NO. C078249

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

CENTRAL DELTA WATER AGENCY, et al.,
Petitioners and Appellants,

v.

DEPARTMENT OF WATER RESOURCES, et al.,
Respondents and Appellees

On Appeal from the Superior Court of Sacramento
The Hon. Timothy M. Frawley, Presiding (Case No. 34-2010-80000561)

APPELLANTS' AMENDED OPENING BRIEF

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Attorneys for Appellants Central Delta Water Agency, South Delta Water Agency, Center for Biological Diversity, California Water Information Network, California Sportfishing Protection Alliance, Carolee Krieger, and James Crenshaw

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Third **APPELLATE DISTRICT, DIVISION**	Court of Appeal Case Number: C078249
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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Central Delta Water Agency

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
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☐ Continued on attachment 2.

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Date: September 30, 2015

Adam Keats
(TYPE OR PRINT NAME)

▶ /s/ Adam Keats
(SIGNATURE OF PARTY OR ATTORNEY)

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1. This form is being submitted on behalf of the following party (*name*): South Delta Water Agency

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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1. This form is being submitted on behalf of the following party (*name*): Center for Biological Diversity

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1. This form is being submitted on behalf of the following party (*name*): California Water Information Network

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1. This form is being submitted on behalf of the following party (*name*): James Crenshaw

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1. This form is being submitted on behalf of the following party (*name*): Carolee Krieger

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(SIGNATURE OF PARTY OR ATTORNEY)

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INTRODUCTION[1]

In 1995, a handful of southern California water agencies and the California Department of Water Resources ("DWR") met in secret and negotiated the Monterey Agreement, a plan to amend the long-term contracts for the operation of California's State Water Project ("SWP"), one of the largest public works projects in the country and an essential component of California's water delivery infrastructure. The Monterey Agreement, and the Monterey Amendments, as the contract amendments became known, provided for a wide-ranging alteration of the relationship between the State of California, the owner and operator of the SWP, and the water contractors (the agencies that contract with DWR for SWP water to deliver to agricultural, residential, and commercial customers).

The Monterey Amendments eliminated critical checks and balances that had been built into the SWP system when it was first proposed and presented to the citizens of California for their approval, by ballot initiative, in the early 1960s. These checks and balances

[1] Appellants' Opening Brief was rejected, along with Appellants' Appendix, due to the pagination of Appellants' Appendix not complying to this Court's rule regarding electronically-filed documents. This Amended Opening Brief corrects the citations to conform to the corrected page numbers of Appellants' Appendix.

included provisions that protected residential and commercial customers (i.e., urban contractors) in times of drought while providing agricultural contractors with favored access to cheaper water in times of plenty. The effects of these changes have been wide-ranging, from major shifts in agricultural production like the rapid and unsustainable growth of nut tree farms in the southern San Joaquin Valley to the approval of sprawl development projects lacking assurances of long-term water supplies.

The Monterey Amendments also accomplished the transfer of the Kern Water Bank—one of the largest water banking facilities in the world—from public control through DWR to private control through the Kern Water Bank Authority, a public-private joint powers authority that is majority-controlled by appellant Paramount Farming, a major international agribusiness company largely responsible for the growth in nut tree crops in the San Joaquin Valley.

Despite having first been adopted almost two decades ago, the Monterey Amendments are not a done deal. They have always been subject to review under the California Environmental Quality Act ("CEQA"). The first attempt at CEQA review, completed in 1995, was rejected by the courts in 2003. The second attempt, initiated in

2003 and completed in 2010, is the subject of this action by Plaintiffs and Appellants Central Delta Water Agency, *et al*. ("Plaintiffs"). As a result of this action, DWR is currently undertaking a third attempt, focusing on one portion of the Monterey Amendments regarding the transfer, use, and operation of the Kern Water Bank ("KWB").

This action challenges the Monterey Amendments and presents three separate grounds for reversal of the Superior Court's Judgment. First, DWR's 2010 environmental review of the Amendments violated CEQA because DWR failed to make a decision on whether to approve or disapprove the Monterey Amendments (or "Project"). In an apparent effort to immunize its 1995 authorization of the contract amendments from judicial scrutiny, DWR attempted to retrospectively analyze the Monterey Amendments' environmental impacts, refusing to make new project approvals after completing its environmental review in 2010. But the prior approvals had been voided by a 2003 writ and order issued as a result of a CEQA challenge. DWR was required under CEQA to not only perform proper environmental review of the Amendments, but also to either authorize or reject them on a final basis at the conclusion of that review. DWR's failure to do this violated CEQA, and this Court should remand the matter with

directions to DWR to either properly approve or properly reject the project.

Second, the 2010 Environmental Impact Report ("EIR") violated CEQA because DWR failed to adequately analyze the no-project alternative by failing to take account of how the provisions of the SWP contracts would govern the allocation of surplus water in the absence of the Monterey Amendments.

Third, this appeal challenges the Superior Court's determination that Plaintiffs' reverse-validation claim was not timely. Altering the SWP contracts and giving away the KWB violated numerous California constitutional and statutory provisions, including prohibitions on the giving away of public resources, changing the terms of public bond agreements, and selling or conveying any component of SWP infrastructure. If DWR's actions in connection with the 2010 EIR are construed as a decision to adopt the Monterey Amendments, that approval is subject to a validation challenge. And if it is construed instead, as DWR contends it should be, as a decision to "continue" the Monterey Amendments rather than to authorize them, it is still challengeable under validation law as a reenactment of the prior authorizations. In either case, Plaintiffs' reverse-validation

action was timely as it was filed at the earliest possible opportunity after the final authorization (or reenactment) of the contract amendments by DWR.

FACTUAL AND PROCEDURAL BACKGROUND

The history and facts relevant to this action, including most major events preceding the 2010 filing, are described in detail by the Superior Court in its March 5, 2014, Ruling on Submitted Matter ("CEQA Ruling") (AA33:8222-50[2]) and its January 31, 2013, Final Statement of Decision re Trial of Time-Bar Affirmative Defenses to Second and Third Causes of Action ("Time-Bar Decision"). (AA30:7626-65.) This Court previously summarized much of the earlier historical background in *Planning and Conservation League v. Department of Water Resources*, (2000) 83 Cal.App.4th 892 ("*PCL v. DWR*"). An abbreviated summary of facts is presented here, with more detailed analyses in the arguments below.

On October 26, 1995, the Central Coast Water Agency, a local water agency that had subcontracted for the delivery of water from the SWP, completed and certified as lead agency the final EIR for the

[2] Citations to documents located in Appellants' Appendix are described as (AA[Vol. #]:[Bate stamp #]). Citations to documents located in the Administrative Record are described as ([Vol. #]:[Page #]).

Monterey Agreement project ("1995 EIR"). (529:253898-99.) On December 13, 1995, DWR certified the same EIR as a responsible agency and approved the Monterey Agreement project ("1995 Notice of Determination"). (529:253900-01.) DWR issued findings and mitigation measures on the same date ("1995 Findings"). (529:253949-61.)

Two citizen groups and one water agency challenged the 1995 EIR and approval of the Monterey Agreement project, raising CEQA and reverse-validation claims. (*PCL v. DWR*, 83 Cal.App.4th at 903.) Although unsuccessful before the trial court[3], the petitioners were successful on appeal when this Court found the 1995 EIR to have been prepared by the wrong lead agency and "defective in at least one critical respect," the failure of the EIR to analyze the impacts of one of the contract amendments, Article 18(b). (*Id*. at 907.) The matter was remanded to the trial court with orders to "vacate the summary adjudication order on the fifth cause of action, issue a writ of mandate vacating the certification of the EIR… [and to] consider such orders it deems appropriate under Public Resources Code section 21168.9,

[3] The trial court in the *PCL v. DWR* matter is referred herein as the "*PCL* trial court" or the "trial court." The trial court that heard and decided the current matter on appeal (The Hon. Timothy M. Frawley, Sacramento Superior Court) is referred herein as the "Superior Court."

subdivision (a), consistent with the views expressed in this opinion…" (*Id*. at 926.) This Court declined to stay implementation of the contract amendments, ruling that the trial court was the more appropriate forum to consider and rule upon such requests. (*Id*.)

The parties then engaged in settlement negotiations, resulting in an agreement signed on May 5, 2003 ("Settlement Agreement"). (115:58847.) The Settlement Agreement was approved by the trial court, which on May 20, 2003, issued a writ of mandate ("*PCL* Writ") and an order titled "Order Pursuant to Public Resources Code Section 21168.9." (115:58929-30; 58931.) Because the parties to the Settlement Agreement referred to the order as the "Interim Implementation Order," and for reasons discussed below, that title is used throughout this brief. (See 115:58883.)

The *PCL* Writ required DWR to prepare, as lead agency, a new EIR and to "make written findings and decisions and file a notice of determination" for a new project described in the Settlement Agreement. (115:58930.) The Settlement Agreement described the new project as including the original contract amendments ("Monterey Amendments") and new, additional amendments that were the result of the Settlement Agreement ("Attachment A

Amendments"). (115:58864-65.) The new project became known as Monterey Plus ("Project"). (1:01.) The trial court permitted the administration and operation of the SWP pursuant to the Monterey Amendments, as supplemented by the Settlement Agreement, "in the interim, until DWR files its return in compliance with" the *PCL* Writ and the trial court discharged the writ. (115:58933.)

DWR certified the new EIR on February 1, 2010. (22:10924.) DWR, through its Director, issued a "Memorandum" describing the agency's "decision" on the Project on May 4, 2010. (22:10928.) A notice of determination was issued on the same date ("2010 Notice of Determination"). (1:1.) This action was filed on June 3, 2010, and an amended pleading filed on June 4, 2010. (AA1:0016, 0099.)

The Superior Court issued its final Judgment, Findings and Peremptory Writ of Mandate on November 24, 2014. (AA37:9201-04, 9205-08.) The judgment referenced and incorporated the Court's prior Time-Bar Decision (AA30:7626-65) and CEQA Ruling (AA8222-50). Notice of Entry of Judgment was filed on December 1, 2014. (AA37:9209.) Plaintiffs gave notice of their appeal on December 30, 2014. (AA37:9225.) Certain real parties filed separate

notices of cross-appeal on January 20 and 22, 2015. (AA37:9235, 9249.)

ISSUES

1. Did DWR prejudicially abuse its discretion when it failed to approve or disapprove the Project in 2010 after completing a new EIR?

2. Did DWR prejudicially abuse its discretion when it failed to include an analysis of the deletion of Article 21(g)(1) from the pre-Monterey Amendments in the 2010 EIR's no-project alternatives?

3. Is Plaintiffs' validation action timely?

4. When issuing its writ in 2014, was the Superior Court required to void DWR's approvals of the Monterey Amendments, or at least its approval of the KWB transfer?

STANDARD OF REVIEW

I. Standard of Review for CEQA Claims

"The EIR is the primary means of achieving the Legislature's considered declaration that it is the policy of the state to 'take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.'" (*Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d

376, 392 (citation omitted) (*Laurel Heights*).) The EIR is therefore the "heart of CEQA" and an "environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return." (*Id*.) "The EIR is also intended to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." (*Id.*) Thus, the EIR is an accountability document and the EIR process "protects the environment but also informed self-government." (*Id.*)

In evaluating an EIR for CEQA compliance, a reviewing court must determine whether the agency has prejudicially abused its discretion. (Pub. Resources Code § 21168.5.) "An abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (*Id.*) Our Supreme Court has clarified that there are two distinct grounds for finding that the agency abused its discretion under CEQA, each of which has a significantly different standard for determining error. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 ("*Vineyard Area Citizens*"); *Save Tara v. City of West*

Hollywood (2008) 45 Cal.4th 116, 131 ("*Save Tara*").) A "reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (*Vineyard Area Citizens*, 40 Cal.4th at 435.)

Challenges to an agency's failure to proceed in the manner required by CEQA are subject to a less deferential standard than challenges to an agency's substantive factual conclusions. (*Id.* at 435.) In reviewing these claims, the court must "determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements.'" (*Id.*) An agency's decision that rests on a failure to comply with one of CEQA's "mandatory procedures" – an error that by its nature precludes informed decisionmaking and informed public participation—is *necessarily prejudicial* and must be set aside. (*Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1236.) "Noncompliance by a public agency with CEQA's substantive requirements 'constitute[s] a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had

complied with those provisions." (*RiverWatch v. Olivenhain Municipal Water Dist*. (2009) 170 Cal. App. 4th 1186, 1199 [quoting Pub. Resources Code § 21005(a)].)

In reviewing whether the agency proceeded in the manner required by CEQA, the court must determine whether the EIR is sufficient as an informational document. (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26.) Thus, as a matter of law, courts reject EIRs that do not "provide certain information mandated by CEQA and [] include that information in the environmental analysis." (*Vineyard Area Citizens, supra*, 40 Cal.4th at 435; see also *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 83 [EIR's conclusion that the project would not result in capacity to process lower quality crude oil was not adequately supported by facts and analysis]; *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1371 (*Berkeley Keep Jets*) [EIR failed to support conclusory statements with scientific or objective data]; *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale* (2010) 190 Cal. App. 4th 1351, 1383 [agency used incorrect baseline to evaluate environmental effects].)

By contrast, the substantial evidence standard of review applies to factual disputes over an EIR, such as a dispute over a finding that mitigation measures adequately mitigate project impacts. (*Vineyard Area Citizens*, *supra*, 40 Cal.4th at 435.) While a court reviewing an agency's decisions under CEQA does not pass on the correctness of an EIR's environmental conclusions, it must determine whether these conclusions are supported by substantial evidence, which includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts" and excludes "[a]rgument, speculation, unsubstantiated opinion or narrative, [and] evidence which is clearly inaccurate or erroneous…." (Pub. Resources Code § 21082.2(c); see also *Californians for Alternatives to Toxics v. Dept. of Food and Agric.* (2005) 136 Cal.App.4th 1, 17 ["[C]onclusory statements do not fit the CEQA bill."].)

II. Standard of Review for Validation Claims

The Superior Court concluded that the Monterey Amendments "came into 'existence' in the 1990's, never were invalidated or set aside, and remain in existence today," and thus Plaintiffs' reverse-validation action was barred by the statute of limitations. (AA30:7662.) The Superior Court's conclusions are subject to

independent review by this Court because it is based on the interpretation of judicial orders (the *PCL* Writ and the Interim Implementation Order) and a contract (the Settlement Agreement). (*In re Insurance Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1429 ["The meaning of a court order or judgment is a question of law within the ambit of the appellate court."].)

III. Rules of Interpretation of Judicial Orders and Contracts

This Court's independent review of the *PCL* Writ, the Interim Implementation Order, and the Settlement Agreement is governed by the same rules of interpretation as those applicable to any other writing. (*Concerned Citizens Coalition of Stockton v. City of Stockton* (2005) 128 Cal.App.4th 70, 77 [judicial orders]; *In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 47 [contracts].)

If the language in a judicial order is ambiguous, a reviewing court must look at the order's "effect when considered as a whole" and "reference may be had to the circumstances surrounding, and the court's intention in the making of the same." (*Concerned Citizens Coalition*, *supra*, 128 Cal.App.4th at 77, quoting *Roraback v. Roraback* (1940) 38 Cal.App.2d 592, 596.) Ambiguous language in a judicial order must be interpreted in a way that renders the order or

judgment lawful and valid. (See *Graham v. Graham* (1959) 174 Cal.App.2d 678, 686 ["If a court order or judgment admits of two constructions, that one will be adopted which is consistent with the judgment required by the facts and the law of the case."]; see also *Dahl v. Dahl* (S.Ct. Utah 2015) 345 P.3d 566, 578 ["Our task is to 'interpret an ambiguity [in a manner that makes] the judgment more reasonable, effective, conclusive, and [that] brings the judgment into harmony with the facts and the law.'" (citations omitted)].)

As with judicial orders, a contract should not be construed "in a manner that will render it unlawful if it reasonably can be construed in a manner which will uphold its validity." (*In re Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 797-798 [quoting *People v. Parmar* (2001) 86 Cal.App.4th 781, 802; citing Cal. Civ. Code §§ 1643, 3541].)

> "[I]t will not be supposed that the parties entered into agreements contemplating a violation of the law. On the contrary, it will be deemed that they intended a lawful, rather than an unlawful, act, and their agreements will be construed, if possible, as intending something for which they had the power to contract." "The court may not assume, in the absence of evidence, that the parties intended to make an unlawful contract."

(*Id.* [quoting *Barham v. Barham* (1949) 33 Cal.2d 416, 429 and *Davidson v. Kessler* (1935) 10 Cal.App.2d 89, 91].) "Applicable law

becomes part of the contract as fully as if incorporated by reference." (*City of El Cajon v. El Cajon Police Officers' Assn* (1996) 49 Cal.App.4th 64, 71 [quoting *Bodle v. Bodle* (1978) 76 Cal.App.3d 758, 764].)

This Court should independently draw inferences from and interpret the *PCL* Writ, the Interim Implementation Order, and the Settlement Agreement. Although the Superior Court supported its interpretation of the documents by considering extrinsic evidence, this Court's interpretation remains de novo because the credibility of the extrinsic evidence considered by the Superior Court is in the form of undisputed writings; the parties disagree only on the inferences that should be drawn. (*Milazo v. Gulf Ins. Co.* (1990) 224 Cal.App.3d 1528, 1534 ["[W]here there is no extrinsic evidence, where the extrinsic evidence is not conflicting or where the conflicting evidence is of a written nature only, the reviewing court is not bound by the rulings of the trial court but rather must make an independent interpretation of the written contract"]; *Parsons v. Bristol Devel. Corp.* (1965) 62 Cal.2d 861, 865-866.)

ARGUMENT

I. DWR Violated CEQA by Failing to Make a Proper Project Decision

The Project analyzed in the 2010 EIR consists of the Monterey Amendments and additional contract amendments described in the Settlement Agreement. (1:95; 23:11116.) The Project is the contract amendments themselves, not the *operation* of the SWP *pursuant to* those contract amendments. (23:11158 ["The proposed project is the Monterey Amendment and the Settlement Agreement"].) A decision on the Project thus should be a decision on whether to approve, enact, and adopt the contract amendments.

In its 2010 Notice of Determination, however, DWR failed to make such a decision. Instead, DWR "determined that the proposed project [could] be carried out by continuing to operate under the existing Monterey Amendment (including the Kern Water Bank transfer) and the existing Settlement Agreement…" and that this decision "does not require re-approval or re-execution of the Monterey Amendment or the Settlement Agreement." (1:58; 23:11169.) DWR accordingly decided to "continue operating under the Monterey Plus proposed project—the Monterey Amendment and the Settlement Agreement…" (22:10931), and directed "the

Department to carry out the proposed project by continuing to operate under the existing Monterey Amendment… and the existing Settlement Agreement… in accordance with the terms of those documents as previously executed…" (22:10932.) DWR also attempted to redefine the Project, claiming in response to comments that "the 'proposed project' under CEQA is *continuing to operate under* the Monterey Amendment and the Settlement Agreement." (196:99703 [emphasis added].)

DWR's refusal to either approve or reject the contract amendments violated its duties under CEQA. First, it resulted in the preparation of an EIR for a decision that in DWR's view had already been made. Retrospective, post-hoc environmental review does not satisfy CEQA. Second, while DWR claimed support from the *PCL* trial court for its refusal to make a new decision on the Project (1:58; 196:99703), the writ and order issued by that court mandated just the opposite: in order for the contract amendments to take legal effect after the preparation of the EIR, DWR was required to authorize them.

A. CEQA Does Not Permit an EIR to Retrospectively Analyze the Impacts of a Project that Has Already Been Approved

CEQA requires "public agencies to ascertain the environmental consequences of a project before giving approval to proceed." (*Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549, 564-565; *LandValue 77, LLC v. Board of Trustees of California State University* (2011) 193 Cal.App.4th 675, 683; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1221; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 672.) An EIR that purports to analyze the impacts of a project after it has already been approved would violate this core requirement of CEQA. "[U]nless a public agency can shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent, environmental review would be a meaningless exercise." (*Mountain Lion Foundation v. Fish & Game Com*. (1997) 16 Cal.4th 105, 117.)

> "The CEQA process is intended to be a careful examination, fully open to the public, of the environmental consequences of a given project, covering the entire project, from start to finish. This examination is intended to provide the fullest information reasonably available upon which the decision makers and the public they serve can rely in determining ***whether or not to start the project at all, not merely to decide whether to finish***

> ***it***. The EIR is intended to furnish both the road map and the environmental price tag for a project, so that the decision maker and the public both know, ***before the journey begins***, just where the journey will lead, and how much they—and the environment—will have to give up in order to take that journey. As our Supreme Court said in *Bozung v. Local Agency Formation Com.* (1975) 13 Cal. 3d 263, 283 [118 Cal. Rptr. 249, 529 P.2d 1017], '[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind.'"

(*Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 271 [quoting an amicus curiae brief filed by the California Attorney General] [emphasis added]; *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 135-136.)

An EIR that purports to analyze the environmental impacts of a project that has already been approved is void on its face. "[A]n agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR." (*Save Tara*, 45 Cal.4th at 132.) Preparing such an EIR would confuse the public and decisionmakers, giving them false hope that the review process meant something substantive and that their contributions mattered. Such an EIR would thwart CEQA's core goals of informed public participation and informed decisionmaking.

B. The *PCL* Trial Court Did Not Order an Improper Retrospective Analysis

DWR justified its failure to make a proper project decision on the grounds that its original approval of the Monterey Amendments was never voided or set aside by the *PCL* trial court, and thus it was only ordered to prepare a *remedial* EIR on the existing, already-approved project. (1:58; 196:99703.) The Superior Court concurred, stating that while "[i]n general, the court agrees" with Petitioners that "analyzing the impacts of a decision that has already been made undermines an EIR's effectiveness as an information document and should not be allowed," but nonetheless concluding that "this case presents a highly unusual situation in which the parties agreed, and the court approved, a 'remedial' EIR to analyze the impacts of the pre-existing contractual amendments." (AA33:8237.)

The court's interpretation of the *PCL* trial court's orders and the parties' Settlement Agreement was in error. As discussed below, these documents demonstrate that the *PCL* trial court did not order or authorize DWR to violate CEQA by preparing a purely retrospective EIR. The *PCL* Writ explicitly required DWR to make a new decision on the Project at the conclusion of a new CEQA process. The Interim Implementation Order authorized, under the court's equitable power,

the continued operation of the Project pending that new decision. And the Settlement Agreement required DWR to prepare a new EIR to analyze the *potential* impacts of the *proposed* project and to comply with CEQA in carrying out its duties.

None of the language in these documents can be read to require or permit DWR to limit itself to preparing an improper, and ultimately meaningless, retrospective analysis of an existing project's environmental impacts. Certainly the other parties to that litigation did not believe so:

> The Monterey Amendments (including the Kern Fan Element (KFE) transfer) are in effect only under the Superior Court's *interim* order under Public Resources Code section 21168.9. (See also Settlement Agreement, §§ II, VII.) When that order expires, the contracts will revert to their pre-Monterey status unless DWR makes a new approval decision and files a return to the writ.

(196:99486 [Letter from plaintiffs' representatives on EIR committee to DWR].)

To the extent that any of the documents could be deemed ambiguous, as the Superior Court found (AA30:7648 ["the Court concludes that the language of the documents is reasonably susceptible to different interpretations"]), they must be interpreted in a way that upholds the law. (*Graham v. Graham* (1959) 174

Cal.App.2d 678, 686; *In re Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 797-798.) As such, any ambiguities cannot be read to permit DWR to prepare an improper retrospective EIR; DWR was, and is, required to make a proper Project approval if the Project is to move forward.

1. The *PCL* Writ Mandated a New Project Approval and Necessarily Required the Voiding of the 1995 Approval

The *PCL* Writ directed DWR to "make written findings and decisions and file a notice of determination" after preparing and certifying an entirely new EIR. (115:58930.) While DWR had acted as the responsible agency for the 1995 project, it was now required to act as the lead agency. (*Id*.) Read in the context of the language, structure, and intent of CEQA (see Sec. I.A, *supra*), these mandates required DWR to make a proper project decision—in this case, to approve or reject on a final basis the adoption of the Monterey Amendments and the terms of the Settlement Agreement. By mandating that DWR "make written findings and decisions and file a notice of determination" (115:58930), the *PCL* trial court was not inviting or permitting DWR to simply continue an existing, already-approved project, because there is no legal authority to make findings

and decisions and file a notice of determination for a project that has already been approved.

The *PCL* Writ required DWR to comply with CEQA in preparing the EIR and required that the new findings, decision, and notice of determination be prepared "in the manner prescribed by sections 15091 – 15094 of the CEQA Guidelines." (115:58930.) The writ thus required DWR to make a new decision whether to approve the Project. Guidelines sections 15091 through 15094, which the writ invokes, delineate the required elements of an agency's project *approval* after the certification of an EIR: findings, the approval itself, a statement of overriding considerations (if necessary), and a notice of determination. (Guidelines §§ 15091-94.) None of these elements have any relevancy or utility for a project that has already been approved.

DWR argued that the *PCL* trial court "did not invalidate or set aside the Monterey Amendment or the Department's approval of the Monterey Amendment." (1:58.) But DWR's 1995 approval was made by DWR acting as a "responsible agency" under CEQA, not as the lead agency. (115:58930.) Responsible agencies have more limited responsibilities and powers than lead agencies. (Guidelines §§

15041(b); 15042; 15096.) A former *responsible* agency, like DWR here, ordered by a court to become the lead agency and prepare and certify a new EIR, make new findings and decisions on a project, and issue a new notice of determination, may not simply retain untouched its prior *responsible* agency project approval. Similarly, an agency's project approval as lead agency does not remain intact after that agency is found to have acted improperly as lead agency and its EIR certification is ordered set aside. (115:58929.)

Here, DWR's decision to continue to operate under the "existing Monterey Amendments" and "existing Settlement Agreement" (1:58) required making both of these improper assumptions: that the Central Coast Water Authority's lead agency approval of the Monterey Amendments somehow survived that agency being deposed as the lead agency, and that DWR's responsible agency approval could magically be translated into a valid lead agency approval of a different project altogether (the Monterey Plus Project being *both* the Monterey Amendments and the Settlement Agreement). (1:01-02; Guidelines § 15092.)

2. The *PCL* Writ Was Not a "Limited Writ" or a "Lesser" CEQA Remedy

The Superior Court concluded that the *PCL* Writ was a "remedial" EIR in that it did not explicitly void the project approvals. (AA33:8237.) CEQA permits a court to issue a mandate voiding a determination, finding, or decision "in whole or in part," and thus it is permissible under certain circumstances, specified by statute, for a writ to be issued that does not void a project approval. (Pub. Resources Code § 21168.9(a)(1).) However, a limited writ can never, under any circumstances, be purely retrospective in the way DWR has interpreted the *PCL* Writ. A court may issue a limited writ *only if* the court makes three specific findings: (1) a finding of severability; (2) a finding that severance will not prejudice compliance with CEQA; and (3) a finding that the court has not found the remainder of the project to be noncompliance with CEQA. (Pub. Resources Code § 21168.9(b); *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 287 ("*Preserve Wild Santee*").) Without these required findings, a CEQA writ may not be limited to only a "portion of a determination, finding, decision or the specific project activity or activities found to be in noncompliance" with CEQA. (*Id.*) When the project components or agency actions are not severable, or if the

remaining portions of the project or actions after severance violate CEQA *in any way*, the only proper remedy is the voiding of all project approvals. (*LandValue 77*, *supra*, 193 Cal.App.4th at 683; *Preserve Wild Santee*, *supra*, 210 Cal.App.4th at 287.)

It is not possible for a court to leave any project approvals intact if it completely decertifies an EIR and makes no findings related to severance, because in such a case the court would not be able to make the required finding that the remaining portion of the project—the approval—did not violate CEQA. (Pub. Resources Code § 21168.9(b).) This is because "CEQA requires an EIR whenever a public agency proposes to approve or to carry out a project that may have a significant effect on the environment…" (*Laurel Heights*, *supra*, 47 Cal.3d at 390-91.) Thus, due to CEQA's mandatory language requiring affirmative findings related to severance and CEQA compliance for all limited writs, a writ that does not contain such language cannot be considered a limited writ and must function to void all project approvals and project activities. A project approval needs a hook on which to hang its hat, and without a valid EIR, there is no hook. The default is thus that a CEQA writ voids a project approval unless otherwise stated.

Courts have repeatedly and consistently upheld the essential linkage between severability and limited writs. (*Golden Gate Land Holdings LLC v. East Bay Regional Park* (2013) 215 Cal.App.4th 353, 371-380 [limited writ permissible after finding of severability]; *POET, LLC v. California Air Resources Board* (2013) 218 Cal.App.4th 681, 759-763 [limited writ *voiding approval of regulations in full* but allowing the regulations to remain in place pending a new approval was appropriate *under the court's equitable powers* only after finding that "the public interests at stake, which include the protection of the environment, weigh in favor of preserving the status quo."]; *Preserve Wild Santee*, *supra*, 210 Cal.App.4th at 287 [limited writ not appropriate because issues were not severable]; *County Sanitation District # 2 of Los Angeles v. County of Kern* (2005) 127 Cal.App.4th 1544, 1604 [limited writ ordered only after finding of severability]; *San Bernardino Valley Audubon Soc'y v. Metro. Water Dist.* (2001) 89 Cal.App.4th 1097, 1102-1108 [EIR ordered prepared and matter remanded to trial court to determine severability issues]; *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1456-57 [severable project components allowed to continue pending certification of new EIR and "reapproval" of the full project, so

previous approval implicitly voided]; *Laurel Heights*, *supra*, 47 Cal.3d at 428 [project allowed to continue pending certification of new EIR but approval voided in full].)

Because the *PCL* Writ did not contain any findings regarding severability or the CEQA compliance of non-severed project components or approvals (115:58929-34), it cannot be interpreted as permitting the 1995 Monterey Amendment approvals to remain valid. Doing so would require interpreting the writ in a way that would violate a mandatory provision of CEQA, an impermissible interpretation of a judicial order. (*Graham v. Graham*, *supra*, 174 Cal.App.2d at 686.)

3. The Interim Implementation Order Was an Equitable Order that Provided Only Temporary Authorization of the Project

The Interim Implementation Order provided for the *interim* administration and operation of the SWP and KWB pursuant to the Monterey Amendments and the Settlement Agreement *pending* the trial court's discharge of the writ (i.e., pending the completion of the new notice of determination based on the new EIR). (115:58933 ["In the interim, until DWR files its return… and this Court orders discharge of the Writ…, the administration and operation of the

[SWP] shall be conducted pursuant to the Monterey Amendments….”].) The plain language of this order clearly states that authorization for the operation of the SWP and KWB pursuant to the terms of the Monterey Amendments and the Settlement Agreement was only temporary, lasting just until DWR filed a return and the court discharged its writ. By the terms of the order, upon the discharge of the writ the administration and operation of the SWP and KWB would revert to the pre-Monterey terms of the long-term contracts, unless DWR took further action to change those terms (such as approving on a final basis the contract amendments and the settlement terms). This is consistent with the writ’s requirement, discussed above, that DWR make a new decision approving or rejecting the amendments.

DWR and the SWP contractors argued in the Superior Court that the Interim Implementation Order was a remedy pursuant to Public Resources Code section 21168.9(a)(3), in that it directed “DWR to take an action to bring its determination, finding, or decision into compliance with CEQA.” Thus, the parties argued, the Interim Implementation Order demonstrated that no approvals were ever voided by the *PCL* trial court under section 21168.9(a)(1).

(AA:27:6719-20 [DWR's brief]; AA12:2889-90 [SWP contractors' brief].)

But the Interim Implementation Order was not and could not be a mandate under section 21168.9(a)(3). Not only did the order not explicitly reference subsection (a)(3) (it referenced only section 21168.9 in whole), but its directives were not contained in the *PCL* Writ itself. (115:58929-30, 58932.) Moreover, the order did not address actions necessary to bring a "determination, finding, or decision" into compliance with CEQA. (Pub. Resources Code § 21168.9(a)(3).) Providing for the interim administration and operation of the SWP pursuant to the Monterey Amendments, pending new CEQA review, does not bring any "determination, finding, or decision" into compliance with CEQA.

Instead, the Interim Implementation Order was an *equitable remedy* issued pursuant to the trial court's equitable powers. (Pub. Resources Code § 21168.9(c); 115:58932 ["This Order is made pursuant to the provisions of Public Resources Code section 21168.9 and pursuant to this Court's equitable powers."].) It is how the court solved the problem of how to maintain the status quo pending new environmental review and a new (permanent) project decision.

Without court authorization for the administration and operation of the SWP pending new environmental review and a new decision by DWR, operation of the SWP would have had to revert to the pre-Monterey contract terms immediately. Given the scale of the contract amendments, it is understandable that DWR sought, and was granted, a temporary reprieve from the court. And the temporary reprieve, being an interim authorization, clearly contemplated a subsequent, permanent decision approving or disapproving the Project.

4. The Settlement Agreement Clearly Required a New Project, a New EIR, and a New Project Decision

The Settlement Agreement required that DWR prepare a "New EIR" that would analyze the "potential" impacts of a "proposed project." (115:58864.) On its face, this language does not express any intent to leave the existing project and its approvals intact. To the contrary, given CEQA's structure of requiring a project approval only after the preparation and certification of a valid EIR, this language must be interpreted as requiring a new project approval at the conclusion of the CEQA process. (See section I.A, *supra*.)

The Settlement Agreement also committed the *PCL* parties to seek a court order "authorizing *on an interim basis* the administration

and operation of the SWP and the KWB Lands, pending discharge of the writ of mandate in the underlying litigation, in accordance with the Monterey Amendments." (115:58883 [emphasis added].) That the Settlement Agreement provided only for *interim* authorization of the SWP in accordance with the Monterey Amendments until the writ was discharged demonstrates that a new approval of the Amendments was required once the new EIR was completed, because the authorization was clearly only temporary.

The Superior Court mistakenly looked to the intent of the parties in crafting the Settlement Agreement to interpret the effect of the *PCL* Writ and the Interim Implementation Order. (AA33:8236 ["[A]s this court previously concluded, the PCL litigation did not invalidate the contract amendments. To the contrary, the evidence shows that the parties 'validated' the amended contracts as part of the Settlement Agreement"]; see AA30:7659-62 [Time-Bar Decision].)

The Court's reasoning fails on several grounds. First, the relevant question is what did the *PCL* trial court intend in its writ, not what the parties intended in their Settlement Agreement. Second, the Court's conclusion is contrary to the plain language of the *PCL* Writ, as explained above. Third, the Settlement Agreement expressly

required DWR to comply with CEQA, including CEQA's requirement that it approve the project only after a valid EIR has been prepared. (115:58890.) Fourth, as discussed below, evidence in the Administrative Record demonstrates, contrary to the Superior Court's conclusion, that the parties to the Settlement Agreement expressly did *not* "'validate[]' the amended contracts as part of the Settlement Agreement" (AA30:7659-62) and did not agree that the Settlement Agreement would preserve the 1995 authorization of the Amendments or bar future validation statute challenges.

The absence of any agreement by the *PCL* parties on these points is evidenced by a November 4, 2002, memo authored by the *PCL* defendants, including DWR, prior to the Settlement Agreement being signed in 2003. (199:101143-47.) The memo reveals that the parties had agreed to disagree on the effect of the *PCL* Writ, Interim Implementation Order, and Settlement Agreement on any future validation action:

> On this point, plaintiffs and defendants agreed that it would be up to a future court, if third parties filed suit, to decide whether [a new notice of determination] would constitute a new approval as that concept is embodied in the validation statutes. Finally, all parties agreed that neutral wording would be used in this area of the settlement agreement to avoid influencing the outcome of such hypothetical, third-party litigation.

(199:101146.)

The memo reveals that DWR and the other *PCL* defendants "conceded to plaintiffs' insistence that the word 'interim' be used to refer to operations under [the] Monterey Amendment and the other settlement agreement operational provisions," (199:101145) even though the *PCL* defendants knew that the *PCL* plaintiffs:

> …believe that the *project approvals*, embedded in the same resolution (CCWA) and findings (DWR) certifying the adequacy (CCWA) and consideration (DWR) of the EIR, *must inherently be set aside* even though the project will be operated under the Monterey Amendments and Attachment A amendments.

(199:101144 [quoting email from *PCL* plaintiffs' attorney, emphasis added in memo].)

The *PCL* defendants knew exactly what the *PCL* plaintiffs were negotiating for when advocating for the use of the term "interim":

> The only discernable purpose [for plaintiffs' demand that the project approvals be set aside or that the status of the Monterey Agreement be explicitly defined as 'interim'] appears to be to enhance the opportunity of third parties to file new validation actions once the new EIR is complete.

(199:101147.) And ultimately DWR and the other *PCL* defendants acceded to the *PCL* plaintiffs' demand and agreed in the Settlement Agreement that the order would be limited to "authorizing *on an interim basis…* the

administration and operation of the SWP and the KWB Lands, pending discharge of the writ of mandate in the underlying litigation, in accordance with the Monterey Amendments…." (115:58883 [emphasis added].)

The *PCL* plaintiffs' intent apparently did not change with the signing of the Settlement Agreement, as evidenced by a 2007 letter authored by plaintiffs' counsel:

> The contractors continue a pattern of self-delusion that the Monterey [A]mendments are final and beyond further change, and that while the [S]ettlement [A]greement allows title to the Kern Water Bank to remain unchanged, that administration and operation is only 'interim' pending completion of the EIR and discharge of the outstanding writ of mandate, as specified in the Superior Court's order of May 20, 2003.

(194:98885; see also 28:13630-32 [2006 Letter from Tony Rossmann re: administrative draft EIR]; see also 199:101131 [Draft Summary of Plaintiffs' Comments and SWC's Responses.)

In short, the Settlement Agreement cannot be used to determine the intent of the trial court in issuing the *PCL* Writ and the Interim Implementation Order. This Court should look no further than the face of the *PCL* Writ and the Interim Implementation Order to determine the *PCL* trial court's intent. The Settlement Agreement reflects only the intent of the parties, not the trial court's intent. But in any event, the Settlement Agreement demonstrates that the parties, far from agreeing that the 1995

authorization would remain in place perpetually, agreed it would be replaced by the Interim Implementation Order which would authorize operation of the SWP in accordance with the Monterey Amendments only until the writ was discharged; i.e., until there was a new EIR followed by a new decision on whether to adopt the Amendments.

5. The Court-Ordered No-Project Alternative Defined the Project, Requiring DWR to Make a New Approval If It Chose to Move Forward with the Project

This Court, in the *PCL v. DWR* appeal that preceded the Settlement Agreement and the *PCL* Writ, concluded that the Monterey Amendments EIR violated CEQA by not including an analysis of the implementation of Article 18(b) of the original, unamended SWP contracts in its no-project alternative. (*PCL v. DWR*, *supra*, 83 Cal.App.4th at 908-920.) In response to this ruling, the parties agreed in the Settlement Agreement to explicitly require DWR to include an "analysis of the effect of pre-Monterey Amendment SWP Contracts, including implementation of Article 18 therein." (115:58864-65.)

By requiring an analysis of the effect of the pre-Monterey SWP contracts (including implementation of Article 18 of those contracts) as the no-project alternative, this Court and the *PCL* trial court defined the Project as the Monterey Amendments and necessarily required

DWR to decide whether to approve the Amendments. This is because the no-project alternative describes the status quo; it describes "the impacts of *not approving* the project." (Guidelines 15126.6(e)(1) (emphasis added).) The no-project alternative "must be straightforward and intelligible, assisting the decision maker and the public in ascertaining the environmental consequences of *doing nothing*…" (*PCL v. DWR*, *supra*, 83 Cal.App.4th at 911 [emphasis added].) "Doing nothing" means "not approving" the project. (Guidelines 15126.6(e)(1).) Here, the pre-Project status quo is not the Monterey Amendments, it is the contracts as they were before the Monterey Amendments. Not approving the Project—"doing nothing"—must result in continuing the contracts as they existed *before* the Monterey Amendments.

DWR evaded the requirement that it decide whether to approve the Project after completing the new EIR. To improperly insulate the Amendments from challenge under the validation statute, DWR described the pre-Project status quo in the EIR—the state of things if the Project were not approved—as the contracts as amended by the Monterey Amendments. (23:11169 ["No permits or approvals are required for the proposed project"].) Under DWR's conception,

"doing nothing" would result in the Project being approved; the contracts would be amended by the Monterey Amendments. In DWR's upside-down approach, it is the no-project alternative—the contracts as they were before the Monterey Amendments—that would require DWR to take action.

CEQA clearly does not permit such artful dodging of an agency's core obligations. It is an agency's "*approval to proceed*" with a proposed project that triggers the need for CEQA review, not a decision to maintain the pre-Project status quo. (*Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549, 564-565; Guidelines §§ 15004(a) [CEQA review necessary "before granting any approval"]; 15301 [projects involving negligible or no expansion of an existing use of an existing facility are exempt from CEQA].) While an agency normally has discretion in describing a project, when an earlier EIR is voided and a new EIR is ordered, the project remains the one described in the original EIR. The improperly approved project analyzed in the first EIR does not, as DWR would have it, become the new status quo, not requiring any further action to proceed.

Because DWR failed to approve or disapprove the Project, it violated CEQA, as well as the terms of the *PCL* Writ, and the judgment should be reversed.

II. The No-Project Alternatives Improperly Fail to Include an Analysis of the Implementation of Both Article 18(b) *and* Article 21(g)(1) of the Pre-Amendment Contracts

While this Court in the *PCL* appeal ruled that the 1995 EIR was deficient due to its failure to include the implementation of Article 18(b) of the pre-Amendment contracts in its no-project alternative, it was silent as to other contract provisions. (*PCL v. DWR*, *supra*, 83 Cal.App.4th at 920 ["In view of our earlier conclusion that DWR must serve as lead agency under CEQA, we need not, as we ordinarily would, address the other alleged deficiencies in this EIR."].) But this Court's reasoning regarding Article 18(b) applies just as strongly to the other contract provisions that were eliminated by the Monterey Amendments. (*Id*. at 915 ["Quite simply, the question was not whether [Article 18(b)] was likely to be implemented in the near future, but what environmental consequences were reasonably foreseeable by retaining or eliminating [Article 18(b)'s] solution to a permanent water shortage."].) This Court concluded that the 1995 EIR's omission of an analysis of the deletion of Article 18(b) caused it

to fail "to meet the most important purpose of CEQA, to fully inform the decision makers and the public of the environmental impacts of the choices before them." (*Id*. at 920.)

Yet, DWR improperly limited its no-project alternative analysis in the new EIR to addressing its prior failure to analyze the deletion of Article 18(b), while refusing to include an analysis of the deletion of an equally important contract provision, Article 21(g)(1). (2:634 ["The DEIR assumed that with the invocation of Article 18(b) all other terms of the long-term water supply contracts would stay the same. This would mean that the Department would continue deliveries above the reduced Table A amounts and deliver additional water, including Article 21 water, when such water was available"]; 24:11833 [No-project alternative CNPA3 assumes that Article 21 water would be fully allocated proportionally to each contractors' Table A amounts]; 24:11833 [No-project alternative CNPA4 assumes that Article 21 water would be fully allocated with preference to agricultural use and groundwater replenishment].)

Article 21(g)(1) is intimately connected to Article 18(b), providing the second half of an important safety valve present in the pre-Monterey contracts. While Article 18(b) required the reduction in

annual entitlements ("Table A," or non-surplus water) based on permanent shortages in supply (whether caused by the failure to construct sufficient additional facilities or for any other reason (25:12081)), Article 21(g)(1) required DWR to "refuse to deliver… surplus water to the extent that [DWR] determines that such delivery would tend to encourage the development of an economy… which would be dependent upon the sustained delivery of water in excess of the contractor's maximum annual entitlement." (25:12125 [Amendment to KCWA's contract, which contained this provision as Article 45; see 23:11144].)

Article 21(g)(1) ensured that water designated as "surplus" was always treated as such by contractors and end-users, and that users of that water would not grow dependent on its sustained delivery. This is a significant limitation on the use of surplus water that would likely result in reduced Delta exports and increased sustainability of the SWP, as commenters pointed out. (32:15923-24; 196:99486-87.) But perhaps most importantly, Article 21(g)(1) made Article 18(b) work: without a limitation on the use of surplus water, Article 18(b) was superfluous, because even if Article 18(b) were invoked, DWR could merely supplement reduced deliveries of entitlement water with

Article 21 surplus water to satisfy contractors' demands. This is exactly what DWR concluded in its analysis of the impacts of the invocation of Article 18(b) in the new EIR. (2:531 [The invocation of Article 18(b) "would not alter Delta exports, would not alter water supply reliability, nor would it alter the total amount of SWP water allocated to contractors. The action would decrease Table A allocations and commensurately increase Article 21 allocations, both as scheduled surplus and as unscheduled (interruptible) supplies."].)

Such a conclusion is not possible if Article 21(g)(1) is also given effect; it would not be possible to just replace Table A water with surplus water because the surplus water would be encumbered by the restrictions of Article 21(g)(1). The implementation of *both* contract provisions was thus essential for the sustainable operation of the SWP, and DWR erred in failing to consider the invocation of Article 21(g)(1) in its no-project alternatives analysis.

A. DWR's Refusal to Include the Implementation of Article 21(g)(1) in the No-Project Alternatives Analysis Was Unreasonable

DWR failed to analyze the implementation of Article 21(g)(1) because it believed that Article 21(g)(1) applied only to a subset of surplus water called "scheduled surplus water," which had not been

delivered since 1986 and was unlikely to be delivered in the future. (2:517-518.) But the plain language of Article 21(g)(1) is clear that it applies to *all* surplus water; i.e., all water that "exceeds the total of annual entitlements of all contractors for that year," not just "scheduled surplus water." DWR itself has now explicitly conceded this point. (196:99711 ["The Department agrees with Plaintiffs' statement that Article 21(g)(1) also applied to interruptible water (now called Article 21 water)."].)

Nonetheless, DWR argued that even if it were to attempt to analyze Article 21(g)(1), it "would need to determine whether the Article 21 supplies would be supporting existing economic development or would 'tend to encourage the development of [a permanent] economy,'" and that such an analysis would be too difficult and DWR would likely not have the ability or authority to perform it. (2:518.) First, DWR is wrong that it lacks the authority for such an analysis: Article 21(g)(1) expressly confers on DWR the authority to analyze whether the contract provision applies. (25:12125 ["The State shall refuse…to the extent the State determines…"].)

Moreover, far from requiring "extensive information about local facilities, local water resources and local water use" and the identification, monitoring, or regulation of each individual decision made by local government, as DWR argues (2:518-519), DWR could ask much simpler questions, such as will this delivered surplus water be used for permanent crops or a residential or commercial development project? Or will it instead be used for row crops or aquifer recharge or some other temporary, non-permanently-dependent use? (See 1.31.14 Transcript, p. 88.) Far from requiring an unreasonable amount of work by DWR, these questions can simply be asked of the experts: the contractors themselves, who can certify their answers.

More importantly, DWR has unreasonably asked the wrong question. To implement Article 21(g)(1), DWR believes that it is required to analyze whether delivered surplus water would go to *either* "existing economic development" *or* development of a permanent economy, with Article 21(g)(1) only applying to the latter. (2:518-19.) According to DWR, the lack of prior enforcement of Article 18(b) and Article 21(g)(1) has already resulted in economies dependent on the sustained delivery of what would be classified as

surplus water if Article 18(b) were invoked. (2:519 ["A strong case could be made that full deliveries of SWP water up to current delivery volumes, regardless of classification of the water, would support existing economic development, not new development."].) This creates an unwritten exception that swallows and negates the rule of Article 21(g)(1). It is also factually incorrect.

Before any future invocation of Article 18(b) by DWR to reduce water entitlements, most SWP water would have been delivered as *entitlement* water, not *surplus* water. (2:518 [no "scheduled surplus water" delivered since 1986]; 2:530 ["With the invocation of Article 18(b), less water would be classified as Table A water and more water would be classified as Article 21 and possibly as other types as well."].) Upon the invocation of Article 18(b), contractors' entitlement deliveries would be reduced, but more surplus water would be available. And this surplus water would be a new thing – a new delivery of a new type of water – whose delivery would in turn be controlled by Article 21(g)(1).

There is thus no need—and no legal basis—for DWR to attempt to differentiate *existing* from *future* economic development in any Article 21(g)(1) assessment after the implementation of Article

18(b). Just because a contractor (or a farm or a residential community or a business) may have become dependent on entitlement water before the implementation of Article 18(b) does not mean that they are grandfathered in for all future use of Article 21 surplus water. The question DWR must ask when analyzing the implementation of Article 21(g)(1) is thus far simpler: "Is *this* water, delivered *this* year, going to create a dependency 'upon the sustained delivery of surplus water?'" Such a dependency would be obvious in most situations: the planting of permanent instead of annual crops or the use by permanent residential or commercial development.

B. DWR's Caricatured Analysis of the Invocation of Article 21(g)(1) in Response to Comments Did Not Satisfy CEQA

Article 21(g)(1) is clear on its face that it applies to all surplus water and that its implementation would have significant impacts on the operation of the SWP, especially when combined with the invocation of Article 18(b). At the minimum, Petitioners' interpretation of the relationship between and the effect of Articles 18(b) and 21(g)(1) is plausible, which is sufficient to require DWR to analyze the invocation of Article 21(g)(1) in the no-project alternative analysis of the EIR. (*PCL v. DWR*, *supra*, 83 Cal.App.4th at 913

[regarding Article 18(b)].) The Superior Court agreed: "If Article 21(g)(1) can be plausibly construed in a manner that would result in significant environmental consequences, its elimination should be considered and discussed as a 'no project' alternative in the EIR." (AA33:8244 [CEQA Ruling] [citing *PCL v. DWR*, *supra*, 83 Cal.App.4th at 913].)

The Superior Court erred, however, in finding that the omission of an analysis of Article 21(g)(1) from the no-project alternative "did not preclude informed decision-making and informed public participation because, in response to comments, DWR developed an analysis of the effects of operating the SWP with Article 18(b) invoked and with limited or no Article 21 water delivered to SWP contractors." (AA33:8245; 2:520-525 [EIR's analysis in response to comments].) But limiting or eliminating Article 21 water is not what Article 21(g)(1) prescribes. DWR's analysis was a caricature of the invocation of Article 21(g)(1), reading into the contract provision terms that did not exist (the elimination of all or most surplus water deliveries) and ignoring the most important component of the article: its restriction of delivery of surplus water *that would support a dependent permanent economy*. (2:520-25; see 25:12125.)

DWR's interpretation of Article 21(g)(1) was unreasonable. As Plaintiffs and other commenters pointed out, the invocation of both Article 18(b) and Article 21(g)(1) together would result in a *change of use*, not necessarily the elimination, of surplus water that would likely have significant impacts on the environment. (32:15923-24; 196:99486-87; AA31:7874-75 [Plaintiffs' Opening Brief]; AA32:8174-76 [Plaintiffs' Reply to SWP Contractors].) This interpretation is fully supported by the plain language of the contract terms, as discussed above. DWR's interpretation, that invoking Article 21(g)(1) would result in all or most deliveries of Article 21 surplus water would being eliminated, was not only a misstatement of the commenters' concerns, but was without any evidentiary support. (2:518-19 [EIR misinterpreting and explaining its refusal to analyze the permanent economy provision of Article 21(g)(1)]; 2:660-82 [EIR discussion of Article 21 contains no evidence that implementation of Article 21(g)(1) would result in zero or severely limited Article 21 deliveries].) DWR's response to commenters' legitimate concerns regarding the deletion of Article 21(g)(1) was thus not a "good faith, reasoned analysis" as required by CEQA. (Guidelines § 15088(c); *Berkeley Keep Jets*, *supra*, 91 Cal.App.4th at 1367.)

Because the 2010 EIR improperly failed to analyze as part of the no-project alternatives the effect of deleting Article 21(g)(1) from the pre-Monterey Amendment contracts, the judgment must be reversed.

III. Plaintiffs' Validation Claims Are Not Time-Barred

The Superior Court ruled that DWR authorized the Monterey Amendments in 1995, and that while the *PCL* litigation required DWR to, as lead agency, prepare an entirely new EIR, make findings and decisions, and issue a new notice of determination, the litigation did not void or set aside DWR's authorization and approval of the Monterey Amendments. As such, according to the Superior Court, the Amendments were never invalidated and Plaintiffs' validation claims on those contracts are barred by the statute of limitations and other time-bar defenses. (AA30:7652, 7660, 7662.)

This ruling is in error because, as discussed in section I above, the Superior Court erred in interpreting the *PCL* Writ, the Interim Implementation Order, and the Settlement Agreement in a way that violated CEQA by not voiding DWR's approval of the 1995 Monterey Agreement project. So the *PCL* Writ voided DWR's 1995 authorization of the Monterey Amendments, and DWR never properly

authorized the Monterey Amendments after completing its environmental review in 2010.

However, even if DWR's actions in 2010 were found to survive Plaintiffs' CEQA challenge, Plaintiffs' validation action still would not be barred under the statute of limitations or laches. First, if DWR's decision to continue to operate the SWP pursuant to the Monterey Amendments is considered a proper project approval under CEQA, it must also be considered an authorization challengeable under the validation statutes. But even if DWR's decision was not a new and separate authorization in 2010, Plaintiffs' validation is still timely under the "reenactment rule": DWR's conditional approval of the Attachment A Amendments reauthorized the entire Monterey Amendments and created an opportunity for a challenge under validation law. (*Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 704 ("*Barratt American*").) Either way, Plaintiffs' reverse-validation challenge is not barred by the statute of limitations and is not otherwise time-barred. (Code Civ. Proc. § 860.)

A. DWR's 1995 Authorization of the Monterey Amendments Was Voided by the *PCL* Writ and Interim Implementation Order

As found by the Superior Court, DWR authorized the Monterey Amendments on December 13, 1995, when it issued the 1995 Notice of Determination. (AA30:7651 ["the Subject Contracts are 'contracts' that were 'authorized' by DWR in 1995 with its approval of the Monterey Agreement, the Monterey Amendment, and the KFE Transfer Agreement"]; see Ex. 49[4], p. 5 (MPAs in support of joint motion for Interim Implementation Order) ["DWR reviewed and considered the 1995 EIR, acting as responsible agency, and approved the proposed Monterey Amendment on December 13, 1995."].) It is this act of authorization upon which the *PCL* plaintiffs based their reverse validation claim. (Ex. 29, ¶¶ 24, 37 [*PCL* Complaint].)

As described above, by issuing the *PCL* Writ and the Interim Implementation Order, the *PCL* trial court necessarily required the voiding of DWR's 1995 approval of the Monterey Amendments. (See section I.B, *supra*.) But the Superior Court rejected this conclusion, stating that:

[4] Exhibits were entered into evidence by the Superior Court during the time-bar defense trial; they are cited here according to their assigned numbers. They are also contained in Appellants' Appendix at Document Numbers 59 and 61.

> Plaintiffs conflate the CEQA 'project' with the 'matters' subject to validation under the Validation Statute (i.e., the Subject Contracts). This is perhaps understandable since the CEQA projects at issue here involved implementation of the Contracts subject to validation. However, it is important to remember that a CEQA project is not a 'matter' subject to validation…

(AA30:7655.)

While it is certainly true that not all CEQA projects are matters subject to validation, when a CEQA project is the authorization of a contract or contract amendment, as is this one, the authorization of the contract or amendment is subject to validation. It is the decision to authorize the execution of a contract, not the actual signing of the contract, that determines the deadline for the filing of a validation action. (Code Civ. Proc. § 864 ["contracts shall be deemed authorized as of the date of adoption by the governing body of the public agency of a resolution or ordinance approving the contract and authorizing its execution."].)

There was no formal resolution or ordinance adopted by DWR when it authorized the Monterey Amendments on December 13, 1995. Instead, the only document produced by DWR evidencing its authorization of the contracts was the 1995 Notice of Determination. Thus, DWR authorized the Monterey Amendments by its issuance of

the 1995 Notice of Determination, and as such it was a single act subject to both CEQA and validation liability. (Ex. 49, p. 5 ["DWR reviewed and considered the 1995 EIR, acting as responsible agency, and approved the proposed Monterey Amendment on December 13, 1995"]; see Ex. 35 [*PCL* Writ describing the "Final Programmatic Environmental Impact Report for Implementation of the Monterey Agreement"; Ex. 34, p. 6-7 [Settlement Agreement defining Monterey Agreement and Monterey Amendment], p. 9 [defining 1995 EIR]; Ex. 2003, p. 4 [Bulletin 132-96]; see also *Smith v. Mt. Diablo Unified School Dist.* (1976) 56 Cal.App.3d 412, 416 – 417; *McPherson v. Richards*, 134 Cal.App. 462, 466 ["A resolution is usually a mere declaration with respect to future purpose or proceedings of the board."]; Code Civ. Proc. § 864.)[5]

[5] DWR's 1995 Findings accompanying the 1995 EIR stated: "Implementation measures which are the overall project for which the EIR was considered by DWR include individual projects which include: (1) adoption of amendments to the various Water Supply Contracts…"].)
The 1995 Notice of Determination and DWR's 1995 Findings are part of the Administrative Record in the CEQA portion of this matter. (529: 253900, 253949.) They were not admitted into evidence by the Superior Court in the time-bar defense trial. Plaintiffs sought post-trial judicial notice of and admission of the documents (AA30:7561, 7285), which the Superior Court denied. (AA30:7625.)
Although they are part of the Administrative Record, to the extent it is necessary or helpful to this Court's review of the validation issue,

Because the *PCL* Writ ordered DWR to file a new notice of determination as *lead agency* (and make new written findings and decisions and prepare an entirely new EIR), the agency's 1995 Notice of Determination as *responsible agency* was necessarily voided. (Ex. 35 at p. 2.) And because the *PCL* Writ contained no language regarding severance, the writ cannot be read to permit the 1995 approvals to remain in place. (See sections I.B.1 and I.B.2, *supra*.) Similarly, the Interim Implementation Order clearly anticipates that DWR's authorization of the Monterey Amendments would be voided and set aside since it provides for the *interim* operation and administration of the SWP, granting to DWR under equity the authority it required to continue to operate the SWP pursuant to the Monterey Amendment provisions pending new environmental review and a new decision on the Monterey Amendments. (Ex. 37 at p. 3; see section I.B.3, *supra*.)

The Superior Court sought to bolster its erroneous conclusion by looking to the Settlement Agreement as well. (AA30:7657-60.) But what controls here is the intent of the *PCL* trial court in issuing the *PCL* Writ and the Interim Implementation Order, not the intent of

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Plaintiffs have separately filed a Request for Judicial Notice of the 1995 Notice of Determination and the 1995 Findings.

the parties in drafting the Settlement Agreement. In any event, the Settlement Agreement required DWR to take actions whose consequence was to void DWR's previous authorization of the Monterey Amendments. DWR committed to prepare a new EIR (Ex. 34 at p. 15) and to file a new notice of determination (Ex. 34 at p. 31), both as the lead agency, and agreed to do so in full compliance with CEQA (Ex. 34 at p. 36). In doing so, DWR committed itself to voiding its prior authorization and to making a new decision about whether to authorize the Monterey Amendments, because the only way DWR could accomplish these obligations *while complying with CEQA* was by voiding its prior authorizations.

The Settlement Agreement also committed the parties to seek a court order "authorizing *on an interim basis* the administration and operation of the SWP and the KWB Lands, pending discharge of the writ of mandate in the underlying litigation, in accordance with the Monterey Amendments." (Ex. 34 at p. 29 [emphasis added].) This demonstrates that the parties intended to void the prior authorization; there would be absolutely no reason, or need, to seek a court order providing interim authorization for the administration and operation of the SWP and KWB if the 1995 authorization had remained in effect.

B. If DWR Approved the Monterey Amendments in 2010, Then the Validation Action Is Timely

For all the reasons stated in section I above, DWR failed to make a decision in 2010 whether to authorize the Monterey Amendments, thereby violating CEQA. Because DWR's 1995 authorization of the Monterey Amendments had been voided in 2003 by the *PCL* Writ, the Interim Implementation Order, and the Settlement Agreement, there is no current valid authorization for the Monterey Amendments and Plaintiffs' validation action has not yet ripened. But if the Court disagrees and concludes that DWR did authorize the Monterey Amendments in 2010, then Plaintiffs' validation action is timely as it was filed within sixty days of that authorization.

C. Plaintiffs' Validation Action Is Not Time-Barred Because DWR Reauthorized the Monterey Amendments

In the alternative, even if DWR's authorization of the Monterey Amendments was *not* voided in 2003, either by order of the *PCL* trial court or by DWR's signing of the Settlement Agreement, Plaintiffs' validation action is still not time-barred because DWR's 2003 authorization of the Attachment A Amendments constituted a *reauthorization* of the Monterey Amendments, and that

reauthorization has not yet become final. Under Supreme Court precedent, the reauthorization of a contract makes the entire contract, including the unamended portions, subject to a validation challenge. (*Barratt American, supra*, 37 Cal.4th at 703-704.)

In *Barratt American*, our Supreme Court found that a city's reenactment of building permit fees, without change to those fees, was subject to a validation challenge under the relevant validation statute, Government Code Section 66022. (*Id.* at 703-704.) Section 66022 allows validation challenges to "an ordinance, resolution, or motion adopting a new fee or service charge, or modifying or amending an existing fee or service charge." (Gov. Code § 66022(a).) The Supreme Court found the city's reenactment of its building permit fees to qualify as "modifying or amending an existing fee," as the city's action was analogous to the legislature amending a portion of a statute while leaving unamended portions unchanged. As the court stated, "[u]nder the 'reenactment rule' of statutory interpretation, the unamended portion of the statute is reenacted with the enactment of the amendment, so that the statute is deemed to have been acted on as a whole." (*Id*. at p. 704.)

The relevant validation statute here is Government Code Section 17700, as this is a challenge to DWR's authorization of contract amendments (which are also related to bond payments). Section 17700 allows for actions to "determine the validity of [a state agency's] bonds, warrants, contracts, obligations, or evidences of indebtedness…" (Gov. Code Sec. 17700(a).) Although this section does not contain the same "modifying or amending" language of Section 66022(a), the analogy holds, as contract amendments are clearly actions subject to validation under Section 17700(a). (See AA30:7649-50, citing *PCL v. DWR*, *supra*, 83 Cal.App.4th at pp. 921-926.) And just as the reenactment rule of statutory interpretation states that the enactment of an amendment to a statute reenacts the entire statute, so must the authorization of a contract amendment reauthorize the entire contract; the contract must be "deemed to have been acted on as a whole" at the date of the authorization of the amendment. (*Barratt American*, *supra*, 37 Cal.4th at 704.)

DWR's adoption of the Attachment A Amendments in 2003 operated as a reauthorization (on an interim basis) of the Monterey Amendments. The Attachment A Amendments are further

amendments to the SWP long-term contracts that were negotiated as part of the Settlement Agreement. (Ex 34 at Attachment A, p. RV001519-23.) They "made certain clarifications to Articles 1, 6, and 16 of the long-term water supply contracts, and also added a new Article 58, addressing the determination of the dependable annual supply of available State Water Project water." (AA30:7641.) DWR first authorized the Attachment A Amendments when it signed the Settlement Agreement in 2003. (Ex. 34 at p. RV001492.) But per the terms of the Settlement Agreement, DWR's authorization of the Attachment A Amendments was "deemed effective on an interim basis," and will become final only upon "(1) the filing of the Notice of Determination following the completion of the new EIR, (2) discharge of the writ of mandate in the underlying litigation…, (3) conclusion of all litigation in a manner that does not invalidate any Monterey Amendment…" (Ex 34 at p. 29.) The Notice of Determination was filed on May 4, 2010 (Ex. 41) and the writ was discharged on August 27, 2010. (Ex. 44.)

This action is the only active litigation regarding the validity of the Monterey Amendments, so the third condition has not yet been met. While this fact may make Plaintiffs' validation challenge *not*

ripe, it does not make it time-barred under any of the theories propounded by Defendants or ruled on by the Superior Court. The distinction is important: dismissal of Plaintiffs' validation action for *lack of ripeness* would permit Plaintiffs (or any other party) to file a new reverse-validation action within sixty days of that dismissal (the date of satisfaction of the condition for DWR's authorization of the amendments). (See AA30:7651 ["If a public agency's acceptance of a contract is conditional, then it follows that the condition must be satisfied for the approval to become 'effective' and the contract to be subject to validation" (citing *California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1433, n. 17)].)

D. Defendants' Other Theories Should Be Rejected

The Superior Court dismissed Plaintiffs' Third Cause of Action (mandamus) as being barred because it regards matters subject to validation and, in the alternative, as being time-barred for the same reasons as Plaintiffs' validation action. (AA30:7662-63.) The court also ruled that the KWB transfer was not subject to a validation challenge due to the enactment of the Validating Act of 2003. (AA30:7663.) Finally, the court ruled that Plaintiffs' claims were barred by laches. (*Id*.)

The Superior Court's decisions on the timeliness of the Third Cause of Action, the applicability of the 2003 Validating Acts, and laches are all based on the theory that the authorization of the contracts and bonds occurred at the latest in 2003, as discussed in detail above. (*Id*.) Because this action challenges contract amendments that were authorized in 2010, the transfer of the KWB was not subject to the 2003 Validating Acts and Plaintiffs' validation and mandamus actions are not time-barred or barred by laches.

IV. In Ruling in Favor of Plaintiffs, the Superior Court Was Required to Order DWR to Void its Project Approvals

The Superior Court found in favor of Plaintiffs on one significant issue: it found that the EIR failed to properly analyze the environmental impacts of the transfer, use, and operation of the KWB. (AA33:8250.) The court issued a limited writ, ordering DWR to prepare new environmental review of the KWB issue. (AA36:9145-46.) While the court ordered the EIR decertified, however, it did not order DWR to void its prior approvals of the Monterey Amendments or even just of the transfer, use, and operation of the KWB. (AA36:9141-42.) The Court stated that it was "mired in a zugzwang, where no move is pleasant, but still one is required. The court must choose between the Scylla of reversing a validated transfer

of title, and the Charybdis of analyzing the environmental impacts of a transfer that already was approved and implemented." (AA36:9136-37.)

As discussed in section I.A, above, the Superior Court did not have discretion to leave the Project approvals in place after finding that the EIR was deficient in its analysis of the transfer, use, and operation of the KWB. A CEQA writ must void any approvals that commit an agency to a definite course of action that has not been subjected to proper environmental review under CEQA. (*Save Tara*, *supra*, 45 Cal.4th at 138 ["agencies must not 'take any action' that significantly furthers a project 'in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project.'" [quoting Guidelines § 15004, subd. (b)(2)(B)].) Just as an "agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR" (*Save Tara*, *supra*, 45 Cal.4th at 132), so too a court does not have the discretion to order such an illusory EIR to be prepared. The Superior Court admitted that it was issuing just such an order:

> The court acknowledges that, for purposes of the EIR, the transfer of the Kern Water Bank is essentially a *fait*

> *accompli*. …Nevertheless, DWR retains the discretion to seek to reverse the transfer, and in any event, the Settlement Agreement requires DWR to include the transfer in its environmental review, even if it feasibly cannot be reversed.

(Remedies Ruling at p. 8, n. 4.)

The court reasoned that it had "previously concluded that, as a result of this complicated history [of the Project], the Monterey Amendment contracts, including the Kern Fan Element Transfer Agreement, were 'validated' and are now immune from challenge." (Remedies Ruling at p. 8.) But even if the KWB transfer was validated in either 1995 or 2003, the Superior Court had the authority, pursuant to CEQA, to order DWR to void its authorization of the transfer. The transfer was still subject to CEQA review, and CEQA requires that the agency retain its discretion to approve or reject a project throughout the CEQA process. (*Mountain Lion Foundation v. Fish & Game Com*., *supra*, 16 Cal.4th at 117. ["unless a public agency can shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent, environmental review would be a meaningless exercise"].) Moreover, per the terms of the Settlement Agreement, DWR retained full discretion over the KWB transfer, including the discretion required by CEQA. (25:12449 ["The Parties

agree that nothing in this Settlement Agreement is intended to limit the discretion granted by law, including CEQA, to DWR…"].)

The Superior Court also reasoned that "[i]nvalidating the Project approvals is unnecessary and would throw the entire SWP into complete disarray…" (AA36:9140.) The court apparently believed that voiding DWR's Project approvals would necessarily alter the use and operation of the KWB. But as discussed in section II.B.3, above, courts have broad equitable powers to craft remedies in CEQA litigation, limited primarily by those limitations "expressly provided in" CEQA. (Pub. Resources Code § 21168.9(c).) One of those limitations is that a court may not order purely retrospective environmental review; it may not leave a project approval in place if it finds the underlying environmental review to have violated CEQA. What it may do is order the continued *operation* of a project *under equity,* while the agency performs new environmental review and until the agency makes a new project decision, either approving or rejecting the project. This was the only way the Superior Court could have maintained the status quo during the preparation of the third EIR. No matter what, the court was required to void the underlying approvals after finding the EIR defective.

CONCLUSION

In 2010, DWR concluded a seven-year environmental review process—its second attempt to comply with its CEQA obligations with respect to the Monterey Amendments—by certifying an EIR that was tens of thousands of pages long, contained dozens of findings, mitigation measures, and overriding considerations, and included comments from hundreds of agencies, groups, and individuals throughout California that spanned thousands of pages. Yet DWR contended that after all of this work, it was not required to issue any "approval" in order for the Project analyzed in the EIR to proceed.

This appeal raises a simple question that gets to the core of what CEQA is all about: is there substance to the process? Does the process have any real meaning? DWR's position is "no." Twenty years of litigation, along with twenty years of engagement by the public in the CEQA process, in DWR's view is a meaningless sham, a purposeless going-through-the-motions exercise. But as is demonstrated throughout this brief, this is a mistaken perspective.

In order for CEQA to have meaning, DWR was required to either approve or disapprove the Monterey Plus Project after certifying the EIR. That such an action might open DWR to a

potential challenge to its approval under California's validation statutes does not justify avoiding making such a decision, and in fact it is exactly why CEQA *absolutely requires* such decisions to be made *after* completing the process: an agency that commits itself to a course of action before conducting environmental review "will not be easily deterred from taking whatever steps remain toward the project's final approval." (*Save Tara*, *supra*, 45 Cal.4th at 135.) It is not enough to say that the agency can change its mind if it so chooses. Such a position is "unlikely to convince public observers that before committing itself to the project the agency fully considered the project's environmental consequences." (*Id*. at 136.) Because DWR refused to make a final approval after completing its EIR process in 2010, the EIR here was a "document of post hoc rationalization," rather than a document of accountability. (*Id*.)

Whereas, Plaintiffs respectfully request that this Court find in their favor and reverse the judgment of the Superior Court, by finding that:

A. DWR prejudicially abused its discretion by:

1. failing to make a proper Project approval; and/or

2. omitting a proper analysis of Article 21(g)(1) from the EIR's no-project alternatives; and/or

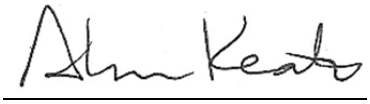
B. If DWR's 2010 decision constitutes a valid project approval under CEQA, Plaintiffs' reverse-validation action was not barred by the statute of limitations or other time-bar defenses, as either:

1. DWR's 2010 decision constituted an authorization of the Monterey Amendments, actionable under validation; or

2. DWR's authorization of the Attachment A Amendments in 2003 constituted a reauthorization and is actionable under the reenactment rule upon the conclusion of this litigation; and

C. The Superior Court was required under CEQA to void DWR's authorization of the Monterey Amendments (or at the minimum the authorization of the KWB transfer), regardless of when the authorization was made, when the court issued its writ in this action, decertifying the EIR and ordering new environmental review of the transfer, use, and operation of the KWB.

RESPECTFULLY SUBMITTED,

DATED: October 8, 2015 BY: 

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CERTIFICATE OF COMPLIANCE

Pursuant to CRC Rule 8.520(c)(1), this brief contains 13,456 words, according to the word count feature of Microsoft Word 2010, and therefore complies with the 14,000 word limit for opening briefs.

/s/ Adam Keats
Adam Keats

PROOF OF SERIVCE

I, Effie Shum, declare: I am and was at the times of service hereunder mentioned, over eighteen (18) years of age, and not a party to this action. My business address is 303 Sacramento Street, 2nd Floor, San Francisco, CA 94111.

On October 8, 2015, I caused to be served the below listed document(s) entitled:

1) APPELLANTS' AMENDED OPENING BRIEF

on all parties in this action via the court's electronic filing system, TrueFiling portal, pursuant to LCvR 5(k), and by electronic mail; and

2) APPELLANTS' AMENDED APPENDIX VOL. 1 THRU VOL. 37

by uploading a copy of the document(s) to be readily accessible online via dropbox.com, and providing the hyperlink to all parties in this action by electronic mail.

Electronic service addresses of persons served are as follows:

SEE ATTACHED ELECTRONIC SERVICE LIST

A copy of Appellants' Opening Brief was served on the Clerk of the Sacramento County Superior, at 720 9th Street, Sacramento, CA 95814 via USPS first class mail.

A copy of Appellants' Opening Brief was electronically uploaded to the California Supreme Court via the Court's web portal.

Executed on October 8, 2015, in San Francisco, California.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Effie Shum

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