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

CENTRAL DELTA WATER AGENCY, et al. Appellants and Petitioners v. DEPARTMENT OF WATER RESOURCES Defendant and Respondent ROLL INTERNATIONAL, et al. Real Parties in Interest and Appellants ALAMEDA COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT ZONE 7, et al. Real Parties in Interest and Respondents	Court of Appeal Case No. C078249 (Sacramento Superior Court Case No. 34-2010-80000561-CU-WM-GDS)

Appeal from the Superior Court, Sacramento County
The Honorable Timothy M. Frawley

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TABLE OF CONTENTS

Page

I. INTRODUCTION 32

II. STATEMENT OF FACTS 36

A. The State Water Project Contractors, Contracts, Table A Amounts, and Firm Yield Operations 36

B. Scheduled and Unscheduled Surplus Water and Article 21 39

C. State Water Project: Water Supply Shortages and Contractual Disputes Emerge 41

D. The Department and Contractors Abandon Firm Yield Operations and Adopt Flexible Water Management Practices to Increase Average Annual SWP Deliveries 45

E. The Monterey Amendment: A Relatively Simple Solution to a Complex Problem 50

III. PROCEDURAL HISTORY 52

A. The First Lawsuit Challenging the Monterey Amendment 52

B. This Lawsuit Challenging the Monterey Amendment 54

C. The No-project Alternative Issue Raised on Appeal 55

IV. STANDARD OF REVIEW 56

V. ARGUMENT 58

A. The EIR's Two No-project Alternatives Analyzing Pre-Monterey Amendment Contract Articles 18 and 21 Are Supported by Substantial Evidence and Therefore Complied with CEQA 59

1. DWR extensively deliberated how it would implement pre-Monterey Amendment Articles 18 and 21 under no-project conditions 59

2. The EIR included two no-project alternatives evaluating how DWR would allocate surplus water if it invoked Article 18(b) 63

3. The record includes substantial evidence supporting DWR's determination that it would deliver surplus SWP water to the contractors if it invoked Article 18(b) 65

B. CDWA Fails to Address the Record Evidence 69

C. CDWA Fails to Meet Its Burden to Show the EIR's No-project Alternatives Lack Substantial Evidence Support 70

D. CDWA's Focus on Article 21(g)(1) to Restrict Surplus Water Deliveries in the No-project is Myopic and Unsupported 74

E. Although DWR Found CDWA's Interpretation of Article 21(g)(1) an Unreasonable Forecast of No-project Conditions, DWR Nevertheless Analyzed it in the EIR 76

F. In Addition to Satisfying CEQA's Substantial Evidence Standard, the EIR's No-project Analysis and Discussion Satisfied Other CEQA Standards 84

1. The EIR's analysis and discussion of four ways of implementing Pre-Monterey Amendment Articles 18 and 21 satisfied CEQA's rule of reason 84

2. The EIR's no-project analysis and discussion allowed for informed decision-making and public participation, rendering any error harmless 87

VI. CONCLUSION 89

TABLE OF AUTHORITIES

Page(s)

California Cases

Assn. of Irritated Residents v. County of Madera
(2003) 107 Cal.App.4th 1383 74

Bohman v. Berg
(1960) 54 Cal.2d 787 66

Center for Biological Diversity v. Dept. of Fish & Wildlife
(2015) 234 Cal.App.4th 214 66

Cherry Valley Pass Acres and Neighbors v. City of Beaumont
(2010) 190 Cal.App.4th 316 86

Citizens of Goleta Valley v. Board of Supervisors
(1990) 52 Cal.3d 553 84

Communities for a Better Environment v. South Coast Air Quality Management District
(2010) 48 Cal.4th 310 57

Crestview Cemetery Assn. v. Dieden
(1960) 54 Cal.2d 744 66

Defend the Bay v. City of Irvine
(2004) 119 Cal.App.4th 1261 70

Dusek v. Redevelopment Agency
(1985) 173 Cal.App.3d 1029 88

Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection
(2008) 44 Cal.4th 459 88

Kings County Farm Bureau v. City of Hanford
(1990) 221 Cal.App.3d 692 88

Laurel Heights Improvement Assn. v. Regents of the University of California
(1988) 47 Cal.3d 376 ..... 71, 74, 87

Mira Mar Mobile Community v. City of Oceanside
(2004) 119 Cal.App.4th 477 ..... 84, 86

Neighbors for Smart Rail v. Exposition Metro Line Construction Authority
(2013) 57 Cal.4th 439 ..... 57, 88

North Coast Rivers Alliance v. Kawamura
(Cal. Ct. App., Dec. 2, 2015, Appeal No. C072067) 2015 WL 9598273, at 14-15 58

Planning and Conservation League v. Castaic Lake Water Agency
(2009) 180 Cal.App.4th 210 85

Planning and Conservation League v. Department of Water Resources
(2000) 83 Cal.App.4th 892 ..... *passim*

Residents Ad Hoc Stadium Com. v. Board of Trustees
(1979) 89 Cal.App.3d 274 85

Sierra Club v. City of Orange
(2008) 163 Cal.App.4th 523 70

Stanislaus Natural Heritage Project v. County of Stanislaus
(1996) 48 Cal.App.4th 182 56

Tracy First v. City of Tracy
(2009) 177 Cal.App.4th 912 70

Twain Harte Homeowners Assn. v., Inc. v. County of Tuolumne
(1982) 138 Cal.App.3d 664 83

Village Laguna of Laguna Beach, Inc. v. Board of Supervisors
(1982) 134 Cal.App.3d 1022 ..... 85, 86

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova
(2007) 40 Cal.4th 412 ..... 57, 71, 74

California Statutes

Cal. Code of Civil Procedure
§ 863 52

Cal. Code Regs., Title 14
§ 15126.6(a) 85
§ 15126.6(f) 84
§ 15126.6, subd. (e)(2) 35, 57, 65, 73
§ 15126.6, subd. (e)(3)(A) 66
§ 15151 56
§ 15204, subd. (a) 85
§ 15384, subd. (a) 73

Cal. Pub. Resources Code
§ 21000 ..... *passim*
§ 21005, subd. (b) 88

Cal. Wat. Code
§ 380, subd. (c) 47
§ 12930 36

Other Authorities

Cal. Rules Court, rule 8.200(a)(5) 33

I.
INTRODUCTION

Over 20 years ago the California Department of Water Resources (DWR) and over two dozen local public water agencies determined that administrative and operational changes to the California State Water Project (SWP) were necessary to accommodate changed circumstances and the modern realities of water supply, water management, and financing of the SWP. DWR and each of these local agencies executed amendments to their respective long-term SWP water supply contracts, consistent with principles of agreement negotiated in Monterey, California. The principles and the amendment are generally known as the "Monterey Agreement" and "Monterey Amendment."[1]

This lawsuit belatedly and imprudently seeks to revisit the Monterey Amendment and remove the longstanding water supply and management benefits it continues to confer on a majority of California's residents. This brief is jointly filed by most of the Real Party in Interest and Respondent local water agencies that long ago executed a Monterey Amendment and

[1] This brief refers to the "Monterey Amendment" in the singular; however, there are actually 27 essentially identical Monterey Amendments—one for each of the SWP contractors that separately approved and executed with DWR its own Monterey Amendment to its individual SWP contract. (See e.g., AR 152:76270-333 [Alameda County Water District's Monterey Amendment]; AR 165:82735-798 [Napa County Flood Control & Water Conservation District's Monterey Amendment]; AR 156:78245-309 [Santa Barbara Flood Control & Water Conservation District's Monterey Amendment].)

which have relied and operated thereunder for the many years since (collectively SWP contractors or contractors).[2]

The Monterey Amendment included various provisions that improved the contractors' water supply reliability and water management options. For example, it allowed contractors to store SWP water supplies outside their service areas for later use. It also facilitated contractors' use of SWP reservoirs to store or "carry over" their annual SWP water supplies from one year to the next. It facilitated permanent and temporary transfers of SWP water supplies among the contractors, and provided for allocation of SWP water supplies more evenly among urban and agricultural contractors during shortages. Providing the SWP contractors with these and other provisions allowing for more flexible water management and conjunctive use opportunities benefitted many California residents and businesses by increasing their local water supply reliability. The Monterey Amendment continues to provide these invaluable benefits as water supply management in California becomes ever more complex amidst growing populations, increased environmental regulations, and climate change.

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[2] In this brief, Respondent SWP contractors address Appellants Central Delta Water Agency et al.'s argument that the superior court improperly found DWR's no-project alternatives analysis satisfied the California Environmental Quality Act. To avoid duplication, Respondent SWP contractors join in the arguments made in DWR's Defendant and Respondent's Brief, specifically Argument Sections I, II, III, and IV. (Cal. Rule Court, Rule 8.200(a)(5).)

In 1995 the Central Coast Water Authority prepared and certified an environmental impact report under the California Environmental Quality Act, Public Resources Code § 21000 et seq. (CEQA), which analyzed the potential environmental effects of the Monterey Agreement and Amendment. A case filed in 1995 challenged the validity of the Monterey Amendment and the adequacy of its environmental review. That litigation ended in 2003 by way of a settlement agreement that required (among other things) that DWR prepare a second environmental impact report. In 2010, DWR completed the second environmental impact report (Monterey Plus EIR or EIR).

In the Monterey Plus EIR, DWR analyzed the environmental impacts of implementing and operating the SWP under the Monterey Amendment. The EIR included a discussion and analysis of the potential environmental effects of not implementing the Monterey Amendment—CEQA's so-called "no-project alternative." In this no-project analysis, DWR concluded it would operate the SWP to deliver all available SWP water to satisfy the demands of the SWP contractors, including so-called "surplus" water. The EIR described four different approaches to how DWR could allocate SWP water under no-project circumstances.

In this case, plaintiffs and appellants Central Delta Water Agency, Center for Biological Diversity, South Delta Water Agency, California Water Impact Network, California Sportfishing Protection Alliance,

Carolee Krieger, and James Crenshaw (collectively, CDWA) challenge the adequacy of the Monterey Plus EIR. CDWA disagrees with DWR's determination and description of how DWR would allocate SWP water supplies in the no-project alternative. CDWA seizes on, and misinterprets, an obscure scrap of contractual text to argue the EIR's no-project alternative should be a scenario where DWR restricts delivery of SWP surplus water supplies if such supplies would support permanent developments. However, as the lead agency preparing the EIR under CEQA, it was DWR—not CDWA—that was tasked with describing the no-project alternative by making factual determinations of "what would be reasonably expected to occur in the foreseeable future" without the project. (Cal. Code. Regs., tit. 14, § 15126.6, subd. (e)(2).)

Under CEQA, this Court must review whether DWR's factual no-project determinations are supported by substantial evidence in the record. As this brief demonstrates, they are. CDWA does not address this substantial evidence. CDWA simply ignores it. This is grounds enough to reject CDWA's argument. Regardless, CDWA fails to meet its burden of establishing that the Monterey Plus EIR's no-project alternatives lack substantial evidentiary support.

Finally, even if CDWA could somehow overcome these failings, this Court should reject CDWA's no-project arguments because CDWA essentially got what it wanted anyhow. Specifically, DWR included in the

EIR a discussion and analysis of restrictive SWP water deliveries in accord with CDWA's hypothetical no-project interpretation.

In sum, this Court should reject CDWA's no-project arguments because the Monterey Plus EIR's no-project alternatives were supported by substantial evidence that is not challenged by CDWA, and also because the EIR provided an analysis and discussion of a reasonable range of no-project alternatives, including CDWA's suggested scenario. DWR's good faith and extensive efforts at analysis and disclosure of the no-project alternatives satisfied CEQA's fundamental purposes of informed decision-making and informed public participation.

II.
STATEMENT OF FACTS

Some historical context is essential to understand and appreciate the issues raised in this appeal.[3]

A. The State Water Project Contractors, Contracts, Table A Amounts, and Firm Yield Operations

In 1960, California voters approved issuance of $1.75 billion in general obligation bonds, as authorized by the Burns-Porter Act (Wat. Code, § 12930 et seq.), thereby establishing the initial funds to build the SWP. (AR 66:33325.) The SWP, managed by DWR, is the largest state-

[3] Citations to the CEQA Administrative Record are denoted (AR [Vol.#]:[Bates#].). Citations to documents in Appellants' Amended Appendix are denoted (AA [Vol.#]:[Bates #].).

built, multi-purpose water project in the country. (*Ibid.*) SWP facilities include approximately 28 dams and reservoirs, 26 pumping and generating plants, and approximately 660 miles of aqueducts. (AR 66:33325; see AR 66:33326 [facilities map].)

In the 1960s, 31 public water agencies agreed to repay all associated SWP capital and operating costs in exchange for SWP water service. They did so by executing substantially similar long-term water supply contracts with DWR (SWP contracts). (AR 23:11124, 11134, 11136; see, e.g., AR 25:12069-12404 [Kern County Water Agency contract].) These contractors, now numbering 29 as a result of consolidations, span a large part of California's geography, and they deliver SWP water to over 23 million Californians. (AR 66:33332 [map of contractors' service areas]; AR 66:33333 [table listing contractor attributes].)

The SWP contractors are a diverse group of agencies with varied constituent water users; however, a general distinction can be made between those that serve primarily agricultural water users and those that serve primarily municipal and industrial water users. The two groups are generally referred to as "agricultural" and "urban" SWP contractors.

The initial SWP contracts established how much SWP water supply each contractor would annually receive and the portion of annual SWP costs each had to pay. (AR 23:11134.) SWP contract Article 6(b) established DWR's general water delivery obligation: "the State each year

shall make available for delivery to the Agency the amounts of project water designated in Table A of this contract . . . ." (AR 25:12076; AR 23:11138-40.) Accordingly, each contract contained a "Table A" specifying the annual amount of SWP water that DWR was to deliver, subject, of course, to applicable regulatory constraints (Table A amount).[4] (See, e.g., AR 25:12104 [Kern County Water Agency's Table A].) Contractors' annual charges for repayment of construction and operation costs of SWP conservation facilities are based on their Table A amounts. (AR 23:11146.)

The long-term SWP "contracts were structured to reflect increasing population and water demand . . . ." (AR 23:11138.) For most SWP contractors, this meant Table A amounts began low in the 1960s, and then "ramped up over time until they reached a maximum Table A amount" in the 1990s or 2000s. (*Ibid.*; see AR 23:11140 [Table 2-5].) The maximum sum of Table A amounts has varied between 4.0 – 4.23 million acre-feet and is currently 4,172,786 acre-feet.[5] (AR 23:11138.)

The maximum sum of all contractors' Table A amounts was a key concept in the SWP's original operational and contractual design. The EIR explained:

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[4] The SWP contracts originally referred to a contractor's Table A amount as its "entitlement." (AR 23:11166.)

[5] An acre-foot is about 325,851 gallons.

> The original 1960s plan for the SWP was to build storage dams and reservoirs upstream of the Sacramento-San Joaquin Delta that, in conjunction with facilities to transport water across the Delta, could develop sufficient water to deliver a "minimum project yield" to all contractors, year-in and year-out. Only during certain few and infrequent critically dry years did the original plan expect deliveries to be less than the combined minimum SWP yield of approximately 4.2 million [acre-feet] AF, in which case agricultural contractors would receive some supply reductions.

(AR 23:11150.) In sum, when the SWP contracts were negotiated and executed, a "minimum project yield" or "firm yield" of approximately 4.2 million acre-feet was the amount of water the SWP was ultimately supposed to deliver to the contractors each year, except during few and infrequent critically dry years. (AR 23:11138.)

B. Scheduled and Unscheduled Surplus Water and Article 21

"Surplus water" is water the SWP can make available, above contractors' Table A water deliveries. (AR 2:509-10, 664-66; AR 23:11143-44.) Before 1988 the SWP often had large amounts of scheduled surplus water for delivery, because (as explained above) the contractors' Table A amounts were initially set low and then gradually increased each year until attaining their maximum values. (AR 2:509-10, 664-66; AR 23:11143-44.) Article 21 of the SWP contracts addressed these surplus deliveries. (AR 23:11143-44.)

Historically, there were two kinds of surplus water: scheduled and unscheduled. (AR 2:509-10; 664-66; AR 23:11143-44.) "Scheduled surplus" was water the SWP had in storage or otherwise expected to be able to deliver in a given year, and therefore its delivery could be planned for throughout the year (i.e., scheduled). (*Ibid*.) "Unscheduled surplus" was water that unexpectedly became available in the Sacramento-San Joaquin Delta for SWP pumping (often from large storm runoff events), which was not required to meet contractors' Table A deliveries, SWP storage goals, or regulatory requirements. (*Ibid.*) Unlike scheduled surplus, the availability of unscheduled surplus and the opportunities to deliver it vary year to year. (*Ibid*.)

In the early years of the SWP, urban contractors' water demands were low, primarily because their service areas had not yet reached the maximum anticipated population levels. In contrast, agricultural SWP contractors had the capability and existing demand to receive water deliveries in excess of their annual Table A amounts, even in the early years of the SWP. Article 21 therefore included a surplus water delivery preference for agricultural and groundwater replenishment uses. (AR 23:11143.) Under these provisions of Article 21, DWR routinely delivered "scheduled surplus" water to agricultural contractors, and also to some urban contractors, in all but one year from 1968 through 1986. (AR 137:69871 [Table 6-3 column 9, showing deliveries of surplus and

unscheduled water], 69823 [Table 2-1 columns 4 and 5, showing same], 70179 [Table B-32, showing surplus and unscheduled water deliveries during 1973-1992].) The amounts of scheduled surplus water DWR delivered often exceeded several hundred thousand acre-feet a year, and cumulatively totaled almost 6 million acre-feet. (*Ibid*.)

DWR discontinued scheduled surplus water deliveries in 1986. (AR 23:11198.) By that time, SWP contractors' Table A amounts and their demands for Table A water deliveries usually exceeded the amount of water DWR could schedule for delivery, meaning that after all Table A deliveries were scheduled there was no "surplus" water to schedule for delivery. (See AR 23:11132 [Figure 2-2, showing trend in increasing Table A water deliveries and decreasing Article 21 "surplus" water deliveries].) Accordingly, since 1986, the SWP's Article 21 surplus deliveries have consisted only of so-called "unscheduled surplus" water from unexpected, high-volume runoff and river flow events. (AR 23:11198.)

C. State Water Project: Water Supply Shortages and Contractual Disputes Emerge

The SWP performed as planned in its early decades by meeting the SWP contractors' requests for Table A water deliveries consistent with the original intent of the SWP contracts. However, as the SWP contractors' Table A amounts and requests increased, particularly those of urban contractors with growing populations, the SWP could not keep pace with

the original "firm yield" expectations of delivering full contractual Table A amounts in almost every year. In 1988, DWR estimated "the firm yield of existing SWP facilities is approximately 2.4 million acre-feet per year," and that "contractor [Table A] requests . . . now exceed that amount." (AR 534:255618-19; see AR 198:100840-49 [another early DWR report identifying impending imbalance between SWP firm supplies and Table A entitlements].)

The SWP's inability to deliver the anticipated firm yield resulted from several factors. As the Monterey Plus EIR explained, "planned minimum yield was determined during the formulation of the SWP during the 1950's and 1960's and was based on the amount of water the SWP could deliver upon completion of all anticipated SWP facilities," but "all of the originally contemplated facilities have not been built and the existing SWP facilities and operations today are not what was envisioned over 50 years ago." (AR 23:11138.) Several planned SWP facilities were not built due to "various concerns, including environmental, political and financial." (AR 23:11150.) Additionally, "more stringent environmental standards in the Delta . . . limited the amount of water that could be diverted at the Banks Pumping Plant and reduced the capability to deliver the maximum water supply." (*Ibid.*)

The SWP's inability to deliver full Table A amounts as originally intended was exposed by a major drought during 1987-1992. DWR applied

the "temporary shortage" terms of SWP contract Article 18(a), which allowed reductions in deliveries to agricultural contractors before reducing deliveries to urban contractors. DWR invoked Article 18(a) to impose severe reductions in SWP allocations and deliveries in 1990, 1991, and 1992—first to agricultural contractors and then even to urban contractors. (AR 23:11151.) For example, in 1991, DWR delivered no water to agricultural contractors, and only 30 percent to urban contractors. (*Ibid*.)

These events caused extreme disagreements and tensions among and between DWR, urban contractors, and agricultural contractors regarding the proper implementation of Article 18's shortage provisions. (AR 23:11151-52.) Agricultural contractors argued that instead of declaring "temporary shortages" and invoking Article 18(a), DWR ought to declare a "permanent shortage" and invoke Article 18(b) instead. Article 18(b) allowed reductions to all contractors' Table A amounts if the SWP could not meet the "minimum project yield" or "firm yield" (i.e., a permanent shortage). (*Ibid.*)

In 1994, the California Research Bureau[6] prepared a report detailing the ongoing disputes regarding SWP operations and financing, which

[6] The California Research Bureau provides nonpartisan research services to the Governor and his staff, to both houses of the Legislature, and to other elected State officials. (https://www.library.ca.gov/crb/, last accessed January 28, 2016.)

discussed various "options for change." (AR 36:18368-18439.) It explained:

> When DWR and the contractors signed the water supply contracts, they all believed the project would reliably deliver the official project yield of 4.2 million acre-feet of water per year. However, the SWP can not supply near that much water. The DWR estimates that the current SWP facilities can deliver 2.8 million acre-feet of water in an average year – 2.2 million acre-feet in a drought year . . . . According to many, this gap between the official project yield and actual project deliveries is at the root of most SWP repayment problems.

(AR 36:18386.)

The report suggested one option for resolving the water allocation dispute: amend the SWP contracts to eliminate Article 18(a)'s "agriculture-is-cut-first" provision and simultaneously eliminate Article 21's agricultural priority for surplus water deliveries:

> The original premise behind the agriculture-is-cut-first priority for surplus water was that agriculture was more flexible in its use of water and could gear up or throttle down depending on the supply. Most people expected that the agriculture-is-cut-first provisions would be sufficient to cover any temporary shortages. No one anticipated that agriculture would receive virtually no water in a year. Since the basic premise is no longer applicable, this option simply removes both provisions.

(AR 36:18380.)

The report stated that a DWR task force had similarly recommended amending the SWP contracts:

> Article 18 of the Contract should be comprehensively amended for developments not foreseen by its writers—such as the mismatch of entitlements and deliveries and the inability to complete project conservation facilities in advance of buildup needs.

(AR 36:18379.)

D. The Department and Contractors Abandon Firm Yield Operations and Adopt Flexible Water Management Practices to Increase Average Annual SWP Deliveries

Although the SWP was initially intended to operate under the "firm yield" principle of reliably delivering water in quantities matching the contractual Table A amounts, the SWP's inability to do so caused DWR and the contractors to explore operational approaches to mitigate the SWP's shortcomings. These operational changes began in the 1980s—long before the Monterey Amendment. These efforts resulted in a major paradigm shift: DWR moved away from the original principle of "firm yield" operations in favor of operations that would deliver more SWP water to the contractors in most years:

> Since timely augmentation of SWP yield through new construction has been precluded, DWR has been devoting increasing attention to the potential for increasing the average annual delivery capability of existing facilities by using operating strategies other than those used for the conventional firm yield mode of operation.

(AR 533:255326; see AR 37:18862; see also AR 136:69425 ["The concept of firm yield has been replaced by the concept of variable yield."].) Modified SWP operations based on maximizing annual water deliveries (consistent with all applicable regulations) began in 1986 and continued thereafter. (AR 533:255327-28; AR 534:255619-20; AR 535:255917-18; see also AR 198:100531.) In other words, "DWR now considers the probability of an amount of water being delivered annually rather than firm yield when discussing reliability of SWP water supplies." (AR 24:11754.)

Discontinuing original "firm yield" operations was a turning point for DWR and the SWP contractors. It acknowledged that all of the originally contemplated SWP facilities had not been built and that the SWP would not likely be able to reliably deliver the full 4.2 million acre-feet per year as initially intended. Variable yield operations replaced the original concept of an extremely reliable SWP centrally controlled by DWR (i.e., firm yield) with an operating regime that placed more responsibility for water supply management on each SWP contractor (i.e., variable yield). (*Ibid.*)

Discontinuing firm yield operating principles fundamentally changed the purpose and role of Table A amounts. (AR 2:510-12 [discussing SWP's current method of estimating water supply based on probability and explaining that Table A amounts have no role in driving SWP operations]; see AR 24:11754.) Instead of being used as some kind of

current and future delivery target that had to be met under the old firm yield principle, Table A amounts would now serve primarily as a way of allocating water supply, water shortages, and SWP costs among the contractors. (AR 2:510-11.)

Under the variable yield operations first embraced in 1986, DWR essentially front-loaded SWP water deliveries every year, instead of holding back in reservoirs a large quantity of "reserve" water (for delivery in subsequent years) as it did under the old firm yield method. This "variable yield" operation maximizes the contractors' annual SWP water deliveries. It is then up to each SWP contractor to determine how best to use and integrate its variable SWP supplies with its other water sources to "make most efficient use of available water supplies, especially during a drought." (AR 136:69426.) DWR and the contractors' shift to local control and management is consistent with the Legislature's 1982 statutory declaration: "Many water management decisions can best be made at a local or regional level, to the end that local and regional flexibility will maximize efficient statewide use of water supplies." (Wat. Code, § 380, subd. (c).)

As SWP operations changed, so too did those of the SWP contractors. They began employing flexible and adaptive water management practices to integrate their now variable SWP supplies with their other water supplies. DWR assisted by "chang[ing] its activities for

water management and develop[ing] programs to compensate for the lack of storage facilities," which included "transferring, exchanging, loaning, storing, purchasing, and carrying over water for delivery at a later date." (AR 136:69426.)

In 1992—years before the Monterey Amendment—DWR reported on the "Changing Ways of Managing Water," and it described several other SWP contract amendments and agreements that had been executed by DWR and the contractors to facilitate better, more flexible water management. (AR 136:69424-36; see AR 23:11140-44.) DWR explained:

> For the Department, the difference between the available supply and demand for water during this drought has helped bring into sharper focus the challenges it faces in managing its water delivery system, the [SWP]. In response, the Department has refined some methods of managing SWP's operations and water supplies; expanded others; and developed and implemented new methods.

(AR 136:69425.)

Many of the practices adopted by DWR and the SWP contractors are now ensconced in modern California water management. (See, e.g., AR 168:84386-88 [DWR Director's 2003 letter describing staples of modern water management].) In fact, DWR's 2005 California Water Plan Update (Water Plan) listed 25 water management strategies that local water agencies now use to protect and increase the reliability of their water supplies. It explained that local water agencies should "think of these

strategies as tools in a tool kit," and the key is "planning a diversified portfolio" that satisfies regional needs and objectives. (AR 64:32533-37; see AR 40:20110 ["local water providers 'mix and match' their supply sources to maximize water supply"].)

One practice is known as conjunctive management, which is the "coordinated operation of surface water storage and use [and] groundwater storage and use," in other words, storing available excess surface water supplies underground (often in wet years) for later extraction and use (often in dry years). (AR 64:32562.) The Water Plan discusses the long and successful history of conjunctive management projects in southern California, which have increased average annual water deliveries by 2 million acre-feet. (*Ibid.*) It also describes SWP contractor Santa Clara Valley Water District's successful use of 20 local creeks to provide instream flows, recharge groundwater, and create a drought "buffer" in its northern California service area. (AR 64:32563.) Similarly, The Metropolitan Water District of Southern California established an Integrated Water Resources Plan to coordinate and diversify its regional water supplies, which includes conjunctive management. (AR 107:55166-80.) Other SWP contractors have similarly implemented increasingly flexible and integrated water management strategies to secure local water supply reliability.

In sum, before the Monterey Amendment, DWR and the SWP contractors significantly changed SWP operating principles from the original firm yield concept, which was driven by Table A amounts, to a variable yield approach driven by hydrology. This emphasized taking advantage of, and making the best use of, all available SWP supplies in every year as a flexible and adaptive way to cope with the SWP's limitations. At the same time, the SWP contractors began employing and relying on a diverse set of flexible water management projects and programs to make most efficient use of their variable SWP supplies as part of their overall water supply portfolios.

E. The Monterey Amendment: A Relatively Simple Solution to a Complex Problem

Despite switching to variable yield operations and implementing flexible water management practices beginning in the mid-1980s, the fundamental imbalance between contractor demands and SWP supplies remained. So too did certain contentious and essentially obsolete SWP contract terms. SWP water shortages were frequent, causing continued infighting regarding SWP water allocations under Article 18's shortage provisions. DWR and the contractors needed a permanent solution. To that end, building new facilities was unrealistic; it would take decades, incur enormous costs, and face substantial environmental and political hurdles.

Similarly, litigation of SWP contract disputes would be lengthy, contentious, costly, and unpredictable.

DWR and the contractors ultimately chose to negotiate a voluntary agreement with a set of principles intended to settle the contractual disputes, further increase the reliability of the contractors' existing water supplies, strengthen the SWP's financial management, and increase the SWP contractors' water management flexibility. (AR 23:11152; see AR 198:100642-100669 [report titled "The Monterey Agreement: Innovative Water Management for the 21st Century"].) These principles were achieved by making numerous changes and additions to the SWP contracts through the Monterey Amendment, which 27 contractors executed in the mid- to late-1990s. (AR 23:11030.)

The significance of the Monterey Amendment in resolving a veritable crisis among DWR and the contractors cannot be overstated. It is also significant that the Monterey Amendment achieved its ends in a relatively simple and environmentally conscious manner. It did not require construction of new canals, reservoirs, or any other SWP facilities, nor did it change the regulatory regime under which SWP facilities operate. In fact, the Monterey Plus EIR concluded that of the 30 amendments to the SWP contracts effected by the Monterey Amendment, only nine have the potential to change the physical environment. (AR 23:11207 [Table 6-3].)

Instead of developing large quantities of new water supplies, the Monterey Amendment redistributed existing SWP supplies. It amended Article 18 so agricultural contractors would not bear the initial burden of shortages, and it amended Article 21 so urban contractors had equal access to unscheduled surplus water. (AR 23:11162; AR 2:805.) It permanently shifted some SWP supplies by requiring agricultural contractors to transfer some of their Table A amounts to urban contractors. (AR 23:11163.) The Monterey Amendment also provided the contractors with more flexibility to integrate and manage their variable SWP supplies with other local water sources, practices already underway long before the Monterey Amendment was executed. (AR 23:11164-65; see Section II.D, above.) The Monterey Amendment has provided these and other water supply and reliability benefits for the last 20 years.

III.
PROCEDURAL HISTORY

A. The First Lawsuit Challenging the Monterey Amendment

In 1995, the Planning and Conservation League and other special interest organizations filed a lawsuit against DWR and others, which included a reverse validation action under Code of Civil Procedure section 863 (PCL case). (AA 20:4830-46.) The PCL case challenged the validity and legality of the Monterey Amendment on various grounds, including allegations that its environmental impact report violated CEQA. However,

plaintiffs in the PCL case did not seek to enjoin DWR from executing or implementing the Monterey Amendment during the litigation, and the SWP operated and allocated water according to the changes made by the Monterey Amendment during the years of litigation. DWR prevailed on all claims in the superior court, and an appeal followed.

In 2000, this Court found DWR should have been the CEQA lead agency instead of the Central Coast Water Authority, and that the environmental impact report violated CEQA because its no-project alternative failed to include an analysis of invocation of Article 18(b) of the pre-Monterey Amendment SWP contracts. (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 903-20 (*PCL v. DWR*).) Importantly, this Court "declined to stay implementation of the Monterey amendments" during the appeal and remanded to the superior court for entry of an appropriate remedy. (*Id*. at p. 926 fn. 16.)

On remand, the parties settled the PCL case. (AR 25:12405-87.) Among other provisions, the settlement approved by the superior court required that DWR would prepare a new environmental impact report. It did not enjoin DWR from continuing to operate under the Monterey Amendment.

DWR completed and certified the new environmental impact report in 2010 (i.e., the Monterey Plus EIR) and filed a return to the superior

court's writ. (AR 22:10924-27.) The superior court found DWR had complied with its orders in the PCL case and discharged its CEQA writ in 2010. (AA 21:5187.)

B. This Lawsuit Challenging the Monterey Amendment

After DWR completed the Monterey Plus EIR, it was served with a new lawsuit filed by the Central Delta Water Agency, Center for Biological Diversity, and other organizations, individuals, and local agencies, which are plaintiffs and appellants here (collectively, CDWA). (AA 1:16-89.) CDWA's lawsuit again sought to institute a reverse validation action to invalidate the Monterey Amendment on various grounds and challenged the adequacy of DWR's Monterey Plus EIR under CEQA.

After a bifurcated time-bar affirmative defenses trial, the superior court dismissed CDWA's reverse validation action and mandamus claims as untimely and barred on several grounds (e.g., statute of limitations, laches, etc.). (AA 30:7626-7665.) After subsequent briefing and a trial on CDWA's CEQA cause of action, the superior court issued a ruling rejecting all but one of CDWA's CEQA allegations. (AA 33:8224-8250.) The lone CEQA issue on which CDWA prevailed was a finding that the Monterey Plus EIR "fails to adequately describe, analyze, and (as appropriate) mitigate the potential impacts of the Project associated with the anticipated use and operation of the Kern Water Bank." (AA 33:8250.) The superior

court issued a final judgment, and DWR served notice of entry of judgment on December 1, 2014. (AA 37:9209-17.) This appeal followed.

C. The No-project Alternative Issue Raised on Appeal

In proceedings below, CDWA unsuccessfully argued the Monterey Plus EIR was deficient because it did not analyze a no-project alternative applying a narrow and restrictive interpretation of Article 21 of the pre-Monterey Amendment SWP contracts, particularly its subdivision (g)(1). CDWA argued that DWR had incorrectly interpreted the pre-Monterey Amendment SWP contracts. CDWA argued that subdivision (g)(1) of Article 21 would require DWR to refuse to deliver surplus SWP water supplies if that water would be used by cities or permanent crops, and that the EIR should have labeled and analyzed this scenario as a no-project alternative.

DWR and the SWP contractors argued the EIR's two no-project alternatives considering a lower minimum project yield of 1.9 million acre-feet were reasonable forecasts of how DWR would operate if it reverted to pre-Monterey Amendment contract terms and invoked Article 18(b), which were supported by substantial evidence and therefore complied with CEQA and the *PCL v. DWR* opinion. They further argued that CDWA's hypothetical interpretation of the SWP contracts was incorrect, unreasonable, and lacking in evidentiary support. Finally, they noted the

EIR nevertheless analyzed CDWA's proffered interpretation in response to comments.

The superior court found that even if the EIR should have analyzed and labeled CDWA's interpretation of Article 21(g)(1) as a "no-project alternative," any such error was not a prejudicial abuse of discretion, because it "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." (AA 33:8245.) The superior court ruled the "analysis of this scenario is not perfect, but it is sufficient to make an informed decision on the Project, particularly where, as here, all of the parties to the SWP contracts believe such interpretation is not reasonable or enforceable." (*Ibid*.; see Cal. Code Regs., tit. 14, § 15151 ["The courts have not looked to perfection but for adequacy, completeness, and a good faith effort at full disclosure."].)

IV.
STANDARD OF REVIEW

This "'appellate court reviews the administrative record independently; the trial court's conclusions are not binding on it.'" (*PCL v. DWR*, *supra*, 83 Cal.App.4th at p. 912 [quoting *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 192-93].) This Court's "task is the same as that of the trial court," to "review

the public agency's actions to determine whether it complied with CEQA." (*Ibid*.)

CDWA's challenge to the adequacy of the EIR's no-project alternatives must be reviewed under the substantial evidence standard. In developing the EIR's no-project alternatives, the CEQA Guidelines directed DWR to "discuss the existing conditions . . . as well as what would be reasonably expected to occur in the foreseeable future [without the project] . . . based on current plans and consistent with available infrastructure and community services." (Cal. Code Regs., tit. 14, § 15126.6, subd. (e)(2).) This required DWR to exercise its discretion and expertise to make factual determinations of existing conditions and how they might change in the future. This Court's opinion in *PCL v. DWR* confirmed that a no-project alternative "is a factually based forecast." (*PCL v. DWR, supra,* 83 Cal.App.4th at p. 917 [underline added].)

It is black letter CEQA law that all of a lead agency's factual determinations are reviewed for substantial evidence. (*Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 328 [stating "all CEQA factual determinations" are subject to review "for support by substantial evidence"]; accord *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 471; accord *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.)

Consistent with these California Supreme Court precedents, this Court recently applied the substantial evidence standard of review to uphold the California Department of Food and Agriculture's factual forecasts of pesticide use, crop damage, and the future effects of quarantines in the no-project alternative in an environmental impact report evaluating a proposed project to eradicate the light brown apple moth. (*North Coast Rivers Alliance v. Kawamura* (Dec. 2, 2015, Appeal No. C072067) 2015 WL 9598273 at 14-15 [certified for publication Jan. 4, 2016].)

In sum, under CEQA all the lead agency's factual determinations are reviewed under the substantial evidence standard. Because a lead agency's no-project descriptions are "factually based forecast(s)," (*PCL v. DWR*, *supra*, 83 Cal.App.4th at p. 917), the substantial evidence standard applies to CDWA's current challenge to DWR's determinations and descriptions of the no-project alternatives in the Monterey Plus EIR.

V.
ARGUMENT

This Court has at least three bases to find the Monterey Plus EIR's no-project alternatives analysis complied with CEQA:

(1) CDWA entirely fails to review the voluminous record evidence favorable to DWR and the contractors; and,

(2) CDWA fails to meet its burden of demonstrating the EIR's no-project alternatives lack substantial evidence support; and,

(3) Any error in the EIR's no-project alternatives analysis was harmless because the EIR provided a good faith analysis and discussion of a reasonable range of no-project alternatives, including specifically addressing CDWA's hypothetical interpretation of Article 21(g)(1), which satisfied CEQA's overarching purposes of informed decision-making and informed public participation.

A. The EIR's Two No-project Alternatives Analyzing Pre-Monterey Amendment Contract Articles 18 and 21 Are Supported by Substantial Evidence and Therefore Complied with CEQA

1. DWR extensively deliberated how it would implement pre-Monterey Amendment Articles 18 and 21 under no-project conditions

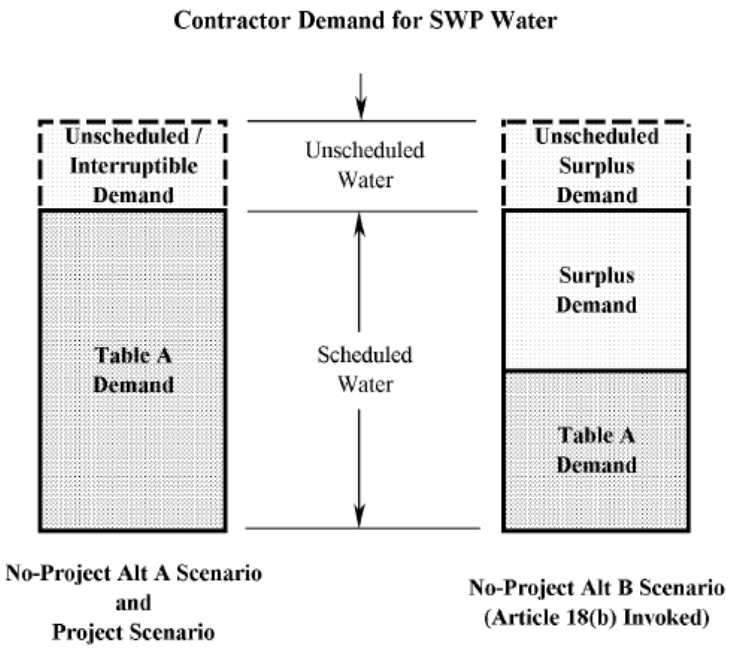
In complying with *PCL v. DWR* and preparing the no-project alternatives discussion for the EIR, DWR had to determine how it would allocate SWP water in the theoretical event it invoked Article 18(b) to reduce contractual Table A amounts from their present collective total of about 4.1 million acre-feet to 1.9 million acre-feet. As explained below, DWR determined that it would continue to deliver water in amounts above the 1.9 million acre-foot threshold if water was available because, among other reasons, DWR had historically delivered such water if the contractors had uses for it.

Invocation of Article 18(b) would cause water that DWR had historically delivered as "Table A water" to be instantly reclassified as "surplus water" (i.e., water not required to meet the now lowered Table A amounts). However, this would be strictly an administrative and semantic change; it would not change the contractors' real-world demands for SWP water, or the actual amount of available water, one bit:

> As was discussed in the Modeling Subcommittee meeting, a Contractor's total demand for water from the SWP would be the same, with or without invocation of Article 18(b). Likewise, a Contractor's demand for scheduled delivery of SWP water (versus demand for unscheduled, or interruptible supplies) would not change with invocation of Article 18(b). <u>The only difference with invocation of Article 18(b) is that the label on the scheduled water would change</u>.

(AR 168:84529 [underline added].)

This circumstance is depicted in the following graphic from the record:



(AR 168:84530.) Simply put, invoking Article 18(b) would instantly convert about half of what had previously been contractors' "Table A demand" (see left-hand column above) into "surplus demand" (see right-hand column above). Regardless of what you call it, however, the contractors' total actual water demand would remain the same. Similarly, the quantity of actual water the SWP could schedule for delivery (i.e., "scheduled water") would remain the same (see middle of figure above). The only difference is that with Article 18(b) invoked what DWR had previously delivered as "scheduled Table A water" could instead be delivered as "scheduled surplus water."

A critical issue raised and considered during preparation of the EIR was how DWR would allocate the previous Table A water that would be relabeled as surplus water upon invocation of Article 18(b):

> What criteria would be used for surplus water deliveries? For example, would surplus first go to make up deliveries to pre-reduction entitlement levels, regardless of use, with supplies allocated in proportion to entitlement; or under Article 21(b) provisions, would priority be given to agricultural and groundwater uses? If the latter, would agricultural contractors have unlimited access to surplus, or only up to their pre-reduction entitlement levels?

(AR 167:83751.)

DWR discussed several ways of allocating surplus water:

> The draft assumptions paper describes only one methodology for allocation of surplus water, i.e., in accordance with pre-Monterey Amendment provisions of Article 21. As has been discussed in several of the Monterey Plus EIR Committee meetings, this is only one of several interpretations of how surplus water supplies might have been allocated with invocation of Article 18(b).

(AR 168:84528; see AR 168:84487-89; see also AR 198:100793-816 [EIR Committee presentation, "No Project Alternative Process for Monterey Plus EIR"].)

After extensive deliberation, DWR concluded: "With invocation of Article 18(b), the Department assumed that the Department and the contractors would have tried to make up the difference between invoked-

Article 18(b) Table A amounts and the planned [i.e., maximum] yield of the SWP," by continuing to deliver all available SWP water, including the newly-labeled surplus water. (AR 2:634; AR 196:99705-706.)

2. The EIR included two no-project alternatives evaluating how DWR would allocate surplus water if it invoked Article 18(b)

Based on DWR's determination that it would seek to allocate so-called surplus water after invoking Article 18(b), DWR's next task was to develop and analyze that scenario as a no-project alternative. As DWR's findings explain, "there is room for disagreement over how to characterize continued operation of the SWP in accordance with pre-Monterey long-term water supply contracts." (AR 1:37.) Given these different views of how surplus water would be allocated in such a no-project scenario, DWR settled on an approach suggested during EIR preparation:

> The EIR needs to include a discussion of the differing surplus water allocation interpretations, the impacts that those interpretations would have had on the allocation of supplies among Contractors, and the uncertainty regarding how this water might ultimately have been allocated with invocation of Article 18(b).

(AR 168:84529.)

Accordingly, the EIR included an analysis and discussion of two no-project alternatives that implemented Article 18(b) of the pre-Monterey Amendment contracts (as directed in *PCL v. DWR*) and which included deliveries of so-called "surplus" water under pre-Monterey Article 21. (AR

24:11832-33; AR 2:631-636.) These alternatives were denoted in the EIR as Court-Ordered No-Project Alternatives 3 and 4 (CNPA3 and CNPA4).[7]

The chief difference between CNPA3 and CNPA4 was how the newly labeled "surplus" water would be allocated to contractors. Under CNPA3, the contractors' Table A amounts were reduced to a collective 1.9 million acre-feet and "[i]n years when available supplies exceeded 1.9 million acre-feet, surplus water would be allocated proportional to contractor's Table A amounts." (AR 24:11832-33.) The other no-project alternative invoking Article 18(b), CNPA4, similarly reduced Table A amounts to 1.9 million acre-feet, but "[u]nder CNPA4, preference would be given to agricultural and groundwater replenishment use in the allocation of surplus water." (AR 24:11833.)

The "Department determined that the two versions of the no project alternative that include reducing the sum of the Table A amounts to 1.9

[7] The EIR included two other no-project alternatives that did not include invocation of Article 18(b). (AR 1:37-38.) One was termed "NPA1" and attempted to forecast past and future conditions as if implementation of the Monterey Amendment had never occurred beginning in 1996 and Article 18(b) was not invoked; another was termed "NPA2" and assumed that all past actions implementing the Monterey Amendment between 1996 and 2003 (when the Monterey Plus EIR Notice of Preparation was published) were final and then attempted to forecast future conditions without further implementation of the Monterey Amendment and without invocation of Article 18(b). (See AR 24:11832.) CDWA does not challenge these specific no-project alternatives or the EIR's inclusion and discussion of multiple no-project alternatives, and these issues are therefore not further discussed in this brief.

million acre-feet (CNPA3 and CNPA4) are reasonable possible alternatives of what might have happened if the proposed project had not been implemented and Article 18(b) of the pre-Monterey Amendment long-term water supply agreements had been invoked." (AR 196:99705.) Accordingly, the EIR analyzed and reported what SWP deliveries would be under these no-project alternatives. (AR 24:11838-60.) It also discussed and compared the environmental effects of these no-project alternatives. (AR 24:11862-64.)

3. The record includes substantial evidence supporting DWR's determination that it would deliver surplus SWP water to the contractors if it invoked Article 18(b)

Substantial evidence supports DWR's determination that if it ever invoked Article 18(b) to lower Table A amounts, DWR would allocate all available SWP water to contractors in an effort to make up for the SWP's inability to deliver water in the amounts originally anticipated.

DWR explained that "this determination was based on . . . the history of the period prior to 1995 when the Monterey Amendment was signed." (AR 2:634.) DWR's reliance on its historic pre-Monterey Amendment operations and delivery practices to construct the no-project alternatives was in accord with the CEQA Guidelines. (See Cal. Code Regs., tit. 14, § 15126.6, subd. (e)(2) [describing no-project as what "would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available

infrastructure . . . ."]; Cal. Code Regs., tit. 14, § 15126.6, subd. (e)(3)(A) ["When the project is a revision of an existing land use or regulatory plan, policy or ongoing operation, the 'no project' alternative will be the continuation of the existing plan, policy or operation into the future."].)

DWR's reliance on its historical practices was also consistent with the *PCL v. DWR* opinion's finding that a no-project alternative is a "factually based forecast of . . . preserving the status quo." (*PCL v. DWR*, *supra*, 83 Cal.App.4th at p. 917 [emphasis added]; accord *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 253 [stating "the no project alternative is the existing operation."][emphasis added].) Furthermore, fundamental principles of contract interpretation place great weight on the historical course of performance. (See e.g., *Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754 ["When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent."]; accord *Bohman v. Berg* (1960) 54 Cal.2d 787, 795.)

The administrative record shows that under the pre-Monterey Amendment contract provisions DWR historically allocated and delivered all surplus water to the contractors if demand for it existed. (AR 137:69871, 69823, 70179 [showing scheduled surplus deliveries in all but one year during 1968-1987 in amounts often exceeding several hundred

thousand acre-feet a year]; see AR 23:11198; see also discussion of historical surplus deliveries in Section II.B above.) DWR properly included such surplus deliveries in the EIR's no-project alternatives as "the continuation of the existing plan, policy or operation into the future." (Cal. Code Regs., tit.14, § 15126.6, subd. (e)(3)(A).)

Other historical records further support DWR's determination that it would seek to deliver so-called surplus water if it invoked Article 18(b) to lower Table A amounts. In 1983, for instance, DWR presciently reported on the forthcoming disparity between Table A amounts (referred to then as "entitlements") and actual SWP water supplies. (AR 198:100840-49.) DWR modeled future delivery scenarios in several tables, that included each contractor's theoretical "Reduced Entitlement Based on Reduced Min. Project Yield," if Article 18(b) were ever invoked. (AR 198:100845-48 [Tables 2 - 5, column "4"].) Footnote "b" in each table explained that column 4 represented "Reduced Annual Entitlements." (*Ibid.*) Footnote "d" of each table discussed "surplus" water: "Any available water supply in excess of Column 4 is allocated to all contractors in proportion to their current annual entitlement . . . ." (See, e.g., AR 198:100848 [Table 5 estimating delivery capability for year 2000][underline added]; see also AR 198:100849 ["Remaining Project water is allocated to satisfy requests for surplus water."].) The allocation procedure described in footnote "d" of

this 1983 document closely resembles the one portrayed in the EIR's no-project alternative CNPA3.

Plainly put, the record proves that as far back as 1983—decades before the issue arose in preparing the Monterey Plus EIR—DWR had already made policy assumptions that it would deliver all available SWP water (regardless of its label) to the SWP contractors if it ever invoked Article 18(b).

The EIR discussed additional historical evidence that DWR never even contemplated refusing to deliver available SWP water under Article 18(b): "In the fall of 1987 in Water Service Contractor's Water Memorandum No. 1878, the Department compared the merit of four interpretations of the allocation procedure under Article 18(b). None of these interpretations considered a cap on water deliveries above Article 18(b) Table A amounts." (AR 2:634 [emphasis added].)

Another basis supporting DWR's determination was that continued delivery of "surplus" water above the reduced Table A amounts set by invocation of Article 18(b) was consistent with other provisions and the overall intent of the SWP contracts. (See, e.g., AR 2:521 [concluding that refusing to deliver water under Article 21 "would be in conflict with the basic terms" of the contracts]; AR 2:634 [finding DWR has "an obligation under the terms of the long-term water supply contracts, to continue deliveries above the reduced Table A amounts and deliver additional water

as Article 21 water to its contractors"]; AR 24:11837 [both the pre- and post-Monterey Amendment contracts "view Article 21 water as water that goes to the contractors when it is available"].)

Finally, DWR found that maximizing SWP water deliveries, even under a no-project scenario with Article 18(b) invoked, "is also supported by the way in which the SWP is operated . . . to optimize the capture of water in the Delta . . . and maximize the intake allotment of Clifton Court Forebay at the maximum permitted rate as much of the time as possible to meet SWP and contractor demands." (AR 2:634-35.) As explained in Section II.D above, this method of maximizing annual deliveries is part of the SWP's "variable yield" operation, which allows contractors to store surplus water in "wet" years as a buffer against "dry" years as part of the conjunctive use and flexible water management programs practiced by many of the contractors. (See AR 64:32562; AR 23:11358-59; AR 65:33092-93.)

B. CDWA Fails to Address the Record Evidence

Instead of attempting to address the myriad evidence supporting no-project alternatives CNPA3 and CNPA4, CDWA ignores it. In fact, CDWA's opening brief offers absolutely no discussion or summary of all the evidence in the administrative record that documents and supports DWR's development of no-project alternatives CNPA3 and CNPA4.

CDWA had the duty to "'lay out the evidence favorable to the other side and show why it is lacking.'" (*Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 934-35 [quoting *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1265-66].) Its opening brief did not do so. CDWA's failure is "fatal" because the "reviewing court will not independently review the record to make up for appellants' failure to carry his burden." (*Ibid*.; see *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 540-41 [rejecting challenge to EIR's baseline description because "plaintiff fails to accurately summarize the relevant facts"].) Accordingly, this Court should reject CDWA's challenge to the EIR's no-project alternatives analysis.

C. CDWA Fails to Meet Its Burden to Show the EIR's No-project Alternatives Lack Substantial Evidence Support

In *PCL v. DWR*, this Court recognized its limited function: "Our task is extraordinarily limited and our focus is narrow. Did the EIR adequately describe the existing conditions and offer a plausible vision of the foreseeable future?" (*PCL v. DWR*, *supra*, 83 Cal.App.4th at p. 911.) When applied to the Monterey Plus EIR's no-project alternatives, the answer to this question is a resounding yes.

As the sections above demonstrate, DWR's deliberations and determinations regarding no-project alternatives CNPA3 and CNPA4 were extensively documented, explained, and supported by materials in the EIR

and the rest of administrative record. This constitutes substantial evidence that these no-project alternatives are "plausible vision[s] of the foreseeable future" without implementation of the Monterey Amendment and with Article 18(b) invoked. (Cal. Code Regs., tit. 14, § 15384, subd. (a) [defining "substantial evidence" as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached."].)

CDWA has not met its burden of showing that no-project alternatives CNPA3 and CNPA4 lack substantial evidence support. In fact, CDWA does not even cite any record evidence contrary to, or inconsistent with, DWR's no-project determinations and the supporting record evidence. Even if CDWA had done so, its argument would fail because when a lead agency's conclusions are supported by substantial evidence, a court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, *supra*, 40 Cal.4th at p. 435 [quoting *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 393].)

In reality, CDWA's argument is an ill-conceived and unsupported attempt to mimic the Article 18 challenge litigated in *PCL v. DWR*. (See e.g., Appellants' Amended Opening Brief (hereafter AOB) at p. 54 [arguing

"this Court's reasoning regarding Article 18(b) applies just as strongly to other contract provisions that were eliminated by the Monterey Amendments."].) This argument-by-analogy fails because the environmental impact report at issue in *PCL v. DWR* did not in any fashion analyze invocation of Article 18(b), rather, it ignored Article 18(b). (*PCL v. DWR, supra*, 83 Cal.App.4th at p. 913 ["The legal uncertainty surrounding article 18, subdivision (b), and the consequent threat of litigation is not a reason to ignore the provision . . . ."][emphasis added].) In contrast, the Monterey Plus EIR includes two express no-project alternatives providing DWR's description of how it believed it would invoke Article 18(b) and then deliver surplus water under Article 21 of the pre-Monterey Amendment contracts (i.e., CNPA3 and CNPA).[8]

Since there was no analysis of a no-project scenario invoking Article 18(b) in the previous environmental impact report, the court in *PCL v. DWR* had nothing to review for substantial evidence support. In contrast, the EIR here includes no-project alternatives that this Court can review for substantial evidence support. Specifically, no-project alternatives CNPA3

[8] Another distinction between the present case and the PCL case is that here there is no dispute among DWR and any of the SWP contractors regarding surplus water under Article 21—all agree that DWR would deliver such surplus water to the contractors in some fashion if it invoked Article 18(b). In contrast, in the PCL case the record showed that "urban and agricultural contractors disputed DWR's implementation of article 18 of their long-term contracts." (*PCL v. DWR, supra*, 83 Cal.App.4th at p. 901.)

and CNPA4 analyze the potential effects of invoking pre-Monterey Article 18(b) to reduce Table A entitlements from about 4.1 million acre-feet down to 1.9 million acre-feet. These two no-project alternatives also describe how DWR believes it might allocate the newly-labeled "surplus" SWP water under Article 21 (i.e., the water that would be available for delivery above the 1.9 million acre-foot reduced Table A amount level). DWR determined that no-project alternatives CNPA3 and CNPA4 are "what would be reasonably expected to occur in the foreseeable future" if the SWP reverted to operating under pre-Monterey Amendment contract provisions including Articles 18(b) and Article 21. (Cal. Code Regs., tit. 14, § 15126.6, subd. (e)(2); see AR 196:99705.)

No-project alternatives CNPA3 and CNPA4 are supported by documents establishing DWR's historical practice and policy was to deliver surplus SWP water to the SWP contractors. Those documents and other facts in the record constitute substantial evidence: "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Cal. Code Regs., tit. 14, § 15384, subd. (a).) DWR's methodology is also consistent with this Court's direction in *PCL v. DWR* that a no-project alternative "is a factually based forecast of . . . preserving the status quo." (*PCL v. DWR*, *supra*, Cal.App.4th at p. 917.) Even CDWA admits "the pre-Project status quo is .

. . the contracts as they were before the Monterey Amendments." (AOB at p. 52.)

In sum, no-project alternatives CNPA3 and CNPA4 complied with the CEQA Guidelines and CEQA case law, including *PCL v. DWR*, and they are supported by substantial evidence. Even if there were merit to CDWA's policy-based disagreement with DWR's descriptions of these no-project alternatives, CDWA's arguments would be legally insufficient to overturn DWR's determinations. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, *supra*, 40 Cal.4th at p. 435 [courts "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable."] [quoting *Laurel Heights Improvement Assn. v. Regents of the University of California*, *supra*, 47 Cal.3d at p. 393]; see *Assn. of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391 ["A court's proper role in reviewing a challenged EIR is not to determine whether the EIR's ultimate conclusions are correct but only whether they are supported by substantial evidence in the record and whether the EIR is sufficient as an information document."].)

D. CDWA's Focus on Article 21(g)(1) to Restrict Surplus Water Deliveries in the No-project is Myopic and Unsupported

CDWA argues "DWR erred in failing to consider the invocation of Article 21(g)(1) in its no-project alternatives analysis." (AOB at p. 57.)

According to CDWA, if DWR ever invoked Article 18(b), Article 21(g)(1) would require DWR to refuse to deliver surplus water if those deliveries would support permanent economies. (AOB at p. 62 [stating "the most important component of the article [is] its restriction of delivery of surplus water *that would support a dependent permanent economy*."].)

CDWA's argument is divorced from the overall context and intent of Article 21 and the entirety of the SWP contracts. First, Article 21(g)(1) is only one subsection of one subdivision in Article 21, which is itself 12 pages long and has more than 30 subsections. (See AR 186:94141-94153.) Second, the typical SWP contract is about 300 pages long and includes hundreds of additional sections. (See AR 186:94040-94375 [Kern County Water Agency contract].) CDWA would have the tail wag the dog, by ignoring the entirety of the contracts and relying solely on the bare text of Article 21(g)(1). As DWR explains in its Defendant and Respondent's Brief at pp. 41-43, Article 21(g)(1) is a "historical relic" with no relation to Article 18(b) and without any current relevance, and DWR never interpreted or applied it in the manner suggested by CDWA.

CDWA's misinterpretation is further evidenced by the fact that CDWA offers no evidentiary support for its position, which would elevate Article 21(g)(1) above all other terms in the SWP contracts and would essentially prevent delivery of substantial amounts of water for beneficial uses throughout much of the State. CDWA simply makes conclusory,

unsupported, and incorrect statements. For instance, CDWA argues the implementation of Article 18(b) and Article 21(g)(1) was "essential for the sustainable operation of the SWP." (AOB at p. 57; see AOB at p. 56 [arguing Article 21(g)(1) "increased sustainability of the SWP."].) CDWA provides no cite to the record that would support these arguments, or that would explain what is meant by "sustainable operation of the SWP." CDWA's only citations to the record are to a few self-serving comment letters parroting their conclusory interpretation.

In sum, CDWA's hypothetical no-project interpretation is without record support. In contrast, voluminous record evidence supports DWR's determination that in a no-project scenario, where it invoked Article 18(b) to lower the sum of Table A amounts to 1.9 million acre-feet, DWR would seek to deliver any newly-labeled "surplus" water above 1.9 million acre-feet to the SWP contractors—not simultaneously use Article 21(g)(1) to restrict deliveries of any such water. (See, e.g., AR 2:521, 566, 634-35; AR 24:11837; AR 137:69871, 69823, 70179; AR 167:83751; AR 168:84528-30, 84487-89; AR 196:99705-15; AR 198:100793-816, 100840-49.)

E. Although DWR Found CDWA's Interpretation of Article 21(g)(1) an Unreasonable Forecast of No-project Conditions, DWR Nevertheless Analyzed it in the EIR

Despite the fact that CDWA's notion of using Article 21(g)(1) to restrict SWP water deliveries misunderstands Article 21, the overall SWP contracts, and the SWP's current variable yield operating principles,

CDWA got the information disclosure and analysis it wanted anyhow. In response to CDWA's comments on the draft EIR, DWR included in the final EIR an analysis of the effects of operating the SWP with Article 18(b) invoked and with limited or no Article 21 "surplus" water delivered to contractors. (AR 2:520-25.) DWR stated "[t]his scenario is analyzed here as a variation of a no project condition . . . ," (AR 2:524), and it explained that "[a]lthough the Department believes that Article 18(b) would not have been invoked in this way, nevertheless, this analysis provides additional information to the public and decision-makers on the effects of not delivering water to SWP contractors that would otherwise be available under Article 21" (AR 2:521).

This analysis shows that under CDWA's no-project scenario, annual SWP water deliveries would be reduced by an average of 1.2 million acre-feet and cause "a 40 percent reduction in SWP water deliveries to the 29 SWP contractors that supply water to 23 million California residents." (AR 2:524.) The EIR also disclosed and discussed the various environmental effects of this scenario. (AR 2:520-25.) It explained potential environmental benefits, including:

- "Lake Oroville and San Luis Reservoir would contain more water at times, with beneficial impacts to recreation and visual resources." (AR 2:524.)

- "Low point water quality issues in San Luis Reservoir would likely be less of a concern . . . ." (AR 2:524.)
- "With Banks Pumping Plant diverting less water at times, salvage of fish species would likely be less than under the proposed project . . . ." (AR 2:525.)

The EIR also explained that "the most serious effects of the scenario analyzed would result from a 40 percent reduction in SWP water deliveries to the 29 SWP contractors that supply water to 23 million California residents. The reduction in water supply would trigger potentially significant adverse impacts affecting up to 23 million people, and affecting over 600,000 acres of irrigated agricultural lands." (AR 2:524.) The EIR disclosed:

> Many agencies would be pressured to seek alternative supplies with consequential redirected environmental impacts. The nature of those impacts is beyond the scope of this analysis, but they might involve: (1) water transfers (with added Delta export pumping, possible crop idling and associated impacts, and groundwater pumping with attendant impacts); (2) construction and use of desalting facilities (with added energy use, greenhouse gas emissions, and coastal resource impacts); (3) groundwater pumping (with impacts on other wells, more overdrafted groundwater basins, and possible ground subsidence); (4) new reservoirs (with multiple potential impacts); (5) new stream diversions

> (with fish, recreation, and other impacts); and (6) other water supply development actions with associated impacts.

(AR 2:524.)

In addition to causing SWP contractors and their local member water agencies to seek additional water supplies to augment the reduction in SWP water deliveries, including increased groundwater pumping and related environmental impacts, the EIR also discussed potential demand reduction measures that might occur: "Enforced conservation, rationing, shortages, forced landscape abandonment, abandonment of annual and permanent crops, and consequential economic impacts would also be likely to result. Some customers would forgo water use for landscaping with consequential effects on vegetation and wildlife." (*Ibid*.)

The EIR even discussed another way of implementing Articles 18 and 21 in tandem, a "limited Article 21 deliveries" scenario. In that scenario DWR would restrict scheduled surplus deliveries, but deliver unscheduled surplus water to contractors. (AR 2:525.) The EIR reported such a scenario would provide an annual average of approximately 350,000 acre-feet of unscheduled surplus water deliveries, "restoring about one-third of the cuts imposed by the no Article 21 delivery analysis." (*Ibid.*) It disclosed "impacts . . . would be similar in all respects to the no delivery analysis," and "distribution of water would be skewed under this alternative, with those contractors with local storage and the ability to hold

winter deliveries for later use benefitting, and those contractors unable to use the seasonal Article 21 deliveries receiving no supply benefit relative to the no Article 21 deliveries analysis." (AR 2:525.)

CDWA argues that the EIR's discussion of these two Article 21(g)(1) scenarios was "not a good faith, reasoned analysis as required by CEQA." (AOB at p. 63.) CDWA argues that "limiting or eliminating Article 21 water is not what Article 21(g)(1) prescribes," (AOB at p. 62), and that "DWR's interpretation, that invoking Article 21(g)(1) would result in all or most deliveries of Article 21 surplus water would [sic] being eliminated, was . . . a misstatement of the commenters' concerns . . . ." (AOB at p. 63).

CDWA's argument is an untenable and disingenuous flip-flop. CDWA fully intended its interpretation of Article 21(g)(1) to result in a significant reduction in SWP pumping and SWP water deliveries. For instance, CDWA argues elsewhere that Article 21(g)(1) is "a significant limitation on the use of surplus water that would likely result in reduced Delta exports . . . as commenters pointed out." (AOB at p. 56 [emphasis added]; see AR 32:15924 [comment letter arguing for "the original Article 21 prohibition against use of surplus water to support permanent economies."].) CDWA also argues: "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)." (AOB at p.57.)

CDWA states that to apply its version of Article 21(g)(1), DWR must ask: "Is *this* water, delivered *this* year, going to create a dependency 'upon sustained delivery of surplus water?'" (AOB at p. 61.) CDWA contends "dependency would be obvious in most situations" as "use by permanent residential or commercial development." (*Ibid*.) Thus, CDWA advocates for DWR to deny surplus water to residential or commercial developments because they are uses CDWA describes as "obvious" situations of "dependency" that would be prohibited from using "surplus" water under its interpretation of Article 21(g)(1).

However, as the EIR explains, were DWR to invoke Article 18(b) to reduce Table A amounts today and then ask the question CDWA poses, the answer would be that permanent residential and commercial developments have already developed in reliance on SWP water deliveries according to the SWP's variable yield operations, which have often exceeded the 1.9 million acre-foot ceiling on Table A amounts that invocation of Article 18(b) would set. Thus, by delivering the newly classified "surplus" water in the Article 18(b) scenario, DWR would be continuing to provide water to these existing permanent developments. (See AR 2:519 [stating that contractors request full Table A deliveries of 4.173 million acre-feet and finding 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"].) Indeed, the record shows that between 1996 and 2006, the decade after the Monterey Amendment was signed, DWR's Table A water deliveries to the SWP contractors exceeded 1.9 million acre-feet in 9 of 11 years, demonstrating that current, permanent uses within the contractors' service areas already rely on deliveries of what would be labeled "surplus" water in a scenario where DWR invoked Article 18(b). (AR 536:256162 [Table ES-1 column 3, reporting total Table A water deliveries 1962-2006].) And, as explained in Section II.D. above, under the variable yield operating principles adopted by DWR and the contractors, delivery of all available SWP water for current or future use by contractors is necessary and essential to protect local integrated water supply reliability and support local water management practices such as conjunctive use.

Because DWR has been delivering all available SWP water, regardless of label, for decades, enforcing CDWA's version of Article 21(g)(1) would mean that DWR would have to refuse to deliver the newly-labeled surplus water for these existing uses. Unfazed by this reality, CDWA actually embraces it: "Just because a contractor (or farm or residential community or a business) may have become dependent on entitlement water before implementation of Article 18(b) does not mean that they are grandfathered in for all future uses of Article 21 surplus

water." (AOB at p. 61.) By refusing to deliver surplus water to long-existing (i.e., "grandfathered") uses, the EIR's analysis of Article 21(g)(1) in response to comments described exactly what CDWA wanted.

CDWA's attack on DWR's analysis as not having been made in good faith is without merit. CDWA says its interpretation of Article 21(g)(1) would: (1) be "a significant limitation on the use of surplus water," (2) result in "reduced" exports, (3) "encumber" surplus water with "restrictions," and (4) restrict deliveries to, as CDWA puts it, "grandfathered" permanent residential or commercial developments. CDWA cannot now argue it is dissatisfied with the EIR's attempt to portray the effects of applying Article 21(g)(1) in precisely that manner. DWR provided a good faith analysis and discussion of two scenarios restricting deliveries to existing permanent uses as demanded by CDWA, and this Court should reject CDWA's arguments to the contrary. (See *Twain Harte Homeowners Assn., Inc. v. County of Tuolumne* (1982) 138 Cal.App.3d 664, 686 [upholding responses to comments that "as a whole evince good faith and a reasoned analysis" and "adequately serve the disclosure purpose which is central to the EIR process."].)

F. In Addition to Satisfying CEQA's Substantial Evidence Standard, the EIR's No-project Analysis and Discussion Satisfied Other CEQA Standards

1. The EIR's analysis and discussion of four ways of implementing pre-Monterey Amendment Articles 18 and 21 satisfied CEQA's rule of reason

The range of alternatives required in an EIR is governed by a "rule of reason" that requires the EIR to set forth only those alternatives necessary to permit a reasoned choice. (Cal. Code Regs., tit. 14, § 15126.6, subd. (f).) While the rule of reason is typically applied to review the range of action alternatives, here, where the EIR analyzed numerous no-project alternatives, the rule of reason should apply to CDWA's challenge demanding analysis of even more no-project scenarios. "CEQA imposes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 566.)

If the substantial evidence supporting no-project alternatives CNPA3 and CNPA4 is somehow not enough for DWR to prevail, this Court should nonetheless find DWR satisfied CEQA's rule of reason because the EIR discussed and analyzed four ways of dually implementing Articles 18(b) and 21 under no-project conditions, which adequately informed decision makers and the public of the potential environmental effects of eliminating these pre-Monterey Amendment contract provisions. (See *Mira Mar*

Mobile Community v. City of Oceanside (2004) 119 Cal.App.4th 477, 489 [holding "discussion of the no project alternative satisfied CEQA because it allowed decision makers to compare the environmental impacts of the project with the impacts of no project."].)

CDWA argues these four no-project scenarios dually analyzing Articles 18(b) and 21 were not enough. CDWA argues for yet more hypothetical no-project alternatives where Article 18(b) is invoked and surplus water deliveries would apparently be somewhere in between the range already analyzed in the EIR. However, "an EIR is not obliged to examine 'every conceivable variation' of the 'no project' alternative." (*Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 246 [quoting *Residents Ad Hoc Stadium Com. v. Board of Trustees* (1979) 89 Cal.App.3d 274, 286-288]; see Cal. Code Regs., tit. 14, § 15126.6, subd. (a); see also Cal. Code Regs., tit. 14, § 15204, subd. (a) ["CEQA does not require a lead agency to conduct every test or perform all research, study, and experimentation recommended or demanded by commentors. . . . so long as a good faith effort at full disclosure is made in the EIR."].)

In *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, the court held an EIR satisfied CEQA's rule of reason because it evaluated residential development alternatives of 25000, 20000, 10000, and 7500 units. The court rejected the argument that

the EIR should have also analyzed an alternative of 15000 units, explaining there could "literally be thousands" of alternatives to a project, but that analysis of all of them was not required under CEQA's rule of reason. (*Id.* at p. 1028.) It found "decision-makers and the public could make an informed comparison of the effects of those various plans," and "an alternative not discussed in the EIR could be intelligently considered by studying the adequate descriptions of the plans that are discussed." (*Id*. at p. 1029; see *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 353-56.) The same rationale should apply to uphold the EIR's disclosure of four ways of implementing pre-Monterey Amendment Articles 18(b) and 21, from which the effects of other no-project variations on surplus water deliveries can intelligently be gleaned. (See *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 488-491 [upholding EIR's alternatives analysis that "while not perfect" still "satisfied CEQA because it allowed decision-makers and the public to evaluate the comparative merits of the proposed project with two low-density and one high-density alternatives."].)

CEQA's "rule of reason" must prevail here: otherwise project opponents could essentially co-opt and usurp the role of the lead agency by demanding that it analyze hypothetical no-project alternatives ad infinitum (as CDWA does here). Because the EIR analyzed no-project alternatives CNPA3 and CNPA4, and also included an analysis and discussion of two

variations of CDWA's interpretation of pre-Monterey Article 21(g)(1), this Court should find the EIR satisfied CEQA's rule of reason by allowing the public and decision makers to adequately evaluate the impacts of continuing to implement the Monterey Amendment versus reverting to the pre-Monterey Amendment contract provisions. (*Laurel Heights Improvement Assn. v. Regents of Univ. of California, supra,* 47 Cal.3d at p. 406 ["The need for thorough discussion and analysis is not to be construed unreasonably . . . to serve as an easy way of defeating projects."]

2. The EIR's no-project analysis and discussion allowed for informed decision-making and public participation, rendering any error harmless

As explained in the sections above, the EIR's no-project alternatives CNPA3 and CNPA4 are supported by substantial evidence, and when combined with the analysis of two scenarios restrictively applying Article 21(g)(1) in response to comments, the EIR provides a range of four no-project variations simulating dual implementation of SWP contract Articles 18(b) and 21 for informed decision making and public participation.

CDWA elevates form over substance when it argues the "EIR improperly failed to analyze as part of the no-project alternatives the effects of deleting Article 21(g)(1)." (AOB at p. 64.) While CDWA's interpretation of Article 21(g)(1) was not officially labeled a "no-project alternative," the key point is that the EIR did conduct and disclose this analysis for decision makers and the public to consider. This is why the

superior court ultimately found no prejudicial abuse of discretion and upheld this part of the EIR. (AA 33:8245.)

Respondent SWP contractors respectfully disagree with the superior court's intermediate ruling that the EIR should have labeled and included CDWA's Article 21(g)(1) interpretation as a "no-project alternative," but we concur with its ultimate ruling that even if this was an error, it was not a prejudicial abuse of discretion under CEQA.

The superior court followed CEQA's statutory command that "courts shall continue to follow the established principle that there is no presumption that error is prejudicial." (Pub. Resources Code, § 21005, subd. (b).) As the California Supreme Court recently held: "Insubstantial or merely technical omissions are not grounds for relief." (*Neighbors for Smart Rail*, *supra*, 57 Cal.4th at p. 463 [citing *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 485-86].) "A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*Ibid*. [quoting *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712].)

In *Dusek v. Redevelopment Agency* (1985) 173 Cal.App.3d 1029, 1043-44, the appellate court upheld an EIR despite the fact "there was not a formalized 'no project' alternative," stating "we look to substance rather

than labels," and concluding "the Agency thoroughly considered that alternative in several contexts." In the same way here, even if the EIR should have expressly labeled CDWA's interpretation of Article 21(g)(1) as a "no-project alternative," that error was not prejudicial because the EIR included a discussion and analysis of two variants of CDWA's restrictive interpretation of Article 21(g)(1) in addition to no-project alternatives CNPA3 and CNPA4 that collectively disclosed and evidenced DWR's thorough consideration and discussion of no-project operations under these pre-Monterey Amendment contract provisions. This inclusive analysis of a range of no-project alternatives allowed for informed decision making and public participation and therefore satisfied CEQA.

VI.
CONCLUSION

For these reasons, Real Parties in Interest and Respondents SWP contractors respectfully request this Court affirm the judgment.

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Respectfully submitted,

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