NO. C086215

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

CENTER FOR FOOD SAFETY, 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. 34-2016-80002469)

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL THIRD **APPELLATE DISTRICT, DIVISION**	COURT OF APPEAL CASE NUMBER: C086215
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 191157 NAME: Adam Keats FIRM NAME: CENTER FOR FOOD SAFETY STREET ADDRESS: 303 Sacramento St., Second Floor CITY: San Francisco STATE: CA ZIP CODE: 94111 TELEPHONE NO.: 415-826-9770 FAX NO.: E-MAIL ADDRESS: akeats@centerforfoodsafety.org ATTORNEY FOR (*name*): Center for Food Safety, et al.	SUPERIOR COURT CASE NUMBER: 34-2016-80002469
APPELLANT/ PETITIONER: CENTER FOR FOOD SAFETY, et al. RESPONDENT/ REAL PARTY IN INTEREST: CALIFIFORNIA DEPARTMENT OF WATER RESOURCES	

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Date: May 31, 2018

Adam Keats
(TYPE OR PRINT NAME)

▶ Adam Keats
(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION

This is an appeal of a challenge to the Revised Environmental Impact Report prepared and certified by the Department of Water Resources for the Monterey Plus project. This appeal has been consolidated for the purposes of oral argument and decision with two other appeals: *Central Delta Water Agency v. Department of Water Resources*, Case No. C078249 ("*Central Delta*"), and *Center for Biological Diversity v. Department of Water Resources*, Case No. C080572. The Monterey Plus project is a series of amendments to the long term contracts that govern the operation of the State Water Project. One of the amendments provides for the transfer of the Kern Water Bank from state ownership to a joint powers authority composed of public and private water entities, but for all practical purposes majority-controlled by a select few private agribusiness companies. The Kern Water Bank is one of the largest underground reservoirs in the world and a critical component of California's water infrastructure.

The Revised Environmental Impact Report ("Revised EIR") was the product of the writ and judgment issued by the trial court in *Central Delta*. The petitioners in that action prevailed on one of their

more significant claims: that the EIR for the Monterey Plus project (the "2010 EIR") had failed to properly analyze the impacts of the transfer, development, use, and operation of the Kern Water Bank as a water banking facility.

The 2010 EIR was itself the product of an even earlier lawsuit regarding the Kern Water Bank transfer that culminated in this Court's opinion in *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892 ("*PCL v. DWR*"). The Revised EIR is thus DWR's third attempt at environmental review for this critical component of the Monterey Amendments, a project first approved in 1996 and implemented, under various disputed authorizations, soon after.

Unfortunately, DWR has once again failed to satisfy its duty under CEQA to adequately analyze the impacts of the Kern Water Bank transfer. The Revised EIR fails to properly analyze the Kern Water Bank transfer's connection to the extreme growth of permanent crops (like almonds and pistachios) in the Kern Water Bank service area and the significant impacts caused by the conversion of the area's cropland from annual to permanent crops. The Revised EIR also fails to adequately compare what impacts it does identify to a legally

sufficient no project alternative, relying—in violation of both CEQA and the trial court's writ issued in *Central Delta* ("2014 Writ")—on the previous analysis provided in the 2010 EIR. And DWR once again has decided not to approve or reject the Kern Water Bank transfer, instead merely deciding to continue operating the project pursuant to the 1996 approvals that it believes to still be in effect.

Two of these claims—concerning the no project alternative analysis and the project decision—are intimately connected to claims raised in *Central Delta* that are actively before this court in that appeal. As such, the trial court should have stayed consideration of these claims pending the resolution of the *Central Delta* appeal, pursuant to California Code of Civil Procedure section 916. That it did not do so, instead entirely rejecting Appellants' petition and discharging the 2014 Writ, makes the judgment void, and as such is the basis for the first claim described below.

DWR and various real parties in interest have frequently tried to minimize the importance of this litigation and these claims, observing that the Kern Water Bank transfer was just one of many claims brought in the *Central Delta* action and that this litigation has extended for an unreasonable amount of time, considering that the

Kern Water Bank has been effectively transferred, developed, used, and operated as a water banking facility for nearly 20 years.

While it is true that far too much time has passed since the Kern Water Bank was originally transferred, Appellants bear no responsibility for any delay, as this challenge, like the others in the related appeals, was timely filed and diligently prosecuted. And while the Kern Water Bank transfer was but one of many claims in *Central Delta*, it was a core concern of Appellants, who have long complained about the relationship of the privatization of the Kern Water Bank to the exceptional growth in permanent crops in the Kern Water Bank service area (and the subsequent hardening of demand of regional water supplies caused by this growth). Similarly, Appellants have consistently sought a true and accurate analysis of the Monterey Amendments' removal of Article 21(g)(1) from the long-term contracts, which specifically provided for the restriction of the use of State Water Project water for the planting of permanent crops like almonds and pistachios.

The same is true for Appellants' concerns regarding DWR's decision to continue operating the project pursuant to its 20-year-old approval (where it acted as a responsible agency) of the first iteration

of the Monterey Amendment project; an approval that was based on an EIR that was struck down by this Court and that predates two subsequent rounds of environmental review. DWR insists on holding onto this approval for the obvious purpose of avoiding liability under California's validation statutes for its illegal and unconstitutional transfer of the Kern Water Bank to private control. This issue has been fiercely contested by all parties since the very early days of the Monterey Amendments project and the *PCL v. DWR* litigation, through the Monterey Plus project and the *Central Delta* litigation, and remains a significant issue in this appeal. That is both a testament to its importance to the public interest groups and water agencies who have filed this action and to the significant, ongoing collateral damage caused to the environmental review process for this project and to CEQA in general.

All of this could have been avoided if DWR had performed its duties correctly way back in 1996, or maybe in 2003, or perhaps in 2010, or at least in 2016. But it has not, and Appellants respectfully seek redress from this Court in order to end this saga once and for all.

FACTUAL AND PROCEDURAL BACKGROUND

The specific event that precipitated this appeal was the September 20, 2016, certification of the Revised Environmental Impact Report ("Revised EIR") for the *Monterey Amendments to the State Water Project Contracts (including Kern Water Bank Transfer) and Associated Actions as Part of a Settlement Agreement (Monterey Plus)* ("Project"). But the facts relevant to this appeal reach back much further, and are much more complicated, starting with the consideration and approval of the Monterey Amendments in the late 1990's. Rather than recounting them all here, Appellants incorporate by reference the Factual and Procedural Background section (pp. 19-22) of the Opening Brief filed in the related appeal *Central Delta*, C078249, and direct the Court's attention to the trial court's October 2, 2017, Ruling on Submitted Matter (CFS AA 10:1932-40.), as well as the March 5, 2014, Ruling on Submitted Matter at issue in the *Central Delta* appeal. (CFS AA 10:1283-1309.)[1] This Court's decision in *PCL v. DWR* also includes a detailed history of the events

[1] Citations to documents located in Appellants' Appendix are described as (CFS AA [File #]:[Bates #]). Citations to documents located in the Administrative Record are described as (RAR [File #]:[Bates #]). Citations to the administrative record filed in the related *Central Delta* appeal, cited herein pursuant to Cal. Rules of Court 8.200(a)(5), are described as (*Central Delta* AR [File #]:[Bates #]).

that ultimately led up to this litigation. (*PCL v. DWR, supra*, 83 Cal.App.4th 892.)

On October 21, 2016, Appellants filed the underlying action before the trial court. On January 19, 2017, Appellants filed a motion for stay of proceedings pursuant to California Code of Civil Procedure section 916, subdivision (a) ("section 916"), contending that "as this case concerns matters embraced in or affected by an appeal pending in the Third District Court of Appeal." (CFS AA 01:0148 [citing *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180].) Both DWR and KWB Parties filed motions in opposition to Appellants' motion for stay, and Appellants replied. (CFS AA 01:0276-0295; 01:0179-0108; 02:0368-0378.) On March 17, 2017, the trial court denied Appellants' motion for stay, finding that "because the portion of its judgment granting issuance of the writ is not at issue on appeal, DWR's compliance with the writ does not enforce, embrace, or affect the appeal within the meaning of section 916(a). Thus, the automatic stay does not apply." (CFS AA 05:0675.)

The appellants in *Central Delta* subsequently sought a writ of supersedeas before this Court, seeking "the immediate stay [of *CFS*] lasting through the pendency of [the *Central Delta*] Appeal." (*Central*

Delta, April 19, 2017, Petition for Writ of Supersedeas at p. 4.) Respondent and KWB Parties filed oppositions to the petition. (*Central Delta*, May 5, 2017, Opposition to Writ of Supersedeas by DWR; *Central Delta*, May 5, 2017, Opposition to Writ of Supersedeas by KWB Parties.) On August 10, 2017, this Court summarily denied the petition. (*Central Delta,* August 10, 2017, Order Denying Petition for Writ of Supersedeas.)

On June 2, 2017, Appellants filed their opening brief before the trial court. (CFS AA 09:1237-1268.) On July 14, 2017, KWB Parties filed their brief in opposition, arguing for the first time that because certain issues were on appeal in *Central Delta*, "the Court does not have jurisdiction" over two of the claims argued in the Opening Brief. (CFS AA 10:1605 [citing *Varian, supra*, 35 Cal.4th at 189, n.6].) Appellants replied, agreeing with the KWB Parties and contending again that the proceedings must be stayed, at least as to these two claims. (CFS AA 10:1898-1900, 1904.) On October 2, 2017, the trial court held that "the court does not have jurisdiction to retry issues that are embraced in or affected by the appeal." (CFS AA 10:1942 [citing *Varian, supra,* 35 Cal.4th at 189].) However, instead of staying consideration of those issues pending the outcome of the *Central*

Delta appeal pursuant to section 916, the trial court denied the petition and discharged the Writ. (CFS AA 10:1948.) The Court's judgment was entered on October 20, 2017 (CFS AA 11:1961), and notice of the judgment was entered on October 27, 2017 (CFS AA 11:1974). The judgment is final and is the judgment on which this Appeal is brought.

ISSUES

1. Should the proceedings before the trial court have been stayed, rather than the petition denied and the writ discharged, due to issues in two claims being embraced in a related appeal?

2. Does the Revised EIR properly analyze the Project's environmental impacts caused by the Project's facilitation of conversion from annual to permanent crops?

3. Does the Revised EIR's analysis of the Kern Water Bank Transfer require a comparison to a CEQA-compliant no project alternatives analysis, and if so, was DWR required to revise the Monterey Plus EIR's no project alternatives analysis after the Revised EIR demonstrated that the Monterey Plus EIR's no project alternatives analysis was not supported by substantial evidence?

4. Did DWR impermissibly define its project decision in a way that made its commitment to the project precede environmental review?

STANDARD OF REVIEW

In determining whether DWR complied with CEQA, this Court reviews the record de novo and is not bound by the trial court's conclusions. (*Environmental Protection Info. Ctr. v. Department of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 479.) Appellants' claim that the trial court improperly failed to stay the action is also reviewed by this Court de novo, being a pure question of law based on undisputed facts. (*Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc*. (1996) 43 Cal.App.4th 630, 635 [citing *People v. Louis* (1986) 42 Cal.3d 969, 985].)

"The EIR is the primary means of achieving the Legislature's considered declaration that it is the policy of the state to 'take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.'" (*Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376, 392 [citation omitted].) The EIR is therefore the "heart of

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

In evaluating an EIR for CEQA compliance, a reviewing court must determine whether the agency has prejudicially abused its discretion. (Pub. Resources Code § 21168.5.) "An abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (*Id*.) Our Supreme Court has clarified that there are two distinct grounds for finding that the agency abused its discretion under CEQA, each of which has a significantly different standard for determining error. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 ("*Vineyard Area Citizens*"); *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131 ("*Save Tara*").) A "reviewing

court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (*Vineyard Area Citizens*, *supra*, 40 Cal.4th at p. 435.)

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

Municipal Water Dist. (2009) 170 Cal. App. 4th 1186, 1199 [quoting Pub. Resources Code § 21005(a)].)

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

In contrast, the substantial evidence standard of review applies to factual disputes over an EIR, such as a dispute over a finding that

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

ARGUMENT

I. PROCEEDINGS ON TWO OF APPELLANTS' CLAIMS SHOULD HAVE BEEN STAYED BY THE TRIAL COURT AS THEY WERE EMBRACED IN A RELATED APPEAL

A. Issues in *CFS* Are Embraced in or Affected by the *Central Delta* Appeal and Thus Two Claims in *CFS* Should Have Been Stayed

California Code of Civil Procedure section 916 states that "the perfecting of an appeal stays proceedings in the trial court upon the

judgment or order appealed from or upon the matters embraced therein or affected thereby, including the enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." (Code of Civ. Proc., § 916, subd. (a).) The Supreme Court in *Varian* found that a determination of "whether a proceeding is embraced in or affected by the appeal" within the meaning of section 916 requires a consideration of "whether postjudgment [or postorder] proceedings on the matter would have any effect on the effectiveness of the appeal." (*Varian*, *supra*, 35 Cal.4th at 189 [citations and quotations omitted].) *Varian* provided four scenarios in which proceedings would have an effect on the effectiveness of an appeal: (1) where the trial court proceeding "directly or indirectly seek[s] to enforce, vacate or modify [the] appealed judgment or order"; (2) where the proceeding "substantially interfere[s] with the appellate court's ability to conduct the appeal"; (3) where "the possible outcomes on appeal and the actual or possible results of the proceeding[s] are irreconcilable"; and (4) where "the very purpose of the appeal is to avoid the need for that proceeding." (*Id*. at 189-90 [citations and quotations omitted].) Only one of these scenarios must be present to effect an automatic stay on

trial court proceedings. Here, at least two of these scenarios are present, and thus, for either or both of the following reasons the trial court was required to issue an automatic stay.

1. The Very Purpose of the *Central Delta* Appeal is to Avoid the Need for the *CFS* Proceedings

One of the main purposes of the *Central Delta* appeal is to avoid the need for the *CFS* proceeding in the first place. This is because one of the remedies sought in *Central Delta* is the voiding of the Monterey Plus approvals, which include the approval of the Kern Water Bank transfer that is the subject of the Revised EIR at issue in *CFS*. (*Central Delta*, Opening Brief, Oct. 8, 2015, at pp. 76-79.) If the *Central Delta* appellants succeed in their appeal, and the approvals for the Kern Water Bank transfer are voided, DWR's "project decision" that is at issue in *CFS* (see Section IV, below) would necessarily be voided too, since it is based on and completely dependent on the Monterey Plus project approvals that would no longer exist.

Similarly, one of the claims at issue in the *Central Delta* appeal regards the 2010 EIR's no project alternatives analysis, specifically regarding its treatment of Article 21(g)(1). (*Central Delta*, Opening

Brief, Oct. 8, 2015, at pp. 54-64 .) This issue was raised before the trial court in *CFS* (and is maintained in this appeal), with Appellants contending that a proper analysis of the impacts of the Kern Water Bank transfer requires an updated no project alternatives analysis, one that accurately considers the impacts of deleting Article 21(g)(1) from the contracts. (See Section III, below.) If this Court, in *Central Delta*, finds the 2010 EIR's no project alternatives analysis to be flawed, the Revised EIR's reliance on that analysis (and the trial court's affirmation of that reliance) will be called into question.

When the very purpose of an appeal is to avoid the need for the trial court proceedings, those trial court proceedings *must* be stayed during the pendency of the appeal, since "the [trial court] proceeding itself is inherently inconsistent with a possible outcome on appeal[.]" (*Varian*, *supra*, 35 Cal.4th at 190.) The *Central Delta* appellants seek in their appeal to have the Monterey Plus project approvals voided and to require the no project alternatives analysis of any subsequent EIR include a proper analysis of the deletion of Article 21(g)(1). Their goal is clearly to avoid the need for these same issues to be raised in any subsequent trial court proceeding, such as *CFS*. Thus, the trial court proceedings regarding Appellants' claims that (1) DWR

improperly defined its project decision (see Section IV, below), and (2) the Revised EIR should include an updated no project alternatives analysis (see Section III, below) should have been stayed.

2. The Possible Outcomes of the *Central Delta* Appeal and the *CFS* Proceedings Are Potentially Irreconcilable

The trial court's holding in *CFS* is potentially irreconcilable with this Court's ruling on the *Central Delta* appeal. In their briefings on the merits, both DWR and the KWB Parties defended DWR's project "decision" and the 2010 EIR's analysis of no project alternatives as having been made in full compliance with the 2014 Writ that is challenged in the *Central Delta* appeal. (CFS AA 10:1480-87 ["DWR Complied with the Court's Unambiguous Direction as to What Decision to Make Following Completion of the Revised EIR"]; CFS AA 10:1598-1611 ["DWR Precisely Followed the 2014 Writ's Direction"].) The trial court agreed, stating that "DWR has done precisely what the 2014 Writ required." (CFS AA 10:1942.) Since the primary defense to two of the claims in *CFS* was that the agency was merely complying with the 2014 Writ, the propriety of which—on these precise issues—is specifically challenged in the *Central Delta* appeal (see *Central Delta*, Opening

Brief), a stay is required because irreconcilable results between the *Central Delta* appeal and *CFS* are possible.[2]

In *Varian*, the Supreme Court explained that irreconcilability is an issue of whether the proceedings "resolve[] the merits of a cause of action." (*Varian*, *supra*, 35 Cal.4th at p. 193.) For instance, the court discussed how both a motion for preliminary injunction and a motion to disqualify counsel do not resolve the merits of a cause of action, and thus, "these motions [are] reconcilable with any subsequent judgment on the merits." (*Id*.) In contrast, an anti-SLAPP motion "goes to the merits of the issues involved in the main action…[and] is therefore irreconcilable with a judgment in favor of the plaintiff." (*Id*.)

Here, the trial court proceedings in *CFS* potentially resolved the merits of issues before this Court in *Central Delta*. DWR, Real Parties, and the trial court all pointed to the 2014 Writ to justify the propriety of DWR's project decision and the sufficiency of the Revised EIR's no project alternatives analysis. (See Sections IV & III, below). But the 2014 Writ itself was challenged—on these precise

[2] Importantly, the question is not whether a *compatible* result is possible (obviating the need for a stay), but rather whether an *irreconcilable* result is possible (necessitating a stay). (*Varian*, *supra*, 35 Cal.4th at p. 190.)

issues—in the *Central Delta* appeal. (See *Central Delta*, Opening Brief, Oct. 8, 2015, at p. 76 ["In Ruling in Favor of Plaintiffs, the Superior Court Was Required to Order DWR to Void its Project Approvals"]; *Id.* at 54 ["The No-Project Alternatives Improperly Fail to Include an Analysis of the Implementation of…Article 21(g)(1) of the Pre-Amendment Contracts"].) The fact that the very writ that has been challenged in the *Central Delta* appeal is the basis of the defense of DWR's action that is challenged in *CFS* makes the *possibility* of irreconcilability readily apparent, as the defense goes to the merits of the action. For example, if in the *Central Delta* appeal this Court strikes down the 2014 Writ and orders the trial court to issue a new writ that properly voids the Monterey Plus approvals, which include the Kern Water Bank transfer approvals, DWR's "project decision" at issue in *CFS* regarding the Kern Water Bank transfer—and the trial court's defense of it—could not stand.

Similarly, if this Court in *Central Delta* finds that the 2010 EIR's no project alternative analysis failed to properly consider the implementation of Article 21(g)(1), the trial court's rulings on Appellants' claim regarding the Revised EIR's no project alternatives

analysis could no longer stand. In each instance, the two potential results are plainly irreconcilable.

The trial court apparently perceived this potential irreconcilability, finding that it had no jurisdiction to reach the merits of these two particular issues. (CFS AA 10:1942-43.) But, as explained below, the trial court erred by then proceeding to resolve the issues and discharging the writ instead of issuing a stay as required by section 916. Because the actual outcome in the *CFS* trial court proceedings could be irreconcilable with a possible result in the *Central Delta* appeal, "[c]ommon fairness and a sense of justice readily suggests that while plaintiffs were in good faith prosecuting their appeals, they should be in some manner protected in having the subject matter of the litigation preserved intact until the appellate court [can] settle the controversy." (*Varian*, *supra*, 35 Cal.4th at pp. 198-99 [citations and quotations omitted].) Thus, proceedings here on Appellants' claims that (1) DWR improperly defined its project decision (see Section IV, below), and (2) the Revised EIR should include an updated no project alternatives analysis (see Section III, below) must be stayed.

B. The Trial Court's Ruling on Two of Appellants Claims Is Void on its Face

"[T]he automatic stay under [California Code of Civil Procedure] section 916 must divest the trial court of fundamental jurisdiction over the matters embraced in or affected by [an] appeal." (*Varian, supra*, 35 Cal.4th at pp. 198-99.) Thus, by denying the petition and discharging the 2014 Writ—as opposed to staying the action—on the basis that the *Central Delta* appeal "prevents the court from reconsidering [certain] issues embraced by the appeal," the trial court erred. The judgment discharging the 2014 Writ "is void on its face" because "the court lacked subject matter jurisdiction" over those issues and was required to stay the action under section 916. (*Id*. at 200 [quotations and citations omitted]; CFS AA 10:1942-43, 1948.)

As described by the California Supreme Court in *Varian*, "[t]he purpose of the automatic stay provision of section 916 subdivision (a) 'is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The [automatic stay] prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect

it.'" (*Id.* at p. 189 [quoting *Elsea v. Saberi* (1002) 4 Cal.App.4th 625, 629].)

The trial court properly found that two issues argued in *CFS* were embraced in the *Central Delta* appeal. (CFS AA 10:1942-43.) However, rather than protecting this Court's jurisdiction and preserving the status quo by staying the action (at least as to those two issues), the trial court improperly acted on them, denying the petition and discharging the 2014 Writ. (CFS AA 10:1942-43, 48.) The trial court relied entirely on *Varian* for its authority and rationale. (See *id*. at pp. 11-12.) In *Varian*, the Supreme Court addressed this precise issue: whether, and when, a trial court's proceedings on matters embraced in or affected by the appeal are stayed. (*Varian, supra,* 35 Cal.4th at pp. 188-189.) The Court explained that there are two potential outcomes to an analysis of section 916: (1) if the statute applies, "the proceedings are stayed;" or (2) "if not, the proceedings are permitted." (*Id*. at p. 189 [citing *Betz v. Pankow* (1993) 16 Cal.App.4th 931, 938].)

Here, the trial court found that "[w]hile the appeal does not prevent the court from determining DWR's compliance with the unappealed portions of the Judgment and Writ, the appeal prevents the

court from reconsidering issues *embraced* by the appeal." (CFS AA 10:1942 [emphasis added].) As a result, the court found that only one issue was properly before it, refusing to reach the merits of the other two issues before denying the petition and discharging the 2014 Writ. (CFS AA 10:1942-43, 48.)

The trial court's holding defies both logic and the law. After finding that two issues were embraced by the *Central Delta* appeal, the court ignored the controlling Supreme Court precedent and discharged the 2014 Writ, rather than staying the relevant claims until the *Central Delta* appeal was decided. (CFS AA 10:1942-43.) In *Varian*, the Supreme Court found that "matters on trial were embraced in and affected by defendants' appeal from the denial of [their anti-SLAPP motions]." (*Varian*, *supra*, 35 Cal.4th at p. 200.) As such, "the trial court lacked subject matter jurisdiction over these matters" and the Supreme Court "reverse[d] the judgment." (*Id*.) Here, the trial court found that certain issues were embraced in the *Central Delta* appeal. (CFS AA 10:1942-43, 48.) The court was thus required to stay those matters until the completion of the *Central Delta* appeal. The court's decision to deny the petition and discharge the 2014 Writ,

instead of issuing a stay, "is void on its face[.]" (*Varian, supra,* 35 Cal.4th at p. 200.)

KWB Parties argued in opposing Appellants' motion to stay that "the pending appeal does not concern the agency's compliance with the writ of mandate." (CFS AA 01:0186.) The trial court agreed, stating "that because the portion of its judgment granting issuance of the writ is not at issue on appeal, DWR's compliance with the writ does not enforce, embrace, or affect the appeal[.]" (CFS AA 05:0675.)[3] However, in KWB Parties' opposition brief on the merits, they argued that since the *Central Delta* appeal challenged the trial court's CEQA remedy, the court did not have jurisdiction over the issue "[b]ecause this precise issue is on appeal[.]" (CFS AA 10:1601-02 [citing *Varian, supra,* 35 Cal.4th at p. 189].) But rather than asking for a stay, the KWB Parties instead argued that Petitioners could not retry the issue in the *CFS* proceeding. (CFS AA 10:1602.) But nowhere in *Varian* does the Supreme Court allow issues that are embraced by an appeal to be anything other than stayed. The automatic stay is just that, an automatic stay "over any matter embraced in or affected by the appeal *during the pendency* of the

[3] For the reasons discussed in this section, the trial court's ruling rejecting Appellants' motion to stay was also in error.

appeal." (*Varian*, *supra*, 35 Cal.4th at pp. 196-97 [emphasis added].) Matters embraced in or affected by an appeal cannot be decided (and thus a challenged writ cannot be discharged), and no authority has been cited in support of the contrary. (See CFS AA 10:1942-43; 10:1602-03.)

Thus, for any matter raised in *CFS* that is embraced in or affected by the *Central Delta* appeal, the trial court's judgment should be found to be void on its face. "When, as here, there is an appeal from a void judgment, the reviewing court's jurisdiction is limited to reversing the trial court's void acts." (*Varian*, *supra*, 35 Cal.4th at p. 200 [citing *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701] [quotations omitted].) Importantly, there is no assessment of the nature of the error or its impact on the case; the Supreme Court expressly rejected the argument that courts should apply a harmless error analysis. (*Id.* at p. 199, n.10.)

In summary, this Court should find that the trial court in *CFS* was required to issue an automatic stay during the pendency of the *Central Delta* appeal. This reflects the clear purpose of section 916 to give an appellate court jurisdiction to decide matters embraced by an appeal in a trial court proceeding before the trial court resolves the

merits of those issues impacted by the appeal. (See, e.g., *Golden Gate Land holdings LLC v. East Bay regional Park District* (2013) 215 Cal.App.4th 353, 364, n.9 [where the court stayed eminent domain proceedings in the trial court during pendency of a CEQA appeal because appellants challenged the remedy on appeal arguing CEQA compliance must occur prior to a project approval of eminent domain proceedings].) Appellants respectfully request that this Court find that the trial court's judgment is void in respect to the aforementioned issues that are subject section 916's automatic stay, and remand to the Trial Court to consider those issues on the merits only subsequent to, and in light of, this Court's findings in the *Central Delta* appeal.

II. THE REVISED EIR DOES NOT PROPERLY ANALYZE THE PROJECT'S ENVIRONMENTAL IMPACTS REGARDING WATER SUPPLY AND RELIABILITY CAUSED BY THE PROJECT'S FACILITATION OF CONVERSION OF ANNUAL TO PERMANENT CROPS

The transfer, development, use, and operation of the Kern Water Bank has resulted in significant environmental impacts related to water supply and reliability, because water acquired by, stored in, and supplied by the KWBA-controlled Kern Water Bank has been used to greatly expand the total acreage of permanent crops in KWBA members' service areas, "hardening" the demand for SWP water in

this region. In response to repeated and longstanding concerns regarding this significant impact of the Kern Water Bank transfer, the Revised EIR concluded that "the development and continued use and operations of the Kern Water Bank was not found to have a significant impact on crop conversion" because it did not directly or indirectly cause the conversion to permanent crops in the KWBA members' service areas. (RAR 2304.) On this basis, the Revised EIR largely avoided any analysis of the impacts to statewide and regional water supplies caused by the transfer of the Kern Water Bank (RAR 2301-2308.)[4]

The Revised EIR's analysis suffers in two significant ways: (1) it denies the causal relationship between the Kern Water Bank transfer and the massive increase in the planting of permanent crops in KWBA

[4] This issue was addressed in Chapter 10.1-44 of the Revised EIR. (RAR 997-998.) Petitioners commented on this analysis in their June 13, 2016, comments. (RAR 2353-54.) DWR's response is found in the Revised EIR's Master Responses 1 - 4 and 7 (RAR 2301-15, 2331-32) and in Response to Comments CFS1-25, CFS1-28, CFS1-37, CFS1-61, CFS1-63, and CFS1-66 (RAR 2369-72, 2374, 2384-85). As discussed in Master Response 1, this issue was also raised, to some extent, in the 2010 EIR. (RAR 2303.) The Revised EIR did conclude that the Project "could make a cumulatively considerable incremental contribution" to crop conversion (RAR 2304) but determined that this impact was less than significant because crop conversion "does not exceed any of the Appendix G standards of significance in the CEQA Guidelines related to agriculture and forestry resources." (RAR 998.)

members' service areas, and (2) it fails to adequately analyze the significant impacts to water supply and reliability caused by this massive crop conversion. Neither its analysis nor its conclusion is supported by substantial evidence.

A. The Transfer, Development, Use, and Operation of the Kern Water Bank Facilitated Massive Crop Conversion in KWBA Members' Service Areas

Petitioners presented and cited to substantial evidence that demonstrates that the transfer, development, operation, and use of the Kern Water Bank by the KWBA has caused massive growth in permanent crops in the KWBA members' service areas. (RAR 2348-2353.) For example, two graphs contained in Petitioners' comments demonstrate this clear causal relationship: Table 1 shows that, while Table A State Water Project deliveries were reduced (at times dramatically) during droughts in 2001-2005, 2007-2010, and 2012-2014, the cumulative acreage of almonds in Kern County rose precipitously. (RAR 2350; see discussion at RAR 2349-51.) Meanwhile, the Revised EIR shows that KWBA's acreages rose at essentially the same rate as the County's. (RAR 747 [Tables showing 206.5% increase for Kern County at large, 189% increase for KWBA members' service areas]; RAR 164.) Similarly, Table 2 in Petitioners'

comments shows how thousands of acres of new almond trees continued to be planted in Kern County despite dramatic fluctuations in Table A deliveries. (RAR 2350; see discussion at RAR 2349-51.) These graphs were supported by articles and news reports describing the almond boom in California, and Kern County in particular. (See RAR 2462-2473 [Exhibits A-D to Petitioners' comments on Draft Revised EIR]; RAR 2489-90 [excerpt from Exhibit E to Petitioners' comments on Draft Revised EIR].)

Similarly, Table 7.6-6 in the Revised EIR shows huge increases in acreages of nut, citrus, and fruit crops in the KWBA members' service areas in the period immediately following the Kern Water Bank transfer (189%, 238.2%, and 141.4%, respectfully). (RAR 747.) And for citrus and fruit, these increases were significantly out of proportion to these crops' rate of growth in all of Kern County, as shown when comparing these figures to those in Table 7.6-5. (*Id*.)

The Revised EIR goes to great lengths to dispute the causal connection between the massive increase in permanent crops in the KWBA members' service areas and the transfer, development, use, and operation of the Kern Water Bank, but it fails to disprove that the water stored in the Kern Water Bank was used to water new

permanent crops that were planted after the Kern Water Bank transfer. (See RAR 2302-08.) It even fails to disprove that the Kern Water Bank transfer did not cause the planting of most or all of the permanent crops in the KWBA members' service areas. Its best attempt is to suggest that "[a]bsent the KWB, alternative sources of water are available to support permanent crop irrigation. Where available, groundwater is used as the primary alternative to surface water." (RAR 2302; see also RAR 2308.)

The notion that alternative sources of water are available for KWBA members to water their permanent crops is not only completely unsupported by the record, but it is directly contradicted: the record demonstrates that in fact, KWBA members' service areas, being located primarily on the west side of Kern and Kings counties, are sorely lacking in groundwater resources. (RAR 3560 [2003 testimony of Kern County Water Agency assistant general manager Jim Beck: "consecutive shortages caused devastation on the west side of Kern County, where there were no alternative supplies other than the State Water Project."]; RAR 2465 ["Much of the increased planting in recent years has occurred on the west side of the San Joaquin Valley, where water supplies have become among the most

fragile in California."]; RAR 981 ["Almost all [of Dudley Ridge Water District's] water is obtained from the SWP."]; RAR 2468 ["The shift in [almond] production was due [to the] California Water Project, which increased the availability of irrigation water in the San Joaquin Valley."].) The lack of sufficient groundwater resources in KWBA members' service areas had prevented these areas from supporting permanent crops; it was the Kern Water Bank that made the planting of these crops possible in the KWBA members' service areas.

The 2010 EIR discusses a study by KCWA, contained in Appendix E of the 2010 EIR, that it claimed showed that the KWBA members could store their water in other area water banks if there was no access to the Kern Water Bank. (RAR 2313; see RAR 4120-24.) But this study only covered a limited period, from 1995 to 2004. (RAR 4120.) The trial court, in its ruling that precipitated the drafting of the Revised EIR, concluded that "the discussion in the Appendix is limited to a report on how the Kern Water Bank was operated between 1995 and 2005. There is no description, analysis, or discussion as to how the Kern Water Bank might be used or operated in the future, and the potential groundwater or water quality impacts that might result therefrom." (CFS AA 10:1450 [*Rosedale* Ruling].) Consistent with

this ruling, for the study in Appendix E to have any value to the Revised EIR's conclusions, it too should have been updated to analyze post-2004 conditions as well as post-2004 use and operation of the Kern Water Bank.

Ultimately, the Revised EIR fails to support its conclusions with substantial evidence in the record to challenge the evidence presented and cited to by Petitioners' that demonstrates that the transfer to and use and operation of the Kern Water Bank by KWBA directly or indirectly caused the massive growth in permanent crops in the KWBA members' service areas.

B. The Revised EIR's Analysis of the Impacts to Water Supply and Reliability Caused by the Project's Facilitation of Crop Conversion Is Not Supported by Substantial Evidence

The Kern Water Bank transfer's impacts to water supply and reliability were clearly highlighted by Petitioners. (RAR 2348-2351.) As Petitioners stated in their comments, "annual cropland losses to permanent cropland and development drive net increases in water demand." (RAR 2352.) In other words, the crop conversion that has taken place in the KWBA members' service areas since the Kern Water Bank transfer has placed increased pressure on regional water

supplies year after year. It is this impact that must be, but is not, analyzed in the Revised EIR.

The Revised EIR invests most of its energy arguing that the conversion of crops in the KWBA members' service area would have happened regardless of the development and operation of the Kern Water Bank, since: (1) crop conversion has been a county-, regional- and state-wide trend; (2) almond crop acreage is directly related to its commodity price; (3) more efficient irrigation techniques require production of more valuable crops; and (4) absent the Kern Water Bank, alternative sources of water would have been available to support permanent crops. (RAR 2302.) These arguments mistakenly focus on Petitioners' claims regarding the *causation* of the incredible growth of permanent crops in the KWBA members' service area. Although this claim is well supported by the evidence presented by Petitioners (see Section II(a), above; see RAR 2348-53), it need not be proven for this argument to prevail. Whether the Project caused the crop conversion itself is less relevant than the undisputed fact that the Project now supplies water to so many acres of permanent crops; it is the "hardening of demand" for water caused by the watering of

thousands of acres of nuts, fruits, and citrus by the Kern Water Bank that the Revised EIR needs to analyze. (RAR 2348-49.)

The Revised EIR fails to properly address this concern, stating that "although the total acreage of nut crops in Kern County did increase, the KWB participants' total contribution to nut production countywide decreased from 35% in 1995 to 33% in 2015." (RAR 2374; see also RAR 2407.) The argument that the KWBA members' *share* of the total nut acreage in Kern County dropped slightly does nothing to challenge the fact that the acreage cultivated for nut production experienced massive *actual* increases. But by emphasizing a 2% drop of KWBA's share of the county's total acreage, the EIR misleadingly spins what is in fact a massive increase in actual acreage as a "relative decrease in new almond acreage in Kern County rather than in increase (which is what would be required to support the commenters' hypothesis)." (RAR 2307.) This is absolutely incorrect: in order for commenters' *actual* hypothesis—that the Kern Water Bank has hardened demand for water by providing water to massive amounts of new permanent crop acreage (*see* RAR 2348-53)—to be correct, what is needed to be demonstrated is an increase in *absolute* permanent crop acreage, not an increase in

KWBA's share of the total. The *share* of the total acreage is irrelevant; it is the number of *actual* acres that matters when analyzing an impact to the environment. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 718 ["The relevant question … is not the relative amount of [pollutants] when compared with preexisting emissions, but whether any additional amount of [pollutants] should be considered significant in light of the serious nature of the ozone problems in this air basin."].)

Just because Kern County's *growth rate* of new almond plantings went from second to third between 1982 and 2015 does not change the fact that over 200,000 acres of nuts, over 22,000 acres of citrus, and over 50,000 acres of fruit were planted in Kern County between 1996 and 2014. (RAR 2307; see RAR 747.) The Revised EIR, specifically tasked with analyzing the impacts of the transfer, development, use, and operation of the Kern Water Bank, failed to analyze this most significant impact—an impact on which Petitioners and members of the public have repeatedly and ceaselessly (over the course of almost two decades) commented.

III. DWR IMPROPERLY FAILED TO REVISE THE 2010 EIR'S NO PROJECT ALTERNATIVES ANALYSIS

The evidence disclosed and analyzed in the Revised EIR, demonstrating how the Kern Water Bank transfer facilitated the conversion of annual to permanent crops, implicates another flaw in the Revised EIR: its failure to revise the 2010 EIR's no project alternative analysis, particularly regarding the Monterey Plus project's deletion of Article 21(g)(1) from the long-term contracts. Article 21(g)(1) was a provision in the long-term contracts that, if ever enforced by DWR, could act to restrict the types of use of surplus (non-Table A) water. (CFS AA 10:1286.) It was deleted as part of the Monterey Plus project. (*Id*.)

Although DWR argued, and the trial court agreed, that the 2014 Writ inoculates the 2010 EIR's alternatives analysis from further challenge, the 2014 Writ clearly requires a fully CEQA-compliant analysis of the impacts of the Kern Water Bank transfer. Given how starkly the evidence presented in the Revised EIR contradicts the assumptions upon which the 2010 EIR's no project alternatives are based, a CEQA-compliant EIR requires an accurate comparison between the project legitimate and factually-supported no project

alternatives. DWR's failure to revise the earlier no project alternatives constitutes a CEQA error, an error that is not excused by the 2014 Writ.

A. Appellants Are Not Barred From Challenging the Revised EIR's No Project Alternative Analysis.

The 2014 Writ ordered DWR to revise the 2010 EIR's analysis of the Kern Water Bank transfer. (CFS AA 10:1515 ["DWR shall … revise the Monterey Plus EIR as necessary to correct the CEQA error with respect to the analysis of the potential impacts associated with the transfer, development, use, and operation of the Kern Water Bank…."].) Although the 2014 Writ vacated DWR's certification of the entire 2014 EIR (primarily because the trial court concluded that "partial decertification will generate uncertainty about which parts of the EIR are certified and which are not" (*Id.*; CFS AA 10:1331.), the Writ expressly limited any subsequent challenges to the Revised EIR to only those sections that were new or changed from the Monterey Plus EIR. (CFS AA 10:1516 ["Only those portions of the revised Monterey Plus EIR that are new or changed shall be subject to challenge under CEQA by petitioners or other interested parties. No other challenges that were raised or could have been raised with

respect to the Monterey Plus EIR may be raised in any challenge to the revised Monterey Plus EIR."].)

DWR revised most of the 2010 EIR's resource sections to the extent they concerned the Kern Water Bank transfer, but it did not revise the 2010 EIR's alternatives analysis. (See RAR 443 [describing content of Revised EIR); RAR 1037.] The trial court had previously rejected the *Central Delta* petitioners' challenge to the 2010 EIR's alternatives analysis (CFS AA 10:1513); that challenge is now before this Court in the *Central Delta* appeal. (*Central Delta,* Opening Brief, Oct. 8, 2015, at pp. 54-64.)

In the proceedings below, the trial court rejected Appellants' challenge to the Revised EIR's no project alternative analysis, concluding that it did not have jurisdiction because the issue "was excluded from the scope of the 2014 Writ, and the issue clearly is 'embraced' by the pending appeal." (CFS AA 10:1942-44.) To the extent that this issue is not stayed (see Section I, above), this Court should conclude that Appellants' challenge to the Revised EIR's no project alternative analysis is not barred by the 2014 Writ.

The CEQA Guidelines require all EIRs to include an analysis of a no project alternative. (14 Cal. Code § 15126.6, subd. (e).) The

purpose of the no project alternative analysis "is to allow decisionmakers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project." (14 Cal. Code Regs. § 15126.6, subd. (e)(1).) "It is a factually based forecast of the environmental impacts of preserving the status quo. It thus provides the decision makers with a base line against which they can measure the environmental advantages and disadvantages of the project and alternatives to the project." (*PCL v. DWR*, *supra*, 83 Cal.App.4th at pp. 917–918.) "Evaluation of project alternatives and mitigation measures is '[t]he core of an EIR'." (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 937 [quoting *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564].)

Given the centrality and importance of an EIR's alternatives analysis, with its intimate connection of its no project alternative analysis to its analysis of a project's impacts, it is not reasonable to interpret the 2014 Writ as excluding any possible challenge to the Revised EIR's no project alternative analysis or as completely and absolutely inoculating the 2010 EIR's no project alternative analysis from future revision. The 2014 Writ plainly required DWR to revise

the 2010 EIR "*as necessary* to correct the CEQA error with respect to the analysis of the potential impacts associated with" the Kern Water Bank transfer. (CFS AA 10:1515 [emphasis added].) And the 2014 Writ voided DWR's approval of the *entire* 2010 EIR, specifically because the trial court chose not to engage in a section-by-section partial decertification of the document. (*Id.*; CFS AA 10:1331 [Joint Ruling].)

A proper analysis under CEQA of the impacts of the Kern Water Bank transfer—as required by the 2014 Writ—requires comparing those impacts to the impacts of the no project alternative. Of course, if the 2010 EIR's no project alternative analysis can still adequately perform this function, there is no reason to revisit the analysis. The only reason the earlier analysis would need to be revised is if something in the new impacts analysis somehow implicates, contradicts, or proves false the earlier no project alternative analysis. If the two analyses are no longer logically or factually consistent, they both must be revised in order for decisionmakers to make a valid comparison.

The 2014 Writ does state that "[o]nly those portions of the revised Monterey Plus EIR that are new or changed shall be subject to

challenge under CEQA by petitioners or other interested parties. No other challenges that were raised or could have been raised with respect to the Monterey Plus EIR may be raised in any challenge to the revised Monterey Plus EIR." (CFS AA 10:1516.) A strictly literal reading of the first sentence might permit DWR to ignore the 2014 Writ's command that the Monterey Plus EIR be revised in the first place; if DWR chose to merely re-certify the earlier EIR, it could argue that no challenges were allowed since nothing was new or changed. This is logically inconsistent with the primary directive of the 2014 Writ: that the 2010 EIR's analysis of the Kern Water Bank transfer was legally insufficient and needed to be revised. (*Id*. at p. 3].)

Instead, the first sentence above should be read along with the second sentence, and both read in context of the entire Writ, to determine that the court intended to prevent endless re-litigation of matters unrelated to and not implicated by the new analysis in the Revised EIR. (See CFS AA 10:1332 ["This court simply cannot accept the premise that every CEQA violation requires the agency to start the EIR process anew. In appropriate cases, the agency must be allowed to correct the deficiencies and re-certify the EIR without re-

opening the non-defective portions of the EIR to further challenge…"].) If a proper analysis of the impacts of the Kern Water Bank transfer requires revisiting other sections of the 2010 EIR—even sections that were previously found to have complied with CEQA—nothing in the Writ should be read to prevent that.

B. The Revised EIR Improperly Relies on the 2010 EIR's No Project Alternatives Analysis

Information revealed in the Revised EIR's impact analysis contradicts the 2010 EIR's description and analysis of the no project alternatives, necessitating revisiting that section. Specifically, the Revised EIR contains analysis and data—none of which is discussed or included in the 2010 EIR—that demonstrates that "surplus water" (i.e., water that would have been subject to Article 21(g)(1) of the pre-Monterey Plus contracts) was used to recharge the Kern Water Bank up through and including 2014, and thus that surplus water supported the tremendous conversion of croplands from annual to permanent crops in the Kern Water Bank service areas. In other words, the Revised EIR reveals that Article 21 surplus water was used to support the development of a permanent economy, which is exactly what Article 21(g)(1) explicitly prohibited, before being deleted by the

Monterey Plus project. This directly contradicts the assumption upon which the 2010 EIR's no project alternatives are based: that determining whether surplus water would ever be used in such a way is unanswerable, being too difficult and involving too many factors. (*Central Delta* AR 11:5301; *Central Delta* AR 2:747.) As such, in order for the Revised EIR's analysis of the transfer, development, use, and operation of the Kern Water Bank to satisfy CEQA and the requirements of the 2014 Writ, the Revised EIR must include an updated analysis of a version of the no project alternative that includes the implementation of Article 21(g)(1).[5]

The Revised EIR contains no additional analysis regarding the deletion of Article 21(g)(1) to that already contained in the 2010 EIR. (RAR 2315-17.) Instead, in its master response regarding Article 21(g)(1), the Revised EIR states that the Revised EIR "does not provide any new information that would show that development of an economy in the Kern Water Bank participants' service area is

[5] A more complete discussion of Article 21(g)(1), including its potential importance in relation to other contract provisions and the failure of the 2010 EIR to analyze its deletion from the contracts as part of the Monterey Plus project, is found in pages 54-64 of Appellants' Opening Brief filed in *Central Delta*, Case No. C078249, which is adopted and incorporated here by reference. (Cal. Rules of Court 8.200(a)(5).)

dependent upon the sustained delivery of surplus water." (RAR 2316.) As Petitioners pointed out in their comments, the Revised EIR contains more than enough new information to require revisiting the Monterey Plus EIR's analysis of Article 21(g)(1):

> The Revised EIR's data regarding the conversion of annual crops to permanent crops in Kern County, including within the KWBA member agencies' service areas, proves that surplus water—both scheduled and unscheduled/interruptible water—has been and likely will be used for growing permanent agricultural crops. At its core, the development and operation of the KWB facilitates the use of surplus water as irrigation for permanent crops, which is exactly what the [2010 EIR] admits Article 21(g)(1) was intended to prevent. The [2010 EIR's] assumption that it was unlikely that anybody thought that such water would be used for such a purpose has been proven false and the Revised EIR must now address this issue.
>
> (RAR 2354.)

Petitioners then pointed to Table 7.6-6 in the Revised EIR, which unequivocally demonstrates large-scale crop conversion from annual to permanent crops in the KWBA service areas immediately following the Kern Water Bank transfer. (*Id.*; see RAR 747.) As Petitioners observed, this data required updating the 2010 EIR's alternatives analysis: "An evaluation of alternatives that limits surplus water for use in permanent economies would allow for adequate

analysis of the project's impacts on the state water supply." (RAR 2361.)

The Revised EIR makes several "key points" regarding Article 21 in its master response to comments. First, it repeats the 2010 EIR's assessment that "the restrictions in Article 21(g)(1) were meant to apply to 'scheduled surplus water'," and that no scheduled surplus water had been delivered after 1994. (*Id*.) Next, it states that "[t]here is nothing in the further analysis of KWB activities that would indicate that more water would be delivered from the Delta as a result of KWB activities." (*Id*.) Finally, the Revised EIR observes that DWR would not have "called forth the Article 21(g)(1) restriction" because storing water underground is good water management. (*Id*.)

None of these points are relevant to the challenge posed here: that the Revised EIR's discussion of the resource impacts of the Kern Water Bank transfer contradicts the 2010 EIR's assumption on which the no project alternatives analysis is premised that surplus water would not be used for permanent crops. (RAR 2354, 2361.) First, regardless of whether Article 21(g)(1) was *intended* to apply only to scheduled surplus water, on its face it *in fact* applied to all surplus water. More importantly, for the purpose of the EIR's no-project

alternatives analysis, what matters is that Petitioners' interpretation of that contract provision was at least *plausible*. (CFS AA 10:1303 [citing *PCL v. DWR*, *supra*, 83 Cal.App.4th at p. 913].)

Second, the Revised EIR's guesswork as to how DWR may have implemented Article 21(g)(1), if at all, if it were not deleted by the Monterey Amendments is insufficient because it ignores Petitioners' plausible interpretation of the contract provision. Moreover, enforcement could have been sought by contracting parties, third parties in interest, members of the public, or public officials, so relying on DWR's self-serving statement that it would ignore the plain language of the contract term is inappropriate.

Finally, the fact that storing water underground is good water management is not relevant to the question of whether Article 21(g)(1) could or would ever be enforced if it were not deleted from the contracts. Article 21(g)(1) is concerned with the eventual use of surplus water, not with the decision to store water underground, either as part of a private water banking operation or in a state-run facility. There is simply no basis for, and certainly no evidence in support of, the idea that the invocation of Article 21(g)(1) would act to prevent the good water management practice of storing water underground.

The Revised EIR also points to Chapter 6 of the 2010 EIR, suggesting that the discussion in this chapter somehow addresses Article 21(g)(1) and Petitioners' concern regarding the EIR's no project alternatives analysis. (RAR 2361.) But nowhere in Chapter 6, which is titled "Effects of Proposed Project on SWP and SWP Contractor Operations," is Article 21(g)(1) discussed or even mentioned. (RAR 2755-2832.) Nowhere in the chapter is an analysis, or even a mention, of the use of Article 21 surplus water for permanent economies. (*Id*.) While the chapter does purport to analyze the effects of the Monterey Plus project on the operations of the SWP under several hydrological conditions, all of these scenarios assume that Article 21(g)(1) would *not* be invoked (i.e., they ignore the deletion of Article 21(g)(1)). (RAR 2785-2818.)

Ultimately, the Revised EIR's primary contention regarding Article 21(g)(1) and the no project alternatives analysis is that DWR "did not make a finding that conversion of annual crops to permanent crops was a significant adverse impact," and therefore, apparently, the 2010 EIR's no project alternatives analysis did not need to be revisited. (RAR 2384.) Whether the Revised EIR's new evidence regarding the Kern Water Bank's role in crop conversion demonstrates

that the impact is significant is discussed in Section II, above. But here, for the purpose of the EIR's no project alternatives analysis, the potential significance of the impact is not the standard: the trial court had already determined that Petitioners' interpretation of Article 21(g)(1) plausibly construes Article 21(g)(1) in a manner that would result in significant environmental consequences, and thus must be part of the EIR's no project alternatives analysis, following this Court's ruling in *PCL v. DWR*. (CFS AA 10:1303.) The question is whether the information contained in the Revised EIR that contradicts the assumption upon which the 2010 EIR's no project alternatives analysis requires revising that earlier analysis. In order for the Revised EIR to adequately analyze the impacts of the Kern Water Bank transfer, as commanded by the 2014 Writ, the answer is yes.

IV. DWR VIOLATED CEQA BY DEFINING ITS PROJECT DECISION AS "CARRY[ING] OUT THE PROPOSED PROJECT BY CONTINUING THE USE AND OPERATION OF THE KWB BY KWBA."

On September 20, 2016, DWR issued a decision memorandum, signed by DWR Director Mark W. Cowin, directing DWR to "carry out the proposed project by continuing the use and operation of the KWB by KWBA." (RAR 11.) DWR's decision memorandum did not

record an approval of the project, while the Revised EIR, in response to comments, states that a new project approval was not required because "The Sacramento County Superior Court has severed the use and operation of the KWB from the remainder of the Monterey Plus project." (*Id.*, RAR 2367.) The Revised EIR then quotes the joint ruling on the merits in *Central Delta* and *Rosedale-Rio Bravo v. DWR* (Sacramento Superior Court Case Nos. 34-2010-80000561 and 34-2010-80000703):

> "Invalidating the Project approvals is unnecessary and would throw the entire SWP into complete disarray, smack in the middle of one of the most severe droughts on record….
>
> However, while the court shall allow the Project approvals to remain in place on an interim basis pending preparation of an adequate EIR, the court's writ shall require DWR … to make a new determination regarding whether to continue the use and operation of the Kern Water Bank by KWBA, after compliance with CEQA."

(RAR 2367; see CFS AA 10:1327.)

DWR's "decision" to carry out the project by continuing the use and operation of the Kern Water Bank, expressed in both its decision memorandum and the Revised EIR, violated CEQA, as it impermissibly defined the project approval in a way that made DWR's commitment to the Project precede its environmental review. DWR's

reliance on the 2014 Writ as permitting its project decision is misplaced, as the Writ requires compliance with CEQA and therefore expressly prohibits DWR's attempted post-hoc environmental review.

A. DWR Impermissibly Defined Its Project Decision in a Way that Made Its Commitment to the Project Precede Environmental Review.

"[A]n agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR." (*Save Tara, supra*, 45 Cal.4th at p. 132.) A project approval defined in this way would confuse the public and decision-makers, giving them false hope that the review process means something substantive and that their contributions matter, thwarting CEQA's core goals of informed public participation and informed decision-making. (See *County of Inyo v. City of Los Angeles* (1984) 160 Cal.App.3d 1178, 1185 [CEQA requires an "interactive process of assessment and responsive modification that must be genuine"].)

CEQA requires "public agencies to ascertain the environmental consequences of a project before giving approval to proceed." (*Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549, 564-565; *LandValue 77, LLC v. Board of Trustees of California State University* (2011) 193 Cal.App.4th 675, 683; *Bakersfield Citizens for*

Local Control v. City of Bakersfield (2004) 124 Cal.App.4th 1184, 1221; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 672.) An EIR that purports to analyze the impacts of a project after it has already been approved violates this core requirement of CEQA. "[U]nless a public agency can shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent, environmental review would be a meaningless exercise." (*Mountain Lion Foundation v. Fish & Game Com*. (1997) 16 Cal.4th 105, 117.)

> "The CEQA process is intended to be a careful examination, fully open to the public, of the environmental consequences of a given project, covering the entire project, from start to finish. This examination is intended to provide the fullest information reasonably available upon which the decision makers and the public they serve can rely in determining whether or not to start the project at all, not merely to decide whether to finish it. The EIR is intended to furnish both the road map and the environmental price tag for a project, so that the decision maker and the public both know, before the journey begins, just where the journey will lead, and how much they—and the environment—will have to give up in order to take that journey."

(*Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 271 [quoting an amicus curiae brief filed by the California Attorney General]; *Save Tara*, 45 Cal.4th at pp. 134-136 ["a

decision approving a project "must be *preceded*, not *followed*, by CEQA review" (italics original)].)

An agency's certification of and reliance on an EIR that purports to analyze the environmental impacts of a project that has already been approved is necessarily prejudicial. (*Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1236; *RiverWatch v.Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1199 ["Noncompliance by a public agency with CEQA's substantive requirements 'constitute[s] a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions."] [quoting Pub. Resources Code § 21005(a)].)

Our Supreme Court has been unwaveringly clear that an agency's commitment to a project cannot, under any circumstance, precede its environmental review of that project. (*Save Tara, supra*, 45 Cal.4th at pp. 138-139 [defining a premature project approval as one in which the agency has "committed itself to the project" so as to "effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered"].) DWR's attempt

to accomplish that here, by "deciding" to carry out the project by merely continuing the use and operation of the Kern Water Bank pursuant to certain project approvals made decades ago, violates this core principle of the law, producing nothing more than "a document of post hoc rationalization." (*Save Tara, supra*, 45 Cal.4th at p. 135.)

DWR was required to do something more than pay lip service to CEQA; it was required to make a genuine project decision, once in which after genuinely reviewing the project's environmental impacts.

B. DWR Cannot Rely on the 2014 Writ for Its Violation of the Law, as the 2014 Writ Required DWR to Comply with CEQA.

DWR argued before the trial court that it "did exactly as the Writ required" in deciding to carry out the previously-approved project. (CFS AA 10:1480.) The KWB Parties made the same argument. (CFS AA 10:1598-1601.) While it is true that the 2014 Writ commanded DWR to "make a new determination regarding whether to continue the use and operation of the Kern Water Bank," the writ also commanded DWR to comply with CEQA: "The Court shall retain jurisdiction over this proceeding until DWR files a final return demonstrating compliance with this peremptory writ of mandate and, as necessary, CEQA…" (CFS AA 10:1516.) As

DWR's project decision violated CEQA, it does not satisfy the terms of the 2014 Writ.

CONCLUSION

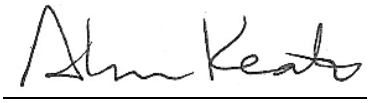
The deficiencies in the Revised EIR and in DWR's project decision are all related to the core complaints regarding the Kern Water Bank transfer that have followed it from its inception: the likelihood that a privately-controlled water bank would pursue its own economic gain at the expense of the public's interests and the environment; the relationship between the control of the Kern Water Bank and the growth of an unsustainable and environmentally harmful permanent crop economy in a water-deficient part of the state; and the apparent collusion between a state agency and its local agency "customers" to avoid at all costs a true and complete legal reckoning of decisions made in secret over twenty years ago.

For the reasons expressed above, Appellants respectfully request that this Court grant them their requested relief, including: (1) finding that the trial court erred in not staying this action, or at least Appellants' claims regarding DWR's project decision and the Revised EIR's no project alternative analysis, and (2) finding the Revised

EIR's analysis of the project's resource impacts, particularly regarding water supply and reliability issues, to not satisfy CEQA. If this Court determines that Appellants' claims should not be stayed and reaches the merits instead, Appellants respectfully request that this Court (3) find that the Revised EIR improperly failed to update the no project alternative to include a proper analysis of the impacts of the deletion of Article 21(g)(1), and (4) improperly found DWR's project decision to have satisfied CEQA.

RESPECTFULLY SUBMITTED,

DATED: May 31, 2018

BY: 
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CERTIFICATE OF COMPLIANCE

Pursuant to CRC Rule 8.204(c)(1), this brief contains 11,388 words, according to the word count feature of Microsoft Word 2010, and therefore complies with the 14,000 word limit for opening briefs.

/s/ Adam Keats
Adam Keats