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)

APPLICATION OF PLANNING AND CONSERVATION LEAGUE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; [PROPOSED] AMICUS CURIAE BRIEF OF PLANNING AND CONSERVATION LEAGUE IN SUPPORT OF APPELLANTS AND CROSS-RESPONDENTS

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APPLICATION OF PLANNING AND CONSERVATION LEAGUE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

I. Introduction

Pursuant to rule 8.200(c) of the California Rules of Court, the Planning and Conservation League (PCL) applies for this Court's permission to file the attached *amicus curiae* brief in support of appellants and cross-respondents Central Delta Water Agency, *et al.*[1] PCL's proposed *amicus* brief corrects misrepresentations by the Department of Water Resources (DWR) and the Kern Water Bank parties (KWB) of what PCL agreed to in the 2003 "Monterey Plus" Settlement Agreement, and can assist this Court in ensuring that its decisions are consistent with prior court orders and the 2003 agreement.

In their briefs, DWR and KWB portray PCL as having conceded that the 1995 Monterey Amendments and State relinquishment of the Kern Water Bank became final and permanent long before the DWR completed the CEQA review of these project components in 2010, as ordered by this Court in 2000. (See, e.g., DWR RB, 47-53; KWB RB/XAOB, 65-67.) DWR and KWB's arguments cannot survive a careful reading of the Settlement Agreement and Interim Implementation Order, which only authorized interim rather than permanent operation of the State Water Project under the 1995 Monterey Amendments.

Compounding this error, DWR and KWB also rely on and misinterpret confidential settlement documents, which the State Water Contractors (SWC) improperly introduced as evidence in the proceedings below. (See, e.g., DWR RB 51; KWB RB/XAOB 67.) These include two self-serving briefing statements submitted to the settlement mediator, by "defendants' legal team" on November 4, 2002 (AR 101143-101149) and by "SWC Defendants" on February 7, 2007. (AR 101137-

[1] The application and brief are combined in this document, as authorized under rule 8.200(c)(4).

101140.) [2] Contrary to the Settlement Agreement, which "sets for the entire agreement" and supersedes any prior understandings (AR 058891), DWR and KWB also resort to an assortment of other materials extrinsic to the agreement itself to argue that the Monterey Amendments became permanent long before DWR completed its 2010 environmental review. (See, e.g., DWR RB 51; KWB RB/XAB 42-43, 49, 63-67; SWC RB 53.)

These improperly-disclosed confidential sources should be disregarded, but even if considered, fail to show that PCL, which worked for years to ensure a transparent and open CEQA process, consented to allow predetermination of the Monterey Amendments' final status before completion of DWR's CEQA review. In short, the arguments advanced by DWR and KWB misrepresent the Settlement Agreement, as well as PCL's participation in that agreement, flouting the agreement's language allowing only time-limited temporary operation under the unlawfully approved 1995 amendments. That limitation remains critical for the Monterey Amendments, the most drastic contract restructuring in the State Water Project's history. As PCL consistently reminded DWR during years of administrative review, the Settlement Agreement did not, and could not, authorize DWR to avoid making a new final decision on the entire project, including the "Monterey" part of Monterey Plus. PCL also repeatedly emphasized that DWR could only permanently authorize the Monterey Amendments after completing lawful CEQA review.

In its ruling requiring DWR as lead agency to prepare a new EIR for the Monterey Amendments, this Court described the EIR as the "heart and soul of

[2] SWC submitted this evidence in the trial court's time-bar trial. AA 2916-2919; AA 2996-3029 (Exhibit 2007). Over the objection of plaintiffs Central Delta Water Agency, *et al.*, the trial court "provisionally received" the relevant exhibits for the purpose of determining whether the 2003 Settlement Agreement, order, and writ were "reasonably susceptible" to the moving parties' interpretation AA 7648. The trial judge conceded that the November 4, 2002 memorandum was "*admittedly one-sided*," yet inexplicably relied upon it in interpreting the Settlement Agreement. AA 7661 (emphasis added). The trial judge considered, but "gave little weight" to the February 7, 2007 memorandum. (*Id.*)

CEQA" and observed that "CEQA compels process. It is a meticulous process designed to ensure that the environment is protected." (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 911.) DWR and KWB's misrepresentations of PCL's position, and of the Settlement Agreement itself, would effectively nullify the informed decision on the Monterey Amendments that CEQA and this Court requires, and which PCL worked for years to incorporate into the Settlement Agreement.

Although PCL's advocacy established the illegality of the provincial 1995 EIR, the League does not appear here to argue the merits with respect to the 2010 assessment. PCL does not take lightly its decision to participate as an *amicus* here, in light of its decision not to challenge DWR's 2010 EIR or decision. PCL's purpose in its proposed *amicus* brief is both limited and specific, however. It seeks to correct DWR's and KWB's misrepresentation of PCL's commitments made and those expected from others in the Settlement Agreement. Whether or not this Court ultimately upholds DWR's 2010 EIR and decision, PCL asks that the Court's decision not be based on a misunderstanding of PCL's expectations about what CEQA requires and how the Settlement Agreement incorporates those requirements.

II. Interests of Prospective Amicus Curiae PCL in the Present Appeal

A. PCL Supported CEQA's Purposes of Environmental Protection and Informed Self-Government.

The EIR process "protects not only the environment but also informed self government." (*Laurel Heights Improvement Association v. Regents* (1988) 47 Cal.3d 376, 392; *PCL v. DWR*, 83 Cal.App.4th at 916.) PCL, a nonprofit advocacy organization, is empowered to protect and restore California's natural environment and to promote and defend the public health and safety of the people of California, through legislative, administrative, and judicial action. PCL, now having completed 50 years of service to the California citizenry and environment, was founded in 1965 and since then has advocated in all branches of California government for a body of laws that

remains at the forefront of environmental policy in the United States. PCL's staff undertakes extensive research and works closely with legislators to promote laws that protect and improve California's environment. PCL was the first organization devoted to bettering Californians' quality of life through environmental legislation.

One of the organization's earliest accomplishments was the enactment in 1970 of the California Environmental Quality Act ("CEQA"), which PCL helped draft and has continually supported over the years, and which lies at the heart of this action. As a party and an *amicus curiae*, PCL—in behalf of its twenty-seven institutional members and thousands of individual members—has contributed to some of the leading cases interpreting CEQA's (and the parallel National Environmental Policy Act (NEPA)'s provisions, such as *PCL v. DWR* (as petitioner); *Vineyard Area Citizens for Responsible Growth. Inc. v. City of. Rancho Cordova* (2007) 40 Cal.4th 412 (as *amicus curiae*); *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 507 (as *amicus curiae*); and *Planning and Conservation League v. State of California* (Alameda Super. Ct., June 3, 2013) No. RG 12626904 (invalidating 2011 AB 900 provisions requiring certain CEQA cases to be heard in original appellate jurisdiction (as petitioner). Beyond the courtroom, PCL has published and updated *The Community Guide to CEQA* and has sponsored CEQA workshops throughout the state. These workshops advise interested individuals, governmental and non-governmental organizations, and locally elected and appointed officials about CEQA's two-fold purpose of environmental protection and informed self-government.

B. PCL Prevailed as Petitioner in *PCL v. DWR* and in that Capacity Became a Signatory to the 2003 Settlement Agreement.

PCL is one of the prevailing petitioners in *PCL v. DWR*, in which this Court set aside the 1995 environmental review of the Monterey Amendments prepared by the wrong lead agency, local contractor Central Coast Water Authority (CCWA). The Court found also found that the EIR's "no project" assessment and project alternatives analysis failed to properly analyze the consequences of implementing the

SWP contracts' long-term shortage provision, article 18(b), prior to its elimination in the Monterey Amendments.[3] Requiring DWR as lead agency to prepare an entirely new EIR, *PCL v. DWR* concluded that the EIR had failed CEQA's "most important" purpose since it "failed to fully inform the decision-makers and the public of the environmental impacts of the choices before them." (83 Cal.App.4th at p. 920.) The Court determined that it "need not hypothesize on the remaining issues" because DWR "may choose to address these in a completely different and more "comprehensive manner." (*Id.*) DWR did not complete its new EIR until 2010. PCL then became a signatory, after negotiating for several years, to the 2003 Settlement Agreement addressed in the present appeal. (AR 058847-058928.)

C. PCL Helped Secure Approval of the 2003 Writ of Mandate and Interim Implementation Order.

In 2003, PCL played a major role in the settling parties' joint efforts to secure a peremptory writ of mandate (AR 058929) and interim implementation order (AR 058931-058934) that complied with the law, while allowing selected unlawful 1995 approval terms to remain in effect until they could be replaced or re-adopted based on an adequate EIR. The writ and order decertified CCWA's 1995 EIR and prohibited DWR and the State Water Project contractors from approving "any new project or activity" in reliance on CCWA's 1995 EIR. (AR 058932.) The order allowed SWP operation under the Monterey Amendments during an "interim" period that ended in 2010, following DWR's EIR certification and approval of the "Monterey Plus" EIR. (AR 058932; see also DWR RB, p 52 ("the 2003 Order did

[3] CCWA's alternatives analysis improperly focused on the SWP contractors' objective of "avoiding litigation." 83 Cal.App.4th at p. 918. But the public requested, and CEQA demanded, an "an objective recitation of the environmental impact of implementing the existing contractual mechanism for eliminating paper water." *Id. PCL v. DWR* also found that PCL and its co-petitioners had properly initiated a validation challenge to the Monterey Amendments, reversing the superior court's decision that addressed the naming of indispensable parties. *Id.* at pp. 820-825.

not authorize DWR to operate pursuant to the Contracts indefinitely even after the Monterey Plus EIR was completed").)

D. PCL Participated in All Phases of Monterey Plus Administrative Review.

Between 2003 and 2010, PCL participated in all phases of DWR's administrative review of the Monterey Plus project, from scoping and public comment through final review, certification and decision. PCL representatives participated in meetings of the EIR Committee convened under section III.B of the Settlement Agreement (AR 058864), in addition to preparing detailed letters and comments. (See KWB XARB, p. 11 (noting that "[t]he PCL plaintiffs participated actively" throughout "the seven year remedial process").)

III. PCL's Assistance to the Court in Deciding This Matter

A. Ensuring Consistency with Court Orders in *PCL v. DWR* and the Settlement Agreement.

The briefs on both sides of the appeal and cross-appeal discuss the relationship to this proceeding of the Court's decision in *PCL v. DWR* and the Settlement Agreement. As a prevailing petitioner in *PCL v. DWR* and signatory to the Settlement Agreement, PCL can contribute to this Court's understanding of them and assist in ensuring consistency.

B. Avoiding Distortions and Misstatements in References to PCL's Positions.

In the 2003 Settlement Agreement, the settling parties announced their intention to ensure that DWR's new EIR "effectuate the desire of the parties" to "comply with the requirements of CEQA and the direction of the courts in the underlying litigation." (AR 058864 (referring to *PCL v. DWR*).) However, the briefs of respondents and cross-appellants incorrectly portray PCL as having conceded the

DWR and KWB position that the 1995 Monterey Amendments' decisions are now final and immune from further (post 2010) review. (See, e.g., DWR RB 37; KWBA 42-43.)

C. Avoiding Improper Reliance on Confidential Settlement Documents and Other Extrinsic Records.

The argument that PCL conceded the finality of the Monterey Amendments prior to DWR's 2010 environmental review lacks substantiation in the 2003 Settlement Agreement, writ and interim order. The contrary claims of DWR and KWB in their briefs improperly rely on (and misinterpret) confidential documents filed with the Monterey settlement mediator, which these parties improperly brought into the public record of the 2010 environmental review.[4] PCL's brief can assist the Court in avoiding reliance on these improperly disclosed and otherwise unpersuasive sources.

[4] See, e.g., DWR RB 37 ("it is plain that the parties and the PCL trial court intended to leave the contracts in place"), 51 (arguing that the parties' joint statement did not include invalidation in a list of "key components," and finding "persuasive" the "fact" that the PCL defendants in November 2002 told the mediator they would "never" agree to set aside project approvals), 54 (DWR's project decision "did not authorize" contract execution); KWB RB/XARB 42-43 (relying on the November 2002 memo to suggest that the plaintiffs ultimately accepted defendants' position on finality, and arguing that the settling parties' February 2003 joint statement confirmed this acceptance), 46 (discussing Kern Water Bank bonds), 49 (citing "extrinsic" evidence to interpret settlement agreement), 63-67 (repeating these arguments); SWC RB/XARB 63 (discussing interim order and settlement agreement).

[PROPOSED] AMICUS CURIAE BRIEF OF PLANNING AND CONSERVATION LEAGUE IN SUPPORT OF APPELLANTS AND CROSS-RESPONDENTS

I. The 2003 Settlement Agreement and Order Authorized Only Interim Rather Than Permanent and Final Operation of the State Water Project Under the 1995 Monterey Amendments, Thus Anticipating and Authorizing Renewed Challenge to those Amendments.

A. 2003 Settlement Agreement

To serve CEQA's goals of environmental protection and informed decision-making, environmental review must precede, not follow, approval of the project. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 132-134.) The Settlement Agreement required DWR's EIR, addressing both the "Monterey" and "Plus" project components, to precede the decision of DWR, if any, to permanently implement the Monterey Amendments. (AR 058863-058869; 058929-058924; see also *PCL v. DWR*, 83 Cal.App.4th at 920 (DWR "may choose" to address issues in a "completely different and more comprehensive manner"); 14 Cal. Code Regs., § 15378 (CEQA project covers whole of the action).)

Throughout DWR's Monterey Plus review, PCL asserted that any authority to proceed with the Monterey Amendments—already determined to be lacking in CEQA compliance--was only interim, pending DWR's new EIR and project decision. Under the Settlement Agreement, the only authorization to proceed with SWP and Kern Water Bank operation "in accordance with the Monterey Amendments" and the Attachment A amendments is conferred only on an "*interim basis*, " and requires "court approval of a motion under Public Resources Code section 21168.9." (AR 058863 (SA, § II); AR 058883 (SA, § VII.C)(emphasis added).)

Moreover, nothing else in the Settlement Agreement demonstrates any intent to abandon CEQA's strong principle against predisposition of project approval in advance of environmental review, or any other requirements of CEQA. On the

contrary, the agreement confirms the intent of the parties to "*comply with the requirements of CEQA*," as well as the "*direction of the courts*" in *PCL v. DWR*. (AR 058864 (emphasis added).) The Settlement Agreement's detailed provisions outlining the parties' expectations for DWR's new EIR (AR 058863-058868, § III) arose from a legal setting in which the direction of this Court in the predecessor action needed to be honored and implemented. In *PCL v. DWR*, this Court had already determined that CCWA's 1995 EIR, the only environmental document supporting prior approvals of the Monterey Amendments, had "failed to meet" CEQA's most important purpose, fully informing decision-makers and the public of "*the choices before them*." (*PCL v. DWR*, 83 Cal.App.4th at 920 (emphasis added).)

To fulfill this indispensable purpose and honor this Court's ruling, the Settlement Agreement could not define the project in a manner that placed the project's most critical question—whether or not to approve the Monterey Amendments—already behind decision-makers rather than before then. Instead, the Settlement Agreement records DWR's commitment to made a decision on the entire project, as that term is ordinarily understood in CEQA. (AR 058863 (§ III.A)(citing Pub. Res. Code, § 21065; 14 Cal. Code Regs., § 15378).)

To help ensure that the Monterey part of "Monterey Plus" would not be construed as a *fait accompli* in the new project review, section III.C of the agreement specifically identifies "the Monterey Amendments (including the provisions relating to the transfer of the KWB lands) and the Attachment A amendments" as "components of the proposed project" that DWR "shall evaluate" in its new EIR. (AR 058864.) Likewise, the form of peremptory writ of mandate in the Settlement Agreement, later approved in superior court, required DWR to identify "the components of the project analyzed in the new EIR" as prescribed under sections 15091-15094 of the CEQA Guidelines. (AR 058926, 058930.)

None of respondents' efforts to extrapolate permanent authorization of the Monterey Amendments from the settlement language are persuasive. For instance, section V.A provides that KWBA "shall retain title" to the Kern Water Bank lands,

and "may continue" to operate the water bank, subject to specified restrictions (AR 058876 (SA, § V.A), but those provisions do not declare their permanence or immunity from challenge once the new EIR was prepared. In context, the Settlement Agreement's restrictions on the water bank also remain interim while DWR's project decision is still pending, rather than final. (AR 059979 (SA, § V.F.) That result should not be surprising for the bank transfer, which on its own terms cannot proceed without lawful environmental review and without the operation of article 52 of the Monterey Amendments. The Settlement Agreement requires DWR to provide an "independent study," and "exercise of its judgment regarding the impacts related to the transfer, development and operation" of the Kern Water Bank in light of Kern environmental permits. AR 58867.[5] Predetermination of the contract provisions on the bank, like other parts of the Monterey Amendments, would run contrary to the agreement's basic purposes, depriving decision-makers and the public of the benefits of the new study it requires.

Moreover, the Settlement Agreement's contingent payment provisions in section VI.C acknowledges the risk that "any person" could bring a validation action, implying the expectation of a new EIR and decision subject to such a challenge. (AR 058880.)

B. 2003 Joint Motion and Interim Order

The 2003 joint motion does not support the notion that the Settlement Agreement reflected an unstated agreement to permanently leave "in place" approvals that preceded DWR's 2010 environmental review. In the joint motion:

[5] DWR's and KWB's other attempts to spin the Settlement Agreement's language into permanent disposition of the Monterey Amendments are similarly unavailing. For instance, nothing about the 45-day tolling period for plaintiffs to challenge validity, in section VII.F, demonstrates any agreement to leave in place earlier contract approvals based on the decertified 1995 EIR (AR 058885; see also Central Delta Reply/XRB 41-46 (discussing tolling agreement and other provisions).

- The parties recorded DWR's and CCWA's agreement "not to approve any new project or activity in reliance on the 1995 EIR." (AA 2990.)
- The parties confined "administration and operation" of the SWP under the Monterey Amendment to the "interim," and defined an endpoint. (*Id.*)
- The parties did not record or agree that the Monterey Amendments were already permanent based upon prior approvals. Instead, they defended the section 21168.9 order as a "careful and responsible effort" to "develop a process for preparation of a new and comprehensive EIR" while "preserving and protecting against adverse changes or alterations, resulting from or arising out of operations under the Monterey Amendment *during the time the new EIR is being prepared*." (*Id.* (emphasis added).)

The 2003 interim order expressly defined the end point for "interim" Monterey authority under the section 21168.9 order: "until DWR files its return in compliance with the Peremptory Writ of Mandate and this Court orders discharge of the writ of mandate." (AR 058933.) PCL's understanding is that at that point, the only lawful authority under the Settlement Agreement to proceed with the Monterey Amendments has expired, and only a new approval decision based on the new environmental review could allow them to proceed on a permanent basis.

C. Joint Statement on the Settlement Agreement

The settling parties' February 26, 2003 joint statement also provides no support for any assumed agreement that approvals based on the decertified EIR remained permanently operative, or that "interim" authority under the agreement was effectively permanent. Instead, the statement only referenced project operation under the "Monterey Amendments and new amendments pending completion of the new EIR and termination of the litigation." (AR 058846.)

II. The 2003 Settlement Did Not, and Could Not, Authorize DWR to Avoid Making Its Decision on the Entire Project Following Completion of Environmental Review.

The 2003 Settlement Agreement, while providing funding, watershed improvements, and other benefits for the environment and public participation, did not resolve the final status of any Monterey Amendments prior to DWR's new review and decision-making. While PCL sought and welcomed these incremental improvements, it would never have agreed to them, or spent years participating on the Monterey Plus EIR committee, only to have decision-makers and the public learn that approval of the Monterey Amendments remained behind them rather than "before them." (*PCL v. DWR*, 83 Cal.App.4th at 920.) Nor could such a result lawfully follow for the Monterey Amendments, which DWR and the contractors recognize requires environmental review under CEQA to proceed to finality. Fulfilling this Court's expectation in *PCL v. DWR* and that of the parties to the Settlement Agreement, the Interim Order prohibited DWR, in any new project approval, from relying "on the 1995 EIR for the Implementation of the Monterey Agreement." (AR 058933.)

In their cross-appellant's reply brief, KWB mistakenly cites PCL's having "collaborated for seven years on the new EIR" in support of its argument intended to insulate the Monterey Amendments from further challenge. (KWB XARB 11.) That argument fails to convey PCL's numerous reminders that DWR could lawfully do not such thing in its new environmental review and decision-making.

During DWR's Monterey Plus review, PCL and its co-plaintiffs consistently reminded DWR of the need to make a new decision on the entire project, rather than construing the Monterey Amendments as a *fait accompli* based on 1995 approvals and the legally inoperative, decertified 1995 EIR. PCL believed so strongly in the foundational importance of making this clear that in December 2006, when DWR's draft attempt at defining the "uses of the EIR" has left this issue muddled, PCL's counsel, Antonio Rossmann, wrote a personal letter to DWR Director Lester Snow

to specifically bring the problem to his attention, noting that "the evasive and imprecise language that the Department took more than three years to prepare represents a great breach of the trust we placed in DWR as the Court of Appeal-assigned lead agency for the State Water Project." (AR 90710.) PCL's communication mentioned the experience of its counsel in leading CEQA cases illustrating the dangers of predisposing a project approval before completing the environmental review informing decision-makers and the public. (*Id.*)

As PCL explained, treating an approval as final prior to CEQA review would fatally compromise environmental review under CEQA, which requires an "interactive process of assessment and responsive modification that must be genuine." *(County of Inyo* v. *City of Los Angeles (VI)* (1984) 160 Cal. App. 3d 1178, 1185.)

Applying this principle to DWR's Monterey Plus review, PCL observed that decision-makers and the public would need "direct answers" to the following questions:

1. Once DWR has completed and certified its EIR, will DWR make a new decision on all components of the project, recorded in a new notice of determination?

2. If DWR makes a new project decision, will that decision determine whether or not DWR will approve and execute the Monterey Amendments?

3. If DWR makes a new project decision to approve a project that includes the Monterey Amendments:

a. Will the decision consider a no project alternative that includes no actions taken under the Monterey Amendments?

b. Will the decision determine whether or not to adopt alternatives to the Monterey Amendments?

c. Will the decision determine whether or not to adopt mitigation measures for any significant impacts of the Monterey Amendments?

d. Will the decision determine whether to authorize the permanent transfer of the Kern Fan Element?

(AR 090711.) Other correspondence from PCL to DWR on the "uses of the EIR" issue conveyed similar messages, designed to ensure that in its Monterey Plus decision-making, DWR would tender an authentic decision on the whole project. (See, e.g., AR 53227-53237, 223353-223358.)

In another letter to the DWR Director, sent when the above concerns had not been clearly addressed, PCL again warned about the continuing absence of a clear commitment from DWR "to rendering a new decision on the 'Monterey Amendments' component of the project once it certifies the new EIR." (AR 99486.) Noting the ambiguity inherent in DWR's suggested approach to merely decide whether to "continue operating" under the proposed project, PCL called for greater clarity, and noted that the Kern Water Bank transfer and operation must also not be treated *as fait accompli* beyond DWR's discretion. (*Id.* (describing definition of the project in terms of "continued operation" as "blatantly inappropriate"). Finally, PCL noted that once the interim order under Public Resources Code section 21168.9 expired, "the contracts will revert to their pre--Monterey status unless DWR makes a new approval decision and files a return to the writ." (*Id.*)

After years of costly administrative review, PCL ultimately did not bring its own challenge to DWR's 2010 decisions. In its pleading consenting to entry of an order discharging the writ of mandate (AR 58651-58653.), PCL observed that "*[a]pprovals based upon the 1995 Monterey Agreement EIR, which led to the issuance of the existing writ of mandate, are of no further effect*, in light of the new approval of a different project by another lead agency. (AR 58652 (emphasis added).) PCL cautioned that its consent to discharge under these circumstances should "not be construed" as representing the lawfulness of DWR's 2010 EIR and approvals. (*Id.*)

DWR relied upon PCL's consent in ultimately securing discharge of the writ, but neither it nor any other party filed an objection to the PCL's consent, or the terms upon which it consented.[6]

III. Confidential Settlement Documents Cited in this Appeal Should Be Disregarded, and if Even if Considered, Are Fully Consistent with the Settlement Agreement's Plain Terms.

As introduced above, DWR and KWB's appellate briefs are noteworthy for their improper use of documents filed in confidence with the Monterey settlement mediator, and introduced by SWC in trial court. Their discussion of these sources leaves the inaccurate impression that the settling parties agreed to permanent disposition of the Monterey Amendments prior to DWR's new review. (See, e.g., DWR RB 51; KWB RB/XAOB 67.)

The sources include two self-serving briefing statements submitted to the settlement mediator. The principal source cited is a November 4, 2002 memo of defendants' legal team to Judge Weinstein marked as "subject to confidentiality agreement," entitled "PCL v. DWR—Dispute Over Writ of Mandate Language." (AR 101143-101149.) The second source is a February 7, 2007 memo to Judge Weinstein marked as "privileged and confidential," presenting the State Water Contractor defendants' one-sided position on the "uses of the EIR" issue. (AR 101137-101140.)

PCL understands that the trial court's provisional admission of these documents in the time bar trial, despite recognizing their "one-sided" nature, partly explains the attention they receive in the appellate briefs. (AA 7661.) Nonetheless, this Court should strongly reject SWC's introduction of documents from the *PCL v.*

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[6] In its cross-appellant's reply, KWB asserts that PCL never "abandoned" its representative role, as that term is used in the law of preclusion. (KWB XARB 25.) In fact, PCL expressly did so in its consent to discharge (AR 58652), using that term well within existing law. See *Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210. PCL concurs with Central Delta., et al. in opposing KWB's gratuitous attempt to alter existing law, and to revisit an issue finally decide in PCL's favor in the *PCL v. Castaic Lake* case.

DWR mediation, plainly marked on their face as confidential, and KWB and DWR's reliance on those documents here to create the false impression that PCL acceded to efforts to insulate the Monterey Amendments from new challenge. Under straightforward California law addressing mediation confidentiality, these confidential sources should never have been admitted. (See *Cassel v. Superior Court* (2011) 51 Cal.4th 113; *Simmons v. Ghaderi* (2008) 51 Cal.4th 189; Evid. Code, § 1119 (addressing inadmissibility of mediation materials).

Even if considered, however, they provide no support for the cited positions. As Central Delta *et al.* persuasively notes in reply (CD RB/XRB 57, the 2002 memo, read in context, persuasively rebuts the notion that the PCL plaintiffs ever consented to insulate the Monterey Amendments from the need for new decision-making, and reveals that the *PCL v. D*WR defendants, which did not wish to limit the order allowing Monterey to "interim" status, ultimately agreed to that. The 2007 memo is merely legal analysis that fails to confront the substance of what PCL presents above, and was rightly noted in trial court for its lack of probative value. (AA 7661.)

CONCLUSION

PCL respectfully requests the Court to consider the analysis presented here, to clarify PCL's positions as they relate to this appeal and to assist in its understanding of the 2003 Settlement Agreement, as well as related decisions, documents and orders.

Dated: May 2, 2016

Respectfully submitted,

Roger B. Moore /s/
Antonio Rossmann /s/
Rossmann and Moore, LLP
Attorneys for Planning and Conservation League

CERTIFICATE OF COMPLIANCE

Pursuant to the California Rules of Court, this brief contains 5414 words, including footnotes, according to the word count feature of Microsoft Word for Mac 2011, and complies with the word limit for *amicus curiae* briefs.

Dated: May 2, 2016

Respectfully,
Roger B. Moore /s/

PROOF OF SERVICE

I, **Roger B. Moore**, hereby declare under penalty of perjury as follows:

I am over the age of 18 years and am not a party to the within action. My business address is 2014 Shattuck Avenue, Berkeley, California 94704.

On May 2, 2016 I served the following document:

APPLICATION OF PLANNING AND CONSERVATION LEAGUE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; [PROPOSED] AMICUS CURIAE BRIEF OF PLANNING AND CONSERVATION LEAGUE IN SUPPORT OF APPELLANTS AND CROSS-RESPONDENTS

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

Electronic service addresses of persons served are as follows: ATTACHED SERVICE LIST

A copy of this document was served on the Clerk of the Sacramento County Superior Court, 720 9thStreet, Sacramento, CA 95814 via U.S. Postal Service, First Class mail.

A copy of this document was also electronically uploaded to the California Supreme Court via the Court's web portal.

Executed on May 2, 2016, at Berkeley, California.

Roger B. Moore /s/

_____

Roger B. Moore