



Third District Rejects CEQA and Other Challenges to Department of Water Resources' EIR for Amendments Extending Long-Term State Water Project Supply Contracts Through 2085

By [Arthur F. Coon](#) on January 8, 2024

In a 51-page published opinion filed January 5, 2024, and resolving consolidated appeals, the Third District Court of Appeal rejected baseline, piecemealing/segmentation, impact analysis, project description, alternatives analysis, and failure-to-recirculate challenges to the EIR for the Department of Water Resources' ("DWR") approval of amendments to long-term water supply contracts with local government agencies receiving water through the State Water Project ("SWP"). The amendments extended the contracts, which were originally entered into in the 1960s for 75-year terms, so as to end in the year 2085, and made other amendments to their financial provisions. In the course of affirming the trial court's judgment upholding the EIR and contract amendments against CEQA, Delta Reform Act, public trust doctrine, and other challenges, the Court of Appeal applied numerous well-established CEQA principles in the enormously significant and complex context of continuing long-term SWP contracts. *Planning and Conservation League, et al v. Department of Water Resources, et al, etc.* (2023) ___ Cal.App.5th ___ (Ct. App. Nos. C096304, C096316, C096384).

Factual and Procedural Background

California's well-documented water supply and distribution problems have for many decades been addressed by an extensive water supply system including the SWP and the Sacramento-San Joaquin Delta ("Delta") as important components. The SWP, which DWR began operating in 1967, annually extracts millions of acre feet of Delta water and conveys it through a system of reservoirs and canals to other parts of the state for primarily urban and agricultural uses, serving millions of residents and irrigating hundreds of thousands of acres of farmland. (California's other "great water project" is the Central Valley Project ("CVP") operated by the United States Bureau of Reclamation ("USBR"), which stores and distributes water to the Central Valley primarily for agricultural use.) Complicating the SWP's operations

are ever-growing and competing concerns for the ecological health of the Delta, which is the only saltwater estuary anywhere used to deliver fresh water for export.

The SWP employs 21 dams and reservoirs, 5 power plants, and 16 pumping plants to move water flowing from the Feather River to the Sacramento River to the Delta, where it is pumped into the California Aqueduct and conveyed south. Its capital costs are financed primarily – following an initial period of bonds issued under the Burns Porter Act – through revenue bonds authorized by DWR pursuant to the Central Valley Project Act. DWR has long-term contracts with 29 local government contractors giving each of them rights to receive a certain portion of available SWP water supplies, and imposing obligations to pay for water received, and also to pay a proportional share of SWP development, operation and maintenance costs regardless of the amount of water received. “Table A” of each contract sets forth the maximum amounts of SWP water DWR will provide to each contractor if available. Since the available SWP water in any given year is affected by numerous constraints, the Table A amounts are obviously not guaranteed, and are commonly referred to as “paper water”; in reality, reliable SWP supply is typically about half of the Table A amounts.

The contracts also contain an “evergreen clause” that allows contractors to receive continued service of water following expiration of the contract term under the same physical conditions, at the same cost, and in annual amounts up to the Table A amount, if they provide DWR with six months’ advance written notice before their terms end. Other terms must be equitable, reasonable, and mutually agreed between the contractor and DWR.

As amended in 1987, the contracts provide for the limited recovery of certain costs, including the costs of constructing certain specified SWP facilities, and of repairing, maintaining and bettering all then-existing SWP facilities; such costs are financed through DWR’s issuance of revenue bonds, as discussed above.

The Project and Litigation

Spurred by “evergreen clause” notices given early by 9 contractors in 2009, DWR began publicly negotiating amendments with contractors in 2013-2014, and presented proposed amendments to extend the contracts’ terms to 2085, and to modify various outdated financial provisions, to various legislative committees in 2018, as required by law. DWR explained that the shorter impending contract termination dates constrained its ability to issue revenue bonds with maturity dates beyond 17 years, as opposed to the customary 30 years, and that this created an undesirable “debt compression problem” with the shorter repayment period increasing annual repayment costs and adversely impacting the contractors and other ratepayers. DPW also indicated that the SWP needed many capital upgrades and repairs and would benefit from 30-year or longer bond funding.

The project at issue totaled eight amendments, one extending the contract terms to 2085 and seven affecting financial provisions. The provisions primarily at issue in the litigation on appeal were (1) the term extension to 2085 and (2) an amendment that eliminated the 1987 limitations on repairs, additions and betterments, and added costs for capital improvements approved by DWR and 80% of the contractors.

Following certification of its 2018 Final EIR (“FEIR”), which found the project would not have a significant environmental impact, DWR approved the contract amendments and filed a validation action in which various public agencies filed answers (both opposing and in support of validation). North Coast Rivers Alliance, et al (“NCRA”) and Planning and Conservation League, et al (“PCL”) filed separate actions challenging the project under CEQA and other laws, in which some contractors intervened. The trial court related the three actions, heard the merits, and then rejected all challenges to the project, entering

judgment in favor of DWR in all three cases. Appellants timely appealed and the Court of Appeal affirmed.

The Court of Appeal's Opinion

Appellants PCL and NCRA unsuccessfully argued on appeal that DWR violated CEQA because: (1) the EIR's impact analysis is deficient; (2) the EIR's project description is inaccurate and unstable; (3) the EIR's alternatives analysis is flawed; and (4) DWR erred in not recirculating the DEIR. As discussed below, the Court of Appeal rejected all these arguments.

The EIR's Impact Analysis Is Sufficient

The Court of Appeal rejected all of Appellants' baseline, segmentation, and impact analysis arguments.

Baseline Issue

The Court first rejected the argument that the EIR improperly used a baseline that did not *exclude* the SWP's continuing diversions of water from the Delta. Noting CEQA's general rule that the baseline must reflect physical conditions at the time environmental analysis begins (citing CEQA Guidelines, § 15125; *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 320, 323), the Court observed that for projects involving ongoing operations and continuations of past activity, "the established levels of a particular use and the physical impacts thereof are considered to be part of the existing environmental baseline." (Quoting *North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 872.) "This rule applies to renewal of a permit or other approval for an existing facility even though the facility and its operations have not been previously reviewed under CEQA." (Citing *Citizens for East Shore Parks v. State Lands Com.* (2011) 202 Cal.App.4th 549, 561 ("*Citizens*"), a decision analyzed in this blog's [2/9/12 post](#).)

Finding *Citizens* to be controlling authority dispositive of Appellants' baseline arguments, the Court stated: "The baseline is the environmental setting under the current contract conditions. We do not use a baseline that imagines a world in which the contracts are not in place." After noting that Appellants offered no persuasive reason for departing from *Citizens*' controlling authority on the CEQA baseline, the Court further rejected their related contention that the EIR failed to discuss alleged inconsistencies of the project with any applicable general, specific or regional plans.

The EIR Does Not Engage in Improper Segmentation

The Court next rejected the argument that the EIR improperly "piecemealed" or "segmented" the project by adopting a "truncated project description" and failing to consider the impacts of allegedly related projects, such as a potential new Delta conveyance project or the previously approved and rescinded "WaterFix" project. CEQA's prohibition on segmentation means that environmental review "must encompass the whole of an action affecting the environment" and that an agency can't "chop up" a large project into many little ones to minimize its total environmental impact. Thus, "an EIR must include an analysis of the environmental effects of future expansion or other action that: (1) is a reasonably foreseeable consequence of the initial project and (2) will likely change the scope or nature of the initial project or its environmental effects." (Citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396 ("*Laurel Heights I*").) Courts have found "improper piecemealing 'when the reviewed project legally compels or practically presumes completion of another action.'" (Quoting *Banning Ranch Conservancy v. City of Newport* (2012) 211 Cal.App.4th 1209, 1224, a decision analyzed in this blog's [1/23/13 post](#).) There may be improper piecemealing if a proposed project is "a

crucial functional element” of a larger project that could not proceed without it, or if its purpose “is to be the first step or to provide a catalyst for future development.” (Citing *id.* at 1223.) However, piecemealing may not be found where the project under review “is only a baby step toward another project” (citing *id.* at 1225) or where the two projects “have different proponents, serve different purposes, or can be implemented independently.” (Citing *id.* at 1223.)

Here, while some of the contract amendments could be viewed as a “first step” toward a future Delta conveyance, or used to finance WaterFix, the Court concluded based on its independent review of the record that the EIR did not engage in piecemealing. The amendments serve an independent purpose from a Delta conveyance – i.e., to fix the bond “debt compression problem” – and also a broader purpose as a potential financing mechanism for DWR’s lengthy “to do” list of other potential projects. Even if the contract amendment is a *necessary* step toward such projects, it is also a “distant step,” and based on its history any Delta conveyance project “lacks certainty and would require an enormous undertaking” to overcome numerous hurdles. The Court also rejected Appellants’ other piecemealing arguments as lacking evidentiary support and based on the faulty assumption that separate projects occurring closely in time must be the same project.

The EIR’s Analyses of Direct, Indirect and Cumulative Impacts Are Adequate

The Court rejected Appellants’ contention that DWR “was required to consider the impacts of an additional 50 years of existing [SWP] operations” for the same reasons it rejected their baseline arguments – i.e., such operations are part of the baseline and not impacts of the contract amendments. Nor was the EIR required to engage in speculative analysis regarding a potential future Delta conveyance, for reasons the Court expressed in rejecting Appellants’ segmentation arguments. Regarding other potential future SWP projects, such were not shown to be *caused* by the project under review, as required for direct or indirect impacts; in sum, the link between them and the project is too “attenuated” and the project is merely a funding mechanism excluded from CEQA (see Guidelines, § 15378(b)(4)) that neither *causes* nor *commits* DWR to such future projects, and no improper deferral of CEQA analysis of such projects was demonstrated.

As to cumulative impacts, the EIR did not need to analyze them because, by definition, the project had none; since the project itself had no significant impacts, it necessarily had no “incremental impact” that could be “cumulatively considerable.”

The EIR’s Project Description Is Not Inaccurate or Unstable

The Court rejected Appellants’ three arguments alleging the EIR’s project description was not “accurate and stable,” a challenge presenting a question of law subject to *de novo* review. (Citing *Save Our Capitol! v. Department of General Services* (2023) 87 Cal.App.5th 655, 673, a decision analyzed in this blog’s [1/2/23](#) and [1/23/23 posts](#).) The Court’s review of the record did not support Appellants’ claim of inconsistency due to the FEIR’s portrayal of the project as separate and independent from the Delta conveyance project. Nor was the EIR faulty for failing to disclose DWR’s expectation that individual contracts would be extended under the “evergreen clause” even without the project’s long-term extension across the entire pool of contractors. Nor was the EIR’s project description inaccurate in its description of the project’s enhanced funding mechanisms, including their elimination of the restriction on bond eligibility for new facilities.

The EIR's Range of Alternatives Is Reasonable

CEQA requires a lead agency to initially determine the project's purpose and objectives (CEQA Guidelines, § 15124(b)), and that the EIR "describe a range of reasonable alternatives to a project that would feasibly attain most of the project's basic objectives while avoiding or substantially lessening any of the project's significant effects." (Citing CEQA Guidelines, § 15126.6(a).) DWR's listed objectives were: ensuring its ability to finance SWP expenditures beyond 2035 for a sufficiently extended period to provide for a reliable revenue stream from the contractors and facilitate SWP planning; maintaining appropriate reserves and funds to meet SWP needs and purposes; simplifying the SWP billing process; and increasing DPW/contractors coordination on SWP financial matters.

DPW considered seven alternatives: (1) no-project; (2) shorter extension with financial amendments; (3) longer extension with financial amendments; (4) extension to 2085 only (without financial amendments); (5) extension to 2085 while delaying implementation of financial amendments until 2035; (6) selling bonds with maturity dates beyond current contract expiration dates; and (7) not requiring all contractors to sign the amendments. DWR considered and rejected an alternative reducing the contracts' Table A amounts and an alternative implementing new water conservation management provisions.

The Court first rejected Appellants' cursory one-sentence argument that none of the alternatives are sufficiently different from the amendments to provide a reasonable range, as being unsupported by citation to authority or analysis. Per the Court: "We defer to [DWR's] selection of alternatives unless [Appellant] (1) demonstrates the alternatives are manifestly unreasonable and do not contribute to a reasonable range of alternatives and (2) identifies evidence of a potentially feasible alternative that meets most of the basic project objectives." (Citing *Save Our Access, etc. v. Watershed Conservation Authority* (2021) 68 Cal.App.5th 8, 32, a decision analyzed in this blog's [8/23/21 post](#).)

Second, DWR's omission of an alternative excluding only the revenue bond amendment did not violate CEQA, which "is not an economic protection statute" (citing *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 903), and does not treat economic effects alone as significant effects on the environment. (CEQA Guidelines, § 15064(e).) Nor must an EIR "consider every conceivable alternative" (Guidelines, § 15126.6(a)), and when an EIR discusses a reasonable range it need not discuss additional alternatives substantially similar to those already discussed. Here, the Court found that exclusion of the revenue bond amendment could be sufficiently understood from the EIR's discussions of the no-project and extension-only alternatives.

Finally, DWR's rejection of the Table A amount reduction and water conservation management alternatives for detailed discussion in the EIR did not violate CEQA. Those alternatives did not address the limited problems that DWR set out to solve based on its project objectives, which addressed financial issues with the SWP contracts and were not challenged as unduly narrow for not attempting to tackle bigger issues.

The EIR's Discussion of the No-Project Alternative Complies With CEQA

Under the no-project alternative, SWP operations would continue under the existing contract terms until the end of 2035; those terms would be extended under the evergreen clause of each contract; DWR would not sell bonds with post-2035 maturity dates; and the debt compression problem would worsen. This alternative, like the amendments, would not cause direct physical environmental impacts because it would not create new water management measures, alter existing construction authority, or change contractual water allocations.

The Court rejected Appellants' various arguments that the no-project alternative was faulty for relying on application of the evergreen clause and not considering a scenario in which the contracts are allowed to expire. It also rejected their challenges to DWR's financial model distinguishing the amendments and the no-project scenario. Per the Court, the no-project analysis must discuss existing conditions and what would be reasonably expected to occur in the foreseeable future absent the project based on current plans and consistent with available infrastructure. (CEQA Guidelines, § 15126.6(e)(2).) A court's task in reviewing a no-project alternative "is extraordinarily limited" and its "focus is narrow" – i.e., "[d]id the EIR adequately describe existing conditions and offer a plausible vision of the foreseeable future?" (Cleaned up, citations omitted.) "Where the EIR is reviewing an existing operation or changes to that operation, the no project alternative is that existing operation." (Quoting *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 253, a decision discussed in this blog's [2/18/15 post](#).)

Applying these standards, and the deferential substantial evidence test, in reviewing DWR's "factually based forecast" of the no-project condition, the Court upheld the EIR's discussion as sufficiently distinguishing between the no-project alternative and the amendments and also "offer[ing] a plausible view of a future in which the amendments are not approved." Per the Court: "Given the long history of the [SWP] and its critical role in distributing water to millions of residents in the state and hundreds of thousands of acres of farmland, [DWR] was not required to envision a world in which the contracts terminate and the [SWP] comes to a halt. ... Thus, it is reasonably foreseeable that the contractors would extend the terms of their contracts through the evergreen clause." Nor was the no-project alternative discussion required to speculate on whether all contract terms would be extended as to each contractor, or about the state reducing SWP deliveries (CEQA Guidelines, § 15126.6(f)(3).)

Finally, DWR did not need to analyze "the environmental advantage of not facilitating the expansion of the [SWP]," because that argument of Appellants improperly assumed the project would have an environmental impact, which (as the Court already held) is not the case.

DWR's Decision Not to Recirculate the EIR Does Not Violate CEQA

A lead agency must recirculate an EIR for public comment and agency consultation when it adds "significant new information" to the FEIR, i.e., changes the EIR "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 (including a feasible project alternative) that the project's proponents have declined to implement." (Citing *Save Our Capitol!*, 87 Cal.App.5th at 706, CEQA Guidelines, § 15088.5(a).) "New information that clarifies or amplifies the previously circulated draft EIR does not require recirculation." (*Ibid.*; Guidelines, § 15088.5(b).) An agency's decision not to recirculate is presumed to be correct and the challenger bears the burden of showing no substantial evidence supports its determination that the added information was not significant. (*Save Our Capitol!*, at 707.) Recirculation may also be required when the DEIR was "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (See CEQA Guidelines, § 15088.5(a)(4).)

The Court held Appellants' arguments were unsupported and meritless under these applicable standards, as they failed to describe and demonstrate the allegedly significant new information and disclosures requiring recirculation or to show that the EIR was inadequate and conclusory. Additional analysis provided for informational purposes in the FEIR in response to public comments regarding potential reduction of Table A amounts and resulting effects did not disclose new or increased project effects, and at most merely clarified or amplified the Table A amount reduction alternative that DWR rejected.

Non-CEQA Claims Also Lack Merit

On independent review, the Court rejected Appellants' claim that DWR's project approval violated the Delta Reform Act (Wat. Code, § 85000, et seq) because DWR did not prepare a written certification of consistency with the Delta Plan. Per the Court, the amendments did not constitute a "covered action" under that Act requiring a certification for numerous reasons, including but not limited to "the Legislature's clear intent to exempt the existing [SWP] from [the definition of] a covered action."

The Court also rejected Appellants' arguments that DWR "violated its duty of continuing supervision under the public trust doctrine" in approving the amendments, conducting substantial case law analysis and concluding that duty applies to water diversions outside DWR's purview and "that the amendments do not impact a public trust resource." Further, DWR's conclusions in this regard were properly based on the EIR's findings and did not require a separate public trust analysis.

Finally, the Court rejected Appellants' arguments that the validation action was prematurely brought (an argument doomed by the Court's earlier rejection of the segmentation argument); that the amendments failed to comply with bond repayment priorities under the Burns Porter Act (Wat. Code, § 12930 et seq); that DWR failed to comply with the pre-approval legislative committee presentation requirements of Water Code § 147.5; that the amendments were unconscionable because they improperly "reauthorized" un-amended contract terms (such as water delivery amounts) that were impossible or impracticable to perform; and that DWR lacked authority to assume "unbounded" contracts assuming "paper water" deliveries and flouting statewide policy to reduce reliance on Delta water exports.

Conclusion and Implications

The complex and often imprecise contours of CEQA, combined with the myriad other laws and often conflicting policies applicable to California's efforts to solve its "great water problem," provide a fertile environment for litigation, as well illustrated by the many claims made and issues raised in this case. Key to the Court's rejection of many of Appellant's CEQA arguments is CEQA's baseline rule that existing facilities and continuing operations are considered part of the existing environmental baseline, meaning that their impacts are not considered to be environmental impacts of a project approving their continuation even if – as is the case here with the 1960's-era SWP – they have never previously been reviewed under CEQA. While I have noticed that many CEQA plaintiffs appear to find this rule hard to accept, it is actually one of CEQA's clearer principles and has been consistently applied even to continuing operations having very significant environmental impacts.

The Court also applied well-established rules and principles in the areas of piecemealing/segmentation, project description, alternatives analysis, and recirculation in rejecting Appellants' myriad claims. Applying piecemealing precedents can be a bit murky (to say the least), but the Court here consistently rejected Appellants' attempts to tie the contract amendments to specific (albeit speculative) major infrastructure projects DWR may (or may not) pursue at some point in the future. While common sense counsels that the contract amendments here provide an enhanced *financing mechanism* that can more readily *facilitate* such future DWR projects, the Court was unpersuaded that any such projects are the *consequence* of the amendments. Hence, they were not required to be described and analyzed in the EIR as part of the contract amendment project.

While California's solutions to its "great water problem" remain – after well over a half-century – a work in progress, this case plays its part in that continuing saga by helping to ensure, at least for the time being, that the grand project will continue and the spigots won't run dry.



Questions? Please contact [Arthur F. Coon](#) of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written *Miller & Starr, California Real Estate 4th*, a 12-volume treatise on California real estate law. “The Book” is the most widely used and judicially recognized real estate treatise in California and is cited by practicing attorneys and courts throughout the state. The firm has expertise in all real property matters, including full-service litigation and dispute resolution services, transactions, acquisitions, dispositions, leasing, financing, common interest development, construction, management, eminent domain and inverse condemnation, title insurance, environmental law and land use. For more information, visit www.mslegal.com.

www.ceqadevelopments.com