SUPERIOR COURT OF CALIFORNIA, COUNTY OF STANISLAUS

FRIANT WATER SUPPLY PROTECTION ASSOCIATION

Petitioner,

vs.

DEL PUERTO WATER DISTRICT; BOARD OF DIRECTORS OF THE DEL PUERTO WATER DISTRICT; SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY; BOARD OF DIRECTORS OF THE SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY

Respondents.

Cases No.: CV-20-5164
CV-20-5193

RULING

SIERRA CLUB, CALIFORNIA NATIVE PLANT SOCIETY, CENTER FOR BIOLOGICAL DIVERSITY, and FRIENDS OF THE RIVER Petitioners DEL PUERTO WATER DISTRICT Respondent SAN JOAQUIN RIVER EXCHANGE CONTRACTORS Real Party in Interest	CV-20-5193

Ruling: CV-5164: Writ **DENIED.**

CV-20-5193: Writ is **GRANTED** as to failure to adequately address the relocation of Del Puerto Canyon Road. Del Puerto Water District is ordered to decertify the EIR and vacate approval of the project. Petitioners are to prepare the order.

The matter is set for a return on the writ of mandate for January 25, 2023 at 8:30 a.m. in Department 21.

The issues raised by the sealed briefing in this case will be addressed in a separate ruling which is likely to be sent the last week in November.

This ruling covers both of these non-consolidated cases because the project challenged is the same project.

The parties:

The Del Puerto Water District (Del Puerto) is the primary Respondent in these matters.

The Friant Water Supply Protection Association (Friant): Represents 10 water supply contractors within the Friant Division of the Central Valley Project. They receive water from the Friant-Kern Canal. The canal is supplied by Millerton Lake, which in turn is fed by the San Joaquin River. Members of the association provide water for about 1 million acres of irrigated land.

Sierra Club, California Native Plant Society, Center for Biological Diversity, and Friends of the River (Environmental Organizations) are the petitioners in the second case.

The United States Bureau of Reclamation (Reclamation) is a federal agency which oversees water resource management.

The **State Department of Water Resources** (DWR) operates the State Water Project, which operates a separate but coordinated water resource management program. Del Puerto and Friant have contracts allowing them water from the water agencies.

The San Joaquin River Exchange Contractors Water Authority (Exchange Contractors) are named as a real party in interest in the Friant case. They are a Joint Powers Authority and successor in interest to long-standing water rights and have contracts with Reclamation.

Background: The Central Valley Project (CVP) is a federal water projected operated by Reclamation. The CVP runs from Redding to Bakersfield, can store over 10 million acre-feet of water, and has a system of dams, reservoirs, canals, and storage facilities. It primarily provides water for agricultural use, but that is not the sole use.

The CVP supplies water rights holders, wildlife refuges, municipal water supplies, and industrial water supplies.

Reclamation is required to comply with state law. It takes water primarily from river flow and transfers it to those it has contracts with. Preferential rights to the water are given to some holders; Friant is in the second tier and is not guaranteed a minimum delivery.

Water flows and transfers are handled between these parties and other parties.

Summary of the project: Del Puerto wants to build a reservoir which could store up to 82,000 acre-feet of water to accumulate during wetter years and be used in drier ones.

The Delta-Mendota Canal (DMC) flows southward through the central valley terminating near the town of Mendota. This is a concrete-lined, manmade canal that provides water.

Some portion of the DMC is diverted into the San Luis Reservoir in Merced County. This artificial lake can contain up to 2 million acre-feet of water.

The project would place a reservoir near Patterson that could either take water or return water to the DMC.

The water to be stored in the proposed Reservior is now operationally and regulatorily available but physically unable to be stored due to a lack of storage capacity south of the Sacramento-San Joaquin River Delta ("the Delta"). The water source is primarily from Respondents' existing entitlements to the CVP under Respondents' separate contracts with Reclamation. A small amount would be sourced from Del Puerto Creek.

It would also involve relocating Del Puerto Canyon Road.

EIR Preparation: On June 27, 2019 Del Puerto issued a Notice of Preparation of the Draft EIR (DEIR). The DEIR was completed on December 11, 2019. 78 written comments were made on the DEIR during the public comment period. The Final EIR (FEIR) was issued on October 9, 2020.

On October 20, 2020, Friant provided comments. The FEIR was approved by the board the next day.

The Court notes here that all of the parties take time to address the lateness of the comments relative to the intended approval date (as Respondent notes) and the quick turnaround of approval after the deadline (as Petitioners note.) Both sides assert that these are tactical; both parties seem likely to be correct.

In any event, Respondents attempt to have it both ways – they contend that they impliedly considered the comments, which were too late to consider.. If Petitioner failed

to timely exhaust the administrative remedies, then that would procedurally bar this litigation. Given that Petitioner's written and oral comments were actually received before the final EIR was approved and the project certified, the fact that the EIR does not address the comments in detail does not suggest that they were not considered nor does it support the argument that there was a failure to exhaust remedies.

Basic rules of CEQA:

The EIR is the " 'heart of **CEQA**.' " (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392, 253 Cal.Rptr. 426, 764 P.2d 278 (*Laurel Heights*).) The purpose of an EIR 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.) "Informed public participation is essential to environmental review under **CEQA**." (*Washoe Meadows Community v. Department of Parks & Recreation* (2017) 17 Cal.App.5th 277, 285, 225 Cal.Rptr.3d 238.)

"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.... The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." (Cal. Code Regs., tit. 14, § 15151.)

The EIR must present facts and analysis; not conclusions or opinions of the agency. The EIR is presumed legally adequate; the agency's certification of the EIR is presumed correct. The writ petitioner bears the burden of proving legal inadequacy and abuse of discretion. (*Id.*) All doubts are resolved in favor of the agency. (*Californians for Alternatives to Toxics v. Dep't of Food & Agriculture* (2005) 136 Cal.App.4th 1.)

FRIANT'S CONTENTIONS:

1. Respondents provided no analysis as to whether it has sufficient legal rights to construct a new turnout from the CVP's Delta-Mendota Canal and use then divert 40,000 acre-feet of CVP water to store in the proposed project.

2. Respondents have no rights or permit to conduct the proposed activities. The proposed activities are subject to the discretion of the California Water Resource Control Board and Reclamation.

3. There is insufficient discussion of the effects on other water users, notably the Friant users.

4. The EIR failed to properly identify the California State Resources Water Control Board as a responsible agency and this is fatal to the EIR.

Friant is correct that to the extent that the project would affect water supply to others, the EIR is required to address that.

For water issues, one on the issues is the source and continuing availability of water for the project, along with the effect that such use of the water will have on the environment and other water users. (*Santiago Cty. Water Dist. v. Cty. of Orange* (1981) 118 Cal.App.3d 818, discussing the necessity of describing the facilities to be constructed to deliver the water to the ultimate destination and the effects of supplying the water to the new project.) Friant argues that the four-part test in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412 applies:

1. CEQA requires a solution to the problem of supplying water to a proposed land project. Sufficient facts must be included to evaluate the pros and cons of supplying the amount of water to the proposed project.
2. An adequate EIR analysis for a long-term project cannot be limited to the first stage or first few years.
3. The future water supplies identified must bear a likelihood of actually proving available.

4. If it is impossible to confidently determine the anticipated future water sources, alternative or replacement sources and the effect of using those contingencies.

Here, though, this is a reservoir which will hold the water, not a land use project which will always and necessarily take water. If the water is not present, the reservoir will presumably not be used.

Critically, Friant's contention is that there could be substantial unused water from Del Puerto's 840,000 acre-foot allotment in normal years and 650,000 acre-foot allotment in critical years, water that would then potentially be available to the Friant users. Friant claims that the CVP supply will be raised if the amount of the allotment is unused, that when limited to the demands of the Exchange Contract, "there are many years in which deliveries to the EC's account for far less than the 840,000 AFY(acre-feet year) minimum."

This contention isn't true. Friant cites to AR 16249 for its From 1997-2010, the usage was 99% or greater of the allotment in all but one year. There were zero years in which the maximum amount being sought to reroute into the reservoir was excess water.

This a critical claim for Friant's case, and the Court reviewed both the pleadings and the oral argument on this to try to determine if the claim that 40,000 acre-feet would be a likely increase in the use of water if it were available for storage would occur.

The evidence does not support this claim. Friant's concern is that the increased availability of water for the reservoir would substantially affect its supply is entirely unsupported by the record. While the Court has some concerns about the decision to provide data as of only 2010, the information the Court does have indicates that the water use has been substantially all of the water allotted for this section of the project.

This is fatal to Friant's primary factual contention.

Friant's also contends that this court should make contractual determinations, claiming in their opening brief::

"The central issue in this case is whether Respondents in fact already have the right 14 to take CVP water from the DMC via a new turnout and annually deposit 40,000 AF of that CVP water in the proposed reservoir. In order to answer that question, 15 the Exchange Contract itself must be examined to determine whether such a right exists." (Petitioner's Opening brief, p.10.)

Respondent is correct that this court is not tasked – nor equipped – to determine the contractual rights of the parties. The Court is bound by Cal.Pub.Res.Code §21168.9 in determining the remedy, and the Court's remedy is necessarily limited to decertification rather than contractual interpretation or enforcement of water rights. Friant's claim that the DWR was not named as a responsible agency or that further information on permitting is required is incorrect. The EIR sufficiently noted that there were potential effects on water that the Respondents viewed as unlikely to be a significant effect.

Furthermore, the draft and final EIR note both Respondents and Reclamation's opinion that no new water permits would be required for the new location because "new" locations are interpreted as diversions from natural waterways, not from the Delta Mendota Canal. Since only Reclamation can ultimately decide if it needs a new permit, the draft and final EIRs also indicate that new permits may be required. The State Water Board made comments regarding new permits but has not yet made a final decision if Reclamation's water rights will need to be changed.

This is sufficient to meet CEQA's requirements. (See:*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674.)

Friant argues that the FEIR does not adequately cover Reclamation's role in a potential turnout location, but the FEIR does discuss the turnout.

The parties appear to agree that the draft and final EIR indicate that Exchange Contractors do need an amendment to one of the agreements with Reclamation for the new turnout and that such turnout is currently under NEPA review by Reclamation. The EIR adequately evaluated this need and Reclamation's NEPA review is not under the

control of Respondents. The only permit sought for or needed from the California water regulatory agencies is to divert water from Del Puerto Creek. That was identified throughout the EIR process.

In short, the EIR gives sufficient information to the public at large of the water use issues present in the project. Friant's primary contention, that the contractual issues need be considered and resolved by this court, is incorrect. Friant's factual claims as to water uses are incorrect. Friant's other contentions of insufficiency are either incorrect or do not rise to the level of decertifying the EIR.

Thus, the requested relief for Friant is DENIED.

ENVIRONMENTAL PETITIONER'S CONTENTIONS:

1. The project description is inadequate.
2. The environmental impacts do not adequately inform the public.
3. The mitigation measures are insufficiently outlined.
4. Transportation is not sufficiently addressed.
5. The issue raised is whether the EIR provides sufficient details to inform the public in a way that allows meaningful consideration. This EIR fails to meet that threshold and therefore, is legally inadequate, because:

Project description adequacy

The first issue is the relocation of Del Puerto Canyon Road.

The Court finds Petitioner's argument on the realignment of Del Puerto Road compelling. The EIR is deficient because it did not adequately address the planned relocation of Del Puerto Canyon Road.

In *Tuolumne County Citizens for Responsible Growth Inc. v. City of Sonora*, (2007) 155 Cal. App. 4th 1214, a construction project including an additional roadway for a home improvement store.

In this case, Stanislaus County rejected Respondents' proposed road change. Thus, there is no current roadway. Respondent argues that the road change "has been

discussed at a conceptual level," and that the FEIR does not serve as inadequate because of that change. In this case, AR 1244 gives a discussion of the proposed roadway, but that proposal had already been rejected by Stanislaus County.
At AR 2482, the EIR acknowledges that neither this alignment or another considered alignment is feasible and acknowledges that further environmental review would be necessary to deal with the alignment issues. It says, "The roadway alignment has been developed at a conceptual level and is subject to refinement during design. Any alignment revision would be evaluated to determine if supplemental environmental documentation is required."

An EIR is by nature a long document, but it is also a summary. Wording errors ought not lead to decertification; Respondent accurately points to a long line of cases that urge both strong deference and not granting writs for minor errors. Nitpicking is not the correct way to look at these documents.

But this is no nit. "Any alignment revision would..." uses the subjunctive tense and leaves the reader with the sense that the roadway is basically in place and that modification may occur, which are minor.

In fact, there is no indication and no serious contention that the current alignment is viable.

Respondent cites to *Citizens for a Sustainable Treasure Island v. City and County of San Francisco (*2014) 227 Cal.App.4th 1036, 1054 for the proposition that any major project will necessarily have some changes. In this case, the Project Overview reads thus:

> "The proposed DPCR involves the construction and operation of a reservoir on Del Puerto Creek to provide approximately 82,000 acre-feet (AF) of new off-stream storage to the Central Valley Project(CVP). Project components are the reservoir (including the main dam, three saddle dams and other facilities), conveyance facilities to transport water to/from the Delta-Mendota Canal (DMC) (including a pipeline and pumping plant), electrical facilities, relocation of Del

Puerto Canyon Road, and relocation of existing and proposed utilities that are within the project area."

The relocation of Del Puerto Canyon Road is plainly a key element in this plan. In *Treasure Island,* the proponents of the plan had long-term outlooks that could not be entirely foreseen. In this case, the roadway location is unknown.

Dry Creek Citizens Coalition v. County of Tulare (1999) 70 Cal.App.4th 20 also does not save Respondents. In that case, the specifics of some water diversion structures were not established in the EIR, but the general functioning of them was clearly established. This is different than the complete relocation of a roadway. Petitioners' other claims of insufficiency do not rise to this level. The project description as to pumping is in fact sufficient, and conjecture as to future changes in Reclamation's position cannot be adequately known until they become apparent or occur.

Environmental Impacts

Petitioners argue that the analysis of the effect on terrestrial species downstream of the project are insufficient, and specifically cites to elderberry longhorn beetles, among other species. They also contend that the wildlife studies should have been done throughout a longer time period.

The EIR includes mitigation impacts to the Elderberry Longhorn beetles. Petitioner's insistence on biological studies at different times of year does not require de novo review; it is substantial evidence to review the methodology for studying the impact and reliability or accuracy of the date upon which the EIR relied. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.) The question is not whether the tests could be better but whether the tests done are sufficiently credible. The studies showed that the Project would have potentially significant impacts on special-status species and provides sufficient information for the public.

Mitigation measures to address possible issues with other species, inclusive of species that may be determined later, is permissible under *Rialto Citizens for*

Responsible Growth v. City of Rialto (2012) 208 Cal.App.4th 899. The measures here are not impermissibly deferred. (See: AR 2387-2397.)

Social impacts are not significant environmental impacts. (Guidelines at §§15131, 15064(e), 15382.) There is no substantial argument by Petitioners that any perceived impacts on recreational activities rises to the level of physical environmental effects. (*Save Our Access-San Gabriel Mountains v. Watershed Conversation Authority* (2021) 68 Cal.App.5th 8, 29.) The EIR states that the Project will create a significant and unavoidable visual impact. That is all that is required by the EIR.

Issues as to the visual aesthetics are in fact addressed by the EIR, inclusive of a picture of what the project is intended to look like. Some visual changes will also occur from areas in Del Puerto Canyon – some of those areas will be inundated - and that is not entirely addressed, but this is not the sort of omission that ought to invalidate an EIR.. Respondents have in fact addressed this issue.

Petitioner also alleges that Respondent added information to the FEIR from the DEIR on water quality. This is true. But, inclusion of additional information in a FEIR is not improper (see: *Cleveland National Forest Foundation v. San Diego Assiciation of Governments* (2017) 3 Cal.5th 497.) Respondents appear to have carefully modelled the water flows and made a sincere effort to give the public information as to the likely effect of the project on them and on water quality.

Mitigation Measures

The mitigation measures are also reviewed under the substantial evidence standard. (*Laurel Heights*, 47 Cal.3d at 407-408.) Courts may not weigh conflicting evidence to determine who has the better argument. The EIR provides for mitigation measures for the construction traffic, biological, air quality, seismic and geological hazards. The EIR consistently states that the Project will not alter Delta pumping operations because the CVP water diverted to the new reservoir is water that was already pumped from the Delta into the DMC. The fact that the U.S. Department of Reclamation, a separate agency, might theoretically someday alter Delta pumping

operations is not a reasonably foreseeable future phase of the Project and therefore, does not have to be identified.

Air quality and greenhouse gas mitigation are addressed in the EIR. It requires reductions of NOx emissions to 10 tons annually and other pollutants to not reach qualified significance thresholds.

Seismic mitigation is raised briefly by Petitioners, but they provide no evidence of seismic effects and the EIR does acknowledge the requirement that the dam be earthquake resistant.

Petitioner's primary complaints as to the mitigation measures are as to the insufficiency of the descriptions of the other alleged affects, which are covered in other sections.

Insufficient Response to Comments

Petitioners note that there is a dispute over whether a 600-foot buffer is sufficient for active hawks' nests; one agency urged a much larger buffer, but Respondent chose the 600-foot buffer based on what Petitioner views as poor methodology. This is exactly the sort of scientific dispute the courts are ill-equipped to engage in.

The FEIR also addressed the absence of any sign of the crotch bumble bee.

Petitioners argue that the assertion by Respondents that the State Water Project will not be affected was met by skepticism from the agency. But the reason for this is indeed in the EIR – the continuing use of the same allotment, simply placed differently, is unlikely to cause an impact.

Construction Issues

Petitioners argue that the construction traffic for the project is insufficiently discussed, including traffic, paving, and fuel use.

Petitioners' discussion of bicycle safety is adequately addressed by the EIR, which notes that pedestrian and bicycle traffic on weekdays, when the construction is expected to occur, was negligible.

Petitioner also overstates the expected construction trips. The discussion of the construction schedule is sufficient notice that there will be traffic and other issues commensurate with a large construction project.

Petitioner makes no clear claim as to how paving issues would adversely affect the environment.

As to fuel and ultimate traffic rates, the EIR does address fuel consumption, estimating it at 4.52 million gallons of fuel. This gives readers an adequate basis to understand the issue.

Consideration of Alternatives

Petitioners argue that reasonable alternatives to the location were not addressed, noting that 85 of 96 potential sites were rejected due to lack of sufficient capacity. But the fact that the purpose of the project was to store a certain amount of acre-feet of water is definitional – that this was the amount of water they wanted stored, and this storage was a goal of the agency.

The EIR reasonably defines project objectives and the proponents have a right to determine those objectives. Claims of groundwater storage being a viable alternative are unsupported. The EIR, however, cites at AR 2432-34 that groundwater storage would be insufficient.

A lead agency need not study alternatives that will not achieve the basic goal. (*California Oak Foundation v. Regents of the University of California* (2010) 188 Cal.App.4th 227, 276.)

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PROOF OF SERVICE BY MAIL

[1013a(3) C.C.P.]

STATE OF CALIFORNIA)

) SS

COUNTY OF STANISLAUS)

I am over the age of 18 years and employed by the Superior Court of the State of California, County of Stanislaus, and not a party to the within action. I certify that I served a copy of the attached Ruling by placing said copy in an envelope addressed to the following:

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Said envelope was then sealed and postage thereon fully prepaid, and thereafter was on 10/31/2022 deposited in the United States mail at Modesto, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 10/31/2022 at Modesto, California