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BY:  MICHAEL D. PLANET
Executive Officer and Clerk Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF VENTURA

BUENA VISTA WATER STORAGE DISTRICT,)	CASE NO.: 56-2019-00528316-CU-WM-VTA
)	
Petitioner,)	
)	RULING ON PETITION FOR WRIT OF
vs.)	MANDATE
)	
KERN WATER BANK AUTHORITY,)	
)	
Respondent.)	

The court hereby rules on the submitted matter regarding the Petition for Writ of Mandate by Petitioner Buena Vista Water Storage District against Respondent Kern Water Bank Authority.

Judicial Notice:

Petitioner’s requests for judicial notice are denied on the grounds that the items subject to the request are extra-record evidence that cannot be considered in ruling on this CEQA challenge.

Summary of Ruling

Petitioner’s petition for writ of mandate is granted on the grounds that the EIR is inadequate for the following reasons:

- The definitions of Project water and existing water rights are inadequate because they are inaccurate, unstable, and indefinite;

- The baseline analysis is inadequate because it fails to include a full and complete analysis—including quantification—of competing existing rights to Kern River water; and,
- The analysis of environmental impacts is inadequate in terms of the significant environmental impacts on senior rights holders and significant environmental impacts on groundwater during long-term recovery operations.

Since the EIR is inadequate for the reasons set forth above, Petitioner’s petition for writ of mandate must be GRANTED. Furthermore, if the EIR is amended in response to this Court’s ruling, then other aspects of the EIR will also need to be altered. For example, the mitigation measures will need to be amended if the amended EIR shows that the Project will cause a significant environmental impact. In addition, in evaluating any amended EIR issued in response to this ruling, the Water Board Complaint and cover letter will be part of any administrative record pertaining to that new/amended EIR.

Therefore, the Court grants the following relief requested in the petition:

- The Court enters judgment determining and declaring that the approval of the Project activities does not comply with CEQA, for the reasons set forth above, and is therefore null and void.
- The Court issues a writ of mandate commanding Respondent to vacate and set aside its approval of the Project and certification for the FEIR, to prepare and certify a legally adequate EIR for the Project, and to suspend any and all activities related to Respondent’s approval of said activities that could result in an adverse change or alteration to the environment as described in this petition, until Respondent has complied with all requirements of CEQA.
- The Court issues declaratory judgment consistent with paragraphs 1 and 2 of the prayer for relief in the petition.

The above ruling is without prejudice to Petitioner’s ability to file a memorandum of costs and a fee motion to seek the relief requested in paragraph 5 of the prayer for relief.

Background & Basis for Petition:

Petitioner challenges the actions by Respondent approving and/or adopting the Final

Environmental Impact Report (“FEIR”) on the Kern Water Bank Authority Conservation and Storage Project (“Project”), and its decision to implement the Project described herein.

Petitioner alleges that Respondent's FEIR fails to meet CEQA requirements for the reasons stated in this Complaint/Petition, including (i) failure to adequately describe the Project; (ii) failure to fully identify, evaluate and disclose the reasonably foreseeable effects of the Project upon the environment; (iii) failure to adequately describe the environmental or baseline conditions; (iv) failure to adequately consider alternatives and mitigation measures; (v) failure to adequately consider cumulative impacts; (vi) failure to adequately respond to comments; and (vii) failure to revise and recirculate the Draft Environmental Impact Report (“DEIR”) when clearly required by CEQA. (Pet., ¶ 3.)

Buena Vista seeks a writ of mandate commanding Respondent to set aside its certification of the FEIR for the Project, its approval of the Project based thereon, its implementation of the Project in whole or in part, and related relief. Buena Vista, as well as its landowners and water users, will suffer immediate and irreparable harm if the Court does not grant the requested relief. Buena Vista also seeks a preliminary and permanent injunction barring Respondent from undertaking any activity with regard to the Project and any activity which could potentially alter the physical and natural environment in Kern County, pending proper and complete environmental review as required by CEQA. (Pet., ¶ 6.)

Buena Vista is presently and has been, at all times relevant hereto, a California Water Storage District organized and existing under and pursuant to California Water Storage District Law [Division 14 (commencing with §39000) of the California Water Code], Buena Vista's boundaries are located exclusively within the boundaries of Kern County. Buena Vista is authorized by California Water Storage District Law to commence and maintain this action on

behalf of itself and its landowners and water users. (Pet., ¶ 8.) Buena Vista brings this action against the KWBA in its capacity as the Lead Agency on the Project described herein and as owner and operator of the KWB. Respondent KWBA is presently and has been, at all times relevant hereto, a public agency and political subdivision of the State of California, formed and existing pursuant to Division 7 of the California Government Code, Joint Exercise of Powers Act, §6500, et seq. As the Lead Agency on the Project, Respondent is responsible for preparation of an environmental document that adequately and accurately describes the Project and its impacts, and, if necessary, evaluates mitigation measures and/or alternatives to lessen or avoid any significant environmental impacts. Respondent is responsible for implementing and complying with the provisions of the CEQA and the CEQA Guidelines with respect to the Project. (Pet., ¶ 9.)

Kern River is a natural stream or watercourse originating in the Sierra Nevada and discharging its flows in the southern San Joaquin Valley, flowing southwest through Bakersfield, and—in wet years—turning northwest and flowing toward Tulare Lake. (Pet., ¶ 28.) Since the late 1800s through present, virtually all natural flow of the Kern River has been fully appropriated to reasonable and beneficial uses both north and south of the Kern River channel. (Pet., ¶ 29.) The Kern River was formally designated as a river with fully appropriated status by the State Water Board in 1989 (Order 89-25) which cited State Water Rights Board Decision 1196 (D-1196), issued on October 29, 1964, concluding that the applicants had failed to show "that there is unappropriated water available" in the Kern River watershed. (Pet., ¶ 33.)

Applicable CEQA Law:

CEQA and the CEQA Guidelines establish a three-tiered review structure. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74.) First, a lead agency must conduct a preliminary

review to determine whether an activity is subject to CEQA—or not subject to CEQA because it (1) “does not involve the exercise of discretionary powers”; (2) “will not result in a direct or reasonably foreseeable indirect physical change in the environment”; or (3) is not a project—and whether the project is exempt. (CEQA Guidelines, §§ 15060, subd. (c) & 15061.) If a project falls within an exemption or “it can be seen with certainty that the activity in question will not have a significant effect on the environment ([CEQA Guidelines], § 15060), no further agency evaluation is required.” (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74.)

Second, if the project is non-exempt, subject to CEQA, and “there is a possibility that the project may have a significant effect,” then CEQA compliance is required and the analysis proceeds to the second tier, i.e. the requirement that the lead agency conduct an initial study. (See *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74; see also CEQA Guidelines, §§ 15060 & 15063, subd. (a).)

Third, depending on the results of the initial study, the lead agency issues an EIR, a negative declaration, or another environmental review document authorized by the CEQA Guidelines. (CEQA Guidelines, § 15063, subd. (b); see also *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74.) Specifically, “[i]f the agency determines that there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment . . . the lead agency shall” either: (a) prepare an EIR; (b) use an existing EIR; or (c) determine, pursuant to a program EIR, tiering, or another appropriate process, which of a project’s effects were adequately examined by an earlier EIR or negative declaration.” (CEQA Guidelines, § 15063, subd. (b)(1).)

CEQA challenges are reviewed under an abuse of discretion standard, asking whether the decision is not supported by substantial evidence or whether the agency has not proceeded in a

manner required by law. (See Pub. Res. Code, §§ 21168 & 21168.5.) “As a result of this standard, ‘The court does not pass upon the correctness of the EIR’s environmental conclusions, but only upon its sufficiency as an informative document.’ (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 189 [139 Cal.Rptr. 396].)” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 (“*Laurel Heights P*”).)

“Failure to comply with the information disclosure requirements constitutes a prejudicial abuse of discretion when the omission of relevant information has precluded informed decision making and informed public participation, regardless whether a different outcome would have resulted if the public agency had complied with the disclosure requirements. ([Citations].)” (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.) As noted by one court:

“A court’s proper role in reviewing a challenged EIR is not to determine whether the EIR’s ultimate conclusions are correct but only whether they are supported by substantial evidence in the record and whether the EIR is sufficient as an information document. (Laurel Heights, supra, 47 Cal.3d at p. 407, 253 Cal.Rptr. 426, 764 P.2d 278.) Substantial evidence is defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” (CEQA Guidelines, § 15384, subd. (a); San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1994) 27 Cal.App.4th 713, 722, 32 Cal.Rptr.2d 704 (Raptor).)”

(*Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391.)

Merits of this Case:

The parties dispute whether the Project description complies with CEQA. “‘Project’ means an activity”—i.e. “the whole of an action”—“which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the

environment.” (Pub. Res. Code, § 21065, subd. (b); CEQA Guidelines § 15378, subd. (a).)

According to the CEQA Guidelines:

“The description of the project shall contain the following information but should not supply extensive detail beyond that needed for evaluation and review of the environmental impact.

(a) The precise location and boundaries of the proposed project shall be shown on a detailed map, preferably topographic. The location of the project shall also appear on a regional map.

(b) A statement of the objectives sought by the proposed project. A clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers in preparing findings or a statement of overriding considerations, if necessary. The statement of objectives should include the underlying purpose of the project and may discuss the project benefits.

(c) A general description of the project's technical, economic, and environmental characteristics, considering the principal engineering proposals if any and supporting public service facilities.

(d) A statement briefly describing the intended uses of the EIR.

(1) This statement shall include, to the extent that the information is known to the lead agency,

(A) A list of the agencies that are expected to use the EIR in their decision-making, and

(B) A list of permits and other approvals required to implement the project.

(C) A list of related environmental review and consultation requirements required by federal, state, or local laws, regulations, or policies. To the fullest extent possible, the lead agency should integrate CEQA review with these related environmental review and consultation requirements.

(2) If a public agency must make more than one decision on a project, all its decisions subject to CEQA should be listed, preferably in the order in which they will occur. On request, the Office of Planning and Research will provide assistance in identifying state permits for a project.”

(CEQA Guidelines, § 15124.)

“The EIR is the heart of the environmental control process. (County of Inyo v. Yorty, supra, 32 Cal.App.3d at p. 810.) CEQA describes the report's purpose - to provide the public and governmental decision-makers (here, the board of water and power commissioners) with detailed information of the project's likely effect on the environment; to describe ways of minimizing significant effects; to point out alternatives to the project. (§§ 21002.1, 21061, 21100; Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 263 [104 Cal.Rptr. 761, 502 P.2d 1049].) The EIR process facilitates CEQA's policy of supplying citizen input. (See People v. County of Kern (1974) 39 Cal.App.3d 830, 841 [115 Cal.Rptr. 67].) By depicting the project's unavoidable effects, mitigation measures and alternatives, the report furnishes the decision-maker information enabling it to balance the project's benefit against environmental cost. (See § 21100; Environmental Defense Fund, Inc. v. Coastside County Water Dist., supra, 27 Cal.App.3d at p. 705.) The report should function as an environmental “alarm bell.” (County of Inyo v. Yorty, supra, 32 Cal.App.3d at p. 810.)

CEQA defines “project” only by the synonymous term “activity.” (§ 21065; cf. Friends of Mammoth v. Board of Supervisors, supra, 8 Cal.3d at pp. 260-262.) In most cases the scope and character of the proposed activity will be clear; when they are not, they can be discerned only in the light of CEQA's policy to “ensure that the long-term protection of the environment shall be the guiding criterion in public decisions.” (§ 21001, subd. (d).) The CEQA Guidelines flesh out the “project” concept by referring to it as “the whole of an action, which has a potential for resulting in a physical change in the environment, directly or ultimately. ...” (Cal.Admin.Code, tit. 14, § 15037, subd. (a).) Commenting on the comparable provisions of the National Environmental Policy Act, the federal Supreme Court has pointed out that an accurate description of the project is necessary in order to decide what kind of environmental impact statement need be prepared. (Aberdeen & Rockfish R. Co. v. SCRAP (1975) 422 U.S. 289, 322 [45 L.Ed.2d 191, 216, 95 S.Ct. 2336]; see also Swain v. Brinegar (7th Cir. 1976) 542 F.2d 364, 369.)

*A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the “no project” alternative) and weigh other alternatives in the balance. **An accurate, stable and finite project description is***

the sine qua non of an informative and legally sufficient EIR.”

(*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192–193, bold added; see also *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 533 [holding that the EIR requires an “accurate, stable and finite project description,” and that the EIR’s role is to ensure the lead agency and public have enough information to ascertain the project’s significant effects, assess ways of mitigating them, and consider project alternatives].)

“Since “[a]n accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR” (*id.* at p. 193), even were the FEIR deemed to be adequate in all other respects, the selection and use of a “truncated project concept” violated CEQA and mandates the conclusion that the County did not proceed “ ‘in a manner required by law.’ ” (*Id.* at p. 200; *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1454–1455 [263 Cal.Rptr. 340].) [Fn. Omitted.]” (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 730, as modified (Sept. 12, 1994).)

“We reiterate - an accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR. The defined project and not some different project must be the EIR's bona fide subject. The CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project; indeed, new and unforeseen insights may emerge during investigation, evoking revision of the original proposal. (Bozung v. Local Agency Formation Com. (1975) 13 Cal.3d 263, 284-285 [118 Cal.Rptr. 249, 529 P.2d 1017].) Here, in contrast, the interrelated character of the proposals was known in advance. Here, the selection of a narrow project as the launching pad for a vastly wider proposal frustrated CEQA's public information aims. The department's calculated selection of its truncated project concept was not an abstract violation of CEQA. In formulating the EIR, the department of water and power did not proceed “in a manner required by law.” (§ 21168.5.)”

(*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199–200.)

KWBA argues that the FEIR contains the four elements required by CEQA Guidelines section 15124, and notes that Petitioner does not argue that any of those elements are missing. KWBA further argues that the FEIR’s Project description provides more than sufficient detail to

allow the public agencies and the public the opportunity to evaluate the possible environmental impacts of the Project.” (AB, p. 16:26-28.) KWBA’s argument misses the mark, as it ignores the fact that Petitioner’s three specific challenges are directed at the general description of the Project, per CEQA Guidelines section 15124(c). As made clear by the authorities set forth above, an accurate, stable, and finite project description is the *sine qua non* of an informative and legally sufficient EIR. (E.g., *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.)

Petitioner raises the following challenges to the description of the Project: (1) the description of the Project water is inconsistent, causing uncertainty; (2) the description of existing Kern River water rights is insufficient; and (3) the description of recovery operations is insufficient. Each challenge is discussed separately below.

Description of Project Water

An inaccurate or inconsistent project description constitutes a prejudicial abuse of discretion (meaning prejudice is presumed) because it precludes meaningful evaluation of the environmental consequences of a proposed project by the public and by decision-makers. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236–1237.) Petitioner argues that there are at least 5 different, inconsistent definitions/description of the water that is the primary component of the Project. Petitioner asserts that the description of such a vital element of the Project must be consistent and accurate. (CEQA Guidelines, § 15124.) The FEIR’s description of Project water is anything but consistent or accurate. Given the varying descriptions of water, it is impossible for the decision-makers and public to have a meaningful discussion regarding the potentially significant impacts of the Project. Such failure by omission renders the FEIR deficient. (See *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713.)

Petitioner's argument is well-taken. As explained below, the FEIR contains at least 4 inconsistent definitions of the Project water:

- (1) FEIR first defines the water as "high flow Kern River water, only available in certain hydrologic conditions and after the rights of senior Kern River water right holders have been met that otherwise would have (1) been diverted to the Intertie, (2) flooded farmlands, or (3) left Kern County." (AR 871.) "Flooded farmlands" is not defined. The FEIR also fails to define water that "left Kern County." The failure to define these critical components of the Project prevents meaningful analysis of any potential impacts.
- (2) The second definition is water that would "trigger mandatory release conditions for flood control, cause downstream flooding, and/or operate the intertie." (AR 722.) This definition does not correspond with the first definition, especially since it for the first time refers to a trigger of mandatory release for flood conditions while omitting any reference to water leaving Kern County or flooded farmlands. Furthermore, the FEIR is not consistent in defining "flood flows." Respondent's WAA indicates that the Lower Kern River water right is historically defined as "flood flows" (AR 506 [WAA attached to DEIR]), but this is not included in the definition in the FEIR.
- (3) FEIR's third definition of Project water seems to indicate that the Project only seeks water that was historically offered to the Intertie. (AR 265 [DEIR].) The FEIR's hydrology discussion relies on a WAA which objective "was to determine if flood water is available for appropriation. The WAA found that the historical record demonstrates that these surplus flows are available; deliveries of surplus water to the Intertie have occurred in 9 years since 1978" (AR 265.) As Petitioner correctly notes, this definition is much more restrictive than the two mentioned above.
- (4) The last definition is water that Respondent has historically received, stating: "KWBA's application, for example, seeks an entitlement to divert unappropriated high flow Kern River water after existing Kern River water rights are met . . . and only when such water is present. The KWB previously diverted this same water for recharge purposes." (AR 825 and see AR111, fn. 1.) This definition is inconsistent with the definitions set forth above, and as Petitioner persuasively asserts, it is particularly confusing because as stated in the FEIR, Respondent purchases and banks Kern River water. (AR 875.) It is unclear whether historical purchases included in this definition. If so, this could have substantial negative impacts on current holders of the water rights. Further, the FEIR states that KWBA's historical maximum annual diversions of Kern River water is 155,948 AFY for purchase and 80,735 AFY for "floodwater." (AR 141.) This amount is significantly less than the 500,000 AFY the Project is purporting to utilize.

By using these varying definitions of Project water, KWBA has failed to provide an accurate, stable, and finite Project description, which is the *sine qua non* of an informative and

legally sufficient EIR. (See, e.g., *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.) In the answer brief, with respect to the description of the water, KWBA asserts that the EIR's executive summary and introduction chapters describe in detail the existing Kern River water rights and sources of water on the system and for the Project. (AR 96-99, 111-115.) KWBA also argues that "the description and analysis of water available or the Project includes water that KWBA has physically diverted and stored under baseline conditions, as well as water that has been released to the Intertie (AR 96, 99, 114.)"

As Petitioner notes in their Reply, the DEIR pages cited by KWBA do not contain an accurate, stable, and finite Project description. Rather, these pages contain vague and inconsistent references to the Project water, which is precisely what Petitioner complains about. For example, under the heading "Purpose and Scope of the EIR," KWBA generally refers to "diverting up to 500,000 AFY of Kern River floodwater in certain high water years when excess flood waters are available for recharge and storage . . ." (AR 97.) However, under the heading "Description of the Project," KWBA inconsistently refers to both floodwaters and water in general, and refers to the water diversion proposed in Application 31676. (AR 98-99.) Adding yet another inconsistency, in a footnote under the "Project Overview" heading, KWBA indicates that the KWB has stored unused Kern River water for the beneficial use of its members—which suggests that there is no "floodwater" at all—and asserts that "the project would result in a State Water Board permit for the continuance of pre-existing activity through use of existing facilities in contrast to an entirely new activity." (AR 111, fn. 1.) The other pages cited by KWBA simply do not contain any description of the Project water.

KWBA further argues that "[t]he EIR and its appended Water Availability Analysis provide further detail and analysis as to the water the Project intends to rely on by way of an

application for a new water right. (AR 226, 233, 495-531.)” The two specific pages cited in the DEIR—AR 226 and 233—do not contain any description of Project water. Rather, those pages merely describe surface water in the area. (AR 226, 233.) The general citation to the entirety of the WAA (AR 495-527) and Operating Guidelines During Shallow Groundwater Conditions (AR 528-531) appended to the DEIR do not offer any clarity as to the definition of Project water. KWBA points to the fact that the WAA will be used by the Water Board in considering whether there is unappropriated water to issue a new permit, to the fact that it describes Kern River pre-1914 water rights, describes diversion points under the 1888 Miller-Haggin Agreement and amendments, summarizes first point measurements from 1978-2011, and summarizes flows at the second point, which reflects Petitioner’s historic diversions as well as diversions to the Intertie. (Citing AR 221, 501-509, 513-514.) None of these references sets forth an accurate, stable, and finite definition of the Project water. KWBA has not, in the opposition, cited to any singular, consistent definition of the Project water.

Petitioner argues that KWBA’s reliance on the WAA is improper because it is attached as an appendix to the FEIR, does not contain a clear and accurate description, and the body of the FEIR does not contain a summary of WAA’s technical data in plain language as per CEQA Guidelines sections 15140 and 15147. “EIRs shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can rapidly understand the documents.” (CEQA Guidelines, § 15140.) As noted by the CEQA Guidelines:

“The information contained in an EIR shall include summarized technical data, maps, plot plans, diagrams, and similar relevant information sufficient to permit full assessment of significant environmental impacts by reviewing agencies and members of the public. Placement of highly technical and specialized analysis and data in the body of an EIR should be avoided through inclusion of supporting

information and analyses as appendices to the main body of the EIR. Appendices to the EIR may be prepared in volumes separate from the basic EIR document, but shall be readily available for public examination and shall be submitted to all clearinghouses which assist in public review.”

(CEQA Guidelines, § 15147.)

Information “‘scattered here and there in EIR appendices’ or a report ‘buried in an appendix’ is not a substitute for a ‘good faith reasoned analysis in response.’ ([Citation].)” (*California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1239.) As explained above, the WAA does not contain a clear and accurate description of the Project water. Moreover, Petitioner is correct that if the WAA did contain the description, then it would technically be improper because CEQA would require such a description to be set forth in the body of the FEIR in plain language. For this additional reason, the inconsistent and unstable definitions of Project water in the WAA are insufficient.

Additionally, KWBA contends that, “[a]lthough the Water Board has yet to determine precisely how much water is available for appropriation, it and the reviewing trial and appellate courts have all confirmed that water entering the Intertie is in excess of the needs of the districts claiming water rights on the Kern River. (AR 1889-1890, 1784-1796; AR-SUPP 43-44 [. . .].)” The fact that the Water Board has not made such a determination, and the fact that water entering the Intertie is in excess of the needs of the districts, is immaterial to the question of whether the FEIR contains an accurate, stable, and finite definition of Project water. KWBA concludes by insisting that the “EIR’s description of the sources of water and water rights on the Kern River system, combined with the more detailed descriptions in the [WAA] and Water Board decisions, provides more than sufficient detail with which to analyze the impacts of the Project.” To the contrary, KWBA still cannot point to an accurate, stable, and finite definition of the Project

water.

Next, Petitioner argues that Respondent's fallback position that the water utilized by the Project will be the water granted by the State Board pursuant to Respondent's Application 31676 is self-defeating. It is true that, in the FEIR, KWBA asserts that "because the project proposes to obtain a State Water Board permit for diversion of unappropriated high flow water from the Kern River and would not take or otherwise affect the entitlements of other water right holders, a detailed description of existing water rights held by KWBA members or other entities is not relevant or necessary to the CEQA analysis of this project." (AR724.) This FEIR was drafted to review environmental impacts associated with the State Board granting Respondent a permit for Kern River water. (AR111, 113, & 116.) As Petitioner correctly notes, to essentially define Project water as "whatever water the State Board gives me" completely fails to inform the public and the State Board of the potential impacts of the Project. Moreover, this Project description effectively defers to a later regulatory process because it relies on the State Board determining what water is actually unappropriated; CEQA does not allow the analysis of a project's effects to be deferred to a later process. (See *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 440, 447.) Petitioner persuasively argue that KWBA's reliance on the State Board's ultimate decision on how much unappropriated water would actually be available therefore is an improper deferral of the Project description and of the analysis that CEQA requires.

Finally, Petitioner contends that these inconsistencies are further exacerbated by KWBA's recent filings with the State Board—i.e. the Water Board Complaint and cover letter, submitted with the requests for judicial notice—which make clear that the Project seeks to severely limit Kern River water rights of existing rights holders. This argument lacks merit because it is

predicated on extra-record evidence that cannot be considered in this CEQA review, for the reasons set forth above in analyzing the requests for judicial notice. That being said, if this CEQA petition for writ of mandate is granted and KWBA is required to comply with CEQA in issuing a new EIR, then the Water Board Complaint and cover letter will be part of any administrative record pertaining to that new EIR. In sum, Petitioner has shown that the Project description is inadequate because it is inaccurate, unstable, and indefinite.

Description of Existing Kern River Water Rights

Petitioner asserts that the FEIR fails to completely and accurately describe existing Kern River water rights; specifically, the FEIR's description of existing water rights is "incomplete and confusing." According to Petitioner, without accurate information regarding the status and extent of current water rights, it is impossible to determine how the Project will impact existing Kern River water rights or water right holders, like Petitioner. Petitioner cites *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 726 and *Citizens To Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 430 for the proposition that courts have held that CEQA clearly requires the lead agency to use its best efforts to find out and disclose all that it reasonably can. *Citizens To Preserve The Ojai* contains no such holding; however, *San Joaquin Raptor* supports Petitioner's position:

"State CEQA Guidelines section 15144 provides: "[d]rafting an EIR or preparing a negative declaration necessarily involves some degree of forecasting. While foreseeing the unforeseeable is not possible, an agency must use its best efforts to *find out* and disclose all that it reasonably can." (Italics added.) CEQA Guidelines section 15145 states: "If, *after thorough investigation*, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact." (Italics added.)"

(*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 726, as modified (Sept. 12, 1994).)

Petitioner notes that in response to the deficiency, the FEIR points to Section 3.2 of the WAA, Appendix L to the DEIR, but that merely summarizes the allocations under the various agreements that make up the Law of the River. (AR 505-507.) Petitioner further notes that Table 4 in the WAA (AR 507) *approximates* allocations to the Second Point based on natural flow at the First Point in certain water year types, and the FEIR states that Petitioner is entitled to “essentially all of the Second Point Rights” (AR 508), but nowhere does the EIR actually quantify the amount that water right holders like Petitioner are entitled to. Petitioner is correct that these summaries and approximations fail to actually quantify the amount of water that right holders such as Petitioner are entitled to. This incomplete data suggests that KWBA failed to investigate and disclose all that it reasonably could.

Petitioner further argues that the FEIR is deficient because its analysis “assumes that any water entering the Intertie in a certain water year is not subject to a water right. [AR 515].” Petitioner asserts that KWBA repeats the circular statement that since the Project propose to obtain a Water Board permit for diversion of unappropriated high flow water and would not take or affect entitlements of other water right holders, a detailed description of existing water rights held by KWBA members or other entities is not relevant or necessary to the CEQA analysis. (Citing AR 724.) Petitioner believes this statement is meaningless if not accompanied by sufficient information to understand how Respondent is defining those rights for purposes of determining the Project’s impacts; the FEIR is intended to analyze the impacts of this change in the place and purpose of use of Kern River water for the State Board. Petitioner asserts that simply saying there will be no impacts on water rights, and thus a discussion of those rights is not necessary, does not provide an accurate view of the Project to allow affected parties and public decision-makers the opportunity to balance the proposal’s benefit against its

environmental cost, considering mitigating measures, assess the advantage of terminating the proposal, or weigh other alternatives in the balance. (Citing *County of Inyo*, 71 Cal.App.3d, at pp. 192-93.)

Petitioner's argument is persuasive. "A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the "no project" alternative) and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193.) KWBA has created a distorted Project description by generally asserting that Project water is water that is unappropriated, while failing to fully, completely, and accurately describe the existing water rights in question. (AR 724.) KWBA insists that it need not describe the existing water rights because the Project will not affect those rights, given that the Project only seeks to divert unappropriated water (AR 724); however, this argument is illogical. Since the FEIR does not contain any consistent definition of the Project water other than the vague assertion that Project water is unappropriated water, it is critical that the FEIR define what exactly "unappropriated" water means. To do so, the description must contain a detailed analysis of existing Kern River water rights, i.e. it must fully, completely, and accurately define the appropriated water, so that the decision-makers and the public can ascertain what water is unappropriated and thus would be available for the Project.

KWBA argues that the EIR's executive summary and introduction chapters describe in detail the existing Kern River water rights and sources of water on the system and for the Project.

(Citing AR 96-99, 111-115.) As explained above, this argument lacks merit because the cited pages contain vague and inconsistent references to the Project water, which is precisely what Petitioner complains about. Likewise, with respect to existing water rights, these pages merely provide vague summaries of existing water rights and usage—which Petitioner accurately describes as “glossing over”—without providing any specific details about existing water rights and usage, and how such water rights and usage affects the unappropriated water that KWBA seeks to divert for the Project. Simply put, these pages do not provide sufficient information about existing water rights.

In summary, Petitioner has shown that a full, complete, and accurate description of existing Kern River water rights is essential to form an accurate, stable, and finite description of the Project, and KWBA fails to set forth such a description of existing water rights.

Description of Recovery Operations

The entire project being proposed for approval (and not some smaller aspect of it) must be described in the EIR; a complete project description is necessary to ensure that all of the project’s environmental impacts are considered. (Kosta & Zischke, *Practice Under the Cal. Environmental Quality Act* (Cont.Ed.Bar 2019) § 12.8, citing CEQA Guidelines, § 15378 [defining “project” as “the whole of the activity”], *Habitat & Watershed Caretakers v City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1297, *Banning Ranch Conservancy v City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1220, and *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1450.) This requirement is best illustrated in the cases summarized in the CEB literature, including the cases discussed below.

In *City of Santee v. County of San Diego*, the court concluded that the EIR was “fatally flawed due to its inaccurate project description and the omission of an adequate analysis of

future uses of the ‘temporary project,’ which in turn will taint the adequacy of the discussion of project alternatives under CEQA” (*City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1447.) Specifically, the EIR for county detention facilities understated the likely duration of temporary detention facilities, thus minimizing traffic and other impacts. (*Ibid.*) In *County of Inyo v. City of Los Angeles* (1981) 124 Cal.App.3d 1, 7, a revised EIR for a water export plan that failed to describe or analyze surface water impacts was found to be insufficient. (*County of Inyo v. City of Los Angeles* (1981) 124 Cal.App.3d 1, 7.)

In *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, the court held that the project description was inadequate because it omitted a description of the sewer expansion (sewer lines and wastewater treatment plant expansion), which was a necessary component of the residential/commercial/park development project. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 729-35.) The court relied on CEQA Guidelines section 15378(a), which defines “project” as “the whole of an action, which has the potential for resulting in a physical change in the environment, directly or ultimately.” Since the sewer expansion had been proposed to serve the housing project, and the housing project could not proceed without the expansion of sewer service, the court concluded that the expansion was an integral component of the housing project. The court came to this conclusion even though the community services district, not the county, was the agency with jurisdiction over the treatment plant expansion and had prepared its own EIR for that project.

Turning to the facts of this case, in essence, it is Petitioner’s position that the Project fails to fully and accurately describe existing and future recovery operations (also referred to as

groundwater recharging¹) for the Project. Although not fully explained in the parties' papers, given that the Project proposes to divert up to 500,000 AFY of Kern River water annually into KWBA's banking operation (the KWB) to be recovered (i.e. pumped out or otherwise taken to be used) by KWBA's members during dry years, it necessarily follows that the Project must include some analysis of the KWB's recovery operations, referring to its ability to store and subsequently pump out the Project water. The FEIR generally addresses recovery operations, but Petitioner believes the discussion is insufficient. Specifically, Petitioner argues:

"FEIR's description and analysis of the Project's recovery of banked water is woefully lacking. The DEIR provides two meaningless paragraphs [AR129-130]; the FEIR doesn't provide much more [AR 724-725]. No details whatsoever are provided. Rather, FEIR justifies its failure to described proposed recovery operations on the claim that maximum annual recovery rates are not expected to increase in a given year. [AR 724.] Yet it is acknowledged that the Project "would allow Respondent and its members to continue to operate in the later years of a multi-year drought." [AR 724-725.] The FEIR is supposed to be a "standalone EIR" [AR 113], yet the specifics of recovering substantial quantities of Project water are simply left out of the FEIR. Simple question such as (i) how much water will be recovered in one year; (ii) how many years of consistent recovery; (iii) when if ever will pumping be shut off due to groundwater levels; (iv) can Respondent's members recover this water in their boundaries remain a mystery. Concluding that there will be less than a significant impact cannot be done without a description of proposed groundwater pumping. As discussed further below, the facts do not support the claim that no impact will result. The FEIR's failure to adequately describe recovery operations in the Project's description leaves an incomplete picture of the Project and prevents Buena Vista, the public, and the interested public agencies from properly evaluating the Project, the environmental setting, and the associated environmental impacts, mitigation, and alternatives. This failure by omission renders the FEIR deficient. [See, e.g., San Joaquin Raptor, 27 Cal.App.4th 713.]"

Respondent argues that Petitioner is "incorrect" that the EIR provides no details

¹ "Recharging" refers to the collection of water, whereas "recovery" refers to the removal of water for use.

regarding the Project's recovery of banked water. According to KWBA, "the EIR exhaustively describes Project operations, including recovery operations. (AR 128-131, 724-726; see also AR 408.)" KWBA states that the EIR specifies that KWB was designed to bank surplus water in wet years for later recovery to provide a more stable, reliable, and sustainable source of water for its members in dry years. KWBA states that "[r]echarge operations at KWB facilities, including water sources, local conveyance facilities utilized, and historical recharge operations including losses are fully described and analyzed. (AR 127-129, 495-531, 380-400.)" KWBA further asserts that the "EIR further describes the reasons and timing for recovery of banked groundwater from the KWB. (AR 129-130, 724-726.)" KWBA states that the "protocol for recovery operations is part of the ongoing baseline operations, and such operations have been continued under the KWBA's Long Term Project Recovery Operations Plan, [KWB MOU], [Interim Plan], and [Joint Plan]. (AR 111-113, 129-130, 132-133, 380-406, 417-433.)" KWBA concludes by stating that the "Project does not propose to make any changes to overall recovery operations on an annual basis. (AR 724-726.)"

Contrary to KWBA's assertion, nothing in AR 127-128, 131-133, 380-406 (KWB MOU), 417-433 (Interim Plan & Joint Plan), 495-500 and 504-531 (WAA) addresses the recovery operations of the Project. The only reference to recovery operations in DEIR is the following:

"Water stored within the KWB is recovered at the request of KWBA's member entities. Recovery operations are subject to the conditions specified in the KWB MOU (see Section 2.2.3.1.). Consistent with the KWBA MOU, and a similar MOU governing banking operations in the Rosedale-Rio Bravo Water Storage District (Rosedale), KWBA and Rosedale developed an Interim Project Recovery Operations Plan Regarding Kern Water Bank Authority (KWB) and Rosedale-Rio Bravo Water Storage District (Rosedale) Projects (Interim Plan) that designates measures to be employed to "prevent, eliminate or mitigate significant adverse impacts" resulting from cumulative recovery operations of KWBA and Rosedale projects subject to said MOUs (Appendix E). The Interim Plan was effective until

the 2014 Writ was discharged in October, 2017. Subsequently, as a responsible agency, KWBA approved the Long-Term Operations Plan (Appendix C), which constitutes a required part of KWB operations.

Subsequently, KWBA entered into a joint plan, Project Recovery Operations Plan Regarding Pioneer Project, Rosedale-Rio Bravo Water Storage District, and Kern Water Bank Authority Projects (Joint Plan) (Appendix F). The Joint Plan also considers cumulative impacts from additional banking projects on the Kern Fan, and designates mitigation measures similar to those contained in the Long-Term KWB Plan. The recovery operations plans all include a joint committee that regularly monitors potential groundwater level impacts of banking project recovery operations on neighboring agricultural and domestic wells based on groundwater modeling and specified triggers for potential mitigation actions, with significant impacts being avoided, eliminated, or mitigated by implementing one or more corrective actions, including investigation of any claims and pump lowering, well replacement, and/ or reduction or adjustment of banking project recovery operations, as appropriate. Water recovered by the KWB, including appropriated Kern River supplies, would continue to be subject to the MOU and all applicable recovery operations plans. This project is meant to increase reliability and long-term storage but does not propose to alter or otherwise increase annual recovery operations above historical levels.

From 1995 through 2016, approximately 1.5 MAF was pumped from the KWB. All of this water was recovered during portions of three dry periods which occurred from 2001 through 2004, 2007 through 2010, and 2012 through 2016.”

(AR 129-130.)

Based on the above, the DEIR states that the Project “does not propose to alter or otherwise increase annual recovery operations about historical levels,” it only intends to increase the amount of water diverted for storage to increase reliability and long-term storage.

In responding to comments, the FEIR adds more information about recovery operations. (AR 724-726.) Even so, as Petitioner correctly states, the FEIR justifies its failure to describe proposed recovery operations on the claim that maximum annual recovery rates are not expected to increase in a given year. (AR 724.) Yet it is acknowledged that the Project “would allow

Respondent and its members to continue to operate in the later years of a multi-year drought.” (AR 724-725.) The responses to comments also assert that “[t]he environmental impacts associated with continued pumping in later years of a multi-year drought are captured throughout the EIR (e.g., air quality, hydrology, energy).” (AR 725.) Pages 4-6 of the WAA (AR 501-503) describe existing estimated water recharge capacities based on diversion figures, and include two tables setting forth the sources and estimated maximum capacities of the recharge operations (provided by KWBA) based on diversion figures. (AR 501-503.) In light of the foregoing, the Court finds that the description of recovery operations is sufficient under CEQA.

Whether the FEIR Has an Adequate Description of the Environmental Setting (Baseline)

“An EIR must include a description of the physical environmental conditions in the vicinity of the project. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. The description of the environmental setting shall be no longer than is necessary to provide an understanding of the significant effects of the proposed project and its alternatives. The purpose of this requirement is to give the public and decision makers the most accurate and understandable picture practically possible of the project's likely near-term and long-term impacts.

(1) Generally, the lead agency should describe physical environmental conditions as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. Where existing conditions change or fluctuate over time, and where necessary to provide the most accurate picture practically possible of the project's impacts, a lead agency may define existing conditions by referencing historic conditions, or conditions expected when the project becomes operational, or both, that are supported with substantial evidence. In addition, a lead agency may also use baselines consisting of both existing conditions and projected future conditions that are supported by reliable projections based on substantial evidence in the record.

(2) A lead agency may use projected future conditions (beyond the date of project operations) baseline as the sole baseline for analysis only if it demonstrates with

substantial evidence that use of existing conditions would be either misleading or without informative value to decision-makers and the public. Use of projected future conditions as the only baseline must be supported by reliable projections based on substantial evidence in the record.

(3) An existing conditions baseline shall not include hypothetical conditions, such as those that might be allowed, but have never actually occurred, under existing permits or plans, as the baseline.”

(CEQA Guidelines, § 15125(a).)

“Knowledge of the regional setting is critical to the assessment of environmental impacts. Special emphasis should be placed on environmental resources that are rare or unique to that region and would be affected by the project. The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context.”

(CEQA Guidelines, § 15125(c).)

KWBA correctly states that Petitioner does not object to the baseline period (1995-2011) employed in the FEIR to assess historical operations. Instead, Petitioner argues that the FEIR fails to sufficiently describe and analyze the following: (1) Petitioner’s existing KWB second priority right; (2) existing Kern River rights and uses; (3) current KWB operations; and (4) adjacent banking operations. According to Petitioner, without a complete description of these baseline conditions, it is impossible for Petitioner and the public to accurately evaluate potential impacts of the Project. Each issue is discussed separately below.

KWBA is correct that, before approval of the EIR, Petitioner never utilized any storage in the KWB. (AR 539 [FEIR responses to comments].) The FEIR’s responses to comments address the only entities who have utilized their storage rights. (AR 726.) KWBA persuasively argues that it has broad discretion in determining whether to use a historical baseline. (See *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310,

328.) KWBA is correct that it was appropriate for it to consider the fact that Petitioner has never used its second priority right to use KWB recharge facilities in establishing the baseline for the Project. Petitioner cites no legal authority that supports its claim that KWBA was obligated to consider Petitioner's contract-only right that had never been exercised in establishing the baseline. Petitioner's reliance on *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316 is misplaced, as that case merely held that an agency properly considered a contractual water entitlement in establishing a baseline. (*Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 337-338.) Petitioner effectively seeks to expand that holding to include the opposite scenario, i.e. to conclude that it was improper for KWBA not to consider a contractual water entitlement in establishing a baseline. The decision in *Cherry Valley Pass Acres* does not contain such a holding, and this Court should decline to create such a new requirement in the CEQA baseline analysis.

Petitioner correctly notes that KWBA's argument dismisses the fact that the KWBA has allegedly denied Petitioner, and others, from utilizing the second priority right, to the extent they needed to initiate litigation. (AR 14913-14931 [litigation tolling agreement, dated September 2012, from the 2nd Priority Complaint litigation].) That litigation was commenced in 2010 (AR 14914), and is based on allegations of wrongdoing by KWBA during most of the historical baseline period (1995-2011).

The question remains, however, whether KWBA's allegedly wrongful conduct of preventing KWB second priority right holders from exercising their right to use KWB facilities during the baseline period (1995-2011), to the extent where Petitioner commenced litigation to enforce their rights, affects the baseline analysis. Neither Petitioner nor KWBA has submitted any legal argument or authority on this issue. That being said, independent research suggests that

Petitioner's argument lacks merit. Petitioner's strongest position would be to analogize KWBA's alleged prior wrongful conduct with illegal activity. Unfortunately for Petitioner, case law consistently holds that preparation of an EIR is not generally the appropriate forum for determining the nature and consequences of prior conduct of a project applicant, and environmental impacts should be examined in light of the environment as it exists when a project is approved, even if that environment includes illegal activity. (See *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1452-53 [holding that because the prior illegality was subject to enforcement actions and the enforcing agency participated in the CEQA process, CEQA did not require any further accounting for prior activity at or within the vicinity of the project]; see also *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1280-82 [summarizing the relevant portions of *Riverwatch* and holding that the inclusion of an illegally constructed airport in the CEQA baseline was proper, given that it had been subject of enforcement actions]; see also *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 370-71 [summarizing *Riverwatch* and holding that while code violations *may* have been relevant to the city's consideration of the variance requested, it was not a CEQA consideration].) Here, as in *Riverwatch*, *Fat*, and *Eureka Citizens for Responsible Government*, there was an enforcement action concerning the alleged illegality—i.e. the 2nd Priority Complaint Litigation—and Petitioner both sought enforcement against the alleged illegality and participated in the CEQA process. Simply put, even though KWBA allegedly denied Petitioner and others from utilizing their second priority right to the extent they needed to initiate litigation, that wrongful conduct by KWBA does not affect the baseline analysis. It was proper for KWBA to assume that Petitioner will not use its second priority right to KWB facilities in establishing the historical baseline.

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Existing Kern River Rights

"[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA." (Santiago County Water Dist. v. County of Orange (1981) 118 Cal.App.3d 818, 829 [173 Cal.Rptr. 602].) The error is prejudicial "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, 712 [270 Cal.Rptr. 650].)

"[T]he substantial evidence test applies to the court's review of the agency's factual determinations." (2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 1993) § 23.34, p. 949 (hereafter Practice Under CEQA).) Substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (State CEQA Guidelines, § 15384, subd. (a); see also Laurel Heights, supra, 47 Cal.3d at p. 393.) "In applying the substantial evidence standard, 'the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision.' " (47 Cal.3d at p. 393.)"

(San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1994) 27 Cal.App.4th 713, 721-722.)

In relevant part, State CEQA Guidelines section 15125 provides as follows:

"An EIR must include a description of the environment in the vicinity of the project, as it exists before the commencement of the project, from both a local and regional perspective. The description shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives.

"(a) Knowledge of the regional setting is critical to the assessment of environmental impacts. Special emphasis should be placed on environmental resources that are rare or unique to that region and would be affected by the project." The Guide to CEQA explains the significance of adequate consideration of the existing environmental setting: "Because the concept of a significant effect on the environment focuses on changes in the environment, this section requires an EIR to describe the environmental setting of the project so that the changes can be seen in context. The description of the pre-existing environment also helps reviewers to check the Lead Agency's identification of significant effects." (Guide

to CEQA, *supra*, p. 579.)

“We must interpret the Guidelines to afford the fullest possible protection to the environment.” (Kings County Farm Bureau v. City of Hanford, supra, 221 Cal.App.3d at p. 720.)

(San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1994) 27 Cal.App.4th 713, 722–723.)

In *San Joaquin Raptor*, an EIR’s description of the environmental setting was found to be fatally flawed. The court found that the EIR for a large residential development project did not disclose the specific location and extent of riparian habitat adjacent to the property, inadequately investigated the possibility of wetlands on the site, understated the significance of the project’s location adjacent to the San Joaquin River, and failed to discuss a nearby wetland wildlife preserve. The court held that the description of the environmental setting was inadequate as a matter of law. The deficiency in the description of the environmental setting tainted the impact analysis and mitigation findings, rendering them legally inadequate as well.

Similarly, in *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1122, the court found that a generalized reference to adjacent vineyards affected by a project was an inadequate description of the environmental setting.

In light of the foregoing authorities, a detailed description of the environmental setting is proper, and that detailed description should include quantified measurements of water used by existing Kern River water rights holders, as well as quantified measurements of the water those rights holders have the right to divert from the Kern River. This is because the record shows that, until 2010, all Kern River water was deemed appropriated (AR Supp. 79; AR 114, 499); only recently was it determined that there was unappropriated water. (AR Supp. 1-47 [court decision]; AR 1797-1803 [State Water Board order].) In determining that there is some unappropriated

water, during some years, neither the State Water Board nor the court defined how much appropriated water exists. (*Ibid.*) Notably, the WAA indicates that “should the State Water Board determine that other water is available for appropriation; the KWBA reserves the right to make a claim for that water.” (AR 49, fn. 2.) The express purpose of this Project is to support KWBA’s application to the State Water Board in which it is making a claim for water by asking for a diversion of up to 500,000 AFA of unappropriated water. (E.g., AR 724.) Since the record shows that there is no definition of the unappropriated water at issue, a definition of the unappropriated water requires an explanation of all existing rights holders’ rights. It follows that a more detailed discussion of those rights to divert and actual diversions—including quantifications of actual historical diversions and existing right holders’ rights to divert Kern River water—is necessary to understand what water KWBA is seeking to obtain.

KWBA refers to the WAA and asserts that the EIR exhaustively describes existing Kern River water rights, including the appropriation and delivery process. (Citing AR 495-531.) It is true, as KWBA notes, that the WAA considers Kern River Pre-1914 Water Right Allocations, and describes the means by which water is allocated to rights holders, outlines pre-1914 water right holders and diversions as outlined in the 1888 Miller-Haggin Agreement, and discusses approximate annual allocations to the first point, second point, lower river users, and Intertie deliveries from 1978 to 2011. (AR 505-507.) KWBA is also correct that Table 7 of the WAA summarizes flows at the second point, which reflect Petitioner’s historic diversions and diversions to the Intertie. (AR 513-514.) Further, KWBA correctly states that the setting and baseline discussion identifies and quantifies the amount of water that actually was diverted when water has been available for diversion. (AR 141-142, 226-237, 245-249, 251-253.) Even so, KWBA cannot cite to any quantification of existing water rights in the DEIR, FEIR, or WAA,

which is the omission that is the subject of Petitioner's objection.

KWBA basically asserts that Petitioner cannot object to the omission of a quantification of the competing water rights on the system because Petitioner "fails to substantiate or quantify those rights itself." KWBA cites *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, 163 for the proposition that "[s]uch conclusory and speculative statements cannot contradict the substantial evidence contained in the EIR and appended [WAA]." As Petitioner persuasively argues in the reply, this case does not support shifting the burden to Petitioner to quantify the water rights. In any event, since Petitioner has raised specific concern about the omission of a quantification of competing water rights, this case is inapposite.

KWBA further argues that Petitioner's claim that the Project will impact senior water rights is incorrect as a matter of law. According to KWBA, its application seeks only water that is surplus, unappropriated water, which, by definition, cannot infringe on valid senior water rights. (Citing AR 119-120, 133.) It is true that the Water Board cannot issue a new permit for the diversion of water that is subject to senior water rights and beneficial uses. (Water Code, §§ 1201, 1202, 1375.) It is also true that KWBA's application seeks to divert up to 500,000 AFY of unappropriated water. (AR 119-120.) However, KWBA's argument ignores the fact that it fails to define this unappropriated water, by virtue of its failure to define all appropriated water, i.e. a quantification of all existing competing water rights.

KWBA concludes by asserting that Petitioner conflates CEQA's requirement that *physical* impacts be analyzed with the separate issue of determining the nature and extent of Petitioner's Kern River water rights, which lies solely in the jurisdiction of the Water Board. KWBA insists that by analyzing only historical uses of the water, it has fulfilled its CEQA duties. While it is true that any changes to *future* Kern River water rights must be decided by the

Water Board, this does not change the fact that the *existing* water rights must be fully explained and quantified in the baseline analysis.

In sum, KWBA's arguments lack merit, and Petitioner has shown that the baseline analysis is inadequate because it fails to include a full and complete analysis—including quantification—of competing existing rights to Kern River water.

Description of KWB Operations

Petitioner argues that the description of KWB operations and impacts relies heavily on past environmental review, even though the FEIR claims to be a standalone EIR (i.e. no tiering). Petitioner complains that the FEIR does not provide information regarding groundwater levels, well depths, rates of percolation or extraction, current trends regarding extraction, or migration or loss of water stored by KWBA; the FEIR fails to provide any information on losses, migration, or other issues that might impact groundwater conditions, the quantity of water extracted, or any other details regarding pumping and groundwater conditions. Petitioner also asserts that the FEIR claims evapotranspiration losses of 6% based on an MOU included in a prior CEQA document, but there is nothing in the AR to show that this calculation is accurate, and the evidence (e.g., 2-ft. depth of recharge ponds, hot summer conditions) indicates that it is not. Petitioner asserts that, at the very least, the FEIR should have addressed evapotranspiration in the KWB ponds as well as migration of the water over time.

KWBA is correct that the record includes a detailed discussion and analysis of Project operations, water diversions, river water, and groundwater regulations (AR 736-744), and KWBA is not proposing to alter annual recovery operations (AR 724-725). To the extent Petitioner challenges the 6% rate of evapotranspiration, KWBA's answer brief contends that Petitioner did not exhaust administrative remedies as to this issue because Petitioner did not raise

this express objection during the administrative process. It is true that an action cannot be brought if the alleged grounds for noncompliance were not presented to the agency orally or in writing before the issuance of the notice of determination. (Pub. Res. Code, § 21177.) The exact issue must have been presented to the agency; the petitioner bears the burden of demonstrating that the issues were first raised on the administrative level. (*Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 17 Cal.App.5th 413, 446, quoting *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 527.) In the reply, Petitioner does not acknowledge this exhaustion argument, or otherwise attempt to point out where in the administrative record it exhausted administrative remedies as to the evapotranspiration issue. Thus, the Court concludes that Petitioner has failed to meet its burden to exhaust administrative remedies as to the evapotranspiration issue. Therefore, this issue has been waived. In conclusion, the FEIR's description of KWB operations is adequate under CEQA.

Description of Adjacent Banking Operations

The KWB is surrounded by adjacent banking operations. (E.g., AR 246 [map].) Petitioner generally argues that the FEIR does not contain an adequate description of these adjacent banking operations, and merely “gloss[es] over” them. However, as KWBA correctly notes in the answer brief, the EIR does contain a general description of these adjacent banking facilities. (AR 244-246, 129-130, 261-262.) KWBA persuasively argues that Petitioner fails to identify any specific shortcoming in the description. Petitioner further argues that the deficient description of adjacent banking operations is highlighted by the fact that after the recent drought, KWBA was forced to enter into the Joint Plan (AR 426-433) with adjacent banking operations to monitor the cumulative impacts of the water banks. In the answer brief, KWBA describes this Joint Plan

argument as a red herring. KWBA's assertion is well-taken. The fact that KWBA entered into the Joint Plan with adjacent banking operations to monitor cumulative impacts of the water banks does not suggest that the description of the adjacent banking operations in the baseline analysis is somehow deficient. This Project is meant to increase reliability and long-term storage, but does not propose to alter or otherwise increase annual recovery operations above historical levels. (AR 130.) Therefore, Petitioner's argument lacks merit.

In sum, the description of KWB operations is sufficient, the FEIR's description of adjacent banking operations is sufficient, and it was proper for KWBA to assume that Petitioner will not use its second priority right to KWB facilities in establishing the historical baseline. However, the baseline analysis is inadequate because it fails to include a full and complete analysis—including quantification—of competing existing rights to Kern River water. For that reason, the baseline analysis is not supported by substantial evidence.

Whether the FEIR Has an Adequate Evaluation of Project Impacts

'An environmental impact report is an informational document which, when its preparation is required by this division, shall be considered by every public agency prior to its approval or disapproval of a project. The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.'

(Pub. Resources Code, § 21061.)

"(a) All lead agencies shall prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project which they propose to carry out or approve that may have a significant effect on the environment. Whenever feasible, a standard format shall be used for environmental impact reports.

(b) The environmental impact report shall include a detailed statement setting forth

all of the following:

(1) All significant effects on the environment of the proposed project.”

(Pub. Resources Code, § 21100(a)-(b)(1).)

“‘Environment’ means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance.” (Pub. Resources Code, § 21060.5.) “All phases of a project must be considered when evaluating its impact on the environment: planning, acquisition, development, and operation.” (CEQA Guidelines, § 15126.) Significant environmental impacts “shall be discussed as directed in Sections 15126.2” or, if not discussed separately, the EIR shall include a table showing where each subject is discussed, including: significant environmental effects of the proposed project, the significant environmental effects that cannot be avoided if the proposed project is implemented, the significant irreversible environmental changes which would be involved in the proposed project should it be implemented, and the growth-inducing impact of the proposed project. (*Ibid.*)

“The Significant Environmental Effects of the Proposed Project. An EIR shall identify and focus on the significant effects of the proposed project on the environment. In assessing the impact of a proposed project on the environment, the lead agency should normally limit its examination to changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published, or where no notice of preparation is published, at the time environmental analysis is commenced. Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects. The discussion should include relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution, population concentration, the human use of the land (including commercial and residential development), health and safety problems caused by the physical changes, and other aspects of the resource base such as water, historical resources, scenic quality, and public services. The EIR shall also analyze any significant

environmental effects the project might cause or risk exacerbating by bringing development and people into the area affected. For example the EIR should evaluate any potentially significant direct, indirect, or cumulative environmental impacts of locating development in areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas), including both short-term and long-term conditions, as identified in authoritative hazard maps, risk assessments or in land use plans, addressing such hazards areas.”

(CEQA Guidelines, § 15126.2(a).)

“An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.”

(CEQA Guidelines, § 15151.)

“A threshold of significance is an identifiable, quantitative, qualitative, or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant.” (CEQA Guidelines, § 15064.7 subd. (a).) The lead agency has substantial discretion in determining the appropriate threshold of significance to evaluate the severity of a particular impact. (See CEQA Guidelines, § 15064, subd. (b); Save Cuyama Valley v. County of Santa Barbara (2013) 213 Cal.App.4th 1059, 1068, 153 Cal.Rptr.3d 534; Lotus, supra, 223 Cal.App.4th at p. 655, fn. 7, 167 Cal.Rptr.3d 382 [“The standard of significance applicable in any instance is a matter of discretion exercised by the public agency “depending on the nature of the area affected.””].)”

(Mission Bay Alliance v. Office of Community Investment & Infrastructure (2016) 6 Cal.App.5th 160, 192.)

“The report shall also contain a statement briefly indicating the reasons for determining that various effects on the environment of a project are not significant and consequently have not

been discussed in detail in the environmental impact report.” (Pub. Resources Code, § 21100(c).) “An EIR shall contain a statement briefly indicating the reasons that various possible significant effects of a project were determined not to be significant and were therefore not discussed in detail in the EIR. Such a statement may be contained in an attached copy of an initial study.” (CEQA Guidelines, § 15128.)

“It has been held that an EIR is inadequate if it fails to identify at least a potential source for water. In *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182 [55 Cal.Rptr.2d 625], for example, the failure to identify a source of water beyond the first five years of development rendered the EIR inadequate, although the developer was pursuing several possible sources. It also has been held that an EIR is inadequate if the project intends to use water from an existing source, but it is not shown that the existing source has enough water to serve the project and the current users. (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818 [173 Cal.Rptr. 602].) On the other hand, it has been held that an EIR is not required to engage in speculation in order to analyze a “worst case scenario.” (*Towards Responsibility in Planning v. City Council* (1988) 200 Cal.App.3d 671 [246 Cal.Rptr. 317] (hereafter *TRIP*).)”

(*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 372–373, as modified (Aug. 7, 2001), as modified on denial of reh'g (Sept. 4, 2001).)

Petitioner argues that the FEIR is inadequate because it fails to “consider and/or forecast the significant impacts potentially resulting from the Project, specifically:” (1) the impacts on Kern River right holders and historical uses of water; (2) impacts resulting from the Project recovery operations; and (3) impacts on the KWBA second priority right. Each issue is discussed below.

Impacts on Kern River Right Holders & Historical Uses of Water

Petitioner’s principal argument—that the impact analysis on Kern River right holders and historical usage is, in effect, tainted and also inadequate due to the inadequate definition of

Project water, inadequate definition of existing water rights, and inadequate description of the baseline in failing to include a full and complete analysis (including quantification) of competing existing rights to Kern River water—is persuasive. KWBA’s argument that, by its very nature, the application cannot harm senior rights holders is unavailing. The FEIR claims that “the project will not reduce deliveries of Kern River water to senior rights holders. [Fn.] Therefore, there would be no loss of entitled water and no related impacts on those senior Kern River water right holders.” (AR 823.) As explained above, since the record shows that the purpose of the Project is to support KWBA’s water rights application, the evidence shows that senior water rights will likely be affected by the Project. As a result, a thorough analysis of how those water rights will be affected is necessary. The FEIR does not contain any such thorough analysis, and the general statement that the rights will be unaffected is insufficient under CEQA.

KWBA’s assertion that the FEIR exhaustively describes existing Kern River water rights including a description of the Kern River water appropriation and delivery process (citing AR 226–233) and KWBA’s WAA (citing AR 495–531) lacks merit. As discussed above, the discussion of existing Kern River water rights is insufficient.

Next, KWBA contends that Petitioner’s brief simply concludes that the FEIR is inadequate because it disagrees with KWBA’s conclusion that the Project will not affect the existing Kern River water right holders. According to KWBA, even if this were anything more than a water rights dispute that has not yet been determined by the Water Board, KWBA is well within its discretion to favor the conclusions of its own experts over Petitioner. (Citing *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1069.) While it is true that disagreement among experts does not make an EIR inadequate (*Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1069), KWBA misconstrues this

problem as a mere disagreement among experts. As explained above, the discussion of existing Kern River water rights is insufficient, and the FEIR lacks the necessary thorough analysis of impacts on those water rights. Thus, KWBA's argument is not well-taken.

KWBA further asserts that the FEIR clarifies at several places that the Project "would divert and recharge up to 500,000 AF of unappropriated high flow water from the Kern River for future recovery, which is likely to occur in approximately 18% of years, and only under specific hydrological conditions." (Citing AR 724, 98–99; see also AR 249, 255, 265, 720, 722, 736, 742–744.) According to KWBA, it had already historically diverted and utilized Kern River flood flows for the purposes of groundwater recharge in accordance with the Flood Policy and under the direction and control of the Kern River Watermaster. (Citing AR 96, 99.) KWBA states that the Project proposes to divert such high flow water from the Kern River under a new water right. (Citing AR 724.) KWBA concludes that "it makes sense" that the impacts of the Project would remain less than significant. While the FEIR properly concludes that the Project will not have a significant impact on historical utilization of Kern River water, these arguments do not address the problem raised by Petitioner, i.e. the Project is seeking a new water right that necessarily will affect senior rights holders, yet there is no meaningful analysis of how the Project will impact those senior water rights. Therefore, the argument is unavailing.

Simply put, the FEIR and record make clear that the purpose of the Project is to support KWBA's application for a new water right, and it is clear that KWBA seeks to have the Water Board change appropriations to grant a new water right, which necessarily will impact senior rights holders. Such impacts will likely be significant; however, the FEIR fails to address those impacts. Instead, the FEIR erroneously and improperly claims that there will be no impacts because KWBA only seeks unappropriated water. This circular logic is improper. KWBA must

analyze how its Project—which necessarily seeks to reallocate water rights to some extent—will impact senior rights holders. Accordingly, the FEIR’s analysis of impacts on senior rights holders is insufficient, while the analysis of impacts on historical water usage is adequate.

Impacts Resulting from the Project Recovery Operations

The FEIR and DEIR assert that the Project will not result in any “marginal lowering of groundwater levels” and the impact is “less than significant.” (E.g., AR 267.) This is because, as KWBA notes in the answer brief, the Project is not proposed or expected “to increase over actual historical baseline recovery operations in any given year.” (AR 724.) Petitioner takes issue with the fact that this statement only addresses recovery operations “in any given year,” while ignoring the long-term environmental impacts to the groundwater supply that will be caused by the extended recovery operations proposed as part of the Project. Petitioner’s argument is well-taken.

Petitioner correctly notes that the EIR admits that “the banking and storage of Kern River water under the Project may result in extended periods of recovery (e.g., additional months or years), but, as described in the KWB MOU (see Section 2.2.3.1.), this would not exceed banked quantities.” (AR 266; see also AR 876.) Petitioner is also correct that, historically, periods of extended recovery operations resulted in severely depleted groundwater levels, as evidenced by the fact that groundwater levels reached historic lows during a multi-year drought. (AR 242-243 [Figures 3.6-8 & 3.6-9].) This makes clear that—contrary to KWBA’s assertion—the Project does in fact propose to alter recovery operations, since the Project proposes to make groundwater available for longer-term pumping operations for additional months or years during drought conditions. As such, it is likely that the Project will result in groundwater depletion from extended recovery operations during a drought. This is a significant environmental impact that

requires analysis, yet there is no analysis of the effect of long-term recovery operations in the FEIR or DEIR.

Lastly, both parties raise arguments regarding the Joint Operating Committee. On the one hand, in the reply, Petitioner contends that Respondent did not use the Joint Operating Committee groundwater models (AR 428) to show with and without Project scenarios regarding extending groundwater pumping in drought conditions in the FEIR. On the other hand, in the answer brief, KWBA asserts that the Joint Plan was in full force and effect as of the date of the FEIR, and the Project does not propose to change any aspect of the KWB's recovery operations, whether under the Joint Plan, MOU, or other operational parameters for storage and recovery of banked water. KWBA's argument lacks merit. The fact that the Joint Plan was in full force and effect is immaterial, and KWBA's argument that the Project does not propose to change recovery operations is false, as explained above. Petitioner correctly states that the FEIR fails to address the groundwater models set forth in the Joint Plan, which are necessary to analyze the long-term recovery operations.

In sum, Petitioner has shown that the Project will likely have a significant environmental impact on groundwater during long-term recovery operations, and the FEIR is deficient for failure to analyze those environmental impacts.

Impacts on the KWB Second Priority Right

Petitioner essentially argues that since the record shows that the Project will have an impact on its second priority right to use KWB facilities, the baseline used by KWBA (i.e. the baseline assuming that Petitioner will not exercise its right, because Petitioner has never exercised its right) is improper, it necessarily follows that the analysis is inadequate. Petitioner's argument lacks merit. As explained above in connection with the baseline analysis of the KWB

second priority right issue, it was proper for KWBA to use the existing historical baseline of Petitioner's non-use of its second priority right to use KWB facilities, even though the record shows that KWBA prevented Petitioner from exercising that right during the historical baseline period. It follows that the record shows that the analysis of impacts on KWB second priority rights is adequate.

Inconsistent Project Descriptions Result in Failed Analysis of Impacts

For the first time in reply, Petitioner argues that KWBA's failure to adequately describe the environmental setting resulted in an inadequate analysis of impacts from the Project; specifically, inconsistencies in the Project description and environmental setting lead to a distorted view of the Project and its potential impacts. Petitioner points to inconsistencies in the description of Project water between the record and the answer brief. It is true that, in the record, when describing Project water or rationalizing the failure to analyze existing Kern River water rights, the FEIR leads one to believe that the water sought by the Project is water that historically flowed into the Intertie. (AR 120 & 265.) According to Petitioner, in contrast, in the answer brief, when discussing impacts of recharging and recovering Project water in the KWB, KWBA would lead one to believe that the Project is a continuation of the past practice of only seeking water that KWBA "historically diverted" and stored in the KWB. Even assuming *arguendo* that there are inconsistencies between the way the Project water is described in the record versus how it is described in the answer brief, such inconsistencies alone would not show a violation of CEQA. Therefore, Petitioner's reply argument lacks merit.

In sum, the analysis is inadequate in terms of the significant environmental impacts on senior rights holders and significant environmental impacts on groundwater during long-term recovery operations. Otherwise, the analysis of significant environmental impacts is adequate.

Conclusion

To summarize, Petitioner has shown that the EIR is inadequate for the following reasons:

- The definitions of Project water and existing water rights are inadequate because they are inaccurate, unstable, and indefinite;
- The baseline analysis is inadequate because it fails to include a full and complete analysis—including quantification—of competing existing rights to Kern River water; and,
- The analysis of environmental impacts is inadequate in terms of the significant environmental impacts on senior rights holders and significant environmental impacts on groundwater during long-term recovery operations.

Otherwise, the EIR is adequate under CEQA. That being said, if the EIR is amended in response to this Court's ruling, then other aspects of the EIR will also need to be altered. For example, the mitigation measures will need to be amended if the amended EIR shows that the Project will cause a significant environmental impact. In addition, in evaluating any amended EIR issued in response to this ruling, the Water Board Complaint and cover letter will be part of any administrative record pertaining to that new/amended EIR.

Since the EIR is inadequate for the reasons set forth above, Petitioner's petition for writ of mandate is GRANTED. In the petition, Petitioner prays for the following relief:

- (1) [All causes of action]: Judgment determining and declaring that the approval of the Project activities does not comply with applicable law and therefore is null and void.
- (2) [First cause of action]: Judgment determining and declaring that Respondent failed to comply with CEQA and therefore the approval of the Project activities was illegal and is null and void, and issue a writ of mandate commanding Respondent to:
 - a. Vacate and set aside its approval of the Project;
 - b. Vacate and set aside the certification for the FEIR as it relates to the Project;
 - c. Prepare and certify a legally adequate EIR for the Project; and
 - d. Suspend any and all activities described herein pursuant to Respondent's approval

of said activities that could result in an adverse change or alteration to the environment as described in this Petition until Respondent has complied with all requirements of CEQA and all other applicable state and local laws, policies, ordinances, and regulations as are directed by this Court pursuant to Pub. Res. Code section 21168.9.

- (3) [Second cause of action]: Declaratory judgment consistent with paragraphs 1 and 2 of this prayer.
- (4) [Third cause of action]: Declaratory judgment in the respects stated in paragraphs 1 and 2 of this prayer.
- (5) That Buena Vista be awarded its costs of suit, including reasonable attorneys' fees. The relief requested in paragraphs 1-4 of the prayer for relief are authorized by CEQA.

(See Pub. Res. Code, § 21168.9.²) The request for attorneys' fees and costs, set forth in

² CEQA authorizes the following relief:

(a) If a court finds, as a result of a trial, hearing, or remand from an appellate court, that any determination, finding, or decision of a public agency has been made without compliance with this division, the court shall enter an order that includes one or more of the following:

(1) A mandate that the determination, finding, or decision be voided by the public agency, in whole or in part.

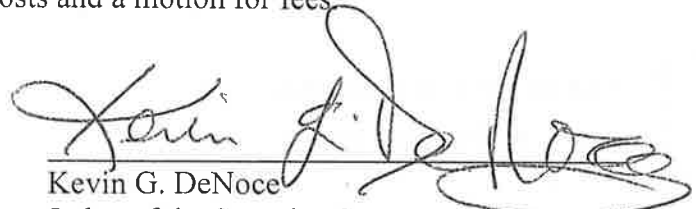
(2) If the court finds that a specific project activity or activities will prejudice the consideration or implementation of particular mitigation measures or alternatives to the project, a mandate that the public agency and any real parties in interest suspend any or all specific project activity or activities, pursuant to the determination, finding, or decision, that could result in an adverse change or alteration to the physical environment, until the public agency has taken any actions that may be necessary to bring the determination, finding, or decision into compliance with this division.

(3) A mandate that the public agency take specific action as may be necessary to bring the determination, finding, or decision into compliance with this division.

(b) Any order pursuant to subdivision (a) shall include only those mandates which are necessary to achieve compliance with this division and only those specific project activities in noncompliance with this division. The order shall be made by

paragraph 5 of the prayer for relief, is to be decided by way of post-judgment procedures applicable to the filing of a memorandum of costs and a motion for fees.

Dated: September 2, 2020


Kevin G. DeNoce
Judge of the Superior Court

the issuance of a peremptory writ of mandate specifying what action by the public agency is necessary to comply with this division. However, the order shall be limited to that portion of a determination, finding, or decision or the specific project activity or activities found to be in noncompliance only if a court finds that (1) the portion or specific project activity or activities are severable, (2) severance will not prejudice complete and full compliance with this division, and (3) the court has not found the remainder of the project to be in noncompliance with this division. The trial court shall retain jurisdiction over the public agency's proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with this division.

(c) Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way. Except as expressly provided in this section, nothing in this section is intended to limit the equitable powers of the court.

(Pub. Resources Code, § 21168.9.)

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PROOF OF SERVICE
CCP § 1012, 1013a (1), (3) & (4)

STATE OF CALIFORNIA)
COUNTY OF VENTURA) ss.

Case No.: 56-2019-00528316-CU-WM-VTA
Case Title: Buena Vista Water Storage District vs. Kern Water Bank Authority

I am employed in the County of Ventura, State of California. I am over the age of 18 years and not a party to the above-entitled action. My business address is 800 S. Victoria Avenue, Ventura, CA 93009. On the date set forth below, I served the within:

RULING ON PETITION FOR WRIT OF MANDATE

On the following named party(ies)

Christian Marsh
455 Market Street, Suite 1500
San Francisco, California 94105

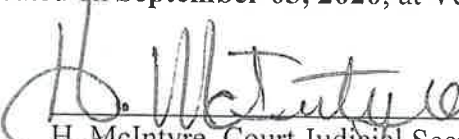
Isaac St. Lawrence
2001 22nd Street, Suite 100
Bakersfield, California 93301

____ **BY PERSONAL SERVICE:** I caused a copy of said document(s) to be hand delivered to the interested party at the address set forth above on _____ at _____ a.m./p.m.

BY MAIL: I caused such envelope to be deposited in the mail at Ventura, California. I am readily familiar with the court's practice for collection and processing of mail. It is deposited with the U.S. Postal Service on the dated listed below.

and **BY FACSIMILE:** I caused a *courtesy copy* of said documents to be sent via facsimile to the interested party at the facsimile number set forth above at ____ from telephone number ____.

I declare under penalty of perjury that the foregoing is true and correct and that this document is executed on **September 03, 2020**, at Ventura, California.

By: 
H. McIntyre, Court Judicial Secretary