

## **TOPICAL RESPONSE 5: WATER LITIGATION AND REGULATORY ACTION UPDATE**

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Comments have been received on the Draft EIS/EIR stating that several federal court decisions and Biological Opinions (BOs) have been issued recently, which are aimed at protecting listed fish species in the Sacramento-San Joaquin Delta (Delta). The comments state that these federal decisions and regulatory actions have reduced the coordinated operations and pumping of the federal Central Valley Project (CVP) and the State of California's State Water Project (SWP), which are operated by the U.S. Bureau of Reclamation (Bureau) and the California Department of Water Resources (DWR), respectively. Further, the comments state that reduced pumping to the SWP, in particular, has reduced water available for import to all users south of the Delta for storage and "new town projects" like the Newhall Ranch Specific Plan. The comments state that the reduced pumping is attributable to federal court decisions and two BOs. In addition, the comments state that the federal decisions and BOs are "new information" and that the "whole issue of available water supply should be revisited with these decisions in mind."

This topical response addresses the comments received on the Draft EIS/EIR, including the federal decisions, regulatory actions, new legislation, and other water-related litigation issues. The response is based on the information presented in the Draft EIS/EIR, **Section 4.3**, Water Resources, which is summarized below, and updated information received from Castaic Lake Water Agency (CLWA), retail water purveyors, and other sources since public circulation of the Draft EIS/EIR on April 27, 2009. In addition, for further responsive information, please see revised **Section 4.3** of the Final EIS/EIR.

### **Summary of Draft EIS/EIR Information and Analysis**

The Draft EIS/EIR provided extensive information regarding the water agencies in the Santa Clarita Valley and, in particular, the imported water supplies provided by CLWA, the wholesale public water agency serving the Santa Clarita Valley. (Draft EIS/EIR, pp. 4.3-14-4.3-19, 4.3-29-4.3-38.) The Draft EIS/EIR also provided detailed information concerning the SWP and its operational constraints. (Draft EIS/EIR, pp. 4.3-19-4.3-29.)

For example, the Draft EIS/EIR reported that, in the southern Delta, water is pumped into the California Aqueduct at the Clifton Court Forebay by the Banks Pumping Plant (or by agreement with the Bureau at the CVP's Tracy Pumping Plant). SWP water exports south of the Banks and Tracy pumping plants are currently limited by a series of water quality and operational constraints, governed primarily by the State Water Resources Control Board (SWRCB) Water Right Decision 1641 (D-1641), as amended. (Draft EIS/EIR, p. 4.3-19.)

The Draft EIS/EIR also reported that from the southern Delta facilities, water in California Aqueduct travels along the west side of the San Joaquin Valley and is either delivered to SWP Contractors or stored in San Luis Reservoir, the SWP's main storage facility south of the Delta. South of San Luis Reservoir, water is conveyed via the California Aqueduct to the primarily agricultural regions in the San Joaquin Valley and the primarily urban regions of the Central Coast and southern California. Water is diverted from the California Aqueduct and delivered directly to SWP Contractors in the central and southern San Joaquin Valley at various locations along the California Aqueduct. The California Aqueduct traverses the west side of the San Joaquin Valley, and water is pumped through a series of four pumping plants (Dos Amigos, Buena Vista, Teerink, and Chrisman) before reaching the Edmonston Pumping Plant. The Edmonston Pumping Plant pumps water over the Tehachapi Mountain Range, and the California Aqueduct then divides into the East Branch and the West Branch. Water intended for use by CLWA is

conveyed through the West Branch to Quail and Pyramid Lakes and then to Castaic Lake, the terminus for the West Branch. (See Draft EIS/EIR, p. 4.3-22 [including **Figure 4.3-3**].)

The Draft EIS/EIR discussed constraints on the SWP system resulting from recent federal court decisions:

"In addition, DWR has acknowledged constraints on the SWP system due to recent federal court litigation (*Natural Resources Defense Council v. Kempthorne*, 506 F.Supp.2d 322 (E.D. Cal. 2007) (*Wanger Decision - Delta smelt*); and *Pacific Coast Federation of Fishermen's Associations, et al. v. Gutierrez, et al.*, No. 06-CV-00245-OWW-GSA (E.D. Cal. 2008) (*Wanger Decision - Chinook salmon/steelhead*). (Copies of these two decisions are available in **Appendix 4.3**)." (Draft EIS/EIR, pp. 4.3-19, 4.3-22.)

The Draft EIS/EIR also disclosed DWR's operational constraints to the SWP system under the injunctive relief remedies imposed by the federal court in the *Wanger Decision* for the protection of the Delta smelt:

"DWR has stated that it will operate the SWP and its facilities in accordance with all statutory requirements, and, in the immediate short-term time frame, operate the SWP using the remedies imposed by the federal court in the *Wanger Decision* to provide protection for Delta smelt, a listed fish species. Further, DWR has stated that a new Biological Opinion for Delta smelt will replace the trial court's order regarding the operation of the SWP, and the new Biological Opinion would continue to provide the mitigation required to address the SWP's impact on the Delta smelt and other listed fish species. (The current status of the Delta smelt Biological Opinion and the associated litigation is provided below.)" (Draft EIS/EIR, pp. 4.3-22.)

Other SWP operation and delivery constraints were identified in the Draft EIS/EIR. (Draft EIS/EIR, pp. 4.3-22-4.3-29.) Among those constraints is the SWP "Table A" delivery capability under current and future conditions. SWP "Table A" is the term used in SWP water supply contracts to reflect the annual maximum amount of water to which a SWP contractor has a contract right to request delivery from DWR. Each SWP contractor water supply contract includes a Table A, which identifies this specific amount. The Table A amount is not equivalent to actual deliveries of water in any given year, and the water actually available for delivery in any given year may be *less* than the SWP contractor's Table A amount, depending upon hydrologic conditions, the amount of water in storage, operational constraints, requirements imposed by regulatory agencies to meet environmental water needs, the amount of water requested by other SWP contractors, climatic conditions, and other factors. (Draft EIS/EIR, p. 4.3-15.)

To assess that capability, DWR uses computer modeling that simulates operations of both the SWP and CVP, and provides average and dry period estimated deliveries for current and future conditions in order to assist the SWP Contractors in determining the water supplies from the SWP that can be relied upon in any given year. This information is fully explained in the Draft EIS/EIR and excerpted as follows:

"To determine the SWP delivery capability under current and future conditions, DWR uses a computer model (currently, CALSIM II) that simulates operations of the SWP and CVP. DWR's most recently published estimates of SWP delivery reliability are included in DWR's State Water Project Delivery Reliability Report 2007 (August 2008) [citing the

State Water Project Delivery Reliability Report 2007, August 2008, found in **Appendix 4.3** of the Draft EIS/EIR].

As background, DWR has assessed the impact of various conditions on SWP supply reliability since 2003. (See DWR Reliability Report, May 2003.) The report assisted SWP contractors in assessing the reliability of the SWP component of their overall supplies. DWR subsequently issued its 2005 SWP Delivery Reliability Report (April 2006). This updated analysis estimated that the SWP, using existing facilities operated under current regulatory and operational constraints, and with all contractors requesting delivery of their full Table A Amounts in most years, could deliver 77 percent of total Table A Amounts on a long-term average basis. The 2005 UWMP's discussion of SWP supply reliability is based on the analysis contained in the DWR 2005 Delivery Reliability Report, April 2006.

Since that time, DWR released the 2007 State Water Project Delivery Reliability Report (August 2008). This Report updates the 2005 Delivery Reliability Report, and describes three areas of uncertainty to SWP delivery reliability: (a) the recent and significant decline in pelagic organisms in the Delta (open-water fish such as striped bass, Delta smelt, and longfin smelt); (b) climate change and sea level rise; and (c) the vulnerability and potential failure of Delta levees. The inclusion of new areas of uncertainty distinguishes the 2007 Delivery Reliability Report from earlier reports by including estimates of the potential reductions to SWP delivery reliability due to the pelagic organism decline and future climate changes.

As described in the 2007 Delivery Reliability Report (August 2008), *simulations to evaluate future (2027) SWP delivery reliability incorporate the current interim court-ordered operating rules related to Delta smelt and a range of possible climate change impacts to hydrology in the Central Valley.* The interim operating rules for Delta smelt are simulated at a more restricted level and a less restricted level for Delta exports to provide a range of estimated water deliveries. Therefore, for 2007, two studies were conducted. For 2027, ten simulations were used to reflect the four assumed scenarios for climate change and the two levels of operating rules." (Draft EIS/EIR, pp. 4.3-23-4.3-24., italics added.)

Further, the Draft EIS/EIR relied on DWR's 2007 Delivery Reliability Report (August 2008) to provide average and dry period estimated deliveries for both current (2007) and future conditions (2027), and compared those figures to those in DWR's former 2005 Delivery Reliability Report. As reported in the Draft EIS/EIR, at page 4.3-24, DWR's delivery capability was summarized as follows:

**Table 4.3-4  
Average And Dry Period SWP Table A Deliveries  
From The Delta Under Current Conditions**

Study of Current Conditions	SWP Table A Delivery from the Delta (in percent of maximum Table A <sup>1</sup> )					
	Long-Term Average <sup>2</sup>	Single Dry-Year (1977)	2-Year Drought (1976-1977)	4-Year Drought (1931-1934)	6-Year Drought (1987-1992)	6-Year Drought (1929-1934)
2005 SWP Reliability Report, Study 2005	68%	4%	41%	32%	42%	37%
Update with 2007 Studies <sup>3</sup>	63%	6%	34%	35%	35%	34%

Notes:

<sup>1</sup> Maximum Table A Amount is 4,133 thousand acre-feet/year.

<sup>2</sup> 1922-1994 for 2005 Delivery Reliability Report; 1922-2003 for Update with 2007 studies.

<sup>3</sup> Values reflect averaging annual deliveries from the two scenarios of Old and Middle River flow targets described in Table 6-3 of the 2007 Delivery Reliability Report.

Source: DWR Delivery Reliability Report, 2007 (August 2008), Table 6-5.

**Table 4.3-5  
Average And Dry Period SWP Table A Deliveries From The Delta Under Future Conditions**

Study of Future Conditions	SWP Table A Delivery from the Delta (in percent of maximum Table A <sup>1</sup> )					
	Long-term Average <sup>2</sup>	Single dry-year (1977)	2-year drought (1976-1977)	4-year drought (1931-1934)	6-year drought (1987-1992)	6-year drought (1929-1934)
2005 SWP Reliability Report, Study 2025	77%	5%	40%	33%	42%	38%
Update with 2027 Studies <sup>3</sup>	66-69%	7%	26-27%	32-37%	33-35%	33-36%

Notes:

<sup>1</sup> Maximum Table A Amount is 4,133 thousand acre-feet/year.

<sup>2</sup> 1922-1994 for 2005 Delivery Reliability Report; 1922-2003 for Update with 2027 studies.

<sup>3</sup> Range in values reflects four modified scenarios of climate change: annual Table A deliveries were first interpolated between full 2050 level and no climate change scenarios, then averaged over the two scenarios of Old and Middle River flow targets.

Source: DWR Delivery Reliability Report, 2007 (August 2008), Table 6-14.

As shown in the above tables cited in the Draft EIS/EIR, under the updated Future Conditions (2027), average SWP delivery amounts may decrease from 8 to 11 percent of maximum Table A Amounts as compared to earlier estimates in the 2005 Delivery Reliability Report. This decrease in reliability results in an estimated average delivery of 66 percent to 69 percent (versus 77 percent as identified in the 2005 Delivery Reliability Report). (Draft EIS/EIR, p. 4.3-25.)<sup>1</sup>

The Draft EIS/EIR applied this data to CLWA's Table A Amount, stating that:

"Applying the 66 percent figure (most conservative of the 66-69 percent range) to CLWA's Table A Amount of 95,200 af, results in approximately 62,800 af expected under average Future Conditions (2027) according to the 2007 Delivery Reliability Report (August 2008). This is compared to the 77 percent, or 73,300 af, included in the water supply planning in the 2005 UWMP in 2030 in an average year." (Draft EIS/EIR, p. 4.3-25.)

The Draft EIS/EIR's analysis of constraints on the SWP system also included a discussion of climate change and the potential impacts it could have on California's future water supplies over the long term. (Draft EIS/EIR, pp. 4.3-25-4.3-26.) In addition, the Draft EIS/EIR assessed recent state court litigation and its impact on the availability and reliability of imported SWP supplies, stating;

"For example, in October 2006, plaintiff, Watershed Enforcers, a project of the California Sportfishing Protection Alliance, filed a lawsuit in Alameda County Superior Court alleging that DWR was not in compliance with the CESA and did not have the required state incidental take permit to protect the Delta smelt as part of DWR's pumping operations at the Harvey O. Banks Pumping Plant located near the town of Tracy (*Watershed Enforcers, et al. v. California Department of Water Resources, et al.* Alameda County Superior Court No. RG06292124 [*Watershed* decision]). In April 2007, the court agreed with the plaintiff and ordered a shutdown of pumping from the Delta if appropriate permits could not be obtained in 60 days. In May 2007, DWR filed an appeal of the trial court's decision, which automatically stayed the decision pending the outcome of the appeal. At the same time, DWR entered into a Memorandum of Understanding with CDFG to jointly work with the appropriate federal agencies to develop a federal Biological Opinion that complies with CESA. During preparation of the new Biological Opinion, DWR committed itself to actions related to protecting the Delta smelt and other species through adaptive management provisions. Upon completion of this effort, DWR

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<sup>1</sup> Since public circulation of the Draft EIS/EIR in April 2009, DWR released the draft "State Water Project Delivery Reliability Report 2009," dated December 2009 (DWR 2009 Draft Reliability Report). (DWR released the draft report for public review and comment on January 26, 2010. The report is available for public review at <http://baydeltaoffice.water.ca.gov>.) The report is an update to the 2007 Delivery Reliability Report, issued as final in August 2008, and updates estimates of the current (2009) and future (2029) SWP Table A delivery reliability and incorporates regulatory requirements for SWP and Central Valley Project (CVP) operations in accordance with a U.S. Fish and Wildlife Service biological opinion for the Delta smelt (December 2008) and a National Marine Fisheries Service biological opinion for salmon (June 2009). Estimates of future SWP delivery reliability also reflect potential impacts of climate change, sea level rise, and levee failure due to flooding and earthquakes. Please refer to **Topical Response 9: State Water Project Supply Reliability**, for further responsive information regarding DWR's latest 2009 Draft Reliability Report.

plans to submit a request to CDFG for a consistency determination under CESA that would allow for incidental take based on the new federal Biological Opinion." (Draft EIS/EIR, p. 4.3-26.)

Despite comments received to the contrary, the Draft EIS/EIR assessed the *Wanger* Decisions' impact on imported SWP supplies in considerable detail:

**"2007 Wanger Decision.** On February 16, 2005, the USFWS issued its Biological Opinion, determining that the operations and criteria for both the CVP and SWP would not result in jeopardy to the Delta smelt. On May 20, 2005, the Natural Resources Defense Council (NRDC) and others filed a supplemental complaint in federal court against the Secretary of the Interior and the Director of USFWS, challenging the adequacy of the 2005 Biological Opinion. On June 9, 2006, plaintiffs filed their motion for summary judgment. On July 6, 2006, in light of new information, the U.S. Bureau of Reclamation (Bureau), operator of CVP, requested that USFWS reinstate consultation on the operations plan and criteria for the CVP. Notwithstanding the request for reinstatement of consultation, the parties proceeded with briefing their cross-motions for summary judgment and, on May 25, 2007, the U.S. District Court for the Eastern District, the Honorable Oliver W. Wanger, presiding, found that the 2005 Biological Opinion was inadequate and that the no-jeopardy determination was arbitrary, capricious, and contrary to the law [citing the 2007 *Wanger* decision (*Natural Resources Defense Council v. Kempthorne*, 506 F.Supp.2d 322 (E.D. Cal. 2007))] found in **Appendix 4.3** of the Draft EIS/EIR].

Thereafter, on August 31, 2007, Judge Wanger announced an initial ruling, which outlined an operational plan calling for reductions in water supplies to protect the Delta smelt. The Court specified that reduced operations would last until the fall of 2008, while federal agencies develop a revised Biological Opinion for Delta smelt that will ensure the SWP's and CVP's compliance with the requirements of the federal ESA. (The current status of the Delta smelt Biological Opinion and the associated litigation is provided below.)

On December 14, 2007, Judge Wanger issued a final court order, which curtails Delta pumping to protect the Delta smelt. The range of reduced operations is consistent with earlier estimates made by DWR following the Court's initial ruling in August 2007. *Following Judge Wanger's final ruling, DWR performed additional modeling and analysis of the impacts of the Wanger Decision on Delta pumping. According to DWR, the final ruling will primarily affect export pumping between January and June 2008, when juvenile Delta smelt are at greatest risk of entrainment in pumps. Further, DWR has stated that the actual impact on SWP water supply will depend on a number of factors, including the locations where adult smelt spawn and off-spring hatch, levels of precipitation for the year, and water temperatures affecting how quickly the fish migrate. The Court's restrictions on SWP/CVP operations will last until the fall of 2008, while the revised Biological Opinion for Delta smelt is completed (see below). The revised Biological Opinion is expected to impose restrictions that may continue reduced pumping operations in the SWP/CVP until broader solutions are implemented for the Bay-Delta.*

**2008 Wanger Decision.** U.S. District Court Judge Oliver Wanger also recently invalidated a 2004 biological opinion issued by the National Marine Fisheries Service (NMFS). The 2004 NMFS Biological Opinion determined that, pursuant to section 7 of the federal ESA, the operation of the Delta pumps would not jeopardize the continued existence of three listed Delta fish species protected under the federal ESA, namely, the winter-run Chinook salmon, the Central Valley spring-run Chinook salmon, and the Central Valley steelhead. Judge Wanger invalidated the biological opinion by relying on several of the factual findings made by NMFS in that opinion. Judge Wanger also faulted the biological opinion for, among other issues, failing to adequately analyze the impact of the operations plan on the critical habitat of the three species [citing the 2008 *Wanger* decision (*Pacific Coast Federation of Fishermen's Associations, et al. v. Gutierrez, et al.*, No. 06-CV-00245-OWW-GSA (E.D. Cal. 2008)) found in **Appendix 4.3** of the Draft EIS/EIR].

After Judge Wanger's ruling, the court held hearings in June and July 2008 on possible remedies; however, no further remedies were imposed beyond the curtailments already issued with respect to the Delta smelt in the prior 2007 *Wanger* Decision." (Draft EIS/EIR, pp. 4.3-26-4.3-27, italics added.)

Contrary to comments received, the Draft EIS/EIR disclosed that on December 15, 2008, the U.S. Fish and Wildlife Service (USFWS) issued the new BO for Delta smelt (2008 BO). The new 2008 BO addressed the effects of the proposed coordinated long-term operations of both the CVP and SWP to the threatened Delta smelt and its designated critical habitat. As disclosed in the Draft EIS/EIR, the 2008 BO continued restrictions on SWP/CVP operations that were already in place under Judge Wanger's preliminary injunction order concerning the Delta smelt, and imposed additional operational requirements to reduce salinity:

"The Opinion continues restrictions on SWP and federal CVP operations that have been in place under Judge Wanger's order concerning Delta smelt. However, the Opinion also imposes new requirements for Delta outflows under certain conditions and requires increased reservoir releases in the fall of some years to reduce salinity." (Draft EIS/EIR, p. 4.3-28.)

The Draft EIS/EIR did not speculate on DWR's assessment of the 2008 BO's impact on SWP delivery reliability because DWR has not yet issued its new biennial "State Water Project Delivery Reliability Report." However, the Draft EIS/EIR disclosed that fact as well, stating:

"DWR has not yet issued a new 'State Water Project Delivery Reliability Report,' which is expected to address the ramifications of the new Biological Opinion, and its effects on SWP supplies and deliveries. DWR is expected to issue the 2009 State Water Project Delivery Reliability Report in 2010." (Draft EIS/EIR, p. 4.3-28.)

As stated, after circulation of the Draft EIS/EIR, DWR issued its draft 2009 State Water Project Delivery Reliability Report. The report contains updated SWP Table A delivery capability estimates, which take into account uncertainties to delivery reliability, including: (a) restrictions on SWP and CVP operations due to federal biological opinions to protect endangered fish such as Delta smelt and spring-run salmon; (b) climate change and sea level rise; and (c) the vulnerability of Delta levees to failure due to floods and

earthquakes. For further responsive information, please refer to **Topical Response 9: State Water Project Supply Reliability**.

Further, in response to the 2008 BO for the Delta smelt, the Draft EIS/EIR correctly noted that on March 5, 2009, the State Water Contractors filed a lawsuit against USFWS, challenging regulatory restrictions placed on SWP operations in the 2008 BO under the federal Endangered Species Act (ESA). (Draft EIS/EIR, p. 4.3-28.) The Draft EIS/EIR noted that others had filed similar litigation. This additional litigation, brought by the Coalition for a Sustainable Delta and Kern County Water Agency, also challenged the regulatory restrictions placed on SWP operations in the 2008 BO under the federal ESA. As reported in the Draft EIS/EIR, the litigation is still pending, and the outcome of the litigation cannot be predicted at this time.

In addition, using the best available information, the Draft EIS/EIR assessed the implications of the state and federal court decisions, and the recent regulatory actions as well as the associated litigation as follows:

"The *Watershed* and the two *Wanger* Decisions, and the recent actions taken by USFWS and California Fish and Game Commission, as well as the associated litigation, have serious implications on imported SWP/CVP water supplies throughout California. These implications are outlined below based on the best available information.

In terms of short-term water supply availability, there have been short-term effects related to issues presented in the *Watershed* and *Wanger* Decisions. For example, pumping operations were shut down for approximately nine days in June 2007 due to concerns over the declining number of Delta smelt. DWR then operated the pumps at limited levels for several weeks while waiting for the smelt to migrate to cooler waters. DWR then resumed normal operations in July 2007. There is also concern that the remedy adopted by the District Court could ultimately become part of the conditions in the new incidental take permit, which is currently subject to litigation. These concerns, if they materialize, could limit the percentage of SWP water that can be delivered to SWP Contractors, including CLWA. If such remedies are not ultimately part of the incidental take permit, the permit itself may contain conditions that would lower the percentage of SWP water made available for delivery to Southern California, including the Santa Clarita Valley.

Because of these concerns, Governor Schwarzenegger directed DWR to take immediate action to improve conditions in the Delta [citing the Governor's release issued July 17, 2007, found in **Appendix 4.3** of the Draft EIS/EIR]. According to the Office of the Governor, the Governor is building on his Strategic Growth Plan from last year, which consists of approximately \$6 billion to upgrade California's water systems. The Governor's plan invests \$4.5 billion to develop additional surface and groundwater storage. The plan also includes \$1 billion toward restoration of the Delta, including development of a new conveyance system, \$250 million to support restoration projects on the Klamath, San Joaquin, and Sacramento rivers, and the Salton Sea project, and \$200 million for grants to California communities to help conserve water. Using existing resources, DWR will implement numerous actions, including screening Delta agriculture intake pumps to protect smelt, restoring the North Delta's natural habitat, improving the



Central Delta water flow patterns, and improving DWR's ability to respond to Delta emergencies, such as levee failures.

The Governor also has directed the Delta Vision Blue Ribbon Task Force to develop a delta management plan. The Task Force presented its findings and recommendations in early 2008, and its strategic plan was issued at the end of 2008. The final report includes a suite of strategic recommendations for long-term, sustainable management of the Bay-Delta. Please refer to the Delta Vision website for the final report and associated information (<http://deltavision.ca.gov/> [last visited April 6, 2009]). The Bay-Delta Conservation Plan is also underway. The Plan is intended to ensure compliance with federal and state Endangered Species Act requirements in the Delta. The \$1 billion proposed in the Governor's comprehensive plan will be used to fund recommendations from both the Delta Vision Task Force and the Conservation Plan [citing the DWR 2007 Delivery Reliability Report (August 2008) for the current status of planning activities that may affect SWP delivery reliability, pp. 25-28 (a copy of which is found in **Appendix 4.3** of the Draft EIS/EIR)].

*Over the long-term, water supply availability and reliability will continue to be assessed by DWR in DWR's biennial SWP delivery reliability reports. These reports take into account a myriad of factors in evaluating long-term water supply availability and reliability. These factors include multiple sources of water, a range of water demands, timing of water uses, hydrology, available facilities, regulatory restraints, including pumping constraints due to impacts on listed fish species, water conservation strategies, and future weather patterns. The Watershed and the two Wanger decisions highlight the regulatory restraints applicable to SWP supplies, which have impacted DWR deliveries of SWP supplies in the past, and could curtail such deliveries in the future.*

Following the final court order issued in the 2007 *Wanger* Decision, representatives of CLWA and the four local retail water purveyors met with Los Angeles County and City of Santa Clarita planning staff to coordinate water supply and land use planning activities for the Santa Clarita Valley. In addition, DWR has since issued the 2007 Delivery Reliability Report (August 2008).

Based on this updated information, CLWA has determined that, while the court-ordered operating rules related to Delta smelt (or a Biological Opinion premised on those operating rules) are in effect, there are sufficient water supplies available for pending and future residential and commercial development within the CLWA service area for the foreseeable future through 2030 as set forth in the 2005 UWMP [citing CLWA's letter to the Los Angeles County Department of Regional Planning (February 5, 2008), a copy of which is found in **Appendix 4.3** of the Draft EIS/EIR]." (Draft EIS/EIR, pp. 4.3-28-4.3-29, emphasis added.)

The Draft EIS/EIR did not address the second BO, issued on June 4, 2009, by the National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS) (2009 BO) because the Draft EIS/EIR was released for public circulation on April 27, 2009, before the 2009 BO was issued. This response addresses the 2009 BO as part of the updated information provided below.

In addition, in response to comments, the Final EIS/EIR appendices (**Appendix F4.3**) include copies of both the 2008 BO and the 2009 BO. (The state and federal court decisions affecting SWP supplies were included in **Appendix 4.3** of the Draft EIS/EIR.)

In summary, while there have been state and federal court decisions and Biological Opinions that have impacted and placed restrictions upon the availability of SWP supplies, those decisions and actions (except for the 2009 BO, which was unavailable at the time the Draft EIS/EIR was issued) were disclosed and assessed in the Draft EIS/EIR; as a result, the information (with the one exception) is not considered "new information." Thus, contrary to the comments received, there is no need or requirement to "revisit" the Draft EIS/EIR's entire water resources analyses.

## **Updated Information Since Public Circulation of Draft EIS/EIR**

### **2009 Biological Opinion**

As stated above, on June 4, 2009, after public circulation of the Draft EIS/EIR, the NMFS issued its final 2009 BO based on its review of the proposed long-term coordinated CVP/SWP operations in the Central Valley, California, and the effects of those operations on listed fish and designated and proposed critical habitats. The 2009 BO concluded that the CVP/SWP operations are likely to jeopardize continued existence of federally-listed Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, Central Valley steelhead, green sturgeon, and Southern Resident killer whales, and the designated critical habitats of the salmon, steelhead, and sturgeon.

According to the NMFS, the 2009 BO's restrictions on CVP/SWP operations will impact an estimated five to seven percent of the available annual water on average moved by the federal and state pumping plants, or about 330,000 acre-feet per year (afy); however, water operations will not be affected by the 2009 BO immediately and will be tiered to water year type. The 2009 BO also includes exception procedures for drought and health and safety issues.<sup>2</sup>

DWR issued an initial response to the new 2009 BO on June 4, 2009. According to DWR, the 2009 BO "reaffirms the need for a comprehensive solution to the water and environmental conflicts in the Delta."<sup>3</sup> DWR's initial estimates show the average year impacts closer to 10 percent, which could reduce Delta export on average by about 300,000 to 500,000 acre-feet, which is in addition to current pumping restrictions imposed by the 2008 BO to protect the Delta smelt. It should be noted, however, that DWR provided only initial estimates and had not yet issued its 2009 State Water Project Delivery Reliability Report. The Delivery Reliability Report has been issued biennially since 2003. It is specifically intended to assist SWP Contractors in assessing the delivery reliability of the SWP component of their overall water supplies. Until the 2009 Delivery Reliability Report was issued, the best available information remains DWR's final 2007 Delivery Reliability Report (August 2008), which was used in the Draft EIS/EIR. For further responsive information, please refer to **Topical Response 9: State Water Project Supply Reliability**.

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<sup>2</sup> Please refer to Final EIR, **Appendix F4.3**, for the NOAA/NMFS release, dated June 4, 2009, summarizing the 2009 BO.

<sup>3</sup> Please refer to Final EIR, **Appendix F4.3**, for the DWR release, dated June 4, 2009, responding to the new 2009 BO.

### **2009 BO Litigation**

After issuance of the 2009 BO, on August 6, 2009, the SWP Contractors filed a lawsuit against federal agencies challenging the 2009 BO on federal ESA grounds. According to the litigation, the BO failed to take into account the many other factors contributing to the fish population decline, and failed to consider the impacts that the 2009 BO would have on people, a requirement of the National Environmental Policy Act (NEPA).<sup>4</sup> In addition, on August 28, 2009, the Coalition for a Sustainable Delta and Kern County Water Agency jointly filed suit against federal agencies challenging the 2009 BO under the federal ESA.<sup>5</sup> This litigation is still pending and the outcome of the litigation cannot be predicted as of this writing.

### **Response to 2008 BO and 2009 BO**

As stated above, DWR has issued its draft 2009 State Water Project Delivery Reliability Report, which includes DWR's assessment of the average year impacts on SWP delivery reliability for current and future conditions resulting from restrictions contained in the 2008 BO and 2009 BO. The reduction in SWP Table A supply, as reflected in DWR's draft 2009 Delivery Reliability Report, does not significantly impact SWP water supply availability in the Santa Clarita Valley (see **Topical Response 9: State Water Project Supply Reliability**); however, the further reductions in SWP Table A supply reinforces the need to continue diligent efforts to conserve potable water and increase the use of recycled water, both to meet the goals in the 2005 UWMP and to maximize utilization of potable water supplies. CLWA and the local retail purveyors are expected to continue to work diligently with the County of Los Angeles and the City of Santa Clarita on conservation measures and enforcement mechanisms to aggressively implement water conservation in the CLWA service area.

### **Recent California Legislation**

Governor Schwarzenegger and the California legislature successfully crafted a comprehensive package of bills aimed at ensuring a reliable water supply in the future, as well as restoring the Delta and other ecologically sensitive areas. This comprehensive legislation places water supply and the Delta environment on an equal footing, establishing those principles as the State of California's fundamental and co-equal goals for the Delta. The plan is comprised of four policy bills and an \$11.14 billion bond. The package establishes a Delta Stewardship Council, sets ambitious water conservation policy, ensures better groundwater monitoring, and provides funds for the State Water Resources Control Board for increased enforcement of illegal water diversions. The bond, if approved in the November 2010 general election, will fund, with local cost-sharing, drought relief, water supply reliability, Delta sustainability, statewide water system operational improvements, conservation and watershed protection, groundwater protection, and water recycling and water conservation programs.<sup>6</sup>

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<sup>4</sup> Please refer to Final EIR, **Appendix F4.3**, for the SWP Contractors release, dated August 6, 2009, concerning the litigation filed challenging the 2009 BO.

<sup>5</sup> Please refer to Final EIR, **Appendix F4.3**, for the Coalition for a Sustainable Delta/ Kern County Water Agency release, dated August 28, 2009, concerning the litigation filed challenging the 2009 BO.

<sup>6</sup> Please refer to Final EIR, **Appendix F4.3**, for DWR's 2009 Comprehensive Water Package, Special Session Policy Bills and Bond Summary, dated November 2009.

**Summary of the Four Bills**

**SB 1 - Delta Governance/Delta Plan:** SB 1 establishes the framework to achieve the co-equal goals of providing a more reliable water supply to California and restoring and enhancing the Delta ecosystem. The co-equal goals will be achieved in a manner that protects the unique cultural, recreational, natural resource, and agricultural values of the Delta. Specifically, this bill:

1. Creates the Delta Stewardship Council, consisting of seven members with diverse expertise providing a broad statewide perspective. The Chairperson of the Delta Protection Commission is a permanent member of the Council. The Council is also tasked with:
  - (a) Developing a Delta Plan to guide state and local actions in the Delta in a manner that furthers the co-equal goals of Delta restoration and water supply reliability;
  - (b) Developing performance measures for the assessment and tracking of progress and changes to the health of the Delta ecosystem, fisheries, and water supply reliability;
  - (c) Determining if a state or local agency's project in the Delta is consistent with the Delta Plan and the co-equal goals, and acting as the appellate body in the event of a claim that such a project is inconsistent with the goals; and
  - (d) Determining the consistency of the Bay-Delta Conservation Plan (BDCP) with the co-equal goals.
2. Ensures that the Department of Fish and Game and the State Water Resources Control Board identify the water supply needs of the Delta estuary for use in determining the appropriate water diversion amounts associated with BDCP.
3. Establishes the Sacramento-San Joaquin Delta Conservancy to implement ecosystem restoration activities within the Delta. In addition to the restoration duties the Conservancy is required to:
  - (a) Adopt a strategic plan for implementation of the Conservancy goals;
  - (b) Promote economic vitality in the Delta through increased tourism and the promotion of Delta legacy communities;
  - (c) Promote environmental education about, and the public use of, public lands in the Delta; and
  - (d) Assist in the preservation, conservation, and restoration of the region's agricultural, cultural, historic, and living resources.
4. Restructures the current Delta Protection Commission (DPC), reducing the membership from 23 to 15 members, and tasks DPC with the duties of:
  - (a) Adopting an economic sustainability plan for the Delta, which is to include flood protection recommendations to state and local agencies;
  - (b) Submitting the economic sustainability plan to the Delta Stewardship Council for inclusion in the Delta Plan.

5. Appropriates funding from Proposition 84 to fund the Two-Gates Fish Protection Demonstration Program, a project in the central Delta which will utilize operable gates for protection of sensitive species and management of water supply.

**SB 6 - Groundwater Monitoring:** SB 6 requires, for the first time in California's history, that local agencies monitor the elevation of their groundwater basins to help better manage the resource during both normal water years and drought conditions. Specifically, this bill:

1. Requires the DWR to establish a priority schedule for the monitoring of groundwater basins and the review of groundwater elevation reports, and to make recommendations to local entities to improve the monitoring programs.
2. Requires DWR to assist local monitoring entities with compliance with this statute.
3. Allows local entities to determine regionally how best to set up their groundwater monitoring program, crafting the program to meet their local circumstances.
4. Provides landowners with protections from trespass by state or local entities.
5. Provides that if the local agencies fail to implement a monitoring program and/or fail to provide the required reports, DWR may implement the groundwater monitoring program for that region.
6. Provides that failure to implement a monitoring program will result in the loss of eligibility for state grant funds by the county and the agencies responsible for performing the monitoring duties.

**SB 7 - Statewide Water Conservation:** SB 7 creates a framework for future planning and actions by urban and agricultural water suppliers to reduce California's water use. For the first time in California's history, this bill requires the development of agricultural water management plans and requires urban water agencies to reduce statewide per capita water consumption 20 percent by 2020. Specifically, this bill:

1. Establishes multiple pathways for urban water suppliers to achieve the statewide goal of a 20 percent reduction in urban water use. Specifically, urban water suppliers may:
  - (a) Set a conservation target of 80 percent of their baseline daily per capita water use;
  - (b) Utilize performance standards for water use that are specific to indoor, landscape, and commercial, industrial and institutional uses;
  - (c) Meet the per capita water use goal for their specific hydrologic region as identified by DWR and other state agencies in the 20 percent by 2020 Water Conservation Plan; or
  - (d) Use an alternate method that is to be developed by DWR before December 31, 2010.
2. Requires urban water suppliers to set an interim urban water use target and meet that target by December 31, 2015 and meet the overall target by December 31, 2020.
3. Requires DWR to cooperatively work with the California Urban Water Conservation Council to establish a task force that shall identify best management practices to assist the commercial, industrial and institutional sector in meeting the water conservation goal.

4. Requires agricultural water suppliers to measure water deliveries and adopt a pricing structure for water customers based at least in part on quantity delivered, and, where technically and economically feasible, implement additional measures to improve efficiency.
5. Requires agricultural water suppliers to submit Agricultural Water Management Plans beginning December 31, 2012 and include in those plans information relating to the water efficiency measures they have undertaken and are planning to undertake.
6. Makes ineligible for state grant funding any urban or agricultural water supplier who is not in compliance with the requirements of this bill relating to water conservation and efficient water management.
7. Requires DWR to, in 2013, 2016 and 2021, report to the Legislature on agricultural efficient water management practices being undertaken and reported in agricultural water management plans.
8. Requires DWR, the State Water Resources Control Board, and other state agencies to develop a standardized water information reporting system to streamline water reporting required under the law.

**SB 8 - Water Diversion and Use/Funding:** SB 8 improves accounting of the location and amounts of water being diverted by recasting and revising exemptions from the water diversion reporting requirements under current law. Additionally, this bill appropriates existing bond funds for various activities to benefit the Delta ecosystem and secure the reliability of the state's water supply, and to increase staffing at the State Water Resources Control Board to manage the duties of this statute. Specifically, this bill:

1. Provides a stronger accounting of water diversion and use in the Delta by removing an exemption from reporting water use by in-Delta water users.
2. Redefines the types of diversions that are exempt from the reporting requirement.
3. Assesses civil liability and monetary penalties on diverters who fail to submit the required reports, and for willful misstatements, and/or tampering with monitoring equipment.
4. Appropriates \$546 million from Propositions 1E and 84, in the following manner:
  - (a) \$250 million (Proposition 84) for integrated regional water management grants and expenditures for projects to reduce dependence on the Delta;
  - (b) \$202 million (\$32 million Proposition 84 and \$170 million Proposition 1E) for flood protection projects in the Delta to reduce the risk of levee failures that would jeopardize water conveyance;
  - (c) \$70 million (Proposition 1E) for stormwater management grants; and
  - (d) \$24 million (Proposition 84) for grants to local agencies to develop or implement Natural Community Conservation plans.
5. Appropriates \$3.75 million from the Water Rights Fund to the State Water Resources Control Board for staff positions to manage the duties in this bill relating to water diversion reporting, monitoring and enforcement.

### ***Water Bond Summary***

The Safe, Clean, and Reliable Drinking Water Supply Act of 2010 is an \$11.14 billion general obligation bond proposal that would provide funding for California's aging water infrastructure and for projects and programs to address the ecosystem and water supply issues in California. The bond is comprised of seven categories, including drought relief, water supply reliability, Delta sustainability, statewide water system operational improvement, conservation and watershed protection, groundwater protection and water quality, and water recycling and water conservation.

**Drought Relief - \$455 million.** This funding will be available for local and regional drought relief projects that reduce the impacts of drought conditions, including the impacts of reductions to Delta diversions. Projects will include water conservation and water use efficiency projects, water recycling, groundwater cleanup and other water supply reliability projects including local surface water storage projects that provide emergency water supplies and water supply reliability in drought conditions. Funds will be available to disadvantaged communities and economically distressed areas experiencing economic impacts from the drought for drought relief projects and programs. Funds will also be available to improve wastewater treatment facilities to protect water quality or prevent contamination of surface water or groundwater resources.

**Delta Sustainability - \$2.25 billion.** This bond will provide funds for projects to assist in maintaining and restoring the Delta as an important ecosystem. These investments will help to reduce the seismic risk to water supplies derived from the Delta, protect drinking water quality and reduce conflict between water management and environmental protection.

**Water Supply Reliability - \$1.4 billion.** These funds would be in addition to prior funding provided by Proposition 50 and Proposition 84 and would support the existing Integrated Regional Water Management (IRWM) program. IRWM is designed to encourage integrated regional strategies for management of water resources that will protect communities from drought, protect and improve water quality and improve local water security by reducing dependence on imported water. The bond would provide funds for water supply projects in 12 regions throughout the state and would also be available for local and regional conveyance projects that support regional and interregional connectivity and water management.

**Statewide Water System Operational Improvement - \$3.0 billion.** This funding would be dedicated to the development of additional water storage, which, when combined with other water management and flood system improvement investments being made, can increase reliability and offset the climate change impacts of reduced snow pack and higher flood flows. Eligible projects for this funding include surface storage projects identified in the CALFED Bay-Delta Record of Decision; groundwater storage projects and groundwater contamination prevention or remediation projects that provide water storage benefits; conjunctive use and reservoir reoperation projects; local and regional surface storage projects that improve the operation of water systems in the state and provide public benefits.

The bond provides that water suppliers who would benefit from new storage will pay their share of the total costs of the project while the public benefits of new water storage can be paid for by this general obligation bond.

**Groundwater Protection and Water Quality - \$1 billion.** To protect public health, funds will be available for projects to prevent or reduce the contamination of groundwater that serves as a source of drinking water.

Funds will also be used to finance emergency and urgent actions on behalf of disadvantaged communities and economically distressed areas to ensure that safe drinking water supplies are available to all Californians.

**Water Recycling and Water Conservation - \$1.25 billion.** Funds will be available for water recycling and advanced treatment technology projects that recycle water or that remove salts and contaminants from water sources. Funds will also be available for urban and agricultural water conservation and water use efficiency plans, projects, and programs. These funds will assist urban water users in achieving water conservation targets.

**Conservation and Watershed Protection - \$1.785 billion.** Funds will be available, through a 50-50 cost share program, for ecosystem and watershed protection and restoration projects in 21 watersheds throughout the state, including coastal protection, wildlife refuge enhancement, fuel treatment and forest restoration, fish passage improvement and obsolete dam removal.

In summary, while the bills just recently passed into law, and the bond still must be approved by voters in the November 2010 general election, the legislative package represents historic steps to reform and rebuild California's water system.<sup>7</sup> The legislative package also has brought state-wide implications, the most significant of which include establishing a Delta Stewardship Council to govern the Delta; setting aggressive water conservation policies and targets for both urban and agricultural uses of water (policies that mandate a 20 percent reduction in urban per capita water use by December 31, 2020, including incremental progress toward the 20 percent goal by reducing per capita urban water use by at least 10 percent on or before December 31, 2015); and a bond measure authorizing the funding of several water reliability, conservation, and efficiency projects. The effects of the bills and bond package cannot be quantified at this time; however, they represent state-wide solutions to several competing interests, including drought relief, water supply reliability, Delta sustainability, water conservation, and groundwater protection.

### **Water Litigation Updates Since Issuance of the Draft EIS/EIR**

The Draft EIS/EIR also presented information regarding court cases associated with water resources in the Santa Clarita Valley. The litigation referenced in the Draft EIS/EIR included state court decisions that were subject to appeal at the time the Draft EIS/EIR was issued on April 27, 2009. An update on those decisions is provided below.

#### ***California Water Impact Network, Inc. v. Castaic Lake Water Agency, Court of Appeal, Second Appellate District, Division Five, Appellate Case No. B205622***

One of CLWA's water sources, as presented in the Draft EIS/EIR, is 11,000 afy of supply it purchased from the Buena Vista Water Storage District (Buena Vista) and the Rosedale-Rio Bravo Water Storage District (Rosedale-Rio Bravo) in Kern County. The Draft EIS/EIR stated:

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<sup>7</sup> Please refer to Final EIR, **Appendix F4.3**, for the Office of the Governor's release, dated November 4, 2009, regarding passage of historic comprehensive water package.



"In early 2007, CLWA finalized a Water Acquisition Agreement with the Buena Vista Water Storage District (Buena Vista) and the Rosedale-Rio Bravo Water Storage District (Rosedale-Rio Bravo) in Kern County. Under this Program, Buena Vista's high flow Kern River entitlements (and other acquired waters that may become available) are captured and recharged within Rosedale-Rio Bravo's service area on an ongoing basis. CLWA will receive 11,000 af of these supplies annually either through an exchange of Buena Vista's and Rosedale-Rio Bravo's SWP supplies or through direct delivery of water to the California Aqueduct *via* the Cross Valley Canal." (Draft EIS/EIR, p. 4.3-18.)

As stated in the Draft EIS/EIR, this purchase was the subject of litigation. In summary, the Draft EIS/EIR stated:

"In November 2006, a petition for writ of mandate was filed by California Water Impact Network, seeking to set aside CLWA's certification of the EIR for the Water Acquisition Agreement Project with Buena Vista and Rosedale-Rio Bravo. (*California Water Impact Network, et al. v. Castaic Lake Water Agency, et al.*, Los Angeles County Superior Court No. BS106546.) The petition was later amended to add Friends of the Santa Clara River (Friends) as a petitioner. In November 2007, the trial court filed its Statement of Decision finding that in certifying the EIR and approving the project, CLWA proceeded in a manner required by law, and that its actions were supported by substantial evidence. Judgment was entered in favor of CLWA in December 2007. Petitioners filed a notice of appeal on January 31, 2008. This appeal is pending." (Draft EIS/EIR, p. 4.3-18, fn. 6.)

On April 20, 2009, just after the Draft EIS/EIR was sent to print, the appellate court ruled in CLWA's favor, and this water purchase is now considered final. Therefore, the 11,000 afy remains one of CLWA's permanent water supply sources. (Please refer to Final EIR, **Appendix F4.3**, for the recent appellate court decision in *California Water Impact Network, Inc. v. Castaic Lake Water Agency*, Second Appellate District, Division Five, Appellate Case No. B205622.)

***California Water Impact Network v. Newhall County Water District, Consolidated with California Oak Foundation v. City of Santa Clarita, Court of Appeal, Second Appellate District, Division Eight, Appellate Case Nos. B203781, B203782***

The Draft EIS/EIR included information summarizing court proceedings originating from the proposed development of an industrial park in the City of Santa Clarita by Gate-King Properties (*California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219). The *California Oak Foundation* decision invalidated an EIR under CEQA for the Gate-King project; however, the City of Santa Clarita then recertified its EIR, along with a final additional analysis for the proposed project, and re-approved the Gate-King project. After the City filed a return to the writ of mandate issued in the *California Oak Foundation* decision, the trial court discharged the writ, finding substantial evidence to support the City's certification of the EIR and associated additional analysis. The Draft EIS/EIR disclosed that the trial court's decision was appealed in November 2007 and that the appeal was still pending. (Draft EIS/EIR, pp. 4.3-71-4.3-72.)

After public circulation of the Draft EIS/EIR on April 27, 2009, the appellate court ruled in the City's favor, affirming the trial court's decision upholding the City's EIR and additional analysis as complying with CEQA. The appellate court decision was issued on May 13, 2009. (Please refer to Final EIS/EIR,

**Appendix F4.3**, for the recent consolidated appellate court decision in *California Water Impact Network, Inc. v. Newhall County Water District/California Oak Foundation v. City of Santa Clarita*, Second Appellate District, Division Eight, Appellate Case Nos. B203781 and B203782.)

Specifically, the Court of Appeal confirmed that the City of Santa Clarita reasonably concluded, based on substantial evidence presented in the EIR, that the 41,000 afy transfer to CLWA is a reliable source of SWP water to the Santa Clarita Valley for planning purposes. While the Court of Appeal's opinion was not ordered published, it nonetheless, represents an additional analysis of the reasons supporting the City's ultimate conclusion that the CLWA 41,000 afy transfer can and should be relied upon for planning purposes in Santa Clarita Valley.

The Court of Appeal also rejected the claim that the City's EIR for the Gate-King project was contrary to CEQA because it failed to discuss "alternative sources" of water in the event that the 41,000 afy transfer becomes "unavailable." Opponents made the claim, relying on the California Supreme Court's decision in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Ranch Cordoba* (2007) 40 Cal.4th 412. The Court of Appeal held that the case did not present a *Vineyard* problem because the City's EIR for the Gate-King project did not limit its assessment of water supplies to a "first stage" of the project, with a promise of "further analysis" for later stages of the project. In other words, the Court of Appeal found there was no *Vineyard* problem because the EIR analyzed the full extent of the Gate-King project's ultimate anticipated water demand and anticipated supplies.

Further, the Court of Appeal upheld the EIR's reliance on water supply projections from DWR, which were derived from DWR's "CalSim-II model." Specifically, the Court found that the EIR adequately summarized the shortcomings of the model and correctly determined that the model, nonetheless, provided the best available data for predicting future availability of water supplies from the SWP. Finally, the Court of Appeal rejected claims that the City's EIR violated CEQA because it did not discuss adequately the potential impact on water supplies, which may result from DWR's compliance with an order issued by the State Water Resources Control Board (SWRCB; Order No. WR2006-306). The Court found that the EIR contained an extensive discussion of the SWRCB Order and disclosed the City's reasons for its conclusion that there was a limited likelihood that measures taken by DWR and others to meet salinity standards would reduce SWP deliveries to CLWA.

***Planning and Conservation League v. Castaic Lake Water Agency*  
(2009) 180 Cal.App.4th 210**

On December 17, 2009, the Court of Appeal, Second District, issued its opinion upholding CLWA's 2004 EIR for the Kern-Castaic 41,000 afy water transfer. (*Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210.)

In 2004, CLWA certified a second EIR ("2004 EIR") for the transfer of 41,000 afy of water from Kern County Water Agency to Castaic Lake Water Agency. The first EIR ("1999 EIR") prepared for the project was certified in 1999 and tiered from the Monterey Agreement EIR prepared by the Central Coast Water Agency. In 2000, the Monterey Agreement EIR was decertified. (*Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892.) Thereafter, the court ordered the 1999 EIR to be decertified because it was tiered off of the decertified Monterey Agreement EIR. (*Friends of the Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373.)

The 2004 EIR acknowledged that the 41,000 afy water transfer was "contractually completed in 1999" and that "[n]o permits and other approvals would be required other than the certification of this EIR." The 2004 EIR also described the underlying history, including the Monterey Agreement and Amendments, the decertification of Central Coast's Monterey Agreement EIR, CLWA's earlier EIR on the 41,000 afy water transfer, and the Monterey Settlement Agreement. As to the 41,000 afy water transfer, the 2004 EIR explained that it did not tier from any other EIR and that it examined the environmental impacts that would occur with or without the change in water allocation criteria implemented as part of the Monterey Amendments. In addition, the 2004 EIR examined three potential water delivery scenarios for the 41,000 afy water transfer: (a) SWP allocation with the Monterey Amendments; (b) SWP allocation without the Monterey Amendments, and with the "agriculture first" reduction provision of article 18(a) in place; and (c) SWP allocation without the Monterey Amendments, but with permanent cutbacks under article 18(b). The 2004 EIR examined the environmental effects of the transfer under all three scenarios.

As to the CLWA service area, the 2004 EIR concluded that the 41,000 afy water transfer will have some significant direct impacts (largely associated with new population growth), and proposed mitigation measures to address these impacts. The 2004 EIR also examined five alternatives to the transfer, including a "no project" alternative, under which CLWA would not obtain either the 41,000 af of water or the contractual rights to it. The remaining alternatives addressed the impact of relying on groundwater or desalinated seawater, and of receiving less or more than 41,000 af of SWP water.

In early 2005, Planning and Conservation League (PCL) and California Water Impact Network (CWIN) initiated litigation under CEQA, challenging the validity of CLWA's 2004 EIR. (*Planning & Conservation League, et al. v. Castaic Lake Water Agency*, Superior Court, Los Angeles County, 2005, No. BS098724; Draft EIS/EIR, **Appendix 4.3** [Chalfant Decision].) In the litigation, petitioners claimed primarily that: (a) DWR was the proper lead agency for the 2004 EIR, and not CLWA; (b) the 2004 EIR constituted improper "piecemeal" review and should have been addressed in DWR's Monterey Plus EIR; (c) the 2004 EIR failed to acknowledge the legal uncertainty surrounding the 41,000 afy water transfer and improperly treated the transfer as a "fait accompli;" (d) the 2004 EIR failed to disclose the potential for DWR's future Monterey Plus EIR to reach different water supply/demand conclusions; and (e) the 2004 failed to analyze the correct "no project" alternative.

The trial court generally held in favor of CLWA, rejecting each of the petitioners' claims. However, the trial court found an "analytical hole" in CLWA's 2004 EIR in that it failed to explain the relevance of the three potential water delivery scenarios analyzed in the EIR, leaving the public unable to meaningfully assess the EIR's analysis of the 41,000 afy water transfer. Petitioners appealed the trial court's decision. CLWA and others also filed cross-appeals.

On appeal, Petitioners first argued that CLWA, in preparing the 2004 EIR, had usurped DWR's duties as the lead agency conducting the environmental review of the Monterey Agreement/Amendments. They contended that DWR must examine the transfer because it is part of the project under review by DWR, namely, the Monterey Agreement and the contractual regime implemented under it. The Court of Appeal rejected these contentions. In doing so, the Court found that "nothing before us suggests that the Monterey Agreement, viewed as a CEQA project, included the Kern-Castaic transfer when the original Monterey Agreement EIR was prepared and certified in 1995." (*Planning and Conservation League*, 180 Cal.App.4th at 235.) The appellate court acknowledge that the Monterey Agreement, as executed in December 1994, "laid the foundation for a new contractual regime between DWR and its contractors," and "freed water provided to agricultural providers for transfer to urban suppliers;" however, the court

noted that the specific contractual developments for the 41,000 afy water transfer culminated in March 1999, shortly before certification of CLWA's 1999 EIR. As a result, the appellate court concluded that the 41,000 afy water transfer "was no more than 'a gleam in a planner's eye' at the time of the Monterey Agreement," therefore, the transfer "fell outside the original Monterey Agreement EIR, and was properly considered in a separate EIR" by CLWA. (*Id.* at 235-236.)

Further, the Court of Appeal found that neither decertification of the 1995 Monterey Agreement EIR, nor implementation of the transfer prior to DWR's new Monterey Plus EIR, brought the transfer within DWR's Monterey Plus EIR or required DWR to be the lead agency. Therefore, relying on *Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal.App.4th 712, the Court of Appeal concluded that:

"Here, as in *Del Mar Terrace*, the Kern-Castaic transfer has significant independent or local utility, in view of its benefits to Castaic's service area and relative autonomy from the Monterey Agreement. . . . [A]lthough the Monterey Agreement, in fact, facilitated the transfer, there is substantial evidence (1) that the transfer could have been implemented under the pre-Monterey Agreement contractual regime, and (2) that the parties intend to continue the transfer, regardless of the outcome of DWR's environmental review of the Monterey Agreement. Moreover, as explained below, Castaic's 2004 EIR adequately reflects the potential environmental effects of the Monterey Agreement, the approval of which is 'outside [Castaic's] powers'. . . , as well as the controversy attached to the transfer arising from DWR's review."

(*Id.* at 237.) The Court of Appeal also concluded that the 2004 EIR did not constitute improper piecemealing under CEQA, because "Castaic could properly certify the 2004 EIR prior to the new Monterey Agreement EIR, provided that the 2004 EIR adequately assesses the environmental impact of the Monterey Agreement, to the extent necessary for a fully informed decision regarding the Kern-Castaic transfer." Additionally, the Court of Appeal rejected the contention that Castaic did not have sufficient expertise to prepare the 2004 EIR, determining that Castaic had the primary responsibility for "carrying out" the transfer; and, therefore, was the proper lead agency. (*Id.* at 238.)

Further, the Court of Appeal rejected the claim that the 2004 EIR "improperly describes the transfer as final," making the project a "fait accompli." (*Id.* at 240-241.) The Court of Appeal cited *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2007) 157 Cal.App.4th 149, 152 (known as *Scope II*) to support its holding that CLWA's 2004 EIR discussed the contractual basis for the transfer and properly evaluated the legal uncertainty of the Monterey Amendments. Although the 2004 EIR did not "expressly state that the outcome of DWR's review is 'unlikely to unwind' the transfer, its discussion unmistakably conveys this conclusion, as it characterizes implementation of the transfer without the Monterey Amendments as the 'worst-case scenario' for the transfer." (*Id.* at 244.) The Court of Appeal also rejected the contention that the 2004 EIR "concealed" the need for DWR's approval of the Monterey Agreement under CEQA, finding that "the transfer is a separate project from the Monterey Agreement." (*Id.* at 245.)

Similarly, the Court of Appeal rejected the claim that the 2004 EIR failed to disclose the potential for DWR's future Monterey Plus EIR to change the transfer's underlying assumptions, including the potential impact of implementing the transfer under the pre-Monterey Agreement contractual regime. The appellate court found that the 2004 EIR properly analyzed "the three scenarios relevant to the transfer,

and evaluate[d] the actual water supplies available under the scenarios." (*Id.* at 245-246.) Importantly, one of these was the potential delivery scenario for the 41,000 afy water transfer without the Monterey Agreement, and with the "agriculture first" reduction provisions of article 18(a). The environmental implications on water supply without the Monterey Agreement were, therefore, adequately analyzed. The Court of Appeal also disagreed with the claim that the 2004 EIR was required to assess the possibility that CLWA would not acquire the rights to the 41,000 acre-feet of water under the pre-Monterey Agreement contractual regime as a "no project" alternative. It found that the EIR's "no project" alternative assuming the absence of the transfer was sufficient because the Monterey Amendment is a *separate* project. (*Id.* at 247-248.)

Finally, the Court of Appeal reversed the trial court's finding that the 2004 EIR contained an "analytical hole." The Court of Appeal concluded that the 2004 EIR is not subject to the challenge on the grounds found by the trial court because the petitioners failed to assert the issue prior to the trial court's ruling and that the claim would have failed even if it had been cognizable. (*Id.* at 250.) In reaching that conclusion, the Court found that the 2004 EIR adequately explained how the delivery scenarios were related to the possible outcomes of DWR's pending Monterey Plus EIR, under the CEQA standard requiring "sufficient information and analysis to allow the public to discern the basis for the agency's action." (*Id.* at 252 [citations omitted].)

On January 14, 2010, the Court of Appeal denied petitioners' petition for rehearing. On January 26, 2010, PCL and CWIN filed a petition for review with the California Supreme Court. (*Planning and Conservation League v. Castaic Lake Water Agency*, California Supreme Court Case No. S179789.) On March 10, 2010, the California Supreme Court (En Banc) denied the petitioners' petition for review and their request to depublish the Court of Appeal decision.

On February 1, 2010, DWR certified the Monterey Plus Final EIR, SCH No. 2003011118 (accessible at DWR's website, [http://www.water.ca.gov/environmentalservices/monterey\\_plus.cfm](http://www.water.ca.gov/environmentalservices/monterey_plus.cfm).) In that Final EIR, on page 5-6, DWR has explained that the 41,000 afy water transfer from Wheeler-Ridge/KCWA to CLWA was properly described in the Monterey Plus Draft EIR. DWR has further explained that the Monterey Plus Draft EIR did not treat the transfer as final, but instead compared two "no project" alternatives, one which included the transfer and one which did not. In this way, the Draft EIR allowed the decision makers and the public to compare the impacts of including or not including the 41,000 afy transfer. Importantly, the Monterey Plus Final EIR does not invalidate any of the water transfers that were part of the Monterey Amendments, including CLWA's 41,000 afy EIR. DWR's Monterey Plus Final EIR is part of the record and available for public review at the website cited above.

### **Summary of Conclusions About Effects of Litigation on Sufficiency of Imported Water Supplies**

The Draft EIS/EIR provided a summary of the effects of litigation on imported water supplies. As stated in the Draft EIS/EIR:

"Based on the above analysis, this EIS/EIR acknowledges that multiple court cases have been filed challenging the sufficiency of imported water supplies in the Santa Clarita Valley. Based on the status of these challenges, their likely outcome, and the fact that no court has yet set aside any of the water transfers or other physical activities approved under any of the challenged documents, it has been determined that substantial evidence exists in this EIS/EIR and record to support the conclusion that there is sufficient water to

serve the proposed Project, the alternatives, as well as anticipated cumulative development in the Santa Clarita Valley." (Draft EIS/EIR, p. 4.3-73.)

Based on the information presented above, it remains appropriate to conclude that there is sufficient water to serve the proposed Project, the alternatives, as well as cumulative development in the Santa Clarita Valley.