is formally public entity, it is effectively majority-controlled by one of the world's largest farming companies, Paramount Farming, and largely serves the interests of two corporations with large landholdings in the service area.⁵¹ The Public Citizen report charges that the divestment of the bank from state authority has been environmentally destructive, raising issues that are nowhere addressed in the DEIR.⁵² While we believe that DWR is very much aware of this report, and should thus have included a reaction to the report as part of the DEIR environmental analysis of the proposed transfer of the Kern Fan Element, we will attach the Public Citizen Report to these comments, so that DWR will have no excuse not to analyze its findings in connection with producing the final EIR.

Whether or not DWR concurs with them, it would be irresponsible not to address these well-known allegations before taking its final action on the proposed Kern Water Bank transfer.⁵³ Indeed, broad concerns about the lack of institutional and environmental accountability among Kern County's local water agencies have drawn the attention, not simply of environmental groups, but also some of the most respected scholars of California's water history. For example, Norris Hundley's discussion observes that such local districts "are ordinarily managed by boards of directors made up of a homogeneous, single interest body of people representing the large water users and guided by a rigid set of goals: maximization of water use at minimum cost with little or no regard for the environment or for the welfare of the people of California."⁵⁴ In short, the EIR will disserve decision-makers and the public unless DWR is able to step outside the mindset of the local Kern agencies, and address the Kern Water

⁵¹ J. Gibler, WATER HEIST (Public Citizen, December 2003)("Public Citizen report"), included as Attachment G to these comments. The EIR should specifically address the Public Citizen report as if it were set forth directly in these comments.

⁵² See Public Citizen report, p. 2 (arguing that the bank should not "provide a handful of corporations with the keys to a virtual 'switchyard' for controlling water deals between agribusiness and real estate developers").

⁵³ To assist decision-makers and the public, PCL also requests that DWR include in the EIR a documentary appendix compiling key reference sources on the Kern Water Bank. The public should have an opportunity to directly review such key documents as (1) the 1987 DWR/ KCWA memorandum of understanding; (2) the purchase agreements framing the transfer of the Kern Fan Element from DWR to KCWA, and from KCWA to KWBA; (3) the 1995 KWBA Statement of Principles; (4) the 1995 KWBA Joint Powers Agreement; and (5) the 1995 KWBA Operations and Monitoring Memorandum of Understanding.

⁵⁴ N. Hundley, THE GREAT THIRST (2001), p. 536; see also R. Gottlieb and M. Fitzsimmons, THIRST FOR GROWTH (1991), pp. 96-97 ("With new purchases and related expansion of irrigated acreage becoming a speculative spiral, the Kern landowners raced to establish new water districts to contract for State Project water....The tendency toward concentration and overextension, already prevalent in the county from the days of *Lux v. Haggin*, was enormously magnified with the arrival of the aqueduct. A handful of landowners dominated the key water districts affiliated with the [Kern County Water Agency], and these districts, in turn, dominated the agency").

bank issues with the “statewide perspective and expertise” required in its stewardship of the State Water Project.⁵⁵

C. The EIR fails to fully disclose how the transfer of the Kern Fan Element out of DWR’s control alters the central purpose of the Kern Water Bank.

Although the DEIR briefly refers to the transfer of the Kern Fan Element out of state ownership, and its subsequent control by the KWBA (DEIR, p. 4-11), it never fully acknowledges how this transformation affected the fundamental purpose of the Kern Water Bank. The DEIR appendix on the transfer briefly references the 1987 Memorandum of Understanding (1987) between DWR and KCWA, which formed the basis for DWR’s acquisition of the Kern property from Tenneco West.⁵⁶ But it never mentions how two key statewide and public protections referenced in the 1987 MOU were later removed:

- **Shift of bank purpose to serve local rather than statewide interests.**

The 1987 MOU clarified that the “primary purpose” of the Kern Water Bank is to “augment the dependable water supply of the State Water Project”; and that “[i]ncidental” to its primary purpose the bank will produce “local benefits.” It defined the bank as a “SWP conservation facility” to be integrated with other SWP operations.

By contrast, the 1995 joint powers agreement for the KWBA reversed the priorities, ensuring that “the Authority will be operated and maintained *“for its benefit and the benefit of the Member Entities.”*⁵⁷

- **Failure to acknowledge statewide trust protection**

Although the MOU conferred upon the Agency a ten-year option to purchase the bank, it imposed conditions of that purchase that would have preserved DWR’s trust responsibilities under the Water Code. Under the MOU, the Agency’s purchase of the bank could only occur “[p]rovided that the *Department’s right to use the area for project purposes* will be preserved. Consistent with section 11464 of the Water Code, the Department shall not sell facilities acquired for the Kern Water Bank.”⁵⁸

⁵⁵ *PCL v. DWR*, 83 Cal. App. 4th at p. 907.

⁵⁶ DEIR, appx. E, p. 10.

⁵⁷ 1995 JPA for the KWBA, recitals at ¶ 5.

⁵⁸ The non-alienation provision in Water Code section 11464 provides that “no water right, reservoir, conduit, or facility for the generation, production, transmission, or distribution of electric power, acquired by the department shall ever be sold, granted, or conveyed by the department so that the department thereby is divested of the title to and ownership of it.”

By contrast, neither article 52 of the Monterey Amendments, nor the conveyance agreements with the Kern agencies for the Kern Fan Element transfer, ever referenced or incorporated DWR's continuing authority, even in the context of local ownership, to use the bank as needed for SWP purposes. Instead, the transfer agreements took the form of unrestricted fee simple transfers, without any discussion of the state's underlying trust duties.

In its EIR, DWR must fully analyze the circumstances surrounding the removal of safeguards for the public and the state, and the environmental consequences of bank operation without these protections. It must also study alternatives that would not eliminate these protections, even in the context of local ownership and administration of the bank.

D. The EIR must more fully describe DWR's experiences and purposes in attempting to develop the Kern Water Bank.

The DEIR barely discusses DWR's original plans for the KWB and attempts to develop it. In a 1979 article, then-DWR director Ronald Robie described a variety of environmental advantages to DWR developing an underground storage facility for the SWP. He concluded that "an SWP ground water program will add flexibility to SWP operations and can be a hedge against earthquake or other disablement of the California Aqueduct."⁵⁹ Following the release of technical studies, DWR focused on the possibilities of developing SWP groundwater recharge operations in Kern County.

In 1986, DWR prepared an EIR for a state-run water bank, contemplating purchase of approximately 20,000 acres of land from Tenneco West, located on the Kern River's alluvial fan (the area that ultimately became the bank's site is sometimes referred to as the Kern Fan Element).⁶⁰ The present DEIR does not disclose that in its own environmental reviews, DWR recognized that operation of the bank might have an impact on the Bay-Delta.⁶¹

DWR made substantial investments in studies and other activities with the expectation of implementing the state-owned bank. Some estimates have placed the total amount DWR paid to develop the bank, including the initial purchase, over \$70 million.⁶² The EIR should disclose the full amount of that investment, including any investment in environmental study and mitigation.

⁵⁹ *Id.* at 45.

⁶⁰ See also Kletzing, *Imported Groundwater Banking: The Kern Water Bank - A Case Study*, (1988). 19 PAC. L.J. 1225.

⁶¹ DWR, First Stage Kern Fan Element Draft Supplemental Environmental Impact Report (1990). pp. 38-42.

⁶² Public Citizen, p. 2.

E. The EIR does not fully disclose the circumstances that caused DWR to relinquish control of the KWB.

The EIR should more fully disclose the circumstances that caused DWR to stop developing the KWB. In this regard, several documents that PCL obtained from DWR, included as attachment H, are illuminating. During the early 1990s, KCWA, joined by other local water districts and the State Water Contractors organization, sought to have DWR cease all “planning, design and land acquisition” activities relating to the water bank, even requesting that it be “mothballed.”⁶³ They also argued that since DWR would not be developing the bank, it should be transferred to local control. In response, DWR director David Kennedy ultimately endorsed divestment of the water bank to the Agency, which then became a key principle in the 1994 Monterey Agreement.⁶⁴

Although DWR had earlier been trying to proceed with the state-run project, two factors--potential ESA impacts, and Kern non-cooperation—thwarted these efforts. The latter reflected both ESA impacts, which KCWA did not want to address, and partly KCWA’s reluctance to allow DWR to protect statewide interests in the bank. DWR had reached a HCP addressing on-site impacts, and that HCP was satisfactory to everyone but the Kern interests. However, DWR staff reported that Kern “wanted to recharge and extract at their will and not pay for ‘any stinking mitigation costs’”. When DWR objected, Kern’s Tom Clark responded, “if we think we must, we will buy it.”⁶⁵

F. The EIR inadequately addresses the details of DWR’s purchase agreement with Kern County Water Agency.

The EIR identifies the agricultural contractors’ retirement of 45,000 acre-feet of agricultural entitlement (almost all by KCWA) as the ostensible consideration (the price paid) for DWR’s transfer of the Kern Water Bank. But it does not adequately analyze the circumstances surrounding that exchange:

- DWR estimated the bank’s worth at just over \$33 million. That figure was just two million more than the state had paid in 1988, despite the state’s subsequent investment of approximately \$40 million in the bank’s development. The state apparently valued the element based upon its purchase piece of marginal agricultural land rather than its more important value—a capitalization of the land’s highest and best use as a water bank.

⁶³ Attachment H (February 18, 1993 draft letter from SWC to DWR).

⁶⁴ Attachment H (1992 SWC action report; February 18, 1993 draft letter from SWC to DWR; February 9, 1993 and April 19, 1993 letters from DWR to SWC).

⁶⁵ Attachment H (Memorandum of Jack Erickson, DWR to John Pacheco, dated February 13, 1996).

- KCWA’s retired agricultural “entitlements” existed only as an accounting tool, and Kern had no realistic expectation of receiving actual wet water under those entitlements. Nevertheless, KCWA was obligated—pursuant to the contracts it signed—to pay the state for that entitlement amount. By retiring those entitlements, KCWA therefore relieved itself of a substantial liability while losing little, if any, chance at wet water. The retired debit would appear to have a substantially higher value than the retired entitlements.
- DWR and KWBA have yet to provide a full accounting of the sources of water going into the Kern Water Bank, an issue that DWR is called upon to address in the Monterey settlement agreement within the Monterey Plus EIR. It seems likely that the other inexpensive sources of water made available to the Kern agencies through the Monterey Amendments—including “interruptible” (formerly surplus) water, carryover storage water, and turnback pool water—might have more than replaced the purported “loss” of KCWA’s 45,000 acre-feet of paper entitlements with less expensive sources.
- The state’s divestment also included some of its water. DWR conveyed title to half the water stored in the bank, as well as all the water stored during 1995. As the KWBA recognized in its financial statement, “the participants [in the KWBA] received Kern Water Bank land and facilities and 42,380 acre-feet of banked water. The 42,830 acre-feet of water subsequently was transferred to each of the participants in proportion to their ownership. This transaction was reflected as a contribution of capital in the amount of \$27,858,500 by the respective participants.”⁶⁶

G. The DEIR fails to analyze key environmental consequences of the Kern Water Bank’s operation without statewide trust accountability.

The DEIR fails to study the major environmental consequences of the Kern Water Bank, other than some smaller issues that centrally focus on KWBA’s administration of the Kern Fan Element lands. Notably, the analysis fails to answer important questions about foreseeable trends in water marketing and groundwater banking due to the project.⁶⁷ Instead, the DEIR abruptly concludes that impacts are less than significant because multiple factors increased groundwater banking, and because of a beneficial impact on groundwater levels.⁶⁸

The EIR must carefully study the following issues:

- **Pressures on the Delta**

⁶⁶ KWBA, *Financial Statements* (December 31, 2000 and 1999).

⁶⁷ Neither Chapter 8 on growth-inducing impacts, nor Chapter 9 addressing water supply reliability and “paper water,” address the transfer and operation of the Kern Water Bank. The effects of available storage and related transfers must be included in those analyses even if the bank is addressed separately in Appendix E.

⁶⁸ DEIR, appx. E, p. 49.

The transfer of the Kern Fan Element resulted in a shift in use of the facility. The state had intended to use the facility as a drought mitigation bank. In local control, it has become a new resource to maximize deliveries of SWP water and an economic resource. Local agencies now benefit from aggressively developing the Kern Fan Element. Under the Monterey Amendments, all contractors can use the Kern Water Bank to store SWP water. Therefore, the bank transfer has a significant potential to increase demand for and export of Delta water. The DEIR does not adequately analyze the impact on SWP demand and Delta export resulting from the transfer and development of the Kern Fan Element.

DWR's records, although not yet disclosed in the EIR, suggest a possible close connection between the Kern Water Bank, Delta pumping, and Delta environmental issues. The bank's relationship to Delta pumping and environmental conditions came up repeatedly in DWR's correspondence with other agencies,⁶⁹ as well as with the contractor constituencies represented in the Monterey negotiations.⁷⁰ In general, those records suggest DWR was well aware that operation of the Kern Bank could lead to increased Delta pumping, and that those increases could affect endangered species.

Additional research by PCL, previously brought to DWR's attention⁷¹, also shows the Kern Bank's role in increased deliveries to southern contractors.⁷² These documents highlight how filling the bank can impact the Delta. For example:

⁶⁹ See, Attachment H, including: Letter from Wayne White, Department of Interior to David Kennedy, dated September 30, 1991 ("we are concerned about potential adverse effects of the project in the Sacramento-San Joaquin River Estuary (Delta) area in central California. The reason for this concern is that water storage capacity within the Kern Water Bank would be filled through additional water exports from the Delta averaging approximately 90,000 acre-feet per year"); *id.* (potential adverse effects on Delta smelt and winter-run Chinook salmon); Letter from John Turner, Department of Fish and Game, to Dan Masnada of CCWA, dated July 20, 1995 (development of storage facilities, along with other Monterey operational changes, "combine to create substantial potential for program effects in the Delta and upstream"); *id.* (full study of Kern Water Bank's "potential impacts on the Delta has never been completed").

⁷⁰ See Attachment H: MWD letter to Tom Clark dated May 29, 1992 (identifying relevance of Chinook impacts); Memorandum of Jack. A. Erickson, DWR, dated April 20, 1993 (acknowledging Delta issues associated with Kern Fan Element); DWR, Kern Fan Element Re-evaluation Study, February 1996 (acknowledging Kern-Delta link).

⁷¹ See Appendix A.

⁷² Several other provisions in the Monterey Amendments also facilitate increased pumping of KWB-bound water. These provisions include liberalized requirements for "interruptible" water, allowance of "carryover" water, and creation of a "turnback pool."

--A KCWA brochure reported that in 2001, the banking program had boosted local supplies by “almost 200,000 acre-feet” and urban Southern California supplies by 81,000 acre-feet.

--Numerous reports from the manager of KCWA member Lost Hills Water District document, among other things, Paramount Farming’s use of water banking to obtain inexpensive sources of state water for future water transfers and sales.

--A Georgia State University paper on water sales from 1990-2001 recorded purchases from the Monterey Amendments turnback pool by KCWA, Dudley Ridge and other contractors at prices of \$5.90 to \$11.79 per acre.⁷³

--The Urban Water Management Plan of the McAllister Ranch Irrigation District, a former agricultural area near Bakersfield that is turning to residential development with the assistance of the Kern Water Bank.

--KCWA’s 1996 Water Supply report contradicts the assumption that Monterey provisions including the Kern Fan transfer have only had a minor effect on deliveries, reflecting an understanding that it expected the Kern water bank, along with Monterey managerial changes, to help increase its SWP yield.

- **Depleting the Environmental Water Account**

There appears to be significant evidence that effective possession of the Kern Water Bank enabled Paramount Farming subsidiary Westside Mutual and other interests within the KWBA to secure “surplus” water from the state, only to sell it back to the state’s Environmental Water Account at a profit.⁷⁴ If DWR itself operated the bank, such privately-profitable sales would not have resulted in a transfer of money out of the state system; DWR could pump its own surplus water to the bank (rather than selling it at bargain-basement prices) and then at times of environmental need could pump that water, without paying marked-up prices for it, to users in lieu of Delta deliveries. By paying less for water, DWR thus could slow the depletion of EWA assets, which in turn would allow the EWA to take more protective actions. That change could become crucially important during a drought, for in times of scarcity the KWBA member agencies could charge far higher prices for their water, and the financial difference between a DWR-managed bank and a privately managed bank, and thus the difference in depletion of EWA funds, could be enormous.

- **Increasing the agribusiness footprint**

⁷³ M. Czetwertynski, *The Sale and Lease of Water Rights in Western States: An Overview for the Period 1990-2001* (March 2002), pp. 16-17.

⁷⁴ The evidence is available at <http://www.ewg.org/reports/CAWaterTakings/part4.php>; http://www.watertransfers.water.ca.gov/water_trans/water_trans_index.cfm. Despite its prominent role in securing the divestment of the Kern Water Bank and benefiting from it, Paramount Farming—whose wholly owned subsidiary Westside Mutual Water Company owns more than 48 percent of the bank--is only cryptically referred to in the DEIR analysis of the Kern bank, and not by name. See DEIR, Appx. E, p. 17 (noting that Westside was formed by “a landowner”).

The profit stream to Paramount Farming and other Roll International affiliates deserves further attention. The bank, which was intended to help balance out the state's water supply to cities, farms and fish, has instead allowed Paramount Farming to double its acreage of nuts and fruits since 1994."⁷⁵ If the Kern Bank has indeed allowed a private company to put substantial additional acreage to agricultural use, that change could have multiple environmental consequences, including local habitat loss, increased pollutant loading, and, perhaps more importantly, increasing and hardening overall south-of-Delta water demand, which in turn could increase Delta impacts in the next drought.

- **Constrained public uses**

Private operation of the bank outside DWR control would hamper the state's ability 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.⁷⁶ The specialty crops and urban uses supported by the bank, due to their inflexibility in times of drought, may increase pressure for water exports from the overburdened Bay Delta during times of critical shortage.

- **Supporting growth and development**

In KCWA's March 1995 newsletter, its general manager describes "our local groundwater basin" as "a multi-billion dollar resource."⁷⁷ The Public Citizen report alleged that the privately controlled water bank serves as "switchyard" for transactions between agribusiness and real estate interests in Southern California.⁷⁸ The DEIR must investigate these allegations, as well as suggestions that the bank may promote sprawl development.⁷⁹

⁷⁵ Arax, *supra*.

⁷⁶ "Water banking could be used as drought protection to statewide benefit and to help improve water quality in the heavily depleted San Joaquin Valley groundwater basin. Operating banks for water marketing will have the opposite effect, fueling increased dependence upon distant water supplies for new growth...." Public Citizen, *Water for People and Place* (Nov. 2005), p. 28.

⁷⁷ KCWA General *Manager* Jim Beck, quoted in *Water Age*, March 2005, p. 3.

⁷⁸ Public Citizen report, p. 2.

⁷⁹ See, e.g., V. Pollard, *Los Angeles Eyeing Kern Water Source*, *Bakersfield Californian*, March 24, 2002 (online) ("DWP officials have had early talks with representatives of Paramount Farming Co. and other participants in the about possible purchase of an as-yet-unspecified amount of water...The chairman of the Kern Water Bank Authority Board, Bill Phillipmore, said sales from the water bank were contemplated from the time the bank was acquired by Kern County water agencies..."). The Public Citizen report asserts that Roll International affiliate WV Acquisitions has contracted with Lennar / LNR subsidiary Newhall Land and farming for

H. The DEIR fails to analyze alternatives that would restore state trust accountability to the Kern Water Bank's operation.

In light of the history and risks described above, it is essential that DWR develop and analyze a meaningful project alternative that would restore some measure of statewide accountability over the manner in which the KWB is operated. That alternative may even be compelled by the need to comply with Water Code section 11464 and other applicable laws.

Throughout its participation in this EIR review, PCL proposed two alternatives that would have addressed the Kern issues. The first was a “Kern Fan retention” alternative, which assumes state ownership and operation to enhance dry-year reliability. The second was a “Kern Fan Transfer with trust conditions” alternative that would allow the Kern Water Bank to remain in local control, subject to operational and financial criteria designed to maximize environmental benefits. It would require the bank to store environmental water in time of surplus and make it available at no cost to the state in time of drought, in exchange for allowing the asset to operate the rest of the time for local purposes. In sum, a variety of operating and financial arrangements must be explored to maximize the bank's contributions to the State's environment. CEQA requires a full analysis of these feasible alternatives, as part of the DEIR prepared on the proposed action.

Unfortunately, the DEIR summarily rejected the “Kern transfer with trust conditions” alternative with a cursory, untenable explanation. DEIR, § 11.2.6, p. 11-16. The DEIR asserts that this alternative would fail to “meet the objectives” of the Monterey Amendment, but does not explain why. On the contrary, allowing local control of the bank to continue subject to the imposition of a state trust—which closely resembles the approach to local control of the bank already set forth in the 1987 DWR/ KCWA MOU—would be a balanced way to “[r]esolve legal and institutional issues related to storage of SWP water” in the county that would harmonize local and statewide interests.⁸⁰ In light of Water Code section 11464 and legal constraints

sales of water entitlement. See http://www.hoovers.com/the-newhall-land-and-farming-company/--ID_11074--/free-co-factsheet.xhtml (describing Newhall as the “landing strip for urban flight”). PCL has no independent knowledge of these accounts, but believes they deserve analysis.

⁸⁰ DEIR, p. 4-1 (listing project objectives). The “local control subject to DWR trust” approach does not appear incompatible with any of the other fundamental project objectives either. Moreover, the prospect that stakeholders might challenge the approach would provide no reason to summarily reject it as a project alternative. *PCL v. DWR*, 83 Cal. App. 4th at p. 915. Nor would the need for local agreement and funding be grounds to summarily dismiss this alternative from consideration (cf. DEIR, p. 11-6), particularly if DWR finds that it is the only lawful manner to proceed with local ownership of the bank.

related to conditions in the Delta, this alternative may well constitute the only lawful manner in which DWR can make a final decision that allows the bank to remain in local ownership.⁸¹

I. The EIR must answer additional questions about the Kern Water Bank's transfer, development and operation.

PCL requests that the EIR answer the following additional questions, each of which relates to potentially significant environmental impacts, as outlined in this comment letter, and each of which CEQA requires be addressed:

1. Does the KWBA actually acquire and sell water, or does it merely provide a facility that allows its member agencies to store and recover water that they acquire and sell?⁸²
2. If the KWBA does actually acquire and sell water, how much water does it acquire and sell on a yearly basis?
3. How much water have each of the KWBA members, including Westside, bought and sold during each year of the Kern Bank's operations, using the Kern Bank in connection with such purchases and sales?
4. To whom has water stored in the Kern Bank been sold?
5. At what price has Kern Bank water been sold? Does that represent a markup beyond costs?
6. How much has the KWBA charged for storage in the Kern Bank ?
7. Has DWR purchased Kern Bank water? For what purpose and place of use? How much has come from the KWBA, and how much from particular agencies? At what price?
8. What are the sources of water that go to the Kern Bank? Each year, how much has come from: (a) SWP Table A allocations; (b) SWP Article 21 water; (c) CVP water; (d) surface runoff; (e) Kern River water?
9. Is there any evidence that DWR delivered water to the Kern Bank knowing it would later need to repurchase that water? Or is there evidence that DWR

⁸¹ The DEIR's premise that alternatives cannot be used here simply to improve "the health of the environment" (DEIR, 11-6) could not be more at odds with the elementary requirements of CEQA, which may be used to *mandate* feasible alternatives or mitigation measures. Pub. Res. Code, § 21002.

⁸² Under the joint powers agreement, the KWBA is empowered to acquire and sell water, but it is less clear where it would get such water, or how it would access recharge or withdrawal facilities; the JPA appears to assign shares of facility use exclusively to the member agencies.

delivered water to the Kern Bank while simultaneously repurchasing earlier-delivered supplies?

10. Does the KWBA pay taxes on the land it owns?

11. Does the KWBA pay taxes on profits from water sales (if sales are above-cost)?

12. Does Westside profit from water sales, and if so does it pay taxes on those profits?

13. Have the KWBA member agencies obtained SWRCB approval for changing (either temporarily or long-term) the place or purpose of use of water stored in the Kern Bank and transferred to different users?

14. What are the KWBA member agencies doing with the profits from their sales, and what are the environmental consequences?

VI. The DEIR's assessment of alternatives is defective.

A. The DEIR presents multiple muddled versions of the No Project Alternative, blurring the distinction between “no project” and project alternatives.

CEQA defines the purpose of a No Project Alternative as, “to allow decision makers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project” (CEQA Guidelines, § 15125).⁸³ Making up in quantity for what they lack in accuracy, the DEIR identifies multiple iterations of the No Project Alternative. As demonstrated here, each of these attempts is incoherent, and in some instances, they muddle the distinction between the No Project Alternative and project alternatives.

A brief synopsis of these attempts highlights their flaws:

- The No Project Alternative 1 (NPA1) assumes at the state would have developed the Kern Fan Element to a capacity of 350,000 acre-feet by 2003 and to 500,000 acre feet by 2020. The capacities used appear to be entirely arbitrary, and may well serve simply to narrow the distance between the no-project and the project without factual foundation. Moreover, the EIR appears to be internally inconsistent as the subject of how much state bank development was foreseeable.⁸⁴

⁸³ PCL has already explained above why the no project assessment has not met the requirements of *PCL v. DWR*. This section describes, in addition, how the DEIR develops no project alternatives that are muddled with project alternatives.

⁸⁴ Inclusion in the No Project Alternative suggests a belief that state development could be “reasonably expected to occur in the foreseeable future,” CEQA Guidelines, § 15126.6(c)(2); but

- The No Project Alternative 2 (NPA2) includes a number of the Table A transfers facilitated under the Monterey Agreements, conveyance of non-project water, and storage of contractor water outside of the contractors' service area—all key components and other provisions of the proposed project that were implemented as of 2003. The DEIR argues that these projects and policies would have been approved by the Department regardless of the Monterey project. However, that argument is entirely speculative, and in no way excuses the CEQA-mandated no project analysis. Each of these components was initiated as a direct result of the Monterey Amendments. As such, they are components of the very action under review and cannot be included in a no project alternative.⁸⁵
- Court-Ordered No Project Alternative 3 (CNPA3) and Court-Ordered No Project Alternative 4 both contain significant flaws. As discussed above, neither of these alternatives provided the rigorous review anticipated by the court in *PCL v. DWR* and by plaintiffs in the settlement agreement.
- CNPA3 is also based on water allocation methods that were not in place at prior to the Monterey agreement. CPNA3 does not reflect the agricultural and groundwater replenishment priority for article 21 that was a specific requirement of the pre-Monterey contracts. Without the Monterey Amendment, this contract provision would remain in place. Therefore the only appropriate no project alternative is one which includes all pre-Monterey contract provisions, including the “agriculture first” and groundwater replenishment provisions of Article 21.
- The no project alternative must reflect the actual ‘no project’ condition. Rather than speculate that DWR might alter contract provisions, approve water transfers and overcome significant challenges to aggressively develop the Kern Fan Element, the no project alternative should assume that DWR would have implemented the pre-Monterey SWP contracts as written, including enforcement of all limitations and conditions.

B. The DEIR summarily rejected feasible alternatives to the project.

The DEIR must examine a range of reasonable alternatives that would feasibly obtain most of the project objectives, but avoid or substantially lessen any significant adverse effects of the project. (14 Cal. Code Regs. §15126.6.) In its screening and review of alternatives, the EIR must provide more than “ cursory” analysis. (*PCL v. DWR*, 83 Cal. App. 4th at 919.) It should not construe project objectives so tautologically that only the proposed project could conceivably be capable of achieving them. Nor should the EIR allow the mere “threat of litigation” under a proposed alternative to prevent its environmental review. *Id.* at 914.

in DWR’s Kern study, it asserts that uncertainties made state bank development “infeasible.” DEIR, Appendix E, p. 10

⁸⁵ Rather than include these components in the NPA2, subsequent drafts of the EIR must include this analysis of a limited set of policies (as opposed to the entire suite of Monterey Amendments) in the alternatives section of the EIR.

DEIR summarily eliminated *nine alternatives* that were suggested by PCL and the two other plaintiffs within the EIR committee process, each without any satisfactory explanation.⁸⁶ These alternatives were offered in order to provide a reasonable range of alternatives within the EIR analysis consistent with the requirements of CEQA. But the DEIR provides unjustified conclusions for each alternative that derailed any further review of them. Although increasing exports south of the Delta is notably (and properly) absent from the list of project objectives (DEIR, p. 4-1), the DEIR's alternatives analysis implicitly appears to assume that unless the contractors' pumping objectives are met, an alternative is infeasible.

The DEIR also gratuitously, and incoherently, chides "the plaintiffs" for seeking in proposed alternatives to improve the *environment*. (DEIR, pp. 11-5 to 11-7.) That reasoning would have been faulty if DWR's EIR had been done in 1995, but it particularly suspect in 2008, in light of the pelagic organism decline in the Delta and recent court rulings, discussed above, that will require constraints on pumping south of the Delta. Moreover, the summary exclusion of alternatives that attempt to balance contractors' and environmental objectives is entirely inconsistent with efforts the state is engaged in elsewhere, including Delta Vision and updates to the California Water Plan. Indeed, the state has long been aware of a variety of approaches that would serve the SWP's financial, management and operational goals while *also* considering environmental protection.⁸⁷ This context underscores the practicality of PCL's proposed alternatives.

A review of the grounds for dismissing the "**Improved Reliability through Environmental Enhancement**" (IREE)⁸⁸ alternative illustrates how the DEIR avoided analyzing a reasonable range of alternatives. Similar grounds were also used to reject other alternatives. The EIR's reasoning suggests that DWR views the project objectives so tautologically that seemingly only the Monterey Amendments (or a negligible variation on them) could feasibly accomplish them:

- The DEIR claims that the IREE "alternative was not considered in detail in the EIR because it would not meet any of the objectives of the Monterey Amendments. Furthermore, it would be in conflict with the basic terms of the long-term water supply contracts." DEIR, p. 11-6. But in summarily dismissing this alternative, the DEIR provides no substantiating evidence or analysis to demonstrate that the alternative would not meet any of the project objectives.

⁸⁶ These alternatives, listed in PCL's December 18, 2006 comments on the last administrative draft EIR (Attachment A) pp. 12-15, are incorporated by reference. PCL proposes again that they be considered for full-fledged review rather than summary rejection.

⁸⁷ CRB report, attachment B to these comments.

⁸⁸ This alternative "would involve the Department reducing stress on fishery resources in the Delta by directly implementing water use efficiency measures, water recycling, storm water capture, and other local water system enhancements that stabilize water demand and improve SWP reliability." DEIR, p. 11-5.

- The assertion that IREE would not meet any of the project objectives is false. A key objective of the project provided in the DEIR is to increase the flexibility of the SWP. DEIR, p. 4-1. DWR specifically identifies environmental regulations as a primary limitation, in addition to hydrologic conditions, to delivery of water through the SWP. [Cite] ⁸⁹It is reasonable to expect that enhancements in the environment of the Delta would reduce the need for regulatory agencies to set new regulations or mandate actions to enforce existing regulations. Reduced regulatory actions would result in increased flexibility of the SWP. The DEIR does not provide any analysis which would indicate that such an assumption is unfounded or inaccurate.
- The DEIR's further claim that the IREE alternative is in conflict with the basic terms of the water supply contracts is also without merit. The proposed project is a set of contract amendments. It follows that alternatives to the proposed project would appropriately incorporate contract amendments. In fact, many of the provisions of the proposed project are in direct conflict with the basic terms of the pre-Monterey long-term water supply contracts.⁹⁰
- The DEIR's rejection of IREE rests heavily on the notion that DWR already operates in compliance with Delta water quality and flow objectives "as constrained by the need to protect threatened and endangered fish species listed pursuant to federal and state Endangered Species Acts." DEIR, p. 11-6. As discussed above, the pelagic species crash and the *Kemphorne* decisions on the Delta Smelt shatter the foundations of this assertion, which must now be revisited. There is now a compelling legal, as well as environmental, reason not to summarily reject an alternative that could feasibly accomplish most of the project objectives, while also reducing injury to the Delta.
- The DEIR also rejects IREE on the preposterous theory that "the Monterey Amendment is not an appropriate tool for mandating that SWP water be used to benefit the Delta environment. DEIR, p. 11-6. That is a remarkable assertion, considering that, as discussed elsewhere, the proposed project could result in increased pumping and thereby injure the Delta.
- Finally, the DEIR rejects IREE, as well as some other alternatives, based upon the legally erroneous theory that it would require action by local agencies; according to DWR, such agencies would have to propose water efficiency measures, which DWR recognizes it could

⁸⁹ In fact, environmental problems in the Delta were contributing factors which led to the reductions in SWP deliveries in the early 1990's, and the contractor disputes that precipitated the Monterey Amendments. *PCL v. DWR*, 83 Cal. App. 4th at p. 908.

⁹⁰ For instance, eliminating the "agriculture first" reduction in article 18(a) of the contract, as is proposed in the proposed project, is in direct conflict with the pre-Monterey contracts. If such conditions were applied to all alternatives, then the proposed project would also have to be eliminated. Alternatives should not be held to a standard that is not imposed on the proposed project.

fund. DEIR, 11-5,11- 6. That misstates CEQA, which does not foreclose an alternatives assessment simply because other agency action may be required⁹¹.

C. The DEIR fails to analyze a reasonable range of alternatives to the project.

While unreasonably rejecting all of the alternatives proposed by plaintiffs, the DEIR remarkably provides *only one* project alternative to the DEIR. Alternative 5 “would be the same as the proposed project except that the Monterey water management practices would not be implemented.” DEIR, p. 11-3. The DEIR’s very limited range of alternatives is misleading and incomplete. In order to provide for reasonable comparison, alternatives to the proposed project must be distinguishable from the proposed project. However, alternative 5 (and NPA2) inappropriately includes significant portions of the proposed project. As a result the DEIR inappropriately concludes that all available courses of action have roughly similar impacts and outcomes.

The DEIR rationalizes this approach by suggesting that many of the actions taken under Monterey could have occurred under the original contracts. Prior to Monterey, however, these policies were not widely adopted by the SWP and they were not commonly practiced under the previous contract. Had DWR decided to implement these actions under a different hypothetical approach, DWR would still have had to complete CEQA review prior to taking those actions. Therefore, it is not appropriate to include these actions in Alternative 5 or NPA2. Since DWR has proposed to take these actions as part of the Monterey Amendments, these actions must be properly treated as potential decisions rather than assumed components of the no project alternative.

In sum, the EIR should include alternatives that are clearly distinguishable from the “no project” and proposed project. These alternatives should not include polices or actions that are being proposed for implementation as part of the proposed project.

VII. The DEIR contains faulty and legally unsupportable assessments of project impacts.

A. The DEIR uses inconsistent time periods for its analyses.

In the historical analysis provided in Chapter 6 the DEIR uses different time periods for analyses in various sections of the EIR. For instance, carryover in Dan Luis is analyzed from 1996 through 2004, while the flexible storage provisions are analyzed from 1996 through 2003 (see DEIR at 6-57 through 6-58). These variations make it impossible to determine the full impact of any of the proposed project and alternatives included in the DEIR. No explanation is provided as to why certain sections are analyzed under differing time periods. Subsequent draft EIR analyses must use a consistent time period throughout the EIR.

⁹¹ See, e.g., *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 864-867. Similar grounds are improperly used to summarily reject other of PCL’s proposed alternatives, such as the “urban preference and dry year reliability” and “no urban preference and dry year reliability” alternatives. DEIR, pp. 11-4, 11-5.

B. The DEIR inadequately analyzes impacts resulting from eliminating and changing contract provisions.

- **Altered Article 21 rules for “surplus”**

As extensively discussed in connection with the baseline, the DEIR failed to analyze the impact of eliminating article 21(g)(1), the prohibition on using “surplus water” (or post-Monterey, “interruptible” water) to build permanent local economies. The EIR must fully analyze how eliminating this provision and simultaneous transfer of the Kern Water Bank and allowance of water storage outside of the SWP service area has altered or will alter SWP contractor demand and ability to receive article 21 water.

The EIR must analyze the degree to which eliminating use provisions for article 21 and providing urban users with increased access to article 21 water resulted in new uses of that water, including serving new growth-fostering water transfers. Analyses should also identify the degree to which altered article 21 provisions have shifted scheduling and delivery of Table A water and whether such shifts have resulted in changes to SWP operations (including changes in the timing or amount of water released from Lake Oroville and San Luis Reservoir).

The proposed project would eliminate pre-Monterey allocation rules for article 21. The priority for agricultural use and groundwater replenishment would be removed, and a new allocation method allowing access to article 21 based on Table A amount percentages would be adopted. Eliminating pre-Monterey contract allocations allows more contractors, including municipal contractors that had not historically received significant deliveries of article 21, to access this water and put it to use for purposes that are much different than pre-Monterey uses of Article 21.

The DEIR fails to disclose the implications of this potential change in allocation. In particular, the DEIR fails to clearly account for the impact resulting from allocating Article 21 to municipal contractors that may use the water for hardened demand and development. Subsequent versions of the EIR must include analysis and clear disclosure of the implications of altering Article 21 allocations.

- **Turnback Pool**

With the Monterey Amendments in place, all SWP contractors have an incentive to request their full contract amounts. In addition, the Turnback Pool provisions of the Monterey Amendments provide a new incentive for SWP contractors to maximize their annual demand for their full contract amounts. The DEIR recognizes that pre-Monterey some contractors could not use their full Table A amounts, and in some cases that resulted in reduced water deliveries through the SWP. That water which was not captured or delivered by the SWP would have thus been left instream for environmental benefit.

However, the Turnback Pools allow the contractors to benefit financially by requesting their full Table A amounts, even if that contractor does not require such water within its own service area. Other contractors who can make use of the water are encouraged under the

Monterey Amendments to purchase Turnback Pool water. It follows that under the proposed project, all contractors would request full contract allocations, regardless of need for that water. As PCL has long since noted, that tendency is likely to harden, and increase, the demand for Delta pumping.⁹²

- **Storage Outside of Service Area**

In allowing SWP contractors to store SWP water outside of their service area, the proposed project significantly expands SWP contractors' ability to accept water, and increases the demand for water from the Delta. The DEIR obscures this fact by assuming that much of the water stored outside contractors' service areas under the provisional implementation of the Monterey Amendments *could* have been stored within the contractors' service area. This assumption is very speculative. It assumes that infrastructure including transport facilities was available; cost of delivery, water quality, access to the right to store water, and other factors impacting the availability of storage capacity within the service area would not have prevented storage of that water within the service area. None of these factors were analyzed when the lead agency determined that water delivered out of the service areas could have been received within the service areas. Rather, the DEIR explains that the assumption is based on, "a telephone survey of contractors conducted by DWR."⁹³

The DEIR further seeks to reduce the perceived impact of water delivered to out of service area storage by assuming that such water would have instead been stored in San Luis Reservoir and delivered to other contractors via article 21 or increased Table A. Again, this assumption is purely speculative. It assumes that other contractors could have received the water and placed it within service area storage. These assumptions clearly seek to minimize the appearance of impacts. Indeed, through this methodology, the DEIR determines that of the 1,092,647 acre-feet of water delivered to out of service area storage between 1996 and 2003, only 44,000 acre feet are actually attributable to the proposed project. This is due to the multiple assumptions inappropriately incorporated into the baseline. However, as explained above, these assumptions do not belong in the baseline, and must be removed from the EIR.

- **Altered allocation under Articles 18 (a) and 21**

The DEIR fails to disclose the impacts of altered allocations under article 18(a). Specifically, the DEIR fails to how altered allocations that expose municipal contractors to reduced reliability could tend to encourage municipal contractors to increase demand for water in normal and wet years in order to restore dry year and shortage reliability.

The pre-Monterey article 18(a) provision requiring an agriculture-first reduction in the event of water shortages provided municipal contractors with a higher degree of drought reliability. Under the proposed project's alteration of article 18(a) this protection is eliminated. The proposed project thus exposes municipal contractors to reduced water reliability during

⁹² See Attachment A (PCL comments on Draft Chapter 9, p. 6.)

⁹³ DEIR, p. 6-60 (No details of that survey are presented).

periods of shortage. Moreover, because the Monterey Amendments would, if finalized, permanently delete article 18(a)'s agriculture-first cutbacks, they would remove a major obstacle to agriculture-to-urban transfers that facilitate growth.⁹⁴

It is reasonable and foreseeable to expect that municipal contractors will seek to mitigate the impact on their water reliability. In fact, the proposed project provides water management tools that would assist contractors in such an effort. The proposed project allows these contractors to greatly expand storage options, it provides these contractors with greater access to article 21 water and eliminates restrictions on use of that water, and it establishes the Turnback Pool giving these contractors greater access to water that would not be used by other contractors.

It is reasonable to assume that given the changes proposed, municipal contractors would have a greater incentive to maximize use of the tools provided in the proposed contract (maximizing Table A requests, utilizing article 21, Turnback Pool and carryover provisions to maximize water in newly available storage) in order restore their dry year and shortage reliability.

It is important to note that both Turnback Pool and article 21 water are usually available in the winter and the spring. SWP exports during these periods have been identified as a primary contributor to the Pelagic Organism Decline in the Delta. Any action that would tend to encourage increased demand and increased export for these categories of water would therefore have a significant impact on the Delta.

The EIR must explicitly disclose the impact of eliminating the protections for municipal contractors under Article 18 (a), and the resulting impacts on the Delta. As elaborated below, the DEIR omits analysis of impacts or provides inadequate analysis of significant impacts associated with the proposed project.

- **Environmental consequences of financial restructuring under Article 51**

The DEIR briefly describes, but never analyzes the environmental consequences of article 51, one of the most important structural revisions in the SWP system that would be initiated by the Monterey Amendments, should they be adopted. DEIR, p. 4-8. Among other revisions, article 51 changes the way that DWR addresses revenues exceeding the cost of operating the SWP system.⁹⁵ As Environmental Defense documented years ago in legislative

⁹⁴ The record of such transfers during the interim enforcement of the Monterey Amendments deserves careful study. There is no evidence to support the speculative assertion that these Table A transfers would have occurred anyway in the absence of the Monterey Amendments. Rather, as the EIR correctly points out (DEIR 6-10), only one occurred previously (Devil's Den), and it was expressly subject to agriculture-first cutbacks even after transfer to urban use.

⁹⁵ In *PCL v. DWR*, the court of appeal recognized the interrelationship between revised articles 18 and 51 in the Monterey Amendments. The court "agree[d] with plaintiffs that inclusion of article 51 in the amended contracts implies that DWR and the contractors have forsaken their expectation that the SWP facilities will be built as planned and will deliver 4.23 MAF of water annually. Article 51 allows contractors a rebate for the costs previously assessed for facilities

testimony on the Monterey Amendments, appended as attachment I, the revenue stream returned to the contractors under article 51 is enormous over the life of the project contracts.

The new EIR must carefully analyze the environmental consequences of article 51 as an integral part of the Monterey Amendments, rather than summarily assuming that because this provision is “economic” in nature it would not contribute to such impacts. Although CEQA does not require analysis of purely economic or social changes, it requires analysis of environmental impacts that can be traced to such changes. (See, e.g., 14 Cal. Code Regs, § 15131; *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 695-98.) Here, 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 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.

- **Reduction of state oversight of water transfers under Article 53**

Prior to the Monterey Amendments, DWR had contractual responsibility to oversee and approve transfers of water through the SWP. Under the proposed project, DWR largely excuses itself from this responsibility for certain transfers. Contractors are now permitted to transfer project and no project water at their convenience. DWR has essentially given up effective ability to control where and how water is used within the SWP.

This provision is particularly important for its implications on growth in California. As stated above, the pre-Monterey contracts recognized the difference between municipal reliability and agricultural reliability. Agricultural Table A amounts were explicitly conditioned by their reliability. Thus, it would be inappropriate to use agricultural water transfers for certain purposes, including development. However, provisions of the proposed project including elimination of article 18(b) and changes in 18(a) now imply that all water in the SWP has equal reliability. This new dynamic risks creating, rather than eliminating, a paper water problem. Under the proposed project, DWR would abandon its role in clearly articulating the difference in reliability of water and hand that responsibility to local agencies.

The proposed project implies that all water under the SWP has equal reliability, yet very little water has been removed from the total Table A amount. Given that the original contracts explicitly stated that Table A amounts for agriculture were not as reliable as municipal contracts, it is illogical to assume that suddenly, the SWP can reliably deliver water to all contractors. Yet under the proposed project, agricultural to municipal transfers will be more common and there will be no requirement to address the issue of reliability. This scenario risks inducing growth based on unrealistic assumptions of water reliability.

- **The DEIR fails to disclose impacts to the Bay Delta Estuary.**

that have never been built. Indeed, fiscal and environmental pressures militate against completion of the project.” (83 Cal.App.4th at p. 914, n. 7.)

As discussed above, the Bay Delta Estuary is in critical decline. Fisheries populations have declined dramatically since 2000. Several fish species, including the Delta Smelt, are now at historic low population indices. State and Federal scientist have determined that increased Delta exports, and in particular, exports occurring in the winter and spring are a significant contributor to these declines.

Yet many of the provisions of the proposed project would *increase* the amount of water exported by the SWP during times of “excess” in the Delta. Excess conditions usually occur in the winter and spring, the very time that delta smelt have become vulnerable to project operations. For instance, the DEIR admits that the Turnback Pool and Article 21 are both provisions that seek to capture water earlier in the year. Yet the DEIR fails to incorporate that timing factor into the analysis of impacts in the DEIR.

C. The DEIR fails to adequately growth-inducing impacts, and impermissibly defers the responsibility to analyze them.

The DEIR attempts to absolve DWR of fully analyzing and mitigating the growth inducing impacts of the proposed project. That evasion has profound environmental consequences, due to the stakes involved: as the DEIR concedes, the combination of new table A and article 21 deliveries in the project could support new populations ranging from 405,103 in the “more resource-intensive” scenario, and 561,684 in a “less resource-intensive” scenario. DEIR, p. 8-9. Yet the DEIR asserts in that DWR is *not* required to extensively analyze the growth inducing impacts of water delivered by DWR because DWR is not responsible for land-use decision. *Id.* at pp. 8-13, 14. The DEIR further holds that DWR is not responsible for differentiating between the impacts of water deliveries that stimulate new growth and the impacts of water deliveries used to enhance dry year reliability. *Id.*, p. 13.

This indifference to a major environmental consequence of the project, if finalized, would constitute a major evasion of CEQA responsibility. CEQA requires a lead agency, such as DWR, to analyze the full environmental consequences of its decisions. That responsibility creates a duty to analyze the consequences of removing an obstacle to growth, or accommodating growth. In this context, the DEIR’s principal strategy—to defer the real analysis to post-decision *local* determination, is completely untenable.⁹⁶ None of these local decision-makers will have the opportunity to analyze the cumulative consequences of accommodating half a million Californians before the suite of growth-inducing changes in the Monterey Amendments become a *fait accompli*. Moreover, particularly given the decade-plus history with interim enforcement of the Monterey Amendments, there is no basis to support the EIR’s premise that the consequences are speculative. Remarkably, the EIR does not even attempt to address the growth-inducing or growth-accommodating impacts of known projects that have relied, in whole or in part, on the Monterey Amendments.⁹⁷ The EIR must disclose the impacts associated with

⁹⁶ See DEIR, p. 8-14.

⁹⁷ The EIR should start by analyzing the documentary history of such projects as Dougherty Valley in Contra Costa County, as well as numerous projects in Los Angeles County: among

the decision to remove the state oversight of SWP water that was embodied in the original pre-Monterey contracts.⁹⁸

While the DEIR argues that DWR does not have responsibility for how water is put to use, it is indisputable that DWR has specific and fundamental responsibilities for overseeing the use of SWP water. Under the Monterey Amendments, DWR has given local agencies increased flexibility, and therefore increased ability to use the water in a way that would potentially impact the environment. While DWR cannot be expected to predict with absolute certainty how contractors and land-use agencies will use the water in the future, DWR has a responsibility to disclose all *potential* significant impacts resulting from this decision and the proposed project. DWR simply cannot be excused from disclosing the impacts of eliminating previously held responsibilities.

The EIR must include adequate analysis of growth inducing impacts, including analysis of how, where and for what purpose water made available under the Monterey Amendments has been put to use, and will likely be used should DWR adopt the proposed project. This analysis must disclose the growth inducing implications of eliminating article 18(b) and article 21(g)(1) of the original contracts, facilitating transfers between agricultural and urban contractors, conveying non-project water, providing municipal contractors increased access to Article 21, permitting unlimited storage outside of the service area, and implementing the Turnback Pool. In addition, the EIR must fully disclose how these provisions may tend to increase the demand for such water and the resulting impacts on the Delta and upstream operations of delivery of such water.

The EIR must specifically state the percentage of water which contractors now have access to under the Monterey Amendments that is likely to be stored for dry year reliability and the percentage which will be used for new growth. Also, the EIR must disclose the degree to which water made available under the Monterey Amendments will be used for resource-intensive growth and urban sprawl. Impacts analysis should include a study of the impacts of the growth likely to be induced by the proposed project water deliveries (i.e. resource intensive sprawl or infill development). For instance, water made available to Castaic Lake Water Agency is likely to result in development of open space and agricultural lands (and require new annexations), whereas water made available to Los Angeles Department of Water and Power is likely to result in development in already developed areas.

them, West Creek, Gate-King, Riverpark, Northlake, Mission Village, Soledad, River Valley, and Newhall Ranch.

⁹⁸ Prior to the Monterey amendment, DWR had explicit oversight of storage of SWP water, water transfers through the SWP, Table A transfers, use of article 21 water, and allocation of water in times of shortage. article 18(b) also required DWR to provide explicit information on the reliability of SWP water through determining the minimum yield of the Delta. Furthermore, under article 18(b), DWR has the authority to reconcile Table A amounts with that minimum yield. Such authority provided the State will direct discretion over the amount of water that could be determined to be reliable.

In addition, as discussed extensively in section V above, the EIR must analyze how the transfer of the Kern Water Bank to local control has facilitated growth-inducing uses of the facility, as compared to operations that would prioritize dry year reliability.

D. The DEIR’s assessment of the reliability of water supplies and growth evades, rather than analyzes, the problem of “paper water.”

Regrettably, the DEIR’s chapter on the reliability of water supplies (Chapter 9) and growth virtually ignores everything that PCL submitted to DWR on the subject during years of EIR planning that preceded the public draft. PCL therefore references its previous submissions on this issue⁹⁹ and once again requests specific responses. In a case of “fighting the hypothetical,” the DEIR does not seriously engage the “common sense” connection between water availability and growth identified in *PCL v. DWR*, and instead, undertakes to dispute the premise. Essentially, DWR argues that growth based upon paper water never existed, that its extent has been exaggerated, and that new measures (biennial reliability reports, Urban Water Management Plans, and SB 221/ 610) will prevent it from happening in the future. DEIR, pp. 9-2 to 9-11.

This analysis is fatally flawed. First, it asks the wrong question about the historical role of paper water, focusing on whether inflated water reliability estimates have subjectively motivated land-use decision-makers to approve projects. The DEIR answers the question in the negative, not because paper water isn’t real, but because ignoring water reliability has been so pervasive that Table A amounts can’t be considered uniquely responsible. DEIR, p, 9-10. But a “but for” causation test is not what CEQA requires. What matters is the following:

- Historically and recently, land use decision-makers in California have frequently approved projects with little regard for the availability of adequate water supplies to support the development. Many of these projects have involved State Water Project water resources.¹⁰⁰ Moreover, 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 pre-Monterey Amendments SWP contracts had mechanisms that could have been used to take “paper water” out of the calculus regardless of decision-makers’ subjective motivations where SWP water was involved: enforcement of article 18(b)’s permanent shortage provision, and article 21(g)(1)’s proscription on using “surplus” water to build permanent economies.
- If the Monterey Amendments become permanent, these safeguards will disappear from the SWP contracts, regardless of what local decision-makers may later do in review of specific projects.

⁹⁹ See Attachment A, particularly the comments addressing the chapter on paper water and growth.

¹⁰⁰ See Attachment J (Kanouse/ EBMUD study).

The problem of “paper water”—stated in its simplest terms, of development decisions grounded in expectations of water supplies exceeding what can actually be delivered—emerged as one of the central themes in the Third District’s ruling, and is perhaps the issue with which *PCL v. DWR* is most closely associated in both case law and in public discussion.¹⁰¹ Rather than providing the thorough and candid assessment of “paper water” and development anticipated in the appellate ruling, the DEIR provides little more than a cursory historical summary, a description of planning laws and practices, and a superficial discussion of Urban Water Management Plans. Indeed, the analysis presented here bears more resemblance to arguments about “paper water” unsuccessfully presented to the court of appeal than the probing and comprehensive assessment anticipated in the appellate ruling and settlement.

A puzzling duality pervades the DEIR’s discussion. The historical overview is dismissive of the notion that inflated expectations of SWP deliveries affected development decisions. But rather than debunking the notion that such inflated expectations were present in projects relying on SWP water, the chapter argues, if anything, that they were all too real; that decision-makers so pervasively failed to consider potential constraints on SWP water deliveries that they would have paid little attention to the amounts of “entitlement” referenced in the project contracts.

The core of this analysis posits that planners assume that *local water agencies* will obtain the supply necessary to meet the long-term water demand that results from planned growth. But far from “disproving” reliance on SWP paper water, this analysis points to planners and decision-makers trusting the water agencies; in other words, they are presumed to have relied upon the same pervasive “water culture” in which the court grounded its historical analysis of the “huge gap” between entitlements and available supplies. Instead of analyzing the historical paper water problem, the DEIR repackages it.

A similar circularity pervades the chapter’s extremely cursory analysis of SWP water supply and urban planning in the future. From the historical position that planners and decision-makers rarely even considered water supply, the draft swings to a somewhat exaggerated faith that they now “get it,” due in part to changes produced by the *PCL v. DWR* decision and settlement, and in part due to parallel legislative changes (notably, SB 610 and SB 221). But the DEIR does not even begin to show that the “modern” mechanisms, such as SB 610/ 221 and Urban Water Management Plans, have now made paper water disappear.¹⁰² Notably, the DEIR does not even analyze two new sources of paper water that are specifically associated with this project. The first, extensively discussed above, is the growing reliance on article 21 water to support permanent developments. The second is that DWR’s over-reliance on CALSIM in its reliability reports, which have induced local decision-makers to rely on estimates of SWP yield

¹⁰¹ See, e.g., *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal. App. 4th 715, 721; Kibel and Epstein, *Sprawl and ‘Paper Water’: A Reality Check for the California Courts* 20 CALIFORNIA REAL PROPERTY JOURNAL 22, 23 (Winter/Spring 2002).

¹⁰² Indeed, the DEIR has not yet addressed PCL’s earlier criticisms of its analysis of Urban Water Management Plans, included in Attachment A,

that are vastly beyond historical deliveries. DWR still has yet to come to terms with this “cyber water” problem, which PCL identified in its scoping comments more than four years ago.¹⁰³

D. The DEIR avoids, and impermissibly delegates to subsequent local review, project-related climate change impacts.

Climate change has been extensively addressed above in connection with baseline issues. The separate chapter on climate change in the DEIR (Chapter 12) creates additional CEQA problems, by systematically avoiding full and responsible discussion of project-related climate impacts. First, the analysis relies heavily on the dubious premise that, because DWR had concluded that the project would not affect *statewide* population growth, it would not affect growth-related greenhouse gas emissions “within the SWP service area as a whole.” DEIR, p. 12-14. But DWR provides no support for the speculative premise that the location of development is inconsequential to greenhouse emissions. In fact, sprawling patterns of development cause considerably more greenhouse gas emissions than more compact forms of development that occur within existing urban areas. Turning “surplus” water into water that facilitates permanent new development in areas that are currently rural or agricultural will have a very significant impact on greenhouse gas emissions, and the DEIR needs to analyze how the proposed Monterey Amendments will affect that possibility.

Second, the DEIR does not study whether the elimination of pre-Monterey safeguards—including the permanent shortage provision in article 18(b) and the proscription on using “surplus” water to build permanent economies in article 21(g)(i)—may impact climate change by removing useful tools to reconcile supplies and deliveries in a climate-constrained project. The DEIR should study from a climate change perspective whether there is a difference between those pre-Monterey approaches and the post-Monterey approach (reliability reports and liberalized use of article 21).

Finally, the DEIR does not analyze whether would be a project-related difference in emissions due to the difference between serving urban and agricultural contractors. The elimination of the pre-Monterey “agriculture first” preference may make that distinction tangible.

E. The DEIR inadequately addresses cumulative impacts.

¹⁰³ As PCL observed in its March 2003 scoping comments (p. 8), a detailed analysis by Dennis O’Connor, then of the California Research Bureau, concluded that DWR’s reliability report had no credible explanation for exceeding historic deliveries by around 50 percent. He concluded that the results were inconsistent with previous estimates and models, and recent deliveries were lower than the modeled conditions. His assessment also observes that CALSIM II is not calibrated or otherwise verified, and that the reliability report did not use the CALSIM II model as designed. O’Connor’s analysis warns that DWR’s assessments of reliability should not replace the “paper water” problem with a new, simulation-based “cyber water” problem. While O’Connor was addressing the draft 2002 report, the problems have never been corrected.

Although the cumulative impacts discussion (Chapter 10) mentions the Central Valley Project, it does not analyze the important question of how the project will affect the environment via CVP use of Delta export capacity. The DEIR analyzes the impact on the availability of water (DEIR, pp. 7-55 to 7-57), but the environmental impacts due to increased pumping from the Delta were not.

VII. Recommended mitigation of impacts

PCL expects that with the additional analysis suggested above, the Final EIR will determine that the proposed project has significant impacts on the environment. Therefore, we provide the following recommendations that could be utilized to mitigate for some, although not all, of the significant impacts identified in these comments.

- To partially prevent growth inducing impacts, the EIR can require DWR to provide a clear statement that Article 21, transfers of Article 21 and reliance on Turnback Pool water are not reliable sources of water and that such sources are not suitable for support of permanent economy, including development. To avoid any confusion, the EIR should commit DWR to excluding these sources of water from the Report on the Delivery Reliability of the State Water Project.
- To partially mitigate impacts associated with eliminating Article 18(b), the EIR should commit DWR to provide explicit guidance on how to interpret reliability curves included in the SWP Delivery Reliability Report.
- To partially mitigate potential impacts to the Delta from increased pumping of Article 21 water, the EIR can prohibit declaration of Article 21 when fish agencies determine that there would be threat to fish species from export of such water.
- To partially mitigate for the loss of statewide oversight of the use of SWP water, the EIR should commit DWR to providing full disclosure of accounting, pumping and delivery of SWP water to the public in a timely (weekly) basis.
- To partially mitigate for the loss of the Kern Fan Element as a public trust resource, the EIR should impose conditions requiring that public trust agencies will have priority for the capacity of the Kern Fan Element for the storage of water to protect public trust resources including the health of the Delta.

These measures would not fully mitigate the impacts of proposed project. Impacts such as increased demand for SWP water to offset dry year by municipal contractors would not be addressed by the proposed mitigation measures above. However, the final EIR would need to address all impacts of the proposed project.

As an original plaintiff in the Monterey Amendments litigation, PCL has an interest in ensuring that the final EIR provide the public and decision-makers with an accurate and thorough

analysis of the proposed Monterey Plus actions and a thorough comparison of viable and feasible alternatives, consistent with the original *PCL v. DWR* court decision.

We are distressed that despite the direction provided by the Court of Appeal, and despite our participation in the EIR process, and despite the significant events that have occurred since 1995, including the collapse of the Delta, the Monterey Plus DEIR is largely based on the same unfounded assumptions included in the CCWA EIR, and EIR rejected by the Court of Appeal.

The current DEIR manifestly fails to provide the full review demanded by the Court – and by the California Environmental Quality Act – and that was anticipated by plaintiffs in the settlement agreement.

We urge DWR to remedy the significant flaws in the current DEIR by fully analyzing, disclosing and mitigating the impacts of the proposed project in future versions of the EIR, as CEQA most emphatically requires.

Thank you for taking our strongly felt comments into consideration.

Sincerely yours,



Gary A. Patton, Executive Director



Roger B. Moore
Rossmann and Moore, LLP

CC:

Lester Snow
Arve Sjovold
Naomi Kovacs
Brian Morris
Senator Machado
Senator Steinberg
Senator Lowenthal
Assemblywoman Wolk
MWD Board
SWP contractors