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By A. O'Donnell, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE	**MARCH 9, 2022**	**DEPT. NO**	**37**
JUDGE	**HON. KEVIN R. CULHANE**	**CLERK**	**A. O'DONNELL**

CALIFORNIA DEPARTMENT OF WATER RESOURCES,

Plaintiff,

v.

ALL PERSONS INTERESTED IN THE MATTER of the State Water Project Water Supply Contract Amendments for Continued Service and the Terms and Conditions Thereof (the "Contract Extension Amendments"),

Defendants.

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NORTH COAST RIVERS ALLIANCE, INSTITUTE FOR FISHERIES RESOURCES, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION, and the WINNEMEM WINTU TRIBE,

Petitioners and Plaintiffs,

v.

DEPARTMENT OF WATER RESOURCES, and DOES 1 through 20,

Respondents and Defendants,

DOES 21 through 200,

Real Parties In Interest.

Case Nos.: 34-2018-00246183
34-2019-80003047
34-2019-80003053

PLANNING AND CONSERVATION LEAGUE, CALIFORNIA WATER IMPACT NETWORK, AQUALLIANCE, and CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, **Petitioners,** **v.** **CALIFORNIA DEPARTMENT OF WATER RESOURCES** **Respondent,** **DOES 1 through 50,** **Real Parties In Interest.**	
Nature of Proceedings:	**RULING ON REQUEST FOR STATEMENT OF DECISION AND OBJECTIONS TO TENTATIVE DECISION; STATEMENT OF DECISION**

The Court issued its Tentative Decision on February 10, 2020. (ROA # 169.) It was served on February 14, 2020. The Tentative Decision stated it "shall be the [proposed] Statement of Decision under California Rules of Court, rule 3.1590(c)(1), subject to a party's objection under rule 3.1590(g). (*Id.* at p. 48.)

On February 28, 2022, Defendants California Water Impact Network, AquaAlliance, California Sportfishing Protection Alliance, Center for Biological Diversity, Planning and Conservation League, and Friends of the River filed a Request for Statement of Decision and Objections to the Tentative Decision in the validation action (Case No. 34-2018-0246183). The filing comprises a request that the Court address 8 additional issues in the Statement of Decision and an objection to the Tentative Decision for failing to resolve those 8 issues. (ROA # 170.)

On March 7, 2022, Defendants Kern County Water Agency, Metropolitan Water District of Southern California, the Santa Clarita Valley Water Agency, the Alameda County Flood Control and Water Conservation District, Zone 7, the Alameda County Water District, the Santa Clara Valley Water District, and the Coachella Valley Water District filed an Objection to Tentative Decision in the validation action, in which they objected to the Court's failure in the Tentative Decision to address 4 controverted issues. (ROA # 172.) On the same day, Intervenors Metropolitan Water District of Southern California, Kern County Water Agency, and Coachella Valley Water District filed identical Objections to Tentative Decision in the two writ proceedings (Case Nos. 34-2019-80003047 and 34-2019-80003053).

The Court overrules the referenced objections and declines to make the requested additional findings in its Statement of Decision.

Following most bench trials, the trial judge issues "a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial." (Code Civ. Proc., § 632.) Such statements of decision are adequate if they fairly disclose the trial judge's determinations of the ultimate facts and material issues in the case. Statements of decision need not address all of the legal and factual issues raised by the parties. (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124-1125.) Where findings are made which are determinative of the case, the failure to make findings on other issues becomes unnecessary. (*Rossi v. Hackett* (1961) 190 Cal.App.2d 400, 407; accord *Daniel Orifice Fitting Co. v. Whalen* (1962) 198 Cal.App.2d 791, 801.) "A failure to find on an immaterial issue is not error." (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230; accord *Wolfe v. Lipsy* (1985) 163 al.App.3d 633, 643).The trial judge is not required to "respond point by point to the various issues posed in [a party's] request for a statement of decision." (*Muzquiz, supra,* at p. 1126; accord *Hellman, supra,* at p. 1230).

The Court has addressed the principal issues material to its decision in the Tentative Decision. The parties' requested additional findings do not add anything to the Court's ultimate determination on the related matters. Therefore, the Court declines to make additional findings herein.

The Court's Tentative Decision is affirmed as the final Statement of Decision, as modified below to:

- Change reference to the document in its second paragraph from the "Tentative Decision" to "Statement of Decision"

- Correct a typographical error on page 5 of the Tentative Decision. The phrase "$17.5 billion in general obligation bonds" has been corrected to state "$1.75 billion in general obligation bonds."

- Change reference to the document under Section B (Related Writ Proceedings) of the Discussion from the "Tentative Decision's" to "Statement of Decision's"

- Modification of the concluding paragraph to reflect that the decision is now final

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STATEMENT OF DECISION

These related matters came on regularly for hearing from January 5, 2022, through January 7, 2022, in Department 37 of the above-entitled court, the Honorable Kevin R. Culhane presiding.

The parties appeared through counsel, as stated on the record. Following consideration of the administrative record[1], together with the briefing and arguments of counsel, the Court now issues its Statement of Decision as set forth below.

I. FACTUAL AND PROCEDURAL HISTORY[2]

Many of the relevant facts in his case are best understood in the context of the legal issues presented. Those facts are set forth in the Court's discussion. The following is a background of the matters the Court is tasked with resolving.

A. Introduction

The referenced, related matters concern the Department of Water Resources' ("DWR" or the "Department") approval of the State Water Project Water Supply Contract Amendments for Continued Service and the Terms and Conditions Thereof (the "Contract Extension Amendments" or "Amendments"). The Amendments, *inter alia,* extend the term of existing contracts between DWR and 29 state water contractors ("Contractors")[3] that have been in effect for nearly 60 years.

B. The State Water Project

DWR owns, maintains, and operates the State Water Project ("SWP"), which is the largest state-owned, multi-purpose, user-financed water storage and delivery system in the United States. (AR 3998) The SWP provides water to 27 million Californians throughout the state from Napa Valley to San Diego and to 750,000 acres of farmland in the San Joaquin Valley. (AR 3997-4006, ARV 3866.) It includes 30 dams, 21 reservoirs, 30 pumping and generating plants, and approximately 700 miles of aqueducts and pipelines. (AR 16198.)

The concept of a state-wide water development project was first proposed in 1919. (AR 4082.) It was further investigated and studied in the 1920's and early 1930's. (AR 4082-4083.) In 1933, the Legislature passed the Central Valley Project Act (Wat. Code,

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[1] The administrative record for these matters comprises documents from the two writ actions (those numbered AR 1-32779) and additional documents specifically related to the validation action (those numbered ARV 1-9517).

[2] Much of the factual background concerning the history of the State Water Project and the original Water Supply Contracts is undisputed and is taken from DWR's opening brief in the validation action.

[3] The Contractors are water districts and other public agencies that distribute State Water Project water to agricultural, municipal, and industrial customers and to retail water agencies throughout California. (AR 3998.)

§§ 11100, *et seq.*), to facilitate construction of dams, reservoirs, canals, pumping plants, and power plants in an extensive system to improve utilization of the Sacramento, San Joaquin, and other rivers. (AR 4083.)

In 1951, the Legislature authorized new units of the Central Valley Project called the Feather River and Sacramento-San Joaquin Delta Diversion Project, which would later become the SWP. (Wat. Code, § 11260.) Water Code section 11260 described the SWP. It was amended in 1956, 1957 and 1959 as the concept for the project was developed. While initially authorized in 1951, construction of the SWP did not begin statewide until after the Legislature passed the California Water Resources Development Bond Act, also known as the Burns-Porter Act (*id.*, §§ 12930, *et seq.*), in 1959. The voters approved the Burns-Porter Act in 1960 to provide funds to assist with constructing the SWP. (*Id.*, § 12931.) The Burns-Porter Act authorized the issuance of $1.75 billion in general obligation bonds (*id.*, § 12935), and the bond proceeds were used to pay for a significant portion of the initial construction of the SWP including the Oroville Dam, the Delta pumping facilities, and the California Aqueduct. The Burns-Porter Act provides that all SWP facilities are to be acquired, constructed, operated, and maintained by DWR pursuant to the provisions in the CVP Act. (*Id*, § 12931.)

While DWR is responsible for constructing, operating, and maintaining the SWP, the Contractors are responsible for paying for most of the costs of doing so; they pay the costs allocable to the delivery of water. In addition to the general obligation bond financing provided by the Burns-Porter Act, the CVP Act authorizes DWR to issue revenue bonds to pay for the capital costs of the SWP. (Wat. Code, §§ 11553 and 11700, *et seq.*) These statutes also authorize DWR to contract with the Contractors to charge them for SWP-related costs. (Wat. Code, §§ 11454, 11625, 12931 and 12937.)

C. The Original Water Supply Contracts

The framework for the original Water Supply Contracts ("Contracts") was first negotiated around 1960. In January 1960, Governor Edmund ("Pat") Brown issued the Statement of Contracting Principles for Water Service Contracts ("Contracting Principles") developed in coordination with DWR. (AR 27919-27924.) "The Contracting Principles represent [DWR's] construction of that portion of the [Burns-Porter] Act dealing with the contract requirements." (*Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900, 905.) The Contracting Principles provided the basic framework for the original long-term contracts for a supply of water from the SWP, including allocation of costs among project purposes (water supply, flood control, recreation, and fish and wildlife preservation and enhancement) and between types of facilities (conservation facilities to store water for delivery and transportation facilities to facilitate delivery to customers). The Contracting Principles expressed that contract rates should be set so as to return to the State "all costs of project operation, maintenance and replacement, all principal and interest on (1) bonds, (2) expenditures from the California Water Fund, and (3) other monies used in the construction of the project works." (AR 27920.) The Contracting Principles also expressed that the Contractors should have the option to continue receiving SWP water at no greater cost than as provided in the original contracts, after the initial stated term of the contracts ended. (AR 27922.)

During 1960, DWR negotiated the first water supply contract with the Metropolitan Water District of Southern California ("MWD"). (AR34065-34180 ["MWD 1960 Contract"].) That contract was executed in November of 1960, just before the voters approved the Burns-Porter Act. (AR 4007.) The MWD contract served as the prototype for the Contracts between DWR and the other Contractors. (AR 4006-4007.)

In 1962, DWR approved standard provisions for the Contracts, which consisted of the basic terms and conditions in the MWD prototype contract that would remain the same for each Contract. Contracts similar to the MWD prototype contact were negotiated with the other public agencies. (AR 4006.) DWR entered into Contracts with each Contractor by the end of 1967. (AR 4007.) The Contracts are substantially uniform with respect to their basic terms and conditions for all 29 Contractors. (AR 4006, AR 4437 [Art. 45].)

The Contracts provide the amount of SWP water that each Contractor might receive. The Contractors may each receive water based on the amount listed in "Table A" of their Water Supply Contract,[4] which is the maximum amount of water that a Contractor may request for delivery in a year. (AR 4382.) The amount of water actually delivered each year varies depending on hydrologic conditions, Sacramento-San Joaquin Delta and Feather River regulatory requirements and restrictions to protect other water users and the environment, SWP operating criteria, and other factors affecting the amount of water available. (AR 4011-4014; see *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1155-1156.) In most years, Table A supplies are forecasted to be less than the amounts set forth in the Contracts. (AR 142-145.) In such years, supplies are allocated among all Contractors in proportion to their annual Table A amounts. (AR 27631-27633 [Art. 18]; AR 143.)

The Water Supply Contracts originally included 75-year stated terms with ending dates that range from November 4, 2035, to August 31, 2042, as provided in Article 2 of the Contracts, depending on when each specific Contract was executed. (AR 4007.) Contractors that give written notice to DWR at least 6 months before the end date have the right to extend water service under their existing Contract indefinitely under Article 4's "Evergreen Provision." (AR 4380 [Art. 4].) Unless agreed to otherwise, Contractors extending their contracts under Article 4 have rights to service of water (1) in the same annual amounts, (2) at no greater cost, (3) under the same physical conditions including time, place, amount and rate of delivery, (4) under the same chemical quality objective, and (5) with the same options to utilize the project transportation facilities for area of origin rights or for moving other non-project water. (AR 4380-4381.) Contractors may extend their Contracts for successive subsequent stated terms. (AR 4381.) To date, nine Contractors have submitted Article 4 notices to DWR for continued provision of SWP water. (ARV 2088-2107).

A central concept in the Contracts is the "beneficiary-pays principle." The Contractors are obligated under the Contracts to pay DWR the amounts needed to cover all costs allocated to the delivery of water, including financing costs associated with the revenue bonds used to construct SWP facilities, SWP operation and maintenance costs (e.g., costs of facility repairs and

[4] The amount of SWP water allocated to each Contractor was originally called an "annual entitlement," but since 2003 has been referred to as a "Table A Amount." (AR 4375 [definition of "Annual Table A Amount"].)

updates, SWP employees, and the electricity used for pumping), and the costs of mitigation of impacts to fish and wildlife due to SWP water operations. (See AR 4023-4027.)

While the State of California was authorized in 1960 to issue $1.75 billion in general obligation bonds to pay for the original SWP facilities, the majority of SWP capital costs today are financed by DWR's issuance of revenue bonds. In the last 50 years and as of October 2018, DWR has issued revenue bonds in the aggregate principal amount of approximately $10 billion, of which about $2.5 billion was outstanding in October 2018. (AR 103, ARV 3624.)

Historically, DWR has kept annual financing costs relatively low through two mechanisms. First, DWR's revenue bonds are highly rated by the credit rating agencies due to the strength of the Contractors' obligations under the Contracts and because most of the Contractors have high credit ratings. Consequently, the interest rates on DWR's revenue bonds are relatively low. (See, e.g., ARV 3612 and 3690 [showing bond ratings of "AAA" and "Aa1" for Water System Revenue Bonds Series AZ], ARV 3623 [Rate Covenant explaining how bond debt service is paid under the Water Supply Contracts].)

Second, prior to 2006, DWR typically issued bonds with 30-year repayment periods. (AR 3976.) Beginning in 2006, however, DWR has been issuing bonds with shorter repayment periods that extend only to 2035, because that is the end of the stated term in the MWD Water Supply Contract. (AR 139, AR 4007, AR 27343-27344.) The issuance of bonds for shorter time periods (15-year bonds versus 30-year bonds, for instance) compresses the timeframe for bond repayment and results in higher annual costs.[5] Those higher annual costs are passed through to the Contractors. (AR 3976.) Modeling of the effects of compression demonstrates that the financing costs payable by the Contractors under the current Contracts (if not amended) will increase dramatically to a spike in charges in 2035. (AR 4510-4514.)

D. The Contract Extension Amendments

As early as 2006, the Contractors began discussing the need to extend the terms of their Contracts, and by 2009, the Contractors had raised the issue with DWR. In May 2013, DWR and the Contractors began formal negotiations to extend the term of the Contracts and to make other financial changes thereto. (AR 3988.)

The contours of potential amendments to address various financial provisions of the Contracts were discussed in 23 public negotiation sessions. The sessions occurred from May 1, 2013, through June 18, 2014, and resulted in an Agreement in Principle ("AIP") for the Contract Extension Amendments, which DWR and 25 of the Contractors executed. (AR 27969-29256.) The AIP specifies the objectives of the Contract Extension Amendments and provided the framework for negotiating the language in the Amendments themselves. (*Ibid.*)

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[5] This situation is referred to as "financial compression."

The AIP outlined the following four primary objectives of the Contract Extension Amendments:

> 1. Ensure DWR can finance SWP expenditures beyond 2035 for a sufficiently extended period to provide for a reliable stream of revenue from the Contractors and to facilitate ongoing financial planning for the SWP.
>
> 2. Maintain an appropriate level of reserves and funds to meet ongoing financial SWP needs and purposes.
>
> 3. Simplify the SWP billing process.
>
> 4. Increase coordination between DWR and the Contractors regarding SWP financial matters.

(AR 4034.) The AIP provided that these objectives were to be met by:

> 1. **[An] Extended Contract Term.** Revise Article 2 to extend the term of the 29 Contracts to December 31, 2085 (subject to the provisions of Article 4).
>
> 2. **Increased Operating Reserves**. Provide for increased SWP financial operating reserves.
>
> 3. **New Billing Provisions**. Implement a comprehensive pay-as-you-go repayment methodology with a corresponding billing system that more closely matches the timing of future SWP revenues to future expenditures. The pay-as-you-go repayment methodology generally means to recover capital, operation, and maintenance costs within the year incurred and/or expended.
>
> 4. **Enhanced Funding Mechanisms and New Accounts**. Provide enhanced funding mechanisms and create additional accounts to address SWP financial needs and purposes.
>
> 5. **Enhanced Coordination Regarding SWP Finances**. Provide for a finance committee and provide other means to increase coordination between DWR and the Contractors regarding SWP financial matters.

(AR 4034-4035.)

The AIP served as the basis for DWR's analysis of the Amendments under the California Environmental Quality Act ("CEQA"). (AR 4034.) On August 17, 2016, DWR released a draft Environmental Impact Report ("EIR") for the Amendments for a 60-day public review. (AR

3955-4516; AR 125.) A public hearing was held on September 12, 2016, and the public comment period closed on October 17, 2016. Informational hearings regarding the Amendments were held before the state Senate Natural Resources Committee on July 3, 2018, and the state Joint Legislative Budget Committee on September 11, 2018. (AR 27898, 27950.) DWR certified the final EIR on November 13, 2018, and approved the Amendments on December 11, 2018. (AR 111, AR 1-2.)

After the EIR was certified, DWR and the Contractors drafted a model amendment consistent with the AIP, which served as the template for the actual amendments executed by each Contractor. (AR 15-102 [model amendment].) The only difference between the model amendment and the executed versions of the Amendments is the amendment number, which varied for each Contractor depending on how many other amendments it had previously executed. As of the date the administrative records were certified, 22 Contractors had approved the Amendments. (ARV 1952-2087 [public water agency board approvals]; ARV 1-1867 [executed Amendments].) The 22 signing Contractors represent 97-percent of the total maximum Table A amount of water. (AR 4009 [Table A amounts per Contractor].)

MWD was the first Contractor to approve and execute the Contract Extension Amendment, and did so on December 11, 2018. (ARV 975-1064, ARV 2002-2034.) The same day, DWR filed its validation action (Case No. 34-2018-0246183) to validate the Amendments (collectively) under Code of Civil Procedure sections 860, *et seq.*

On January 8, 2019, North Coast Rivers Alliance, Institute for Fisheries Resources, Pacific Coast Federation of Fishermen's Associations, San Francisco Crab Boat Owners Association, and the Winnemem Wintu Tribe (collectively referred to as "NCRA Petitioners") filed a verified petition for writ of mandate and complaint for declaratory and injunctive relief (Case No. 34-2019-80003047) ("NCRA's Writ"). NCRA Petitioners allege the Amendments violate CEQA, the Delta Reform Act, and the Public Trust Doctrine.

On January 10, 2019, Planning and Conservation League, California Water Impact Network, Aqualliance, and California Sportfishing Protection Alliance (collectively "PCL Petitioners") filed a verified petition for writ of mandate (Case No. 34-2019-80003053) alleging DWR failed to comply with CEQA in certifying its final EIR for the Amendments ("PCL's Writ").

MWD, Kern County Water Agency, and Coachella Valley Water District intervened in the two writ proceedings, filing oppositions thereto.

The three referenced matters were ordered related on June 27, 2019, and assigned to the undersigned judge for all purposes on August 20, 2019. The parties subsequently stipulated, and the Court ordered, that all three matters be heard together with a single decision resolving all three matters to follow.

As noted above, a hearing was held on these matters from January 5, 2022, through January 7, 2022. The matters were deemed submitted at the conclusion of the hearing.

II. DISCUSSION

The Court elects to discuss DWR's validation action[6] first. Discussion of the prima facie elements of the validation complaint and the defenses raised thereto generally follows the order they were argued by the parties during the three-day hearing.[7]

A. Validation Complaint

(1) Legal Standard

A uniform standard of review for validation proceedings brought under Code of Civil Procedure sections 860, *et seq.*, does not exist. The applicable standard(s) of review depend upon the issues being litigated.

Generally, an agency's conduct "is reviewed for abuse of discretion, which is established if the agency failed to comply with required procedures or made findings that are not supported by substantial evidence." (See, e.g., *San Francisco Baykeeper, Inc. v. State Lands Commission* (2018) 29 Cal.App.5th 562, 576.) An agency's "legal conclusions are reviewed de novo." (*Ibid.*)

"Questions of statutory interpretation . . . present questions of law, which [the Court] review[s] de novo." (*Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 604.)

And "[t]he standard of review [of] a CEQA [claim], as provided in [Public Resource Code] sections 21168.5 and 21005, is abuse of discretion." (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512.) Such an abuse is established if the agency "fail[s] to proceed in the manner CEQA provides or . . . reach[es] factual conclusions unsupported by substantial evidence[8]." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* ("*Vineyard*") (2007) 40 Cal.4th 412, 435 [citing Pub. Resources Code, § 21168.5].) "Judicial

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[6] Defendants Kern County Water Agency, MWD, the Santa Clarita Valley Water Agency, the Alameda County Flood Control and Water Conservation District, Zone 7, the Alameda County Water District, the Santa Clara Valley Water District, and the Coachella Valley Water District (collectively "MWD, et al.") filed an opening brief in support of DWR's validation action. (ROA # 149.) Defendant Mojave Water Agency filed a joinder to said opening brief on September 29, 2021. (ROA # 151.) These parties are collectively referred to as the "Supporting Answering Parties."

[7] Discussion of the various CEQA issues differs, in part, from the hearing's order of argument.

[8] Substantial evidence is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (14 Cal. Code Regs § 15384, subd. (a).) It includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (*Id.*, subd. (b).) It does not include argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or economic impacts which do not contribute to, or are not caused by, physical impacts on the environment. ([Pub. Resources Code,] § 21082.2, subd. (c).)" (*Ibid.*) The substantial evidence standard is "highly deferential." (*Calif. Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 984.) "In reviewing for substantial evidence, the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,' for, on factual questions, [the court's] task 'is not to weigh conflicting evidence and determine who has the better argument.' [Citation.]" (*Vineyard* at p. 435.)

review of these two types of error differs significantly . . . ." (*Vineyard* at p. 435.) While the Court "determine[s] de novo whether the agency has employed the correct procedures," it "accord[s] greater deference to the agency's substantive factual conclusions." (*Ibid.*) "In evaluating an EIR for CEQA compliance, then, 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* at p. 435; accord *Sierra Club, supra,* at p. 512.)

(2) Request for Judicial Notice

DWR's request for judicial notice filed in support of its reply to Defendants County of San Joaquin, County of Contra Costa, Contra Costa County Water Agency, County of Solano, County of Yolo, County of Butte, County of Plumas, Plumas County Flood Control and Water Conservation District, Central Delta Water Agency, and Local Agencies of the North Delta's (collectively the "Public Agencies") Opposition (ROA # 160) and Defendants California Water Impact Network, AquaAlliance, California Sportfishing Protection Alliance, Center for Biological Diversity, Planning and Conservation League, and Friends of the River's (collectively "CWIN") request for judicial notice filed in support of their opposition brief (see CWIN's Opp'n Br. at p. 15, fns. 5, 6), are denied because the subject documents are not relevant to the Court's decision on the validation action. The existence of an "opt out" provision as part of the ongoing negotiations regarding the Delta Conveyance Project and DWR's SWP allocation announcements for the 2018-2019 water year do not impact the Court's analysis herein.

(3) Prima Facie Elements

DWR brought its validation action under Code of Civil Procedure ("CCP") sections 860, *et seq.*, commonly known as the "Validation Statute." A validation action is a unique proceeding used to secure a prompt judicial determination that certain measures by a public agency, such as the issuance of bonds and contracts involving financing and financial obligations, are valid, legal, and binding. (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 842-43.)

CCP section 860 provides: "A public agency may upon the existence[9] of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action . . . to determine the validity of such matter." "Determining whether the [V]alidation [S]tatute[] appl[ies] to a particular agency action is an exercise in cross-referencing." (*Coachella Valley Water Dist. v. Super. Ct.* (2021) 61 Cal.App.5th 755, 768.) Because "their procedures apply to 'any matter which under any other law is authorized to be determined pursuant to [the statute] [citations]," the Court must "look to other statutes to determine the scope of public agency actions that are subject to validation [thereunder]." (*Ibid.*)

DWR contends Government Code section 17700 is the "other law," which authorizes it to bring its validation action. Section 17700 provides, in pertinent part:

[9] For purposes of the Validation Statute, "bonds, . . . contracts, . . . and evidences of indebtedness shall be deemed to be in existence upon their authorization." (Code Civ. Proc., § 864.) "Bonds and warrants [are] deemed authorized as of the date of adoption by the governing body of the public agency of a resolution or ordinance authorizing their issuance, and contracts [are] deemed authorized as of the date of adoption by the governing body of the public agency of a resolution or ordinance approving the contract and authorizing its execution." (*Ibid.*)

> (a) The state or any . . . agency . . . may bring an action to determine the validity of its bonds, warrants, contracts, obligations, or evidences of indebtedness pursuant to [the Validation Statute].
>
> (b)
>
> > (1) Any state . . . agency . . . that issues bonds, notes, or other obligations the proceeds of which are to be used to purchase, or to make loans evidenced or secured by, the bonds, warrants, contracts, obligations, or evidences of indebtedness of one or more local agencies, may bring an action to determine the validity of the bonds, warrants, contracts, obligations, or evidences of indebtedness of those local agencies to be purchased by, or used to evidence or secure loans by, the state board, department, agency, or authority pursuant to [the Validation Statute].

A validation action is an *in rem* proceeding; thus, it "operates against property, as distinct from an injunction that operates against persons." (*Friedland, supra,* at p. 843.) "As an *in rem* proceeding, a validation action differs from traditional actions challenging a public agency decision; its effect binds the agency and all other persons." (*Ibid.*; accord *Coachella Valley Water Dist., supra,* at p. 768.) Here, the res DWR seeks to validate is DWR's Contract Extension Amendments.

The form of the summons and the manner of service in a validation action are statutorily prescribed. (Code Civ. Proc., §§ 831, 831.1.) Completion of the required notice establishes jurisdiction over all interested parties. (Code Civ. Proc., § 862.) Further, judgment in a validation action is conclusive against all parties as to all matters that could have been adjudicated against the public agency and against all other persons. (Code Civ. Proc., § 870; *Coachella Valley Water Dist., supra,* at pp. 767-68.)

Here the Court finds, and no party disputes, that the Contract Extension Amendments are the proper subject of a validation action pursuant to Code of Civil Procedure sections 860, *et seq.*, and Government Code section 17700. The Court additionally finds that proper notice of the validation action was provided, giving the Court jurisdiction over all interested parties in this matter. (See Case No. 34-2018-00246183 ROA ## 6 [Order for Publication of Summons in Validation Action], 58 [Declaration of Notice of Validation Action in Accordance with Publication Order], 145 [Proofs of Publication of Summons Pursuant to Court Order for Publication of Summons].)

Further, the Court finds DWR acted within its general, broad contracting authority concerning the SWP in approving and executing the Contract Extension Amendments. (See DWR's Opening Br. ISO Validation at 21:20-23:14, 28:17-29:9 [citing statutory sources of DWR's contracting authority and case law discussing DWR's authority].)

Finally, the Contract Extension Amendments "exist" for purposes the Validation Statute as DWR approved and authorized the execution of the Amendments on December 11, 2018. (AR 103.)

Thus, the Contract Extension Amendments are subject to validation in this action, subject to the merits of the various defenses raised by several answering parties.[10]

(4) Violations of Water Code sections 147 & 147.5

The Public Agencies argue DWR failed to comply with Water Code sections 147 and 147.5 in approving the Contract Extension Amendments.

a. Section 147

Water Code section 147 concerns required annual fiscal reporting by DWR to the State Legislature. It provides that in January of every year, DWR "shall prepare and submit to the chairpersons of the fiscal committees of the Legislature a report with regard to the budget for the State Water Resources Development System." (Water Code, § 147, subd. (a).) Subdivision (b) of the statute states what information is required to be included in the annual report, and subdivision (c) requires the annual report to provide three fiscal years' worth of the required information.

The Public Agencies argue DWR failed to comply with section 147 as follows:

> In a letter to [the Joint Legislative Budget Committee ("JLBC")] dated June 11, 2018, the Delta Counties Coalition [("DCC")] noted there is "little question that the primary impetus for this contract extension" was a Delta conveyance estimated to cost contractors "tens of billions of dollars in the coming decade," and the largest capital improvement being considered in the SWP. DCC requested that DWR provide the detailed financial analysis required under Water Code 147. Despite that request, DWR failed to provide the analysis required by Water Code section 147 before making its final determinations.

(Public Agencies' Corrected Opp'n Br. 25:8-12.)

DWR responds that "Section 147 is not applicable to this validation proceeding or the Amendments, as it requires DWR to provide an annual report about SWP finances to the [Legislature]." (DWR's Reply to Public Agencies' Opp'n 11:27-12:2.) DWR continues: "Section 147 is not relevant to whether the Amendments are valid under the Validation Statute, and DWR submits the reports as required." (*Id.* at 12:2-4.)

[10] In addition to the various defenses to the validation action discussed herein, the Public Agencies also argue in their corrected opposition brief that 1) DWR improperly failed to provide any analysis to inform what effect absorbing a Delta conveyance option would have on the fiscal integrity of the SWP (Public Agencies' Corrected Opp'n Br. 24:19-25:4), and 2) that validation is premature because DWR improperly segmented "Delta conveyance SWP contract amendments." (*Id.* at 26:1-20.) These issues are subsumed under the Court's CEQA analysis.

The Court agrees that Water Code section 147 has no application to DWR's validation action. As stated above, it concerns required annual fiscal reporting. The Public Agencies have not shown that authorizing the Contract Extension Amendments triggered reporting required under section 147, and there is no evidence in the record that DWR failed to submit its annual reports as required.

b. Section 147.5

Water Code section 147.5 concerns the State Legislature's review of the renewal and extension of long-term water supply contracts. It provides:

> At least 60 days prior to the final approval of the renewal or extension of a long-term water supply contract between [DWR] and a state water project contractor, [DWR] shall present at an informational hearing before the Legislature the details of the terms and conditions of the contract and how they serve as a template for the remaining long-term water supply contracts. This presentation shall be made to the Joint Legislative Budget Committee and relevant policy and fiscal committees of both houses, as determined by the Speaker of the Assembly and the Senate Committee on Rules. [DWR] shall submit a copy of one long-term contract to the Joint Legislative Budget Committee no less than 30 days prior to the scheduled hearing.

(Emphasis added.)

The Public Agencies argue DWR violated Water Code section 147.5 in its presentation of the Contract Extension Amendments to the JLBC because it participated in the informational hearing "based . . . on *draft* contract extension amendments . . . rather than waiting on the final version following EIR review of public comments." (Public Agencies' Corrected Opp'n Br. 25:19-21.) The Public Agencies contend:

> DWR did not provide the highly critical EIR comments it received on the project in its legislative packet. Despite the urgency it claimed to have the hearing, DWR neglected to mention that it still had neither responded to public comments submitted to DWR more than two years earlier, nor arrived at a final set of proposed amendments following responses to those comments. [fn.]

(*Id.* at 25:22-26.)

DWR contends that it complied with Water Code section 147.5, as the statute "does not require that a 'final version' of the Amendments be presented to the Legislature before DWR approval[,]" and "[t]he model amendment that DWR presented to the Legislature was identical in all material respects to the Amendment that DWR and MWD approved on December 11, 2018."

(DWR's Reply to Public Agencies' Opp'n 12:8-9; DWR's Opening Br. ISO Validation 30:16-18.)

Here, the JLBC conducted an informational hearing pursuant to section 147.5 on September 11, 2018, during which DWR presented information concerning the terms and conditions of the Contract Extension Amendments and how they serve as a template for the Contractors' Water Supply Contracts. (AR 27339-27754, AR 27950-27964.) More than three months prior to that informational hearing, on May 10, 2018, DWR presented the JLBC with a packet of information for use in the hearing. (AR 27339-27342. AR 27475-27753.) The packet included: "(1) an executive summary highlighting the primary components of the Contract Extension Amendment, (2) the Agreement in Principle negotiated between DWR and the Contractors, dated June 18, 2014, (3) the proposed Contract Extension Amendment, (4) a model contract, showing how a consolidated original contract and amendments to date would appear if further amended by the Contract Extension Amendment, and (5) the text of Water Code Section 147.5." (AR 27340.)[11] DWR authorized the Amendments' execution more than ninety days after the legislative hearing was held, on December 11, 2018. (AR 103.)

As an initial matter, and as raised by the Court during the January 2022 hearing, the Court questions as a procedural matter whether the Public Agencies can raise as a defense to a validation action a Water Code section 147.5 challenge concerning the substantive sufficiency of an informational hearing held thereunder after such a hearing has been held. However, assuming such a challenge is properly made, the Court finds the referenced hearing and informational packet satisfied section 147.5's requirements. The statute does not state that the final version of a contract must be presented to the Legislature, and the Public Agencies have not shown that the model amendment DWR presented to the JLBC differed in any meaningful way from the final version of the Contract Extension Amendment entered into between DWR and MWD in December 2018. Moreover, the Public Agencies have not shown that section 147.5 required DWR to provide the Legislature with information, such as public comments, obtained during its CEQA analysis.

(5) Contract Impossibility / Impracticability / Unconscionability

CWIN argues the Contract Extension Amendments cannot be validated because the terms of certain unamended portions of the original Contracts are impossible and/or impracticable to satisfy and unconscionable. (CWIN's Opp'n Br. 10:22-18:17.) These arguments are premised upon the underlying contention that by extending the term of the original Contracts by 50 years, the Contract Extension Amendments reenacted the unamended portions of the original Contract, making the entirety of the amended contracts subject to validation, not just the Amendments themselves. (*Id.* at 8:18-25.) On the reenactment issue, CWIN asserts:

[11] A preliminary informational hearing was held before the Senate Committee on Natural Resources and Water on July 3, 2018. (AR 27898-27927.) The purpose of the hearing was "intended to identify and explore the state water policy implications of the proposed contract amendments[,]" with "[t]he hope . . . that th[e] hearing w[ould] provide JLBC a framework within which to further explore the proposed contract amendments in their [September 11, 2018] hearing." (AR 27900.)

> Because the Amendments extend the existing contracts that govern the SWP for an additional 50 years, they act on the contract *as a whole*, including any unamended provisions. This is because California courts evaluating actions subject to validation follow the "'reenactment rule' of statutory interpretation." [Citations.] This means "the unamended portion ... is reenacted with the enactment of the amendment, so that [it] is deemed to have been acted on as a whole," and therefore the entirety of the Amendments are subject to validation. [Citation.] Here, DWR itself explains how the Amendments extend the life of the original contract terms, which originally "included 75-year stated terms with ending dates that range from November 4, 2035, to August 31, 2042 ... depending on when each specific Contract was executed. (AR 4007.)" (DWR Opening Brief at p. 11.) This is a quintessential example of a reenactment. [Citation.] Thus, despite DWR's contentions to the contrary, the Amendments are not limited to mere alterations of financial provisions. [fn.]
>
> Here, this means the inquiry into legality and the validity of the Amendments extends beyond what has been changed from the original contracts, *i.e.*, every contract provision is subject to an action challenging contractual validity. . . .
>
> . . . .
>
> . . . This Court must look at the entirety of the amendments.

(*Id.* at 8:18-9:18.) In support of its underlying "reenactment rule" argument, CWIN cites two cases, *Barrett American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685 ("*Barrett*") and *Coachella Valley Water District v. Superior Court* (2021) 61 Cal.App.5th 755 ("*Coachella Valley*").

DWR replies that CWIN's "authority for [its reenactment proposition] is thin, and the [two] cases cited are inapposite." (DWR's Reply to CWIN's Opp'n 7:8-10.) DWR argues, *inter alia*:

> [CWIN] fundamentally misapply[ies] the Validation Statute [fn.] in asserting that DWR's approval of the Amendments "reenacted" all terms in the Contracts. [Citations.] A validation action is an *in rem* proceeding in which the subject being litigated is a specific res. [Citations.] Here, that res is the Amendments which revise various financial terms in the Contracts to ensure the long-term fiscal health of the SWP beyond 2035. [Citations.] The unamended terms that [CWIN is] challenging are not part of the res in this validation action, and have already been validated in *Metropolitan Water Dist. of Southern California v. Marquardt* [(1963) 59 Cal.2d 159], which, among other things, recognized

> that the Contracts authorize perpetual water service under Article 4. (*Id.* at p. 195.)

(*Id.* at 7:12-22.)

Here, the Court finds, *Barrett* and *Coachella Valley* do not stand for the broad proposition for which CWIN cites them, *i.e.*, that California courts evaluating actions subject to validation follow the reenactment rule of statutory interpretation.

Barrett concerns the interpretation of specific sections of the Mitigation Fee Act[12] to determine the available remedies and applicable statute of limitations in a real estate developer's challenge to building permit fees it paid. (*Barrett, supra,* at p. 692 ["In this case, we determine: (1) whether a party who challenges a local agency's fees for building inspections and permits under section 66014 can state a claim for remedies under both section 66016 (prospective fee reduction) and section 66020 (refund); (2) whether the limitations period of section 66020 or section 66022 applies to a claim that the local agency's building permit fees are excessive; and (3) whether a local agency's reenactment of the same building permit and inspection fee is subject to challenge under section 66022."].) Said fees were part of a "comprehensive fee schedule" for many municipal services established by a 2002 resolution. (*Id.* at p. 702.) In finding the 2002 resolution was subject to challenge under Government Code section 66022, the Court analogized the City's reenactment of its building permit fees "as part of a revised comprehensive fee resolution" to "legislation at the state level that amends a portion of a statute while leaving the unamended portion unchanged." (*Id.* at p. 704.) Although the court references the "reenactment rule" of statutory interpretation, its decision was not based thereon. Rather, the court premised its decision based on "the facts [of the] case" concerning the adoption of the subject resolution and the city's obligations under section 66014. (*Id.* at pp. 702-704.)

Coachella Valley involves a taxpayer's challenge to a water district's tax increase. As stated in the decision, the court was tasked with answering "a single question: Do[es] the [V]alidation [S]tatute[] apply to a county water district's ad valorem property tax such that a challenge to the tax must be brought within the 60-day statute of limitations in [CCP] section 860?" (*Coachella Valley* at p. 759.) The court answered yes and held that the petitioner's writ proceeding was time-barred as he filed the action in 2018 challenging a 2013 resolution that adopted the tax increase. The decision never mentions the "reenactment rule," and the holding is not based thereon.

Barrett and *Coachella Valley* are inapposite to this validation proceeding. Moreover, CWIN has provided no authority to support extending application of the reenactment rule beyond its use as a rule of statutory construction, and the Court declines to do so. (See *Central Delta Water Agency v. DWR* (2021) 69 Cal.App.5th 170, 204 ["Central Delta contends that 'just as the reenactment rule of statutory interpretation states that the reenactment of a statute reenacts the entire statute, so must the authorization of a contract amendment reauthorize the entire contract; the contract must be 'deemed to have been acted on as a whole' at the date of the authorization of the amendment. [Citation.] However, Central Delta provides no support for the sweeping proposition that an analysis of statutory interpretation applies with equal force to

[12] Government Code sections 66000-66025.

contracts."].) "Under the [California] Constitution, 'a section of a statute may not be amended unless the section is re-enacted as amended.' [Citation.] A ballot initiative, therefore, must restate the entire provision it proposes to amend." (*County of San Diego v. Comm'n on State Mandates* (2016) 7 Cal.App.5th 12, 37.) In contrast, the res of this validation proceeding is the Amendments, not the Contracts in their entirety, as amended.

For the stated reasons, CWIN's reenactment rule argument must fail. Thus, its impossibility, impracticability, and unconscionability arguments, which challenge unamended portions of the Contracts also fail.

(6) CEQA Violations

a. Segmentation

The Public Agencies and North Coast Rivers Alliance, Institute for Fisheries Resources, Pacific Coast Federation of Fishermen's Associations, San Francisco Crab Boat Owners Association, and the Winnemem Wintu Tribe (collectively "NCRA") argue DWR violated CEQA by improperly segmenting or "piecemealing" the Amendments from related projects. (Public Agencies' Corrected Opp'n Br. 33:20-35:13; NCRA's Opp'n Br. 22:9-24:3.) NCRA and the Public Agencies contend:

> Instead of studying all of its interdependent actions together, DWR has improperly segmented its analysis. It isolated this Project - its 50-year contract extensions - from the "State Water Project Water Supply Contract Amendments for Water Management and California WaterFix" Project[13] [citation], the COA Addendum[14] [citations], and any new Delta conveyance. Indeed, DWR announced that it was preparing a Draft EIR for the

[13] Starting in 2014, DWR and the Contractors began a separate "process for amending the Contracts to confirm and supplement certain provisions for several water management actions, including transfers and exchanges, and to address changes in financial provisions related to the costs of [a two tunnel water conveyance project] known as California WaterFix. (AR 140.) "This public process was initially noticed in November 2014 for cost allocation of the [earlier-] proposed Bay Delta Conservation Plan (BDCP). In February 2018, DWR and the Contractors resumed the public process to negotiate the proposed amendments." (*Ibid.*) "The purpose of the resumed negotiations was to address terms and conditions of water management actions related to water transfers and exchanges, and to develop terms and conditions for allocation of costs of California WaterFix for Contractors that directly benefit from WaterFix. The negotiations led to development of a non-binding 'Agreement in Principle Concerning the State Water Project Water Supply Contract Amendments for Water Management and California WaterFix.'" (AR 140-141, AR 52909-82914.) These amendments are referred to as the "Water Management Amendments."

[14] Around the time DWR was reviewing the Amendments and the EIR, it was negotiating with the Bureau of Reclamation regarding their joint, coordinated operation of the SWP and the federal Central Valley Project, which is governed by a Coordinated Operation Agreement ("COA"). (AR 25049-25081.) NCRA states that one day after DWR approved the Amendments, it approved an addendum to the COA, however, no citations to the administrative record concerning said addendum were provided. (See NCRA's Opp'n Br. 17:5-7.) NCRA refers only to a paragraph in DWR's answer to its writ petition, which states that it executed an addendum to the COA on December 12, 2018. (DWR's Answer to NCRA's Writ ¶ 67.) No other evidence is submitted concerning the COA addendum. For example, NCRA cites no evidence concerning the scope or purpose of the COA addendum.

> State Water Project Water Supply Contract Amendments for Water Management and California Waterfix on July 13, 2018 [citation], and circulated that draft for public comment in October 2018 - during the same time frame it was considering this Project. It treated these actions as completely distinct, even as DWR's Project approval is necessary for its implementation of these related, contract amendments, as it enables DWR to sell long-term bonds to finance the capital improvements needed to undertake all SWP-related Projects. [Citation.] It likewise illogically separated from its review of the subject Contract Extension Amendments its consideration of [an] additional Delta conveyance, whether it is called BDCP, WaterFix, or a peripheral canal. DWR did so even as the Project enables DWR to obtain revenue bonds to fund Delta conveyance-related expenditures by removing the prior contract requirement that facilities must have existed before 1987 to be eligible for bond financing. [Citations.]
>
> DWR has claimed that this piecemeal approach does not violate CEQA because DWR will separately consider the various actions that the Project enables. [Citation.] But separate consideration of interrelated components of the same overall project is the epitome of improper segmentation.

(NCRA's Opp'n Br. 22:28-23:18; see also Public Agencies' Corrected Opp'n Br. 34:7-35:13[15].)

DWR rejoins:

> NCRA [and the Public Agencies] are wrong on the merits, and fail to set forth or apply the relevant test for piecemealing[, stated in *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376 ("*Laurel Heights*")]. . . .
>
> Moreover, although the Amendments, a possible conveyance facility, and possible water management contract revisions may be related in the general sense that they, and "any water planning project in the state," have an overall "goal of reliable water supply," they have different purposes and "independent utility." [Citations.] "(N)o SWP facilities would be built or expanded" as part of the Contract Extension Amendments (AR 4102), and the Amendments "do not include language that

[15] The Court notes the Public Agencies also argue in support of their segmentation argument that "DWR declined to include an 'opt out' provision on the extension amendments, even as it openly pursued an objective that would expand financing opportunities for new project facilities." (Pub. Agencies Corrected Opp'n Br. 34:13-15.) The Public Agencies have not shown how the existence or non-existence of an opt out provision is material to the Court's segmentation analysis. Therefore, it is not addressed further.

> would approve or otherwise authorize the construction of new facilities" (AR 138-139). NCRA [and the Public Agencies] overlook the reality that the Amendments function to maintain the financial health of the SWP irrespective of a Delta conveyance project. [Citations.] That is, the Amendments would need to happen even without a Delta conveyance project. [Citations.]
>
> Similarly, the Contract Extension Amendments' financial objectives differ from the purpose of the contract amendments for water management, which is to "provide greater water management regarding transfers and exchanges of SWP water supply within the SWP service area." (Compare AR 52912 with AR 4034.) DWR has the "discretion to select the project objectives consistent with the problem [it is] trying to address." [Citations.]

(DWR's Reply to NCRA's Opp'n 9:21-10:21; see also DWR's Reply to the Public Agencies' Opp'n 19:3-21:23.)

"CEQA requires the preparation of an [EIR] whenever a public agency proposes to approve or to carry out a project that may have significant impacts on the environment." (*Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 277 [citing Pub. Resources Code,] §§ 21100, 21151].) "'Project' is a term of art." (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1220.) "CEQA broadly defines a 'project' as 'an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and ... [¶] ... [¶] ... that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.'" (*Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1222 [citing Pub. Resources Code, § 21065].) "The statutory definition is augmented by the [CEQA] Guidelines[16], which define a 'project' as 'the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . .'" (*Ibid.* [citing 14 Cal. Code Regs. § 15378, subd. (a)].)

"The Legislature has made clear that an EIR is 'an informational document' and that '[t]he purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.' [Citations.]" (*Laurel Heights* at p. 391.) "The EIR is the primary means of achieving the Legislature's considered declaration that it is the policy of this state to 'take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.' ([Pub. Resources Code,] § 21001, subd. (a).)" (*Id.* at p. 392.) "The EIR is therefore 'the heart of CEQA.' [Citations.]" (*Ibid.*)

[16] 14 Cal. Code Regs. §§ 15000, *et seq.*

"Of vital import is the timing of the preparation of the EIR. 'A basic tenet of CEQA is that an environmental analysis "should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment."' (*Laurel Heights* at p. 395.)" (*Aptos Council, supra,* at p. 277.) "Early environmental review may be detrimental to public coffers, but late environmental review may cause projects to clash with bureaucratic processes that are already in play, creating incentives to ignore potential environmental impacts. (*Ibid.*)" (*Ibid.*) "Therefore, EIRs should be prepared as early in the planning process as possible to enable environmental considerations to influence project, program or design." (*Ibid.* [citation and internal quotation marks omitted].)

"'There is no dispute that CEQA forbids "piecemeal" review of the significant environmental impacts of a project.' [Citation.]" (*Aptos Council, supra,* at pp. 277-278; accord *Banning Ranch Conservancy, supra,* at p. 1222].) "Agencies cannot allow 'environmental considerations [to] become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.' [Citation.]" (*Banning Ranch Conservancy, supra,* at p. 1222.)

> The California Supreme Court set forth a piecemealing test in *Laurel Heights*. "We hold that an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." (*Laurel Heights, supra*, 47 Cal.3d at p. 396.) "Under this standard, the facts of each case will determine whether and to what extent an EIR must analyze future expansion or other action." (*Ibid.*)
>
> Applying this test, the *Laurel Heights* court held a university wrongly piecemealed the environmental review of the relocation of its pharmacy school. The EIR analyzed the school's initial move into 100,000 square feet of a building. (*Laurel Heights, supra*, 47 Cal.3d at p. 393.) It failed to "discuss the additional environmental effects, if any, that will result from [the university's] use of the remaining 254,000 square feet when it becomes available" after a tenant's long-term lease expired. (*Ibid.*) But school officials had publicly announced their intention to use the whole building. (*Id.* at p. 397.) And "[t]he draft EIR acknowledged that [the university] will occupy the entire Laurel Heights facility when the remainder of the space becomes available." (*Id.* at p. 396.) Thus, "the future expansion and general type of future use is reasonably foreseeable" and required analysis in the EIR. (*Ibid.*)

(*Banning Ranch Conservancy, supra,* at p. 1222.)

"This is where the law gets murky. 'Reasonably foreseeable' is a familiar concept, but the courts have not comprehensively explored the meaning of 'consequence' in this context. The cases tend to be fact driven, as predicted." (*Banning Ranch Conservancy* at p. 1222.) "[And t]he piecemealing case law defies easy harmonization." (*Id.* at p. 1223.) However, several appellate decisions have "group[ed] the leading cases by their stated reasoning into some potentially useful categories." (*Ibid.*; see also *Aptos Council, supra,* at pp. 279-280 ["Courts have found that agencies improperly piecemealed environmental review of projects in various situations."].)

"First, there may be improper piecemealing when the purpose of the reviewed project is to be the first step toward future development. [Citations.]" (*Banning Ranch Conservancy, supra,* at p. 1223 [citing *Laurel Heights* as an example]; accord *Aptos Council* at p. 279.) "And there may be improper piecemealing when the reviewed project legally compels or practically presumes completion of another action. [Citations.]" (*Banning Ranch Conservancy* at p. 1223; *Aptos Council* at p. 280.) "For example, in *Tuolumne County*, the appellate court determined the City of Sonora improperly piecemealed review of the building of a shopping center and the widening of a street, because the widening of the street was a condition precedent to the development. (*Tuolumne County, supra*, 155 Cal.App.4th at p. 1226.)" (*Aptos Council* at p. 280.) "There is no piecemealing, however, when 'projects have different proponents, serve different purposes, or can be implemented independently.'" (*Ibid.* [quoting *Banning Ranch Conservancy* at p. 1223].)

Applying these standards to this case, the Court finds DWR did not improperly segment its review of the Project from the other referenced matters.[17] The Water Management Amendments and any future Delta conveyance project are not reasonably foreseeable consequences of the Contract Extension Amendments. They are not legally compelled or presumed to be complete by the Contract Extension Amendments.[18] The Contract Extension Amendments "'[do] not create new water management measures, alter the existing authority to build new or modify existing facilities, or change water allocation provisions of the Contracts.' . . . [Further, they] do not include language that would approve or otherwise authorize the construction of new facilities that could be funded through the Contracts in the future, including California WaterFix." (AR 139; see also AR 138-141, AR 287, 292, AR 4102, AR 52909-52914.) Moreover, the Contract Extension Amendments and the Water Management Amendments serve different purposes. (Compare AR 4034 with AR 52912.) Finally, the

[17] The Court notes that the Public Agencies argue as a separate CEQA violation that DWR's deferral of environmental review for future, new SWP facilities would "amount to a prohibited post-hoc rationalization." (Public Agencies' Corrected Opp'n Br. 33:1-17.) The Court views this argument as a segmentation issue and extends its segmentation analysis to other projects the Amendments may finance in the future, not just a Delta conveyance.

[18] At the hearing, Roger Moore contended on behalf of the Public Agencies that DWR's Director stated at the September 11, 2018 JLBC hearing that the Contract Extension Amendments were undertaken with the express purpose of advancing the (then anticipated) California WaterFix project. However, review of the audio recording from that hearing (AR 27964), indicates that taken in context and in its entirety, the Director's testimony indicated that the Contract Extension Amendments provided a funding mechanism for all future capital projects, potentially including but not limited to the WaterFix project.

Contract Extension Amendments have independent utility and would occur regardless of the Water Management Amendments or a Delta conveyance project. (AR 288.)[19]

b. Impacts

NCRA and the Public Agencies argue the EIR improperly concludes that the Contract Extension Amendments have no impacts.

Specifically, NCRA contends:

> DWR concludes that the Project will have no impact on any resource topics "because it would amend and add financial provisions" to its SWP contracts and "would not create new water management measures, alter the existing authority to build or modify existing-SWP facilities, or change water allocation provisions" of those contracts. [Citations.] But DWR overlooks the essential purpose of the Project's contracts - to enable DWR to divert enormous quantities of water from the Delta and deliver them to the SWP's contractors. The impacts of DWR's SWP water deliveries are felt throughout the system, most acutely in the Delta, because DWR diverts water from the Delta to supply water to the SWP for delivery to its contractors. [Citations.]
>
> . . . . DWR's failure to address the impacts of Project approval on river flows and dependent fish and wildlife violates CEQA, because such project effects must be examined. [Citations.]
>
> DWR also improperly concludes that the Project has no cumulative impacts. [Citations.] But DWR has failed to examine the closely related past, present, and reasonably foreseeable probable future projects that, when taken with the Project's water deliveries, will result in significant cumulative impacts - including any Delta conveyance project, the COA Addendum, and the Water Management Amendments . . . . CEQA requires examination of a project's cumulative effects on the environment. [Citations.]

(NCRA's Opp'n Br. 27:8-28:5.)

The Public Agencies assert:

> [DWR's] blanket denial [that the Project will have no significant environmental impacts] cannot stand. . . .

[19] As stated in footnote 13, NCRA has cited no evidence in the record concerning the scope or purpose of the COA addendum. Therefore, the Court need not analyze NCRA's segmentation argument to the extent it is premised on that addendum.

> . . . . DWR is relying on its Contract Extension Amendments to facilitate its proposed Delta conveyance, overcoming what would otherwise be an insurmountable obstacle to revenue bond financing. DWR and State Water Contractors have long been aware of the integral role of, and need for, SWP contract amendments in order for DWR to secure financing for and proceed with a Delta conveyance. [fn.]
>
> The EIR's denial of any significant environmental impacts is also disproven by the further provision of the Amendments authorizing financing for otherwise uncovered new facilities if approved by a set percentage of contractors. [Citation.] This new provision, enacted with no particular water or cost limitation, is especially concerning in light of the AIP's rejection of an "opt out" objective, and deferral of that assurance to a later, segmented review of additional SWP contract amendments. [Citations.] Between now and 2085, it could facilitate a virtual blank check of revenue bond debt for new SWP facilities, which could be involuntarily imposed on dissenting contractors and the public. [fn.]
>
> The EIR also failed to prepare a cumulative impact assessment that accounts for individual effects that are cumulatively considerable when evaluated together. [Citations.] . . . The EIR failed to analyze any reasonably foreseeable future projects, and DWR has failed its duty to disclose all it reasonably can. [fn.] Moreover, DWR's proposed Delta conveyance should have been identified as a reasonably foreseeable probable future project with still-unmitigated significant impacts. [Citations.]

(Public Agencies' Corrected Opp'n Br. 31:16-32:19.)

DWR replies:

> In arguing that DWR's impacts assessment for the Amendments violates CEQA, [NCRA and the Public Agencies] conflate the Amendments with SWP operations in their entirety, and then claim that DWR was required to analyze impacts from ongoing SWP operations and the construction of possible new SWP facilities in addition to the Amendments. [Citation.] The[Public Agencies] also incorrectly argue that changes to the definition of "facilities" under the Amendments will enable DWR to construct a Delta conveyance facility. But [the Public Agencies'] facilities argument is not accurate . . . because the Amendments do not authorize construction or modification of any facilities [Citations.] . . . .

CEQA does not support [the parties'] argument[s] because an EIR "shall identify and focus on the significant effects of the proposed project on the environment," and here the project is the AIP and the Amendments. [Citations.] Therefore, DWR was not required to analyze the impacts from ongoing SWP operations—over 50 years after the SWP was created—in the EIR for the Amendments. Similarly, CEQA does not obligate DWR to speculate about possible SWP infrastructure that may be constructed in the future and be financed with water system revenue bonds, and to guess as to what potential impacts could result from those (possible) future projects. [Citations.] DWR will conduct separate CEQA review before deciding whether to construct a Delta conveyance project or other SWP infrastructure. [Citations.] [The Public Agencies'] concerns about the Amendments not including an express opt-out provision for Delta conveyance are misplaced (even assuming, arguendo, that issue is somehow relevant to the impacts analysis for the Amendments), since an opt-out clause is being included in other amendments that specifically address a Delta conveyance facility. [Citation.] Further, substantial evidence supports DWR's conclusion that the Amendments do not cause any significant environmental impacts. [Citations.]

[The parties'] arguments on cumulative impacts are also deficient. [Citation.] The EIR evaluated potential cumulative impacts based on "past, present, and probable future projects that would or did result in similar changes to Contract provisions" and considered additional criteria including:

> (1) whether the project [was] under active consideration [while the Amendments EIR was being prepared]; (2) whether the project would be operational or contemplated within the timeframe of the proposed project; and (3) whether the project in combination with the proposed project would have the potential to affect the same resources.

[Citations.] DWR then evaluated two other projects including the California WaterFix project (a Delta Conveyance project that is no longer being considered), and the Monterey Agreement / Amendment project (amendments to the Contracts that DWR and most Contractors had previously approved). [Citation.] DWR ultimately concluded that the Amendments, along with these other projects, do not cause cumulative impacts, in part because the Amendments only concern financial management of the SWP and

> do not cause any (even minor) environmental impacts . . . . [The parties] appear to argue that the cumulative impacts analysis for the Amendments should have included any other activity involving the SWP including possible future projects, but that is not what CEQA requires, and their argument should be rejected.

(DWR's Reply to Public Agencies' Opp'n 16:12-18:10; see also DWR's Reply to NCRA's Opp'n 12:10-13:3.)

An environmental impact report must include a detailed statement setting forth "[a]ll significant[20] effects[21] on the environment[22] of the proposed project." (Pub. Resources Code, § 21100; see also 14 Cal. Code Regs. § 15126.2, subd. (a).)

"In assessing the impact of a proposed project on the environment, the lead agency normally examines the 'changes' in existing environmental conditions in the affected area that would occur if the proposed [project] is implemented." (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 659-661; 14 Cal. Code Regs. § 15126.2, subd. (a).) Existing environmental problems would ordinarily be included in an environmental impact report's description of the existing environment "rather than p[roject]-generated environmental impacts." (*In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1167-1168; see also *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 875-877.) For example, in *Friends of the Eel River*, the Court of Appeal held that the diversion of water from the Eel River, which predated the subject project and was not altered by the project, is not a "significant impact caused by [the] Project," even if the public agency "relies on these diversions." (*Friends of the Eel River* at pp. 875-876; see *id.* at p. 876 ["Appellants have not cited any authority for the proposition that, when a project relies on an arrangement that predates the project and is authorized in a different proceeding, the project's EIR must consider the significant impacts of the prior arrangement."].)

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[20] A "significant effect on the environment" is defined as a substantial, or potentially substantial, adverse change in the environment. (Pub. Resources Code, § 21068; 14 Cal. Code Regs. § 15382.)

[21] "Effects" include:

> (1) Direct or primary effects which are caused by the project and occur at the same time and place.
>
> (2) Indirect or secondary effects which are caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect or secondary effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density, or growth rate, and related effects on air and water and other natural systems, including ecosystems.

(14 Cal. Code Regs § 15358, subd. (a).)

[22] "Environment" refers to the "physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of history or aesthetic significance." (Pub. Resources Code, § 21060.5; 14 Cal. Code Regs. § 15382.)

In evaluating the significance of a project's environmental effect(s), the lead agency must consider both "direct" and "reasonably foreseeable indirect" physical changes[23] in the environment "which may be caused by the project." (14 Cal. Code Regs. § 15064, subd. (d).) "A direct physical change in the environment is a physical change in the environment which is caused by and immediately related to the project[,]" such as "the dust, noise, and traffic of heavy equipment that would result from construction of a sewage treatment plant and possible odors from operation of the plant." (*Id.* at subd. (d)(1).) "An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project." (*Id.* at subd. (d)(2).) "If a direct physical change in the environment in turn causes another change in the environment, then the other change is an indirect physical change in the environment." (*Ibid.*) "For example, the construction of a new sewage treatment plant may facilitate population growth in the service area due to the increase in sewage treatment capacity and may lead to an increase in air pollution." (*Ibid.*)

"An indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable." (*Id.* at subd. (d)(3).) For example, "[a]n EIR is not required to include speculation as to future environmental consequences of future development that is unspecified or uncertain." (*Envir. Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1032.) "Under these standards, an EIR's analysis must include environmental impacts that will occur indirectly as a foreseeable consequence of the project. . . . [¶] Conversely, an EIR need not provide an analysis of an indirect environmental impact that is not a reasonably foreseeable consequence of the project." (Practice under the Cal. Envir. Quality Act ("CEQA Practice Guide") (Cont.Ed.Bar 2d ed. 2021) § 13.22.)

An environmental impact report must also discuss the "cumulative impacts"[24] of a project when the project's incremental effect is cumulatively considerable." (14 Cal. Code Regs. § 15130, subd. (a).) "This determination is based on an assessment of the project's incremental effects 'viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.'" (CEQA Practice Guide § 13.37 [quoting 14 Cal. Code Regs. § 15065, subd. (a)(3)].) "Cumulative impact analysis assesses cumulative damage as a whole greater than the sum of its parts." (*Banning Ranch Conservancy, supra,* 211 Cal.App.4th at p. 1228 [internal quotation marks and citation omitted].)

"An EIR need not discuss cumulative impacts that do not result in part from the project." (CEQA Practice Guide § 13.38 [citing 14 Cal. Code Regs. § 15130, subd. (a)(1)].) "'The project must make some contribution to the impact; otherwise, it cannot be characterized as a cumulative impact of that project.' (*Sierra Club v. West Side Irrigation Dist.* (2005) 128 Cal.App.4th 690, 700.)" (*Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1559-1560; see *Citizens for East Shore Parks v. State Lands Comm'n* (2011) 202 Cal.App.4th 549, 565-566

[23] "Effects analyzed under CEQA must be related to a physical change." (14 Cal. Code Regs § 15358, subd. (b); see also Pub. Resources Code, § 21100, subd. (d).) "An economic or social change by itself shall not be considered a significant effect on the environment." (14 Cal. Code Regs § 15382.)

[24] "Cumulative impacts" means "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." (14 Cal. Code Regs. § 15355.)

[stating the EIR did not need to consider the cumulative impacts of water discharges which were part of the current operative condition and not effects of the project under consideration].)

DWR's environmental impact analysis is found in Chapter 5 of the draft EIR. (AR 4041-4199.) As stated in its introduction, Chapter 5 "present[ed] an analysis of [several] resource topics[, and e]ach resource topic section contain[ed]: (1) a description of the environmental and regulatory setting; (2) methods of analysis; (3) standards of significance used to elevate the significance of project impacts; and (4) impacts and mitigation measures." (AR 4043.) The introduction further states:

> As described in the Project Description, the proposed project would not create new water management measures, alter the existing authority of DWR to build new or modify existing facilities, or change water allocation provisions of the Contracts. The proposed project would amend certain financial provisions. CEQA and the CEQA Guidelines do not require an economic analysis, and do not recognize financial changes as physical changes to the environment requiring an impact analysis under CEQA. But, economic and social changes can be used to determine if there are physical changes to the environment (CEQA Guidelines Section 15131). Therefore, to fully evaluate and disclose the potential effects to the physical environment, this chapter evaluates the proposed financial provisions and any potential physical change in the environment resulting from these for each resource topic.

(AR 4044-4045.) Ultimately, DWR found as a result of its Chapter 5 analyses that the Contract Extension Amendments "would result in no impact on any of the[] resources topics." (AR 3978, AR 4048.) For example, as for the Water Supply resource, the draft EIR stated as follows concerning its "Impacts and Mitigation Measures":

> The proposed project would amend and add financial provisions of the current Contracts based on the negotiated AIP between DWR and the Contractors. The proposed project would not create new water management measures, alter the existing authority to build new or modify existing facilities, or change water allocation provisions of the current Contracts. Further, the proposed project would not change O&M of the SWP. Because water allocation would not change, there would be no change in land uses associated with SWP deliveries including conversion of agricultural land uses to urban uses or increased developed uses in urban areas. The proposed project would not alter DWR's estimates under the SWP Delivery Capability Report to deliver[] SWP supplies to the Contractors.

> Local General Plans include goals, policies, and actions to ensure sustainable growth and development across diverse environments, communities, and jurisdictions within California. The proposed project does not change any goals or policies relating to the provision of water supply in any of the jurisdictions where the SWP is located, as no physical changes would occur as a result of the proposed project. Furthermore, because the proposed project would not amend water supply provisions of the Contracts, the Contractors would provide water supply in their respective services areas in the same manner as they do today, providing local jurisdictions with projected water supplies for planning purposes
>
> Therefore, no impact to surface water supplies, water supply facilities or operations would occur and no mitigation measures are required.

(AR 4193-4194.)

DWR further determined that the Contract Extension Amendments "do not contribute to any cumulative effect" because, in part, implementing the Project would not result in any physical environmental impacts. (AR 3978-3979; see also the draft EIR's Cumulative Impacts discussion at AR 4203-4206; AR 4206 ["As identified in Chapter 5, Environmental Analysis, implementation of the proposed project would not result in physical environmental impacts; therefore, it would not contribute to any cumulative effect and would not compound or increase an environmental impact of . . . other projects. As a result, the proposed project would have no cumulative impacts."].)

The Court finds no merit in NCRA and the Public Agencies' impact arguments. Applying the referenced standards, the Court finds DWR correctly found that the Contract Extension Amendments (versus SWP's current operations) do not result in any environmental impacts. Although hotly disputed by the parties, the Court agrees with DWR's characterization of the Amendments as "financial" in nature. (See AR 4033 ["The proposed project consists of amendments to the financial provisions of the Contracts, including extending the contract expiration dates addressed in Article 2."].) Although the Amendments broaden the scope of what can be financed via SWP revenue bonds, the Amendments do not call for or authorize the construction of any specific project that may be funded thereby. Stated otherwise, what facilities/projects might be funded with the expansion of available bond financing is uncertain. Although the "Delta Conveyance Project" is the currently proposed isolated conveyance project in the Delta, that could change. As all of the parties are well-aware, the Bay Delta Conservation Plan ("BDCP") and California WaterFix were previously proposed Delta conveyance projects, which were abandoned. The environmental impacts of any new SWP facilities will be the subject of future environmental review. (See AR 140 ["For future projects, DWR will continue its practice of providing separate CEQA compliance at the time that each such project is proposed."]; AR 223 ["DWR would continue its practice of providing separate CEQA compliance at the time that a project to modify or construct new SWP facilities is proposed."] AR 227 ["Any proposed changes to the SWP in the future would require separate CEQA

compliance for that project."].) Quite simply, the Amendments do not cause any physical changes to the affected area.

Further, since the Project itself causes no environmental impacts, it will not cause any cumulative impacts.[25]

Accordingly, DWR's impact analysis satisfies CEQA.

c. No Project Alternative

NCRA and the Public Agencies contend the EIR's No Project Alternative violates CEQA because it improperly conflates the No Project Alternative with the Project, *i.e.*, the No Project Alternative improperly assumes that the Contracts would be renewed absent the Contract Extension Amendments via Article 4's Evergreen Provision. (NCRA's Opp'n Br. 24:12-19; Public Agencies' Corrected Opp'n Br. 28:10-25.) Thus, these parties argue the No Project Alternative does not describe the environmental consequences of doing nothing. (NCRA's Opp'n Br. 24:14-16; Public Agencies' Corrected Opp'n Br. 28:15-17.)

The Public Agencies additionally argue that DWR's No Project Alternative violates CEQA because it arbitrarily assumes an expiration date of 2085, attempts to ascribe a timing advantage to the Project over the No Project Alternative, fails to analyze the "potentially vast environmental advantage for the No Project Alternative in not facilitating the financing of environmentally damaging new facilities" by removing the prior contract requirement that facilities must have existed before 1987 to be eligible for bond financing, and fails to include the foreseeable need to reduce water deliveries in the future. (Public Agencies' Corrected Opp'n Br. 29:4-31:1.)

DWR rejoins that the No Project Alternative Complies with CEQA. DWR states:

> Defendants' no-project alternative argument[s are] wrong on both the law and the facts. [Citation.] . . .
>
> The no-project alternative . . . complies with CEQA's requirements and reflects a continuation of the current SWP Contracts, since the Contracts are akin to an existing plan that the Amendments would revise by adding a new stated term (of 2085) and other terms concerning financial management of the SWP. [Citations.] Specifically, "[u]nder the No Project Alternative, DWR takes no action, and DWR and the Contractors would continue to operate and finance the SWP under the Contracts to December 31, 2035." (AR 4218.) Thereafter, and "upon receipt of Article 4 letters from the Contractors," the "term of the Contracts

[25] To the extent the Public Agencies claim the future imposition of involuntary bond debt for new facilities constitutes an environmental impact that should have been analyzed in the EIR, they are incorrect. CEQA Guidelines make clear that impacts analyzed under CEQA "must be related to a physical change." (14 Cal. Code Regs. § 15358, subd. (b); see also 14 Cal. Code Regs. § 15382.)

would be extended beyond their current expiration dates," and "[w]ater service would continue beyond 2035 to all Contractors, consistent with the Contracts including the existing financial provisions." (*Id.*)

(DWR's Reply to Public Agencies' Opp'n 13:8-14:3; see also DWR's Reply to NCRA's Opp'n 11:7-12:7.)

Concerning the Public Agencies' additional arguments, DWR asserts:

> [The Public Agencies] assert . . . that DWR should have evaluated "the range of terms that might produce agreements under Article 4." [Citation.] While not entirely clear, [the Public Agencies] apparently contend that DWR should have hypothesized about different possible scenarios that might possibly occur in the future, and then evaluated those amorphous possibilities as the no project alternative. There is no merit to [the Public Agencies'] position because CEQA does not require DWR to speculate or predict the future in evaluating the no-project alternative. CEQA instead requires an assessment of what would "be reasonably expected to occur in the foreseeable future" without the Amendments. [Citations.] Because DWR did so here, [the Public Agencies'] argument lacks merit.
>
> [The Public Agencies] also incorrectly state that DWR assumed "an expiration date of 2085 under the No Project Alternative." [Citation.] The no project alternative does not assume any expiration date, but correctly tracks Article 4 under which [the] Contractors may request indefinite provision of water. [Citations.] The court should disregard [the Public Agencies'] arguments that are based on this incorrect description of the no project alternative because they are not premised on the actual analysis DWR conducted in the EIR.
>
> [The Public Agencies] next wrongly assert that DWR failed to "analyze the environmental benefits of the No Project Alternative." [Citation.] DWR analyzed potential impacts from the no project alternative, and concluded that "similar to the proposed project," the no project alternative "would not result in any direct physical environmental impacts because it would not create new water management measures, alter the existing authority to build new or modify existing facilities, or change water allocation provision of the Contracts." (AR 4421.) . . . Moreover, the no project alternative does not meet most of the Project objectives, which is also a factor that DWR properly considered under CEQA in evaluating alternatives to the Amendments. [Citations.]

> [The Public Agencies'] final argument regarding the no project alternative contends that DWR should have evaluated reductions in the amounts of SWP water delivered to Contractors. [Citation.] This argument ignores CEQA's requirements for assessing the no project alternative to an existing plan, policy or operation, where "the 'no project' alternative will be the continuation of the existing plan, policy or operation into the future" which is exactly what DWR did here. [Citations.] Once again, there is no merit to [the Public Agencies'] position because CEQA does not require DWR to speculate or predict the future in evaluating the no-project alternative. [Citation.] [The Public Agencies] also improperly conflate the SWP with the actual project here (the Amendments.) Their arguments concerning the no project alternative should be rejected.

(DWR's Reply to Public Agencies' Opp'n 14:22-16:10.)

"CEQA requires that [an EIR] analyze a 'no project' alternative." (*Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 488 [citing 14 Cal. Code Regs. § 15126.6, subd. (e)].) "The 'no project' analysis shall discuss the existing conditions at the time the notice of preparation is published, . . . as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services." (14 Cal. Code Regs. § 15126.6 subd. (e)(2).) "[A]n EIR need not consider 'an alternative whose effect cannot be reasonably ascertained and whose implementation is remote and speculative' . . . ." (*Planning and Conservation League v. Castaic Water Agency* (2009) 180 Cal.App.4th 210, 246 [quoting 14 Cal. Code Regs § 15126.6, subd. (f)(3)].) "The no-project alternative is a fact-based forecast of the environmental effects of maintaining the status quo." (CEQA Practice Guide § 15.18 [citations omitted].)

"The CEQA Guidelines recognize that the definition of the no-project alternative will vary depending on the nature of the project proposed for approval." (CEQA Practice Guide § 15.19 [citing 14 Cal. Code Regs § 15126.6, subd. (e)(3)].) "When the project is the revision of an existing land use or regulatory plan, policy or ongoing operation, the 'no project' alternative will be the continuation of the existing plan, policy, or operation into the future." (14 Cal. Code Regs § 15126.6, subd. (e)(3)(A).) "Thus, the projected impacts of the proposed plan . . . would be compared to the impacts that would occur under the existing plan." In contrast, "[i]f the project is [otherwise], for example a development project on identifiable property, the 'no project' alternative is the circumstance under which the project does not proceed" and would "compare the environmental effects of the property remaining in its existing state against the environmental effects which would occur if the project is approved." (*Id.* at subd. (e)(3)(B).)

"The purpose of describing and analyzing a no project alternative is to allow decisionmakers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project." (Cal. Code Regs., tit. 14, § 15126.6, subd. (e)(1).) "The

analysis is sufficient if it gives decisionmakers a gauge for measuring the environmental advantages and disadvantages of the project and the alternative[] to it." (CEQA Practice Guide § 15.22 [citing *Planning and Conserv. League, supra,* at p. 247].)

Here, the No Project Alternative was described in the EIR as follows:

> Under the No Project Alternative, DWR takes no action, and DWR and the Contractors would continue to operate and finance the SWP under the Contracts to December 31, 2035. Upon receipt of Article 4 letters from the Contractors (at least 6 months prior to the existing expiration date for each Contract) the term of the Contracts would be extended beyond their current expiration dates. Under this alternative, the Contracts would not expire beginning in 2035. Water service would continue beyond 2035 to all the Contractors, consistent with the Contracts including the existing financial provisions. Annual revenue and water supply cost recovery would continue consistent with the current Contracts. Until the Contractors submit their Article 4 letters to extend their Contract expiration dates and the extended Contract expiration date is determined, DWR would not sell bonds with maturity dates past 2035 to finance SWP capital expenditures and therefore the current compression in the recovery of capital costs and bond financing costs would be exacerbated.

(AR 4218, 4221.)

DWR's impact analysis of the No Project Alternative provides:

> Similar to the proposed project, [the No Project Alternative] would not result in any direct physical environmental impacts because it would not . . . create new water management measures, alter the existing authority to build new or modify existing facilities, or change water allocation provisions of the Contracts. Operation of the SWP under this alternative would be subject to ongoing environmental regulations including for water rights, water quality and endangered species protection, among other State and federal laws. Also similar to the proposed project, Alternative 1 would not require permits or approvals to extend the Contracts as the Contractors would send in their Article 4 letters to extend the term of the Contracts beyond 2035. Article 4 provides as follows:
>
> "4. OPTION FOR CONTINUED SERVICE
>
> By written notice to the State at least six (6) months prior to the expiration of the term of this

contract, the District may elect to receive continued service after expiration of said term under the following conditions unless otherwise agreed to:

(1) Service of water in annual amounts up to and including the District's maximum annual entitlement hereunder.

(2) Service of water at no greater cost to the District than would have been the case had this contract continued in effect.

(3) Service of water under the same physical conditions of service including time, place, amount and rate of delivery, as are provided for hereunder.

(4) Retention of the same chemical quality objective provision as is set forth herein.

(5) Retention of the same options to utilize the project transportation facilities as are provided for in Articles 18(c) and 55, to the extent such options are then applicable.

Other terms and conditions of the continued service shall be reasonable and equitable and shall be mutually agreed upon. In the event that said terms and conditions provide for continued service for a limited number of years only, the District shall have the same option to receive continued service here provided for upon the expiration of that and each succeeding period of continued service."

The no project alternative will likely result in a further delay in the ability of DWR to sell revenue bonds beyond 2035 to fund needed repairs and improvements to existing facilities and to fund the construction and acquisition of new facilities. Article 4 letters would be expected to be submitted over time between now and 2035 under the no project alternative. A determination of the length of the extension would be required. The Article 4 requirement that the service of water be at no greater cost than would have been the case had this Contract continued in effect, presents issues as to whether and how to establish a new project repayment period and payment methodology similar to that used in the existing Contract (or whether a new payment methodology

should be established). So even under Article 4, there would be issues that would need to be addressed before the Contracts could be extended and this would take additional time.

This expected delay under the no project alternative would continue to exacerbate the revenue bond compression problem that DWR and the Contractors are currently facing. DWR is not issuing revenue bonds beyond the date of the first-expiring Contract term (December 31, 2035) because a secure revenue source is required for the successful marketing of DWR's revenue bonds. The compressed revenue bond maturities would in turn require the Contractors to pay DWR the revenue bond debt service over a much shorter period of years and in much higher annual amounts than would otherwise be the case if the Contracts were extended and DWR were able to issue longer-term revenue bonds (historically, 30 years or more) commensurate with the expected economic life of the repairs, improvements and facilities being financed. Alternatively, DWR might decide to defer some SWP repairs, improvements, or construction projects to hold down the costs to be passed on to the Contractors. At the same time, some Contractors might opt to conserve funds for the purpose of paying DWR these higher annual charges under the Water Supply Contracts, by delaying expenditures for their own operations and/or local capital projects. This could indirectly affect the reliability of SWP water service and/or the reliability of some Contractors' water service to their customers.

CEQA does not require lead agencies to speculate as to future environmental consequences, where future development is unspecified and uncertain. Impacts associated with deferred operation and maintenance and major construction are speculative at this time as it is unknown how deferred maintenance and repair would affect SWP facilities and, in turn, affect SWP water service, and it is unknown if the Contractors would have difficulty financing local system improvements and how this would affect their local water service. Nevertheless, it is reasonable to assume that the indirect impacts of this alternative would likely be greater than the impacts of the proposed project. But the extent and nature of such indirect impacts are speculative and not analyzed further in this EIR.

(AR 4221-4223.)

The Court finds DWR did not violate CEQA in how it defined the No Project Alternative or in its analysis of its impacts.

Since the Contract Extension Amendments are akin to a revision or continuation of an ongoing operation, DWR correctly defined the No Project Alternative to be the continuation of the Contracts under Article 4's Evergreen Provision.[26] Such a definition is called for under CEQA Guidelines section 15126.6, subdivision (e)(3)(A) and subdivision (e)(2). (See *Center for Biological Diversity v. Dep't of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 254 ["When a project involves a proposed change to an ongoing operation, or even the continuation of an ongoing operation, a decision to reject the project would leave the operation in place."]; *ibid.* ["The EIR is not the approval of a new program; it is the review of an ongoing[/modified] one."].) As discussed *supra,* an EIR's no project analysis is supposed to discuss the existing conditions "as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved. It is unreasonable to assume that the Contractors would let their existing Contracts lapse given the interest they expressed in extending their Contracts (AR 133), and the importance of SWP's water supplies to the Contractors in meeting their regional water demands. (AR 134.)

Further, DWR's impact analysis for the No Project Alterative is supported by substantial evidence. As discussed *supra*, the Contract Extension Amendments do not cause any significant environmental impacts. Therefore, DWR did not err in concluding the No Project Alternative and the Project would result in similar (non-existent) environmental impacts.

Additionally, the No Project Alternative was not flawed in assuming the SWP water deliveries would continue to proceed as contracted in the original Contracts. (See Public Agencies' Corrected Opp'n Br. 30:6-31:1.) The No Project Alternative correctly assumes the continuation of water deliveries as stated in the original Contracts. (See 14 Cal. Code Regs section 15126.6, subd. (e)(3)(A) ["When the project is the revision of an . . . ongoing operation, the 'no project' alternative will be the continuation of the existing . . . operation . . . ."]; see also AR 4380 [Article 4's terms (1) and (3), which provide for continued service of water "in annual amounts up to and including the [Contractor's Table A amount]" and "under the same physical conditions of service, including time, place, amount and rate of delivery"].) And as described, *supra,* Table A's stated amounts are the maximum amounts of water that a Contractor can request for delivery; actual water deliveries depend on numerous factors affecting the amount of water available in a given year. (See AR 4011-4014, AR 142-145, AR 4215.)

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[26] Contrary to the Public Agencies' contention, the No Project Alternative does not arbitrarily assume an expiration date of 2085. (See AR 135 ["*DWR elected not to specify an expiration date for the No Project Alternative.* Article 4 gives Contractors the option to request an extension of the Contract without specifying the term, and the right to receive the same option at the expiration of each term. At the end of each term, DWR and Contractors would need to agree upon a new expiration date. *DWR believes that it is reasonable to assume that whatever term was agreed upon after the Contractors invoke Article 4, that Contactors would exercise that option again after each term, and that SWP water service is likely to continue to at least 2085.* In the EIR impact analysis, DWR believes it is helpful for the purposes of impact analysis to assume that under the No Project Alternative the Contract will continue to at least 2085 so that it could be more easily compared to the proposed project. This approach is consistent with Section 15126 (1)(3), which provides that one purpose of the no project alternative is to permit a comparison with the proposed project." (emphasis added)].)

d. Reasonable Alternatives

NCRA and the Public Agencies argue that the EIR fails to study a reasonable range of alternatives contrary to settled CEQA mandates. (NCRA's Opp'n Br. 25:19-23; Public Agencies' Corrected Opp'n Br. 37:7-10.) In particular, these parties contend the EIR should have included alternatives that significantly reduce water deliveries and implement conservation targets. (NCRA's Opp'n Br. 25:19-27:6; Public Agencies' Corrected Opp'n Br. 37:17-25.) The Public Agencies also argue an alternative should have been considered that "decoupled support for the financial integrity of the existing SWP system from other provisions, notably the redefinition of 'facilities' eligible for revenue bonds." (Public Agencies' Corrected Opp'n Br. 37:7-16.)

DWR responds, *inter alia,* that alternatives were unnecessary since there were no significant environmental impacts to diminish. (DWR's Reply to NCRA's Opp'n 13:9-12; DWR's Reply to Public Agencies' Opp'n 22:13-17.) DWR states: "Where there are no potentially significant environmental impacts, the obligation under CEQA to propose mitigation or alternatives does not arise." (DWR's Reply to NCRA's Opp'n 13:20-23; DWR's Reply to Public Agencies' Opp'n 22:26-23:2.)

The Court agrees.

"CEQA and the Guidelines are replete with references to the need for a discussion of project alternatives." (*Laurel Heights* at p. 400 [citing Pub. Resources Code, §§ 21002.1, subd. (a), 21061, and 21100].) "Perhaps most important, the Legislature has expressly declared that ' . . . it is the policy of this state to: . . . [require] governmental agencies at all levels . . . to consider alternatives to proposed actions *affecting the environment.*' (Pub. Resources Code, § 21001, subd. (g).)" (*Ibid.* [emphasis added]; see also *In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1163 ["CEQA requires that an EIR, in addition to analyzing the environmental effects of a proposed project, also consider and analyze project alternatives *that would reduce adverse environmental impacts.*"].)

"The CEQA Guidelines state that an EIR must 'describe a range of reasonable alternatives to the project ... which would feasibly attain most of the basic objectives of the project but would *avoid or substantially lessen any of the significant effects of the project* ....' (Cal. Code Regs., tit. 14, § 15126.6, subd. (a).)" (*In re Bay Delta etc., supra,* at p. 1163.)

As discussed under the Court's discussion of impacts, the Contract Extension Amendments do not cause any significant environmental impacts. Accordingly, no discussion of reasonable alternatives beyond the No Project Alternative were required. (See *Laurel Heights* at p. 402 [stating that alternatives, like mitigation measures, have the function of "diminishing or avoiding adverse environmental effects"]; *Watsonville Pilots Ass'n v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089 ["[T]he key to the selection of the range of alternatives is to identify alternatives that meet most of the project's objectives but have a *reduced level of environmental impacts.*" (emphasis added)].)

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e. Changed Circumstances / Recirculation

NCRA and the Public Agencies contend DWR failed to consider changed circumstances and recirculate the EIR. Specifically, the parties argue DWR should have disclosed that it was renegotiating the COA with the Bureau of Reclamation, certain 2018 legislative developments, new developments pertaining to DWR's proposed Delta conveyance, and findings from a climate change assessment. (NCRA's Opp'n Br. 28:19-29:1; Public Agencies' Corrected Opp'n Br. 38:2-9.)

DWR responds that the "changed circumstances" cited are irrelevant to the Contract Extension Amendments and do not require recirculation of the EIR. Specifically, DWR states:

> The[] . . . four purportedly relevant "changed circumstances" . . . [did not] . . . trigger[] recirculation of the Amendments. [Citation.] First, the "2018 legislative developments on the Contract Extension Amendments," . . . cite[d] are not relevant, because the legislative activities identified in the cited comment letters pertain to the now-defunct WaterFix project, and the cost of repairs to SWP facilities that are unaffected by the Amendments. [Citation.] Second, "[n]ew developments pertaining to . .. DWR's proposed Delta conveyance" also do not require circulation, because "no SWP facilities would be built or expanded" as part of the Amendments [citation], and the Amendments do not approve or "otherwise authorize the construction of new facilities." [Citation.] Third, [the Public Agencies] cite "[f]indings of the Fourth Climate Change Assessment," [citation], but the findings cited [citation], either pertain to SWP infrastructure and operations (unaffected by the Amendments), or to concerns regarding the financial stability of the SWP that amplify the purpose of the Amendments [citation], and do not support recirculation.
>
> Finally, [the parties] refer to "[i]mplications of the Bureau of Reclamation's demand to renegotiate the Coordinated Operations Agreement [between Reclamation and DWR] (COA), whose earlier iteration had been the source of operational assumptions in the EIR." [Citation.] Their assertion that the COA (whatever iteration thereof) was a source of operational assumptions in the EIR for the Amendments is incorrect. The Amendments and the COA are related only in that they both pertain to aspects of managing the SWP. The aspects that they manage are, however, completely different (one is financial, the other operational) and both will be implemented without regard to whether the other stands or falls. Because the Amendments are financial changes to existing Contracts that will not affect the physical environment, [the parties'] considerations regarding the

> infrastructure and operations of the SWP are irrelevant to the Project at issue, and no recirculation was required.

(DWR's Reply to Public Agencies' Opp'n 25:13-26:9; see also DWR's Reply to NCRA's Opp'n 15:3-16:8.)

Normally, an environmental impact report is circulated for one round of review and comment by the public. (CEQA Practice Guide § 16.15.) However, "[w]hen significant new information is added to an environmental impact report"[27] after notice of public review has been given, but before final certification of the EIR, the lead agency must issue a new notice and recirculate the EIR for comments and consultation. (Pub. Resources Code, § 21092.1; 14 Cal. Code Regs. § 15088.5, subd. (a).) "The purpose of recirculation is to give the public and other agencies an opportunity to evaluate the new data and the validity of conclusions drawn from it." (CEQA Practice Guide § 16.15A; *Silverado Modjeska Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 303.) "Recirculation is intended to be the exception rather than the rule." (*Envir. Council of Sacramento v. County of Sacramento* (2020) 45 Cal.App.5th 1020, 1034.)

"The critical issue in determining whether recirculation is required is whether any new information . . . is 'significant.'" (CEQA Practice Guide § 16.15A.) "'In [*Laurel Heights Improvement Assn. v. Regents of University of California* [("*Laurel Heights II*")] (1993) 6 Cal.4th 1112, 1129 . . .], [the California Supreme Court] held that new information is "significant," within the meaning of section 21092.1, only if as a result of the additional information "the EIR [would be] changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect." (Accord, [Guidelines], § 15088.5, subd. (a).)' [Citation.]" (*Spring Valley Lake Ass'n v. City of Victorville* (2016) 248 Cal.App.4th 91, 107.)

The Supreme Court in *Laurel Heights II* provided four examples of situations in which recirculation is required:

> [R]ecirculation is required, for example, when the new information . . . discloses: (1) a new substantial environmental impact resulting from the project or from a new mitigation measure proposed to be implemented [citation]; (2) a substantial increase in the severity of an environmental impact unless mitigation measures are adopted that reduce the impact to a level of insignificance [citation]; (3) a feasible project alternative or mitigation measure that clearly would lessen the environmental impacts of the project, but which the project's proponents decline to adopt [citation]; or (4) that the draft EIR was so fundamentally and basically inadequate and conclusory in nature that public comment on the draft was in effect meaningless [citation].[fn.]

[27] "[N]ew information . . . that [is] not added to the EIR [is] evaluated under the same legal standard as information that is added to the EIR under the recirculation standards [discussed *infra*]." (CEQA Practice Guide § 16.16 [citing cases].)

(*Laurel Heights II* at p. 1130.) These examples were subsequently incorporated into the CEQA Guidelines. (See 14 Cal. Code Regs. § 15088.5, subd. (a).)

DWR did not abuse its discretion in failing to recirculate the EIR to discuss any of the four referenced changed circumstances. None of the cited changes was "significant" within the meaning of Public Resources Code section 21092.1 or the CEQA Guidelines. The referenced circumstances do not concern "a substantial adverse environmental effect *of the project* or a feasible way to mitigate or avoid such an effect." (*Laurel Heights II* at p. 1029.)

f. Shifting Project Definition

The Public Agencies claim "several truncated, unstable, or flatly inaccurate project concepts" in the EIR "fomented confusion." (Public Agencies' Corrected Opp'n Br. 36:5-6.) Specifically, the Public Agencies contend:

> First, DWR's EIR portrayed the Project as "separate" and "independent" from DWR's Delta conveyance project . . . , [which] contrasts with what DWR has represented elsewhere from early stages of project review to the last. [Citations.]
>
> Second, DWR's EIR listed extending the contract term past 2035 to 2085 as the first project element, . . . [but] does not disclose that extending the contract term past 2035 until 2085 is also what DWR expects will occur if the project is not adopted. [Citations.]
>
> Third, DWR's second project objective refers to "ongoing financial SWP needs and Purposes" AR 126, 3977. This is too vague to distinguish between aspects of the Project that serve the needs and purposes of existing facilities, and the Project's redefinition and expansion of "facilities" to allow revenue bonds for new projects.
>
> Finally, the EIR asserts that the proposed project would not "alter the existing authority to build new or modify existing facilities.... of the current Contracts." [Citation.] That distorts the Project's relationship to financing of project facilities, failing to disclose its elimination of the restriction on revenue bond eligibility for new facilities in Article 1(hh)(8), or its redefinition and expansion of eligible "facilities."

(*Id.* at 36:5-23.)

DWR replies that "the EIR includes an accurate and stable project description, based on the objectives outlined in the AIP, which meets CEQA's requirements." (DWR's Reply to Public Agencies' Opp'n 21:10-13.)

The Court agrees.

An "EIR's project description, and the accompanying analysis, must be consistent throughout the EIR." (CEQA Practice Guide § 12.11.) "[A]n accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR. The defined project and not some different project must be the EIR's bona fide subject." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199.) "'[A] curtailed, enigmatic or unstable project description draws a red herring across the path of public input.' [Citation.]" (*San Joaquin Raptor Rescue Center, supra,* 149 Cal.App.4th at p. 655.) "[A] project description that gives conflicting signals to decision makers and the public about the nature and scope of the project is fundamentally inadequate and misleading." (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1052.) "'[O]nly through an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives ... .' [Citation.]" (*Ibid.*)

Here, DWR accurately and consistently described the Contract Extension Amendments.

First, as discussed under the Court's above analysis of Segmentation, the EIR does not improperly segment its review of the Project from any future Delta conveyance.

The Public Agencies' second argument is based upon a faulty premise, *i.e.*, that the No Project Alternative assumes an expiration of date of 2085. As stated above under the Court's No Project Alternative analysis, "DWR elected not to specify an expiration date for the No Project Alternative" as "Article 4 gives Contractors the option to request an extension of the Contract without specifying the term." (AR 135; see also AR 4222 [stating that under the No Project Alternative, "[a] determination of the length of the extension would be required"].)

Third, DWR's second project objective is not too vague. The second project objective states in its entirety: "Maintain an appropriate level of reserves and funds to meet ongoing financial SWP needs and purposes." (AR 4034.) The draft EIR details how the Contract Extension Amendments meet that objective by increasing operating reserves in section 4.4.2. (AR 4035-4036.) The Court finds this discussion satisfies CEQA's requirements.

Fourth, the EIR does not distort the Project's relationship to the financing of project facilities. Contrary's to the Public Agencies' claim, the EIR does disclose the Project's amendment to Article 1(hh)(8) of the Contracts in both the draft EIR and the final EIR's response to comments. (See AR 4037; AR 263-264.)

In section 4.4.4 of the draft EIR, DWR states in relevant part:

> To maintain sufficient reserves and to obtain funds needed for operation, maintenance, construction, and repair of the SWP facilities, the proposed project would do the following:

. . . .

> 4. Allow SWP revenue bonds to be issued to: (1) finance repairs, additions, and betterments to most facilities of the SWP without regard to whether the facilities were in existence prior to January 1, 1987, which is the current Contract requirement in Article 1 (hh)(8); and (2) finance other capital projects (not already in the list in Article 1 (hh) for which revenue bonds could be sold) when mutually agreed to by DWR and at least 80 percent of the affected Contractors, provided the approving affected Contractors' Table A amounts also exceed 80 percent of all affected Contractors' Table A amounts.

(AR 4073.) And the final EIR's Response to Comment 6-2 states in part:

> Article 1 (hh) is not proposed for elimination under the proposed amendment. Rather, the proposed amendment would modify one item and add another item. It would modify item 8 in Article 1 (hh) by eliminating the limitation that a facility must have been in existence prior to January 1, 1987 to be eligible for water system revenue bond financing for repairs, additions, or betterments to the facility. The proposed amendment would allow water system revenue bond financing for repairs, additions, and betterments to any existing facility, regardless of its date of construction, but once again only after the CEQA process and Contractor consultation process are completed. The proposed amendment would also add an item to Article 1 (hh) that would allow a proposed project to be added to the list if approved by 80 percent or more of the affected Contractors, with 80 percent or more of the Table A water among those affected Contractors. However, such a project would not be undertaken or funded by water system revenue bonds unless the project was thoroughly analyzed and authorized in compliance with CEQA and the Contractor consultation process has taken place.

(AR 263-264.)

g. Not a Project / Exception

In support of DWR's validation action, the Supporting Answering Parties argue that the Contract Extension Amendments are not a "project" under CEQA and/or are exempt from CEQA. (MWD's Opening Br. ISO Contract Extension Validation Complaint 22:9-24:10.)

In light of the Court's decision that DWR did not violate CEQA assuming the Contract Extension Amendments are subject to its provisions, the Court declines to reach these alternative arguments.

(7) Violation of the Delta Reform Act

Defendant South Delta Water Agency ("South Delta"), NCRA, and the Public Agencies contend that DWR violated the Delta Reform Act by failing to prepare and submit to the Delta Stewardship Council a certificate of consistency.[28] (South Delta's Opp'n Br. 3:15-25, 6:12-8:15; NCRA's Opp'n Br. 33:3-34:20; Public Agencies' Corrected Opp'n Br. 38:22-39:8.)

DWR responds that the Contract Extension Amendments are not a "covered action" under the Act so no certification of consistency was required. (DWR's Reply to South Delta's Opp'n 5:8-9; DWR's Reply to NCRA's Opp'n 16:13-15; DWR's Reply to Public Agencies' Opp'n 26:11-17.) Specifically, DWR argues that the Amendments do not satisfy two of the elements required to constitute a "covered action," *i.e.*, they will not "occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh," and will not "have a significant impact on [the] achievement of one or both of the [Act's] coequal goals." (See, e.g. DWR's Reply to South Delta's Opp'n 8:21-25.) DWR states:

> [First, t]he Amendments do not "occur" within the Delta . . . because they concern financial management of the SWP and its fiscal integrity. In interpreting the word "occur," this Court may consider its "usual and ordinary" meaning. [Citation.] "Occur" means "to happen; take place; [or] come to pass." (www.dictionary.com/browse/occur.) The Amendments do not meet this definition because they do not "happen or take place" in the Delta as they do not authorize construction of facilities in the Delta . . . or authorize construction of facilities that would alter Delta flows or SWP operations. [Citations.] The Amendments do not literally occur within the Delta or in any other physical location, and do not authorize or affect any activity that would occur there, as SWP operations would continue regardless of the Amendments under Article 4 of the Contracts. [Citations.] . . . .
>
> . . . .
>
> [Second, t]he Amendments . . . do not have a significant impact on achievement of the coequal goals of providing a more reliable water supply and enhancing the Delta ecosystem . . . , for similar reasons. The Amendments update financial provisions to the Contracts, but do not create new water management measures

[28] To the extent the Public Agencies contend "DWR must also comply with a broader suite of laws protecting the Delta spanning six decades," (Public Agencies' Corrected Opp'n Br. 26:39:5-8), the Court does not consider any such additional affirmative defenses since the Public Agencies provided no argument or evidence in support thereof in their opposition. (Evid. Code, §500.)

> or alter DWR's (or the Contractors') existing authority to build new or modify existing facilities. [Citations.] The Amendments also do not change water allocation provisions, or alter current or future SWP operations. [Citations.] And the Amendments do not result in any environmental impacts. [Citations.] . . . .
>
> . . . .
>
> In sum, because the Amendments are not a covered action under the Act, DWR was not required to submit a certification of consistency to the Council. The Act imposes no other requirements on DWR with respect to the Amendments.

(DWR's Reply to South Delta's Opp'n 9:6-11:3.)

"The Delta is the upstream, mostly freshwater portion of the San Francisco Estuary, the largest estuarine system on the west coast of the Americas and a distinct and valuable natural resource of vital and enduring interest to present and future residents of the state and nation." (*Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1030.) "The Legislature has declared that the Delta is a 'natural resource of statewide, national, and international significance, containing irreplaceable resources, and it is the policy of the state to recognize, preserve, and protect those resources ... for the use and enjoyment of current and future generations.' (Pub. Resources Code, § 29701.)" (*Ibid.*)

"The Delta is in a state of crisis because people have been unable to find balance in the tradeoffs among competing demands for its resources. Groups who seek to promote their own interests in the Delta include water exporters, water users within the Delta, upstream water users in the Delta watershed, environmentalists, and supporters of Delta urbanization." (*Delta Stewardship Council Cases, supra,* at p. 1035.) "In response to[, *inter alia*,] the Delta's state of crisis, the Legislature enacted the Delta Reform Act in 2009, finding and declaring that 'existing Delta policies are not sustainable' and that '[r]esolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources.' ([Water Code,] § 85001, subd. (a); see *id.*, subd. (b).)" (*Id.* at p. 1038.)

> [As part of the Act,] the Legislature created the [Delta Stewardship Council ("Council")] as an independent agency of the state [fn.] ([Water Code,] § 85200, subd. (a)) and charged it with adopting and implementing a legally enforceable Delta Plan, a comprehensive, long-term management plan for the Delta that is built upon the principles of adaptive management [fn.] and uses the best available science to further **two coequal goals—"providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.**" ([Water Code,] § 85054; see §§ 85300, subd. (a), 85302, subds. (a), (g), 85308, subds. (a), (f), 85059.)

(*Ibid.* [emphasis added].)

The Council unanimously adopted the Delta Plan in May 2013. (*Delta Stewardship Council Cases, supra,* at p. 1041.)

> [Its] working parts . . . are 73 recommendations and 14 policies. [fn.] The recommendations are nonregulatory but call out actions essential to achieving the coequal goals of the Delta Reform Act in a manner that protects and enhances Delta values as an evolving place. By contrast, the policies are regulatory in nature; **state and local agencies proposing to undertake a "covered action"—a land use action as defined in the Act—must comply with the policies**. (See [Water Code,] §§ 85022, subd. (a), 85057.5, subd. (a).)

(*Id.* at p. 1042 [emphasis added].)

> The Delta Plan regulations, which are codified at sections 5001–5016 of title 23 of the California Code of Regulations, took effect on September 1, 2013. As previously indicated, the regulations do not propose or require the implementation of any specific project; rather, they establish legally enforceable standards that apply if a state or local public agency proposes to undertake a **"covered action"** . . . .

(*Delta Stewardship Council Cases, supra,* at pp. 1043-1044.)

The Delta Reform Act defines a "covered action," as:

> a plan, program, or project as defined [under CEQA] that meets all of the following conditions:
>
> (1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.
>
> (2) Will be carried out, approved, or funded by the state or a local public agency.
>
> (3) Is covered by one or more provisions of the Delta Plan.
>
> (4) Will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta.

(Water Code, § 85057.5.)

> Under the Delta Reform Act, state and local land use actions that qualify as covered actions must be consistent with the Delta Plan. ([Water Code,] § 85022, subd. (a).) **The Act requires any state or local public agency that proposes to undertake a covered action to prepare a written certification of consistency prior to initiating the implementation of that covered action, with detailed findings as to whether the covered action is consistent with the Delta Plan, and then to submit that certification to the Council.** ([Water Code,] § 85225.) "Any person who claims that a proposed covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, the action will have a significant adverse impact on the achievement of one or both of the coequal goals ... , may file an appeal with regard to a certification of consistency submitted to the council." ([Water Code,] § 85225.10, subd. (a).) If no appeal is filed, the state or local public agency may proceed to implement the covered action. ([Water Code,] § 85225.15.) If an appeal is filed, the Council must hold a hearing, unless it is determined that the issue raised on appeal is not within the Council's jurisdiction or does not raise an appealable issue. ([Water Code,] § 85225.20.)

(*Delta Stewardship Council Cases, supra,* at p. 1044.)

The referenced authorities make clear that the referenced certification of consistency is required only for "covered actions," as defined by the Delta Reform Act. And here, the Court agrees with DWR that the Contract Extension Amendments are not a covered action for the reasons proffered by DWR.

As discussed earlier under the Court's CEQA impact analysis, the Amendments are financial in nature and do not create new water management measures, alter the existing authority to build new or modify existing SWP facilities, or change the Contracts' water allocation provisions. (See, e.g., AR 4193-4194.) Accordingly, they do not "occur" within the boundaries of the Delta or Suisun Marsh. Further, and for the same reasons, the Amendments will not have a significant impact on the Act's coequal goals. The Amendments (versus the existing SWP operations) affect neither California's water supply nor the Delta ecosystem.

For the stated reasons, South Delta, NCRA, and the Public Agencies have not shown DWR violated the Delta Reform Act.

(8) Violation of the Public Trust Doctrine

NCRA and CWIN argue DWR violated the Public Trust Doctrine in approving the Contract Extension Amendments without assessing their impacts on public trust resources,

including flows and habitat necessary for fish, wildlife, and recreation. (NCRA's Opp'n Br. 36:19-20, 37:16-20; Public Agencies' Corrected Opp'n Br. 19:22-25, 20:1-23.)

DWR replies that it did not violate the Public Trust Doctrine in adopting the Amendments because, *inter alia,* the Amendments "do not . . . affect, let alone harm, public trust resources because they implement financial changes to existing Contracts that will not have any effect on the physical environment." (DWR's Reply to Public Agencies' Opp'n 17:15-17; see also DWR's Reply to CWIN's Opp'n 18:12-20:11.)

> "The public trust doctrine, which is traceable to Roman law, rests on several related concepts. First, that the public rights of commerce, navigation, fishery, and recreation are so intrinsically important and vital to free citizens that their unfettered availability to all is essential in a democratic society. [Citation.] 'An allied principle holds that certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace. ... [¶] Finally, there is often a recognition, albeit one that has been irregularly perceived in legal doctrine, that certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate. ...'[Citation.]"[Citation.]
>
> The United States Supreme Court announced the public trust doctrine in *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387 (*Illinois Central*), which is still the primary authority elucidating its function and purpose. [Citation.] *Illinois Central* established that "the title which a State holds to land under navigable waters is ... held in trust for the people of the State, in order that they may enjoy the navigation of the waters and carry on commerce over them, free from obstruction or interference by private parties; that this trust devolving upon the State in the public interest is one which cannot be relinquished by a transfer of the property; that a State can no more abdicate its trust over such property, in which the whole people are interested, so as to leave it under the control of private parties, than it can abdicate its police powers in the administration of government and the preservation of the peace; and that the trust under which such lands are held is governmental so that they cannot be alienated, except to be used for the improvement of the public use in them." [Citation.]
>
> "While the public trust doctrine has evolved primarily around the rights of the public with respect to tidelands and navigable waters, the doctrine is not so limited." [Citation.] More than "'a set of rules about tidelands,'" or "'a restraint on alienation by the government,'" this doctrine functions "'largely as a public property right of access to certain public trust natural resources for

various public purposes.' [Citation.]" [Citation.] Thus, the doctrine protects "expansive public use of trust property." [Citation.]

. . . .

The public trust is also "more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." [Citation.] Thus, the state or trustee has "an affirmative duty to take the public trust into account in the planning and allocation of [trust] resources, and to protect public trust uses whenever feasible." [Citation.]

. . . .

There is no set "procedural matrix" for determining state compliance with the public trust doctrine. [Citation.] However, "'**[a]ny action which will adversely affect traditional public rights in trust lands is a matter of general public interest and should therefore be made only if there has been full consideration of the state's public interest in the matter**; such actions should not be taken in some fragmentary and publicly invisible way. Only with such a safeguard can there b[e] any assurance that the public interest will get adequate public attention.' [Citation.]" [Citation.]

(*San Francisco Baykeeper, Inc., supra,* 242 Cal.App.4th 202, 232-234 [emphasis added].)

"[T]he determinative fact [under the Public Trust Doctrine] is the impact of the activity on the public trust resource." (*Envir. Law Found. v. State Water Resources Control Board* (2018) 26 Cal.App.5th 844, 859.) "The analysis begins and ends with whether the challenged activity harms [a public trust resource] and thereby violates the public trust. . . . [T]he dispositive issue is not the source of the activity, or whether the water that is diverted or extracted is itself subject to the public trust, but whether the challenged activity . . . harms a [public trust resource]." (*Id.* at p. 859-860.)

As discussed under the Court's analysis of CEQA impacts and the Delta Reform Act, the Contract Extension Amendments do not result in any environmental impacts. Since the Amendments do not harm a public trust resource, DWR did not violate the Public Trust Doctrine in adopting them.

///

B. Related Writ Proceedings

As discussed in the Statement of Decision's factual and procedural history, NCRA's Writ alleges that the Contract Extension Amendments violate CEQA, the Delta Reform Act, and the Public Trust Doctrine. PCL's Writ alleges DWR failed to comply with CEQA in certifying its final EIR for the Amendments.

For the reasons stated in the Court's analysis of the CEQA, Delta Reform Act, and Public Trust Doctrine defenses raised in the validation complaint, the referenced writs are denied. The writs do not raise any issues that were not briefed and argued in connection with the validation complaint.

IV. CONCLUSION

For the stated reasons, IT IS ORDERED that judgment be entered on the validation complaint in favor of Plaintiff DWR.[29]

IT IS FURTHER ORDERED that judgment be entered on the two writ actions in favor of Respondent/Defendant DWR.

Counsel for DWR is directed to prepare, submit, and serve upon all parties proposed judgments in the three related matters for the Court's signature.

Date: March 9, 2022

The Honorable Kevin R. Culhane
Judge of the Superior Court of California,
County of Sacramento

CERTIFICATE OF SERVICE OF MAILING ATTACHED

[29] The Court finds CWIN's argument in its opposition to the validation complaint that the Amendments cannot be validated until there is a final, non-appealable judgment on the two writs to be without merit. (See CWIN's Opp'n Br. 21:18-23.)

CERTIFICATE OF SERVICE BY MAILING

(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above entitled **RULING ON REQUEST FOR STATEMENT OF DECISION AND OBJECTIONS TO TENTATIVE DECISION; STATEMENT OF DECISION** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

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Dated: MARCH 10, 2022

Superior Court of California,
County of Sacramento

By: _____
A. O'Donnell, Deputy Clerk