Public Comment #5

From: Roger Moore
To: sbcob
Cc: Carolee Krieger
Subject: Re: 3/2 Agenda item 5 [State Water Project contract amendments]
Date: Monday, March 1, 2021 4:53:30 PM
Attachments: CWIN letter to SBC-BOS 3-1-21.pdf

The attached additional letter is for the same agenda item tomorrow. Exhibits are being sent to you separately. Please ensure that the Board members receive these.

Thanks,
Roger B. Moore
Attorney for CWIN

Law Office of Roger B. Moore

337 17th Street, Suite 211

Oakland, CA 94612

Office phone: 510-548-1401

Email: rbm@landwater.com

On Mon, Mar 1, 2021 at 9:40 AM Roger Moore <rbm@landwater.com> wrote:

> The attached letter and appendix of documents, sent on behalf of the California Water Impact Network (CWIN), were provided to the Santa Barbara County Board of Supervisors in advance of its meeting on February 2, 2021 [File # 21-00088]. At that meeting, the Board continued this matter to March 2, 2021.
>
> Please ensure that this letter, and the complete appendix of documents, are included in the record and made available for the Board's consideration of Departmental agenda item 5 in its meeting on March 2, 2021 [File # 21-00156].
>
> Thanks,
> Roger B. Moore
> Attorney for CWIN
>
> Law Office of Roger B. Moore

Public Comment #5

337 17th Street, Suite 211

Oakland, CA 94612

Office phone: 510-548-1401

Email: rbm@landwater.com

LAW OFFICE OF ROGER B. MOORE

LAND, WATER AND ENVIRONMENTAL LAW

337 17TH STREET, SUITE 211
OAKLAND, CALIFORNIA, 94612
LANDWATER.COM, RBM@LANDWATER.COM, 510-548-1401
ADMITTED IN CALIFORNIA

March 1, 2021

Santa Barbara County Board of Supervisors
105 East Anamapu Street
Santa Barbara, CA 93101
Via email: sbcob@countyofsb.org

Re: **Due to Serious Legal, Financial and Environmental Risks, Approval of State Water Project Contract Amendment 20 (Contract Extension Amendment) and Amendment 21 (Water Management Amendment) Must Be Denied, or At Minimum Delayed** [Item 5, File No. 21-00156]

To the Clerk and Members of the Santa Barbara County Board of Supervisors:

On this matter continued from the Board's February 2, 2021 meeting, the California Water Impact Network (CWIN) again urges rejection of proposed State Water Project (SWP) Contract Amendments 20 and 21 if those matters are brought to a vote. If the amendments are not denied outright, they must at minimum be the subject of further study to avoid irreversible financial and environmental risks that would otherwise follow for the county and its constituents—*not just for now, but for the next 64 years of project operation until 2085*.These risks are described in detail in CWIN's February 1, 2021 letter (CWIN Letter) to the Board, which also included an appendix with more than 200 pages of exhibits.

The CWIN Letter and appendix of exhibits remain equally relevant to the agenda item above. For example:

(1) CWIN's letter documents that the current misnamed "contract extension" amendments are a classic "wolf in sheep's clothing." Amendment 20 would do far more than simply extend the SWP contract from 2038 to 2085, as if that step were not substantial enough. Instead, the amendments would dramatically change the definition of "facilities" eligible for revenue bond debt, removing a major obstacle to forcing untold billions in new debt for the proposed Delta tunnel, or for other costly new infrastructure projects even when opposed by the County and its constituents.

(2) This would be the perhaps the worst possible time to finalize this set of contract "extension" amendments, even if the County ends up seeing some benefits in. them. Far from safely securing an extension of the County's SWP contract, signing Amendment 20 now would make the County an unwitting and unrepresented pawn in multiple pending lawsuits just now nearing briefing on the merits. These actions address the lawfulness of DWR's environmental review and the validity of the contract amendments. In these actions, DWR, and perhaps others, are very likely to make expansive arguments about its ability to impose new debt obligations on unwilling contractors, taxpayers and ratepayers, without the county being present to assert its own voice in case its interests diverge.
(3) Far from helping to minimize debt compression or reduce risks, CWIN's letter showed that signing Amendment 20 at this stage would needlessly sacrifice the opportunity the County will otherwise retain under Article 4 of the current SWP contract. Article 4's Evergreen Clause entitles the County Flood Control and Water Conservation District (District) to extend the SWP contract under its current terms, or to seek more favorable terms that, unlike Amendment 20, do not expose the County and others to increased and irreversible risks of new facilities debt. Either approach would be preferable to Amendment 20, which creates more new risk than it could possibly solve.
(4) Agreeing with County staff that Amendment 21 addressing water management is not yet ready for final action, CWIN's letter pointed out that Amendment 21 also the subject of separate pending litigation, and would likewise create major new environmental and financial risks if finally approved.

Although a month has now passed since the CWIN Letter, CWIN has reviewed the new file for Agenda item 5 [File No. 21-00156], and notes the absence of a response to the detailed concerns and evidence raised in its letter. In case useful, without repeating its earlier, more detailed concerns, CWIN notes several further points here in case useful. First, CCWA's assurance in its new memorandum that it will be financially responsible for failure to meet SWP obligations, and that "*to date* neither CCWA nor the District have ever defaulted on SWP payments" (page 3, emphasis added) is the water agency equivalent of an ostrich sticking its head in the sand. As reflected in the attached memoranda previously submitted by CWIN (Exhibit 1), a strong likelihood remains that in the event of default, the County would still face potential exposure to contingent liability even if the Transfer of Financial Responsibility Agreement (TFRA) continues. Further, even if CWIN is incorrect in that conclusion, CCWA liability for SWP default or cost overrun would not solve the underlying problem for the County taxpayers and ratepayers. Even if the costs are passed along by CCWA as an entity rather than by the County directly, taxpayers and ratepayers would still bear the ultimate burden for the District's share of potential billions in new SWP cost overruns that Amendment 20 would help facilitate.

Second, the strong likelihood DWR will raise arguments in the contract extension proceeding adverse to the County's interests is based on direct and recent experience rather than mere suspicion. Attached (Exhibit 2) is a detailed letter from counsel for Kern County-area water districts from the recent California WaterFix validation litigation, which remains relevant to Agenda item 5 as well as Amendment 20's facilitation of indebtedness for the currently proposed Delta Conveyance Project. It speaks to DWR's anticipated uses of the contract extension, as well as the likelihood it will seek to force a "cram-down" of costs on SWP contractors and the public for new facilities costs regardless of whether they consent.

Third, it would make no sense to proceed on the contract extension amendments while DWR's further set of Delta conveyance-specific contract amendments remain pending. Signing the former now would deprive the County of important leverage as to the latter.

Finally, it would be unrealistic in the extreme to ascribe any further water supply advantage for the County for the proposed amendments. Compounding the SWP's decades-old paper water problem, on which CWIN has provided extensive evidence, it is a matter of state law that exports from the Delta will need to reduce, not increase, in the future. For example, the Delta Reform Act of 2009 confirms that the Delta is in "crisis" and "existing Delta policies are not sustainable." (Wat. Code, § 85001). Leaving no doubt about whether the status quo of allocations from the Delta can continue in the foreseeable future, the Act commits to "*reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of improved regional supplies, conservation, and water use efficiency*." (Wat. Code, § 85021(emphasis added).)

Respectfully submitted,

By: _____
ROGER B. MOORE

Attorney for California Water Impact Network

LAW OFFICE OF ROGER B. MOORE

LAND, WATER AND ENVIRONMENTAL LAW

337 17TH STREET, SUITE 211
OAKLAND, CALIFORNIA, 94612
LANDWATER.COM, RBM@LANDWATER.COM, 510-548-1401
ADMITTED IN CALIFORNIA

Counting on the County:
Legal and Practical Concerns About the Proposal for Santa Barbara County to Relinquish Its Role as State Water Project Contractor

Synopsis

This memorandum identifies formidable legal and practical problems if Santa Barbara County relinquishes to Central Coast Water Authority (CCWA) the decision-making role it has retained as State Water Project (SWP) contractor for more than half a century. My analysis disputes the effectiveness of having CCWA fully displace the county's role by piecing together a patchwork of powers assigned from its contractors. Even if effective as an assignment, this approach would produce defective governance, including the foreseeable risk that CCWA in the future will be dominated by a single entity, the City of Santa Maria. Substantial weakening of county and public accountability is likely to follow from ceding the SWP contractor role to CCWA. With important decisions looming on such matters as the proposed multi-decade extension of SWP contracts and the Delta tunnels, changing contracts to allow CCWA to displace the county's independent role as decision-maker would amount to the wrong decision at the worst possible time, and likely require CEQA review.

My analysis, prepared at the request of the California Water Impact Network (C-WIN), reflects my independent review of primary documents, legal research, and experience reviewing SWP contracts statewide and in the county. I have closely followed and studied the county's SWP role since 1995, when my co-counsel and I represented Citizens Planning Association of Santa Barbara County and its two co-petitioners in their successful challenge to the environmental review of the Monterey Amendments. (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal. App. 4th 892) (*PCL v. DWR*).)

The analysis addresses four principal themes. First, an agreement assigning the county's SWP contractor status to CCWA is likely to fail its ostensible purpose of shielding the county from contingent liability. The county, whose board of supervisors acts *ex officio* as the Santa Barbara County Flood Control and Water Conservation District (County FCD), Wat. Code Appendix, § 6, could not have qualified as a state water contractor under the Burns-Porter Act (Wat. Code, § 12930, *et seq*.) had it not pledged, in Article 34 of its SWP contract, to impose taxes or assessments when other means are insufficient to meet SWP payment obligations due then or within the year. The commitment of all SWP

contractors to cover default with taxing power was a central part of the contracting principles ratified by California's voters and later codified in the Burns-Porter Act. CCWA has failed to demonstrate that substituting itself for the county as SWP contractor can feasibly reduce the county's risk of contingent liability beyond safeguards already in place. That premise is not supported by 2014 joint powers legislation (AB 2170, ch. 386 (Stats. 2014) codified at Gov. Code, § 6502), which clarified rather than changed existing law and did not alter the limitation of JPAs to common powers. Displacing the county would invite discord over complex issues, such as the scope of common powers assigned to CCWA, the role of private entities and non-member contractors, and whether assignments to CCWA can proceed in the absence of a popular vote.

Second, even if effective as an assignment, relinquishing the county's contractor role to CCWA would produce defective governance. Unlike the county, which must continue to represent all its constituents, CCWA is highly likely to be dominated by one entity, the City of Santa Maria. The city controls nearly half of the underlying contract allotments among CCWA's contractors, and could acquire an effective majority if it acquires previously retired Table A amounts. If this occurs after the county ends its role as SWP contractor, it may be too late to ensure decisions on SWP participation remain accountable in the south coast, or to ratepayers and taxpayers throughout the county.

Third, prejudice to the county and the public may result from making CCWA the SWP contractor. C-WIN has elsewhere documented its concerns that the SWP has not delivered water to Santa Barbara County's South Coast water districts and cities "in a cost-effective and reliable manner," and that new SWP indebtedness for the Delta tunnels "could result in vast economic hardship and financial turmoil" for the county's agencies and ratepayers" while diverting resources that could be better spent on local efforts to improve water supply reliability (See, e.g., C-WIN, *The Unaffordable and Unsustainable Twin Tunnels: Why The Santa Barbara Experience Matters* 7, 9, 18 (July 2016); ECONorthwest, *California WaterFix: Potential Costs to Santa Barbara County* (July 2016).) As state and local decision-makers consider the proposed extension of SWP contracts, proposed construction of Delta tunnels, and other major water and infrastructure decisions, the county's decision-making role will grow in importance.

Finally, because the governance problems noted above would weaken environmental accountability for much, if not all, of the county, eliminating the county's role as SWP contractor is likely to require CEQA review. This is hardly the first time CCWA has sought to overstep its authority and underplayed the importance of contractual changes. In *PCL v. DWR*, the Court of Appeal rejected CCWA's attempt, with DWR's acquiescence, to stand in for DWR in reviewing the Monterey Amendments. The court criticized CCWA for neglecting water contractors and members of the public "not invited to the table" (*Id*. at 905), and for failing to analyze elimination of a safeguard against reliance on "paper water" contract entitlements "worth little more than a wish and prayer." (*Id*. at 914-915.) A generation later, the county's independent role as contractor remains an important safeguard against future SWP decisions that are similarly detached from reality. It will disserve the county, the public, and the environment for the county to declare that within the county, CCWA controls the table and decides who is invited.

II. Existing Agreements Already Make CCWA Fully Responsible for Project Costs and Limit the County's Exposure to Contingent Liability

Assessing whether it is in the county's interest to eliminate its role as SWP contractor requires awareness of the safeguards already in place in existing agreements protecting against the county's exposure to contingent liability for SWP costs. The 1991 Transfer of Financial Responsibility Agreement (TOFR) between the County FCD and CCWA provides that "[a] principal purpose of this agreement is to ensure that the district's financial obligations under the SWP attributable to a CCWA contractor will be "completely and fully assumed and satisfied by CCWA, and that the District will be completely and fully reimbursed by CCWA" for all costs, liabilities and obligations "in connection with implementation of the SWP contract as to each CCWA contractor." (TOFR, Recital J.) Whenever interpretation is required, it shall be interpreted "in order to achieve that purpose." (*Id*.)

Provisions in the Water Supply Agreements (WSAs) between CCWA and its contractors, referenced in the TOFR, are "intended to ensure that the District will be fully and completely reimbursed by the CCWA for all of its costs, liabilities and obligations in connection with the implementation of the SWP Contract as to the CCWA contractors." (TOFR, Recital F.) These WSA provisions operate to limit the circumstances that would result in the County FCD's contingent liability. For example, CCWA contractors' "cross guarantees," also known as "step up" provisions, require each contractor to "stand behind the promises of the other contractors either in the North County or the South Coast," providing that "if a contractor defaults, the other contractors in the region are obligated to take an increased level of water deliveries and to pay for the additional water, up to a limit of 125% of the payments otherwise made by the stepping-up contractor." (TOFR, Recital F, section 2 (citing WSA section 16(a).) The enforcement remedies available to CCWA include stopping deliveries to the defaulting contractor, transferring the defaulting contractors' entitlement and obligation to pay to another CCWA contractor, and bringing a lawsuit to require payment. (TOFR, Recital F, section 5 (citing WSA, section 16).)

Should a default nonetheless occur, the TOFR empowers the County FCD to bring an action for damages or in equity against CCWA for specific enforcement of its payment obligations. (TOFR, section 3.A.) The County FCD may also directly bring a third party beneficiary enforcement action against defaulting CCWA contractors, or bring that action in the name of CCWA if any court deems that County FCD unable to bring the action in its own name." (TOFR, section 3.B.)

IIII. Assigning SWP Contractor Status to CCWA Would Be Ineffective in Reducing the County's Risk of Contingent Liability.

A. CCWA Acquired No New Authority Through AB 2170 (2014), Which is Merely Declarative of Existing JPA Law.

CCWA incorrectly assumes that California's 2014 legislation authorizing Joint Powers Authorities to impose fees, taxes and assessments (AB No. 2170 (ch. 366), codified at Gov. Code, § 6502) removes a legal barrier to CCWA serving directly as the state water

contractor, enabling CCWA to honor financial obligations as SWP contractor originally assumed by the county. That expansive reading of the 2014 legislative change is mistaken. The revisions approved "do not constitute a change in, but are declaratory of existing law." (AB 2170, Ch. 386, section 1.) The new language added in AB 2170 mentions "the authority to levy a fee, assessment or tax," not to revise or expand JPA authority, but to identify these as examples of common powers available under section 6502 prior to the 2014 amendment. At most, the clarifying reference to fees, assessments and taxes in AB 2170 would rule out a categorical argument based on the premise that these powers are categorically unavailable to a JPA. It would not assist in determining the scope and limits of the powers available to the JPA, or whether the JPA could collectively take the place of the county.

AB 2170 did not change in the simple but central limitation placed on exercise of joint powers under section 6502: the exercise of power by the public agencies entering the agreement, must be "*common to the contracting parties*." (Emphasis added.) Likewise, AB 2170 did not and could not change constitutional principles relating to voter approval and participation, such as Proposition 13's requirement of two-thirds voter approval for a special tax, or Proposition 218's notice, protest and hearing procedures required of local agencies before imposing property related fees or charges.

Documents from AB 2170's legislative history also assist in corroborating what should be clear from its plain language—that the 2014 joint powers legislation only clarified and did not change the law or remove existing limitations on JPA power. For instance:

- Staff analysis prepared in connection with the assembly's concurrence in Senate amendments (August 11, 2014) observed that a JPA "may only exercise the powers expressly provided in the agreement," is limited to the entering agencies' existing powers, and requires compliance with procedural requirements applying to one of the contracting public agencies. The staff analysis describes the California Constitution's requirements relating to property related fees, and notes that "Counties and other local agencies" may impose such fees on property owners "after completing the Proposition 218 process. Special districts created by statute, however, must have specific authority for each of these revenue sources." As recounted in this staff report, both supporters and opponents of AB 2170 recognized that it was meant only to "clarify" existing law.

- Senate floor analysis of AB 2170 for the Senate Rules Committee (July 11, 2014) and for the Third Reading (June 18, 2014) noted that "[b]ecause a JPA only allows public agencies to exercise their existing powers, the bill does not grant any new revenue powers to local governments. This bill also does not change any of the voter approval thresholds or other procedural requirements that state law imposes on local taxes, assessments and fees."

- Legislative analysis prepared for the Senate Governance and Finance Committee (February 20, 2014) describes existing law under the Joint Exercise of Powers Act (Gov. Code, § 6500, *et seq*.), and notes that "[e]ach public agency must independently possess the authority to perform the activity that is to be performed jointly pursuant to a joint

powers agreement. The courts have found that the Act grants no new powers to public agencies, but merely sets up a new procedure for the exercise of existing powers."

• The same legislative analysis, in a comments section, references the concern that, separately from the question of whether public agencies can jointly exercise revenue powers through a JPA, it "leaves significant unanswered questions about how public agencies should jointly exercise those powers. In particular, AB 2170 doesn't specify how a JPA should comply with many of the Constitutional requirements that apply to local government revenues. It is unclear how a JPA should comply with the constitutional requirement that a local agency must adopt an appropriations limit if it receives proceeds of taxes or how a JPA's appropriations limit would relate to the appropriations limit adopted by its member public agencies. AB 2170 is silent about the manner in which local agencies must jointly seek approval for taxes, fees, or assessments. Can a JPA seek voter approval from among all qualified votes within the JPA's entire territory? Or must each public agency member independently obtain the approval of its respective residents before it is entitled to exercise revenue power jointly with other agencies? By providing no statutory guidance to local officials, and in the absence of relevant case law on these questions, AB 2170 may still leave public agencies vulnerable to legal challenges if they exercise their common revenue powers in a manner that is inconsistent with state law." (*Id.)*

B. CCWA Cannot Fully "Step In" for the County in the SWP Contract, Because Its Patchwork of Assigned Powers are Not Commensurate With the County's Powers.

CCWA assumes that through a patchwork of assigned powers from its contracting agencies, it can fully take over for the County FCD as SWP contractor, consistently with the JPA "common powers" limitation in Government Code 6502 and other requirements of law. This assumption underlies the hope that the county, which has long been wary of SWP costs, might be able to remove risks of bearing contingent liability by agreeing to have CCWA to proceed as SWP contractor. Unfortunately, the argument that CCWA can simply step into the county's decision-making role as SWP contractor appears to be no more credible than its announcement a generation ago that the Monterey Agreement would serve the "primary objective" to "avoid litigation." (*PCL v. DWR*, 83 Cal.App.4th at 901.)

Rather than resolving contingent liability concerns beyond the protections in existing agreements outlined in section II, *infra*, CCWA's displacing the county as SWP contractor would likely invite discord over complex issues testing the limits of CCWA's exercise of authority. For example, even when the powers of CCWA's individual contractors are generously construed, it does not appear that their scope of common powers that could be assigned to CCWA are commensurate with the county powers relating to taxes, fees and assessments. CCWA holds water delivery contracts with a varied set of entities that includes four cites (Santa Barbara, Buellton, Guadalupe and Santa Maria), four water districts (Carpinteria Water District, Montecito Water District, Goleta Water District, Santa Ynez Water Conservation District/Improvement District No. 1), a mutual water company (La Cumbre), and three private entities (SCWC, Morehart Land Co. and Raytheon Co.) CCWA also holds a utility agreement with Vandenburg Air Force Base.

The county's authority appears to be broader than the sum of those parts, not simply in its jurisdiction extending throughout Santa Barbara County, but also in governance and public accountability. As the Third District Court of Appeal observed in a different setting, "[l]ocal districts established by statute inherently differ in kind from municipal corporations….They draw their authority from the enactments which create them. They are created for limited purposes, exercise limited powers, are far less visible and significant in the political scheme of things than municipal corporations, and are less likely to accurately reflect the will of the populace. The fact that the Legislature limits the power assigned to them suggests little or nothing about the exercise of power by municipalities, which draw their powers from the California Constitution." (*Baldwin v. County of Tehama* (1994) 31 Cal.App.4 th 166, 177.)

Moreover, reliance on the county's tax and assessment authority in article 34 of the SWP contract cannot be marginalized as an incidental provision easily filled by another willing replacement agency such as CCWA. SWP contractors "shall, whenever necessary, levy upon all property not exempt from taxation, a tax or assessment sufficient to provide for all payments under the contract." (Wat. Code, § 11652.) The SWP history described in *Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900, underscores the centrality of SWP contractors' article 34 commitments to the effective operation—and indeed, the very existence—of the SWP approved by California's voters in 1960 and codified in the Burns Porter Act:

- "The Legislature's Joint Committee on Water Problems reported in 1958 that 'A firm tax base is required to support any general obligation bond issue', (Twelfth Partial Rep. by the J. Com. on Water Problems, 'Economic and Financial Policies for State Water Projects', (Mar. 24, 1958) p. 23) and Bulletin 78 of the Department of Water Resources, published in 1959, stated that if the Project were to be self-liquidating it would be necessary to obtain money for costs not met by water sale revenues, and that such money could be obtained from 'taxes in service areas, in some such manner as has been employed by The Metropolitan Water District to provide funds for the Colorado River Aquedect. ...' (Dept. Water Resources, Bull. No. 78, 'Investigation of Alternative Aqueduct Systems to Serve Southern California', (Dec. 1959) p. 27.)." (140 Cal.App.3d at 904.)

- "[T]he Senate Factfinding Committee on Water Resources recommended that the water delivery contracts required under the Act be made 'only with public agencies with taxing powers'. (Partial Rep. of the Factfinding Com. on Water Resources, 'Contracts, Cost Allocations, Financing for State Water Development', (Mar. 1960) p. 10.)" (*Id*.)

- "The Report of the Senate Committee concluded: 'Legislation should require that rates for services from the facilities be set so as to return with interest the reimbursable expenditures on the facilities, whether made from bond funds or the California Water Fund'. (I*d* at p. 9.)" (*Id*.)

- "About nine months before the election at which the Act was approved, the Department published the 'Governor's Contracting Principles for Water Service Contracts'." The contracting principles were precisely that, i.e., rules for implementing the water contracts required under the Act.**"** *(Id.)*

• "The Department was the administrative agency responsible for negotiating the contracts required by the Act. The contracting principles represent the Department's construction of that portion of the Act dealing with the contract requirements. The Governor's Contracting Principles not only carried out the Senate Committee on Water Resources' recommendation that water contracts be made only with public agencies with taxing power, but also specifically required that the contracts provide for the mandatory use of local taxes:

> 'Each contracting agency will agree that, in the event in any year it is unable or fails through other means to raise the funds necessary in any year to pay the state the sum required under the contract [i.e., enough to pay all costs of the system], it will use its taxing or assessment power to raise such sum'.
>
> The contracting principles also indicated 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'"

(140 Cal.App.3d at 905.)

• "Consistent with the requirements of the Act and the contracting principles, article 5 of the [Metropolitan Water District contract [prototype for other SWP contracts] provided: 'This contract is entered into for the direct benefit of the holders and owners of all general obligation bonds issued under the [Burns-Porter] Act, and the income and revenues derived from this contract are pledged to the purposes and in the priorities set forth in that Act'." (*Id*. at 905.)

• **"**Also consistent with the contracting principles, the contract further provided in article 34(a): 'If in any year the District fails or is unable to raise sufficient funds by other means, the governing body of the District shall levy upon all property in the District not exempt from taxation, a tax or assessment sufficient to provide for all payments under this contract then due or to become due within that year'." (*Id*.)

This history underscores the concern that substituting an entity with lesser authority over taxing and assessment may not prove to be effective in reducing the county's risk of contingent liability more than in CCWA's existing agreements with the County FCD and CCWA's contractors. It remains to be seen how, or whether, CCWA contractors with limits to their own jurisdiction can assign powers robust enough to offer more protection against defaults than the existing contracts' step-up and default remedy provisions. Another procedurally untested area that may precipitate future conflict involves the rights and duties of an "associate member" mutual water company, as well as several private entities that are CCWA contractors. (See 1998 Ops. Cal. Atty. Gen. 362, 372-373 (rejecting the notion that the Joint Exercise of Powers Act (Gov. Code, §§ 6500-6599) recognizes "different classes of membership" such as "limited" or "associate" members).)

C. CCWA's Exercise of Authority, Unlike the County's, May Be Subject to Constitutional Voting Requirements.

The contract terms proposed by CCWA to acquire rights from contracting entities and stand in for CCWA as SWP contractor must also be reviewed for compliance with constitutional provisions addressing the imposition of taxing and related obligations without a popular vote, as required by Propositions 13, 218, and 26 (Cal. Const., art. XIIIA, § 1(a); Cal. Const., art. XIIIC, § 2(d); Cal. Const., art. XIIID, § 3.) Individual CCWA contractors must also consider when their own determinations require a vote of the constituents within their service areas.

The County FCD has access to its taxing authority grandfathered in without submitting to these voting requirements where needed to cover SWP contracting obligations, based upon the role of that authority within the contracting principles approved by voters in 1960, and then incorporated into the Burns-Porter Act and SWP contracts. "[W]hen the state's voters approved the Act, that they approved an indebtedness in the amount necessary for building, operating, maintaining, and replacing the Project, and that they intended that the costs were to be met by payments from local agencies with water contracts." (*Goodman*, 140 Cal.App.3d at 910.)

CCWA assumes that the grandfathering in of the county's already established taxing authority will also apply to its new proposed arrangements relating to taxing authority and its intended role to replace the County FCD as the ultimate SWP contractor. However, that assumption is problematic. *Goodman* upheld the grandfathering of *ad valorem* taxes of an original SWP contractor, rejecting a broad objection that would have limited SWP expenditures beyond the originally referenced $1.75 billion in general obligation bonds. The court drew heavily on their necessity to the Governor's contracting principles ratified and approved by voters in 1960, codified in the Burns-Porter Act. (*Goodman*, 140 Cal.App.3d at 907-910.) By contrast, CCWA's proposed action would arguably run contrary to those same contracting principles, enabling CCWA, an agency with narrower and arguably weaker taxing authority, to serve as contractor in the county's place.

D. Assignments to CCWA May Be Limited by WSRA Requirements.

CCWA's founding agencies entered into the authority's JPA Agreement "for the purpose of exercising their rights under their respective" Water Supply Retention Agreements (WSRA), which are also extensively discussed in the TFRA. The County FCD had earlier entered into these agreements between 1983 and 1986, receiving DWR approval in 1991. One of the WSPA provisions stated that no revenue bond financing for project facilities could be issued unless authorized by a vote of the people within the jurisdiction of each participating purveyor. Each WSRA also assigned a maximum entitlement to the entity at issue. In their references to entitlements and their requirement of a popular vote, the WSRA do not appear to have been updated or revised.

IV. Assigning SWP Contractor Status to CCWA Would Weaken County and Public Accountability at a Critical Juncture for the SWP.

A. CCWA Control Would Foreseeably Allow a Single City to Dominate the County's SWP Contract.

Even if CCWA could be legally effective in obtaining and asserting powers assigned to from its contractors, notwithstanding the analysis above, CCWA's proposal to replace the county with itself as the decision-making SWP contractor should be rejected because of the risks it proposes to future governance on county SWP matters. The looming reality within CCWA is the high likelihood of dominance, if not outright control, by a single entity, the City of Santa Maria. Santa Maria's current voting share, based on allocation of water entitlement at CCWA's formation, is 43.19 percent of the total. If that city follows through on plans to acquire all or most of the 12,214 acre-feet of additional entitlement that the county long ago requested and DWR agreed to suspend, it may turn its likely institutional dominance of CCWA into outright control.

If that occurs following a decision by the county to end its decision-making role as SWP contractor, the result is likely to prove prejudicial to the county and its constituents in the south coast and elsewhere, as well as to the county's ratepayers and taxpayers. An October 17, 2017 city manager's memorandum to the Santa Maria City Council, prepared by that city's Director of Utilities, recognizes that the County Board of Supervisors "exercises significant authority over State Water decisions because approval of the County, as contractor, is required." (*Id*., p. 3.) Ominously, the memorandum presents the county's substantial influence as a drawback to be overcome, asserting that "the composition of the County Board of Supervisors changes over time, causing uncertainty in long-term water planning." (*Id*.) Another way of putting this, however, is that control by CCWA—particularly if it is dominated by a single city—can be counted on to be less democratically accountable to communities throughout the county, and less likely to ask hard questions of DWR and other contractors as it relates to future SWP participation.

B. CCWA Control Would Weaken the County's Independent Voice in Addressing the Proposed SWP Contract Extension.

There could hardly be a worse time than the present for the county to abandon its longstanding, if sometimes reluctant, role as SWP contractor. Discussions remain pending between DWR and SWP contractors over the proposed multi-decade extension of SWP water supply contracts, presently set to expire in 2035 and several years following. During earlier discussions of the proposed contract extension several years ago, Santa Barbara County occasionally used its independent role as SWP contractor to ask prescient questions. For example, a September 30, 2014 memorandum from County Public Works requested that as part of its water contract extension proposal, "DWR should include in the EIR an analysis of the economic and legal impacts and implications relative to the continued pre-Prop 13 taxing authority with the Contract Extension Project; i.e., what are the impacts of assuming an extension of pre-Prop 13 taxing authority. The county is concerned that if a contractor default should occur, the County would be liable for covering the default without taxation ability that exists under the current contract because of its pre-Prop 13 legal status."

Research for this letter identified no document in which DWR thoroughly analyzed the economic and legal impacts of this important issue as requested by County FCD. The county's independent role as SWP contact is likely to become even more crucial in the

future, as decision-makers get closer to making a decision on the proposed SWP contract extension

C. CCWA Control Would Weaken the County's Independent Voice in Addressing the Proposed Delta Tunnels.

This year and in the foreseeable future, the county's continuation of its decision-making role as SWP contractor will be crucial to preserve the county's crucial independent voice in review and decision-making on the proposed Delta tunnels. That subject is closely related to the proposed SWP contract extension, since the notoriously troubled financing arrangements for the proposed tunnels, to the extent they are known, would likely be flatly infeasible if the SWP contracts were allowed to expire starting in 2035.

On occasion, the County FCD has already used its SWP contractor role to raise tough questions about the proposed tunnels and their relationship to the contract extension. For example, in a December 15, 2014 letter to DWR's project manager for the SWP contract amendment, County Public Works noted DWR's unsatisfactory response to the "many occasions" the county had raised inquiries related to its taxing authority, and raised concern about the County FCD's "financial responsibilities" if the then-current BDCP were implemented "as part of the District's contract" with DWR. The potentially devastating impacts of the tunnel project for the environment, and the county's agencies and ratepayers, makes it crucial to preserve the county's ability to act independently from CCWA on SWP matters. (See, e.g., C-WIN, *The Unaffordable and Unsustainable Twin Tunnels: Why The Santa Barbara Experience Matters* 7, 9, 18 (July 2016); ECONorthwest, *California WaterFix: Potential Costs to Santa Barbara County* (July 2016).)

D. CCWA Control Would Weaken the Opportunity for Independent Discussion of Critical Water and Infrastructure Choices.

Last year's Oroville Dam crisis provided another sobering reminder of the significant costs and risks the SWP will face in the years ahead, as well as the importance of listening to independent voices willing to ask difficult questions of DWR and other state water contractors needed to improve economic and environmental sustainability. (See, e.g., Independent Forensic Team report, *Oroville Dam Spillway Incident* (2018), https://drive.google.com/file/d/15fmj836-EnyYgPgf7_a_JIoK0N8J-mZE/view; R. Stork, et al., *The Oroville Dam 2017 Spillway Incident* (2017), https://drive.google.com/file/d/15fmj836-EnyYgPgf7_a_JIoK0N8J-mZE/view.) More recently, the foundering but still-pursued Delta tunnels project has prompted major criticisms and rethinking of "water reliability" paradigms from unexpected sources. In a recent op-ed piece, the mayor of Los Angeles warned that "we cannot rely solely on 20th century engineering for our 21st century water needs." Mayor Garcetti called for a new "Mulholland moment" focused upon local supplies and sustainability. https://www.dailynews.com/2018/03/03/los-angeles-new-mulholland-moment-for-safe-and-adequate-water-eric-garcetti/. At this crucial moment for local and statewide water future, the county should be wary of needlessly curtailing its own influence on SWP projects. The county should especially be wary of handing over its authority to CCWA, the very agency that has kept Santa Barbara County closely associated with "paper water"

planning and obsolete 20th century engineering.

V. The Proposed Elimination of the County's Contractual Role Would Weaken Environmental Protection and Informed Self-Government, Requiring Review Under CEQA.

CCWA assumes no environmental review will be necessary under CEQA if it takes over for the county as SWP contractor, on the apparent premise that it is environmentally inconsequential to substitute one public agency for another in this capacity. That assumption is specious. As analyzed above, that change is likely to weaken environmental accountability for much, if not all, of the county. Moreover, CCWA's benign account of its latest attempt at overreaching misses the importance of CEQA's interactive process to informed self-government. (See, e.g., *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 392 ("The EIR process protects not only the environment but also informed self government"); *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929, 936 (members of the public have a "privileged position" in the CEQA process).) As an environmentally consequential change that would prejudicially eliminate the county's independent role as SWP contractor, the proposed takeover by CCWA as contractor is likely to require CEQA review.

LAW OFFICE OF ROGER B. MOORE

LAND, WATER AND ENVIRONMENTAL LAW

337 17TH STREET, SUITE 211
OAKLAND, CALIFORNIA, 94612
LANDWATER.COM, RBM@LANDWATER.COM, 510-548-1401
ADMITTED IN CALIFORNIA

February 1, 2019

To: Carolee Krieger, California Water Impact Network

From: Roger Moore

Re: Failure of BHFS Letter to Address Major Risks from CCWA's Efforts to Pressure Santa Barbara County to Relinquish its Role as State Water Project Contractor

Overview

In a letter to Ray Stokes dated August 1, 2018 (BHFS Letter), the law firm serving as general counsel to the Central Coast Water Authority, Brownstein Hyatt Farber Schreck, took issue with some of the conclusions in my April 5, 2018 legal analysis entitled *Counting on the County: Legal and Practical Concerns About the Proposal for Santa Barbara County to Relinquish Its Role as State Water Project Contractor*. *Counting on the County* identifies major legal, institutional and financial risks that would follow if the county were to accede to CCWA's pressure to have the county relinquish its decision-making role as State Water Project (SWP) contractor.

Although the BHFS letter congratulates its client for "expert" management (page 5) and devises colorful adjectives for its critics (e.g., "false, confused, irrelevant, and misleading," page 3), the letter fails to overcome serious legal problems addressed in *Counting on the County*. The letter is replete with flawed assumptions that a controversial assignment impacting the county's public role in the SWP can be resolved as routine contract interpretation. Due to crucial near-term decisions the county will face as SWP contractor—for example, whether to accede to a mislabeled SWP "extension" amendments that would open the door to new facilities debt and appear chiefly designed to facilitate indebtedness for the proposed Delta tunnels—it would be hard to imagine a worse time for the county to voluntarily abandon its independent voice as a SWP contractor, and thereby weaken public accountability over the SWP's consequences in Santa Barbara County. The risks from losing the county's critical independent role must be measured against the high likelihood, analyzed in detail in *Counting on the County*, that assigning the contractor role to CCWA will fail, as a matter of law, to shield the county from contingent liability any more effectively than current agreements.

Existing Agreements Make CCWA Fully Responsible for State Water Project Costs and Protect Against the County's Contingent Liability

Counting on the County pointed out (page 3) that existing agreements already make CCWA entirely responsible for State Water Project costs, and contain provisions designed to prevent the Santa Barbara County Flood Control and Water Conservation District (County FCD) from being held responsible for contingent costs. Those agreements include the 1991 Transfer of Financial Responsibility Agreement (TOFR) and Water Supply Agreements (WSAs) between CCWA and its contractors. Under these agreements, CCWA must "fully and completely" reimburse the County FCD, and honor specific provisions intended to avoid default and minimize the risk of contingent liability (TOFR, Recital F.) If CCWA fails to prevent default, the County FCD may bring an enforcement action against CCWA or defaulting contractors. (TOFR, section 3, subdivisions A, B.)

These protections exist already, and will continue without the County FCD having to weaken public accountability by abandoning its role as SWP contractor. Despite its veneer of disagreement, the BHFS letter (page 1) concedes it is "[a]greed" that "[s]ince 1991, CCWA has been fully responsible for all costs associated with the State Water Contract." CCWA acknowledges that "CCWA's contracts with its members and other project participants include numerous safety mechanisms to guard against any default, including the so-called 'step-up' provisions that require other contractors to assume the obligations of any defaulting contracting party." (*Id*. at 4, fn. 1.)

Retaining the County's Contractor Role is Needed to Protect the Public Against Efforts to Make Risky Changes in the State Water Project and Force Payment for Costly New Projects, Including the Delta Tunnels.

The BHFS letter misleadingly suggests (page 1) that abandoning the County's contractor role is needed to prevent taxes or assessments from being levied on "all property owners within Santa Barbara County," including "property owners who do not receive State Water Project water." This suggestion is doubly wrong. First, it overplays a speculative and hypothetical threat within the existing contracts that fails to explain or account for existing safeguards protecting the County. Second, it ignores the immediate risk that without the County asserting its independent voice as State Water Contractor, CCWA will quickly acquiesce to contract amendments and project decisions that will make the SWP, and taxpayers and ratepayers' obligations under it, immensely more costly and risky. These changes are intended to facilitate irrevocable debt obligations for the Delta tunnels, currently branded as California WaterFix.

The superficial discussion of taxes and levies in the BHFS letter is a selective reference to article 34(a) of the County FCD's long-term water supply contract with DWR, which provides that if the Agency is "unable to raise sufficient funds by other means," its governing body shall levy "a tax or assessment sufficient to provide for all payments under this contract then due, or to become due within that year." Water Code section 11652 also specifies that "[t]he governing body shall, whenever necessary, levy

upon all property in the state agency not exempt from taxation, a tax or assessment sufficient to provide for all payments under the contract then due or to become due within the then current fiscal year or within the following fiscal year before the time when money will be available from the next general tax levy." Contractors can only levy a tax when unable to make payment by other means. See 61 Ops. Cal. Atty. Gen. 373, •6 (1978).

Neither Water Code section 11652 nor article 34(a) would, or could, change as the result of an assignment agreement between the County FCD and CCWA. Accordingly, the argument that the County's obligations would be avoided is entirely derivative of the flawed argument, criticized in *Counting on the County* and further below, that an assignment to CCWA can succeed in reducing any residual contingent liability left to the County if CCWA defaults on its obligations. The BHFS letter deems CCWA default to be unlikely. Even if default occurred under the current agreements, despite the TOFR's provisions aimed at preventing it, the County could sue CCWA or defaulting contractors to recover costs before such liability would even potentially come into play. (TOFR, section 3, subdivisions A, B.)

In contrast to these highly speculative risks, there is a clear and immediate danger that if the County voluntarily abandons its role as SWP contractor, and thereby deprives its constituents of an independent voice, CCWA will take actions greatly compounding the SWP's problems for taxpayers and ratepayers, including those in the county. With the county out of the picture, CCWA is poised to accede to enormous new indebtedness to fund the Delta tunnels, and sign contract "extension" amendments approved by DWR in December that are designed to facilitate them. In the current WaterFix coordinated proceedings in Sacramento County Superior Court, DWR is already seeking to aggressively use the code and contract provisions on SWP taxing authority to impose potential billions in WaterFix-related costs on taxpayers. In short, the BHFS letter's premise that assignment to CCWA will result in "no different or new obligations," or new contract amendments (page 4) could not be more wrong.

In light of the immediate and irreversible risk that CCWA, if allowed to become SWP contractor, will acquiesce to the imposition of major new SWP-related debt, the BHFS letter's claim that "the proposed assignment, if approved, will be invisible to Santa Barbara County residents and businesses" (page 5) is hollow and false. DWR is separately pursuing, and has filed a separate legal action seeking to validate, contract "extension" amendments that would facilitate indebtedness for the Delta tunnels. Testimony at the September 11, 2018 Joint Legislative Budget Committee hearing undermined the premise of independence from WaterFix upon which DWR's separate Contract Extension is founded. That includes the testimony of DWR director Karla Nemeth that DWR plans to "use these amendments to finance WaterFix," and the testimony of Rachel Ehlers of the Legislative Accounting Office that the contract extension amendments would "affect and facilitate" WaterFix.

DWR's contract "extension" amendments are poorly named. The proposed amendments would not simply extend the length of the SWP contracts, currently set to

expire in 2035-2042, for another half-century until 2085. Instead, they would make the SWP significantly more costly and risky by taking away an important safeguard in the current contracts. DWR's extension amendments would eliminate limitations on covered "facilities" under article 1(hh)(8) of current SWP contracts that would otherwise render WaterFix ineligible for revenue bond financing. Through the "extension" amendments, DWR proposes new authorization for "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."

The first of these changes would remove a major current contractual obstacle to financing the Delta tunnels. The second would make it easier for the most powerful SWP contractors to impose new revenue bond debt for other costly and risky new projects. Under the "extended" contract provisions proposed by DWR, that would be the case even if Santa Barbara County, and its taxpayers and ratepayers, oppose the imposition of debt for these new facilities.

The "Evergreen Clause" in Santa Barbara County's State Water Contract Provides a Better Way to Protect the County's Interests, Without the Risky Changes Proposed by DWR and CCWA.

CCWA has misleadingly suggested that the "extension" amendments proposed by DWR are needed to ensure continued county access to SWP water supplies and to avoid compression problems.

That is simply not true. Article 4 of the current SWP contracts contains what is commonly known as the Evergreen Clause. That clause enables any SWP contractor, at least six months before SWP contracts are set to expire, to elect to receive continued service for an extended period, and sets forth the procedure in which DWR is to honor the request, including specific conditions noted "unless otherwise agreed to." The conditions, unless "otherwise agreed to," are:

> (1) Service of water in annual amounts up to and including the Agency's maximum annual entitlement hereunder. (2) Service of water at no greater cost to the Agency 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.

The Evergreen Clause provides that "[o]ther 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 Agency shall have the same option to receive continued service

here provided for upon the expiration of that and each succeeding period of continued service." This provision helps establish that to receive continued water service or ensure workable periods to cover expenditures for SWP operation and maintenance, SWP contractors—and the Legislature—need not hastily accede to DWR's proposed extension provisions, including those that could make the SWP more costly and risky.

The argument that the contract "extension" proposed by DWR—with potentially risky escalation of debt burdens bundled in—is needed to address legitimate operation and maintenance needs of the existing SWP is also untrue. Those could be more responsibly addressed consistently with the Evergreen Clause, rather than acquiescing to finance major new facilities debt. The recent Oroville dam crisis underscores the importance of listening to independent voices willing to ask difficult questions of DWR and other state water contractors needed to improve economic and environmental sustainability. See, e.g., Independent Forensic Team report, *Oroville Dam Spillway Incident* (2018), https://drive.google.com/file/d/15fmj836-EnyYgPgf7_a_JIoK0N8J-mZE/view; R. Stork, et al., *The Oroville Dam 2017 Spillway Incident* (2017), https://drive.google.com/file/d/15fmj836-EnyYgPgf7_a_JIoK0N8J-mZE/view.

As recently noted, "[l]arge scale water management systems in general, and California's water management system in particular, provide a good analogue to the financial system." J. Viers and D. Nover, *Too Big to Fail: Limiting Public Risk in Hydropower Licensing*, 24 Hastings Environmental L.J. 143, 144 (2018). As was the case when financial systems appeared to some "too big to fail," a prudent system manager should not respond to crises by making it easier to add indebtedness on expensive new facilities, potentially at the expense of constructive steps to better manage existing ones. By contrast DWR will, with CCWA's acquiescence, force a risky escalation of indebtedness under the guise of risk reduction.

Assignment to CCWA Will Be Ineffective in Reducing the Risk of the County's Contingent Liability and Avoiding the Need for Taxpayer Voting

Despite extensive discussion of extraneous issues, the BHFS letter is almost entirely unresponsive to the detailed analysis in *Counting on the County* (pages 3-9) explaining why the proposed assignment agreement to CCWA would be ineffective in reducing any remaining county risk of contingent liability beyond the level provided in existing agreements. The core error in the BHFS letter (pages 3-5) is that it assumes the reduction in contingent liability will be effective as a matter of contract law, because the proposed assignment agreement says that the county will have no role. But that is not the law, which will turn on whether they underlying assurances codified in the Burns-Porter Act have been met. Whether the contracts would allow for *some* assignment to occur is inapposite; the issue is whether, under governing law, the requisites that underlay the county's existing SWP commitments can be fully assumed by an entity that has inferior taxing authority—even if its constituent entities have some ability to tax.

The point analyzed in *Counting on the County* is that regardless of what the contracts' attempt to assign, elimination of the contingent role will be ineffective unless CCWA is legally capable of meeting the Governor's contracting principles and Burns-

Porter Act requirements, as approved by California's voters in 1960 and later codified in the original SWP contracts. (See *Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900, 904-910.) *Goodman* also clarifies the important distinction between the original agreements and CCWA and DWR's proposed new agreements for purposes of determining whether the latter are exempt from constitutional provisions limiting property taxes and requiring voter approval. The original SWP contracts survived that scrutiny and were grandfathered in, but that would not be the case for new agreements. Although CCWA asserts that it has some taxing authority, notably absent from its analysis is any claim that this authority is commensurate with that of the county. Without such a showing, attempts to assign away the contingent liability not already assumed by CCWA are likely to be ineffective, and at best would still threaten to immerse the county in complex and costly litigation.

Almost half a decade ago, Santa Barbara County Public Works requested DWR to "include in the EIR" for the SWP contract extension an analysis of the economic and legal impacts and implications relative to the continued pre-Prop 13 taxing authority with the Contract Extension Project; i.e., what are the impacts of assuming an extension of pre-Prop 13 taxing authority. The county is concerned that if a contractor default should occur, the County would be liable for covering the default without taxation ability that exists under the current contract because of its pre-Prop 13 legal status." DWR declined to provide that analysis in its Contract Extension EIR, and still has not done so.

The Assignment of the Contractor Role to CCWA Would Require CEQA Compliance.

The BHFS letter (page 6) incorrectly assumes no environmental review will be necessary under CEQA if it takes over for the county as SWP contractor, on the apparent premise that it is environmentally inconsequential. That assumption is specious. As analyzed above, that change is likely to weaken environmental accountability for much, if not all, of the county. (See, e.g., *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 392 ("The EIR process protects not only the environment but also informed self government"; *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 910-920 (CEQA compliance required prior to making environmentally consequential changes in SWP contracts).)

January 14, 2019

VIA OVERNIGHT DELIVERY AND EMAIL

Michael Weed, Esq.
Orrick, Herrington & Sutcliffe LLP
400 Capitol Mall, Suite 3000
Sacramento, CA 95814-4497
mweed@orrick.com

Re: KCWA Member Units' and SWP Agricultural Water Contractors' Meet and Confer Positions Regarding the Administrative Record in *DWR v. All Other Persons*, JCCP No. 4942

Dear Mr. Weed:

Pursuant to paragraph 5 of the Court's order regarding the Validation Record, this letter sets forth the undersigned parties' positions regarding their request for additions and deletions of record documents that have been denied by Plaintiff California Department of Water Resources ("DWR").[1]

At the outset is important to point out that the matter DWR seeks to validate the lawfulness of, and all questions related thereto, as against the world, could be interpreted as extremely broad. In pertinent part, DWR's Validation Complaint ("Complaint") seeks a judgment to validate:

(1) **the bonds** DWR has authorized to finance the capital costs of a water facility known as the California WaterFix ("WaterFix" or "CWF");
(2) **the resolutions** DWR adopted in connection with those bonds;
(3) the **pledge of revenues** for the bonds repayment, which DWR alleges it is authorized to collect from the State Water Contractors ("Contractors") pursuant to their **Water Supply Contracts**.[2]

[1] Attached hereto as Exhibit A is a list of the disputed additions and deletions discussed herein.

[2] If we misconstrue the Complaint's breadth and DWR is not actually seeking a judgment that would have the legal effect of precluding our clients from in a future proceeding challenging DWR's authority to charge or collect revenues from our clients or the Kern County Water Agency for repayment of CWF bonds or other costs pursuant to the *existing* Water Supply Contracts (the "Cram-Down"), via a Statement of Charges or some other billing, then please have DWR immediately so advise us in writing. Also, we note DWR prepared a draft EIR for a project to amend the Water Supply Contracts to add provisions authorizing CWF charges. It is unclear why after filing the Complaint DWR has stated or suggested in other forums (e.g., legislative hearings regarding the extension amendment) that a further contract amendment is necessary to charge the Contractors for CWF, when in this action DWR is alleging all Contractors, including the North of Delta Contractors (permitted to opt-out and avoid CWF charges under such amendment), have no choice but to participate in and pay for CWF under the *existing* Water Supply Contracts. We ask that DWR clarify its position in this regard.

(Complaint, ¶¶ 1, 54, Exhibit A, § 805.) The Complaint attaches more than 50 pages constituting the three (3) substantive Resolutions underlying its decision to issue bonds. In that regard, the Complaint seeks validation of the substance of the Resolutions themselves, by seeking validation of DWR's "statutory authority to finance [CWF] *in accordance with the terms of the Resolution* and Supplemental Resolutions." (Complaint, § 15.) The Complaint also references DWR's Project Order No. 40, which purports to add CWF to the Central Valley Project ("CVP"), and consequently to the State Water Project ("SWP"), pursuant to Water Code section 11260 as a modification of Delta facilities described therein. Finally, Complaint's Prayer for Relief restates the broad relief requested throughout the text of the Complaint itself.[3]

The validation statute itself is silent as to what documents are included in the administrative record in a validation action. But there are two analogous contexts in which there is statutory authority: administrative mandamus proceedings and CEQA administrative mandamus proceedings. In both contexts, the scope of the record is construed broadly to include relevant documents in the agency's actual or constructive possession. (Code Civ. Proc., § 1094.6, subd. (c) [mandamus record includes, *inter alia*, "all written evidence, and any other papers in the case"]; Pub. Resources Code, § 21167.6, subd. (e)(10) [CEQA record includes, *inter alia*, "[a]ny other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits of the project"].) By analogy, it stands to reason that the administrative record in this validation action must include any document relevant to the determination of whether the resolutions at issue are valid and the requested judgment may issue.[4]

A. Water Supply Contracts

In the Final Draft Index, DWR has listed the State Water Project Water Supply Contracts as part of the Administrative Record but has stated that it agrees to their inclusion only for "the limited purpose of establishing the existence of those contracts." DWR has specifically stated that they may not be referred to "for purposes of contract interpretation or implementation, as the legality, interpretation and implementation of such contracts have been previously validated by judicial ruling or operation of law." The undersigned reject this attempt to qualify the inclusion of these documents in the record. As discussed above, these documents should be included in the record because they are relevant to the determination of issues in this action. The undersigned have plead, as their Third Affirmative Defense, that the judgment requested is contrary to the terms of these contracts. In addition to being obviously relevant to that affirmative defense, the contracts are also relevant to DWR's claim for validation.

To give just one example of their relevance, DWR has requested a judgment validating its power to "adopt and approve the Resolution[s] … and each of the recitals, findings, determinations, and terms therein." (Compl., ¶54(b).) Among those "terms" are the covenant in section 805 of the General Bond Resolution that "[t]he Department shall charge and collect amounts under the Water Supply Contracts sufficient to return the costs of the California WaterFix

[3] The breadth of the Complaint, and its extension to "implementation" actions, is explained in more detail in the Honorable Judge David Brown's Ruling on Submitted Matter (Hearing on Demurrer (Natural Resources Defense Council) – Joinder), dated January 31, 2018, attached hereto as Exhibit B.

[4] Note that the undersigned parties do not waive their positions that the relevant evidence in this case is not confined to the administrative record and that this action is subject to the Civil Discovery Act.

for the construction or acquisition of which bonds have been authenticated and delivered without regard to whether or not the Department is able to construct, acquire or operate the California WaterFix." Those charges are not authorized under the Water Supply Contracts, and thus a judgment must not issue declaring all the terms of that resolution to be valid. DWR's contention that "the legality, interpretation and implementation of such contracts have been previously validated by judicial ruling or operation of law" is incorrect. No prior judgment exists answering the question of whether the contracts authorize DWR to charge the contractors for WaterFix. As suggested above, if DWR does not actually seek to force our clients to pay for CWF costs under the existing Water Supply Contracts, then it should so state as much in an amendment to the Complaint to reduce and/or clarify its scope.

B. Amendment to Funding Agreements

The First Amended Memorandum of Agreement regarding the funding for review of the BDCP is relevant to this action, because the undersigned have asserted as their Tenth Affirmative Defense that the matter DWR seeks to validate is contrary to those agreements. Furthermore, they have asserted as their Eighth Affirmative Defense that DWR is estopped from seeking the judgment it requests in this action, *inter alia* because of the representation that the undersigned would be given an opportunity to opt-out of the Project in exchange for the funding committed in these agreements (amounting to fraud and misconduct on DWR's part).

Furthermore, Document 16y in DWR's proposed record is the original Memorandum of Agreement between DWR and the SWP contractors. Inexplicably, DWR refuses to include an amendment to an agreement in the record when it has already acknowledged that the agreement itself belongs in the record. DWR's position on this issue is inconsistent and unreasonable and should be withdrawn.

C. KCWA Member Unit Contracts

DWR has agreed to include the SWP Contractor's Water Supply Contracts (with caveats, as discussed above) and has included the Funding Agreements between DWR and the SWP Contractors. However, it has refused the undersigned's request to include parallel agreements between KCWA and its member units. As DWR is well aware, these member units pay for most of the SWP charges DWR bills to KCWA, or over 20% of the costs of the SWP. The KCWA Member Unit Agreements establish that charges imposed on KCWA are passed through to the Member Units, thus establishing their standing in this action. The undersigned, in their Third Affirmative Defense, allege that the project is inconsistent with these contracts as well as the SWP Water Supply Contracts, and their Eighth Affirmative Defense alleges estoppel based on fraud and misconduct on DWR's part.

D. CEQA Approvals

The undersigned have requested the inclusion of the CEQA document entitled "Decisions Regarding the BDCP/California WaterFix Final Environmental Impact Report (SCH # 2008032062)," with its attachments including the EIR, and the press release entitled "California WaterFix Reaches Key Milestone As State Environmental Review Is Certified." This CEQA document is absolutely essential to resolution of this action, because it defines in detail the Project

that DWR is seeking to validate. DWR has requested a judgment stating that it "has the authority under California Water Code Sections 11260, 11500 and 11700 to issue the California WaterFix Revenue Bonds to finance the capital costs of the California WaterFix as units of the Project." Making such a determination requires the interpretation of the statutes authorizing the Project and a comparison of that statutory meaning with the WaterFix project as proposed. The CEQA documents contain the details of the WaterFix project including the description of what CWF is.

E. Governor's Contracting Principles

The Governor's Contracting Principles, which DWR has refused to include at the undersigned's request, are "an important source of the [Burns-Porter] Act's meaning, and the Act must be construed in light of their contents." (*Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900, 908.) Indeed, they are a key interpretive resource for understanding the contracts in general, because "the voters were aware that all future water contracts would be implemented pursuant to the Contracting Principles" when they approved the initial funding of the SWP. (*Ibid.*) If, as the undersigned believe, DWR seeks a judgment that would imply that bond debt to pay for WaterFix is part of the indebtedness approved by the voters when they approved the Burns-Porter Act in 1960, as described in *Goodman*, then this document is essential to resolution of that question.

F. Proposition 9 and Statement of Vote

The undersigned requested inclusion of the text of the Peripheral Canal initiative that would have required new provisions be added to the Central Valley Project Act to authorize the Peripheral Canal (which DWR apparently analogies to CWF), and the Statement of Vote showing California voters rejected it. It should be noted that it was DWR that made the Peripheral Canal relevant to this action by its reliance on Project Order 12 (Document 18 in the proposed record) approved by DWR in or about 1966. If the Peripheral Canal ("PC") is relevant, then DWR cannot just cherry-pick which PC documents should and should not be in the record. Given that reliance, these documents are relevant to the interpretation of the statutes authorizing the SWP and CVP, because "both the Legislature and the electorate by the initiative process are deemed to be aware of laws in effect at the time they enact new laws and have enacted the new laws in light of existing laws having direct bearing upon them." (*Williams v. Superior Court* (2001) 92 Cal.App.4th 612, 624.)

G. Bittle Letter

The undersigned requested that DWR include a letter from Timothy Bittle, of the Howard Jarvis Taxpayers Association, to Barbara Keegan with the subject line "Property Tax Override for California Water Fix." DWR's refusal to include this document is odd, considering that it is standard practice to include comment letters received by an administrative agency in the Administrative Record. (E.g. Pub. Resources Code, § 21167.6, subd. (e)(6) [CEQA].) In any case, the document is relevant to the Prop 13/218/26 concerns that have been raised by the parties to this case. The General Bond Resolution in section 805 commits DWR to charge **and collect** revenues from the SWP Contractors to pay for the WaterFix and in section 807 commits DWR to "diligently enforce its rights" under the contracts, including the right to require the imposition of taxes under, for instance, article 34(d) of KCWA's water supply contract, which requires the imposition of taxes.

Again, if DWR takes the position that the preexisting indebtedness exception to Prop 13 relied on in *Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900 applies to taxes to pay for CWF, this letter is clearly relevant to the action. Furthermore, it should be admitted to the record as a public comment letter received by the agency without regard to the matter to be validated.

H. Revised Bulletin 76 (Deletion)

The undersigned have requested that DWR delete from its draft record document 19, which is a revision to DWR Bulletin 76, entitled "Delta Water Facilities," dated July 1978. This document, to the extent it has any bearing on WaterFix, demonstrates only that DWR has made various plans regarding improvements in the Delta for some time. However, 18 years removed from approval of the Burns-Porter Act, this self-serving document has no conceivable relevance to CWF or what the voter's understood when they approved the Act in 1960. It cannot be relevant to the question in this action, which is whether the statutory authorization to modify CVP Delta facilities is broad enough to authorize DWR to unilaterally add the gigantic WaterFix project and its $15 plus billion dollar price tag to the CVP and by extension the SWP and its billings. What DWR may or may not have said about the PC and its authority to add or modify Delta facilities in 1978 is irrelevant and self-serving. In contrast, the original Bulletin 76, dated 1960, has been included at the undersigned's request, and is the relevant version. The 1960 version, being roughly contemporaneous with the Burns-Porter Act, is relevant to the interpretation of the people's authorization of the SWP.

I. Categories of Documents Relevant to Conditions Precedent

DWR has declined the undersigned's request to include several categories of documents relevant to certain conditions that must be met to justify the bond resolutions. Failure to satisfy these conditions precedent is the basis of the Twelfth Affirmative Defense and others pled by the undersigned. For the reasons set forth below, the undersigned believe these documents must be included in the record.

Furthermore, the undersigned protest DWR's failure to identify the documents it is refusing to include in the record. If DWR is unwilling to cooperate by providing copies of the documents, this will have to be addressed through discovery.

1. Economic Feasibility

DWR is seeking a judgment validating not only its General Bond Resolution for WaterFix bonds but also supplemental resolutions authorizing two specific series of bonds. According to section 205(A) of the General Bond Resolution itself, such issuance requires that DWR certify that the project is "technically and economically feasible." In light of DWR's apparent failure to meet that requirement, the undersigned have pled the Lack of Economic Feasibility or Financial Viability Determination as their Eleventh Affirmative Defense. Thus, the undersigned requested inclusion of "[d]ocuments showing California WaterFix is technically and economically feasible." This category of documents is clearly relevant based on the requirement of section 205(A), and it also includes two documents identified by the undersigned by name, the report titled "Benefit-Cost Analysis of the California WaterFix" by Dr. Jeffrey Michael, and the DWR report titled "The

Unexpected Complexity of the California WaterFix Project Has Resulted in Significant Cost Increases and Delays (Report 2016-132)."

2. Compliance with Water Code section 85089

The undersigned have also requested documents "showing compliance with Water Code section 85089." As you know, section 85089 prohibits "initiation" of "construction" of a new conveyance in the Delta prior to execution of certain agreements with the Contractors. The undersigned assert, as their Sixth Affirmative Defense, that a judgment in this action would be in violation of that provision. For example, the judgment would validate DWR's **commitment** to construct the WaterFix project, as found in section 804 of the General Bond Resolution. While DWR may disagree with this position, this theory is properly pled and relevant documents must be included in the record. Moreover, our clients contend initiation of construction has commenced and the requested documents are relevant to and support their argument. In this regard, this category of documents also includes the JPA for the Delta Conveyance Design and Construction Authority, and its amendments.

3. Compliance with Article 50(g)

The undersigned have also requested documents showing that DWR has complied with article 50(g) of the water supply contracts, which requires that before issuing CVP Act bonds to be repaid out of Water Supply Contract revenues DWR must present a financing plan to the SWP Contractors and allow them the opportunity to comment. Because DWR is attempting to validate the issuance of the WaterFix bonds under the CVP Act and pledge those revenues to repay the bonds **under the existing contracts**, DWR must show that it has complied with the requirements that those contracts impose on the issuance of CVP Act bonds.

4. Basis of Prop 13/218/26 Exemption

The undersigned requested that DWR include documents "supporting DWR's contention that the Contractors may levy taxes or assessments pursuant to the Water Supply Contracts to raise revenues needed to pay for CWF costs, without violating Articles 13, 13A, 13B, 13C, and 13D of the California Constitution." Based on the arguments set forth above regarding Mr. Bittle's letter and others, any exemption from Prop 13, Prop 218, or Prop 26 that DWR believes to be applicable is relevant to this action and the relevant documents must be included in the record. The reality – no matter how much DWR or the Contractors want to dance around the issue – is that many Contractors do and *must* levy property taxes to pay for DWR's SWP charges and, clearly, they will continue to have to do so to pay for the staggering costs of CWF charges. Therefore, it is inevitable that the validity of the bonds and their repayment (e.g., the pledge of revenues from the Contractors' Water Supply Contracts) depends, per *Goodman*, on the resolution of the following issue: Whether the costs of CWF were part of the indebtedness approved by the voters in 1960. If not, Proposition 13 will bar additional property taxes for CWF, and the mechanism laid out to pay the bondholders in the Complaint is not valid. The requested documents are relevant to this issue.

J. Bond Resolutions and Official Statements

The undersigned also requested that DWR include the General Bond Resolution for the Water System Revenue Bonds (DWR-WS-1), any supplemental resolutions related thereto, and

the Official Statements for those series of bonds. Because those bonds were issued under the Central Valley Project Act, and because DWR purports to issue the CWF bonds under the Central Valley Project Act, these documents are relevant to the commitments that DWR has already made regarding funding and how DWR segregates funds from different sources. They are also relevant to the interpretation of the water supply contracts, in particular the scope of the "delta facilities" definition (Article 1(hh)) for which certain charges are authorized under Article 50. If DWR contends CWF fits within this definition and Article 50 may be used to charge the Contractors for CWF costs, then these documents are relevant.

K. Certification of Consistency

As discussed above, DWR is asking for a judgment validating a bond resolution that essentially commits it to construction of the WaterFix. The undersigned have, as their Second Affirmative Defense, that DWR has not met the legal requirements necessary to make that commitment. The Sacramento-San Joaquin Delta Reform Act requires that the Project be consistent with the Delta Plan. This certification by DWR is relevant to that requirement and thus to whether DWR may commit to the project at this point.

L. Transcripts of Legislative Hearings on Contract Extension Amendment

The contract extension amendments are integral to the financing for and even the validity of the bonds. They are relevant to the undersigned's defense based on a lack of a financial viability or economic feasibility determination. They contain admissions by DWR that new contract amendments will be required in order to charge the Contractors for CWF. Furthermore, DWR defines the Water Supply Contracts in its complaint as being the contracts as they exist now and as they may be amended in the future, which means the representations made in these hearings will be relevant to the interpretation of the contracts as they exist now and will then exist, and whether such contracts authorize the alleged pledge of revenues.

/s/ Brett A. Stroud
Brett A. Stroud
of The Law Offices of Young Wooldridge, LLP
for Wheeler Ridge WSD, Semitropic WSD, Semitropic ID,
Buttonwillow ID, Pond-Poso ID, and Oak Flat WD

/s/ R. Scott Kimsey
R. Scott Kimsey
of Klein DeNatale Goldner
for Belridge WSD, Berrenda Mesa WD, Dudley Ridge WD,
Lost Hills WD, and West Kern WD

/s/ Isaac St. Lawrence
Isaac St. Lawrence
of McMurtrey, Hartsock & Worth
for Kern Delta WD, Buena Vista WSD, Henry Miller WD,
and Cawelo WD

/s/ Dan Raytis
Dan Raytis
of Belden, Blaine & Raytis
for Rosedale Rio-Bravo WSD

/s/ Robert G. Kuhs
Robert G. Kuhs
of Kuhs & Parker
for Tehachapi-Cummings County WD

/s/ Michael N. Nordstrom
Michael N. Nordstrom
of The Law Offices of Michael N. Nordstrom
for Empire Westside ID

/s/ Cheryl Orr
Cheryl Orr
of Musick, Peeler, & Garrett
for Tulare Lake Basin WSD

Enclosures: Exhibits A-B

Exhibit A

	KCWA Member Units and SWP Agricultural Contractors join in and incorporate by reference herein KCWA's request for documents to be added to the record, including those described in Attachment A to KCWA's request (listed above under KCWA's proposals)
January 20, 1960	Governor's Contracting Principles for Water Service Contracts under the California Water Resources Development System (Author: DWR)
December 1960	Bulletin 76, entitled "Report to the California State Legislature on the Delta Water Facilities as an Integral Feature of the State Water Resources Development System" (Author: DWR)
1982	Water Facilities Including a Peripheral Canal — Referendum Statute (Proposition 9) (Author: Attorney General of California)
July 17, 1982	Statement of Vote Primary Election June 8, 1982 (Excerpt) (Author: California Secretary of State)
March 15, 2016	Letter from Timothy Bittle to Barbara Keegan re: "Property Tax Override for California Water Fix" (Author: Timothy Bittle, Howard Jarvis, and Taxpayers Assoc.)
August 2016	Benefit-Cost Analysis of the California WaterFix (Author: Dr. Jeffrey Michael, Center for Business and Policy Research, and University of the Pacific)
July 21, 2017	Decisions Regarding the BDCP/California WaterFix Final Environmental Impact Report (SCH # 2008032062), including: • Exh. A: Final EIR/EIS, • Exh. B: Findings of Fact and Statement of Overriding Considerations, • Exh. C: Mitigation, Monitoring and Reporting Program, and • Exh. D: Notice of Determination (Author: Cindy Messer, DWR)
October 2017	Department of Water Resources: The Unexpected Complexity of the California WaterFix Project Has Resulted in Significant Cost Increases and Delays (Report 2016-132) (Author: California State Auditor)
July 21, 2017	California WaterFix Reaches Key Milestone As State Environmental Review Is Certified (Author: DWR)
December 15, 2011	First Amendment to the Memorandum of Agreement Regarding Collaboration on the Planning, Preliminary Design and Environmental Compliance for the Delta Habitat Conservation and Conveyance

	Program in Connection with the Development of the Bay Delta Conservation Plan (Author: DWR)
Any Date	Documents showing compliance with Water Code section 85089 (Author: Any Author)
Any Date	Documents showing California WaterFix is technically and economically feasible (see Complaint, Exh. A, Revenue Bond General Bond Resolution, No. DWR- CWF-1, § 205(A).) (Author: Any Author)
Any Date	Documents supporting DWR's contention that the Contractors may levy taxes or assessments pursuant to the Water Supply Contracts to raise revenues needed to pay for CWF costs, without violating Articles 13, I3A, 13B, 13C, and 13D of the California Constitution (Author: Any Author)
Any Date	Documents showing compliance with Article 50(g) of the Water Supply Contracts with respect to the issuance of WaterFix revenue bonds (Author: Any Author)
November 15, 1963	Water Supply Contract Between the State of California Department of Water Resources and Kern County Water Agency (with Amendments I through 39) (Author: DWR/KCWA)
December 20, 1963	Contract Between the State of California Department of Water Resources and Tulare Lake Basin Water Storage District for a Water Supply (with Amendments 1 through 35) (Author:)
March 23, 1965	Contract Between the State of California Department of Water Resources and Oak Flat Water District for a Water Supply (with Amendments 1 through 35) (Author: DWR/Oak Flat WD)
December 30, 1963	Water Supply Contract Between the State of California Department of Water Resources and Empire West Side Irrigation District (with Amendments 1 through 18) (Author: DWR/Empire West Side ID)
December 13, 1963	Water Supply Contract Between the State of California Department of Water Resources and Dudley Ridge Water District (with Amendments 1 through 28) (Author: DWR/Dudley Ridge WD)
June 29, 1971	Contract Between Kern County Water Agency and Buttonwillow Improvement District of Semitropic Water Storage District for a Water Supply (Author: KCWA/Buttonwillow ID)
December 9, 1976	Amendment No. 1 to Water Supply Contract Between Kern County Water Agency and Buttonwillow Improvement District of Semitropic Water Storage District (Author: KCWA/Buttonwillow ID)

October 25, 1979	Amendment No. 2 to Water Supply Contract Between the Kern County Water Agency and Buttonwillow Improvement District (Author: KCWA/Buttonwillow ID)
November 11, 1995	Amendment No. 3 to the Water Supply Contract Between Kern County Water Agency and Buttonwillow Improvement District of Semitropic Water Storage District (Author: KCWA/Buttonwillow ID)
April 28, 1974	Contract Between Kern County Water Agency and Pond-Poso Improvement District of Semitropic Water Storage District for a Water Supply (Author: KCWA/Pond-Poso ID)
December 9, 1976	Amendment No. 1 to Water Supply Contract Between Kern County Water Agency and Pond-Poso Improvement District of Semitropic Water Storage District (Author: KCWA/Pond-Poso ID)
October 25, 1979	Amendment No. 2 to Water Supply Contract Between the Kern County Water Agency and Pond-Poso Improvement District (Author: KCWA/Pond-Poso ID)
November 14, 1995	Amendment No. 3 to the Water Supply Contract Between Kern County Water Agency and Pond-Poso Improvement District of the Semitropic Water Storage District (Author: KCWA/Pond-Poso ID)
January 9, 1969	Contract Between Kern County Water Agency and Semitropic Water Storage District for a Water Supply (Author: KCWA/Semitropic WSD)
December 9, 1976	Amendment No. 1 to Water Supply Contract Between Kern County Water Agency and Semitropic Water Storage District (Author: KCWA/Semitropic WSD)
October 25, 1979	Amendment No. 2 to Water Supply Contract Between Kern County Water Agency and Semitropic Water Storage District (Author: KCWA/Semitropic WSD)
November 14, 1995	Amendment No. 3 to the Water Supply Contract Between Kern County Water Agency and Semitropic Water Storage District (Author: KCWA/Semitropic WSD)
January 8, 1970	Contract Between Kern County Water Agency and Wheeler Ridge-Maricopa Water Storage District for a Water Supply (Author: KCWA/Wheeler Ridge-Maricopa WSD)
March 25, 1974	Supplement to Contract Between Kern County Water Agency and Wheeler Ridge-Maricopa Water Storage District for a Water Supply (Author: KCWA/Wheeler Ridge-Maricopa WSD)

October 15, 1979	Amendment No. 1 to Water Supply Contract Between Kern County Water Agency and Wheeler Ridge- Maricopa Water Storage District (Author: KCWA/Wheeler Ridge-Maricopa WSD)
April 28, 1988	Amendment No. 2 to Water Supply Contract Between the Kern County Water Agency and Wheeler Ridge-Maricopa Water Storage District (Author: KCWA/Wheeler Ridge-Maricopa WSD)
November 14, 1995	Amendment No. 3 to Water Supply Contract Between the Kern County Water Agency and Wheeler Ridge- Maricopa Water Storage District (Author: KCWA/Wheeler Ridge-Maricopa WSD)
November 14, 1995	Amendment No. 4 to the Water Supply Contract Between Kern County Water Agency and Wheeler Ridge-Maricopa Water Storage District
March 30, 1999	Amendment No. 5 to Water Supply Contract Between Kern County Water Agency and Wheeler Ridge- Maricopa Water Storage District
March 31, 1999	Amendment No. 6 to Water Supply Contract Between the Kern County Water Agency and Wheeler Ridge- Maricopa Water Storage District
October 4 1966	Contract between Kern County Water Agency and Belridge Water Storage District for a Water Supply (Author: KCWA/Belridge WSD)
November 21, 1967	Amendment No. 1 to Water Supply Contract between Kern County Water Agency and Belridge Water Storage District (Author: KCWA/Belridge WSD)
October 11, 1979	Amendment No. 2 to Water Supply Contract between Kern County Water Agency and Belridge Water Storage District (Author: KCWA/Belridge WSD)
September 28, 1983	Amendment No. 3 to Water Supply Contract between Kern County Water Agency and Belridge Water Storage District (Author: KCWA/Belridge WSD)
November 14, 1995	Amendment No. 4 to Water Supply Contract between Kern County Water Agency and Belridge Water Storage District (Author: KCWA/Belridge WSD)
April 7, 1998	Amendment No. 5 to Water Supply Contract between Kern County Water Agency and Belridge Water Storage District (Author: KCWA/Belridge WSD)
December 10, 1999	Amendment No. 6 to Water Supply Contract between Kern County Water Agency and Belridge Water Storage District (Author: KCWA/Belridge WSD)

December 8, 2000	Amendment No. 7 to Water Supply Contract between Kern County Water Agency and Belridge Water Storage District (Author: KCWA/Belridge WSD)
December 8, 2000	Amendment No. 8 to Water Supply Contract between Kern County Water Agency and Belridge Water Storage District (Author: KCWA/Belridge WSD)
September 30, 2003	Amendment No. 9 to Water Supply Contract between Kern County Water Agency and Belridge Water Storage District (Author: KCWA/Belridge WSD)
March 9, 1967	Contract between Kern County Water Agency and Berrenda Mesa Water District for a Water Supply (Author: KCWA/Berrenda Mesa WD)
June 24, 1971	Amendment No. 1 to Water Supply Contract between Kern County Water Agency and Berrenda Mesa Water District (Author: KCWA/Berrenda Mesa WD)
February 28, 1985	Amendment No. 2 to Water Supply Contract between Kern County Water Agency and Berrenda Mesa Water District (Author: KCWA/Berrenda Mesa WD)
November 14, 1995	Amendment No. 3 to Water Supply Contract between Kern County Water Agency and Berrenda Mesa Water District (Author: KCWA/Berrenda Mesa WD)
January 23, 1997	Amendment No. 4 to Water Supply Contract between Kern County Water Agency and Berrenda Mesa Water District (Author: KCWA/Berrenda Mesa WD)
December 22, 1999	Amendment No. 5 to Water Supply Contract between Kern County Water Agency and Berrenda Mesa Water District (Author: KCWA/Berrenda Mesa WD)
June 8, 2000	Amendment No. 6 to Water Supply Contract between Kern County Water Agency and Berrenda Mesa Water District (Author: KCWA/Berrenda Mesa WD)
August 8, 2003	Amendment No. 7 to Water Supply Contract between Kern County Water Agency and Berrenda Mesa Water District (Author: KCWA/Berrenda Mesa WD)
August 31, 2007	Amendment No. 8 to Water Supply Contract between Kern County Water Agency and Berrenda Mesa Water District (Author: KCWA/Berrenda Mesa WD)

August 15, 1967	Contract Between Kern County Water Agency and Buena Vista Water Storage District for a Water Supply (Author: KCWA/Buena Vista WSD)
February 27, 1975	Amendment No. 1 to Water Supply Contract Between Kern County Water Agency and Buena Vista Water Storage District (Author: KCWA/Buena Vista WSD)
December 19, 1979	Amendment No. 2 to Water Supply Contract Between Kern County Water Agency and Buena Vista Water Storage District (Author: KCWA/Buena Vista WSD)
November 14, 1995	Amendment No. 3 to Water Supply Contract Between Kern County Water Agency and Buena Vista Water Storage District (Author: KCWA/Buena Vista WSD)
September 28, 1972	Contract Between Kern County Water Agency and Cawelo Water District for a Water Supply (Author: KCWA/Cawelo WD)
November 14, 1995	Amendment No. 1 to the Water Supply Contract Between Kern County Water Agency and Cawelo Water District (Author: KCWA/Cawelo WD)
February 27, 1975	Contract Between Kern County Water Agency and Henry Miller Water District for a Water Supply (Author: KCWA/Henry Miller WD)
November 14, 1995	Amendment No. 1 to the Water Supply Contract Between Kern County Water Agency and Henry Miller Water District (Author: KCWA/Henry Miller WD)
October 26, 1972	Contract Between Kern County Water Agency and Kern Delta Water District for a Water Supply (Author: KCWA/Kern Delta WD)
December 13, 1979	Amendment No. 1 to Water Supply Contract Between Kern County Water Agency and Kern Delta Water District (Author: KCWA/Kern Delta WD)
November 14, 1995	Amendment No. 2 to Water Supply Contract Between Kern County Water Agency and Kern Delta Water District (Author: KCWA/Kern Delta WD)
November 10, 1966	Contract between Kern County Water Agency and Lost Hills Water District for a Water Supply (KCWA/Lost Hills WD)
September 18, 1967	Amendment No. 1 to Water Supply Contract between Kern County Water Agency and Lost Hills Water District (KCWA/Lost Hills WD)
November 25, 1986	Amendment No. 2 to Water Supply Contract between Kern County Water Agency and Lost Hills Water District (KCWA/Lost Hills WD)

July 23, 1992	Amendment No. 3 to Water Supply Contract between Kern County Water Agency and Lost Hills Water District (KCWA/Lost Hills WD)
November 14, 1995	Amendment No. 4 to Water Supply Contract between Kern County Water Agency and Lost Hills Water District (KCWA/Lost Hills WD)
December 10, 1999	Amendment No. 5 to Water Supply Contract between Kern County Water Agency and Lost Hills Water District (KCWA/Lost Hills WD)
May 5, 1966	Contract between Kern County Water Agency and Rosedale-Rio Bravo Water Storage District for a Water Supply (Author: KCWA/Rosedale-Rio Bravo WSD)
November 13, 1979	Amendment No. 1 to Water Supply Contract between Kern County Water Agency and Rosedale-Rio Bravo Water Storage District (Author: KCWA/Rosedale-Rio Bravo WSD)
November 14, 1995	Amendment No. 2 to Water Supply Contract between Kern County Water Agency and Rosedale-Rio Bravo Water Storage District (Author: KCWA/Rosedale-Rio Bravo WSD)
December 16, 1966	Contract between Kern County Water Agency and Tehachapi-Cummings County Water District for a Water Supply (Agricultural Contract) (Author: KCWA/Tehachapi-Cummings CWD)
January 10, 1980	Amendment No. 1 to Water Supply Contract between Kern County Water Agency and Tehachapi-Cummings County Water District (Agricultural Contract) (Author: KCWA/Tehachapi-Cummings CWD)
November 14, 1995	Amendment No. 2 to Water Supply Contract between Kern County Water Agency and Tehachapi-Cummings County Water District (Agricultural Contract) (Author: KCWA/Tehachapi-Cummings CWD)
December 16, 1966	Contract between Kern County Water Agency and Tehachapi-Cummings County Water District for a Water Supply (M&I Contract) (Author: KCWA/Tehachapi-Cummings CWD)
October 25, 1979	Amendment No. 1 to Water Supply Contract between Kern County Water Agency and Tehachapi-Cummings County Water District (M&I Contract) (Author: KCWA/Tehachapi-Cummings CWD)
November 14, 1995	Amendment No. 2 to Water Supply Contract between Kern County Water Agency and Tehachapi-Cummings County Water District (M&I Contract) (Author: KCWA/Tehachapi-Cummings CWD)

August 8, 2003	Contract between Kern County Water Agency and West Kern County Water District for a Water Supply (Agricultural Contract) (Author: KCWA/West Kern County WD)
June 13, 1968	Amendment No. 1 to Water Supply Contract between Kern County Water Agency and West Kern County Water District (Agricultural Contract) (Author: KCWA/West Kern County WD)
November 14, 1995	Amendment No. 2 to Water Supply Contract between Kern County Water Agency and West Kern County Water District (Agricultural Contract) (Author: KCWA/West Kern County WD)
September 15, 1966	Contract between Kern County Water Agency and West Kern County Water District for a Water Supply (M&I Contract) (Author: KCWA/West Kern County WD)
March 25, 1976	Supplement to Contract between Kern County Water Agency and West Kern County Water District (M&I Contract) (Author: KCWA/West Kern County WD)
January 31, 2009	Contract Between Kern County Water Agency and Buttonwillow Improvement District of Semitropic Water Storage District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/Buttonwillow ID)
March 31, 2009	First Amendment to Contract Between Kern County Water Agency and Buttonwillow Improvement District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/Buttonwillow ID)
January 31, 2009	Contract Between Kern County Water Agency and Pond-Poso Improvement District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/Pond-Poso ID)
March 31, 2009	First Amendment to Contract Between Kern County Water Agency and Pond-Poso Improvement District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/Pond-Poso ID)
January 31, 2009	Contract Between Kern County Water Agency and Semitropic Water Storage District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/Semitropic WSD)
March 31, 2009	First Amendment to Contract Between Kern County Water Agency and Semitropic Water Storage District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/Semitropic WSD)

December 28, 2011	Second Amendment to Contract Between Kern County Water Agency and Semitropic Water Storage District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/Semitropic WSD)
March 30, 2012	Third Amendment to Contract Between Kern County Water Agency and Semitropic Water Storage District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/Semitropic WSD)
January 31, 2009	Contract Between Kern County Water Agency and Wheeler Ridge-Maricopa Water Storage District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/Wheeler Ridge-Maricopa WSD)
March 31, 2009	First Amendment to Contract Between Kern County Water Agency and Wheeler Ridge-Maricopa Water Storage District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/Wheeler Ridge-Maricopa WSD)
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January 9, 2009	Contract Between Kern County Water Agency and Buena Vista Water Storage District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/Buena Vista WSD)
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December 28, 2011	Second Amendment to Contract Between Kern County Water Agency and Cawelo Water District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/Cawelo WD)
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January 31, 2009	Contract Between Kern County Water Agency and Rosedale-Rio Bravo Water Storage District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/Rosedale-Rio Bravo WSD)

March 31, 2009	First Amendment to Contract Between Kern County Water Agency and Rosedale-Rio Bravo Water Storage District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/Rosedale-Rio Bravo WSD)
December 28, 2011	Second Amendment to Contract Between Kern County Water Agency and Rosedale-Rio Bravo Water Storage District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/Rosedale-Rio Bravo WSD)
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March 31, 2009	First Amendment to Contract Between Kern County Water Agency and Tehachapi-Cummings County Water District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/Tehachapi-Cummings CWD)
January 31, 2009	Contract Between Kern County Water Agency and West Kern Water District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/West Kern WD)
March 24, 2009	First Amendment to Contract Between Kern County Water Agency and West Kern Water District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/West Kern WD)
December 28, 2011	Second Amendment to Contract Between Kern County Water Agency and West Kern Water District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/West Kern WD)
March 30, 2012	Third Amendment to Contract Between Kern County Water Agency and West Kern Water District for Delta Habitat Conservation and Conveyance Program Costs (Author: KCWA/West Kern WD)
	The KCWA Member Units and SWP Agricultural Contractors request the following document be deleted from the record: • Bulletin 76, entitled “Delta Water Facilities”, dated July 1978 (Author: DWR) (DWRVAL003700-3961/#19)

07/01/86	Central Valley Project Water System Revenue Bonds, General Bond Resolution (DWR-WS-1)
10/10/18	Central Valley Project Water System Revenue Bonds Series AZ – Official Statement
07/27/18	Certification of Consistency (Certification ID: C20185)
	Any and all transcripts of legislative hearings related to the SWP Water Supply Contract extension amendment.
	Any and all Official Statements regarding bonds issues under Resolution No. DWR-WS-1.
05/14/18	Joint Powers Agreement Forming the Delta Conveyance Design and Construction Joint Powers Authority.
10/26/18	Amended and Restated Joint Exercise of Powers Agreement Between the Department of Water Resources, State of California and the Authority.
	Prior versions of “Amended and Restated Joint Exercise of Powers Agreement Between the Department of Water Resources, State of California and the Authority.”

Exhibit B

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 01/31/2018 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **34-2017-00215965-CU-MC-GDS** CASE INIT.DATE: 07/21/2017
CASE TITLE: **California Department of Water Resources vs. All Persons interested in the matter of the Authorization of California WaterFix Revenue Bonds, the Issuance, Sale and Delivery of California's Waterfix Revenue Bonds Series A**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP

APPEARANCES

Nature of Proceeding: Ruling on Submitted Matter (Hearing on Demurrer (Natural Resources Defense Council) - Joinder) taken under submission on 1/23/2018

TENTATIVE RULING

Plaintiff California Department of Water Resources' ("Plaintiff" or "DWR") Demurrer to Defendant Natural Resources Defense Council's ("NRDC") Answer to DWR's Complaint for Validation is OVERRULED.

This is a special proceeding filed pursuant to Government Code § 17700 and Code of Civil Procedure § 860 to determine the validity of bond financing for a state agency's project. A validation proceeding differs from a traditional action challenging a public agency's decision because it is an in rem action whose effect is binding on the agency and on all other persons. Under Code of Civil Procedure § 860, a public agency may bring an action to determine the validity of an action it undertakes within 60 days of that action. Here, the state agency initiating the proceeding and seeking validation is Plaintiff DWR. It is apparently undisputed that DWR is a state agency that is authorized to file actions to validate its financial instruments. (Cal. Water Code §§ 120,123; *see Planning & Conservation League v. Dep't of Water Res.* (1998) 17 Cal.4th 264, 269.)

DWR filed its Validation Complaint on July 21, 2017, seeking a judgment confirming the validity of its bond financing for the "California WaterFix" project. The Validation Complaint includes one cause of action for "Determination of Validity." (Compl. at 13.)

In pertinent part, the DWR Validation Complaint seeks a judgment to validate:

(1) **the bonds** the Department has authorized to finance the capital costs of a water facility known as the California WaterFix;

(2) **the resolutions** the Department adopted in connection with those bonds; and

(3) **the pledge of revenues** for their repayment.

(DWR Validation Compl. ¶ 1 (emphasis added).) DWR's Validation Complaint explains that DWR is seeking to validate "only that the Central Valley Project Act authorizes it **to issue revenue bonds** to finance the capital costs of the California WaterFix **and to pledge California WaterFix Revenues** to secure the payment of debt service on those bonds in the manner provided by the resolutions." (DWR Validation Compl. ¶ 2 (emphasis added).) "The Department brings this action to obtain a validation judgment confirming that authority and the validity of the **bonds** and **resolutions** the Department approved and authorized pursuant to that authority." (*Id.* (emphasis added).)

DWR's Complaint attaches more than 50 pages constituting the three substantive Resolutions underlying its decision to issue bonds. DWR has already adopted these Resolutions. (Compl. ¶ 5.) DWR's pleading nevertheless also seeks validation of the substance of the Resolutions themselves, given that the Complaint seeks validation of DWR's "statutory authority to finance [the WaterFix Project] *in accordance with the terms of the Resolution* and Supplemental Resolutions." (Compl. ¶ 15 (emphasis added).)

Requests for Judicial Notice

NRDC filed a Request for Judicial Notice ("RJN") along with its Opposition. The RJN attaches various agency and county documents (Exhs. 1-5 to RJN) and asserts that the documents are "official acts of state agencies and facts and propositions that are not reasonably subject to dispute." (RJN at 1.)

DWR filed an objection to NRDC's RJN.

The Court did not find it necessary to reach these Exhibits in ruling on DWR's instant demurrer to Answer. Accordingly, NRDC's RJN is DENIED.

Legal Standards

Demurrer to Answer

Code of Civil Procedure § 430.20(a) provides for a demurrer to an Answer where "[t]he answer does not state facts sufficient to constitute a defense." Code of Civil Procedure § 430.20(b) also provides for a demurrer to an Answer where "[t]he answer is uncertain," including "ambiguous and unintelligible."

"A demurrer can be used to eliminate 'boilerplate' affirmative defenses that often appear in answers (e.g., 'waiver,' 'estoppel,' 'unclean hands,' etc.). But such demurrers are very rare, probably because they are not worth the cost when the same result can be achieved by serving requests for admissions or standard form interrogatories seeking the bases for the affirmative defenses." (Weil & Brown, California Civil Procedure Before Trial (2011) § 7:35.) "'The defenses shall be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished.' [Code Civ. Proc. § 431.30(g).]."

For the purposes of the ruling on demurrer, i.e., to test the sufficiency of the answer, it admits all facts well pleaded in the answer, including denials. (*Miller & Lux v. San Joaquin Light & Power Corp*. (1932) 120 C.A. 589, 600, [demurrer "admitted the truth of all issuable facts pleaded in the answer and eliminated all allegations in the amended complaint denied by the answer"]; *Warren v. Harootunian* (1961) 189 C.A.2d 546, 548.) A failure to demur specially is a waiver of defects of form. (*Allerton v. King* (1929) 96 C.A. 230, 233, 235.)

Affirmative defenses must not be pled as "terse legal conclusions," but "rather . . . as facts averred as

carefully and with as much detail as the facts which constitute the cause of action and are alleged in the complaint." (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384 (internal quotation marks omitted); Code Civ. Proc. § 425.10(a)(1); *Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exh.* (2005) 132 Cal.App.4th 1076, 1098-1099.) "The determination of the sufficiency of the answer requires an examination of the complaint because its adequacy is with reference to the complaint it purports to answer." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 733.)

Validation

DWR's Complaint for Validation specifically identifies the statutory authorities that DWR believes authorize this particular validation action. "This is a validation action brought under California Code of Civil Procedure Section 860 *et seq.* (the "Validation Statute") and Government Code Section 17700." (Compl. ¶ 1.) Further, DWR alleges that Section 11700 and Section 11701 of the Water Code authorize "the Department to issue revenue bonds '[f]or the purpose of providing money and funds to pay the cost and expense of carrying out any of the objects and purposes of this part.'" (Compl. ¶¶ 24-25.)

The scope and breadth of this validation action is dictated by these statutes. Accordingly, the Court sets out the relevant statutory text below.

Government Code § 17700

Government Code § 17700 provides, in its entirety:

(a) The state or any state board, department, agency, or authority, including, but not limited to, the State Public Works Board, **may bring an action to determine the validity of its bonds, warrants, contracts, obligations, or evidences of indebtedness pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure.**

(b) (1) Any state board, department, agency, or authority 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 Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure.**
(2) For purposes of this subdivision, "local agency" shall have the same meaning as set forth in Section 53510.

(c) For the purposes of Section 860 of the Code of Civil Procedure, any action initiated pursuant to this section shall be brought in the Superior Court of the County of Sacramento.

(Gov't Code § 17700 (emphasis added).)

Code of Civil Procedure § 860

The statute "pursuant to" which the state agency may bring its validation action under Government Code § 17700 is Code of Civil Procedure § 860, which is the statute DWR's pleading labels the "Validation Statute." Code of Civil Procedure § 860 provides in its entirety:

A public agency may upon the existence 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** in the superior court of the county in which the principal office of the public agency is located **to determine the validity**

of such matter. The action shall be in the nature of a proceeding in rem.

(Code Civ. Proc. § 860 (emphasis added).)

Water Code §§ 11700, 11701

The Validation Statute expressly requires that some "other law" specify the "matter(s)" that are "authorized to be determined" in a validation action under Section 860.

DWR's Complaint for Validation alleges that Water Code §§ 11100 *et seq.* (the "Central Valley Project Act" or "CVP Act") "authorizes" DWR to "issue revenue bonds to pay the capital costs of" new units of the Project. (Compl. ¶¶ 8-9.)

According to DWR's pleading, specifically, "Section 11700 of the CVP Act authorizes the Department to issue revenue bonds '[f]or the purpose of providing money and funds to pay the cost and expense of carrying out any of the objects and purposes of this part.'" (Compl. ¶ 24.)

For the **purpose of providing money and funds to pay the cost and expense of carrying out any of the objects and purposes of this part, the department may, from time to time, issue bonds. As used in this chapter, "bonds" means revenue bonds**, notes, refunding bonds, refunding notes, bond anticipation notes, certificates of indebtedness, and other evidences of indebtedness payable from the sources provided in this chapter.

(Cal. Wat. Code § 11700 (emphasis added).)

DWR's Complaint for Validation further alleges that "Section 11701 of the CVP Act" authorizes issuance of revenue bonds:

Whenever the department determines that it is necessary to carry out any of the objects and purposes of this part, it shall prepare preliminary cost estimates, an estimate of the amount required to be raised for those purposes by the issuance of bonds, and a statement of the probable amount of money, property, materials, or labor, if any, to be contributed from other sources in aid thereof, and shall adopt a resolution declaring that the public interest and necessity require the carrying out of those objects and purposes and authorizing the issuance of bonds for the purpose of obtaining funds in an amount not in excess of that estimated to be required for those purposes.

(Compl. ¶ 25 (quoting Section 11701 of the CVP Act [Water Code § 11701]).)

Relief Sought in DWR's Complaint for Validation

Although DWR's Complaint purports to allege a single cause of action for "Determination of Validity" (Compl. at 13-15), the Complaint actually seeks judicial "validation" of three different items: (1) the validity of DWR's authority to issue revenue bonds to pay capital costs of the WaterFix project; (2) the validity of DWR's "resolutions" underlying its determination to issue such bonds; and (3) the validity of DWR's authority to "pledge revenues" from the project toward repayment of such bonds.

The first paragraph of DWR's Complaint frames the relief DWR seeks in this action:

In short, and as described in detail below, the Department seeks a judgment confirming the validity of (1) **bonds** the Department has authorized to finance the capital costs of a water facility known as the California WaterFix; (2) the **resolutions** the Department adopted in connection with those bonds; and (3) the **pledge of revenues** for their repayment.

(Compl. ¶ 1 (emphasis added).)

The Prayer for Relief in DWR's Complaint seeks this relief in much more detail:

[t]hat judgment be entered on the First Cause of Action determining that:

(a) The Department's **adoption of the Resolution, the First Supplemental Resolution, and the Second Supplemental Resolution, and the respective terms therein, constituted the authorization of the California WaterFix Revenue Bonds** within the meaning of the Validation Statute, including the California WaterFix Revenue Bonds, Series A, Series B and subsequent Series, and the California WaterFix Revenue Bonds are in existence for purposes of validation;

(b) The **Department has the authority under California Water Code Sections 11260, 11500 and 11700 to issue the California WaterFix Revenue Bonds** to finance the capital costs of the California WaterFix as units of the Project **and to**

(i) **adopt and approve the Resolution**, the First and Second Supplemental Resolutions and subsequent Supplemental Resolutions adopted in accordance with the Resolution, and each of the recitals, findings, determinations, and terms therein;

(ii) **authorize the issuance, sale and delivery of, and issue, sell and deliver, the California WaterFix Revenue Bonds,** including the California WaterFix Revenue Bonds, Series A, Series B and subsequent Series, **pursuant to the terms of the Resolution, the First Supplemental Resolution, the Second Supplemental Resolution and subsequent Supplemental Resolutions** adopted in accordance with the Resolution;

(iii) **apply the proceeds of the California WaterFix Revenue Bonds, Series A, to pay Planning Costs and other preconstruction Capital Costs of the California WaterFix** incurred by the Department prior to the issuance of the Bonds of Series A, including to reimburse advances for such costs under the conditions specified in the First Supplemental Resolution;

(iv) subject to applicable statutory and regulatory requirements, **apply the proceeds of the California WaterFix Revenue Bonds, including the California WaterFix Revenue Bonds, Series B and subsequent Series, to the purposes and in the manner authorized in the Resolution, the Second Supplemental Resolution and subsequent Supplemental Resolutions** adopted in accordance with the Resolution; and

(v) **pledge the Revenues, including certain Project revenues, to the payment of debt service on the California WaterFix Revenue Bonds**, including the California WaterFix Revenue Bonds, Series A, Series B and subsequent Series;

(c) **Upon issuance, sale and delivery thereof, the California WaterFix Revenue Bonds and the California WaterFix Revenue Bonds, Series A, Series B and subsequent Series will be valid**, legal and binding obligations of the Department in accordance with their terms; and

(d) In accordance with the Resolution, **the validity of the authorization and issuance of any of the California WaterFix Revenue Bonds shall not be dependent upon or affected in any way by** (A) the proceedings taken or to be taken by the Department for the **planning, design, acquisition, construction or completion of the California WaterFix**, or (B) **any contracts made by the Department** in connection therewith, or (C) **the failure on the part of the Department to complete the California WaterFix or to maintain the same or to make all necessary improvements** to or

replacements thereof or any part thereof, or (D) **the acquisition or maintenance by the Department of all rights, licenses or permits necessary for the operation of the California WaterFix.**

(Prayer for Relief ¶ 54 (emphasis added).) The above-quoted Prayer for Relief restates the relief requested throughout the text of the Complaint itself. Parenthetically, "[w]hile the prayer is no part of the complaint, it may properly be consulted in determining whether a pleading was intended to include any specific character of relief and may well serve to show what kind of case the plaintiff supposes he has made." (*McPheeters v. McMahon* (1933) 131 Cal.App. 418.)

The Prayer for Relief further seeks:

That the Court permanently enjoin and restrain all persons from the institution of any action or proceeding challenging, inter alia, the **validity of the Resolution and the First Supplemental Resolution, the Second Supplemental Resolution, any subsequent Supplemental Resolution and the respective terms therein**, and the California WaterFix Revenue Bonds, including the California WaterFix Revenue Bonds, Series A, Series B and subsequent Series, and the proceedings and authorizations leading and resulting thereto, or **any matters herein adjudicated or which at this time could have been adjudicated in this action**.

(Prayer for Relief ¶ 55 (emphasis added).) DWR apparently seeks to enjoin future challenges to the bonds themselves, *as well as* challenges to the validity of *the Resolutions* and terms therein, and challenges to any "proceedings and authorizations leading and resulting thereto." (*Id.*)

Discussion

In the instant demurrer to NRDC's Answer, DWR challenges the Second Affirmative Defense (Lack of Specificity) and Third Affirmative Defense (Ultra Vires) on grounds that neither states facts sufficient to constitute a defense. (Demurrer at 1.) DWR contends that these affirmative defenses "are irrelevant to and beyond the scope of the issues raised by the validation complaint," and "otherwise fail to state a legitimate defense or contention." (P&As at 1.)

DWR discusses the Second and Third Affirmative Defenses together in the moving papers, describing them as supported by "the same substantive allegations." (P&As at 9.) Accordingly, the Court will therefore analyze the Second and Third Defenses together here.

The Second Affirmative Defense in NRDC's Answer states, in its entirety:

The Complaint lacks the specificity required by law, such as to allow this Court to provide DWR the relief it requests. In particular, the Complaint fails to identify the current and future proceedings taken by DWR for the planning, design, acquisition, construction or completion of WaterFix, including any contracts made by DWR in connection therewith, that may or may not be the subject of this Validation Lawsuit; fails to specify the statutory requirement that the costs of the environmental review, planning, design, construction, and mitigation required for the construction, operation, and maintenance of WaterFix, as well as full mitigation of property tax or assessments levied by local governments or special districts for land used in the construction, location, mitigation, or operation of WaterFix, must be fully paid for by persons or entities that contract to receive water from the State Water Project and the federal Central Valley Project or a joint powers authority representing those entities; fails to specify that extension of the Water Supply Contracts on which DWR relies for repayment of the bonds is a discretionary action that is undergoing review under the California Environmental Quality Act and that review is not complete; and fails to confirm that repayment of the bonds will not use revenues obtained from property taxes levied without a public vote.

(Answer at 12.)

The Third Affirmative Defense in NRDC's Answer states, in its entirety:

The Complaint seeks to validate the issuance and repayment of bonds when the necessary legal preconditions have not been satisfied. First, the validity of the bond issuance and repayment is dependent upon extending the term and duration of existing Water Supply Contracts for decades beyond their current expiration date, but DWR has not yet complied with the requirements of the California Environmental Quality Act to undertake this discretionary action. Second, the validity of the bond issuance and repayment is dependent upon DWR demonstrating that SWP/CVP Contractors or a joint power authority representing those contractors will fully pay for the costs of the environmental review, planning, design, construction, and mitigation required for the construction, operation, and maintenance of WaterFix, as well as full mitigation of property tax or assessments levied by local governments or special districts for land used in the construction, location, mitigation, or operation of WaterFix. Third, the bond issuance and repayment would create bonded indebtedness for the acquisition or improvement of real property after July 1, 1978, and impose obligations to increase property taxes on SWP water contractors if a contractor fails to otherwise provide adequate payment. But two thirds of the voters in each of the SWP water contractor service areas have not approved of property tax increases in an election as required by the California Constitution.

(Answer at 12-13.)

In arguing that neither affirmative defense states facts sufficient to constitute a defense, DWR argues that "validation actions are limited in scope," such that the only issue in such actions is "limited to whether the proposed financing for the underlying project is valid, i.e., a lawful exercise of the public agency's authority." (P&As at 4.) DWR argues that "[t]he narrow scope of a validation action also, necessarily, excludes matters that are not determinative of validity." (P&As at 4.) DWR relies upon various cases, including the *California High Speed Rail* case from our Third District Court of Appeal, for the proposition that validation actions are limited to "the validity of the issuance of the bonds" and *not* the "particular use of bond proceeds" that might occur in the future. (P&As at 4-5 (quoting *California High Speed Rail Auth. v. Superior Court* (2014) 228 Cal.App.4th 676, 703-05 ("[t]o allow real parties in interest to prematurely challenge future potential uses of the bonds [i.e., whether the underlying project complied with statutory requirements] would undermine the purpose of the validation action and interpose an infinite number of obstacles to the public financing of public projects.") (holding that undefined project and pending and anticipated disputes regarding project implementation were not relevant to the validity of the bond authorization).)

DWR also argues that given the narrow scope of validation actions generally, the Second and Third Affirmative Defenses are irrelevant. DWR argues that like the cases cited in its papers, *this* validation action "presents specific, limited issues" of "the legal validity of revenue bonds [DWR] authorized pursuant to" Water Code §§ 11000 et seq., "and the pledge of California WaterFix Revenues that will repay the bonds." (P&As at 5-6.) According to DWR, this action will resolve the issue of whether DWR "has the legal authority to approve and issue revenue bonds to finance California WaterFix facilities, to pledge California WaterFix revenues to the repayment of those bonds, under the bond resolutions and the CVP Act, and to use bond proceeds for financing the California WaterFix." (P&As at 6.) DWR argues that "[q]uestions and challenges regarding the implementation, that is, the construction, maintenance and operation, of the underlying project are not involved." (P&As at 6.) DWR argues that, as such, "affirmative defenses and allegations that raise" challenges to the WaterFix Project itself, such as challenges to "implementation" of the project, are "not relevant to this validation action." (P&As at 7.)

Here, DWR contends that the affirmative defenses fail to state facts sufficient to constitute defenses because they all essentially amount to challenges of the project's "implementation," not the threshold

issue of its financing. Specifically, DWR asserts that the affirmative defenses fail because: (1) they are partially premised on NRDC's interpretation of Water Code § 85089, which DWR contends governs project *construction* (i.e., "implementation"), not financing, and is inapplicable here (P&As at 9-11); (2) they assume that the validity of the bond financing requires extension of DWR's Water Supply Contracts, which has not yet occurred and which DWR contends is an "implementation" matter (P&As at 11-12); (3) they assume that the validity of the bond financing turns on whether property tax levies might need to make up for revenue shortages and which DWR contends is an "implementation" matter (P&As at 12-14); and (4) they assume that the validity of the bond financing turns on DWR's having first completely complied with all regulatory and statutory mandates applicable to the project, such as CEQA, which DWR contends is an "implementation" matter (P&As at 14-15).

All of DWR's challenges to the affirmative defenses share a common premise: that any practical and legal limitations of using certain funding sources to repay the bonds (i.e., that the "pledge" would require extension of the Water Supply Contracts, which would in turn require compliance with CEQA and/or other rules and/or Water Code § 85089, etc.), are all "implementation" issues that are beyond the scope of actions to validate an agency's authority to issue bonds.

The Scope of Validation Actions and the California High Speed Rail Case

DWR is correct that challenges to project "implementation" have been held to be outside the scope of an agency's action to validate its authority to issue bonds. (*See California High Speed Rail Auth.*, 228 Cal.App.4th at 704-05.) In reversing the trial court's denial of validation of the Finance Committee's authority to issue bonds, the Third District Court of Appeal held that based on the governing statutes applicable in *that* particular case, the trial court had no authority to scrutinize whether substantial evidence supported the Finance Committee's determination that it was "necessary or desirable" to authorize issuance of bonds to partially fund the proposed High Speed Rail project. (*Id.* at 697-98.) The appellate court held that the statutes applicable in that case did not require the Finance Committee "to make any factual findings or to explain the basis for its determination" that it was "necessary and desirable" to authorize the issuance of bonds to finance the project. (*Id.*) Because the governing statutes required only that the Finance Committee *itself* determine that bond issuance would be "necessary or desirable," the trial court could not examine whether the Finance Committee's record *in fact* adequately supported the Committee's determination. (*Id.* at 697-99.)

According to the appellate court, it was sufficient that the Finance Committee "had before it a draft resolution detailing the authorization of the bonds and the structure of the eventual sales, including that the bonds sold would not exceed the appropriation authorized by the Legislature." (*Id.* at 699-700.) It was sufficient that

the Finance Committee's determination that it is 'necessary or desirable' to authorize issuance of the bonds to carry out the purposes of the Bond Act rests on the draft resolution and the Finance Committee's assessment of need, unencumbered by the need to identify the facts or express reasons for supporting the determination. Real parties in interest would have us impose more of an evidentiary burden on the Finance Committee than is required by the governing statute . . . .

(*Id.* at 700.)

The appellate court reiterated that, in general, an action to validate bond issuance is narrow in scope, and in that case the "validity of the [bond] authorization . . . is the only issue framed by the pleadings" such that the only issue was "limited to the validity of the issuance of the bonds for any purpose authorized by the Bond Act." (*Id.* at 703-04.) When the only issue before a court is the validity of bond authorization, challenges to changes in the project's "preliminary plans" and challenges to the likelihood that "future use of bond funds will stray too far from" the original purpose of the bonds, are challenges

that should not impact validation of whether an agency has the authority to issue bonds. (*Id.* at 703-05.)

According to DWR, contrary to the parameters for validation actions described *High Speed Rail* and similar cases, the Second and Third Affirmative Defenses improperly conflate the distinct issues of DWR's "*legal authority* to approve and issue . . .the revenue bonds" with DWR's "*ability* to sell those bonds and collect revenues to repay them." (Reply at 1 (emphasis by DWR), Reply at 3-4, 8-9).) DWR argues that only its "legal authority" to approve and issue the bonds is at issue in this case, and that arguments about the feasibility of implementing the project itself, feasibility of using certain funding sources (i.e., water contracts) to repay the bonds, and whether Water Code § 85089 prevents funds from being spent on "construction" of the project, etc., are all "implementation" matters outside the scope of a validation action. (Reply at 1-9.)

At This Time DWR Has Not Shown the Affirmative Defenses to be Deficient or Irrelevant Given the Several Matters For Which DWR's Complaint Seeks Validation

DWR's Complaint seeks validation of more than DWR's "authority to issue bonds." As a result, the issues presented for "validation" in this action appear broader than those presented in the pleading at issue in *High Speed Rail*. The pleading in *High Speed Rail* sought to validate only the agency's authority to issue bonds; it did not also seek to separately validate the *substance of the Resolutions* underlying the agency's decision to issue bonds, and it did not also seek to separately validate the agency's *"pledge of revenues"* from certain sources as the means of repaying the bonds.

Notwithstanding the limited scope of validation actions generally (as emphasized in the moving papers), **DWR's Complaint** is what frames the issues in this action. Because DWR seeks judicial "validation" of individualized matters *other than* its authority to issue bonds (the only issue in *High Speed Rail's* pleading), the Court finds that DWR has not shown that *High Speed Rail* applies to render the Answer's affirmative defenses irrelevant and/or defectively pleaded.

In the Opposition, NRDC argues that its affirmative defenses are in direct response to the breadth of relief sought in DWR's Complaint. (Opp'n at 1.) According to NRDC,

DWR's demurrer and motion are based on an impermissibly narrow view of this action that looks only at the requirements of the Central Valley Project Act (Wat. Code §§ 11000 et seq.) for the issuance of revenue bonds, claiming that DWR's ability to secure revenue for repayment of these revenue bonds is irrelevant to this action. *However, DWR's resolution approving the issuance of $11 billion in bonds explicitly pledges that the revenues from operation of WaterFix, pursuant to existing State Water Project ("SWP") contracts, will be used over at least the next 70 years to repay these bonds, and DWR's complaint seeks to validate the pledge of revenues to the repayment of debt service on the revenue bonds. DWR has made the issuance and repayment of these revenue bonds relevant to this action.*

(Opp'n at 1 (emphasis added).) NRDC points out that the Resolutions (which DWR's Complaint seeks to validate) state that DWR will "charge and collect amounts under the Water Supply Contracts sufficient to return the costs of the California WaterFix." (DWR Compl., Ex. A, Sec. 805.) But as NRDC notes, DWR admits that the existing Water Supply Contracts are set to expire between 2035 and 2042. (Opp'n at 2, 4 (citing DWR Mem. P&A, n.9).) "Finally, even if DWR could rely on the existing Water Supply Contracts to repay the costs of its proposed $11 billion WaterFix bond offering, those Contracts obligate SWP contractors to raise property taxes within their service areas to repay these costs, to the extent that SWP contractors are unable to generate sufficient revenues from the sale of water to repay their bond obligations. But the California Constitution prohibits the imposition of ad valorem property taxes greater than 1% without a public vote, which votes have not yet occurred." (Opp'n at 3.)

The Court notes that the governing statutes (quoted above herein) expressly authorize DWR to "bring an

action to determine the validity of its bonds" (Gov't Code § 17700 (emphasis added); Code Civ. Proc. § 860; Wat. Code §§ 11700-11701). They do not -at least not expressly - authorize the separate judicial "validation" of underlying substantive Resolutions or a "pledge of revenues." The Complaint seeks to have each of these separately validated in this action. The moving papers identify the *Friedland* case, wherein the appellate court upheld a lower court's determination that an agency's prior validation action validated not only the agency's authority to issue bonds *but also* validated the underlying resolutions and a pledge to use certain funding to repay the bonds. (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 838-39, 841, 844-46, 849, 852.) In the validation action at issue in *Friedland*, the agency expressly sought validation of its authority to issue bonds, validation of its resolutions, and validation of its pledge to use certain funds to repay the bonds; however, no parties filed answers in that validation action and it was essentially unopposed. (*Id.*) The trial court entered a validation judgment in favor of the agency. Later, when a taxpayer sought to challenge matters in one of the agency resolutions underlying the decision to issue bonds, the appellate court upheld the lower court's sustaining of demurrers on the grounds that the failure to raise that challenge in the validation action waived the challenge pursuant to Code of Civil Procedure § 870. (*Id.* at 844-45, 851.)

While *Friedland* suggests that the resolutions underlying an agency's decision to issue bonds (and the agency's pledge to use certain funding to repay bonds) may properly be within the scope of a validation action regarding the bonds, that case did not pronounce any legal standard by which a trial court should separately assess the validity of such underlying agency resolutions and/or pledges pertaining to bond repayment. The moving papers do not identify the legal standard by which to assess whether the substance of specific resolutions and/or pledges of repayment should be validated. In the absence of authority pronouncing such legal standard, the Court finds that it would be premature to reject affirmative defenses challenging the substance of the Resolutions and the "pledge of revenues" here. At this procedural posture, absent a legal standard by which to assess whether the substance of specific resolutions and/or "pledges" should be validated, the Court will allow the affirmative defenses that challenge the substance of these items.

Here, the Second and Third Affirmative Defenses raise legal and factual challenges to DWR's ability to obtain validation of the particulars of its Resolutions and its "pledge of revenues." For instance, the Second Affirmative Defense asserts, in part, a lack of "specificity" in the pleading that might not "allow this Court to provide the relief" requested, such as the validation of DWR's "pledge" to use Water Supply Contracts with uncertain futures as the means to repay bonds. The Third Affirmative Defense similarly asserts in part that based on extrinsic facts surrounding its Water Supply Contracts (and other facts), DWR is acting beyond its authority in seeking to validate its Resolutions and its "pledge of revenues."

The Court finds that, at least at this procedural stage of the litigation, DWR has not shown that *High Speed Rail* and similar cases necessarily preclude any affirmative defense that raises challenges to project "implementation." This is especially so given the breadth of matters DWR seeks to have validated in this action: not only DWR's authority to issue the bonds, but also the Resolutions underlying the decision to issue bonds and the "pledge of revenues" stated therein. By seeking separate validation of each of these items, DWR has arguably injected these "implementation"-type issues into this action.

In sum, DWR has not shown the affirmative defenses to be irrelevant to the legal theories plead in the Complaint; indeed, the affirmative defenses relate to the relief requested in DWR's pleading. None of DWR's cited cases involved a sustained demurrer to an Answer in a validation action. At this time, DWR has not met its burden to show that, as alleged, these affirmative defenses cannot constitute defenses in this case as a matter of law.

DWR's demurrer to the Answer is OVERRULED.

Joinder in Demurrer

Defendant Metropolitan Water District of Southern California timely filed a Joinder to DWR's Demurrer, asserting that because Metropolitan is aligned with DWR in this case, it should be entitled to the same relief DWR requests in the instant demurrer.

Defendant Metropolitan has not shown that it has standing to demur to an answer to DWR's Complaint, i.e., a pleading *not filed by Metropolitan*. Metropolitan did not file the Complaint in this case and Metropolitan is not a plaintiff in this action. Although it is undisputed that Metropolitan is "aligned" with Plaintiff DWR in this validation action, and although Metropolitan and DWR both apparently hope to achieve same outcome in this action, Metropolitan has not identified any authorities that would allow it to challenge *another defendant's* Answer to *DWR's Complaint*.

To be clear, the Court is aware that this validation action is a unique action where Metropolitan is nominally a "defendant" even though its interests are aligned with the Plaintiff's. Nevertheless, Metropolitan has not shown that this suffices to give Metropolitan standing to challenge another defendant's Answer to *DWR's* pleading.

"A *party against whom an answer has been filed* may object, by demurrer as provided in Section 430.30 . . ." (Code Civ. Proc. § 430.20 (emphasis added).) Here, the Answer was filed as against DWR. On the plain text of Section 430.20, Metropolitan is not the "party against whom" the subject "answer has been filed."

Because Metropolitan has not shown that it has standing to demur to answers to a pleading filed by DWR, the Court DENIES Metropolitan's request to join in DWR's Demurrer to the Answer.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

COURT RULING

The matter was argued and submitted. The matter was taken under submission.

Having taken the matter under submission on 1/23/2018, the Court now rules as follows:

SUBMITTED MATTER RULING

The tentative ruling is affirmed, with the following addition:

During the hearing, DWR assured the Court that there is no risk that *Friedland* and Code of Civil Procedure 870 will be applied to bar future lawsuits challenging the substance/particulars of DWR's Resolutions and "pledge of revenues" (Exh. A to Compl.). However, if DWR intends to concede in future actions that certain matters are **not** the type that "could have been adjudicated" in this action (Code Civ. Proc. § 870), the Court has not seen any written stipulation or clarifying amendment to the pleading specifying such matters. As such, for purposes of framing the "issues" that can be adjudicated in this validation action, at this time the Court will rely not on DWR's counsel's assurances during the hearing but on the broad text of the Complaint and the exhibits thereto.

Under *Friedland*, this action could be the only opportunity for Defendants to challenge the legality of DWR's "pledge of revenues" and other substantive provisions of the Resolutions to be validated herein. The Court makes no determination on that issue here. However, DWR argues that the sole issue presented in this action is whether DWR's proposed financing structure is legal. Yet DWR has not shown that, for instance, no possible legal issue is presented by a proposed financing structure that

would obligate water contractors to repay the bonds even if the project is never built, which (according to Defendants) would necessarily force the water contractors to raise taxes on the public in their districts without public input here and now, on the front end, before any bond issuance. It appears to the Court that it is possible to construe this as a constitutional/legal challenge analogous to the one raised -- and held barred by the failure to raise it in the prior validation action -- in *Friedland*.

At this time, given the potential impact of *Friedland* and Code of Civil Procedure § 870 on Defendants' ability to raise such challenges in the future, DWR has not shown that such challenges present strictly a bond "marketability" issue rather than a legality issue clouding DWR's proposed financing structure. At this time, then, the Court declines to hold that the challenged affirmative defenses are irrelevant or deficiently alleged.

Declaration of Mailing

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: February 1, 2018

E. Brown, Deputy Clerk _____s/ E. Brown_____

ADAM KEAR
ROBERT C. HORTON
ASSISTANT GENERAL COUNSEL
METROPOLITAN WATER DISTRICT OF
SOUTHER CALIFORNIA
P.O. BO 54153
LOS ANGELES, CA 90012

MICHAEL WEED
ORRICK, HERRINGTON, SUTCLIFFE, LLP
400 CAPITOL MALL
SUITE 3000
SACRAMENTO, CA 95814-4497

KATHERINE S POOLE
NATURAL RESOURCES
DEFENSE COUNCIL
111 SUTTER STREET
20TH FLOOR
SAN FRANCISCO, CA 94104