Los Angeles County Superior Court, "Statement of Decision, *California Water Impact Network v. Castaic Lake Water Agency*, Case No. BS 098724" (April 2, 2007)

California Water Impact Network v. Castaic Lake Water Agency
BS 098724

Statement of Decision on Petition for Writ of Mandate

Petitioners California Water Impact Network ("CWIN") and Planning and Conservation League ("PCL") petition for writ of mandate under California Environmental Quality Act ("CEQA"). The court has read and considered the moving papers, oppositions, and reply, heard oral argument, and renders the following decision.

A. Statement of the Case

Petitioner CWIN commenced its petition for writ of mandate in Ventura County Superior Court on January 24, 2005. The petition alleges that on December 23, 2004, the Castaic Lake Water Agency ("Castaic"), a public water agency and water wholesaler that treats and delivers water to water retailers in Los Angeles and Ventura Counties, approved the permanent transfer of 41,000 acre feet per year from Real Party in Interest Kern County Water Agency ("Kern") and its member unit in Kern County, Wheeler Ridge-Maricopa Water Storage District ("Wheeler Ridge"), to Castaic (the "Kern water transfer," the "Kern transfer," or the "transfer"). Castaic also purported to certify the Environmental Impact Report ("EIR") for the project (the "2004 EIR" or the "EIR"). Petitioner claims the Kern water transfer "threatens to promote large-scale urban sprawl in Ventura and Los Angeles Counties, while diverting water from important environmental and agricultural uses in Kern County forever." Petitioner alleges that the 2004 EIR is premature, and fails to comply with CEQA.

The petition alleges a cause of action for violation of CEQA in that Real Party in Interest California Department of Water Resources ("DWR"), not Castaic, should have been the lead agency for the 2004 EIR, which does not adequately describe the background on which the project is based, fails to disclose a reliance on an invalid Urban Water Management Plan, fails to adequately describe alternatives to the project, including a "no project" alternative, fails to discuss growth inducement, and inaccurately states the availability of water availability.[1]

On January 24, 2005, PCL filed its own petition for writ of mandate against Castaic in Ventura County Superior Court. The PCL petition alleges a violation by Castaic in recording a Notice of Determination on December 23, 2004, certifying the 2004 EIR and rendering its approval of the Kern water transfer. The petition purports to allege five "causes of action" for violation of CEQA in the 2004 EIR based on Castaic stealing DWR's duty to be the lead agency for the EIR, certification of a defective EIR, approval of inadequate findings, erroneous presentation of the project as already complete, and "prejudicial abuse of discretion."

On June 22, 2005, upon motion by Castaic, the Ventura County Superior Court (the Honorable Frederick H. Bysshe, Jr.) ordered the transfer of both petitions, which had been consolidated, to Los Angeles. On March 27, 2006, the case was reassigned to this court.

On June 27, 2006, the court heard the demurrers of Castaic and Real Party in Interest Kern to the consolidated petitions. The court ruled that the petitions were timely filed and were

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[1]On CWIN's oral motion, the petition's second and third causes of action have been dismissed. As a result, CWIN's petition solely concerns Castaic's compliance with CEQA in the 2004 EIR.

not barred under the doctrine of *res judicata*. The court noted that the Kern water transfer agreements are valid. While principles of *collateral estoppel* barred Petitioners from re-raising issues resolved by the Second District with respect to the 1999 EIR, this conclusion did not foreclose the petitions and the demurrers were overruled.

On July 16, 2006, the court denied Castaic's motion for a legal determination under principles of *collateral estoppel* and party admission that Castaic is the proper lead agency for preparation of the EIR for the Kern water transfer. However, Petitioners are bound by their concession that Castaic may act as the lead agency at some point for an EIR on the Kern water transfer.

B. Preliminary Issues

1. Standing and Timeliness

Petitioner PCL alleges that it is a non-profit corporation devoted to environmental protection. PCL Pet. at ¶6-7. Some of PCL's members live in the area affected by the Kern water transfer. PCL Pet. at ¶8. Petitioner CWIN alleges that it is a nonprofit public benefit corporation the purpose of which is to protect California's environment. CWIN contends that it is impacted by the Kern water transfer because its members reside in and use the Santa Clara River watershed, which is impaired by the water transfer. CWIN Pet. at ¶9. Thus, Petitioners contend that they are impacted by the project and have standing to raise the issues herein. Respondents do not contest Petitioners' standing. *See* Waste Management of Alameda County, Inc. v. County of Alameda, (2000) 79 Cal.App.4th 1223, 1233-34.

The actions are timely on CEQA issues, each having been filed on January 24, 2005, within 30 days of Castaic's Notice of Determination that the 2004 EIR had been certified, filed in various counties between December 23 and December 27, 2004. *See* Pub. Res. Code §21167(c).

2. The Administrative Record

Castaic has certified the administrative record. Pub. Res. Code §21167.6; LASC 9.24(e). The record was received in evidence at trial.

Castaic and Kern, and DWR separately ask the court to judicially notice various records. Judicial notice is the acceptance by a court without formal proof of the existence of a matter of law or fact that is relevant to an issue in the case. People v. Rowland, (1992) 4 Cal.4th 238, 268, n.6. Certain documents are subject to judicial notice. Ev. Code §451, 452. Even where subject to judicial notice, however, a document must be relevant. Id.

The California Supreme Court decision in Western States Petroleum Assn. v. Superior Court, ("Western States") (1995) 9 Cal.4th 559, 573, n.4, provides that extrinsic evidence is generally not admissible for a traditional mandamus challenging a quasi-legislative agency action. The exclusion of extrinsic evidence in a traditional mandamus action is essentially the exclusion of irrelevant evidence. Extrinsic evidence is generally not admissible for a traditional mandamus challenging a quasi-legislative agency action. Id. Such evidence may be admissible in a narrowly construed exception in which (1) the evidence in question existed before the agency made the decision, and (2) the evidence could not have been presented to the agency in the first instance in the exercise of reasonable diligence. Id. at 578. The purpose of limiting extra-record evidence is that the free use of such evidence would invade the deference to which the legislative

branch is entitled under the constitutional separation of powers. If the courts freely considered extra-record evidence in mandamus cases, the highly deferential substantial evidence standard would be turned into a *de novo* standard where the courts in effect would decide not whether an administrative decision was supported by the evidence before the agency but instead whether it was the wisest and best decision according to the courts. Id. at 572.

Castaic asks the court to judicially notice: (1) the unpublished appellate decision in Friends of the Santa Clara River v. Castaic Lake Water Agency, 2003 Cal.App. Unpub. LEXIS 11239, dated December 1, 2003 ("Friends II"), and (2) the unpublished appellate decision in California Water Network v. Castaic Lake Water Agency, 2006 Cal.App. Unpub. LEXIS 2452, dated March 23, 2003.[2] The existence of these court decisions is subject to judicial notice. Ev. Code §452(d).[3]

DWR asks the court to judicially notice (1) Amendment No. 19 to the Water Supply Contract between it and Castaic dated May 28, 2003, and (2) Notice of Preparation of EIR for the Monterey Amendment dated January 24, 2003. DWR contends that these documents are official acts of a California agency subject to judicial notice under Ev. Code section 452(c) and (d). The Notice of Preparation is an official act of DWR and is judicially noticed. However, Amendment No. 19 is not. Official acts should be limited to regulations, public announcements, and other actions the existence of which is beyond dispute. A well informed person has no way of knowing whether Amendment No. 19 is authentic and valid. Nor is it a court record under section 452(d). DWR's request for judicial notice of Amendment No. 19 is denied.

C. Statement of Facts

1. SWP

In 1951, the Legislature authorized construction of a state water storage and delivery system. Planning & Conservation League v. Department of Water Resources, (2000) 83 Cal.App.4th 892, 898. The Legislature subsequently authorized the State Water Project ("SWP"), a complex system of 28 reservoirs and dams, 26 power and pumping plants, and 600 miles of canals and aqueducts to deliver 4.23 million acre-feet of water annually to Central and Southern California. The primary source for the SWP is the drainage of the Feather River, a tributary of the Sacramento River in Northern California (hereinafter, the "Delta").

DWR is the state agency charged with the statutory responsibility to build, manage, and operate the SWP. Essentially, DWR is the wholesale provider of water to middlemen agencies. In 1961, DWR entered into individual contracts with various agricultural and urban water suppliers in the State, referred to as State Water Contractors. *See* Water Code §12937. There are 29 agencies or districts that currently are State Water Contractors.

The SWP water contracts entitled the contractors to receive an annual amount of SWP

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[2]Castaic also supplied the court with copies of its decisions on demurrer and motion for legal determination in this case, which need not be judicially noticed.

[3]Real Party Wheeler purports to join in Castaic's request for judicial notice. In its ruling on the demurrers, the court informed Wheeler of the futility of a joinder as merely a cheerleading effort. No further discussion of the purported joinder is necessary.

water in exchange for a proportionate share of financing and maintaining the SWP facilities. Each water contract contains provisions for both allocation of the amount of water available each year and costs among the contractors. Each contract identifies a Table A amount, the annual maximum amount of water which DWR agrees to deliver, if available for delivery, to each SWP contractor on an annual basis. Delivery of the Table A amount is not assured, but rather provides the basis for proportional allocation of available water among contractors. The Table A amount is specified as either agricultural or urban (M&I). Each contract also includes Article 40, which permits water transfers between contractors, and Article 41, which requires DWR approval of any transfer subject to reasonable terms and conditions. AR 2356.

Each contractor annually submits a request to DWR for water delivery in the following year, up to the amount in Table A. In a year when DWR is unable to deliver the total of contractor requests, deliveries to all contractors will be reduced. The current Table A totals are 4.17 million acre-feet per year.[4] In fact, given existing facilities and contractor demands, the SWP can only deliver an average of 2.96 million acre-feet per year.

2. The Monterey Agreement

Historically, the delivery of less than Table A totals was not a significant problem because contractor demand was less than the Table A amounts. However, in the late 1980's and early 1990's, a drought led to SWP deliveries in amounts below that requested by contractors. Articles 18(a) and (b) of the SWP water contracts addressed DWR's temporary and permanent inability to deliver the water allocations listed in Table A of the contracts by requiring agricultural contractors to accept a reduction in water first before any remaining reduction was shared by urban contractors. In 1990, agricultural contractors received only half their requested water and none in 1991. Because contractors pay their proportionate share of fixed costs regardless of how much water is delivered, the agricultural contractors were paying for water they were not receiving and they were displeased. As a result, urban and agricultural water contractors clashed over DWR's delivery obligations and the proper interpretation of Article 18. AR 45-46.

In December 1994, five State Water Contractors and and DWR reached agreement on a broad set of fourteen principles (the "Monterey Agreement"). Among other things, the Monterey Agreement changed the allocation between agricultural and urban contractors of entitlements to SWP water. The Monterey Agreement eliminated Article 18 and specified that all SWP water was to be allocated in proportion to Table A amounts. Paragraph 24 of the Monterey Agreement provides for the permanent transfer of 130,000 acre-feet from certain willing agricultural contractors, including KWCA, to urban contractors, as implemented by individual agreement. AR 2515. It also provides that individual contractors may transfer entitlements among themselves beyond the 130,000 acre feet proposed, with DWR expeditiously executing any necessary documents and approving all such contracts. Other provisions of the Monterey Agreement include a revision of water allocations during shortages, eliminating the "agriculture first" provision, and retirement of 45,000 other acre-feet of entitlement by agricultural contractors.

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[4]An "acre-foot" is the amount of water that would cover one acre one foot deep.

The Monterey Agreement provides that individual SWP contracts could be amended to conform to it. Over the next two years, 27 of the 29 Water Contractors amended their SWP contracts to implement the principles of the Monterey Agreement (collectively, the "Monterey Amendments").

In 1995, a State Water Contractor, Central Coast Water Authority ("Central"), acted as lead agency and certified a program EIR analyzing the environmental impacts of the Monterey Agreement. This program EIR also addressed Paragraph 24 (Article 53 in the Monterey Amendments) water transfers, including the Kern water transfer. In late 1995, PCL filed a lawsuit in Sacramento Superior Court challenging the program EIR, Planning & Conservation League v. Department of Water Resources, ("PCL").

3. The Kern Water Transfer Agreement

Castaic is a State Water Contractor created by the California Legislature. Its mandate is to purchase and deliver sufficient supplies of water to serve the needs of the Santa Clarita Valley. *See* Swanson v. Marin Municipal Water District, (1976) 56 Cal.App.3d 512, 524 (water district has obligation to augment available water to meet increasing demands). Castaic diverts its SWP water from the West Branch of the California Aqueduct. Castaic is one of the Water Contractors entering into the Monterey Amendments (Amendment 17 to Castaic's SWP contract).

Kern County Water Agency ("KCWA") is a special district formed by the Legislature in 1961. Wheeler Ridge is a special district formed in 1959 to provide supplemental water to agricultural lands in Kern County and is located immediately north and east of Castaic. KCWA has contracts with Wheeler Ridge and other member agencies, for KCWA's SWP water.[5]

In March 1999, Castaic entered into an agreement to purchase from Wheeler Ridge, subject to KCWA's consent, 41,000 acre-feet per year of SWP water (the Kern water transfer). The price for the transfer was $47 million in debt instruments purchased by private investors. The purpose of the transfer is to permit Castaic to serve the water demands of existing users, as well as meet a portion of future water demand from anticipated growth within the Castaic service area. AR 16. The Kern water transfer is the largest transfer under Article 53 of the Monterey Amendments, and it counts towards the 130,000 acre-feet limit. In their transfer agreement, both sides warranted that there was no pending or threatened litigation other than PCL that could affect the 41,000 acre feet SWP entitlement. AR 2562-63.[6]

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[5]In 1998, another KCWA member, Belridge Water Storage District, certified an EIR on the environmental effects of transferring 130,000 acre-feet of SWP water to unidentified purchasers. This EIR was not challenged.

[6]Castaic has been planning since 1987 to increase the supply of water to Santa Clarita Valley. At that time, Los Angeles County General Plan forecast substantial population growth in the Santa Clarita Valley. In 1988, Castaic adopted a Capital Program and Water Plan (the "Capital Program") to address the purchases, construction, and improvements necessary to meet the anticipated water demand. The Capital Program called for the purchase of SWP water from districts willing to sell, including Wheeler Ridge, and the storage of water for later use during drought conditions at Semitropic Groundwater Storage District's ("Semitropic") basins. AR

DWR's approval of the Kern water transfer was required under Articles, 15, 41, and 56 of the SWP contracts. On March 31, 1999, DWR approved the transfer by entering into Amendment 18 of Castaic's SWP contract. Amendment 18 adds Article 53(j), which provides that "in accordance with Article 53(a)" of the Monterey Amendments, Castaic's Table A annual entitlements were increased by 41,000 acre-feet. AR 2545-47. DWR and KCWA, which consented to the transfer of its water, also entered into Amendment 28 to KCWA's SWP contract, an amendment which reduced KCWA's entitlement by 41,000 acre-feet. Based on these amendments, DWR has allocated SWP water to Castaic since 1999 based on a total Table A amount of 95,000 acre-feet -- Castaic's original Table A 54,000 acre-feet plus the 41,000 acre-feet from the Kern water transfer.

On March 29, 1999, Castaic, acting as lead agency, certified an EIR for the Kern water transfer. This 1999 EIR tiered off the 1995 Monterey Amendment program EIR, the Belridge EIR, and Castaic's own 1988 EIR for the Capital Program. In April 1999, Castaic's EIR for the Kern water transfer was challenged in Friends of the Santa Clara River v. Castaic Lake Water Agency, BS056954 ("Friends"). On August 16, 2000, the trial court entered judgment, denying the petition in its entirety.

4. The PCL and Friends Decisions

In September 2000, the Third Appellate District in PCL found that DWR was the only entity with the "statewide perspective and expertise" to serve as lead agency for the Monterey Agreement program EIR. Because "the allocation of water to one part of the state has potential implications for distribution throughout the system," the court recognized DWR's principal responsibility to "facilitate the water transfers allowed under the Monterey Agreement." 83 Cal.App.4th at 907. The use of Central as lead agency for the Monterey Agreement program EIR was inappropriate. Id. at 907.

This lead agency error was not harmless because the EIR also was defective. Perhaps as a consequence of Central's lack of statewide expertise, the EIR failed to properly discuss a "no project" alternative, including the environmental impact of implementing the pre-Monterey Agreement Article 18(b)'s permanent water shortage provision. Id. at 918. This was particularly important because local land use planners rely on the "paper water" entitlements in Table A

41845.

Pursuant to the Capital Program, Castaic permanently acquired 12,700 acre-feet of SWP Table A water in 1991 from Devil's Den Water District, a SWP contractor immediately north of Castaic. This transfer was subject to DWR approval, which per Article 41 of the SWP contracts could not be unreasonably withheld. DWR approved the transfer, noting that the transferred water remained labeled for "agricultural purposes" for purposes of delivery shortages.

Also pursuant to the Capital Program, in 2002 Castaic entered into a groundwater storage or "banking" agreement with Semitropic. This action was challenged under CEQA on the basis that the Monterey Agreement required DWR to conduct an environmental review. The challenge was rejected by the appellate court, which held that DWR had no jurisdiction over Castaic's management of water; DWR merely schedules SWP water delivery to Castaic. Cal. Water Network v. Castaic Lake Water Agency, (2006) 206 Cal.App. Unpub. LEXIS 2452, 9.

rather than real, deliverable water. The question was what impacts were reasonably foreseeable from eliminating Article 18(b)'s solution to permanent water shortage? Id. at 914-15. The PCL court held that the EIR, which lacked simulation models and projections relating to land use planning and demand for water, did not adequately address this issue. Id. at 919. It directed the Sacramento Superior Court to retain jurisdiction over the action until a new EIR was prepared and certified.

Based on the Third District's PCL decision, on January 10, 2002, the Second Appellate District reversed the judgment in Friends and directed the trial court to issue a writ of mandate compelling Castaic to set aside certification of its EIR. Friends, (2002) 95 Cal.App.4th 1373. The reversal was based solely on the fact that Castaic's EIR had been tiered upon the now inadequate Monterey Agreement program EIR. The Second District rejected all of the other challenges to Castaic's EIR, finding them to be without merit. The appellate court noted that Castaic may be able to cure the defect by waiting for DWR to comply with the Third District's directive in PCL by preparing a new program EIR. Castaic could issue a subsequent EIR, a supplement to EIR, or addendum to EIR, tiering upon the new Monterey Agreement EIR.

The Friends appellate decision concluded as follows: "The judgment is reversed. The trial court shall issue a writ of mandate vacating the certification of the EIR, shall retain jurisdiction until Respondent certifies an EIR complying with CEQA consistent with the views expressed in this opinion, and shall consider such orders it deems appropriate under [Pub. Resources Code] section 21168.9."

On October 25, 2002, after remand from the court of appeal, the Friends trial court issued a Peremptory Writ of Mandate and Judgment on Remand, retaining jurisdiction until Castaic certifies an EIR that complies with CEQA and is consistent with the views expressed by the Second District. The trial court did not direct Castaic to set aside its approval of the Kern water transfer and denied the petitioner's request to enjoin Castaic from using any of the 41,000 acre feet of additional water allotted to it by the Kern water transfer. The trial court did state that the injunction request could be renewed upon a showing that the water was actually used for an improper purpose (irreversible new development).

5. Monterey Plus

On June 6, 2003, the Sacramento Superior Court approved a settlement between the parties in PCL. That settlement, known as "Monterey Plus," provides that the Monterey Agreement can proceed on an interim basis. In exchange, DWR agreed, among other things,[7] to prepare a new program EIR for implementation of the Monterey Agreement. This new EIR would include (1) information on water deliveries during the drought and recent historical period, (2) an analysis of a no project alternative, including the environmental impact of Article 18's water shortage provisions, (3) analysis of environmental impacts from changes in SWP operations and deliveries resulting from implementation of the Monterey Agreement, (4) analysis

[7]Some of the other provisions include biennial reports on project reliability, land use restrictions on the Kern Water Bank, new guidelines for permanent water transfers, new procedures for public involvement in contract changes, and funding for watershed restoration and new technical studies. AR 45048-49.

of environmental impacts of seven already completed water transfers from KWCA and member units totaling 70,000 acre-feet (Attachment E), which the parties recognized were "final," and of the Kern water transfer, which the parties acknowledged was being challenged in the pending Friends litigation in Los Angeles Superior Court, and (5) analysis of the environmental impacts from implementation of Monterey Plus. AR 48557-59. With respect to the Kern water transfer, the Monterey Plus parties agreed that "jurisdiction with respect to [Friends] should remain in that court and that nothing in this Settlement Agreement is intended to predispose the remedies or other actions that may occur in that pending litigation." The Monterey Plus did not require DWR to re-approve or disapprove any transfer.

6. The Friends II Decision

The Second District upheld the Friends trial court's decision not to grant injunctive relief for the Kern water transfer on December 1, 2003, in unpublished case no. B164027 ("Friends II"). PCL had filed an *amicus* brief supporting the petitioner in Friends II, pointing out that the Monterey Plus settlement now existed and arguing that the Friends decision required the trial court to rely on the status of PCL litigation, including the new Monterey Agreement program EIR DWR was to prepare, in deciding injunctive relief. The Friends II appellate court stated that PCL was wrong; it merely had suggested, not required, that the trial court could determine and rely on the status of the PCL case in deciding injunctive relief.

7. The 2004 EIR

After Friends, Castaic decided to prepare a revised EIR prior to DWR's preparation of a Monterey Amendment EIR. Castaic was driven by a concern that the Friends petitioner and others would use the decertification of its 1999 EIR to cloud its right to the transferred water, as well as Castaic's duty to its customers to complete the environmental documentation and finalize the Kern water transfer.

In June 2004, Castaic prepared and circulated a draft EIR that tiered only on Castaic's 1988 Capital Program EIR. Castaic concluded that it was the lead agency because it has the principal responsiblility for carrying out and implementing the project. Because the transfer is between neighboring SWP contractors, involving the withdrawal of water from a single branch of the Aqueduct, Castaic concluded that the transfer has no significant impacts on SWP operations or the water diverted from the Delta. *See* AR 13-14.

PCL served comments to the draft EIR on August 16, 2004. These comments criticized the use of Castaic as lead agency, arguing that Castaic's review was "premature" and "likely to operate at cross-purposes with DWR's statewide review." AR 1959. PCL contended that DWR, not Castaic, was required to be the lead agency under the PCL decision. Only DWR's expertise could analyze the changes in the amount of supplies available, the location and timing of deliveries, and changes in the SWP's conveyance and storage facilities for all of the proposed transfers, including the Kern water transfer. AR 1962. CWIN also timely expressed concern about Castaic's lack of authority to act as lead agency, and the potential for conflict with DWR's role. AR 578-580.

DWR, acting as a responsible agency under CEQA, commented on the draft EIR. It stated that the "document adequately and thoroughly discusses the proposed project and its

impacts. The [draft]EIR discusses the effects of the project on the environment and State Water Project (SW) and uses baseline conditions consistent with those being considered for inclusion in [DWR's EIR]. The draft also "adequately discusses the reliability of the SWP, pre- and post-Monterey Amendment conditions, future conditions, and SWP operations." DWR acknowledged that Castaic's EIR uses a model, DWRSIM, to assess the potential impact associated with the Kern transfer and that DWR's EIR will use a newer model, CALSIM II. DWR indicated that the use of a different computer model may cause slight changes in results, which may lead DWR to different conclusions than those made by Castaic in its EIR. Despite this fact, DWR concluded that the draft EIR adequately discusses the reliability of SWP, pre- and post- Monterey Amendments conditions, future conditions, and SWP operations. AR 564-65.

Castaic rejected Petitioners' concerns, and relied on DWR's comments to refute objections that its draft EIR will be inconsistent with the yet to be prepared DWR program EIR. AR 961-4. Castaic adopted findings, a mitigation monitoring program and statement of overriding considerations and certified a final EIR (the 2004 EIR).[8] The 2004 EIR describes Castaic's water program for the future needs of Santa Clarita Valley, the procedural history of the project (including the 1999 EIR), and the fact that the Kern water transfer has been implemented and ongoing since 1999. It uses two separate baselines for the project setting and evaluates environmental impacts of the Kern water transfer on the SWP, Castaic, and Wheeler Ridge. In discussing these impacts, the 2004 EIR considers three SWP scenarios: (a) with the Monterey Agreement, (b) without the Monterey Agreement, and (c) without the Monterey Agreement and with Article 18(b) permanent shortages. The EIR uses the DWRSIM model and concludes no significant direct environmental impacts will occur as a result of the project. There would, however, be indirect growth impacts as a result of water provided by the project.

8. The Petitioners Take Over from the Friends Petitioner

On January 24, 2005, CWIN and PCL filed separate petitions for writ of mandate in Ventura County concerning Castaic's compliance with CEQA in the 2004 EIR, and other issues.

On February 1, 2005, the Friends petitioner dismissed the action with prejudice. On February 7, 2005, the trial court in Friends held a hearing on Castaic's *ex parte* application to vacate the dismissal with prejudice and to discharge the writ of mandate. Castaic argued that, by dismissing, the petitioner was attempting to get the clerk, through ministerial act, to divest the court of its continuing jurisdiction over the 2004 EIR prepared in response to the court's peremptory writ of mandate. Instead, the Friends petitioner was passing the baton to CWIN and PCL for a challenge to the 2004 EIR. The trial court declined to set aside the dismissal, stating that whether the Ventura proceedings were a continuation of the Friends lawsuit was an issue of fact for the Ventura (now this) court.

On March 5, 2005, Castaic petitioned the Second Appellate District for a writ of mandate with respect to the trial court's refusal to vacate the dismissal, arguing that the trial court violated Pub. Resources Code section 21168.9 (stating that the trial court shall maintain jurisdiction over the agency's proceedings until the court has determined that the agency has complied with

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[8]On December 30, 2004, Castaic filed its return to the peremptory writ of mandate in Friends.

CEQA) because it had not yet determined that the 2004 EIR complied with CEQA Yet, under CEQA, a trial court that orders preparation of a new EIR must retain jurisdiction for a final determination of the EIR's validity.

On April 14, 2005, the Second Appellate District denied Castaic's petition for "failure to demonstrate that the 'retain jurisdiction' provision of Public Resources Code section 21168.9, subdivision (b), abrogates the entitlement to voluntary dismissal conferred by Code of Civil Procedure section 581, subdivision (b)(1)."[9]

D. CEQA

1. Standard of Review

A party may seek to set aside an agency decision for failure to comply with CEQA by petitioning for either a writ of administrative mandamus (CCP §1094.5) or of traditional mandamus. CCP §1085. A petition for administrative mandamus is appropriate when the party seeks review of a "determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of noncompliance with [CEQA]." Pub. Res. Code §21168. This is generally referred to as an "adjudicatory" or "quasi-judicial" decision. Western States Petroleum Assn. v. Superior Court, ("Western States") (1995) 9 Cal.4th 559, 566-67. A petition for traditional mandamus is appropriate in all other actions "to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with [CEQA]." Where an agency is exercising a quasi-legislative function, such as by adopting a rule or entering into a contract, it is properly viewed as a petition for traditional mandamus. Id. at 567; Pub. Res. Code §21168.5.

At issue here is a CEQA challenge to a quasi-legislative action recorded by Castaic in a December 23, 2004 Notice of Determination approving the project, certifying the 2004 EIR, and adopting findings, a mitigation monitoring program, and a statement of overriding considerations. This procedural setting, where no administrative hearing was held or required, is governed by traditional mandamus. In determining whether to grant a petition for traditional mandamus in a CEQA case, the court may consider only whether there was a prejudicial abuse of discretion. Public entities abuse their discretion under CEQA if the agency has not proceeded in a manner required by law or if its determination or decision is not supported by substantial evidence. Western States, 9 Cal.4th at 568; Pub. Res. Code §21168.5.[10]

This requires "scrutiny of the alleged defect" depending on whether the claim is predominately "improper procedure or dispute over the facts." Vineyard Area Citizens for

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[9]The Second District later dismissed Castaic's appeal from the Friends dismissal, finding that the voluntary dismissal was not appealable. *See* H.D. Arnaiz, Ltd. v. County of San Joaquin, (2002) 96 Cal.App.4th 1357, 1364-67.

[10]The standard of review for traditional mandamus in a non-CEQA case is governed by an "arbitrary and capricious" standard, not a "prejudicial abuse of discretion" standard. The CEQA standard is the more stringent inquiry. Western States, 9 Cal.4th at 574.

Responsible Growth v. City of Rancho Cordova, ("Vineyard") (2007) 40 Cal.4th 412, 435. Whether Castaic is the proper lead agency is an procedural issue of law for the court. PCL, 83 Cal.App.4th at 905-06. Similarly, as Petitioners argue (Pet. Supp. Resp. Br. at 5), whether Castaic's 2004 EIR failed to provide certain required information and, as a result, presents uncertainties about the finality of the Kern water transfer is failing "to proceed in a manner required by CEQA" and an issue of law. Vineyard, 40 Cal.4th at 435. These issues require "a critical consideration, in a factual context, of legal principles and their underlying values." Harustak v. Wilkins, (2000) 84 Cal.App.4th 208, 212.

On the other hand, whether Castaic abused its discretion in the 2004 EIR's findings must be answered with reference to the evidence in the administrative record. This standard requires deference to the agency's factual and environmental conclusions based on conflicting evidence, but not to issues of law. Laurel Heights Improvement Assn. v. Regents of University of California, ("Laurel Heights") (1988) 47 Cal.3d 376, 393, 409. Argument, speculation, and unsubstantiated opinion or narrative will not suffice.[11] Guidelines, 15384(a), (b). The findings must be supported by "substantial evidence," defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. CEQA Guidelines §15384(a). The question whether substantial evidence exists is a question of law. *See* California School Employees Association v. DMV, (1988) 203 Cal.App.3d 634, 644.

2. CEQA

The purpose of CEQA (Pub. Res. Code §21000 *et seq.*) is to maintain a quality environment for the people of California both now and in the future. Pub. Res. Code §21000(a). "[T]he overriding purpose of CEQA is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage." Save Our Peninsula Committee v. Montery County Board of Supervisors, (2001) 87 Cal.App.4th 99, 117. CEQA must be interpreted "so as to afford the fullest, broadest protection to the environment within reasonable scope of the statutory language." Friends of Mammoth v. Board of Supervisors, (1972) 8 Cal.3d 247, 259. Public agencies must regulate both public and private projects so that "major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian." Pub. Res. Code §21000(g).

The Legislature chose to accomplish its environmental goals through public environmental review processes designed to assist agencies in identifying and disclosing both environmental effects and feasible alternatives and mitigations. Pub. Res. Code §21002.

Under CEQA, a "project" is defined as any activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment (1) undertaken directly by any public agency, (2) supported through contracts, grants, subsidies, loans or other public assistance, or (3) involving the issuance of a lease, permit,

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[11] As an aid to carrying out the statute, the State Resources Agency has issued regulations called "Guidelines for the California Environmental Quality Act ("Guidelines"), contained in Code of Regulations, Title 14, Division 6, Chapter 3, beginning at section 15000.

license, certificate, or other entitlement for use by a public agency. Pub. Res. Code §21065. The word "may" in this context means a reasonable possibility. Citizen Action to Serve All Students v. Thornley, (1990) 222 Cal.App.3d 748, 753. "Environment" means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance. Guidelines, §21060.5.

The "project" is the whole of the action, not simply its constituent parts, which has the potential for resulting in either direct or reasonably foreseeable indirect physical change in the environment. Guidelines §15378. An indirect physical change must be considered if that change is a reasonably foreseeable impact which may be caused by the project. On the other hand, a change that is "speculative or unlikely to occur is not reasonably foreseeable." Guidelines §15064(d)(3). The term "project" may include several discretionary approvals by government agencies; it does not mean each separate government approval. Guidelines §15378(c).

The EIR is the "heart" of CEQA, providing agencies with in-depth review of projects with potentially significant environmental effects. Laurel Heights, 6 Cal.4th at 1123. An EIR describes the project and its environmental setting, identifies the potential environmental impacts of the project, and identifies and analyzes mitigation measures and alternatives that may reduce significant environmental impacts. Id. Using the EIR's objective analysis, agencies "shall mitigate or avoid the significant effects on the environment... whenever it is feasible to do so. Pub. Res. Code §21002.1. The EIR serves to "demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its actions." No Oil, Inc. v. City of Los Angeles, (1974) 13 Cal.3d 68, 86. It is not required to be perfect, merely that it be a good faith effort at full disclosure. Kings County Farm Bureau v. City of hanford, (1990) 221 Cal.App.3d 692, 711-12. A reviewing court passes only on its sufficiency as an informational document and not the correctness of its environmental conclusions. Laurel Heights, 47 Cal.3d at 392. An EIR will be upheld if it suffices as an informational document; mandate will issue only if it fails to include relevant information which precludes informed decision-making and informed public participation.

"Choosing the precise time for CEQA compliance involves a balancing of factors. EIRs... should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment." Guidelines, §15004(b). As a general rule, public agencies shall not undertake actions concerning a proposed project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures before completion of CEQA compliance. Guidelines, §15004(b)(2). "[I]n order to achieve the salutary objectives of CEQA the determination of the earliest feasible time to [prepare the CEQA document] is to be made initially by the agency itself, which decision must be respected in the absence of manifest abuse." Mount Sutro Defense Committee v. Regents of University of California, (1978) 77 Cal.App.3d 20, 36, 40.

E. Analysis

CWIN and PCL argue that DWR is required to be the lead agency for the Monterey Amendments project EIR, which will examine all water transfers on a program level. The Kern

water transfer is part of the Monterey Amendments project. Therefore, DWR is the correct lead agency to conduct the environmental review of the Kern water transfer. According to Petitioners, while Castaic may not serve as the lead agency for "first-level" environmental review of the water transfer, it may serve as lead agency for a project level EIR for the Kern water transfer.

1. Validity of the Transfer

At the outset, the court must make clear an issue greatly discussed at hearing. Petitioners contend, and Castaic and Wheeler Ridge strongly dispute, that DWR may "invalidate" the Kern water transfer when it performs the program EIR.

Under contract and validation law, the Kern water transfer contract, entered into in 1999, is valid, has been approved by DWR, and Castaic has paid Wheeler Ridge for it. Neither the parties nor DWR can terminate the Kern transfer contract. Nothing in CEQA permits a public agency to void a contract.

In Kenneth Mebane Rranches v. Superior Court, (1992) 10 Cal.App.4th 276, a flood control district sought to condemn land outside its territory in order to mitigate the environmental impact of a project within its boundaries. The appellate court held that CEQA only requires mitigation of environmental impacts where it is feasible to do so. Where mitigation is infeasible, an agency can always approve a project notwithstanding environmental impacts if it issues a statement of overriding interests. But it cannot take actions that are not legal, and hence infeasible. 10 Cal.App. at 291-92.

Thus, in evaluating the environmental effects of the Monterey Agreement, DWR may impose mitigations that are legal. But it cannot invalidate the Kern transfer. The imposition of illegal mitigations would be infeasible. *See also* Pub. Res. Code §21004 (in mitigating significant environmental impact, agency may only employ powers provided by law).[12]

This does not mean that DWR's Monterey Amendments EIR cannot affect the Kern water transfer. DWR's EIR will consider the environmental impacts of the Kern water transfer in conjunction with the Attachment E transfers which the parties in Monterey Plus agreed were completed and final. DWR conceivably could conclude that these transfers have significant environmental impacts. As a consequence, DWR might have to impose feasible mitigation measures, adopt alternatives, or make a finding of infeasibility and adopt a statement of overriding considerations.[13] If mitigations/alternatives are adopted, they could significantly impact Castaic and Wheeler Ridge. As DWR states, "the contract amendments that effectuated the transfers under the Monterey Amendment[s] do not preclude DWR in its choice of

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[12]The parties disagree on whether the Monterey Amendments are valid and final. That is, they disagree on whether the amendments can be challenged in a reverse validation action separate and apart from CEQA. Resolution of this issue is unnecessary to the court's decision.

[13]At hearing, Petitioners' counsel stated that the parties to Monterey Agreement entered into a joint statement of the possible impacts from the Amendments, citing AR 48628-29. The joint statement at those pages of the record does not discuss possible mitigations; it merely summarizes the terms of Monterey Plus.

alternatives in the Monterey Amendment[s] EIR or mitigation measures that may need to be imposed to reduce significant impacts to less than significant." DWR Br. at 20. DWR gives an example of reducing the amount of SWP water to protect water quality standards for fish in the Delta. Id. at 20. These mitigations could undermine the Kern water transfer.[14] But DWR will not be considering whether the Kern water transfer is valid; it simply does not have the authority to void that transfer. *See* Kenneth Mebane Ranches v. Superior Court, (1994) 10 Cal.App.4th 276, 292.

2. Lead Agency Law

The lead agency under CEQA is the agency that carries out a project or has primary authority for approving a project. Pub. Res. Code 121067; Guidelines §15051; *see* PCL, 83 Cal.App.4th at 904 (DWR, not Central (a State Water Contractor), had principal responsibility for carrying out the Monterey Agreement and should have been lead agency for program EIR). The role and responsibility of the lead agency is "fundamental to the CEQA process as a whole." Guidelines §15050. The identification of the proper lead agency plays a "crucial role" in the division of responsibilities among public agencies reviewing a project. PCL, 83 Cal.App.4th at 903. When determining the appropriate lead agency, the courts look to determine which agency has principal responsibility for the core project activity. Friends of Cuyamaca Valley v. Lake Cuyamaca, (1994) 28 Cal.App.4th 419, 427. The lead agency responsibility is placed upon the agency with power to approve or disapprove the project. Lexington Hills v. State of California, (1988) 200 Cal.App.3d 415, 433. Though one agency has substantial responsibility for a project, it cannot act as lead agency if another agency bears final responsibility. *See* Fullerton Joint Union High School District v. Board of Education, (1982) 32 Cal.3d 779, 795, n.15 (State Board of Education, not county, had final responsibility for school district plan). Where the project is local, such as land use decisions, the agency that has general governmental power over a project is almost always the lead agency. Where two or more agencies are involved in a project, the agency that will carry out the project shall be the lead agency. Guidelines §15051(a).

3. The Impact of the PCL Decision

Petitioners contend that the PCL decision left no doubt that DWR is the appropriate lead agency for a program-level environmental review of the water transfers in the Monterey Agreement, contrasting DWR's statewide expertise with CCWA's "provincial experience." The Monterey Amendments restructure water distribution throughout the state, and the "allocation of water to one part of the state has potential implications for distribution throughout the system." Only DWR has principal responsibility for implementation of the Monterey Amendments. Op. Br. at 11-12; *see* PCL, 83 Cal.App.4th at 904, 908. Since the Kern water transfer is part of the Monterey Amendments, DWR must perform any EIR concerning the Kern water transfer.

Petitioners' argument is a *non-sequitur*. Nothing in PCL requires DWR to perform the environmental review for the Kern water transfer. Certainly, the PCL decision requires that DWR prepare the program EIR for the Monterey Amendments, now Monterey Plus. The

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[14]The close cooperation between DWR and Castaic on the 2004 EIR reduces, but does not eliminate, the prospect that DWR will impose alternatives or mitigations.

appellate court's reason for committing this task to DWR is that CEQA requires the lead agency to be the agency with principal responsibility for the project, the project is the environmental review of the Monterey Agreement, and DWR, not CCWA, has principal responsibility for implementing the Monterey Agreement. The decision pointed out that DWR manages the SWP, and has the statewide expertise and perspective to conduct the environmental review of the Monterey Agreement, which statewide project. While CCWA may have had a substantial stake in seeing the Monterey Agreement implemented, it did not have principal responsibility for it. DWR did, and DWR is required to perform the EIR for the Monterey Agreement. 83 Cal.App.4th at 906.

However, the PCL decision does not commit DWR to conduct the EIR for the Kern water transfer, or for any site specific project conducted pursuant to the Monterey Amendments. The PCL decision plainly requires DWR to prepare the program EIR for the Monterey Amendments, and its permanent transfer of 130,000 acre feet of SWP water. But it does not even mention the Kern water transfer, which is a local water transfer of Wheeler Ridge water to a point 60 miles further south in Santa Clarita Valley. The local nature of the project makes Castaic the logical choice to act as lead agency of this transfer, and nothing in PCL requires Castaic to wait for DWR's program EIR. The Kern water transfer is simply a different project from the Monterey Amendments.

Petitioners' concession that at some point Castaic can and should act as the lead agency for the Kern water transfer EIR undermines their argument that PCL committed this task to DWR. The concession shows that Petitioners really are concerned about the timing of this project specific EIR, and not whether it was committed to DWR in the PCL decision. Petitioners contend that Castaic must wait for DWR's Monterey Amendments program EIR and tier off of it for the Kern water transfer EIR. This argument is, as Castaic describes it, that Castaic "jumped the gun" by preparing the 2004 EIR. But the argument implicitly concedes that PCL did not commit the transfer EIR to DWR.

4. The Agency with Principal Responsibility

Even if PCL did not commit environmental review of the Kern water transfer to DWR, Petitioners argue that the Kern water transfer is an integral part of the Monterey Amendments project. This is shown by Monterey Plus, which excludes the Kern water transfer from the list of transfers designated as "final" and recognizes DWR's responsibility to assess its environmental impacts as part of the programmatic review. The Kern water transfer contract itself expressly relies on the Monterey Amendments, using its provisions as authority to accomplish the Kern water transfer. Even Wheeler Ridge's amendment to its SWP contract identifies the outcome of PCL as a factor that could impact the Kern water transfer's effectiveness. All of these facts, Petitioners argue, mean that the transfer is part of the Monterey Amendments environmental review.

Petitioners further argue that the nature of a program EIR supports their position. This purpose "is to document a series of actions so related they can be characterized as one project." Friends, 95 Cal.App.4th at 1377. The Monterey Amendments, including its transfer provisions, qualify as a "series of actions so related that they can be characterized as one project." An integrated review of the entire program may provide occasion for a more exhaustive

consideration of effects and alternatives than would be practical in an EIR on an individual action, ensure consideration of cumulative actions that might be slighted on a case-by-case analysis, avoid duplicative reconsideration of basic policy considerations, and allow the lead agency to consider broad policy alternatives and program-wide mitigation measures at an early time when the agency has greater flexibility to deal with basis problems or cumulative impacts. Id. at 1377. These factors are all borne out by the 2004 EIR, which presents a series of issues (the amount of supplies available to several water agencies, the location and timing of SWP deliveries, and use of SWP conveyance and storage facilities) on which DWR has superior expertise and greater accountability than Castaic. DWR may not delegate to Castaic its responsibility to prepare the environmental review for the Kern water transfer.

Under lead agency law, Castaic may act as lead agency and prepare an EIR for the Kern water transfer. The Kern water transfer is a project separate in time from the Monterey Amendments, now Monterey Plus. The core of the project is a local transfer of water between Castaic and Wheeler Ridge. Castiac alone had the responsibility to determine the water needs of its service area and to obtain the necessary water for those needs. Castaic negotiated and entered into the transfer contract with Wheeler Ridge. Castaic performed the contract by obtaining private investors who paid $47 million to Wheeler Ridge's water, and by taking delivery from DWR. The transfer is valid and cannot be challenged. Thus, Castaic has the general governmental power over the transfer, and is presumptively the lead agency for its own project. Bakman v. Dept. of Transportation, (1979) 99 Cal.App.3d 665, 678-79. Indeed, the environmental review of water transfers is generally performed by a local, not state, agency. County of Amador v. El Dorado County Water Agency, (1999) 76 Cal.App.4th 931 (local agency's analysis of water transfer project); Save Our Carmel River v. Monterey Peninsula Water Management District, (2006) 141 Cal.App.4th 677, 701 (city was lead agency as recipient of water transfer); Friends of the Eel River v. Sonoma County Water Agency, (2003) 108 Cal.Appp.4th 859 (local agency's EIR for plan to increase diversions of water from river); Sierra Club v. West Side Irrigation District, (2005) 128 Cal.App.4th 690 (local agency's environmental review of two projects to transfer water rights).[15]

It is true that DWR has an overall interest in promoting effective water management on a statewide basis. Pursuant to this interest, DWR had the right to approve the Kern water transfer, and it did so. This does not equate to principal responsibility, however. DWR is required by statute to "facilitate" the voluntary transfer of water between local agencies. Water Code §109.

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[15]The Friends court implicitly decided that Castaic may act as lead agency for the Kern water transfer. The Friends court acknowledged that it was required to address all deficiencies in the EIR unless it made a finding of improper lead agency. Pub. Res. Code §21005(c). If Castaic was the improper lead agency for the 1999 EIR, the appellate court was obligated to say so. The Friends court concluded that the 1999 EIR's only deficiency was that it tiered from the defective Monterey Agreement program EIR. Thus, the decision necessarily implied that Castaic was the proper lead agency for the 1999 EIR.

Of course, this case concerns the 2004 EIR, not the 1999 EIR, and the court previously held that Petitioners were not bound by the Friends court's implied determination. But the project is the same, and the implicit appellate determination is entitled to weight.

Per the SWP contracts, DWR's approval of the Kern water transfer could not be unreasonably withheld. Thus, DWR's involvement in the transfer is to facilitate the transfer by approving it and providing the SWP schedule delivery. Moreover, the SWP is intended as a supplement, not the exclusive supply, of water. Water supply decisions must be made by local Water Contractors, who obtain water both from SWP and other sources.[16]

Given that the decision to enter into the Kern water transfer belonged solely to Castaic and Wheeler-Ridge, and that DWR's approval is necessary merely to facilitate the transfer, Casataic had principal responsibility for the transfer.[17]

5. Project Definition

Petitioners contend for the first time in their Supplemental Vineyard Reply and at oral argument that the correct project definition is not the Kern water transfer, but is really the Monterey Amendments, citing the court's earlier ruling on Castaic's motion for legal determination that the key issue is whether the Amendments are a "series of actions (including the Kern water transfer) so related that they should be characterized as a single project." Pet. Supp. Reply at 5.

The correct definition of the project -- whether it is the Monterey Amendments or the Kern water transfer -- is a different issue than whether Castaic can act as lead agency for the project. Although the court did allude to project definition in ruling on the earlier motion, Petitioners never raised this issue in their opening brief or reply. Instead, they raise it for the first time in a reply brief on the application of Vineyard to this case. On appeal, an issue raised without analysis or authority lacks foundation and need not be addressed. City of Arcadia v. State Water Resources Control Board, ("Arcadia") (2006) 135 Cal.App.4th 1392, 1429, 1431. Similarly, an issue raised for the first time in supplemental reply deprives the opposing party of an opportunity to analyzing the issue and defend their position. Petitioners have waived the correct project definition as an issue by not raising it earlier.

Assuming *arguendo* that the issue has not been waived, a project under CEQA includes an activity directly undertaken by a public agency which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. Pub. Res. Code §21065(a). The "project" must be broadly defined, so as to ensure against avoiding environmental review by "chopping a larger project into little ones" or "piecemealing." Bozung v. Local Agency Formation Commission, (1975) 13 Cal.3d 263, 283-84. The project includes "the whole of an action" that has a potential for resulting in a direct or indirect physical change in the environment. Guidelines §15378. An accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a

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[16]As Wheeler Ridge points out, DWR was not the lead agency for the 1991 Devils Den transfer or any of the Attachment E transfers listed in the Monterey Agreement.

[17]Given that DWR's approval may not be unreasonably withheld, cases holding that a state agency should prepare the EIR where it has final authority to approve a project are simply inapposite. *See* Fullerton v. State Board of Education, (1982) 32 Cal.3d 779, 795, n.15 (State Board of Education had final authority to submit plan to voters for new unified school district).

proposed activity. Mequeen v. Board of Directors, (1988) 202 cal.App.3d 1136, 1143. The agency must avoid "piecemealing" or splitting a project into two or more segments. Otherwise, the cumulative environmental impacts of each piece may not be fairly analyzed. Burbank-Glendale-Pasadena Airport Authority v Hensler, (1991) 233 Cal.App.3d 577, 592. On the other hand, CEQA was not intended to and cannot reasonably be construed to make a project of every activity of a public agency, regardless of the nature and objective of such activity...." Simi Valley Recreation & Park District v. Local Agency Formation Commission, (1975) 51 Cal.App.3d 648, 663.

In San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus, (1994) 27 Cal.App.4th 713, 731-32, the court held that the project description in an EIR was improperly restricted to a 633 single family residential units, a 40,500 square foot commercial center, and a 14 acre park, failing to include sewer expansion which the EIR acknowledged would be required as part of the development. Although a separate EIR was prepared for the sewer expansion, neither it nor the development project EIR referred to the growth-inducing effects of the two projects considered together. This failure to address cumulative impacts was a separate failure of the development EIR. 27 Cal.App.4h at 733. "[t]he danger of filing separate environmental documents for the same project is that considration of the cumulative impact on the environment of the two halves of the project may not occur. This danger was here realized." Id. at 734 (citation omitted). Because the EIR did not "adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project" informed decision-making was precluded, the EIR was inadequate. Id.

The lesson from San Joaquin and other project definition cases is that the project should be defined broadly to ensure a complete analysis of impacts resulting from future expansion or continuation of other phases of the project.

In this case, DWR is the lead agency for the Monterey Amendments program EIR. DWR's description of its project is to improve the management of SWP supplies and operations through the Monterey Amendments. Thus, the Monterey Amendments EIR is broad in scope. The EIR will look at changing the allocation of all SWP water supplies (including deletion of agriculture first shortage provisions), retiring 45,000 acre feet of agricultural water, and establishing more efficient use of SWP facilities. As part of the analysis, it will analyze the potential impacts from permanently transferring 130,000 acre feet of water from agricultural to urban contractors per the Monterey Agreement. This analysis will look at the individual transfers, including the Kern water transfer, as they fit the entire Monterey Amendments. But DWR does not intend to consider each transfer individually; it intends to evaluate the impact of all the Attachment E transfers and the Kern water transfer as a whole. DWR Br. at 17.

Castaic's 2004 EIR project description concerns the impacts of the Kern water transfer alone. Castaic's EIR does look at cumulative impacts of the project with other projects, including the Monterey Amendments, but does not purport to assess the environmental impacts of the Monterey Amendments independent of the Kern water transfer. AR 141-42.

Castaic relies on the independent utility test to argue that the Kern water transfer is a separate project the environmental impact of which may be separately analyzed from the Monterey Amendments. The "independent utility" test has been developed in NEPA cases to determine whether multiple actions are connected so as to require an agency to consider them in

a single environmental review. Wetlands Action Network v. United Sates Army Corps. Engineers, (9th Cir. 2000) 222 F.3d 1105, 1118.[18] Pursuant to the independent utility test, where each of two projects would have taken place with or without the other, each has "independent utility" and the two are not considered so connected that an agency must consider them in a single environmental review. Native Ecosystems Council v. Dombeck, (9th Cir. 2002) 304 F.3d 886, 894. *See also* DelMar Terrace Conservancy, Inc. v. City Council of the City of San Diego, (1992) 10 Cal.App.4th 712 (freeway segment was separate project serving a viable purpose even if long-term, multi-segment plan to expand freeway never occurred, and had independent utility under CEQA).

Castaic argues that it has contemplated the Kern water transfer since 1988, when it included a transfer with Kern in its 1988 Capital Program for the Santa Clarita Valley's future water needs. For economic reasons, Wheeler Ridge, too, sought to transfer its SWP water rights since approximately 1985. Castaic concludes that the Kern water transfer would have occurred with or without the Monterey Amendments. Articles 40 and 41 of the SWP contract permitted transfers between Water Contractors, subject to DWR approval. Article 53, added to the SWP contracts by the Monterey Amendments and concerning the transfer of 130,000 acre-feet, did not "enlarge, restrict, or otherwise impact" Castaic's right to acquire water from Wheeler Ridge under Articles 40 and 41. Instead, it was merely a blanket approval of certain contemplated transfers. Castaic Op. Br. at 21. The Kern water transfer was completed, paid for, and operating since 1999. Nothing about it is tied to the outcome of the Monterey Amendments. Thus, while the transfer is part of a larger scheme (the Monterey Amendments), it is a long-planned site specific project with independent utility from the Monterey Amendments.

The court cannot conclude that the Kern water transfer would have taken place without the Monterey Amendments. True, Castaic has wanted Wheeler Ridge's SWP allocation of water since the late 1980's, and Wheeler Ridge was willing to provide it. Yet, it did not happen until after the Monterey Amendments. The contract between Castaic and Wheeler Ridge states that the transfer was taking place "in accordance with" Article 53 of the Monterey Amendments, and those Amendments change the way SWP water is allocated in California. It does not say that the transfer is being made under Article 41. Petitioners contend, and the court agrees, that only through conjecture can one conclude that Castaic and Wheeler Ridge would have entered into the transfer without the Monterey Amendments, and with Article 18's agriculture first provisions in place.[19]

Though the court cannot conclude that the Kern water transfer would have occurred without the Monterey Amendments, it can conclude that the transfer will remain in effect even if the Monterey Amendments are not approved or otherwise are mitigated under CEQA. The court

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[18]Since CEQA was modeled on the federal NEPA statute, federal decisions on NEPA are persuasive authority on CEQA issues. No Oil, Inc. v. Los Angeles, (1974) 13 Cal.3d 68, 86.

[19]When Petitioners commented on the draft EIR that any pre-Monterey Amendments transfer would be subject to Article 18's agriculture first provisions, Castaic did not say that the Kern transfer would have occurred without the Monterey Amendments. It merely responded that the transfer "could occur" either pre- or post- Monterey Amendments. AR 993.

already has indicated that the Kern water transfer is final. The parties to the transfer stated at hearing that they have no intention of rescinding it even if the Monterey Amendments are mitigated and Article 18's agriculture first provisions are in effect. This position is supported by the fact that the 2004 EIR evaluates the water supply impacts of just such a pre-Monterey Amendment Article 18 scenario. AR 186. As such, it is compelling evidence that the transfer will stand.[20]

Plainly, then, the Kern water transfer is final and will remain in place whatever happens to the Monterey Amendments. As such, the transfer has "independent utility" for purposes of environmental review. It is not so connected to the larger Monterey Amendments that the two must must be considered in a single environmental review. *See* Native Ecosystems Council v. Dombeck, 304 F.3d at 894.

6. EIR Timing

Petitioners' real argument seems to be that, whenever a program EIR is anticipated, the agency preparing an EIR for a specific project must wait for the program EIR.

This is not the law. Nothing in CEQA requires Castaic to wait for DWR's program EIR. Indeed, as a general proposition, the environmental review process should be undertaken early enough in the planning process to impact planning decisions, with the timing committed to the agency's discretion. City of Vernon v. Board of Harbor, (1988) 63 Cal.App.4th 677, 690-91. The Kern water transfer occurred almost eight years ago. It has been paid for and operating for a number of years. Castaic tried to conduct a timely environmental review, but that EIR was set aside in Friends. It is not an abuse of discretion for Castaic to want to complete the environmental review and obtain finality for the transfer without waiting for DWR's program EIR of the Monterey Amendments, now Monterey Plus.

Nor does this decision frustrate the law concerning program EIRs and tiering. The purpose of a program EIR is to document a series of actions so related that they can be characterized as one project. Friends, 95 Cal.App.4th at 1377. If the program EIR is sufficiently comprehensive, the lead agency may dispense with further environmental review for later activities within the program that are adequately covered in the program EIR. Guidelines §15618(c). Thus, the program EIR may be used to focus or simplify later environmental review, or as the basis of a tiered EIR. "Tiering" means the coverage of general matters and environmental effects in an EIR prepared for a policy, plan, program or ordinance, followed by narrower or site-specific EIRs which incorporate by reference the discussion in the prior report. *See* Pub. Resources Code §§ 21068.5, 21093 and Guideline §§ 15152, 15385. Tiering is favored "whenever feasible, as determined by the lead agency." Pub. Resources Code §21093(b). It is required where a prior EIR has been prepared and certified for a program, plan, or ordinance. Pub. Resources Code §21094(a). However, tiering is only required "where a prior environmental report has been prepared and certified for a program." Friends, 95 Cal.App.4th at 1383. It is not required, and in fact is prohibited, where the program EIR has yet to be prepared. Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova, ("Vineyard") (2007) 40 Cal.4th 412

[20]Petitioners think so too, for their principal argument is premised on the 2004 EIR's assumption that the transfer is final for all purposes.

EIR cannot tier off of *future* environmental document).

7. Vineyard

In Vineyard, the Supreme Court addressed a county prepared EIR for a large land use development project known as "Sunrise Douglas." The principal issue was the availability of long-term water supply for the project, and the environmental impacts and mitigation for such supply. The Supreme Court analyzed the various water supply cases and distilled several principles. First, the EIR for a land use project must present sufficient facts to evaluate the pros and cons of supplying the amount of water the project will need, and not simply ignore or assume a water supply solution will be found for a development project. Second, an adequate EIR for a large project must show water supply for the entire project. It is not enough to show available water for early stages. While the agency may tier and defer analysis of certain details of later phases of long-term or complex projects, deferring analysis through tiering is appropriate when the impacts or mitigation measures are not determined by the first-tier approval and are specific to later phases. Third, the future water supplies identified and analyzed must bear a likelihood of actually being available. Finally, where there is some uncertainty about availability, CEQA requires some discussion of possible replacement sources or alternatives, and their environmental consequences.

Of particular use herein, the Supreme Court discussed the EIR's reliance on an anticipated local Water Board's master plan update, which would discuss the availability of long-term water supplies to the area and their environmental impact. The Court held that the county's EIR cannot tier from a *future* environmental document. If the environmental analysis from the Water Board's anticipated master plan update was important to understanding the long-term water supply for Sunrise Douglas, it should have been performed in the Sunrise Douglas EIR even though that might result in subsequent duplication by the Water Board's master plan update. Or, the county could have deferred analysis and approval of Sunrise Douglas until the Water Board's master plan update, then tiered the Sunrise Douglas EIR from the programmatic analysis performed by the Water Board.

The Vineyard decision shows that the timing of Castaic's project specific EIR in relation to DWR's program EIR is up to Castaic. It may either wait for DWR's program EIR and tier off of it, or prepare its own EIR for the Kern water transfer first. If it chooses the latter, Castaic may not tier off an environmental document that does not yet exist. Instead, Castaic must analyze all necessary environmental impacts and mitigations. If analysis of some portion of the Monterey Amendments is important to understanding the environmental impacts of the Kern water transfer, then analysis of that issue must be included in Castaic's EIR. But if Castaic's EIR does so, it is irrelevant that the document duplicates some of what DWR would do, or even that it may be inconsistent with DWR's analysis.[21] As DWR contends, CEQA's goal is to ensure sufficient information; it contains no prohibition against too much information. DWR Br. at 21. The timing of Castaic's EIR for the Kern water transfer is up to Castaic and Castaic alone.

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[21]As previously stated, the prospect of inconsistencies between Castaic's EIR and DWR's program EIR is diminished by Castaic's use of DWR modeling, DWR's comments and input into the 2004 EIR, and the general cooperation and coordination between the two agencies.

F. Contents of the 2004 EIR

Apart from the proper lead agency, Petitioners argue that the 2004 EIR is inadequate. Initially, the court believed that Castaic could have real problems on this issue. It is one thing for Castaic to act as lead agency on a water transfer before the program EIR is prepared; Vineyard and other case law say that Castaic may do so. But the EIR must be adequate and complete. Vineyard teaches that if analysis of some portion of the Monterey Amendments is important to understanding the environmental impacts of the Kern water transfer, then that analysis must be included in Castaic's EIR. PCL held that the "no project" alternative was particularly important for the Monterey Amendments, and the public was entitled to know what would happen if the Amendments were not approved and Article 18 was implemented in the event of water shortage. Commentators particularly wanted to know whether imposition of Article 18 might eliminate the "paper water" entitlements in the water contracts, reduce land planning decisions based on that paper water, and ultimately reduce growth and construction of additional SWP facilities. PCL, 83 Cal.App.4th at 892-3.

The court wondered whether Castaic would have the expertise to perform any analysis of the Monterey Amendments or the "no project" alternative that would be required in the 2004 EIR. However, the parties' briefs, and oral argument at hearing, have demonstrated that, with one exception, the 2004 EIR's contents are sufficiently presented. Indeed, Petitioners barely criticize the 2004 EIR's adequacy, except as it impacts the lead agency issue.

1. "Deception"

Petitioners' principal argument about content is that the 2004 EIR is deceptive in failing to make clear that the Kern water transfer is not "final." They contend that the 2004 EIR's project definition treats the Kern water transfer as an immutable *fait accompli* which fails to disclose that the "final status" of the transfer depends on the DWR's forthcoming review. According to Petitioners, the EIR improperly relies on the interim availability of the water to predict that DWR will "leave it in place," a point which the court in California Oak Foundation v. City of Santa Clarita, ("California Oak") (2005) 133 Cal.App.4th 1219, 1238, n.16 had no trouble dispatching, and also improperly states that it would be unnecessary and speculative to consider what the DWR might do to change the transfer (*See* AR 994). Pet. Op. Br. at 19-20. This false assumption that the transfer is immutable may result in land use decision-makers approving projects based on water availability "worth little more than a wish and a prayer." Id. at 20-21.

The court has determined that the transfer is final as a matter of law. Therefore, the EIR is not wrong in saying so. What Petitioners really contend is that the Kern water transfer, though final, can be affected by the DWR's program EIR through mitigations and imposition of alternatives. Yet, the EIR proceeds as if the transfer cannot be altered. As counsel described the issue at hearing, the 2004 EIR "talks about risk, but never directly informed the public about the fact that the transfer may be unwound through the Monterey Amendment EIR process." Thus, the EIR refers to the transfer as of an "*existing* 41,000 " acre feet of SWP Table A water (AR 15, 35) and states that "no permits or *other approvals* would be required other than" certification of the

EIR. AR 16.[22]

The EIR is the method for disclosure of environmental issues. Rural landowners Assn. V City Council, 43 Cal.App.3d 1013, 1020. CEQA's purpose is to compel agencies to make decisions with environmental consequences in mind, but CEQA does not and cannot guarantee that these decisions will always favor environmental concerns. Laurel Heights, 47 Cal.3d at 393. The EIR should provide sufficient analysis to allow decision-makers to make intelligent judgments about environmental consequences. Guidelines §15151. The evaluation of environmental effects need not be exhaustive, but the EIR's sufficiency is reviewed in the light of what is reasonably foreseeable. Id. Perfection is not required, but adequacy, completeness, and a good faith effort at full disclosure is. Id.

In California Oak, the court addressed the proposed development of a 584 acre industrial park project in the Santa Clarita. The City's EIR relied on the Kern water transfer for water supply, and the appellate court held that it did not adequately address the uncertainty in that water delivery. 133 Cal.App.4th at 1236. The City's comments "did little more than dismiss project opponents' concerns about water supply" and the EIR failed to discuss the adequacy and availability of water supply absent the Kern water transfer. Appendix K to the EIR did acknowledge uncertainty in the Kern water transfer, but this was insufficient in part because inforamtion "scattered here and there in EIR appendices" or a report "buried in an appendix" is not a substitute for good faith reasoned analysis. Id. at 1239 (citation omitted). Moreover, Appendix K contained no facts and analysis about the likelihood of deficit or alternative sources of supply, and was misleading about the fact that Castaic had an SWP "entitlement" without explaining that the entitlement consisted in part of "paper water." Id. at 1239-40. Hence the EIR failed as an informational document on water supply issues.

Castaic contends, and the other Respondents agree, that the 2004 EIR fully addresses the uncertainty of what DWR will do. At hearing, they contended that Petitioners really are arguing that the 2004 EIR is misleading because it does not anticipate Petitioners' argument.[23]

The EIR explains that planning for water supply to meet demands requires consideration of reliability of SWP supplies, because historical and statistical analysis show that the full Table A amount will not be available in some years. AR 41. The EIR explains that Castaic's Table A amount is the maximum SWP amount, and the amount of SWP water actually available to it varies from year to year. Id. The EIR acknowledges that DWR's allocations are based on that year's hydrological conditions, the amount of water stored in the SWP system, and contractor requests for water. AR 16. The EIR discusses the Monterey Agreement (AR 46-47), PCL and Monterey Plus. AR 17-18, 47. The EIR cautions land use planners who might rely on the EIR to predict future water supplies, that while Castaic will implement all feasible measures to obtain water "past water deliveries are not a guarantee of future delivery rates." AR 13.

The EIR considers the environmental impact of the project based on water allocation

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[22]At trial, Petitioners' counsel made plain that this issue of deception is distinct from the reliability of water delivery by DWR.

[23]Respondents' contention sounds like an argument that Petitioners failed to exhaust their administrative remedies. However, no failure to exhaust claim was made in their briefs.

scenarios of pre-Monterey Amendments without Article 18 cutbacks, pre-Monterey Amendments with Article 18 cutbacks, and post-Monterey Amendments. AR 56. The EIR argues that the project could have been authorized under Article 41, but instead was implemented under Article 53 of the Monterey Agreement. It adds that DWR is preparing a new EIR for the Monterey Amendment.

Since the Monterey Amendments change the way in which SWP water is allocated among contractors, the 2004 EIR provides three separate analyses of the project's impacts to water supply. AR 186-89. The EIR goes to great lengths to discuss the uncertainties in the Article 18 allocations. AR 187-89. For each scenario, the EIR estimates reliability based on wet, dry, and extended dry year conditions. AR 183-91. The EIR addresses direct impacts to water supply and water quality under the three water allocation scenarios. AR 202-05. It discusses indirect impacts from the growth-inducing effect of the project, and mitigations of these impacts through implementation of existing agency policies. AR 207-224. It discusses the cumulative impact of the project and other projects inside and outside the project area. AR 278-89. Finally, it addresses alternatives to the project, including a no project alternative. AR 293-300.

The EIR clearly demonstrates the variability of SWP deliveries, and covers what could happen as a result of the Monterey Amendments EIR. But Petitioners are correct that the EIR has a hole in it. The EIR does not directly explain that the project may be impacted by the outcome of the Monterey Amendments EIR. Instead, the 2004 EIR assumes there are three possible water delivery scenarios without any discussion of why or how they would occur: "Since the Monterey Amendments change the way in which SWP water is allocated among contractors, the 2004 EIR provides three separate analyses of the project's impacts to water supply." The reader is left to interpret how these allocations could come about, and must conclude on his or her own that they are three possible outcomes of challenges to the Monterey Amendments. Nor does the EIR explain how such challenges could cause these allocations to occur.

An EIR is an informational document which is supposed to provide the reader with the "analytic route the...agency traveled from evidence to action." Citizens of Goleta Valley v. Board of Supervisors, ("Goleta") (1990) 52 Cal.3d 553, 568. This means that the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions. Castaic is not required to predict the outcome of litigation, and may not be able to discuss the likelihood of each of the three allocations. However, it should have at least explained why the three scenarios are relevant and how they would occur.[24] The failure to do so leaves the reader wondering why they are pertinent. Consequently, the 2004 EIR fails to provide the analytic route by which the three alternatives are relevant.

Non-compliance with the disclosure requirements of CEQA may constitute a prejudicial abuse of discretion regardless of whether the agency would have taken the same action had it complied with CEQA. Pub. Res. Code §21005(a). Still, CEQA is subject to the established principle that there is no presumption of prejudicial error. Pub. Res. Code §21005(b). Only if the manner in which the agency failed to follow the law is prejudicial must the decision be set aside. Sierra Club v. State Board of Forestry, (1994) 7 Cal.4th 1215, 1236.

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[24]For example, the court has no idea how a pre-Monterey Amendments without Article 18 cutbacks would occur.

The issue is whether Castaic's failure to supply the analytical route for its consideration of the three allocations is prejudicial. Prejudice depends on whether the failure to include this information makes "any meaningful assessment" of the project's environmental effects impossible, in which case prejudice is presumed. Sierra Club v. State Board of Forestry, (1994) 7 Cal.4th 1215, 1236 (agency approved timber harvesting plans without requiring necessary environmental information in them).[25] Even under this standard, not every CEQA failure is prejudicial. An EIR will be upheld if the error *de minimus* or clerical in nature (Save San Francisco Bay Association v. San Francisco Bay Conservation and Development Commission (1992) 10 Cal.App.4th 908, 935), the EIR analysis is comprehensive, if not perfect, despite the error (Schaeffer Land Trust v. San Jose City Council, (1989) 215 Cal.App.3d 612, 627-28), and information which should have been included to make the EIR accurate nonetheless has no material effect on informed decision-making or informed public participation (Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners, (1993) 18 Cal.App.4th 729, 747-50).

The Vineyard court reiterated that the reviewing court must focus on the nature of the defect, depending on whether the claim is predominantly one of improper procedure or a dispute over facts. Where the agency has employed the correct procedures, greater deference is given to the agency's factual conclusions, which are reviewed for substantial evidence. 40 Cal.4th at 435.

The 2004 EIR's non-compliance concerns its analytic route – why and how the three allocations are pertinent. This is not a fact issue to be supported by substantial evidence. Instead, it is a failure affecting the public's ability to make a "meaningful assessment" of the project's environmental effects. As such, it is prejudicial. *See also* Rural Land Owners Assn. v. Lodi City Council, (1983) 143 Cal.App.3d 1013, 1023 (whenever failure to comply with CEQA results in a subversion of its purposes by omitting information from the environmental review process, the error is prejudicial).[26]

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[25]One appellate court, Resource Defense Fund v. Local Agency Formation Commission, (1987) 191 Cal.App.3d 886, 897-98 has stated that "[f]ailure to comply with CEQA is necessarily prejudicial." This does not appear to be the consensus approach. *See* Dusek v. Anaheim Redevelopment Agency, (1985) 173 Cal.App.3d 1029, 1040-42 ("a minor CEQA sin or two" constituting technical defects where the public had not been misled or defrauded is not enough for prejudice).

[26]Petitioners also argue that the 2004 EIR finesses the non-final nature of the project by jumping the gun and analyzing pre-Monterey Amendments. According to Petitioners, Castaic performed a "mini-programmatic review" at AR 155-06 and App. D (AR 468-550). The charts at AR 184 and 506 show this. According to Petitioners, this is not just factual overlap; this is usurpation of DWR's responsibilities.

DWR correctly points out that Petitioners are complaining about too much information, something that CEQA does not proscribe. Petitioners have no complaint about the content of the mini-program review. To the extent that Castaic performed a task that DWR is obligated to perform, DWR may either use Castaic's analysis or perform a new one. The cooperation of DWR and Castaiac suggests that the overlapping environmental analysis will be consistent. Even if inconsistent, DWR's analysis will control for the Monterey Amendments. There is no

2. Modeling

Petitioners contend that Castaic used an obsolete DWR model, DWRSIM, for making predictions about the amount of SWP water that could be available as a result of the Kern water transfer. DWR has used CALSIM II for modeling SWP deliveries since 2000. While the EIR uses CALSIM II to look at the environmental setting, it only uses DWRSIM to look at environmental impacts. According to Petitioners, Castaic's rationale for doing so -- that DWRSIM should be used for the 1998 environmental setting -- makes no sense. Modeling is for future results, not historical analysis.

Petitioners argue that Castaic's use of an old model prejudicially overstates the reliability of SWP water delivery. App.D, Table 2-2 compares the projected 2020 deliveries based on the two different models. AR 493. The graph shows a discrepancy between the two models, particularly in the 50-70% supply range, and most glaringly in the range of drought conditions. Although the EIR does not quantify these differences, Castaic's responses to public comments presents a table that does. The table shows that the two models can differ by as much as 5000 acre-feet. Pet. Op. Br. at 23. According to Petitioners, this is not the "slight discrepancy" DWR states it is.

When a challenge is brought to studies on which an EIR is based, "the issue is not whether the studies are irrefutable or whether they could have been better. The relevant issue is only whether the studies are sufficient credible to be considered as part of the total evidence that supports the" agency's decision. Laurel Heights, 47 Cal.3d at 409 (lead agency entitled to choose and rely on expert opinion even though others may disagree). Expert testimony constitutes substantial evidence and an agency is entitled to rely on it. Uhler v. City of Encinitas, (1991) 227 Cal.App.3d 795, 805. Even where experts disagree, the agency is entitled to choose one expert's opinion over another. Laurel Heights, 47 Cal.3d at 409. The party challenging the EIR bears the burden of demonstrating that the studies on which the EIR is based "are clearly inadequate or unsupported." State Water Resources Control Board Cases, (2006) 136 Cal.App.4th 674, 795.

CEQA requires Castaic to reasonably inform the reader about the amount of water available. The EIR states that all environmental impacts from the project are driven by the amount of water delivered and the timing of delivery. AR 55. Castaic analyzed the amount of SWP water available for delivery through hydrologic modeling with computer simulations that predict the amount of water available under various hydrologic conditions. To do so, the EIR, like all EIR's had to have an environmental setting for the project. This environmental setting describes the conditions of the project as they exist at the time the Notice of Preparation is published or, if there is none, at the time the environmental analysis is commenced. This setting will normally constitute the baseline physical conditions by which an agency determines whether an impact is significant. Guidelines §15125(a).

The 2004 EIR states that its baseline 1998 environmental setting used DWRSIM, which is a model simulating the operations of the SWP, "because this is the modeling tool that was available during 1998." AR 55. DWR had used DWRSIM in 2000 to conduct a reliability study for another project. The 2004 EIR does use CALSIM II for the current environmental setting of

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usurpation of responsibility.

the project. CALSIM II was available because DWR performed a SWP Delivery Reliability Report in 2003 using CALSIM II as its model. AR 56. Although the modeling tools are different, the criteria used to input into the computer simulation has not changed significantly. Id.

The question raised by Petitioners is why use an older computer simulation model (DWRSIM) for the 1998 baseline when a newer model (CALSIM II) was available? Appendix D of the 2004 EIR, entitled "Technical Data for Hydrologic Analysis," explains that Castaic had to do so because it did not perform any model analysis of its own. Instead, Castaic relied upon DWR's expertise, and its existing model studies. *See* AR 491. DWR used DWRSIM in its 2000 study and CALSIM II in its 2003 study; Castaic relied upon those same studies and same models.

Castaic's reliance on DWR's existing studies and its expertise is an explanation, but the issue becomes whether it is an adequate one.

The answer is in Appendix D, which explains that DWRSIM has a database of monthly runoff based on historic hydrologic data for a 73 year period from 1922-74. DWRSIM takes this data and, depending on the input variables of operating constraints and water contractor demand, estimates the amount of water SWP can deliver each month over that 75 year period. Assuming that hydrologic conditions repeat, the operator can predict the amount of water available under that particular hydrologic condition and with a particular demand and operating condition. AR 491.

Appendix D then shows that DWRSIM and CALSIM II predict similar outcomes, and that the differences in their predictions can be explained. In Figures 2-1 and 2-2 of Appendix D, Castaic compares the two models' prediction of SWP water deliveries at existing demand and at predicted 2020 demand levels. AR 493. The "existing demand" for the DWRSIM model is 1998 demand. The "existing demand" for the CALSIM II model is 2001 estimated demand. The 2001 demand is higher than the 2000 demand. Consistent with reality, the model will only show delivery up to the amount of demand; SWP will not deliver more water than is asked for even if it is available. This difference in demand explains why CALSIM II shows more delivery in wet years than DWRSIM; the lower demand in 1998 limits the amount of delivery.

The difference in demand also explains in part why CALSIM II predicts a higher delivery in extremely dry conditions; 1998's lower demand means more water is left in storage from the preceding year and is available for delivery in a dry year. Appendix D says that the proof is in the pudding: comparison of DWRSIM and CALSIM II in Figure 2-2, for the year 2020 with the same level of demand for each model, shows very close prediction of SWP delivery for both models. AR 492-93.

Castaic concludes that the two models predict "generally comparable" results and their differences are minimal. AR 491, 1003. Castaic argues that, if anything, the slightly higher supplies predicted by the DWRSIM model provide a worst case scenario for purposes of growth inducing impacts; the more water the more developers will grow the Santa Clarita Valley. AR 1003-04, 1009.

Contrary to Petitioners' argument, the use of DWRSIM and not CALSIM II in the 1998 baseline study does not affect the conclusion that the study constitutes substantial evidence. Petitioners do not present expert opinion that the use of DWRSIM results in any error. They merely rely on the differences in Figures 2-1 and 2-2 of Appendix D, and Appendix D explains

the reason for the differences. As Castaic points out, Petitioners cannot point to any environmental significance to the use of DWRSIM and not CALSIM II. Therefore, Petitioners have not met their burden of demonstrating that use of DWRSIM for the 1998 baseline in the 2004 EIR was "clearly inadequate or unsupported."[27]

3. Cumulative Impacts

Petitioners contend that the 2004 EIR attempts to assess the project's impacts on the SWP without discussion why Castaic is competent to do so. As an example, the EIR rejects any significant project impact on the Delta, even though it acknowledges that differences in timing in the use of water for urban (Castaic) rather than agricultural (Wheeler Ridge) purposes would change the timing of deliveries. AR 192. Petitioners argue that the Delta is "in crisis" and there is great potential for conflict between Castaic's and DWR's respective environmental analysis. Pet. Op. Br. at 23-4.

An EIR must contain a cumulative impacts analysis of the project's environmental impact when considered in conjunction with other projects (Guidelines §15130) in order to ensure that "the entire relevant environmental picture" has been adequately considered. Laupheimer v. State of California, (1988) 200 Cal.App.3d 440, 462. A cumulative impact consists of an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts. Guidelines §15130(a)(1). The EIR should not discuss impacts which do not result at least in part from the project being evaluated. Id. The analysis should reflect the severity and likelihood of occurrence of the impact. Guidelines §15130(b). In every case, there should be at least a preliminary search for potential cumulative environmental effects and a preliminary assessment of their significance. Laupheimer, 200 Cal.App.3d at 462-63. The detail required in a cumulative impacts discussion need not be as great as provided for the environmental impacts attributable to the project alone. Guidelines §15130(b). Generally, the EIR should list the projects producing cumulative impacts or provide a summary of projections contained in a prior certified or adopted environmental document which describe the regional conditions contributing to the cumulative impact. Guidelines §15130(b)(1). The 2004 EIR uses the list approach to discuss cumulative impacts of the project's environmental impact when considered in conjunction with other projects. AR 241-289.

Castaic argues that everything that happens with respect to the Kern water transfer happens south of the Delta, and the EIR thoroughly discusses that, including the impact of the timing of deliveries. AR 193-06. Thus, the EIR's conclusion that the project will have no direct

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[27]Castaic does not have statewide expertise on SWP reliability, but its consultants and DWR do. In commenting on Castaic's draft EIR, DWR stated that the differences between CALSIM II and DWRSIM "may cause slight changes in results, which may lead DWR to different conclusions....[in DWR's Monterey Amendments EIR]" AR 564. However, DWR also found that the draft EIR adequately and thoroughly discussed the project and its impacts, including the effects of the project on the environment and the SWP, using appropriate baseline conditions, and had a good discussion of the relationship between the Kern water transfer and Monterey Plus. DWR concluded that the draft EIR a "adequately discusses the reliability of the SWP, pre- and post- Monterey Amendment conditions, and SWP operations." AR 564-65.

significant impact on the SWP or related facilities is fully supported. Castaic contends that Petitioners really are attacking its ability to act as lead agent for a local project if the project has the potential for statewide impact. According to Castaic, this argument goes to the lead agency issue, and is incorrect as a matter of law. Castaic is qualified and required by CEQA to assess impacts that occur outside of its borders in evaluating the Kern water transfer. Citizens of Goleta Valley v. Board of Supervisors, (1990) 52 Cal.3d 553, 573.

The court does not know whether Petitioners really are attacking Castaic's expertise or the adequacy of its assessment of SWP impacts from the Kern transfer. The reason is that Petitioners' arguments are conclusionary and unsupported by analysis, authority, or many facts. Petitioners' obligation was to point out what is wrong with the analysis, or what has been omitted that was required. An issue raised without analysis or authority lacks foundation and need not be addressed. Arcadia, 135 Cal.App.4th at 1429, 1431. The court has no obligation to search the EIR's cumulative analysis section to look for defects. Their general objection requires only a general response that Castaic's cumulative impacts analysis is adequate.

4. The "No Project" Alternative

Petitioners argue that the 2004 EIR fails to address the "no project" alternative, an issue particularly important because it was the principal defect in the PCL Monterey Agreement EIR. As the PCL court stated, a "no project" alternative must discuss "existing conditions" and "what would reasonably be 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." 83 Cal.App.4th at 912. The Monterey Agreement EIR did not discuss the projections related to land planning, demand for water, and other impacts of reducing entitlements pursuant to Article 18(b). Id. at 919. Petitioners contend that the 2004 EIR does discuss the water supply reliability impacts of invoking Article 18(b), but not the statewide impacts the PCL court found so crucial.

The short answer to Petitioners contention is that 2004 EIR addresses a different project than the Monterey Amendments. The "no project" alternative for any EIR requires a comparison of the impacts of approving the project with the effect of not doing so. Guidelines §15126.6.(e)(1); Mira Mar Mobile Community v. City of Oceanside, (2004) 119 Cal.App.4th 477, 488-89. The only "no project alternative" that Castaic is obligated to consider is the alternative of "no Kern water transfer." Castaic has addressed this alternative by discussing groundwater sources of water and a possible moratorium. AR 291-4. Petitioners do not quibble with this analysis. But Castaic had no obligation to consider "no Monterey Amendments" as a no project alternative.[28] Indeed, it would make no sense to evaluate "no Monterey Amendments" as an alternative to the Kern water transfer.[29]

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[28]Of course, the 2004 EIR is obligated to consider invocation of Article 18(b) as a reasonably foreseeable environmental impact, and the adequacy of it doing so has been discussed.

[29]For a similar reason, Castaic need not analyze alternative uses of the SWP water in a "no project" alternative. CEQA does not require consideration of alternatives that do not meet the project objective; *i.e.*, delivery of water to Castaic's customers. *See* Guidelines §15126.6(c).

5. Post-Hoc Rationalization

Petitioners also suggest that the 2004 EIR is a post-hoc rationalization for "a decision already made." Pet. Op. Br. at 18. Pre-judging environmental decisions in order to accomplish a project is prohibited under CEQA. An agency may not commit to a project before CEQA review is completed because a fundamental purpose of an EIR is to provide decision-makers with information they can use in deciding whether to approve a project. Therefore, post-approval environmental review has been condemned. Laurel Heights, 47 Cal.3d at 394. *See* Residents Ad Hoc Stadium Com. v. Board of Trustees, (1979) 89 Cal.App.4th 274, 285. Of course, an agency contemplating a project may be presumed to favor the project, and CEQA assumes this to be inevitable. Therefore, it builds in procedural protections to insure that the decision-maker does not fail to note the facts and arguments by opponents to the EIR. Id. at 285.

Castaic had completed the transfer and performed under it for several years prior to preparing the 2004 EIR. Plainly, it desires to keep the transfer and not change it. When the 1999 was found deficient, Castaic was required under CEQA to perform a "fresh look" at the transfer's environmental impacts. With the exception of the analytical hole discussed above, it has done so. *See* City of Vernon v. Board of Harbor, (1998) 63 Cal.App.4th 677, 1523 (adequacy of EIR overcomes contention that it was a post-hoc rationalization).

G. Conclusion

Castaic may act as the lead agency for the Kern water transfer. The 2004 EIR was properly prepared except for one defect – it fails to show the analytic route as to how and why the three allocations of pre-Monterey Amendments, pre-Monterey Amendments without Article 18, and post-Monterey Amendments are relevant and would occur. The court offers no opinion on whether this failure must be rectified by addendum (Guidelines §15164), a subsequent EIR, a supplement to EIR, or a new EIR. That determination is Castaic's to make in the first instance.

The Petition for Writ of Mandate is granted in part. A writ shall issue commanding Castaic to set aside its approval of the 2004 EIR and comply with CEQA, either through the preparation of a new EIR or other environmental documentation, such as an addendum, addressing the analytic route of the three water allocations. Castaic is not directed to set aside the Kern water transfer. Judgment shall be entered in favor of Petitioners solely on this issue.

This shall serve as the court's proposed statement of decision in compliance with CRC 232(c). If there are no written objections filed, the statement shall be final. As Respondents have prevailed on all but one issue, Castaic's council is ordered to prepare a writ of mandate and judgment consistent with this decision, and serve it on all other counsel for approval as to form. After 10 days, Castaic may file the proposed writ and judgment with the court, along with a declaration stating the nature and extent of any objections received. An OSC re: judgment shall be set for April 23, 2007.

Dated: April 2, 2007

/s/ JAMES C. CHALFANT
Superior Court Judge

JAMES C. CHALFANT