Delta Decisions & Drought
The Future of Water Supply in California
A Workshop for LAFCo Staff, Consultants and Commissioners

A PRACTICAL WORKSHOP
Among the factors to be considered in the review of proposals is the timely availability of water supplies for projected needs.

This class will focus on the recent and pending major legal, political and practical decisions which may dramatically affect the water supply throughout California. The session will explore approaches for LAFCo Commissioners and staff to take in assessing the sustainability of water supply and capacity in proposals.

EXPERIENCED INSTRUCTORS
George Spiliotis, Course Moderator; Executive Officer, Riverside LAFCo
Tim Quinn, Executive Director, Association of California Water Agencies
Terry Erlewine, Executive Director, State Water Contractors
Celeste Cantu, General Manager, Santa Ana Watershed Project Authority
David Boyer, Partner, McCormick, Kidman & Behrens, LLP

COURSE DETAILS
FRIDAY 2 May 2008
10:00 am to 3:00 pm
9:30 am - networking and refreshments
Metropolitan Water District
700 N. Alameda
Los Angeles, CA
(Downtown- Union Station)

Registration Fee
Members and Associates
$75/person
$60/person for three or more from the same agency

Nonmembers $125

Registration includes lunch and course materials.

Space is limited. Register early.

REGISTRATION FORM - DELTA DECISIONS
LAFCo or Agency
________________________________________
Address
________________________________________
________________________________________
Phone
Attendees
Please include e-mail
________________________________________
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FEES
Members
___ at $75 $______
___ at $60 $______
___ Three or more from "same agency" registering together
Non-Members
___ at $125 $______

Total Enclosed $______

NOTICE: Seating is limited. Registrations are transferable but there are no refunds. Payment must accompany registration.
CALIFORNIA ASSOCIATION OF LOCAL AGENCY FORMATION COMMISSIONS

801 12<sup>th</sup> Street, Suite 611, Sacramento, CA 95814

CALAFCO University

DELTA DECISIONS AND DROUGHT
May 2, 2008
10AM – 3 PM

COURSE OUTLINE

Instructors:
George Spiliotis – Moderator/Facilitator
David Boyer - McCormick, Kidman & Behrens, LLP
Celeste Cantu - Santa Ana Watershed Project Authority (SAWPA)
Terry Erlewine – Association of State Water Contractors (AWC)
Timothy Quinn – Association of California Water Agencies (ACWA)

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<th>TIME</th>
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<tr>
<td>10:00</td>
<td>Panel Introductions/ Course Overview</td>
<td>George Spiliotis</td>
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<tr>
<td>10:15</td>
<td>Legal/Regulatory Setting &amp; Recent Case Law</td>
<td>David Boyer</td>
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<td>10:45</td>
<td>Delta Blue Ribbon Panel Vision</td>
<td>Tim Quinn</td>
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<td>11:15</td>
<td>Break</td>
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<td>Terry Erlewine</td>
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<td>Celeste Cantu</td>
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<td>Moderated Audience Discussion</td>
<td>G.S &amp; Panel</td>
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<td>2:50</td>
<td>Closing and Evaluation</td>
<td>George Spiliotis</td>
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MODERATOR
GEORGE SPILIOTIS
Executive Officer: Riverside Local Agency Formation Commission

George has been the Executive Officer of the Riverside LAFCO since December 1989. Since that time, Mr. Spiliotis has provided the Commission with staff analysis on a wide range of proposals, including incorporations, complex reorganization proposals, district consolidations, dissolutions, etc. In 1998, the American Planning Association-Inland Empire Section awarded the Commission its award for Distinguished Leadership by an Agency. That same year, George received recognition from CALAFCO as the Outstanding Executive Officer. Phenomenal growth in the Inland Empire, two incorporations, as well as MSRs and sphere of influence reviews for nearly 150 agencies have kept George and his staff busy for the last few years.

Prior to coming to LAFCO, George served as a Research Analyst in the Orange County Administrative Office where he was responsible for fiscal analyses related to large-scale development proposals and incorporations. While in Orange County, George also sat on the County Subdivision Committee.

Although a Bay Area native, George received a Bachelor’s Degree from the University of California at Irvine and has lived in Southern California since that time. George lives in Moreno Valley with his wife, Elaine. They have a son in high school and a daughter away at college.

PANEL MEMBERS
DAVID D. BOYER
McCormick, Kidman & Behrens, LLP

David Boyer is the senior litigation partner at McCormick, Kidman & Behrens, LLP, and has extensive experience in water supply and related land-use planning issues. This experience includes defending against legal challenges to a variety of water supply projects involving the Bay-Delta. It also includes providing legal advice to both public and private clients concerning issues involving land use and natural resources law. His recent litigation has focused upon issues concerning the growing relationship between land use and water supply planning.

CELESTE CANTU
Santa Ana Watershed Project Authority (SAWPA)

SAWPA’s General Manager, Celeste Cantú, is no stranger to the region. She has been a staunch supporter of SAWPA’s regional integrated planning and has encouraged other regions to follow SAWPA’s model.

Prior to coming to SAWPA, she served as the former Executive Director of the State Water Resources Control Board in Sacramento, a position she held for more than five years. During her tenure, the Board tackled numerous challenges including the growing issue of salinity in water and irrigated land in many parts of the State and the protection of water quality in the Sacramento/San Joaquin Delta and Colorado River from which Southern California gets much of its water supply.
Early in her career, she was the Planning Director for the City of Calexico. Celeste later headed the Public Housing Authority for Imperial County. She then went on to a distinguished career with the U.S. Department of Agriculture and the California Assembly before joining the State Water Board in 2001.

Celeste is a native Californian and has had a lifelong commitment to public service with extensive experience in local, State and Federal government. She is a graduate of Yale and Harvard’s John F. Kennedy School of Government. She and her husband, Barry, have two sons, Jay and Jack, both at Cal.

TERRY ERLEWINE

Association of State Water Contractors (SWC)

Mr. Erlewine is the General Manager of the State Water Contractors and has devoted his entire career to California water supply management and planning. State Water Contractors (SWC) is a non-profit mutual benefit corporation that represents the interests of the 27 public agencies located throughout California that receive water from the California State Water Project (SWP). As General Manager of SWC, Mr. Erlewine is directly responsible for overseeing and carrying out the objectives of SWC, including, but not limited to: timely completion of SWP facilities; assisting to ensure proper and efficient SWP operations; protection of water rights needed by the SWP and the SWC Member Agencies; review and coordination of litigation affecting the SWP; presentation of SWC views to legislative and administrative agencies, myriad stakeholders, interested parties, and the general public; and development and maintenance of a public information program about the SWP.

In addition to these and other responsibilities, Mr. Erlewine plays a key role in coordinating with the California Department of Water Resources with regard to statewide SWP operations, water supply management and deliveries, and the numerous institutional efforts, programs, policies, environmental regulations, and multi-party agreements affecting SWP operations. Mr. Erlewine is also responsible for developing, managing and disseminating information as it pertains to SWP delivery facilities, including current water supply and water quality conditions, flow and storage data, flood and drought status, and all regulatory matters affecting the SWP. In addition, Mr. Erlewine oversees the SWC’s participation in the current and developing framework for managing water supply and ecological issues within the Sacramento-San Joaquin Bay-Delta.

TIMOTHY QUINN

Association of California Water Agencies (ACWA)

Timothy Quinn is executive director of the Association of California Water Agencies (ACWA), a statewide association whose 450 local public water agency members are responsible for about 90% of the water delivered in California. Quinn became executive director in July 2007 and has more than 22 years of experience in California water issues. Prior to joining ACWA, he served as deputy general manager of the Metropolitan Water District of Southern California.
Federal ruling on fish protection may limit California water releases

By Matt Weiser - mweiser@sacbee.com
Published 12:11 am PDT Thursday, April 17, 2008

A federal judge’s ruling Wednesday could mean less water for farms and cities – this time to protect salmon and steelhead.

Judge Oliver Wanger in Fresno found that the U.S. Bureau of Reclamation and National Marine Fisheries Service ignored their own evidence that fish would be harmed as they looked to increase water exports from the Sacramento-San Joaquin Delta.

Wanger’s ruling came in a lawsuit challenging a 2004 plan by state and federal agencies to change reservoir operations.

The U.S. Bureau of Reclamation and National Marine Fisheries Service violated the Endangered Species Act in approving rules to guide these new operations, called a biological opinion, Wanger ruled.

The biological opinion was controversial from the beginning. A draft prepared by Fisheries Service biologists in Sacramento concluded fish would be harmed by the new water operations. But The Bee reported in October 2004 that this finding was summarily reversed by political appointees.

The agencies behaved in an "arbitrary and capricious" manner, the judge found, by failing to include measures to recover the species, which include Central Valley steelhead and winter- and spring-run chinook salmon. They also failed to consider the effect of climate change on water operations.

The evidence included findings by the agencies themselves that the new operations could kill 20 percent of each species.

"In practical terms this forecasts elimination of spring-run salmon from the Sacramento River, a total loss of habitat, despite the ... conclusion there will be no adverse impact or jeopardy to the species," Wanger wrote.

Reclamation operates Shasta Lake and federal pumps that export Delta water to the Bay Area and Southern California. The National Marine Fisheries Service approved the biological opinion. Both agencies were reviewing the decision and had no substantive comment.
"I would characterize this as a huge victory for the salmon, and it is historic," said Mike Sherwood of Oakland-based Earthjustice, lead attorney for the plaintiffs, which include six environmental groups, two fishing groups and the Winnemem Wintu Tribe. "It could be a turning point in our struggle to stop the slide towards extinction of these species."

The California Department of Water Resources, which operates the state’s Delta water pumping system, was a co-defendant in the lawsuit filed in 2005.

"It's another indicator the system we have now is not working well for the environment or for water reliability," said Jerry Johns, DWR deputy director.

Judge Wanger on Wednesday ordered the biological opinion rewritten, a process the agencies have already begun and expect to finish in December. Wanger may impose interim remedies to protect fish until the new opinion is complete. He set an April 25 court date for that purpose.

Wanger is the same judge who, in December, imposed new rules on state and federal Delta pumps to protect the threatened Delta smelt. Those rules are expected to reduce water deliveries by as much as 30 percent this year to 25 million Californians.

The latest case mainly affects water releases from reservoirs, especially Shasta, north of Redding, the largest in the state. The releases determine whether spawning and rearing habitat in the Sacramento River is adequate for salmon and steelhead.

River temperatures must be no more than 56 degrees Fahrenheit to ensure spawning and survival of young fish. Interim remedies could require more water to be released in summer, which may mean less water to meet farm and urban demand in dry fall months.

"There will be an impact, but probably not much of one immediately," said Tim Quinn, executive director of the Association of California Water Agencies. "Starting now, we've got a lot less system (capacity) for water supply, and we've got to operate it more for fisheries."

Quinn said California may need to augment its water supply to make more water available for fish and their habitat. This could come in a variety of forms, including major steps to make cities and farms more water-efficient and self-reliant.

It was unclear on Wednesday whether the decision will affect Folsom Lake and the American River, where Reclamation has delayed a new flow standard meant to protect fish.

The lawsuit did not involve fall-run chinook salmon. But remedies ordered by the judge may benefit this species along with the others, Sherwood said.

A sharp decline in fall-run chinook last year prompted wildlife officials Tuesday to impose the first-ever total closure of salmon fishing on the ocean, which will last through April 2009. This is predicted to cost the state's economy $255 million and 2,263 jobs.
CALIFORNIA BAY-DELTA

LEGAL/REGULATORY SETTING
AND RECENT CASE LAW

David Boyer
Senior Litigation Partner
McCormick, Kidman & Behrens, LLP
LEGAL DESCRIPTION

- Sacramento-San Joaquin Delta: fresh water/salt water estuary formed by the confluence of the Sacramento and San Joaquin Rivers.

- 738,000 acre area generally bordered by the cities of Sacramento, Stockton, Tracy, and Pittsburg.

- The legal boundaries of Delta fixed by Legislature in 1959. (Wat. Code §12220.)
CONTRACT LAW

- Central Valley Project (CVP)
  - Long-term contracts between Bureau of Reclamation (Bureau) and CVP contractors govern

- State Water Project (SWP)
  - Long-term SWP water supply contracts between the Department of Water Resources (DWR) and the water supply contractors govern
CENTRAL VALLEY PROJECT

- Largest water storage delivery system in California
- 22 reservoirs with combined storage of 11 million acre-feet
  - Acre-foot = “[a]mount of water that covers an acre of land one foot deep. An acre-foot is enough water to supply one or two households for one year.” (Central and West Basin Replenishment Dist. v. So. Cal. Wat. Co. (2003))
CENTRAL VALLEY PROJECT

- Delivers 7 million acre-feet in an average year
- Water irrigates more than 3 million acres of farmland and provides drinking water to nearly 2 million consumers
- Long-term contracts with more than 250 contractors in 29 out of 58 counties
CENTRAL VALLEY PROJECT


- 1937 Act: dams and reservoirs should be used for
  - River regulation, improvement of navigation, and flood control;
  - Irrigation and domestic uses; and
  - Power
Central Valley Project Improvement Act (CVPIA) (1992) enlarged purposes to include:

- Recreation
- Fish and wildlife enhancement, and
- Water quality improvements

And required dedication of 800,000 af of water for fish and wildlife uses.
CENTRAL VALLEY PROJECT

- Managed by Bureau
- Under Section 8 of the Reclamation Act, Bureau is required to comply with state law and to acquire rights for diversion and storage of water by CVP
1951 Legislature authorized Feather River and Sacramento-San Joaquin Delta Diversion Project (Wat. Code § 11260)

1960 California voters approved the California Resources Development Board Act (Burns-Porter Act)---Act authorized issuance of $1.75 billion in bonds to construct SWP

Began operations in 1967 under management of DWR
STATE WATER PROJECT

- 29 long-term contractors
- MWD was first and largest SWP contractor
- Kern County Water Agency (KCWA) largest of the agricultural contractors
- MWD and KCWA each have member agencies or units
REGULATORY-LEGAL SETTING

- Federal laws administered by federal agencies
- Federal laws administered by state agencies
- State laws administered by state agencies
FEDERAL LAWS ADMINISTERED BY FEDERAL AGENCIES

- National Environmental Policy Act (NEPA)

- U.S. Army Corps of Engineers
  - Clean Water Act § 404: dredge & fill; wetlands
  - Water Resources Development / Acts / Water Control Manuals: water supply & flood control

- National Marine Fisheries Service (NOAA Fisheries or NMFS) / Fish and Wildlife Service (FWS) jointly administer
  - Endangered Species Act (ESA) / § 7 consultation / § 10 HCP/ITPs
Bureau of Reclamation: CVP
- Water contracts
- Operation of CVP

Federal Energy Regulatory Commission (FERC) (Federal Power Act): licensing of hydroelectric projects
FEDERAL LAWS ADMINISTERED BY STATE AGENCIES

- State Water Resources Control Board (State Board) / Regional Water Quality Boards (Regional Boards)
  - National Pollutant Discharge Elimination System (NPDES) permits / Waste Discharge Requirements (WDRs)
  - Clean Water Act (CWA) § 401 certification

- Office of Historic Preservation / SHPO
  - National Historic Preservation Act § 106
STATE LAWS ADMINISTERED BY STATE AGENCIES

- California Environmental Quality Act (CEQA)

- State Board
  - Water right permits/licenses
  - Change in point of diversion / place of use—wastewater

- State Board/Regional Boards
  - State Porter-Cologne Water Quality Act (Porter-Cologne)
  - CWA § 401 certification of compliance with appropriate requirements of State law
STATE LAWS ADMINISTERED BY STATE AGENCIES

- Department of Fish & Game
  - Streambed Alteration Agreements (§ 1602)
  - Fish & Game Code § 5937
  - California Endangered Species Act (CESA)

- DWR
  - Water Contracts
  - Operation of SWP
  - Division of Safety of Dams
Bay-Delta Hearing Process

- State Board duties:
  - allocates water rights
  - adjudicates water right disputes
  - develops statewide water protection plans
  - establishes water quality standards
  - guides 9 Regional Bds
Bay-Delta Hearing Process

- 1969 Porter-Cologne Act (PCA)
  - State Bd has ultimate authority over state water quality policy
  - Portions of 1972 federal CWA borrowed from PCA

- After passage of fed CWA, State Bd duties include adopting water quality plan for CWA compliance
Bay-Delta Hearing Process

- Decision 1485
  - Underlying principle: water quality in Delta $\geq$ quality w/o SWP and CVP
  - modified permits held by Bureau and DWR
Bay-Delta Hearing Process

- *Racanelli* decision—held D-1485 standards invalid
  - Bd’s primary task in its water quality role is not to protect water rights but to protect beneficial uses.
  - “without project” conditions wrong standard—upstream non-project users not entitled to unlimited access to upstream waters
Bay-Delta Hearing Process

- BUT, Ct of App also recognized expansive nature of Bd’s power
- Affirmed principle that Bd has power to determine the proper balance between water quality interests and the effects of water diversions and w/o strict adherence to traditional priorities of water rights law
- All competing demands for water must be considered when balancing
Bay-Delta Hearing Process

- Decision 1641
  - 1987 Bd began reexamination of water quality objectives for Delta
  - 1991 adopted Bay-Delta Plan
  - Plan submitted to US EPA for approval
  - EPA rejected portion of Plan re: fish and wildlife objectives
  - EPA published own draft standards for Delta
Bay-Delta Hearing Process

– To coordinate parallel state and federal Bay-Delta activities, fed and state entered into Framework Agreement
– Later in 1994 entered into Bay Delta Accord, which set forth revised objectives
– 1995 Bd released Water Quality Control Plan for Bay-Delta
Bay-Delta Hearing Process

– After 80 days of hearings, Bd issued D-1641

– Purpose of D-1641 was:
  ▪ To implement the flow objectives of Bd’s 1995 Water Quality Control Plan, and
  ▪ To allocate responsibility for implementing the flow-dependent objectives
Robie Decision


- Upheld Decision 1641

- Except for changes in CVP permits allowing service to additional lands in Westlands and Santa Clara County
RECENT LITIGATION IMPACTING BAY-DELTA

- Monterey Amendment Litigation
- OCAP ESA Cases
- CESA Delta Smelt Case
- CALFED EIR Cases
Monterey Amendment Litigation

- 1995 Monterey Amendment to SWP water supply contracts
- Legal challenge by Planning and Conservation League (PCL) et al.
- DWR recently circulated new “Monterey Plus” EIR – challenge of new EIR likely
OCAP ESA CASES

- OCAP -- Operations, Criteria and Plan
- Set of operating guidelines for both CVP and SWP pumps
- The framework for future operations of the SWP and CVP
- Environmental groups challenged 2005 biological opinions (B.O.) for OCAP concerning fish species impacted by pumping
Natural Resources Defense Council v. Kempthorne

- Judge Wanger held B.O. for smelt was inadequate

- Issued 12/14/07 interim remedial order remanding B.O. to FWS

- Directed FWS to have new B.O. prepared by 09/15/08
Natural Resources Defense Council v. Kempthorne

- In interim, Bureau and DWR to:
  - Increase smelt sampling and monitoring, and
  - Meet Court's specifications re: limiting net upstream flow in the Delta’s Old and Middle Rivers
Plaintiffs have separately challenged Bureau’s issuance of long-term CVP renewal contracts based upon now-invalid 2005 B.O.

Judge Wanger recently ruled that all contract holders will have to be brought into case if plaintiffs seek to void contracts.
Pacific Coast Federation of Fishermen’s Ass’ns. v. Gutierrez

- Judge Wanger held NMFS’ 2004 B.O. inadequate

- B.O. for three salmon species (winter-run Chinook, spring-run Chinook, and Central Valley steelhead)

- Already problem with B.O. due to prior ruling by 9th Cir.
B.O. will be remanded to NMFS

Ct set hearing for June 6, 2008, to determine need for interim remedies to protect species

Ct noted in ruling that an inoperative CVP or SWP would be a catastrophe to all
Watershed Enforcers v. DWR

- CESA challenge in Alameda County Superior Court
- March 2007 trial court held DWR’s operation of SWP violated CESA due to SWP operations resulting in prohibited “take” of smelt
- Trial court ordered DWR to cease all SWP operations absent “take” permit
- DWR appealed and parties agreed to stay litigation until Dec. 31, 2008
Coalition For A Sustainable Delta

- Sept. 2007 sent 60-day notice to Army Corps and two Mirant power plants
- Coalition is claiming plants take ESA listed fish, including smelt, in cooling operations without ESA take authority
- No lawsuit yet
Coalition for a Sustainable Delta v. Dept of Fish and Game

- Challenges DFG’s fishing regulations related to striped bass
- Alleges
  - Striped bass non-native to Delta
  - 760,000 striped bass in Delta annually consuming between 3-6% of protected salmon and smelt
- Alleges DFG’s adoption of fishing regulations to protect striped bass violates ESA
18 state and federal agencies with management or regulatory responsibility over Bay-Delta formed CALFED

Purpose: to devise long-range plan to resolve the water supply, quality and environmental conflicts

CALFED adopted 30 yr. program, which included measures for improving the Bay-Delta ecosystem, water quality and quantity, and Delta levee stability.
CALFED BAY-DELTA CASES

- 3 sets of challenges under CEQA were filed
- Trial Ct upheld EIR
- Ct of Appeal reversed
- Oral argument in Cal. Supreme Ct last month
- Fed Ct challenge under NEPA currently stayed
LEGAL FRAMEWORK FOR ANALYSIS OF LOCAL IMPACTS

- Rule No. 1: Analysis of an alternative future water source is required only when it is “impossible to confidently determine” that the anticipated future water source will be available.

- Rule No. 2: A project EIR may precede a related program EIR.
LEGAL FRAMEWORK

- Rule No. 3: DWR is the recognized expert with respect to the annual delivery reliability of the SWP
- Rule No. 4: Local water suppliers are recognized as experts in local water supply planning; their analysis of local water supplies, including the reliability of future water supplies, must be assessed and considered
LEGAL FRAMEWORK

- Have the Wanger decisions rendered all WSAs (and UWMPs used as WSAs) issued prior to Dec. 2007 suspect?
  - Probably, unless the water supplier relies entirely upon a local water supply
LEGAL FRAMEWORK

Who determines if WSA has been rendered obsolete and what is the procedure?

– “That a lead agency can effectively reject the conclusions reached in the WSA does not mean the lead agency should.”

– “[I]f the WSA is found to be incomplete or to contain inaccurate information or faulty analysis, the lead agency should request the water supplier to modify, correct or supplement the WSA.” (California Water Impact Network v. Newhall County Water Agency [April 16, 2008])
CALIFORNIA BAY-DELTA--
LEGAL/REGULATORY SETTING
AND RECENT CASE LAW

David D. Boyer
McCormick, Kidman & Behrens, LLP

This year Californians are witnessing events that will likely result in an overall reshaping of the infrastructure, institutions, and practices in the Bay-Delta. Population declines in certain fish species led to a federal court order to cut water exports. News of this order and the threat of water moratoriums as a result brought needed public attention to the various water supply-and water quality conflicts involving the Bay-Delta that have existed for over fifty years.

This public focus on the problems in the Bay Delta and their statewide impacts have come at the end of Phase I of the CalFed program, causing many to question the value of the CalFed program since its original focus was to resolve these precise water supply and water quality conflicts. In the meantime, there appears to be a renewed urgency by many state government officials to develop a final and permanent solution for the Bay-Delta. The combined impact of these events may set Bay-Delta water policy, and perhaps the region itself, on a course for dramatic reconfiguration.

This paper will provide an overview of the current legal and regulatory framework governing the Bay-Delta and a summary of recent legal decisions that have caused or have the potential for causing a reduction in the delivery reliability
of water from the Bay-Delta. Focusing primarily upon recent appellate court
decisions, this paper will also provide a basic legal framework for analyzing the
impact of these changes upon local water supply and land use planning.

LEGAL AND REGULATORY SETTING FOR THE

BAY-DELTA

1. GEOGRAPHICAL AND HYDROLOGICAL SETTING

The Sacramento-San Joaquin Delta is a fresh water/salt water estuary formed by the
confluence of the Sacramento and San Joaquin Rivers. The Delta comprises a 738,000
acre area generally bordered by the cities of Sacramento, Stockton, Tracy, and Pittsburg.
In 1959, the legal boundaries of the Delta were fixed by the Legislature.¹

The area contains more than 60 islands and tracts interlaced by about 700 miles of
waterway. Prior to development, the Delta was a wetland area containing mainly tule
marsh and grassland. In the mid-19th century, however, Delta farmers commenced
construction of dikes which eventually resulted in a levee system that now protects about
520,000 acres of farm land. Corn, grain, hay, and pasture currently account for more than
75 percent of the region's agricultural production.²

The Sacramento River contributes roughly 78 to 80 percent of the Delta inflow in
most years, while the San Joaquin River contributes about 10 to 15 percent. The flows of
the Mokelumne, Cosumnes, and Calaveras Rivers, which enter into the eastern side of the
Delta, contribute the remainder. The rivers flow through the Delta and into Suisun Bay
through the Carquinez Strait. From there the water continues into San Pablo Bay, and

¹ Wat. Code § 12220.
² Delta Vision, Vision for the California Delta (Dec. 17, 2007)
ultimately travels through San Francisco Bay and into the Pacific Ocean. The hydrology of the Bay-Delta Estuary is influenced by a combination of tidal flow and freshwater outflow, resulting in highly variable flow patterns. Historically, during summers when runoff diminished, ocean water intruded into the Delta as far as Sacramento. During the winter and spring, fresh water from heavy rains pushed the salt water back, sometimes past the mouth of San Francisco Bay.

The major factor affecting water quality in the Delta is saltwater intrusion. Delta lands, situated at or below sea level, are constantly subject to ocean tidal action. Salt water entering from San Francisco Bay extends well into the Delta, and intrusion of the saline tidal waters is checked only by the natural barrier formed by fresh water flowing out from the Delta.

"But as fresh water was increasingly diverted from the Delta for agricultural, industrial and municipal development, salinity intrusion intensified, particularly during the dry summer months and in years of low precipitation and runoff into the river systems. One of the major purposes of the projects was containment of maximum salinity intrusion into the Delta. By storing waters during periods of heavy flow and releasing water during times of low flow, the freshwater barrier could be maintained at a constant level."

The Bay-Delta Estuary provides habitat for about 90 species of fish. The estuary serves as a migratory route and nursery area for Chinook salmon, striped bass, white and green sturgeon, American shad, and steelhead trout. The estuary also provides a habitat for the delta smelt, Sacramento splittail, catfish, largemouth bass, black bass, crappie, and blue gill. Hydraulic conditions in the estuary affect the area's fishery resources in

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3 Racanelli Decision, supra, 182 Cal. App. 3d at 107.
numerous ways. The location of the entrapment zone, where freshwater outflow meets with saline ocean water, may affect fishery food supplies. Central Valley Project, State Water Project, and other project diversions may draw fish into pumping facilities. Reverse flows in the estuary may disorient migrating fish or may otherwise affect out migration of anadromous fish to the ocean.

2. INSTITUTIONAL SETTING

a. CENTRAL VALLEY PROJECT

Currently, the Central Valley Project (CVP) is the largest water storage delivery system in California, covering 29 of the State's 58 counties. The project's features include 18 federal reservoirs, plus 4 additional reservoirs jointly owned with the SWP (primarily the San Luis Reservoir). The keystone of the CVP is the 4.6 million acre-feet Lake Shasta, the largest reservoir in California. The reservoirs in this system provide a total storage capacity of slightly over 12 million acre-feet, nearly 30 percent of the total surface storage in California, and deliver about 7.3 million acre-feet annually to agricultural, urban, and wildlife uses.

Congress initially authorized the CVP through the Rivers and Harbors Act of August 30, 1935.4 Congress, however, re-authorized the project as a federal reclamation project through the Act of August 26, 1937. The project is, therefore, managed by the United States Bureau of Reclamation (Bureau). "Under section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383), the . . . Bureau is required to comply with state law and to acquire water rights for diversion and storage of water by the CVP." 5

4 49 Stat. 1028, 1038.
5 Racanelli Decision, supra, 182 Cal. App. 3d 106; see also California v. United States (1978) 438 U.S. 645 [57 L. Ed. 2d 1018, 98 S. Ct. 2985] [a state may impose any condition on control, appropriation, use or
Permit applications to appropriate water for the CVP were initially filed on behalf of the state. These were assigned to the Bureau when the federal government assumed responsibility for constructing the CVP. The CVP was completed and in operation prior to issuance of the first permits in 1958.

b. STATE WATER PROJECT

In 1951 the Legislature authorized the Feather River and Sacramento-San Joaquin Delta Diversion Project. In 1960, the California voters adopted the California Water Resources Development Board Act, commonly known as the Burns-Porter Act. The Act authorized the issuance of $1.75 billion of general obligation bonds for the purpose of constructing the State Water Resources Development System. The resulting project, now known as the State Water Project (SWP), actually began operations in 1967 under management of the Department of Water Resources (DWR). The permits to appropriate water for the operation of the SWP were issued to DWR by the State Water Resources Control Board (SWRCB) in 1967.

Water from the Feather River "is stored behind Oroville Dam and is released into the Feather River and its eventual confluence with the Sacramento River." In the northern Delta, water is diverted from Barker Slough into the North Bay Aqueduct for municipal use in Solano and Napa Counties. "The water flow continues through the Delta to the Clifton Court Forebay [in the southern Delta] where a portion of it enters the South..."
Bay Aqueduct for delivery to [urban and agricultural areas in Alameda and Santa Clara Counties]. A much greater portion is lifted [at the Harvey O. Banks Delta Pumping Plant] into the [Edmund G. Brown] California Aqueduct for transport through the San Joaquin Valley [and for use by contractors in the southern San Joaquin Valley] and eventually again lifted by a series of pumping stations over the Tehachapi Mountains for delivery and use in the Southern California region.\footnote{14}

SWP water is delivered to 29 long-term contractors, including agricultural users in the San Joaquin Valley, with Kern County Water Agency having the contract for the greatest amount of water. SWP water transported to Southern California is used primarily for municipal and industrial purposes; the Metropolitan Water District of Southern California is the SWP’s largest contractor.\footnote{15}

3. REGULATORY SETTING

a. THE STATE WATER RESOURCES CONTROL BOARD AND THE PORTER-COLOGNE ACT

The State Water Resources Control Board (State Board) was formed in 1967, replacing the State Water Rights Board. In addition to taking over the water rights duties of the State Water Rights Board, the State Board also assumed the water pollution planning and control duties of the State Water Quality Board. The Porter-Cologne Act set out the functions of the State Board, by establishing a comprehensive state-wide program for water quality control administered by nine regional boards and coordinated by the State Board. The regional boards are primarily responsible for formulating and adopting water quality control plans covering the state’s 16 planning basins subject to the

\footnote{14} Id. at 100.
State Board’s review and approval. But the State Board is solely responsible for setting state-wide policy concerning water quality control. "And in its capacity as the designated state water pollution control agency for purposes of the Federal Water Pollution Control Act, the Board is empowered to formulate its own water quality control plans which supersede conflicting regional basin plans. Thus, the Porter-Cologne Act gave the SWRCB full authority over the state’s rivers and their use, which includes the Bay-Delta.

The State Board has exclusive jurisdiction over wastewater issues. Such issues, therefore, cannot be taken directly to the courts without first exhausting the State Board’s process. The State Board, however, shares original jurisdiction with the courts in actions seeking to enforce Article X, Section 2 of the California Constitution concerning unreasonable water use, and in actions seeking adjudication of water rights.

The Clean Water Act (CWA), which was substantially revised in 1972, establishes a national program to eliminate water pollution. The CWA prohibits the "discharge of any pollutant" unless the discharge is authorized under specific provisions of the CWA. The term "discharge of a pollutant" is defined as the "addition" of a pollutant from a "point source," such as a pipe or conduit, into "navigable waters."

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16 Wat. Code §§ 13240 & 13245.
17 Wat. Code §§ 13140-13147.
19 The jurisdiction of the SWRCB is limited to surface and subterranean streams flowing through known and definite channels. (Wat. Code §§ 1200 & 1201.) The acquisition and exercise of riparian rights, and overlying rights to groundwater not part of the underflow of a stream, remain outside the SWRCB's control.
22 33 U.S.C. § 1251 et seq.
24 Id. at § 1362(7).
term "navigable waters" is defined as "waters of the United States." Thus, the CWA broadly prohibits the discharge of pollutants from point sources into waters of the United States except as authorized by the CWA.

The CWA establishes two major permit programs that authorize and regulate discharges into water. First, Section 402 establishes the National Pollutant Discharge Elimination System (NPDES), often described as the "heart" of the CWA regulatory program. Under the NPDES, the Environmental Protection Agency (EPA) may issue permits authorizing the discharge of pollutants from point sources into navigable waters, and establishing effluent limitations for the discharges. The EPA may also authorize a state to administer its own NPDES permit program, if the state program meets specified criteria in the CWA. California was the first state to obtain EPA-approval of its permit program, which is administered by the SWRCB and its Regional Boards.

The second major permit program under the CWA is Section 404, which authorizes the Army Corps of Engineers to issue permits authorizing the discharge of dredged or fill materials into navigable waters. The Corps, in acting under Section 404, must consider not only the direct effects of the discharge of dredged or fill materials at the discharge site, but also the indirect effects that may occur in upstream or downstream areas, such as the potential harm to endangered species located in a downstream area.

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25 Id. at § 1362(12).
27 Id. at § 1342(a).
28 Id. at § 1342(b).
29 Id. at § 1313(d)(2).
30 Riverside Irrig. Dist. v. Andrews (10th Cir. 1985) 758 F.2d 508.
The EPA may veto the Corps’ issuance of a Section 404 permit if the EPA determines that the permit fails to adequately protect environmental values.\textsuperscript{31}

Section 303 of the CWA requires the states to adopt water quality standards for bodies of water, such as rivers and lakes, located in their respective jurisdictions.\textsuperscript{32} Thus, the CWA not only establishes permit programs governing the discharge of effluents into water, but also requires the states to develop ambient water quality standards for their waters. The state water quality standards must be approved by the EPA, and must be reviewed by the state every three years; if the state revises its standards or adopts new ones, it must again submit the standards to the EPA for approval.\textsuperscript{33} If a state fails to establish water quality standards, or the EPA determines that the state’s standards do not meet the CWA’s requirements, the EPA must adopt its own water quality standards for the state.\textsuperscript{34}

The water quality standards must establish both the “designated uses” of the waters and “water quality criteria” for such uses.\textsuperscript{35} The standards must be established on the basis of the “use and value [of the water] for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other purposes …”\textsuperscript{36} In California, the SWRCB adopts the water quality control plans needed to meet this requirement.\textsuperscript{37}

Under section 303(d) of the CWA, each state must adopt special measures to protect waters that fail to meet water quality standards. The state must identify and

\textsuperscript{31} James City County v. EPA (4th Cir. 1993) 12 F.3d 1330.
\textsuperscript{32} 33 U.S.C. § 1313.
\textsuperscript{33} Id. at § 1313(c)(1), -(2)(A).
\textsuperscript{34} Id. at § 1313(b), -(c)(3), -(4)
\textsuperscript{35} Id. at § 1313(c)(2)(A); 40 C.F.R. § 130.2(d).
\textsuperscript{36} 33 U.S.C. § 1313(c)(2)(A).
\textsuperscript{37} Wat. Code § 13170.
compile a list of waters that do not meet water quality standards, after the effluent limitations established for point source discharges are taken into account.38 The state must also establish a “priority ranking” for such waters, taking into account the severity of the pollution and the uses associated with the waters.39

The state must establish a “total maximum daily load” (TMDL) for such waters that will implement the state’s water quality standards, taking into account seasonal variations and a margin of safety; the TMDL is the maximum “load” of pollutants that a water body can receive from all sources, including point sources and non-point sources, without violating water quality standards.40 The TMDLs must be submitted to the EPA for approval, and the EPA may approve the state TMDLs or adopt its own TMDLs for the water body.41

California law requires both the incorporation of TMDLs into its water quality management plans and that such plans contain a program of implementation to achieve water quality objectives, including pollution from non-point sources.42 Therefore, California fully provides for the implementation of TMDLs at the state level. Under California law, the implementation programs must contain a description of the actions necessary to achieve requirements, a time schedule for completion of these actions, and a description of enforcement policies necessary to ensure compliance.43

38 33 U.S.C. § 1313(d).
39 Id. at § 1313(d)(1)(A).
40 Id. at § 1313(d)(1)(A).
41 Id. at 1313(d)(1)(C).
42 Wat. Code § 13050(j).
43 Wat. Code § 13242.
b. **THE ENDANGERED SPECIES ACT**

The Endangered Species Act (ESA), enacted in 1973, continues to dominate the conflict between environmental and consumptive uses in the Bay-Delta.\(^44\) Congress' purposes in enacting the ESA were to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such . . . species."\(^45\) To further these purposes, Congress strongly framed the primary policy underlying the ESA: "[A]ll Federal departments and agencies shall seek to conserve endangered species and threatened species. . . ."\(^46\) The United States Supreme Court has stated that the "plain intent of Congress . . . [in enacting the ESA] was to halt and reverse the trend toward species extinction, *whatever the cost.*"\(^47\)

These strong policies of the ESA have evolved beyond the conservation of listed species, and now include the preservation of their habitat. While habitat conservation may be one effective method to ensure the survival of a species, it often times serves to impose significant limitations upon the ability of water suppliers to exercise their water rights. The ESA's "taking" prohibition exempt no one; public and private entities alike are subject to its broad reach.

In 1973 Congress significantly revised the ESA to expand protection to plants as well as animals, and to provide for the designation of threatened as well as endangered species.\(^48\) The ESA has four key provisions: (1) listing species as threatened or

\(^{44}\) 16 U.S.C. § 1531 *et seq.*

\(^{45}\) *Id.*, at § 1531(b).

\(^{46}\) *Id.*, at § 1531(c)(1).


\(^{48}\) 16 U.S.C. §§ 1532(6), (14) & (16).
endangered\textsuperscript{49}; (2) consulting with the U.S. Fish and Wildlife Service (FWS) or National Oceanic and Atmospheric Administration (NOAA Fisheries) by federal agencies before undertaking federal projects\textsuperscript{50}; (3) prohibiting the "taking" of threatened or endangered species\textsuperscript{51}; and (4) authorizing "incidental taking" of species pursuant to a permit.\textsuperscript{52}

Although utilized the federal ESA is utilized much more often for purposes of litigation, California also has its own California Endangered Species Act (CESA).\textsuperscript{53} CESA generally parallels the main provisions of the ESA, although there is a subtle difference between the ESA and the CESA in the definition of "endangered species" that some argue indicates that under the CESA a higher standard must be met for listing a species.\textsuperscript{54}

c. **BAY-DELTA HEARING PROCESS**

Comprehensive water quality standards for the Delta -- the so-called "Tracy Standards" -- were first formulated on November 19, 1965, through the combined efforts of the Sacramento River and Delta Water Association, the San Joaquin Water Rights Committee, DWR, and the Bureau. In 1967 the SWRCB issued Decision 1275 which approved the permits for operation of the SWP, and imposed compliance with the established water quality criteria as a condition of the permits.

Also in 1967, in compliance with the provisions of the Federal Water Pollution Control Act, the State Board submitted the adopted standards, which were eventually approved by the Secretary upon the condition that the SWRCB consider imposition of

\textsuperscript{49} Id., at § 1533 \textit{et seq}.
\textsuperscript{50} Id., at § 1536 \textit{et seq}.
\textsuperscript{51} Id., at § 1538.
\textsuperscript{52} Id., at § 1539.
\textsuperscript{53} Fish & Game Code §§ 2050-2098.
\textsuperscript{54} See \textit{e.g.}, A. Littleworth & E. Garner, California Water II (2007 2\textsuperscript{nd} ed.) p. 156.
more stringent Delta salinity controls. In 1971, it issued Decision 1379 establishing new water quality standards applicable to both the CVP and the SWP. The decision was stayed as a result of litigation challenging the State Board's authority to impose conditions on permits held by a federal agency.

In 1975 the State Board approved water quality standards for the Delta and for the San Francisco Bay Basin. It then indicated its intention to proceed with hearings to receive evidence relating to salinity control and protection of fish and wildlife. In conducting these hearings, the State Board for the first time acted pursuant to its combined authority to determine water rights and to establish water quality objectives. In discharging its dual functions, it reconsidered existing water quality objectives in light of then current data concerning the effects on the Bay-Delta of the operations of the two water projects--the users with the greatest impact. The State Board also undertook to modify the existing water rights permits of the projects--the water rights holders with the lowest seniority--in order to implement the enacted water quality objectives.

The final product was the Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh and Water Right Decision 1485. In the Plan, the SWRCB set new water quality objectives to protect fish and wildlife and to protect agricultural, industrial and municipal uses of Delta waters. Decision 1485 modified the permits held by the Bureau and DWR, among others, to compel the projects to release enough water into the Delta or to reduce their exports from the Delta so as to maintain the water quality objectives set in the Plan.\textsuperscript{55}

\textsuperscript{55} Racanelli, \textit{supra}, 182 Cal. App. 3d at 110-111.
A number of parties filed mandamus petitions seeking to invalidate the water quality control plan and Decision 1485. In the coordinated proceeding on those petitions, the trial court rejected the Board's water quality objectives as inadequate and issued a writ of mandate commanding the Board to set aside the plan and the decision and to reconsider the plan.\textsuperscript{57}

On appeal in the 1986 opinion often referred to as the \textit{Racanelli} decision, the appellate court concluded "that the modification of the projects' permits in order to implement the water quality [objectives] was a proper exercise of the Board's water rights authority," but "in establishing only such water quality [objectives] as will protect Delta water users against the effects of project activities, the Board misconceived the scope of its water quality planning function."\textsuperscript{58} According to the court, "the Board has the power and duty to provide water quality protection to the fish and wildlife that make up the delicate ecosystem within the Delta."\textsuperscript{59} The appellate court also concluded that "the procedure followed--combining the water quality and water rights functions in a single proceeding--was unwise" because in doing so "the Board compromised its important water quality role by defining its scope too narrowly in terms of enforceable water rights."\textsuperscript{60}

Because the Board had already announced its "intention to conduct hearings during 1986 to establish new and revised" water quality objectives, the appellate court determined that "remand to the Board could serve no useful purpose."\textsuperscript{61} Accordingly, the

\textsuperscript{56} \textit{Id.}, at 111.
\textsuperscript{57} \textit{Id.}, at 111, 120.
\textsuperscript{58} \textit{Id.}, at 98.
\textsuperscript{59} \textit{Ibid.}
\textsuperscript{60} \textit{Id.} at 119, 120.
\textsuperscript{61} \textit{Id.}, at 120.
court reversed the judgment commanding the Board to reconsider the water quality control plan and instead simply expressed its expectation that "the renewed proceedings [would] be conducted in light of the principles and views expressed in [the court's] opinion." As a result, Decision 1485 remained in effect.

In July 1987, the State Board began proceedings to reexamine water quality objectives for the Bay-Delta and consider how water right permits would be modified to meet the new objectives. In May 1991, it adopted the 1991 Bay-Delta Plan with objectives for salinity, dissolved oxygen, and temperature. The 1991 Bay-Delta Plan was subsequently submitted to the U.S. Environmental Protection Agency (USEPA) for approval. In September 1991, the USEPA approved all of the salinity objectives for municipal, industrial, and agricultural beneficial uses, and the dissolved oxygen objective for fish and wildlife beneficial uses. The USEPA stated that the other fish and wildlife objectives were disapproved because of their failure to protect estuarine habitat and other fish and wildlife beneficial uses. As required under federal regulations when a state does not adopt changes in standards recommended by the USEPA upon notification of approval or disapproval of a state's standards, the USEPA initiated promulgation of water quality standards for the Bay-Delta Estuary. In January 1994, the USEPA published draft standards for the Estuary in the Federal Register.

To coordinate the parallel State and federal Bay-Delta resource management activities, the Governor's Water Policy Council of the State of California (Council) and the Federal Ecosystem Directorate (FED), comprised of State and federal resource agencies collectively known as CALFED, entered into a Framework Agreement in June 1994. The purpose of the agreement is to establish a comprehensive program for

\[62 \textit{Ibid.}\]
coordination and communication between the Council and the FED regarding environmental protection and water supply dependability in the Bay-Delta and its watershed.

Meanwhile, in March 1994, the State Board commenced a proceeding to revise the water quality objectives for the Bay-Delta. During the public workshops, the Board encouraged interested parties to develop alternatives for revising the objectives. Eventually, various representatives of the state and federal governments and certain urban, agricultural, and environmental interests reached agreement on recommendations to the Board for the revised objectives. This agreement is embodied in a document entitled "Principles for Agreement on Bay-Delta Standards between the State of California and the Federal Government" (principles for agreement), which was signed on December 15, 1994. Among the signatories were the Secretary of the California Resources Agency and the Secretary for the California Environmental Protection Agency.

The same day the principles for agreement were signed, the Board released the first draft of its new water quality control plan for the Bay-Delta. The Board used several elements of the principles for agreement, as well other recommendations from interested parties, in preparing the draft plan. This process culminated with 80 days of Board hearings and the issuance of Decision 1641, the primary purpose of which was to implement the flow objectives of the 1995 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (1995 Bay-Delta Plan). These flow objectives include those set for Delta outflow, the salinity objectives in the Delta that occasionally control the Delta outflow, the flow objectives on the Sacramento River at
Rio Vista, the flow objectives on the San Joaquin River at Vernalis, and the Salinity objectives on the San Joaquin River at Vernalis.

As an interim measure, this responsibility had been imposed only upon the Bureau for the CVP and DWR for the SWP. This Decision addressed the water rights of all those parties whose water use might affect the 1995 Bay-Delta Plan objectives. It accepted the contributions that certain parties would make toward meeting the flow objectives through various settlement agreements. It also expanded the responsibility of the SWP and CVP by adding objectives that were not part of earlier orders.

Eleven petitions for writ of mandate/complaints were filed challenging Decision 1641. All actions were coordinated in the Sacramento County Superior Court. The trial court conducted sixteen days of hearing and issued a 102-page statement of decision that affirmed Decision 1641 in part and overturned it in part.

In a 158-page decision authored by Justice Ronald Robie and now referred to as the Robie decision, the Third District Court of Appeal upheld Decision 1641, except for the changes in the CVP permits that would have allowed the Bureau to serve additional lands in Westlands and Santa Clara County. Not only did the decision set the baseline for the current operating standards for the Bay-Delta, it addressed a number of important issues that had been debated for years but never decided.

It first rejected the argument that the Delta Protection Act required the upstream reservoirs release water for the benefit of Delta riparians and appropriators, even though the flows would not have been available under natural flow conditions. The Act, which became law in 1959, simply makes findings on the need to maintain “an adequate water supply” for the Delta, and “to provide a common source of fresh water for export.”
court determined that Delta riparians and appropriators have no right to water stored upstream by others in an earlier season, and it is for the State Board to balance in-Delta and export needs in order to determine whether the Delta has an “adequate” supply of water. The court concluded that the Board did this.

It next addressed the “no injury” rule which is based upon both the common law and later statutory provisions, provides that the point of diversion, place of use, or type of use of a water right may be changed if the change does not injure any legal users of water. Some Delta users argued that they did not have to prove a right to the water in question, only a mere showing of injury was sufficient. The court, however, concluded that the “no injury” rule relates only to parties who have “rights” to the water involved, and since in the Decision 1641 proceedings the Delta riparians and appropriators had no rights to the water stored by upstream irrigation districts, they could not be injured by changes in use of that water.

Related to the court’s ruling concerning the “no injury” rule, was its ruling concerning the definition of a “legal user of water.” One of the CVP contractors challenged the Bureau’s petition to include fish and wildlife enhancement as a purpose of use under its CVP permits. The State Board had ruled in Decision 1641 that the term “legal user” in Water Code section 1702 excluded those whose use of water was pursuant to a contract with an appropriator, such as the CVP. The court, however, found no legal or historic support for this narrow view, concluding that the legislature had intended the broad term “legal user” to include those who lawfully use water under a contract with an appropriator.
Finally, a number of environmentalist groups argued that the public trust doctrine required imposition upon the SWP and CVP of even higher flow release obligations, claiming the legal standard to be that such higher flow release obligations are required whenever “feasible.” The court, however, determined that what is “feasible” is for the State Board to decide by considering whether the protection of the public trust values is consistent the “public interest,” taking into account all of the beneficial uses to be made of water in the Bay-Delta, including municipal, industrial, and agricultural.

RECENT LITIGATION AND COURT DECISIONS

IMPACTING THE BAY-DELTA

1. THE MONTEREY AMENDMENT LITIGATION

The 1995 amendment to the SWP water supply contracts between DWR and the long-term contractors, referred to as the Monterey Amendment, resolved longstanding disputes between the urban and agricultural State Water contractors over allocation of available supply during times of shortages as well as other financial and water management issues. Planning & Conservation League (PCL), Plumas County, and the Citizens Planning Association of Santa Barbara County subsequently challenged the Environmental Impact Report (EIR), which was prepared by Central Coast Water Authority as the lead CEQA agency, and the validity of the provision in the Monterey Amendment authorizing the transfer of Kern Water Bank lands to Kern County Water Agency.

Although the Sacramento County Superior Court against the petitioners, the Third District Court of Appeal reversed the trial court’s judgment finding that the EIR was
inadequate due to (1) the designation of the Central Coast Water Agency as lead agency, rather than DWR, and (2) the EIR’s failure to adequately address potential impacts that might flow from the Monterey Amendment’s removal of Article 18(b) from the SWP water supply contracts.\textsuperscript{63}

The case was remanded to Superior Court for consideration of petitioners’ request for an injunctive order. The parties stipulated to a stay of litigation while settlement negotiations proceeded. A settlement agreement was signed by all parties in the spring of 2003. The settlement provides for a number of actions to be taken, including the preparation of a new EIR on the Monterey Amendment, referred to as the Monterey Plus EIR. In addition, DWR and the contractors agreed to use the term “Table A amount” in lieu of entitlement and amended the SWP water supply contracts to reflect the new term. The settlement agreement also requires DWR to issue a water supply reliability report biennially to provide more accurate information on the reliability of the available supply of water from the SWP, and for DWR to initiate a watershed protection program in Plumas County.

The new draft Monterey Plus EIR was released for public comment in early October 2007. The public comment period concluded on January 14, 2008.

2. CVPIA LITIGATION

In 1992, the Central Valley Project Improvement Act made significant changes to the CVP’s legislative authorization, amending the project’s purposes to place fish and

wild life mitigation and restoration on a par with water supply, and to place fish and wild
life enhancement on a par with power generation.64

a. Bay Institute of San Francisco v. United States (9th Cir. 2004)

87 Fed. Appx. 637

This unpublished decision by the Ninth Circuit Court of Appeal resolved this
litigation over the Bureau’s methodology for accounting for the 800,000 acre feet to be
dedicated to fish, wildlife and habitat restoration under the CVPIA. The Ninth Circuit
affirmed the district court’s holding that (1) Section 3406(b)(2) of the CVPIA does not
require the United States Department of Interior to calculate the cost of water actions
against a hypothetical model of CVP operations during the 1928-1934 drought period;
(2) that Interior may not exclude from its calculation of Project yield water flows
implemented in connection with Auburn Dam; (3) that Interior may not use offset/reset
matrices in accounting for the use of water; and (4) that the CVPIA does not prohibit
Interior from reusing water initially released for (b)(2) purposes.

The Ninth Circuit, however, also held that the district court erred in concluding
that Interior lacks discretion to refrain from crediting the amount of Project yield actually
used for any (b)(2) purpose against the designated 800,000 acre feet of Project yield. The
Court stated that “To hold otherwise would defeat the primary purpose for which the
800,000 acre feet were designated.”


327 F.Supp.2d 1180

South Delta farmers and water agencies brought an action against the Bureau
challenging the New Melones Interim Operations Plan (Vernalis Standard) developed

64 Title 34 of PL 102-575.
under the CVPIA. The Ninth Circuit Court of Appeal found that the Bureau’s decision to release water under the Plan was not arbitrary and capricious, and that plaintiffs lacked proof of actual injury.

An earlier state court challenge to State Water Resources Control Board Order No. 95-6 approving changes to the Bureau’s allocation of water from New Melones was dismissed for failure to join the Bureau, an indispensable party. The Bureau had previously refused to waive sovereign immunity.65

3. OCAP ESA CASES

Operations, Criteria, and Plan (OCAP) is the title for a set of operating guidelines for both the CVP and the SWP’s pumps, based upon a set of federal biological assessments of the endangered fish species affected by pumping. In 2004, a U.S. Fish and Wildlife Service (FWS) biological assessment determined that the existing OCAP did not jeopardize the continued existence of the Delta Smelt or its critical habitat.

Case No. 05-CV-01207)

In 2007, a federal district court in California invalidated a biological opinion issued by the FWS relating to the operation of the CVP and SWP, and required the projects to reduce their water deliveries to their contractors.66 This decision is now referred to as the “Wanger ruling,” named after the federal judge, Hon. Oliver Wanger, who issued it.

The FWS’ biological opinion, issued on February 16, 2005, concluded that the coordinated current and future operation of the CVP and SWP would not jeopardize the

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continued existence of the Delta smelt, a tiny fish located solely in the Sacramento-San Joaquin Delta that has been listed as an endangered species by the Secretary of the Interior. It also determined that the Delta smelt population had declined over the past 20 years, as the result of the operation of the SWP and other causes.

Relying on a computer modeling program, however, the opinion concluded that SWP operations would not likely jeopardize the continued existence of the smelt, because the level of take resulting from SWP operations is at or below historic take levels. The opinion based this conclusion, in part, on the establishment of various conservation measures and a risk assessment program that would avoid or minimize adverse effects. The risk assessment program established an adaptive management program to protect the smelt; under the program, a Delta smelt working group would work with a management team, which in turn would consider whether to reduce export diversions from the CVP and/or SWP and other measures to protect the smelt.

The district court held that the biological opinion was inadequate on various grounds, including the opinion’s failure (1) to provide any certainty or requirement that the working group or management team take any actions to protect the smelt, (2) to provide reasonable assurances that adverse impacts identified in the biological opinion would be mitigated, (3) to use the best available science in analyzing the existing Delta smelt population, and that the most recent information indicated that the smelt was at historically low levels, (4) to use the best available science in addressing climate change and its effect on the smelt’s critical habitat, (5) and to adequately analyze the indirect and cumulative impacts of the project operations on the smelt.67

67 Id., at 387-388.
The district court subsequently issued an order requiring the CVP and SWP to reduce water exports from the Delta in order to protect the smelt, and provided that the order will remain in effect until the FWS issues a new biological opinion providing long-term protection for the smelt. The court ordered that the FWS prepare the biological opinion by no later than September 2008.\(^6\)

It is estimated that the court’s order will result in reduced Delta pumping and cut back on water exports this year by 14% to 37%, or up to two million acre-feet. The Wanger ruling is the reason many local water agencies are talking about supply cutbacks in 2008, as exports from the CVP and SWP will be limited under any hydrologic scenario. The ruling has highlighted the potential long-term economic effects of water shortage due to problems with Bay-Delta conveyance, diminishing water supplies, and lack of adequate storage.


This recent ruling by U.S. District Court Judge Wanger invalidated a biological opinion issued in 2004 by United States National Marine Fisheries Service ("NMFS" also referred to as "NOAA Fisheries," used interchangeably) concerning the impact of CVP and SWP operations on endangered salmon species (winter-run Chinook, spring-run Chinook, and Central Valley steelhead) in the Delta.\(^6\) This ruling seemed inevitable to most observers, as NMFS had already asked for a voluntary remand to better explain the implications of the CVP and SWP upon the recovery of salmonid species based upon an

\(^{69}\textit{Pac. Coast Fed. of Fishermen’s Ass’n s v. Gutierrez} \text{(E.D. Cal., April 16, 2008) 2008 U.S. Dist. LEXIS 31462.} \)
earlier ruling by the Ninth Circuit Court of Appeal in *National Wildlife Fed'n v. National Marine Fisheries Serv.* (9th Cir. 2007) 481 F.3d 1224. The federal defendants, therefore, had no choice but to concede some of the claims against them.

While most of the plaintiffs' other claims failed, Judge Wanger also issued a clear statement regarding the failures of both NMFS and the Bureau to properly consider the effects of global climate change for water management in the region, an issue even conceded by the water user interveners. The ruling, however, also acknowledged that many of the federal defendants' efforts on behalf of salmonid species were adequate. For example, the court held that the proposed mitigation measures to offset the effects of the OCAP "are definite, and sufficiently certain to be enforceable" and "strike the appropriate balance between the needs of certainty and flexibility prescribed by law."

The court also acknowledged that an inoperative CVP or SWP "would not maintain the status quo, rather it would produce catastrophic results to the public and all parties in interest." Accordingly, the court set a scheduling conference for April 25, 2008 to address a schedule for addressing interim remedies without change in current operations.

4. **CESA DELTA SMELT CASE**

a. *Watershed Enforcers v. California Department of Water*

*Resources (Court of Appeal, First App. Dist., Case Nos. A117715, A117750)*

In March 2007, the Superior Court for Alameda County held that the DWR's operation of the SWP violated the CESA due to SWP operations resulting in a prohibited
“take” of the Delta smelt. The court ordered DWR to cease and desist further SWP operations within 60 days unless it obtained take authorization from the California Department of Fish and Game (DFG) as provided in the CESA.

DWR and several other parties appealed the decision to the First District Court of Appeal, and the court granted a joint motion to stay the appeal through December 31, 2008, subject to subsequent request of any party or order of the court.

It is this decision by the Alameda County Superior Court that spurred on the Bay Delta Conservation Plan (BDCP). Headed by the Resources Agency, BDCP is a collaborative effort among key stakeholders to create an ecosystem restoration plan that complies with CESA mandates. In essence, the BDCP is a more focused and objective-oriented effort to consider the core task of the CalFed program: how to create a long-term plan that allows reliable conveyance of water while protecting the Delta ecosystem. As part of its work, the BDCP steering committee is considering alternative conveyance scenarios, such as partial or complete reliance on a new conveyance facility around the Delta.

Preparation of a draft EIS/EIR on the BDCP has begun, with workshops scheduled throughout the state. This document will be available for public review by the end of 2009, and the steering committee anticipates approval of the BDCP and a permit decision by end of 2010

5. CALFED EIR CASES

The failure of the “peripheral canal” – a facility to send water supplies around the periphery of the Bay-Delta – on the November 1982 ballot ensured that Bay-Delta water conveyance would remain entirely dependent on Delta levees for another generation.

70 Watershed Enforcers v. California Department of Water Resources (Alameda County Superior Court Case No. RG06292124)
Though the canal was rejected in part due to environmental concerns, the default option of moving 100% of that water "through-Delta" was immediately fraught with environmental hazards of its own.

The 1994 Bay Delta Accord was a response to increasing conflicts between pumping operations and environmental regulation, particularly the ESA. The Accord gave rise to the CalFed program and its guiding document, the 2000 Record of Decision. CalFed was primarily designed to create a reliable regulatory climate for through-Delta water conveyance.

The CalFed Record of Decision (ROD) issued on August 28, 2000, and its supporting Environmental Impact Study (EIS) and EIR were challenged by environmental groups and agricultural interests in both state and federal courts. The various state court challenges were coordinated and consolidated in the Sacramento County Superior Court, which ultimately ruled in favor of the CalFed agencies, upholding the ROD and EIR. That judgment, however, was reversed by the Third District Court of Appeal in a lengthy opinion, which contained a discussion concerning alternatives that many southern California water agencies found very disturbing:

The feasibility of such a reduced exports alternative is clear, notwithstanding the projected population growth that undergirds the commitment not to reduce exports. As stated previously, it is projected that the state's population will grow from 30 to 49 million by the year 2020, and that half of this growth will be in Southern California. Such population growth requires water. However, if there is no water to support the growth, will it occur as projected? Population growth is not an immutable fact of life. Stable populations have been established in such states as New York, Pennsylvania, Connecticut, and Rhode Island. [citation omitted] Inflow of new residents to California continues to exceed outflow because conditions in the State are conducive to population growth. One aspect of these conditions is the availability of water. However, as the State reaches the limit of available water and must

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seek other sources such as desalination, water will become more expensive to obtain and California's appeal will lessen.

Years ago some argued that people should follow the water, not vice versa. While it is not the function of this court to advocate one position or the other, this argument nevertheless points out a glaring defect in the PEIS/R. CALFED conducted its environmental analysis by assuming certain population growth in the State over the next 15 years and then finding ways to provide water to that population. But CALFED appears not to have considered, as an alternative, smaller water exports from the Bay-Delta region which might, in turn, lead to smaller population growth due to the unavailability of water to support such growth. Taking an assumed population as a given and then finding ways to provide water to that population overlooked an alternative that would provide less water for population growth leaving more for other beneficial uses. CALFED apparently assumed that the California population would grow as projected regardless of the availability of water and did not consider whether, if less water was supplied, population growth would be affected accordingly, leading to less demand.\footnote{Id., at 211-212.}

Not surprisingly, the California Supreme Court granted subsequent petitions for review, and on April 2, 2008, it heard oral argument in the matter. A decision is expected within 90 days, or by July 2, 2008.

Plaintiffs in the federal lawsuit allege violation of National Environmental Policy Act (NEPA) and the federal Administrative Procedures Act. That federal challenge has been stayed by agreement of the parties until the state court challenges to CALFED are determined.

While the CalFed challenges have traveling the appellate process, a number of supplemental programs have been proposed and implemented in an effort to corrected some of CalFed’s subsequently perceived deficiencies. “Delta Vision” is a result of the CalFed program’s mandate to evaluate the progress of CalFed’s Phase I that ended in 2007. That mandate includes an evaluation of the viability of “through-Delta”
conveyance. In this respect, it mirrors the BDCP effort. But, Delta Vision also incorporates broader issues of “Delta sustainability” – chiefly, the future of development and farming practices in the region.\textsuperscript{73}

In February 2007, Gov. Arnold Schwarzenegger appointed a seven-member Blue Ribbon Task Force to develop a long-term sustainable vision for the Delta and an implementation plan by October of 2008.\textsuperscript{74} The Vision was released in December 2007 and makes 12 linked recommendations. The Task Force also recommended a new governing structure for the Delta with secure funding and the ability to approve spending, planning and water export levels.

CalFed Phase I implementation requires an evaluation of long-term Delta sustainability, including an assessment of major risks to Delta resources and infrastructure, including threats posed by earthquakes, floods, and land subsidence. 2005 legislation added climate change and sea-level rise to those study elements and requires DWR to look at 50-, 100-, and 200-year scenarios.\textsuperscript{75} The Delta Risk Management Strategy (DRMS), often known as “the Dreams study,” now plays a supporting role to the Delta Vision and BDCP.

\textsuperscript{73} Senate Bill 1574 (Kuehl/2006)
\textsuperscript{74} Executive Order S-17-06
\textsuperscript{75} AB 1200 (Laird/2005)
LEGAL FRAMEWORK FOR ANALYSIS OF THE IMPACT OF BAY-DELT A CHANGES ON LOCAL WATER SUPPLY AND LAND USE PLANNING

While the Bay-Delta’s current legal and regulatory scheme may appear complex, and while that scheme is likely to change substantially as a result of current litigation, the legal framework a local planner should apply to consider the reliability of imported water from the Bay-Delta is no different than the legal framework that the planner should apply when considering the reliability of water from any source.

1. OVERVIEW OF APPLICABLE LAWS

a. CEQA

The California Environmental Quality Act (CEQA) was originally enacted to require public agency decisionmakers to document and consider the environmental implications of their actions. CEQA contains both procedural and substantive mandates. Public agencies must refrain from approving projects with significant environmental effects if "there are feasible alternatives or mitigation measures" that can substantially lessen or avoid those effects.77

Under CEQA, a public agency responsible for approving or carrying out a project that may have a "significant effect" on the environment must prepare an environmental impact report (EIR) that describes these effects and proposes mitigation measures and alternatives to avoid the effects. The California courts have held that—for projects that

will depend on water supplies—the EIR must describe the project’s environmental effects relating to the use of water supplies, because the EIR’s analysis of the project’s environmental effects would otherwise be incomplete.\(^{78}\)

The question that remained unanswered until 2007, however, was how firmly future water supplies for a proposed project must be identified or, to put the question in reverse, what level of uncertainty regarding the availability of water supplies can be tolerated in an EIR for a land use plan. Neither CEQA, nor any published appellate court decision had directly addressed that issue.

**b. URBAN WATER MANAGEMENT PLANNING ACT**

In 1983, the Legislature enacted the Urban Water Management Planning Act (UWMPA).\(^{79}\) The original purpose of the UWMP was to ensure that all urban water suppliers make their best efforts to efficiently use water resources.\(^{80}\) Under the current version of the UWMPA, an agency that provides water supplies for urban use, described as an urban water supplier, must prepare an Urban Water Management Plan (UWMP) every five years which describes the availability of water supplies for future growth needs. The UWMP must describe the agency’s water supplies, and evaluate whether the supplies are sufficient to meet the agency’s projected water demands over a minimum 20-year planning horizon, taking into account the agency’s existing and planned future uses.\(^{81}\) The statute provides that CEQA does not apply to the UWMP, and thus the water supply agency is not required to prepare an EIR for the UWMP.


\(^{79}\) *Wat. Code § 10610 et seq.*

\(^{80}\) See *Legislative history of AB 797* (Klehs/1983).

\(^{81}\) *Id.*, at § 10631.
There has only been one published decision concerning an UWMP. This was a challenge to the 2000 UWMP jointly adopted by the Santa Clarita Valley water suppliers: Castaic Lake Water Agency (CLWA), Newhall County Water District, Santa Clarita Water Company, and Valencia Water Company. These suppliers rely upon water imported from the SWP and out of area storage through CLWA and groundwater from two aquifers: (1) Alluvial; and (2) Saugus. In 2000, groundwater provided about 54 percent of total supply overall for the Santa Clarita Valley retail suppliers.

The 2000 UWMP acknowledged a perchlorate contamination plume in the Saugus aquifer as spreading and having shut down 25 percent of Saugus aquifer wells. The 2000 UWMP said treatment would cost more than $300 per af, that a groundwater cleanup plan was being discussed, and that “available options to address the perchlorate issues create a high probability that the annual yields discussed in the UWMP can be sustained.”

While the trial court upheld the adequacy of the 2000 UWMP, the Fifth District Court of Appeal reversed the judgment and found the 2000 UWMP’s description of the reliability of groundwater from Saugus Formation and Alluvial Aquifer inadequate due to the plan’s failure to address timing issues concerning perchlorate contamination. “Simply stating that a treatment technology is available and that a groundwater treatment plan is being developed without discussing when the plan may need to be implemented and the amount of time needed for its implementation leaves a temporal gap in the description of the reliability of the water source.”

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83 Santa Clarita Water Company is the retail division of CLWA and is properly referred to as “CLWA Santa Clarita Water Division.”
85 Id.
c. SB 610/221

Enacted in 2001, SB 610’s primary purpose is to strengthen the link between water supply and land use. It only applies to large projects, such as residential projects of more than 500 units and large commercial projects. It provides that public water agencies must prepare a “water supply assessment” (WSA) describing the availability of water supplies for a proposed project. The WSA must describe whether sufficient water supplies are available to meet the project’s needs over a 20-year period, taking into account the water supplier’s “existing and planned future uses.” The WSA must describe the availability of future water supplies under different scenarios—normal years, dry years and multiple dry years—and describe the specific authority for the supplies.

In determining the sufficiency of future water supplies, the WSA must describe the plans for acquiring the supplies, including estimated costs and how they will be financed. The WSA may incorporate information from the relevant UWMP, if the UWMP provides adequate information for this purpose. For groundwater supplies, the WSA must determine whether the groundwater basin is “sufficient” to meet the project’s future demands over a 20-year period, and must specifically consider past, present and future projected pumping by the water supplier. If the water supplier is a city or county, the city or county must prepare the WSA.

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86 See Legislative history of SB 610 (Costa/2001).
87 Id., at § 10912.
88 Wat. Code § 10910 et seq.
89 Id., at § 10910(c)(3).
90 Id., at § 10910(d).
91 Id., at § 10911.
92 Id., at § 10910(c).
93 Id., at § 10910(f).
94 Id., at § 10910(b).
SB 221 was also enacted in 2001 with the stated purpose of preventing local planning officials from approving large subdivisions without verifying the existence of long-term water supplies, and it specifically requires an affirmative written verification (WV) of sufficient water supply by the water supplier that would supply water to the subdivision as a condition of approval of the applicable tentative map, parcel map, or development map. It applies to residential subdivisions of more than 500 dwelling units and any public water system with fewer than 5,000 existing service connections if proposed residential development would increase service connections by 10 percent or more.

SB 610 and SB 221 fundamental difference is in terms of whether a project can be approved if it currently lacks a “sufficient” water supply. Under SB 610 a local government can approve a project lacking a sufficient water supply if the government includes the requisite SB 610 information concerning the insufficiency of the water supply in its findings.

In contrast, SB 221 requires that in approving a tentative subdivision map, the local government include a condition that the project has a “sufficient water supply.” This condition cannot be included, and the project cannot be approved, if the water supply agency determines that sufficient water supplies are not available for the project.

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95 Gov't Code § 66473.7.
96 Gov't Code § 66473.7(a)(1).
97 Wat. Code § 10911(b).
98 Govt. Code § 66473.7(b).
2. CRITICAL RULES FROM RECENT DECISIONS

a. RULE NO. 1: ANALYSIS OF AN ALTERNATIVE FUTURE WATER SOURCE IS REQUIRED ONLY WHEN IT IS "IMPOSSIBLE TO CONFIDENTLY DETERMINE" THAT THE ANTICIPATED FUTURE WATER SOURCE WILL BE AVAILABLE

_Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova (Vineyard)_99 involved a challenge to an EIR for a long-range plan for 22,500 homes on 6,000 acres. The anticipated water supply for planned development had several components, including use of groundwater for near-term development and new surface water supplies coupled with a conjunctive use program that would provide water for the longer term. The EIR explained that other development projects would compete for these water supplies, and mitigation was adopted to prohibit specific development entitlements until a secured water source was in place. The trial court and court of appeal both upheld the EIR's water supply analysis, concluding that the EIR adequately identified and evaluated potential water sources for the development.

In its review of prior appellate court decisions concerning land use and water supply planning, the Supreme Court set forth four principles:

1) An EIR cannot ignore or assume a solution to the problem of supplying water to a land use project;

2) An adequate environmental analysis cannot be limited to the water supply for the first stage or the first few years;

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3) Water sources must bear a likelihood of actually proving available, and speculative sources or unrealistic amounts ("paper water") will not be sufficient bases for decisions under CEQA; and

4) When a full discussion leaves some uncertainty regarding future water sources, then CEQA requires some discussion of possible replacement sources or alternatives, and any environmental impacts from those contingencies.\(^{100}\)

The language in the decision concerning the fourth principle was modified slightly after the Court ruled on several petitions for rehearing.\(^{101}\) It is now correctly stated as: The analysis of replacement or alternative sources of water is only required when it is "impossible to confidently determine" that anticipated future water sources will be available.\(^{102}\)

*Santa Clarita Organization for Planning the Environment v. County of Los Angeles (SCOPE II)*\(^{103}\) was the first published appellate court decision applying the principles set forth by the Supreme Court in *Vineyard*. *SCOPE II* was the second round of challenges against the EIR for the West Creek development in the Santa Clarita Valley. The opponents challenged the county's EIR, which had been revised following the Second District Court of Appeal's decision in *SCOPE I*.\(^{104}\) The project opponents made the same argument in *SCOPE II* that they had won against the Gate King project EIR in *California Oak*\(^{105}\), arguing that the West Creek project's new CEQA review on

\(^{100}\) *Id.*, at 429-433.


\(^{102}\) *Id.*, at 162.


\(^{105}\) *California Oak Foundation v. City of Santa Clarita (California Oak)* (2005) 133 Cal.App.4th 1219.
water supply failed to adequately address the legal uncertainties threatening the long-term availability of the Kern-Castaic Transfer, one of the many SWP Table A transfers that occurred following the addition of the Monterey Amendment to each SWP water supply contract. CLWA was the local water wholesaler, and the Kern-Castaic Transfer accounted for a substantial portion of the SWP imported supplied relied upon by CLWA.

This time, however, the Second District Court of Appeal upheld the Westcreek Revised EIR and rejected this argument by the project opponents. Applying the substantial evidence test, the Court of Appeal found that the West Creek Revised EIR met all four principles of analysis stated in Vineyard. Because the Revised EIR concluded, based on a reasoned analysis of the circumstances surrounding the water transfer and its uncertainties, that West Creek’s water supplies bore a likelihood of actually proving available, West Creek’s EIR satisfied the third principle in Vineyard. As a result, the Court concluded, West Creek’s EIR was not required to analyze alternative water sources under Vineyard’s fourth principle.

Scope II disposes of a number of issues that project opponents have raised based on the Vineyard and California Oak decisions, including whether the substantial evidence standard of review applies when a court determines the sufficiency of an EIR’s analysis of water supplies subject to some amount of uncertainty, and whether the California Oak decision determined as a matter of law that any EIR relying upon water supplies from a transfer of SWP water must analyze alternative water supplies. Even more broadly, the SCOPE II decision makes clear that under CEQA, so long as an EIR discloses the uncertainties surrounding a particular water supply and contains substantial evidence demonstrating the likelihood that the supplies will be available in the
future despite the disclosed uncertainties, the EIR need not identify and analyze alternative water supplies, and the lead agency’s decision to certify the EIR and approve the project will be affirmed against challenges that other – “even better” – evidence supports a conclusion that the water supply may not be available in the future.

b. RULE NO. 2: A PROJECT EIR MAY PRECEDE A RELATED PROGRAM EIR

In *Vineyard*, the challenged EIR found that the future water supplies needed for the development would be provided through conjunctive use of surface and groundwater supplies. The Supreme Court noted, however, that the EIR was relying on a conjunctive use program for which an EIR had yet to be prepared. “To the extent the FEIR attempted, in effect, to tier from a future environmental document, we reject its approach as legally improper under CEQA.”\(^{106}\) The Court, thereafter, concluded that a lead agency need not delay the preparation of a project EIR for the sole purpose of tiering upon another agency’s related program EIR that has yet to be certified.\(^{107}\)

c. RULE NO. 3: DWR IS THE RECOGNIZED EXPERT WITH RESPECT TO THE ANNUAL DELIVERY RELIABILITY OF THE SWP

Over ten years ago the California Supreme Court had to again admonish its lower courts to recognize the expertise of the many agencies and special districts created by the legislature:

> [Administrative agencies to which the Legislature has delegated regulatory authority in particular areas often develop a high degree of expertise in those areas and the body of law that governs them... A court's task is not to weigh conflicting evidence and determine who has

\(^{106}\) *Vineyard, supra*, 40 Cal.4\(^{th}\) at 842.  
\(^{107}\) *Ibid.*
the better argument when the dispute is whether adverse effects have been mitigated or could be better mitigated. We have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so. Our limited function is consistent with the principle that 'The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind.'\textsuperscript{108}

Following this rational, the Third District Court of Appeal in its 2002 decision in \textit{Planning and Conservation League v. Department of Water Resources (PCL)} noted that only DWR had the sufficient expertise and statewide perspective to serve as lead agency for the Monterey Amendment EIR, since the Amendment would likely result in a significant reallocation of SWP imports throughout the State:

Similarly, DWR has a statewide perspective and expertise. The allocation of water to one part of the state has potential implications for distribution throughout the system. DWR is painfully familiar with the problems plaguing the Delta and the possible impacts of the Delta Accord, an agreement between the federal and state governments, on the Kern Fan Element. As in \textit{City of Sacramento}, it is the "logical choice for lead agency" because it has principal responsibility for implementation of an agreement that substantially restructures distribution of water throughout the state.\textsuperscript{109}

As part of the settlement agreement in \textit{PCL}, all parties to the agreement, including the State of California, recognized DWR’s sole expertise in determining the annual delivery reliability of the SWP. Given this recognized expertise, the settlement agreement requires DWR to issue a water supply reliability report biennially to provide more accurate information on the reliability of the available supply of water from the SWP.

Courts have since held that as the state agency charged with management and operation of the SWP, only DWR has sufficient expertise to accurately assess SWP

\textsuperscript{108} \textit{Western States Petroleum Ass'n v. Superior Court (WSPA)} (1995) 9 Cal. 4th 559, 572-573.
\textsuperscript{109} \textit{PCL, supra}, 83 Cal. App. 4\textsuperscript{th} at 907.
supply capacity and delivery reliability. In *SCOPE I*, the court of appeal stated that data from DWR concerning SWP reliability is the standard for planning. Even the UWMPA recognizes that in the preparation of a UWMP, all water suppliers receiving annual SWP deliveries should rely upon the most recent delivery reliability report issued by DWR in preparing their UWMP.

d. **RULE NO. 4: LOCAL WATER SUPPLIERS ARE RECOGNIZED AS EXPERTS IN LOCAL WATER SUPPLY PLANNING—THEIR ANALYSIS OF LOCAL WATER SUPPLIES, INCLUDING THE RELIABILITY OF FUTURE WATER SUPPLIES, MUST BE ASSESSED AND CONSIDERED**

Both the Legislature and the courts have long recognized that in the context of local land use and water supply planning, local water suppliers are to be considered the experts in local water supply planning. The UWMPA provides that when preparing its UWMP, a retail water supplier should rely upon the information provided to it by its regional wholesaler water supplier. SB 610 and SB 221 specifically require that the WSAs and WVs come from the local water supplier. In *SCOPE II* the Second District Court of Appeal applauded the County of Los Angeles’ use of SWP delivery reliability information from DWR and local water supply information, including the analysis for future water suppliers, from the water supplier that would be serving the West Creek Development.

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112 Wat. Code § 10631(k).
113 Gov’t Code § 66473.7; Wat. Code § 10910
114 *SCOPE II, supra*, 157 Cal. App. 4th at 162.
Yet, perhaps the strongest warning to date against ignoring the local water supplier's analysis of current and future water supplies has come in the Second District Court of Appeal recent decision in *California Water Impact Network v. Newhall County Water District*. In discussing the duty of a lead agency under SB 610 to evaluating the WSA issued by the water supplier and the discretion to accept or disagree with the water supplier's analysis, the court noted:

That a lead agency can effectively reject the conclusions reached in the WSA does not mean the lead agency should. Indeed the purpose behind the WSA laws is to insure that relevant information concerning water supplies is assessed and considered prior to the approval of statutorily defined projects. The water provider is one of the key sources of that information and the WSA is the effective method that information is transmitted to land use decisionmakers. Thus to fulfill its usefulness and statutory aims, the lead agency would be well advised to evaluate the WSA and if the WSA is found to be incomplete or to contain inaccurate information or faulty analysis, the lead agency should request the water supplier to modify, correct or supplement the WSA.116

**e. RULE NO. 5: A WATER SUPPLY ASSESSMENT MAY NOT BE DIRECTLY CHALLENGED OUTSIDE OF A CHALLENGE TO THE EIR OR NEGATIVE DECLARATION**

There have been few legal challenges involving WSAs since the enactment of SB 610. As long-term water planning continues to become an increasingly divisive issue in California, project opponents have begun to view WSAs—similar to EIRs and other informational documents related to project approvals—as useful tools for attacking development projects. Before the *California Water Impact Network v. Newhall County Water District* 2008 Cal. App. LEXIS 554

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116 Id., at fn. 21.
case, a basic question that had not been addressed in court was whether WSAs may be directly challenged independent of CEQA, or whether they must be challenged as part of a CEQA lawsuit. A direct challenge could consist of a suit against the water provider after it approves the WSA, claiming that the provider failed to comply with SB 610. On the other hand, in the CEQA context, a challenger could sue the lead agency alleging that the EIR is defective due to reliance upon an inadequate WSA.

If the WSA can be directly challenged independent and separate from CEQA, a project proponent may face separate lawsuits challenging both the EIR and the WSA, as the developer faced in CWIN. If a challenge to a WSA must be brought under CEQA, however, both the WSA and EIR challenge would be in one suit.

After the Newhall County Water District (NCWD) prepared and approved a WSA for a large industrial project in the City of Santa Clarita, CWIN sued NCWD alleging that the WSA failed to meet several substantive SB 610 requirements. CWIN did not raise its objections to the WSA with the City or wait for the City to make its independent determination of whether adequate water supplies existed or to make its decision regarding project approval before bringing suit. Immediately after NCWD approved the WSA, CWIN sued.

The trial court ruled that a WSA could not be challenged independent of a CEQA challenge to an EIR or Negative Declaration, and dismissed CWIN’s challenge. The Second District Court of Appeal agreed and affirmed the judgment of the trial court.

At the outset, the court considered whether it should stay its decision, pending the resolution of the ongoing EIR litigation in the California Oak matter, as this litigation

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would resolve the issue of the sufficiency of the EIR, including the WSA. The court, however, felt that the issue presented by the CWIN appeal posed sufficient public interest and was sufficiently capable of repetition so as to warrant the court’s application of a rarely used exception to the mootness doctrine, which permitted the court to address the actual issue on appeal.\textsuperscript{118}

The court disagreed with CWIN that NCWD’s action on the WSA constituted a reviewable decision. Rather, the WSA was a report, similar to a myriad number of other reports prepared for EIRs. The vehicle for challenging those reports is through the EIR process under CEQA. The court also concluded that CWIN failed to exhaust its administrative remedies against the City, as it was the City who would ultimately make the determinations regarding reliability of water supply as part of its CEQA review process.\textsuperscript{119}

The court of Appeal, however, made it clear that WSAs are reviewable by a court. In this case, the petitioner simply selected the wrong vehicle to present its claims.\textsuperscript{120}

\textsuperscript{118 Id.} \textsuperscript{119 Id.} \textsuperscript{120 Id.}
Delta Decisions & Drought: The Future of Water Supply in California

CALAFCO University Course
May 2, 2008

Timothy Quinn, Executive Director
CALIFORNIA WATER SYSTEM

Mokelumne River Aqueduct

Los Angeles Aqueduct

Colorado River Aqueduct

Hetch Hetchy System

Los Angeles Aqueduct

William Mulholland

CA Department of Water Resources
State Water Project
1960 - Burns Porter Act
1973 - 1st water to So.Cal.
Managing Water is Managing Change

- 1957 Plan
- Wild & Scenic Rivers Acts
- Endangered Species
- Climate Change
- Legal Decisions
- Clean Water Act
Modern Values, Modern Solutions

20th century solutions focused on resource extraction for utilitarian purposes.

21st century solutions must invest in sustainability for the environment and economy.
Investments in Sustainability

- Sustainability requires comprehensive investments
- Investing in Local Resources
  - Conservation
  - Recycling
  - Desalination
- Investing in “smart” infrastructure
  - Dealing with the “Elephants in the Room”
INVESTING IN AGRICULTURAL WATER USE EFFICIENCY
INVESTING IN URBAN WATER USE EFFICIENCY
USING WATER OVER AND OVER AGAIN: RECYCLING
NEW INSTITUTIONAL RELATIONSHIPS:

Working with…

- Wastewater Agencies
- Flood Control Agencies
- Resource Conservation Agencies
NEW INSTITUTIONAL RELATIONSHIPS:
Solutions
The Changing Role of Infrastructure
“Dumb” & “Smart” Infrastructure
In the Power Generation Industry
Dumb Water Infrastructure (circa 1980s)

- Lake Shasta without TCD
- Red Bluff Diversion
- Unscreened Diversions
- South Delta Diversions
- Non-Fish-Friendly Dams: Butte Creek
- Single-Purpose Water Management
Smart Infrastructure - Above Delta

- Shasta Temp Control Device
- GCID Fish Screens
- M&T/Parrott Pump Relocation
- Butte Creek Before
- Princeton-Codora-Glenn/Fish Screen
- Battle Creek Screen & Ladder
- Durham Mutual Fish Ladder
- Butte Creek After
Smart Infrastructure - Below the Delta

- Kern County Groundwater Storage
- Diamond Valley Lake
- CA Friendly
- Efficient Devices
- Recycling
- Ag Conservation
The Delta
Importance of the Bay-Delta

- Supplies Bay Area, Central Valley & So. California

Some regions up to 100% dependent on the Delta

- Bay Area – 33%
- Kern County – 23%
- Southern Cal – 30%

Some regions up to 100% dependent on the Delta
Delta Inflow

Sacramento River
~80% Inflow; good quality

East Side Rivers
~5% Inflow; good quality

San Joaquin River
~15% Inflow; poor quality

Ocean/Tidal
High salinity
Delta Water Use

Sacramento

Delta Water Use

Bay Area, Central Valley & Southern Cal

Wet 87%
Avg. 69%
Dry 51%

To Bay

Wet 9%
Avg. 24%
Dry 36%

In-Delta

Export

Wet 4%
Avg. 7%
Dry 13%

Sacramento

Stockton

Bay Area, Central Valley & Southern Cal
Key Delta Infrastructure

North Bay Aqueduct

Delta Cross Channel

Contra Costa Pumps

SWP Pumps

CVP Pumps

Stockton

Delta Cross Channel

SWP Pumping Plant
How Water Gets to the California Economy

1. Sac River
   - Delta Cross Channel
   - Mokelumne River
   - Old & Middle Rivers

2. San Joaquin River

3. Sac River / West Delta

SWP Pumps

CVP Pumps
Land Subsidence
Due to Farming & Peat Soil Oxidation

Subsidence
- ~ 1.5 ft. per decade
- 30 ft. in some areas

Elevation Color Codes
- 30 feet
- Sea Level
Fishery Implications

Delta Cross Channel

1

2

3

4

CVP Pumps

Pumps

SWP Pumps
Where California Water Policy is Being Made Today
New Legal Requirements

“A recent federal court decision essentially restricts the north-to-south flow of water as a requirement to protect listed fish species under the ESA”
Bandaids Won’t Solve the Problem
Delta Conveyance Solutions

- Delta Vision Process
- Bay Delta Conservation Plan
Long Term BDCP Conveyance Alternatives

Figure E-2: Conservation Strategy Option 1
Long Term BDCP Conveyance Alternatives
Long Term BDCP Conveyance Alternatives

Figure E-4, Conservation Strategy Option 3
### Table E-3. Overall Comparison of Options by Criteria Category (Rank)

<table>
<thead>
<tr>
<th>Evaluation Criteria Category</th>
<th>Conservation Strategy Option</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Option 1</td>
</tr>
<tr>
<td>Biological</td>
<td>⬤</td>
</tr>
<tr>
<td>Planning</td>
<td>⬤</td>
</tr>
<tr>
<td>Flexibility/ Sustainability/Durability</td>
<td>⬤</td>
</tr>
<tr>
<td>Impacts on Other Resources</td>
<td>⬤ ⬤ ⬤ ⬤</td>
</tr>
</tbody>
</table>

Note: Derived from information presented in Tables 7-1 and 7-2. Criteria performance ranks are:

- ⬤ ⬤ ⬤ ⬤ = Best performing,
- ⬤ ⬤ ⬤ = Second best performing,
- ⬤ ⬤ = Third best performing,
- ⬤ = Lowest performing

Where ranks are equal the two Options receive same rank.
Contact

Timothy Quinn
(916) 441-4545
Executive Director
Association of California Water Agencies
Urban Water Management Plans

- UWMP Identify Water Supply Availability for Urban Water Agencies
- Water Management – Making Available Water Supply Sources Meet Water Needs
- Consider all water management options
Typical Water Management Tools

- Local Water Supply (e.g., Santa Ana River)
- Reservoir Storage – Saves water from wet periods for droughts
  - Surface Reservoirs
  - Groundwater
- Water Conservation
- Recycled Water
- Imported Supplies
Imported Water Supplies

• Bay Area
  – Hetch Hetchy Aqueduct
  – Mokelumne Aqueduct
  – State Water Project
  – Central Valley Project

• Southern California
  – Colorado River Aqueduct
  – Los Angeles Aqueduct
  – State Water Project
Effects of Delta Uncertainty

- Directly affects State Water Project and Central Valley Project
- Central Valley Project has limited urban users – Contra Costa ID, Santa Clara Valley WD, Sacramento, several smaller cities
- State Water Project is primary urban import for much of state
SWP Delivery Reliability Report

Purpose

• To provide useful information to water suppliers and planners on the delivery reliability of the SWP presently and 20 years into the future.

Audience

• State Water Contractors and related water providers; city, county, and regional planning agencies; interested citizens
SWP Delivery Reliability Report

• DWR supports local determination of the sufficiency of local water supply
• Explains how SWP delivery reliability is determined
• Presents results
• Provides examples of how to apply the information.
• Commits to an evaluation of CALSIM II
SWP Service Area Map
What is “Table A”? 

- Maximum amount of water SWP is contracted to provide annually 
- Tool used to apportion available water supply each year
Table A Amounts

Source: Bulletin 132-00 Table B-4 column 39
CALSIM II

A computer model that simulates the operation of the SWP

- Incorporates operations of SWP and CVP facilities
- Represents the Sacramento and San Joaquin River system and Delta
- Accounts for system operational objectives, physical constraints, legal and institutional agreements and statutes
- Uses historical water conditions, which are modified to reflect a certain level of development
CALSIM II

- Accepted by DWR, the U.S. Bureau of Reclamation and CALFED

- Used in studying
  - CALFED Conveyance Program
  - CALFED Storage Program
  - Annual Operation of SWP and CVP
  - Proposed changes in Delta flow and quality requirements
What is Water Delivery Reliability?

It is an estimate of the certainty that a given amount of water will be delivered to a specific place at a specific time.
Factors affecting SWP Delivery

Reliability

Availability of water from the source

The means to convey the water

Amount and pattern of water demand
Previous SWP Delivery Reliability Reports – 2003 & 2005

![Graph showing delivery reliability for dry and wet conditions for 2005 SWP delivery reliability report.]

- **Dry**
- **Wet**
What’s New in the 2007 Report?

• Discussion of Uncertainty in SWP Deliveries resulting due to:
  – Decline of Delta Fish Populations
  – Climate Change and Sea Level Rise
  – Fragile Delta Levees and Water Conveyance

• Estimates of Delta Impact to SWP Delivery Reliability due to:
  – Project Operations to Protect Delta Smelt
  – Climate Change
Limitations to Estimating Water Delivery Reliability

- Studies Must Rely on Key Assumptions
  - Water Storage and Conveyance Facilities
  - Water Demands
  - Regulatory Constraints on Operations

- Studies Assume Repeating Historical Weather Patterns
  - Sequence of Dry or Wet Years the Same for All Scenarios
## Factors Affecting Water Delivery Reliability and Sources of Uncertainty

<table>
<thead>
<tr>
<th>Factors</th>
<th>Sources of Uncertainty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Availability of source water</td>
<td>Climate change impact</td>
</tr>
<tr>
<td>Ability to convey source water to point of delivery</td>
<td>Measures to protect delta smelt</td>
</tr>
<tr>
<td></td>
<td>Fragile Delta levees</td>
</tr>
<tr>
<td>Demand for SWP water</td>
<td>Other sources of local water supply:</td>
</tr>
<tr>
<td></td>
<td>surface / groundwater storage,</td>
</tr>
<tr>
<td></td>
<td>water recycling, conservation,</td>
</tr>
<tr>
<td></td>
<td>and local transfers</td>
</tr>
<tr>
<td></td>
<td>Costs of supply</td>
</tr>
</tbody>
</table>
## Treating Uncertainty in the Analysis of SWP Delivery Reliability

<table>
<thead>
<tr>
<th>Uncertainty</th>
<th>Treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Variable Old and Middle River flow restrictions for delta smelt</td>
<td>Two scenarios of flow restrictions: less restrictive / more restrictive</td>
</tr>
<tr>
<td>Unclear extent of future climate change</td>
<td>Four scenarios of climate change: 2 global climate models + 2 scenarios of greenhouse gas emissions</td>
</tr>
</tbody>
</table>
SWP Delivery Reliability Report
2007 Update -- Key Assumptions

• Current Conditions
  – Recent SWP Demands ~ 3.3 MAF/Year
  – OCAP Court Case Operational Constraints

• Future Conditions
  – Contractual SWP Demands ~ 4.2 MAF/Year
  – OCAP Court Case Operational Constraints
  – Climate Change Assumptions
Estimating Climate Change Impacts on Future SWP Supplies

• Two Greenhouse Gas Emissions Assumptions
  – Large Increase
  – Small Increase

• Two Climate Change Models
  – Parallel Climate Model
  – Geophysical Fluid Dynamic Lab Model (Tends to show more warming than PCM)
Analysis Approach
Present and Future Level

- OCAP Court Case Specified Upper and Lower Bound of Operational Restrictions
- Nearly 1 MAF difference in Water Supplies
- Not directly predictable – Managed in Real Time by US Fish and Wildlife Service
- DWR Computed Separately and Reported Average
Analysis Approach
Future Level (2027) Only

• 8 Separate Projections
  – High Impact and Low Impact Court Restrictions
  – Four Climate Change 50-Year Projections

• Projections Interpolated to 2027 Conditions
• Average Computed from 8 Projections
• Range Identified from Highest and Lowest Annual Projections
## SWP Table A Deliveries

**Percent of maximum Table A amount* (thousand acre-feet)**

<table>
<thead>
<tr>
<th></th>
<th>Average</th>
<th>Maximum</th>
<th>Minimum</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>2005 Report</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Current</td>
<td>68% (2818)</td>
<td>93% (3848)</td>
<td>4% (159)</td>
</tr>
<tr>
<td>Future</td>
<td>77% (3178)</td>
<td>100% (4133)</td>
<td>5% (187)</td>
</tr>
<tr>
<td><strong>2007 Update</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Current</td>
<td>63% (2595)</td>
<td>90% (3711)</td>
<td>6% (243)</td>
</tr>
<tr>
<td>Future</td>
<td>66-69% (2724-2850)</td>
<td>100% (4133)</td>
<td>6-7% (255-293)</td>
</tr>
</tbody>
</table>

* 4133 taf/year

Range in values reflects different climate change scenarios
# SWP Table A Deliveries during Dry Periods

Percent of maximum Table A amount (4133 taf)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2005 Report</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Current</td>
<td>4%</td>
<td>41%</td>
<td>32%</td>
<td>42%</td>
<td>37%</td>
</tr>
<tr>
<td>Future</td>
<td>5%</td>
<td>40%</td>
<td>33%</td>
<td>42%</td>
<td>38%</td>
</tr>
<tr>
<td>2007 Update</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Current</td>
<td>6%</td>
<td>34%</td>
<td>35%</td>
<td>35%</td>
<td>34%</td>
</tr>
<tr>
<td>Future</td>
<td>7%</td>
<td>26-27%</td>
<td>32-37%</td>
<td>33-35%</td>
<td>33-36%</td>
</tr>
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</table>

Range in values reflects different climate change scenarios
# SWP Article 21 Deliveries (taf)

<table>
<thead>
<tr>
<th></th>
<th>Average</th>
<th>Maximum</th>
<th>Minimum</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>2005 Report</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Current</td>
<td>260</td>
<td>1110</td>
<td>0</td>
</tr>
<tr>
<td>Future</td>
<td>120</td>
<td>550</td>
<td>0</td>
</tr>
<tr>
<td><strong>2007 Update</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Current</td>
<td>90</td>
<td>590</td>
<td>0</td>
</tr>
<tr>
<td>Future</td>
<td>30</td>
<td>410 - 420</td>
<td>0</td>
</tr>
</tbody>
</table>

Range in values reflects different climate change scenarios
SWP Table A Reliability under Current Conditions

2005 SWP Delivery Reliability Report Study 2005

Updated studies (2007 studies)
Based on averaging annual Table A deliveries of two scenarios of Old and Middle River flow targets

Percent time at or above:

0 10 20 30 40 50 60 70 80 90 100

Percent of Full Table A Amount:

0 10 20 30 40 50 60 70 80 90 100

Annual Delivery (TAF):

413 827 1240 1653 2067 2480 2893 3306 3720 4133

Dry

Wet
SWP Table A Reliability under Future Conditions

Dry

Wet

2005 SWP Delivery Reliability Report Study 2025

Updated studies (2027 studies) Graph region based on four climate change scenarios interpolated to 2027 level and averaged over Old and Middle River flow target scenarios (Table 6-13)
### SWP Table A Delivery Reliability Summary

Table A Deliveries at various exceedence frequencies (taf)

<table>
<thead>
<tr>
<th>Exceedence Frequency</th>
<th>25%</th>
<th>50%</th>
<th>75%</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>2005 Report</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Current</td>
<td>3323</td>
<td>3173</td>
<td>2588</td>
</tr>
<tr>
<td>Future</td>
<td>4133</td>
<td>3565</td>
<td>2738</td>
</tr>
<tr>
<td><strong>2007 Update</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Current</td>
<td>3218</td>
<td>2976</td>
<td>2168</td>
</tr>
<tr>
<td>Future</td>
<td>3687 - 3815</td>
<td>2967 - 3205</td>
<td>1860 - 2077</td>
</tr>
</tbody>
</table>
2007 SWP Delivery Reliability Report

- Draft Released December 2007
- Final Being Prepared
- OCAP Court Restrictions Imposed through September 2008
- New OCAP Biological Opinion (BO) September 2008
- Results Subject to Change with new BO
Example Urban Water Management Plan
Castaic Lake Water Agency 2020 Level
Senate Bill No. 221

CHAPTER 642

An act to amend Section 11010 of the Business and Professions Code, and to amend Section 65867.5 of, and to add Sections 66455.3 and 66473.7 to, the Government Code, relating to land use.

[Approved by Governor October 9, 2001. Filed with Secretary of State October 9, 2001.]

LEGISLATIVE COUNSEL'S DIGEST

SB 221, Kuehl. Land use: water supplies.

(1) Under the Subdivision Map Act, a legislative body of a city or county is required to deny approval of a tentative map, or a parcel map for which a tentative map is not required, if it makes any of a number of specified findings. Under the Planning and Zoning Law, a city, county, or city and county may not approve a development agreement unless the legislative body finds that the agreement is consistent with the general plan and any applicable specific plan.

This bill would prohibit approval of a tentative map, or a parcel map for which a tentative map was not required, or a development agreement for a subdivision of property of more than 500 dwelling units, except as specified, including the design of the subdivision or the type of improvement, unless the legislative body of a city or county or the designated advisory agency provides written verification from the applicable public water system that a sufficient water supply is available or, in addition, a specified finding is made by the local agency that sufficient water supplies are, or will be, available prior to completion of the project.

By increasing the duties of local legislative bodies and local planning agencies and commissions, the bill would impose a state-mandated local program.

(2) Existing law requires any person who intends to offer subdivided lands within California for sale or lease to file with the Department of Real Estate an application for a public report consisting of a notice of intention and a completed questionnaire that includes, among other things, a true statement of the provisions, if any, that have been made for public utilities in the proposed subdivision, including water, electricity, gas, telephone, and sewerage facilities.

This bill would provide that for proposed subdivisions subject to specified requirements of the Subdivision Map Act, the true statement of the provisions that have been made for water is satisfied by submitting
a copy of the written verification of the availability of a sufficient water supply, obtained pursuant to specified requirements as described in (1) above.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 11010 of the Business and Professions Code is amended to read:

11010. (a) Except as otherwise provided pursuant to subdivision (c) or elsewhere in this chapter, any person who intends to offer subdivided lands within this state for sale or lease shall file with the Department of Real Estate an application for a public report consisting of a notice of intention and a completed questionnaire on a form prepared by the department.

(b) The notice of intention shall contain the following information about the subdivided lands and the proposed offering:

(1) The name and address of the owner.

(2) The name and address of the subdivider.

(3) The legal description and area of lands.

(4) A true statement of the condition of the title to the land, particularly including all encumbrances thereon.

(5) A true statement of the terms and conditions on which it is intended to dispose of the land, together with copies of any contracts intended to be used.

(6) A true statement of the provisions, if any, that have been made for public utilities in the proposed subdivision, including water, electricity, gas, telephone, and sewerage facilities. For subdivided lands that were subject to the imposition of a condition pursuant to subdivision (b) of Section 66473.7 of the Government Code, the true statement of the provisions made for water shall be satisfied by submitting a copy of the written verification of the available water supply obtained pursuant to Section 66473.7 of the Government Code.

(7) A true statement of the use or uses for which the proposed subdivision will be offered.

(8) A true statement of the provisions, if any, limiting the use or occupancy of the parcels in the subdivision.
(9) A true statement of the amount of indebtedness that is a lien upon the subdivision or any part thereof, and that was incurred to pay for the construction of any onsite or offsite improvement, or any community or recreational facility.

(10) A true statement or reasonable estimate, if applicable, of the amount of any indebtedness which has been or is proposed to be incurred by an existing or proposed special district, entity, taxing area, assessment district, or community facilities district within the boundaries of which, the subdivision, or any part thereof, is located, and that is to pay for the construction or installation of any improvement or to furnish community or recreational facilities to that subdivision, and which amounts are to be obtained by ad valorem tax or assessment, or by a special assessment or tax upon the subdivision, or any part thereof.

(11) (A) As to each school district serving the subdivision, a statement from the appropriate district that indicates the location of each high school, junior high school, and elementary school serving the subdivision, or documentation that a statement to that effect has been requested from the appropriate school district.

(B) In the event that, as of the date the notice of intention and application for issuance of a public report are otherwise deemed to be qualitatively and substantially complete pursuant to Section 11010.2, the statement described in subparagraph (A) has not been provided by any school district serving the subdivision, the person who filed the notice of intention and application for issuance of a public report immediately shall provide the department with the name, address, and telephone number of that district.

(12) The location of all existing airports, and of all proposed airports shown on the general plan of any city or county, located within two statute miles of the subdivision.

(13) A true statement, if applicable, referencing any soils or geologic report or soils and geologic reports that have been prepared specifically for the subdivision.

(14) A true statement of whether or not fill is used, or is proposed to be used in the subdivision and a statement giving the name and the location of the public agency where information concerning soil conditions in the subdivision is available.

(15) Any other information that the owner, his or her agent, or the subdivider may desire to present.

(c) The commissioner may, by regulation, or on the basis of the particular circumstances of a proposed offering, waive the requirement of the submission of a completed questionnaire if the commissioner determines that prospective purchasers or lessees of the subdivision interests to be offered will be adequately protected through the issuance
SEC. 2.  Section 65867.5 of the Government Code is amended to read:

65867.5.  (a) A development agreement is a legislative act that shall be approved by ordinance and is subject to referendum.
(b) A development agreement shall not be approved unless the legislative body finds that the provisions of the agreement are consistent with the general plan and any applicable specific plan.
(c) A development agreement that includes a subdivision, as defined in Section 66473.7, shall not be approved unless the agreement provides that any tentative map prepared for the subdivision will comply with the provisions of Section 66473.7.

SEC. 3.  Section 66455.3 is added to the Government Code, to read:

66455.3.  Not later than five days after a city or county has determined that a tentative map application for a proposed subdivision, as defined in Section 66473.7, is complete pursuant to Section 65943, the local agency shall send a copy of the application to any water supplier that is, or may become, a public water system, as defined in Section 10912 of the Water Code, that may supply water for the subdivision.

SEC. 4.  Section 66473.7 is added to the Government Code, to read:

66473.7.  (a) For the purposes of this section, the following definitions apply:
(1) "Subdivision" means a proposed residential development of more than 500 dwelling units, except that for a public water system that has fewer than 5,000 service connections, "subdivision" means any proposed residential development that would account for an increase of 10 percent or more in the number of the public water system's existing service connections.
(2) "Sufficient water supply" means the total water supplies available during normal, single-dry, and multiple-dry years within a 20-year projection that will meet the projected demand associated with the proposed subdivision, in addition to existing and planned future uses, including, but not limited to, agricultural and industrial uses. In determining "sufficient water supply," all of the following factors shall be considered:
(A) The availability of water supplies over a historical record of at least 20 years.
(B) The applicability of an urban water shortage contingency analysis prepared pursuant to Section 10632 of the Water Code that includes actions to be undertaken by the public water system in response to water supply shortages.
(C) The reduction in water supply allocated to a specific water use sector pursuant to a resolution or ordinance adopted, or a contract entered into, by the public water system, as long as that resolution, ordinance, or contract does not conflict with Section 354 of the Water Code.

(D) The amount of water that the water supplier can reasonably rely on receiving from other water supply projects, such as conjunctive use, reclaimed water, water conservation, and water transfer, including programs identified under federal, state, and local water initiatives such as CALFED and Colorado River tentative agreements, to the extent that these water supplies meet the criteria of subdivision (d).

3. “Public water system” means the water supplier that is, or may become as a result of servicing the subdivision included in a tentative map pursuant to subdivision (b), a public water system, as defined in Section 10912 of the Water Code, that may supply water for a subdivision.

(b) (1) The legislative body of a city or county or the advisory agency, to the extent that it is authorized by local ordinance to approve, conditionally approve, or disapprove the tentative map, shall include as a condition in any tentative map that includes a subdivision a requirement that a sufficient water supply shall be available. Proof of the availability of a sufficient water supply shall be requested by the subdivision applicant or local agency, at the discretion of the local agency, and shall be based on written verification from the applicable public water system within 90 days of a request.

(2) If the public water system fails to deliver the written verification as required by this section, the local agency or any other interested party may seek a writ of mandamus to compel the public water system to comply.

(3) If the written verification provided by the applicable public water system indicates that the public water system is unable to provide a sufficient water supply that will meet the projected demand associated with the proposed subdivision, then the local agency may make a finding, after consideration of the written verification by the applicable public water system, that additional water supplies not accounted for by the public water system are, or will be, available prior to completion of the subdivision that will satisfy the requirements of this section. This finding shall be made on the record and supported by substantial evidence.

(4) If the written verification is not provided by the public water system, notwithstanding the local agency or other interested party securing a writ of mandamus to compel compliance with this section, then the local agency may make a finding that sufficient water supplies
are, or will be, available prior to completion of the subdivision that will satisfy the requirements of this section. This finding shall be made on the record and supported by substantial evidence.

(c) The applicable public water system’s written verification of its ability or inability to provide a sufficient water supply that will meet the projected demand associated with the proposed subdivision as required by subdivision (b) shall be supported by substantial evidence. The substantial evidence may include, but is not limited to, any of the following:

(1) The public water system’s most recently adopted urban water management plan adopted pursuant to Part 2.6 (commencing with Section 10610) of Division 6 of the Water Code.

(2) A water supply assessment that was completed pursuant to Part 2.10 (commencing with Section 10910) of Division 6 of the Water Code.

(3) Other information relating to the sufficiency of the water supply that contains analytical information that is substantially similar to the assessment required by Section 10635 of the Water Code.

(d) When the written verification pursuant to subdivision (b) relies on projected water supplies that are not currently available to the public water system, to provide a sufficient water supply to the subdivision, the written verification as to those projected water supplies shall be based on all of the following elements, to the extent each is applicable:

(1) Written contracts or other proof of valid rights to the identified water supply that identify the terms and conditions under which the water will be available to serve the proposed subdivision.

(2) Copies of a capital outlay program for financing the delivery of a sufficient water supply that has been adopted by the applicable governing body.

(3) Securing of applicable federal, state, and local permits for construction of necessary infrastructure associated with supplying a sufficient water supply.

(4) Any necessary regulatory approvals that are required in order to be able to convey or deliver a sufficient water supply to the subdivision.

(e) If there is no public water system, the local agency shall make a written finding of sufficient water supply based on the evidentiary requirements of subdivisions (c) and (d) and identify the mechanism for providing water to the subdivision.

(f) In making any findings or determinations under this section, a local agency, or designated advisory agency, may work in conjunction with the project applicant and the public water system to secure water supplies sufficient to satisfy the demands of the proposed subdivision. If the local agency secures water supplies pursuant to this subdivision, which supplies are acceptable to and approved by the governing body of
the public water system as suitable for delivery to customers, it shall work in conjunction with the public water system to implement a plan to deliver that water supply to satisfy the long-term demands of the proposed subdivision.

(g) The written verification prepared under this section shall also include a description, to the extent that data is reasonably available based on published records maintained by federal and state agencies, and public records of local agencies, of the reasonably foreseeable impacts of the proposed subdivision on the availability of water resources for agricultural and industrial uses within the public water system’s service area that are not currently receiving water from the public water system but are utilizing the same sources of water. To the extent that those reasonably foreseeable impacts have previously been evaluated in a document prepared pursuant to the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) or the National Environmental Policy Act (Public Law 91-190) for the proposed subdivision, the public water system may utilize that information in preparing the written verification.

(h) Where a water supply for a proposed subdivision includes groundwater, the public water system serving the proposed subdivision shall evaluate, based on substantial evidence, the extent to which it or the landowner has the right to extract the additional groundwater needed to supply the proposed subdivision. Nothing in this subdivision is intended to modify state law with regard to groundwater rights.

(i) This section shall not apply to any residential project proposed for a site that is within an urbanized area and has been previously developed for urban uses, or where the immediate contiguous properties surrounding the residential project site are, or previously have been, developed for urban uses, or housing projects that are exclusively for very low and low-income households.

(j) The determinations made pursuant to this section shall be consistent with the obligation of a public water system to grant a priority for the provision of available and future water resources or services to proposed housing developments that help meet the city’s or county’s share of the regional housing needs for lower income households, pursuant to Section 65589.7.

(k) The County of San Diego shall be deemed to comply with this section if the Office of Planning and Research determines that all of the following conditions have been met:

(1) A regional growth management strategy that provides for a comprehensive regional strategy and a coordinated economic development and growth management program has been developed pursuant to Proposition C as approved by the voters of the County of San
Diego in November 1988, which required the development of a regional growth management plan and directed the establishment of a regional planning and growth management review board.

(2) Each public water system, as defined in Section 10912 of the Water Code, within the County of San Diego has adopted an urban water management plan pursuant to Part 2.6 (commencing with Section 10610) of the Water Code.

(3) The approval or conditional approval of tentative maps for subdivisions, as defined in this section, by the County of San Diego and the cities within the county requires written communications to be made by the public water system to the city or county, in a format and with content that is substantially similar to the requirements contained in this section, with regard to the availability of a sufficient water supply, or the reliance on projected water supplies to provide a sufficient water supply, for a proposed subdivision.

(l) Nothing in this section shall preclude the legislative body of a city or county, or the designated advisory agency, at the request of the applicant, from making the determinations required in this section earlier than required pursuant to subdivision (a).

(m) Nothing in this section shall be construed to create a right or entitlement to water service or any specific level of water service.

(n) Nothing in this section is intended to change existing law concerning a public water system’s obligation to provide water service to its existing customers or to any potential future customers.

(o) Any action challenging the sufficiency of the public water system’s written verification of a sufficient water supply shall be governed by Section 66499.37.

SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act, within the meaning of Section 17556 of the Government Code.