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To the Santa Barbara Board of Supervisors

9/20/16

RE: State Water Project contract questions

Dear Supervisors;

Thank you all for meeting with us to hear our concerns regarding the 12,000 AF of relinquished Table A Allocation that Santa Maria has requested and that you, as the State Water Project contractor, have on your October 4<sup>th</sup> agenda to consider. For the reasons we discussed with you all, we hope you deny this request.

The second concern we have is with the DEIR recently released by DWR on the SWP Water Contract Extension Project. We urge you to submit comments by the October 17<sup>th</sup> deadline. The "Evergreen Clause" allows you to not extend the contract at this time with no penalties in the future. Your current SWP contract is not set to expire until 2038. We see no need to extend the SWP contracts at this time unless it is to sell revenue bonds to finance the Twin Tunnels.

C-WIN Advisor, Arve Sjovold, has analyzed the various contracts that you have entered into with DWR and CCWA and the contracts CCWA has entered into with the water agencies (see attached.) His conclusions are troublesome. Please review his conclusions.

Sincerely,

Carolee

Carolee Krieger, Executive Director  
The California Water Impact Network

## **Santa Barbara County's Ability To Reach Local SWP Participants If CCWA Fails To Pay DWR**

**September 18, 2016  
By Arve Sjovold**

**Assumed Event: Destruction of SWP Coastal Branch** If some catastrophic event—an earthquake for example—were to destroy the Coastal Branch of SWP aqueduct, SWP participants in Santa Barbara County might stop making payments to CCWA and focus their available revenue on developing alternative supplies. Because CCWA has no source of revenue independent of its member units, CCWA would be unable to remit to the State what is owed the State by Santa Barbara County SWP participants. The State of California has a clear right to collect any required payments from the Santa Barbara County if nobody else is making the payments.

**Question: Can Santa Barbara County Recover The Costs From Local Purveyors** This analysis examines the County's ability to recover directly from purveyors in the County independently and without CCWA.

**Conclusion: Prospects For Recovery From Local Purveyors Is Poor** This analysis concludes that Santa Barbara has very limited ability to reach the individual participants that make up CCWA. In the event of the destruction of the Coastal Branch pipeline and the financial collapse of CCWA, Santa Barbara County would have to find the money to pay DWR to retire the remaining Coastal Branch bonds and meet all other SWP obligations. Except for limited exceptions, CCWA's member entities could not be made to pay.

**Legal Structure Of SWP** State Water in Santa Barbara is governed by three contracts. A careful reading of the three contracts reveals that they create an ingenious structure that appears to protect the taxpayers of Santa Barbara County but, in fact, does precisely the opposite. If the Coastal Branch were to become unusable, the taxpayers of the County would be left holding the bag.

### **WSRA                      Water Supply Retention Agreement                      1984**

Parties: Santa Barbara County and local purveyor participants. CCWA is not a party.

What rights did County transfer?

The [local purveyor participant] agrees to pay the [Santa Barbara County] the amount required to be paid by the [Santa Barbara County] under the State Water Contract to **retain** annual entitlement and capacity rights of

11,300 acre feet, and all rights associated therewith under the State Water Contract ("Retained Rights")  
WSRA Page 2 of SM's WSRA      Emphasis added

County had Table A entitlement only. These rights carried with them an obligation to pay for facilities and certain operating expenses north of the departure point of the Coastal Branch at Devil's Den. No Coastal Branch facilities existed or were contracted for. No participation rights existed at the time of the contract. The key word is 'retain'. You can't retain something that you don't have and which doesn't exist. It follows that this contract cannot be construed as creating a duty to pay for something that might come into existence in the future. It follows that the County has no basis under this contract for collecting anything beyond the charge related to the project north of Devil's Den. The Table A rights transferred under the WSRA in 1984 did not include the Coastal Branch and the WSRA cannot be used to reach local purveyors for Coastal Branch costs and expenses.

Another limitation in the WSRA contracts is the Table A amount transferred. For example, the County would be limited to collections from Santa Maria related to the 11,300 acre feet mentioned in Santa Maria's WSRA. Santa Maria is currently exercising Table A rights in a much greater amount. But this could not be collected unless the County could establish a chain of assignments from some other purveyor to Santa Maria. Language in the WSRA appears to preclude such an assignment.

A Non-Participating [local purveyor's] Retained Rights shall continue to be retained by the [Santa Barbara County] for possible use in other projects pursuant to the State Water Contract and pursuant to the procedures set forth in this Article unless otherwise terminated, pursuant to this Agreement, at the request of the [local purveyor].

WSRA Page 4

County's ability to recover from purveyors under the WSRA is limited to recovery for unpaid charges north of Devil's Den. These charges will have been paid up to the time of the catastrophic event. Going forward, the County will be able to recover these charges from participating purveyors to the extent of those purveyors WSRA Table A amounts.

The County will be able to recover from participating purveyors for costs north of Devil's Den above their WSRA amounts only if the County can show a chain of valid assignments from non-participating WSRA signers.

The County will have no basis for recovery from non-participating purveyors such as Lompoc.



An additional infirmity is that the TFRA—the document in which this language occurs—does not bind the purveyor participants.

In fact, the general rule of the WSA contract that binds the purveyor-participants is just the opposite of what is said in the Step Up clause. The liability of each individual purveyor is separate, not joint and several.

WSA 5 (e) Several Obligation. Except as expressly set forth in Section 16(d) hereof, the Contractor shall not be liable under this Agreement for the obligations of any other Project participant. The Contractor shall be solely responsible and liable for performance of its obligations under this Agreement, including the obligation pursuant to Section 16(d). The obligation of the Contractor to make payments under this Agreement is a several obligation and not a joint obligation with those of the other Project Participants.

WSA Section 5 (e), page 15

The Step Up clause is unenforceable and offers no meaningful protection to Santa Barbara County.

The language immediately below which appears intended to protect the County, is essentially meaningless. It allows the County, a party to this contract, to enforce against CCWA, the other party. Such would be the case as a matter of contract law absent the verbiage below which is meaningless surplus language.

### 3. Default: Remedies.

A. Against CCWA. In the event of default or a failure by CCWA to make any payments provided for hereunder, CCWA acknowledges that the District may specifically enforce the obligations of this agreement by either an action for damages or equitable proceedings, or both, and the prevailing party in any such action shall be entitled to recover its reasonable attorneys fees and costs. The use of any remedy specified herein for the enforcement of this agreement is not exclusive, and shall not deprive the party using that remedy of, or limit the application of, any other remedy provided by law.

WSA Page 6

The language below purports to create a right in Santa Barbara County to enforce different contract—the WSA under a third party beneficiary theory. The legal infirmity is that the WSA does not benefit Santa Barbara. The fact that CCWA and Santa Barbara agree between themselves to third party beneficiary enforcement does not make it so. This clause cannot create enforcement rights in Santa Barbara.

3. Default: Remedies.

B. Against WSA Contractors. CCWA expressly warrants that each WSA was intended to benefit the District, and that the District is an intended beneficiary of each such WSA. Accordingly, to the extent CCWA does not make any or all of the payments to the District as required hereunder, and to the extent that the failure of CCWA to make such payments is caused by the failure of any Contractor to fulfill any obligations of payment to CCWA, the District shall have the right, as a third party beneficiary, to enforce the obligation of the WSA of individual defaulting Contractors to make payments in any legal or equitable action which it deems appropriate.

WSA Page 7

Santa Maria created additional insulation for itself against third party beneficiary enforcement. In late 1991 or in early 1992 Santa Maria and CCWA amended the WSA between themselves. This language clarifies that, as to Santa Maria, there is no third party beneficiary to its WSA.

Section 29. Limitation of Rights to Parties. Nothing in this Agreement expressed or implied is intended or shall be construed to give to any person other than the Authority, the Contractor or any Project Participant any legal or equitable right, remedy or claim under or in respect of this Agreement or any covenant, condition or provision herein contained except as expressly granted by the Authority pursuant to the terms of the Original Water Supply Agreement; and all such covenants, conditions and provisions are and shall be held to be for the sole and exclusive benefit of the Authority, the Contractor and any Project Participant except as expressly granted by the Authority pursuant to the terms of the Original Water Supply Agreement.

Santa Maria WSA Amendment 1

The language below is also meaningless. The language allows Santa Barbara County to enforce its rights in the TFRA against any participant purveyors. The problem is that the TFRA creates no duties in any purveyor-participant owing to Santa Barbara County. Santa Barbara County may have a right to bring an action against a purveyor-participant. But the WSA gives Santa Barbara County no rights to enforce.

The District's rights hereunder shall include the right to bring an action to enforce **its rights hereunder** against a defaulting Contractor in the name of the CCWA in the event a court of competent jurisdiction holds that the District is not entitled to enforce its rights in its own name hereunder.

WSA Page 7            Emphasis added

The language below shows an intention to re-negotiate a single agreement to replace the web of existing contracts. It never happened.

9. Integration of All Agreements. CCWA and the District agree to use their best efforts to negotiate, as early as practical, a single integrated agreement incorporating all elements of this agreement, the WSRAs, and other agreements which may exist between the parties.  
WSA Page 9

**Conclusion As To TFRA** Santa Barbara has no power to reach CCWA participants using TFRA.

### **Recovery Under An Equity Theory**

County might mount an argument that for the last quarter century everyone believed that all responsibility for SWP contract performance had devolved down to purveyor-participants and to their Joint Powers entity CCWA. But evidence to prove this fact might be scarce outside of County bureaucrats and politicians.

Purveyor-participants would argue that the contracts were drafted between parties of equal sophistication using experienced lawyers. Therefore, the bargained-for wording should not be set aside.

Purveyor-participants would also argue that had Santa Barbara County not been sharing the risk via its ultimate guarantee of payment, they would never have gone forward with participation in the SWP in the first place.

**Conclusion As To Equitable Reform Of The Contracts** Persuading a court to reform the contracts would be an uphill battle.

**Overall Conclusion** Santa Barbara County was out-foxed by the local SWP participants when the contracts were negotiated twenty-five years ago. The effect of the agreements is that the County remains exposed to the very financial liability that it was negotiating to avoid. Creative legal theories in the future will not alter the outcome. Santa Barbara's ability to reach the CCWA participant entities is just about zero.