TOPICAL RESPONSE 6: CLWA'S 41,000 AFY WATER TRANSFER

Comments have been received on the Draft EIS/EIR claiming that **Section 4.3**, Water Resources, of the Draft EIS/EIR should not rely on the 1999 Kern-Castaic water transfer, a permanent transfer of 41,000 acre-feet (af) of State Water Project (SWP) Table A water to the Castaic Lake Water Agency (CLWA) by the Kern County Water Agency (KCWA) and its member agency, Wheeler Ridge-Maricopa Water Storage District (41,000 acre feet per year (afy) water transfer). The comments generally contend that the Draft EIS/EIR should not include or rely on CLWA's 41,000 afy water transfer because it is not final and is the subject of litigation; and, therefore, is not a reliable source of water supply for the proposed Project.

Specifically, comments state that the 41,000 afy water transfer is "tied inextricably" to the validity of the Monterey Amendments made to the Monterey Agreement and that the Department of Water Resources (DWR) has not yet issued a final EIR addressing the environmental effects of the Monterey Amendments (Monterey Plus EIR). Further, the comments state that if the Monterey Amendments are overturned by a new court challenge upon DWR's certification of the new Monterey Plus EIR, then the 41,000 afy water transfer would be a transfer of agricultural water with Article 18(a) restrictions as specified in the original SWP contracts. Other comments state that there is a reasonable chance the 41,000 afy transfer, which is the subject of litigation, may be overturned and set aside. The comments also assert that these litigation challenges create uncertainty regarding the availability and reliability of water supplies for the Santa Clarita Valley.

Comments also claim that the Draft EIS/EIR, at page 4.3-69, erroneously summarized the Court of Appeal's conclusions concerning the validity of the 41,000 afy water transfer in *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2007) 157 Cal.App.4th 149 (*SCOPE II* decision). According to one comment, the Court of Appeal in the *SCOPE II* decision "merely found reasonable the EIR's speculation that the outcome of the Monterey Agreement litigation was unlikely to unwind the transfer." (Final EIS/EIR, see letter from California Water Impact Network, dated August 24, 2009 (Letter 044).) Further, comments state that neither the U.S. Army Corps of Engineers (Corps) nor California Department of Fish and Game (CDFG) should issue any permits until the new Monterey Plus EIR is completed and certified by DWR. Finally, comments claim that CLWA has not yet certified a valid EIR for the 41,000 afy water transfer.

This topical response addresses the concerns raised above regarding CLWA's 41,000 afy water transfer. The response is based on the information presented in the Draft EIS/EIR, **Section 4.3**, Water Resources, which is summarized below, and other information provided by CLWA and other retail water purveyors in the Santa Clarita Valley. In addition, for further responsive information, please see revised **Section 4.3** of the Final EIS/EIR.

Introductory Information

To fully address these concerns, it is important to provide an overall context for the proposed Project with respect to two issues: the scope of the proposed Project and the December 17, 2009 Court of Appeal decision upholding CLWA's EIR. Each issue is discussed below.

First, the proposed Project is comprised of the applicant's proposed RMDP and SCP project and alternatives to that project. As stated in the Draft EIS/EIR, **Section 4.3**, Water Resources, page 4.3-1, the RMDP component is a conservation, mitigation, and permitting strategy for sensitive biological and other

natural resources that will be relied upon in implementing various infrastructure improvements required by the approved Newhall Ranch Specific Plan. The SCP component is a conservation, mitigation, and permitting strategy for the spineflower that encompasses the Specific Plan area, the Valencia Commerce Center (VCC) planning area, and a portion of the Entrada planning area. Approval of the proposed project (RMDP/SCP) would facilitate development in the Specific Plan, the remainder of the VCC planning area, and a portion of the Entrada planning area.

As to the approved development in the Specific Plan area, the applicant will primarily use local groundwater, which has been historically used on-site for agricultural operations, for urban/municipal potable uses, and recycled water from local water reclamation plants to meet the Specific Plan's non-potable water uses (*e.g.*, irrigation). At build-out of the Specific Plan, a small percentage of the Specific Plan's water supply would come from water under contract with the Nickel Family, LLC in Kern County (Nickel water). Because these two local water sources (groundwater and recycled water), plus the Nickel water, meet the water needs of the Specific Plan, no potable water is needed for the Specific Plan from the existing or planned imported SWP supplies of CLWA. This is significant because the vast majority of the water supplies needed to serve the proposed Project are a result of the Newhall Ranch Specific Plan, which would be facilitated by the proposed SCP and RMDP, and the Specific Plan does not rely on existing or planned imported SWP supplies from CLWA; therefore, the 41,000 afy water transfer does not directly apply to the Specific Plan because it is not needed to serve the Specific Plan site.

However, as to the approved development in the VCC planning area, and the proposed development in a portion of the Entrada area, the applicant (The Newhall Land and Farming Company) would rely on water supplies through a combination of SWP water delivered through CLWA and groundwater resources from the local groundwater basin to meet the potable water demands of both VCC and Entrada; and, for non-potable supplies, the applicant would rely on recycled water from local water reclamation plants (WRPs). For that reason, the Draft EIS/EIR, **Section 4.3**, Water Resources, provided an extensive discussion of the availability and reliability of CLWA's SWP supplies, including the 41,000 afy water transfer.

Second, since public circulation of the Draft EIS/EIR in April 2009, the pending state court litigation over the adequacy of CLWA's 2004 EIR on the 41,000 afy water transfer was resolved in favor of CLWA. On December 17, 2009, the Court of Appeal, Second District, reversed an earlier trial court decision, and determined CLWA's new EIR adequately analyzed all of the 41,000 afy water transfer's potential significant environmental impacts and that the document fully complied with the California Environmental Quality Act (CEQA). (*Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, rehearing denied on January 14, 2010.) Therefore, the 41,000 afy water transfer is now supported by a certified Final EIR that has been upheld in a published appellate court decision. On January 14, 2010, the Court of Appeal denied the appellants' petition for a rehearing in the case. On January 26, 2010, PCL and CWIN filed a petition for review with the California Supreme Court. 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.

Draft EIS/EIR's Assessment of SWP Supplies (Including CLWA's 41,000 afy Water Transfer)

As stated in the Draft EIS/EIR, page 4.3-1, the Newhall Ranch Specific Plan does not rely on imported SWP supplies from CLWA; instead, the Specific Plan is approved to use primarily local groundwater and recycled water from local water reclamation plants to meet that project's potable and non-potable water demand. The proposed Project (RMDP/SCP) also would facilitate development of the remainder of the

VCC planning area, and a portion of the Entrada planning area. These two planning areas would rely on water supplies through a combination of SWP water delivered through CLWA and groundwater resources from the local groundwater basin to meet the potable water demands of both VCC and Entrada. For that reason, the Draft EIS/EIR evaluated the availability and reliability of CLWA's SWP supplies, including the 41,000 afy water transfer. (Draft EIS/EIR, **Subsection 4.3.1**.)

In conducting that evaluation, the Draft EIS/EIR, **Subsection 4.3.3**, Regulatory Setting, at pages 4.3-10-4.3-19, provided an overview of the regulatory setting and existing conditions affecting the water agencies within the Santa Clarita Valley. In addition, the Draft EIS/EIR, **Subsection 4.3.4.2**, State Water Project and Associated Facilities, at pages 4.3-19-4.3-29, provided an overview of the SWP and its associated facilities, operations, deliveries, and constraints. The background information provided below further elaborates on the SWP system.

SWP Overview. From 1951 through 1959, the California Legislature authorized and funded construction of the SWP facilities, which are managed and operated by DWR. SWP water supplies are used for both urban and agricultural uses throughout California.[1] The SWP facilities consist of a complex system of dams, reservoirs, power plants, pumping plants, canals and aqueducts to deliver water throughout California.

At the inception of the SWP, DWR entered into individual water supply contracts with agricultural and urban water suppliers (SWP contractors). The contracts were the method used to fund construction and operation of the SWP facilities for the delivery of water to the SWP contractors. Each such contract sets forth the annual amount of water to which a SWP contractor is contractually entitled, which is stated in "Table A" to the contract (Table A Amount or allocation). However, the amount of SWP water actually available for delivery in any year may be an amount *less* than the contractor's maximum Table A Amount due to hydrology, precipitation, operational constraints, environmental constraints, and a number of other factors. The Table A Amount was previously referred to as "SWP entitlement."[2]

There are currently 29 SWP contractors that have entered into water supply contracts with DWR. A SWP contractor may annually request that DWR deliver water in the following year in any amount up to the SWP contractor's Table A Amount. The SWP contracts provide that in a year when DWR is unable to deliver the full amount of contractor requests, deliveries to contractors are reduced so that total deliveries equal total available supply for that year. CLWA's annual contractual Table A Amount is 95,200 afy. In the fall of each year, CLWA, along with all the other SWP contractors, submits a request to DWR for an allocation for the following year. DWR utilizes the factors noted above to "allocate" water among all contractors who have made requests, so that each contractor receives a percentage of its Table A Amount.

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1 Urban water uses also are referred to as "municipal and industrial," or "M&I," uses.

2 As stated by the Court of Appeal in *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715, SWP Table A "entitlements" are not equivalent to actual deliveries of water because the amount of SWP water actually available for delivery in any given year may be an amount *less* than the Table A Amount. For example, the amount of SWP water actually available for delivery in any given year may be reduced due to several factors, including drought periods, increased SWP operational constraints, environmental water requirements/constraints (*e.g.*, the listing of several fish species as endangered or threatened or the protection of listed fish species due to reduced pumping, etc.), water quality concerns, and other factors.

For example, if the SWP allocation is 40 percent of the Table A Amounts, each contractor would be entitled to 40 percent of its Table A Amount. If the allocation is 100 percent (as in 2006), each SWP contractor would be entitled to the entire contractual Table A Amount.[3] In 2007, DWR announced that its final 2007 water allocation to the SWP Contractors would be reduced to 60 percent.[4] DWR also advised SWP Contractors to begin implementation of any additional water conservation measures available to them because, for 2007, the Sacramento region is listed as a "dry" water year, and the San Joaquin region is listed as a "critically dry" water year. (*Id*.) Because of these conditions, DWR further advised that water allocations for 2008 could be low if a below average water year materializes. (*Id*.)

Available supply can and does vary significantly from year-to-year, and CLWA's annual allocation is based on its total contractual amount (95,200 acre-feet). For example, in 2003, DWR approved deliveries of Table A Amount allocations, totaling 3.71 million acre-feet (or 90 percent of the 4.13 million acre-foot Table A Amount).[5] In 2002, DWR approved deliveries of Table A Amounts, totaling 2.89 million acre-feet (70 percent).[6] In 2001, DWR approved deliveries of Table A Amounts, totaling 1.61 million acre-feet (39 percent),[7] and in 2000, DWR approved deliveries of Table A Amounts, totaling 3.42 million acre-feet (90 percent).[8]

In addition, to clarify, CLWA's 41,000 afy water transfer amount is not accounted for separately from CLWA's total annual allocation as some comments have suggested. Since 2000, DWR has included the 41,000 afy in the Table A Amount that is allocated to CLWA (based on its total annual allocation of 95,200 acre-feet). In other words, DWR has *delivered* SWP supply, including a percentage of the 41,000 afy water transfer, to the CLWA service area since calendar year 2000.

CLWA's 41,000 AFY Water Transfer Acquisition. By way of background, in 1999, CLWA purchased 41,000 afy of SWP Table A Amount from Kern County Water Agency, acting on behalf of its member district, Wheeler Ridge-Maricopa Water Storage District. This purchase brought CLWA's total annual SWP Table A Amount to 95,200 afy.

The 41,000 afy water transfer was memorialized in a DWR/CLWA water supply contract amendment (Amendment No. 18), which reflected the *increase* in CLWA's annual allocation of SWP Table A Amounts from 54,200 afy to 95,200 afy. This increase reflects the permanent allocation of the 41,000 afy to CLWA (95,200 - 54,200 = 41,000).[9] As reported in the Draft EIS/EIR, the 41,000 afy water transfer

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[3] DWR "News for Immediate Release," dated April 18, 2006, which is found in **Appendix F4.3** of this Final EIS/EIR.

[4] DWR Notice to SWP Contractors, dated May 23, 2007, which is found in **Appendix F4.3** of this Final EIS/EIR.

[5] DWR Bulletin 132-04, Management of the California State Water Project, (September 2005), which is provided in **Appendix 4.3** of the Draft EIS/EIR.

[6] DWR Bulletin 132-03, December 2004 (**Appendix F4.3** of this Final EIS/EIR).

[7] DWR Bulletin 132-02, January 2004 (**Appendix F4.3** of this Final EIS/EIR).

[8] DWR Bulletin 132-01, December 2002 (**Appendix F4.3** of this Final EIS/EIR).

[9] The "Amendment No. 18 to the Water Supply Contract between the State of California, Department of Water Resources and Castaic Lake Water Agency," dated March 31, 1999, is found in **Appendix 4.3** of the Draft EIS/EIR.

has been completed, CLWA paid approximately $47 million for the additional Table A Amount, the monies have been delivered, the sales price has been financed through CLWA by tax-exempt bonds, and DWR increased CLWA's SWP Table A allocation, starting in calendar year 2000, because it was a permanent transfer/reallocation of SWP Table A water between SWP contractors.

The 41,000 afy water transfer was approved by DWR on March 31, 1999, in the fully-executed amendment to CLWA's water supply contract (Amendment No. 18). As stated by DWR in Bulletin 132-00, dated December 2001, at page 94, Amendment No. 18 "provided for the *permanent* transfer of 41,000 afy of SWP agricultural entitlement by CLWA from KCWA, . . . The transfer is consistent with implementation of the Monterey Amendment, which provides for the *permanent* transfer of up to 130,000 afy of agricultural entitlement to urban agencies."[10] (Emphasis added.) As discussed above, since 2000, DWR has included the 41,000 afy in all allocations made to CLWA, based on CLWA's total annual Table A allocation of 95,200 acre-feet.[11]

Additionally, Bulletin 132-04 (September 2005), at page 120, DWR identified all eight Table A transfers, including the 41,000 afy water transfer, as "permanent" transfers under the Monterey Amendments. DWR has further confirmed that the parties to the Monterey Settlement Agreement "recognize that the Kern-Castaic Lake Water Agency 41,000 afy Table A transfer is subject to pending litigation and agree that jurisdiction with respect to that litigation remain[s] in the Los Angeles County Superior Court and that nothing in the [Monterey Settlement Agreement] is intended to predispose the remedies or other actions that may occur in the pending litigation," and in that same Bulletin, at page 120, DWR pointed out that the potential environmental effects of all eight "permanent Table A transfers" under the Monterey Amendments, including the 41,000 afy water transfer, will be analyzed in DWR's new Monterey EIR.[12] (The Monterey Amendments and related Monterey Settlement Agreement are discussed in further detail below.) Therefore, the 41,000 afy water transfer is a permanent transfer of SWP Table A water.

Monterey Amendments. In 1994, disputes arose among DWR and many agricultural and urban SWP contractors regarding the availability and distribution of water through SWP facilities. To avoid potential litigation, those parties met in Monterey, California, to attempt to resolve their ongoing disputes and, after negotiations, they agreed to a statement of principles, which became known as the "Monterey Agreement." The Monterey Agreement, signed by DWR and many of the agricultural and urban SWP contractors, established principles to be incorporated into contract amendments (the "Monterey Amendments"), which were primarily intended to increase the reliability of all SWP water supplies, stabilize SWP's rate structure, and increase water management flexibility for all SWP contractors. To date, all but two SWP contractors have accepted the Monterey Amendments. The Monterey Amendments included, among other benefits, water transfers among SWP contractors. Specifically, under the Monterey Amendments, SWP contractors may transfer unneeded Table A water to other contractors on a permanent

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[10] DWR Bulletin 132-00, dated December 2001 (**Appendix F4.3** of this Final EIS/EIR).

[11] Please see **Appendix F4.3** of this Final EIS/EIR for DWR's "Notices to State Water Project Contractors" informing them of increases or decreases in approved Table A Amounts from 2000 to 2006. In the 2006 Notice, CLWA's Table A allocation is shown as 95,200 afy, and in all of the prior Notices, CLWA's Table A allocation is shown in two places, once under the "San Joaquin Valley" heading, which shows the allocation at 12,700 afy, and again under the "Southern California" heading, which shows the allocation at 82,500 afy, totaling 95,200 afy.

[12] DWR Bulletin 132-04 (September 2005), p. 120 (**Appendix 4.3** of the Draft EIS/EIR).

basis, which provides financial relief from SWP charges for the seller and additional water supplies for the buyer. The Monterey Amendments have facilitated the transfer of 130,000 afy of SWP Table A Amounts from agricultural to urban SWP contractors.[13] Many such transfers were implemented soon after the Monterey Amendments became effective.

Environmental Review and Subsequent Litigation on the Water Transfers

The following discussion demonstrates the reliability and independent validity of CLWA's 41,000 afy water transfer.

Monterey Amendments and Subsequent Litigation

***Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892, 908, 916.** In 1995, the Central Coast Water Authority (CCWA), one of the 29 SWP contractors, certified an EIR under CEQA for the implementation of the Monterey Agreement. Over the following two years, 27 of the 29 SWP contractors, including CLWA and Kern County Water Agency, amended their SWP contracts to conform to the Monterey Agreement. These amendments are sometimes called "Monterey Amendments." Article 53 of CLWA's amended SWP contract reflects a provision of the Monterey Agreement permitting KCWA and other agencies to participate in, and approve, permanent water transfers totaling 130,000 acre-feet per year. DWR and the SWP contractors who had executed the Monterey Agreement began implementing various amendment provisions, including the completion of permanent transfers of Table A Amounts among agricultural and urban SWP contractors. CLWA's 41,000 afy water transfer was one of eight water transfers effectuated by the Monterey Agreement.

The adequacy of CCWA's EIR was challenged in the Sacramento County Superior Court in 1995. The Superior Court held that DWR should have prepared the EIR, rather than CCWA, but that this was a harmless error since the EIR was adequate. (Super. Ct. Sacramento County, 1995, No. 95CS03216.)

Petitioners appealed the judgment and, among other things, sought a writ to stay implementation of the Monterey Agreement during the appeal. The appellate court reversed the trial court's decision. It agreed with the trial court that DWR should have been the lead agency under CEQA, but found that the error was not harmless because the EIR's analysis of alternatives was insufficient and thus, the EIR inadequate. (*Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892, 908, 916.) The appellate court then remanded the case to the Sacramento County trial court with directions to issue a writ of mandate vacating certification of the EIR and retaining jurisdiction until DWR, as lead agency, prepared and certified an EIR in accordance with CEQA. (*Id.* at p. 926.) The appellate court declined to stay implementation of the Monterey amendments, and directed the trial court to consider whether the Monterey Agreement could continue to be implemented while the new EIR was being prepared. (*Id.*)

[13] Neither the Monterey Agreement nor the Monterey Amendments created a new right to carry out permanent transfers of SWP Table A Amounts. That right had existed since the early 1960s through Article 41 of the SWP contracts. The Monterey Amendments simply provided a vehicle through which the SWP agricultural contractors promised that they would support such Article 41 transfers up to 130,000 acre feet. The Monterey Amendments also did not limit the SWP contractors' rights to implement permanent transfers under existing law other than those described in the Monterey Amendments. (See, *e.g.*, Wat. Code §§ 382, 383.)

Although the appellate court decision invalidated certification of the EIR, it did *not* set aside or invalidate the Monterey Agreement or enjoin the water transfers effected thereunder. To date, no court orders have ever been issued to "stay" further implementation of the Monterey Agreement.

The Monterey Settlement Agreement. In March 2001, before the Sacramento County trial court acted on remand, the parties to *Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892 (the *PCL* litigation) entered into settlement negotiations. In May 2003, DWR, Central Coast Water Authority, Planning and Conservation League, certain SWP contractors (including CLWA) and other entities entered into a final settlement of the *PCL* litigation (the "Monterey Settlement Agreement").[14] Under the Monterey Settlement Agreement, the parties expressly agreed that the SWP would continue to be administered and operated in accordance with both the Monterey Amendments and terms of the Monterey Settlement Agreement:

> "Pending the Superior Court's issuance of an order discharging the writ of mandate in the underlying litigation, the Parties will jointly request that the Superior Court enter an order approving this Settlement Agreement, and an order, pursuant to California Public Resources Code Section 21168.9, authorizing on an interim basis the administration and operation of the SWP . . . in accordance with the Monterey Amendments, [and] the terms of this Settlement Agreement. . . ." (See, Final EIS/EIR, **Appendix F4.3** [Monterey Settlement Agreement, p. 9].)

The Monterey Settlement Agreement did not set aside or invalidate the Monterey Agreement, or any of the water transfers effectuated under the Monterey Amendments. On June 6, 2003, the Sacramento County Superior Court issued the requested order, pursuant to CEQA (Public Resources Code section 21168.9), approving both the Monterey Settlement Agreement and the administration and operation of the SWP pursuant to the Monterey Amendments and the terms of the approved agreement.[15]

Section III(C)(4) of the Monterey Settlement Agreement required DWR to carry-out an "[a]nalysis of the potential environmental effects relating to" eight water transfers under the Monterey Amendments, seven so-called "Attachment E Transfers" and the 41,000 afy water transfer, also referred to in the agreement as the "Kern-Castaic Transfer." Further, the Monterey Settlement Agreement obligated DWR to evaluate all eight of the water transfers in the same manner, even though seven of them, defined in the agreement as the "Attachment E Transfers," were no longer subject to legal challenge. (See, Final EIS/EIR, **Appendix F4.3** [Monterey Settlement Agreement, Sections III(C)(4), III(D), III(E), pp. 11-12].) The purpose of the DWR review of the eight transfers was to examine the environmental effects of all of the transfers, in addition to other factors included within the Monterey Amendments; it was not to determine whether to continue the transfers, because seven of them were final and beyond CEQA re-consideration, and the eighth, the 41,000 afy transfer, was also a permanent transfer, although it was still subject to litigation.

Section III(D) of the Monterey Settlement Agreement identified the Attachment E Transfers as "final" and affirmed that none of the parties could challenge the effectiveness or validity of the Attachment E Transfers, which had been litigated in other forums or had become final without challenge by the expiration of applicable statutes of limitations. (See, Final EIS/EIR, **Appendix F4.3** [Monterey

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[14] The Monterey Settlement Agreement is found in **Appendix F4.3** of this Final EIS/EIR.

[15] The Sacramento County trial court's order is found in **Appendix F4.3** of this Final EIS/EIR.

Settlement Agreement, Section III(D), p. 12].) The 41,000 afy water transfer was not included among the Attachment E transfers, only because the 41,000 afy water transfer was then under the jurisdiction of the Los Angeles County Superior Court and that litigation was ongoing.

Section III(E) of the Monterey Settlement Agreement protected the jurisdiction of the Los Angeles County Superior Court in connection with the then-pending CEQA litigation challenging the validity of CLWA's EIR on the 41,000 afy water transfer. Section III(E) states, in part: "[n]othing in this Settlement Agreement is intended to predispose the remedies or other actions that may occur in that pending litigation." As set forth below, Section III(E) provides:

> "Acknowledgement and Agreement Regarding Kern-Castaic Transfer [the 41,000 afy water transfer]. With respect to Section III(C)(4)(b) regarding the Kern-Castaic Transfer, the Parties recognize that such water transfer is subject to pending litigation in the Los Angeles County Superior Court following remand from the Second District Court of Appeal. (See *Friends of the Santa Clara River v. Castaic Lake Water Agency*, 95 Cal.App.4th 1373, 116 Cal.Rptr.2d 54 (2002); review denied April 17, 2002.) The Parties agree that jurisdiction with respect to that litigation 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." (Final EIS/EIR, **Appendix F4.3** [Monterey Settlement Agreement, Section III(E), p. 12].)

The Monterey Settlement Agreement does not preclude CLWA, a signatory to that agreement, from using the 41,000 afy water transfer as part of its overall SWP Table A supplies for planning purposes. Instead, it clearly recognized that the transfer was under the jurisdiction of the Los Angeles County Superior Court.

In addition, the Monterey Settlement Agreement allows implementation of the Monterey Amendments and validates the water transfers that already had taken place by the time that agreement took effect. The fact that the 41,000 afy water transfer was not included on the list of "final" transfers in Attachment E to that agreement did not make it a temporary transfer. As explained above, it was only excluded because it was the subject of ongoing litigation. The 41,000 afy water transfer was both a permanent and final reallocation of SWP Table A Amounts from one SWP contractor to another (CLWA), just as were the other seven transfers.

CLWA Environmental Review of 41,000 afy Water Transfer and Litigation

Litigation Related to CLWA's 1999 "Tiered" EIR. In March 1999, CLWA entered into an agreement with Wheeler-Ridge, a water district, which receives SWP water from KCWA, for the permanent entitlement and transfer of the 41,000 afy water transfer from Wheeler Ridge to CLWA. DWR and KCWA approved CLWA's 41,000 afy water transfer.

Prior to completion of the 41,000 afy water transfer, the proposed transfer was the subject of two separate environmental reviews. In the first environmental review, KCWA prepared an EIR, dated June 1998, which evaluated the environmental consequences of the proposed 41,000 afy water transfer within KCWA's service area. The 1998 EIR was certified and was not challenged in court. As a result, that EIR is conclusively presumed to comply with CEQA (Pub. Res. Code § 21167.2).

In the second environmental review, CLWA prepared a separate EIR, which assessed the environmental effects of CLWA's acquisition of the 41,000 afy water transfer within its service area. CLWA's EIR tiered from the previously certified Monterey Agreement EIR, discussed above. The CLWA's Board of Directors certified CLWA's EIR in March 1999.

In April 1999, an organization called Friends of the Santa Clara River brought a lawsuit challenging the adequacy of the EIR under CEQA (*Friends of the Santa Clara River, et al. v. Castaic Lake Water Agency, et al*., Superior Court, Los Angeles County, 1999, No. BS 056954). The trial court ruled in favor of CLWA and upheld the adequacy of the EIR under CEQA. Petitioner appealed.

During the pendency of the appeal, the aforementioned *PCL* decision was issued, which, ordered the Monterey Agreement EIR decertified. (See *Planning and Conservation League, supra,* 83 Cal.App.4th 892.) As a result, the appellate court in *Friends of the Santa Clara River v. Castaic Lake Water Agency* reversed the trial court and concluded that CLWA's EIR on the 41,000 afy water transfer must be decertified because it had been "tiered" from the now-invalid Monterey Agreement EIR. The Court of Appeal expressly stated that the only reason CLWA's EIR had to be decertified was because it was tiered from the Monterey Agreement EIR: "We have examined all of appellant's other contentions and find them to be *without merit*. If the PCL/tiering problem had not arisen, we would have affirmed the judgment." (*Friends of the Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373, 1387 (*Friends I*), emphasis in original.)[16]

Like the Court in the *PCL* decision, the *Friends I* court refused to issue any ruling affecting CLWA's ability to continue to rely on the 41,000 afy water transfer, leaving it to the trial court's discretion on remand whether or not to enjoin CLWA's use of the water pending its completion of a new EIR. (*Id.* at p. 1388.)

Upon remand, the trial court rejected the request from appellant Friends of the Santa Clara River to enjoin CLWA's use of, and reliance upon, the 41,000 afy water transfer. Specifically, the trial court authorized CLWA to utilize any of the 41,000 afy subject to the following order:

> "Respondent [CLWA] will not be prohibited from using the water to which it is entitled, but Petitioner may renew its application for such prohibition based upon evidence of the actual use of such additional water for purposes it considers improper."[17]

Rather than renewing their request to prohibit the use of the 41,000 afy water transfer, Friends of the Santa Clara River appealed the trial court's judgment and, again, requested that the use of the 41,000 afy water transfer be prohibited. In this second appeal, referred to herein as *Friends II*, the Second District Court of Appeal affirmed the trial court's ruling allowing CLWA to utilize and rely on the 41,000 afy

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[16] *Friends I* is the first appeal from the trial court's decision in *Friends of the Santa Clara River, et al. v. Castaic Lake Water Agency, et al.* (Superior Court, Los Angeles County, 1999, No. BS 056954). It provides useful factual background information concerning the Monterey Amendments, the Monterey Amendments EIR, water transfers authorized by the Monterey Amendments, the local agency environmental review of the 41,000 afy water transfer, CLWA's acquisition of the 41,000 afy, and the relationship with the *PCL* decision.

[17] For the trial court's decision, please refer to **Appendix F4.3**, p. 2 ¶6, of this Final EIS/EIR.

water transfer pending completion of its new EIR.[18] It also clarified that CLWA's use of that water is not legally bound to either the *PCL* litigation or to DWR's new Monterey Plus EIR. (See Final EIS/EIR, **Appendix F4.3** [*Friends II*, p. 17].)

CLWA's New 2004 EIR. In December 2004, CLWA certified a second EIR for the 41,000 afy water transfer, adopted a mitigation program and statement of overriding considerations, and approved the transfer. The CLWA 2004 EIR analyzed the environmental implications of the 41,000 afy water transfer without tiering from CCWA's prior Monterey Agreement EIR. Petitioners did not file a substantive challenge to the CLWA 2004 EIR, and the trial court dismissed the prior action, with prejudice, on February 1, 2005.

Accordingly, neither the *PCL* litigation, the Monterey Settlement Agreement, nor the *Friends* litigation changed the status of the 41,000 afy water transfer from a permanent, final allocation of SWP Table A water to a "temporary or non-final" water transfer. To the contrary, the Monterey Settlement Agreement specifically provides that the SWP will continue to be administered and operated in accordance with both the Monterey Amendments and the terms of the Settlement Agreement, and the various *Friends* decisions confirm that CLWA may continue to use the 41,000 afy to which it is entitled pending CLWA's compliance with CEQA.

Litigation Related to CLWA's 2004 EIR. *Planning and Conservation League, et al. v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, the latest court challenge to the CLWA 41,000 afy water transfer, reaffirms previous decisions regarding the validity and independence of the transfer. It also holds that CLWA's 2004 EIR adequately analyzed 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) of the Monterey Agreement.

CLWA's 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 afy of water

[18] For the Court of Appeal's unpublished opinion, please refer to **Appendix F4.3** of this Final EIS/EIR (*Friends of the Santa Clara River v. Castaic Lake Water Agency*, 2003 WL 22839353,[*Friends II*]).

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 afy of SWP water.

In early 2005, PCL and California Water Impact Network (CWIN) initiated litigation under CEQA challenging the validity of CLWA's 2004 EIR. (*Planning and 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. (*Id.*) 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, et al. v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 235.) The appellate court acknowledged 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 pp. 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 p. 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 p. 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 pp. 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 p. 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 p. 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 pp. 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 pp. 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 p. 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 p. 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.) 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 incorporated by reference as part of the record and available for public review at the website cited above.

***Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2007) 157 Cal. App. 4th 149 (*SCOPE II*).** Commentors questioned the Draft EIS/EIR's summary of the *SCOPE II* decision. *SCOPE II* addresses the 41,000 afy Kern-Castaic water transfer, although CLWA was not the lead agency for the challenged EIR in that case. The EIR at issue in *SCOPE II* identified and analyzed the Kern-Castaic transfer as part of the permanent supply for a development project. The court held, among other things, that the challenged EIR's analysis of the 41,000 afy Kern-Castaic water transfer satisfied the third prong of the test set forth in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, which requires future water supplies identified and analyzed in an EIR to "bear a likelihood of actually proving available." (*SCOPE II*, *supra*, 157 Cal. App. 4th at p. 159, citing *Vineyard*, 40 Cal.4th at p. 432.) The EIR's conclusion was supported by the statement that, though there was some uncertainty surrounding the Kern-Castaic transfer due to the Monterey Agreement litigation, an adverse outcome in that litigation would not be likely to "unwind the transfer agreement" because the transfer is "intended to be permanent" and "can be valid even without the Monterey Agreement." (*Id.* at p. 160.) The Court rejected petitioner's argument that the Kern-Castaic transfer is not final and permanent, stating that there is "no evidence that the parties to the Monterey Settlement Agreement consider the transfer as anything other than permanent now that the revised EIR for the transfer has been certified. The Monterey Settlement Agreement did not make the Kern-Castaic transfer temporary." (*Id.*)

As with the EIR in *SCOPE II*, the Draft EIS/EIR identifies and analyzes the 41,000 afy Kern-Castaic transfer as a permanent source of water for the entire Project and sets forth a reasoned analysis to support the conclusion that the water transfer is both an available and reliable source of water for the Project. (Draft EIS/EIR, **Section 4.3**.)