TOPICAL RESPONSE 2: LITIGATION CONCERNING WATER SUPPLIES

Pointing to various litigation matters, comments have stated that there is a probable lack of water supplies for the Gate-King Industrial Park project. Other comments cite pending litigation as evidence that the Castaic Lake Water Agency (CLWA) 41,000 acre-feet per year (afy) water transfer is "further compromised." These comments generally take the position that pending litigation creates uncertainty regarding the availability and reliability of water supplies to serve the Santa Clarita Valley.

The purpose of this topical response is to respond to various statewide, regional, and local litigation matters concerning water supplies in Santa Clarita Valley and the region. Before responding in detail, however, the City of Santa Clarita desires to place the water-related litigation challenges into perspective. First, California Environmental Quality Act (CEQA) does not provide that merely because a program or project has been challenged in litigation, it cannot be considered by a lead agency in analyzing the potential impacts of such action. CEQA, in fact, provides that approval of a program or project is considered valid until a court overturns certification of the EIR and voids the approval. Second, CEQA does not require finality from all litigation challenges before a water source can be included in a water agency's overall supplies. Based on the substantial evidence before it, as discussed below, the City of Santa Clarita has determined that Castaic Lake Water Agency's (CLWA) 41,000 afy water transfer is sufficiently certain, despite litigation, for that water to reasonably be included in CLWA's overall SWP water supplies for the Santa Clarita Valley. (See also, Gate-King Draft Additional Analysis, Section 3.0, pp. 3.0-34 to 3.0-58; and **Topical Response 1: CLWA's 41,000 AFY Water Transfer**.)

Finally, the comments express opinions about the potential effects of litigation. The City of Santa Clarita has conferred with CLWA, the wholesale public water agency for the Santa Clarita Valley, and the local retail water purveyors, including the CLWA Santa Clarita Water Division, the retail purveyor that will serve the Gate-King Industrial Park project site. The City also has considered information published by the state Department of Water Resources (DWR), and has required the Gate-King Industrial Park Draft Additional Analysis to use DWR's estimates of available SWP supplies in average/normal, dry and multiple-dry years; these estimates take into account *reductions* in allocation of the Table A Amounts, based on numerous factors, including dry conditions in the Feather River watershed (the source of SWP water), hydrology, Bay-Delta water quality considerations, environmental constraints, and operational constraints (including the fact that construction of the SWP system was never completed as

contemplated).[1] Both DWR and these expert water agencies have acknowledged CLWA's use of the 41,000 afy water transfer as part of its overall SWP supplies since 2000, despite potential uncertainty over its prospective availability due to pending litigation. On balance, the City has determined that the 41,000 afy water transfer can and should be used for planning purposes based on the record before it. Nonetheless, the City acknowledges that it is important to disclose the existence and implications of such litigation, so that the decision makers and the public are apprised of litigation concerning the availability and reliability of imported water to the Santa Clarita Valley and the region.

The City of is aware of the litigation challenges raised by the comments, and has continually reassessed whether any of the litigation challenges invalidate or reduce imported water supplies relied on in the Santa Clarita Valley. However, the City has determined, based on the entire record, that, while there is potential uncertainty created by the litigation discussed below, substantial evidence exists in both the ADDITIONAL ANALYSIS and the record as a whole to support the City's factual determination that water supplies, including the 41,000 afy water transfer, are sufficient to serve both the Gate-King Industrial Park project and other existing and planned development in the Valley.

1. LITIGATION CONCERNING THE MONTEREY AMENDMENTS AND THE CLWA 41,000 AFY WATER TRANSFER

The litigation relating to both the Monterey Amendments and CLWA's 41,000 afy water transfer was summarized in the Gate-King Industrial Park Additional Analysis in Section 5.8.1, Environmental Setting, at pages 5.8-5 through 5.8-11, and is further discussed below. In addition, **Topical Response 1: CLWA's 41,000 AFY Water Transfer** provides further detail concerning this litigation.

(a) *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892 (*PCL* decision).[2]

In the *PCL* decision, the Third District Court of Appeal decertified an EIR prepared by the Central Coast Water Agency (CCWA) to address the environmental implications of the Monterey Amendments, a series of revisions to the long-term water supply contracts between DWR and the SWP Contractors governing SWP water supplies. The Monterey Amendments contemplated revisions in the methodology of allocating water among SWP contractors, and provided a mechanism for the transfer of SWP Table A

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1 As stated by the Court of Appeal in *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715, SWP "entitlements" are not equivalent to actual deliveries of SWP water because the amount of SWP water actually available for delivery in any given year may be an amount *less* than shown in the long-term water supply contracts between DWR and the SWP contractors. This is due to several factors, including the fact that the initial SWP entitlements were based on a SWP system that was never completed, resulting in a difference between contractual entitlements and the amount of water that the SWP can actually deliver under variable conditions. *Id*. at 721-722.

2 A copy of the *PCL* decision is presented in **Appendix AI** of the Final Additional Analysis.

water Amounts from one contractor to another. Although the appellate court set aside the EIR prepared by CCWA because it was not the "lead agency" under CEQA, it did not invalidate or otherwise vacate the Monterey Amendments. In addition, no court has ordered any stay or suspension of the Monterey Amendments pending certification of a new EIR to be prepared by DWR.

Following decertification of the Monterey EIR, the *PCL* litigants entered into the Monterey Settlement Agreement in 2003.[3] Among other things, the Monterey Settlement Agreement designated DWR as the lead agency to prepare the new EIR to address the Monterey Amendments. DWR is currently in the process of preparing that EIR. In the meantime, however, under the Monterey Settlement Agreement, the parties agreed that the SWP would continue to be administered and operated in accordance with the Monterey Amendments and the terms of the Settlement Agreement.

The Monterey Settlement Agreement also included three provisions (Sections III (C)(4), (D) and (E)), relating to the eight water transfers that had been completed pursuant to the Monterey Amendments. In those provisions, the seven water transfers between contracting agencies that had either never been litigated or as to which all litigation had been concluded were agreed to be "final" and were listed on Attachment E to the Agreement (*i.e.*, the "Attachment E Transfers"); the parties to the Monterey Settlement Agreement agreed that no challenge would be raised to the Attachment E Transfers. The CLWA 41,000 afy water transfer, known in that agreement as the "Kern-Castaic Transfer," was not among the "final" transfers listed on Attachment E, because it was still subject to pending court proceedings in the Los Angeles County Superior Court challenging the EIR prepared by CLWA for that transfer. However, despite the differing litigation setting of the Attachment E transfers and the 41,000 afy water transfer, the potential environmental effects of all eight water transfers will be analyzed in DWR's new Monterey EIR. However, contrary to comments made on the Gate-King Industrial Park Additional Analysis, nothing in the Monterey Settlement Agreement requires DWR's new Monterey EIR to be the only analysis of the eight water transfers, including the 41,000 afy transfer nor does the Settlement Agreement do more than acknowledge the 41,000 afy transfer was subject to continuing litigation. As discussed below in **subsections 1(b), (c)** and **(g)**, CLWA prepared its own new EIR to address the environmental implications of the 41,000 afy transfer in response to the then-pending Los Angeles County Superior Court proceedings. For further information, please refer to **Topical Response 1: CLWA's 41,000 AFY Water Transfer**.

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3 A copy of the Monterey Settlement Agreement is presented in **Appendix AF** of the Final Additional Analysis.

(b) *Friends of the Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373 (*Friends I* decision).[4]

As noted above in **subsection 1(a)** and in **Topical Response 1: CLWA's 41,000 AFY Water Transfer**, CLWA prepared a supplemental Final EIR to assess the environmental effects of CLWA's acquisition of the 41,000 afy water transfer within its service area. That EIR relied on, or was "tiered" from, the Monterey EIR discussed in **subsection 1(a)**, above. A lawsuit was brought challenging the adequacy of the EIR under CEQA. The trial court ruled in favor of CLWA by upholding the adequacy of the EIR, and that decision was appealed. During the pendency of the appeal, the Third District Court of Appeal issued the *PCL* decision, which found the Monterey EIR inadequate and ordered it decertified. After the Third District Court of Appeal issued the *PCL* decision, the Second District Court of Appeal issued the *Friends I* decision, which directed the trial court to issue a writ of mandate to set aside certification of CLWA's EIR, but only because it had been "tiered" from the Monterey EIR that had been found to be inadequate in the *PCL* decision. However, the *Friends I* appellate court refused to enjoin CLWA from using the 41,000 afy water transfer pending preparation of a new EIR. Instead, the appellate court left it to the trial court's discretion whether or not to enjoin CLWA's use of the water pending its completion of a new EIR and, on remand, the trial court issued a Judgment that, among other things, denied an injunction that sought to prohibit the use of the 41,000 afy water transfer. For further information, please refer to **Topical Response 1: CLWA's 41,000 AFY Water Transfer**, and **subsections 1(c)** and **(g)**, below.

(c) *Friends of the Santa Clara River v. Castaic Lake Water Agency*, 2003 WL 22839353 (*Friends II* decision; unpublished opinion).[5]

On remand to the trial court, the *Friends I* petitioners sought to enjoin CLWA's use of, and reliance upon, the 41,000 afy water transfer under CEQA, but the trial court rejected that injunction request in the Judgment it issued in the case.[6] The *Friends I* petitioners filed a second appeal; this time, it was an appeal of the trial court's Judgment that allowed CLWA to use the 41,000 afy water pending completion of CLWA's new EIR. On that second appeal, the Second District Court of Appeal in the *Friends II* decision affirmed the trial court's ruling allowing CLWA to use and rely on the 41,000 afy water transfer pending completion of its new EIR.

Significantly, as noted in the *Friends II* decision, petitioners and others had argued that the trial court's determination of whether to enjoin CLWA's use of the 41,000 afy water transfer should have been based

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4 A copy of the *Friends I* decision is presented in **Appendix AA** of the Final Additional Analysis.

5 A copy of the *Friends II* decision is presented in **Appendix Y** of the Final Additional Analysis.

6 A copy of the Judgment and Peremptory Writ of Mandate dated October 25, 2002 issued by the trial court following the Friends I decision in **Appendix AB** and the transcript of the hearing, dated September 24, 2002 before the trial court are presented in **Appendix AD** of the Final Additional Analysis.

on the status of the *PCL* litigation and DWR's new Monterey EIR. Specifically, they argued that, based on the *Friends I* decision, CLWA was required to await DWR's certification of the new Monterey EIR before preparing its own EIR analyzing the 41,000 afy water transfer. In short, they argued that CLWA's new EIR had to be tiered from DWR's certified Monterey EIR.

However, the Court of Appeal in *Friends II* rejected these arguments, refused to enjoin the 41,000 afy water transfer, and made it clear that CLWA's use of that water is not legally bound to either the *PCL* decision or to certification of DWR's new Monterey EIR. After the Friends II decision was issued, CLWA prepared and circulated a new draft EIR for the 41,000 afy transfer, received and responded to public comments regarding its Draft EIR, and held two separate public hearings concerning both the EIR and the 41,000 afy transfer project. On December 22, 2004, CLWA certified the Final EIR and approved the 41,000 afy transfer project. On December 30, 2004, CLWA lodged the certified Final EIR with the Los Angeles County Superior Court, as part of its "return" to the trial court's writ of mandate issued by the trial court as directed in the *Friends I* decision. No objections to CLWA's return were filed that challenged the adequacy of CLWA's 2004 EIR on the 41,000 afy water transfer. On February 1, 2005, petitioner, Friends of the Santa Clara River, filed a request for entry of a dismissal with prejudice of the *Friends I* action, which was subsequently entered by the Los Angeles County Superior Court, terminating the *Friends I* action. For further information, please refer to **Topical Response 1: CLWA's 41,000 AFY Water Transfer**, and **subsection 1(g)**, below.

(d) *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715 (*West Creek I* decision).[7]

In the *West Creek I* decision issued in February 2003, the Second District Court of Appeal, Division Six, directed the trial court to issue a writ of mandate ordering the County of Los Angeles to vacate its certification of the EIR for the West Creek project, a mixed residential and commercial development, located in the Santa Clarita Valley. In the *West Creek I* decision, the Court of Appeal held that the County's conclusion that water supplies would be sufficient for cumulative development, including West Creek, was not supported by substantial evidence, because the EIR's cumulative water supply analysis did not adequately disclose the actual amount of water that the SWP can reliably deliver to CLWA in wet, average and drought years, and did not discuss or analyze the difference between an "entitlement" to SWP water and the actual availability of such supplies. The appellate court criticized the EIR's analysis because, rather than using estimates from DWR or other reliable sources as to the amount of SWP water that is actually available in wet, average and drought years, the analysis instead relied upon 100 percent of CLWA's Table A entitlements in wet and average years, and 50 percent of its Table A entitlements in

7 A copy of the *West Creek I* decision is presented in **Appendix AS** of the Final Additional Analysis.

drought years, without substantial evidence supporting the validity of those percentages. The appellate court concluded that the EIR should have discussed the fact that SWP entitlements cannot be taken at face value, and should have provided reasoned analysis in response to comments raising this problem. The appellate court directed the trial court to issue a writ of mandate vacating certification of the EIR, and to retain jurisdiction until the County had certified an EIR complying with CEQA and the views expressed in the *West Creek I* decision.

Although the *West Creek I* appellants had challenged the EIR's discussion of the CLWA 41,000 afy water transfer, and the EIR's reliance on the transfer, the trial court dismissed that issue and the Court of Appeal did not include that issue as a ground on which it found the EIR's analysis to be defective. The *West Creek I* decision did, however, identify the overall problem with relying upon 100 percent of SWP entitlements to calculate water supply, rather than upon DWR reliability estimates of actual deliveries of SWP water in wet, average and drought years. As discussed in **subsection (f)** below, on remand, the trial court issued a writ of mandate that ordered the County to void its certification of the EIR, but not the West Creek project approvals,[8] and the County prepared a revised EIR for the West Creek project. In the "return" hearing, a project opponent raised issues similar to the comments here concerning the permanence of CLWA's 41,000 afy water transfer and the resulting reliability of water deliveries based on that transfer, but the trial court rejected those issues and discharged the writ of mandate. The project opponents have appealed the trial court's order discharging the writ of mandate. Please see the further discussion in **subsection 1(f)**, below.

(e) *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219 (*California Oak* decision).[9]

Comments on the Gate-King Industrial Park Additional Analysis claim that the *California Oak* decision "overturned" the project EIR in that case "because it was based on the illegal 41,000 AF water transfer from Kern County." See, C-WIN letter, p. 1. The City does not concur with this characterization of the opinion.

On the contrary, the *California Oak* decision did not invalidate the EIR for the "Gate-King" industrial/business park project in the City of Santa Clarita "because it was based on the illegal" 41,000 afy water transfer. Instead, as discussed below, the Court of Appeal found the Gate-King EIR inadequate because the Draft and Final EIR (including responses to comments): (a) contained "no discussion at all of the uncertainty surrounding" the 41,000 afy water transfer; (b) did not "mention the decertification" of

8 A copy of the trial court's writ of mandate, Judgment, and the transcript of the hearing before the trial court, are presented in **Appendix AS** to the Final Additional Analysis.

9 A copy of the *California Oak* decision is presented in **Appendix E** of the Final Additional Analysis.

the CLWA 1999 EIR for the 41,000 afy transfer; and (c) did not "discuss the fact that [SWP] entitlements are not really entitlements but only 'paper water.'" As explained in the *California Oak* decision, the Gate-King EIR should have included *either* an analysis of how demand for water would be met without water from the 41,000 afy transfer, *or* why it was appropriate to rely on the 41,000 afy transfer in any event.

As described by the Court of Appeal in the *California Oak* decision, the Gate-King project proposed to subdivide property to accommodate the industrial/business park development. The City of Santa Clarita certified the EIR for the project, and an environmental group challenged the EIR certification on several grounds, including the City's reliance on the 41,000 afy transfer. The Court of Appeal held that the trial court had erred in approving the certification of the EIR because the EIR's "discussion" of the 41,000 afy water transfer in its water supply discussion was inadequate. (The Draft EIR contained only four pages on water supply.)

Specific to the 41,000 afy transfer, the Court of Appeal found that the City had relied upon the transfer, but that the EIR contained "no discussion at all" of the legal uncertainty surrounding the 41,000 afy transfer due to decertification of CLWA's original EIR for that transfer, and because the EIR relied on "paper water" contrary to established law, including the *West Creek I* decision. There was insufficient discussion in either the Draft EIR or the Final EIR (responses to comments) to support the City's decision to rely on the 41,000 afy transfer. The City attempted to cure the EIR's deficiency by preparing an appendix to the Final EIR. Although the appendix contained some explanation of the legal uncertainty surrounding the 41,000 afy transfer, the appendix incorrectly assumed that, even without the 41,000 afy transfer, there would be sufficient supplies to serve the project by relying on CLWA's SWP entitlements, without discounting those entitlements by reliability estimates from DWR. Thus, the appellate court directed that the EIR be decertified because it did not contain substantial evidence supporting an analysis of how demand for water would be met without the 41,000 afy transfer, *or* in the alternative, why it was appropriate to rely on the 41,000 afy transfer despite the challenges to it. *Id*. at p. 1242.

(f) *Santa Clarita Organization for Planning the Environment v. County of Los Angeles*, Santa Barbara Superior Court Case No. 1043805; Second Appellate District No. B189116 (*West Creek II* decision).[10]

In response to the Court of Appeal's *West Creek I* decision and trial court subsequently issued writ of mandate, discussed in **subsection 1(d)**, above, the County of Los Angeles prepared a revised EIR to evaluate CLWA's SWP water supplies based on the availability, reliability and supply estimates for SWP water in wet, average and drought years obtained from DWR. The EIR used those estimates to analyze

[10] A copy of the *West Creek II* trial court's Order After Hearing, which is currently on appeal, and the transcript of the hearing, are presented in **Appendix AU and AT, respectively,** of the Final Additional Analysis.

the amount of actual SWP water reliably available to serve the West Creek project and other cumulative development. After certifying the revised EIR, the County filed a "return" to the writ of mandate with the trial court in Santa Barbara County that had retained jurisdiction over the project.

After the hearing, the Santa Barbara County Superior Court issued an "Order After Hearing," determining that the revised West Creek EIR contained substantial evidence to support the County's decision to rely on the 41,000 afy water transfer for planning purposes. The Order noted that the County acknowledged and disclosed the potential uncertainties involving the 41,000 afy water transfer created by pending litigation, and also contained substantial evidence to support the County's decision to rely on the 41,000 afy water transfer. The Order summarized the evidence, including the facts that: (a) DWR continues to allocate and deliver the water in accordance with the amended water supply contract authorizing the 41,000 afy transfer; (b) neither the *PCL* litigation, nor the Monterey Settlement Agreement set aside any of the water transfers made under the Monterey Amendments, including the 41,000 afy water transfer; (c) the courts have not enjoined CLWA's use of the 41,000 afy water transfer; and (d) CLWA has prepared and certified a new EIR on the 41,000 afy water transfer and that EIR is presumed under CEQA to be adequate despite pending legal challenges. The *West Creek II* trial court decision is currently on appeal.

(g) *Planning and Conservation League v. CLWA, et al.* Ventura County Superior Court No. CIV 231588; and *California Water Impact Network v. Castaic Lake Water District, et al.* Ventura County Superior Court No. CIV 231606 (41K litigation).

As discussed in **subsection 1(c)**, above, in response to the trial court's writ of mandate in the *Friends I* decision, CLWA set aside certification of its prior EIR for the 41,000 afy water transfer, and commenced preparation of a new EIR in January 2003. In June 2004, CLWA circulated a Draft EIR (State Clearinghouse No. 1998041127) that was not tiered from the Monterey EIR disapproved in the *PCL* decision.

On July 28, 2004, CLWA held a public hearing to receive comments on the Draft EIR, and, by the end of November 2004, CLWA prepared and circulated a two-volume Final EIR (State Clearinghouse No. 1998041127). On December 8, 2004, CLWA held an additional noticed public hearing on both the EIR and the 41,000 afy water transfer project. On December 22, 2004, CLWA's Board certified the Final EIR and approved the 41,000 afy water transfer project.[11]

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11 Copies of CLWA's Draft EIR, Final EIR, and Resolutions are incorporated by this reference and available for public review at the City of Santa Clarita, 23920 Valencia Boulevard, Santa Clarita, California, Contact: Mr. Jason Mikaelian, AICP, (661) 255-4330.

On December 30, 2004, CLWA filed its "return" to the writ of mandate with the Los Angeles County Superior Court. No objections to CLWA's return were filed that challenged the adequacy of CLWA's 2004 EIR on the 41,000 afy water transfer. On February 1, 2005, petitioner, Friends of the Santa Clara River, filed a request for entry of a dismissal with prejudice of the *Friends I* action, which was subsequently entered by the Los Angeles County Superior Court, terminating the *Friends I* action.

In January 2005, two legal challenges to CLWA's new 2004 EIR for the 41,000 afy water transfer were filed in the Ventura County Superior Court by the Planning and Conservation League and the California Water Impact Network (41K litigation). The 41K litigation cases have been transferred to Los Angeles County Superior Court, consolidated as Case No. BS098724, and are still pending. However, since December 22, 2004, the certified 2004 EIR is presumed adequate, unless and until a court of competent jurisdiction issues an order to set aside or invalidate the document. No such order has been issued to date.

The pending challenges to the adequacy of CLWA's 2004 EIR for the 41,000 afy transfer, and DWR's pending preparation of a new Monterey Amendments EIR, allegedly introduce an element of potential uncertainty regarding the 41,000 afy water transfer. Accordingly, the City of Santa Clarita has made a factual determination, based on the Gate-King Industrial Park Additional Analysis and the record, of whether it is appropriate to include the 41,000 afy transfer for planning purposes, or whether there is so much uncertainty that the transfer should not be considered at all. While acknowledging that there is uncertainty created by this litigation, the City concludes that substantial evidence supports its determination that it is still appropriate to include water reliably available from the 41,000 afy water transfer as part of CLWA's 95,200 afy Table A Amount for several reasons, including the following:

- First, the 41,000 afy water transfer was memorialized in 1999 in a DWR/CLWA water supply contract amendment, and DWR has allocated and annually delivered the water in accordance with that contract amendment since 2000. At the same time, DWR and KCWA executed Amendment No. 28 to the water supply contract between these parties, which also provided for the permanent transfer of the 41,000 afy by KCWA, acting on behalf of its member district, to CLWA, which DWR also stated was consistent with the implementation of the Monterey Amendments. Neither of these contract amendments was ever legally challenged and, therefore, both are considered permanent and in full force and effect. In connection with that transfer, CLWA paid approximately $47 million for the additional 41,000 afy Table A supply, the monies have been delivered, the sale price has been financed through the sale of CLWA tax-exempt bonds, and DWR has approved and amended CLWA's long-term water supply contract to reflect the increase in CLWA's SWP Table A Amount, and the permanent transfer and reallocation of SWP Table A supply between SWP contractors.

- Second, DWR has from its inception treated the 41,000 afy water transfer as a "permanent" Table A transfer from one SWP contractor to another, and has stated that the transfer is consistent with implementation of the Monterey Amendments, which provide for the "permanent" transfer of up to 130,000 afy of agricultural Table A Amounts to urban SWP contractors.

- Third, the Court of Appeal held that the only defect in the 1999 CLWA EIR was that it tiered from the Monterey EIR, which was later decertified. This defect has now been remedied by CLWA's

preparation in 2004 of a new EIR that did not tier from the Monterey EIR. CLWA's 2004 EIR is presumed adequate pending resolution of the latest legal challenges to that EIR.

- Fourth, the Monterey Settlement Agreement expressly authorized the operation of the SWP in accordance with the Monterey Amendments and the terms of the Monterey Settlement Agreement. The Monterey Amendments, which are still in effect, authorized SWP contractors to transfer unneeded SWP supply amounts to other contractors on a permanent basis. Specifically, the Monterey Agreement provisions authorized 130,000 afy of agricultural SWP contractors' entitlements to be available for sale to urban SWP contractors. CLWA's 41,000 afy acquisition was a part of the 130,000 afy of SWP Table A Amount that was made available for transfer, consistent with the Monterey Amendments. The 41,000 afy transfer was not listed on Attachment E to the Monterey Settlement Agreement with the other permanent transfers because it was the only permanent transfer that was subject to then pending litigation (i.e., the *Friends I* litigation). The Monterey Settlement Agreement otherwise treated all eight of the permanent transfers the same, and provided that DWR's new EIR would do so, as well, as DWR has affirmed in a letter commenting on the CLWA 2004 EIR for the 41,000 afy water transfer. No other transfers that were part of the 130,000 afy were the subject of litigation.

- Fifth, as to the new Monterey EIR, the Court of Appeal in the 41,000 afy litigation has stated that CLWA's use of the 41,000 afy is not legally bound to the *PCL* litigation, or to DWR's new Monterey EIR. In addition, DWR did not oppose CLWA's completion and certification of the EIR for the 41,000 afy water transfer, independent of DWR's new Monterey EIR. Thus, the pending legal challenges to the CLWA EIR, and DWR's preparation of a new Monterey EIR, are unlikely to have any impact on the amount of SWP water available to CLWA as a result of the completed 41,000 afy water transfer.

- Sixth, two courts have refused to enjoin the 41,000 afy water transfer, pending CLWA's preparation of a new EIR, and this EIR is now completed and certified by CLWA as adequate and complete under CEQA. CLWA also filed the 2004 EIR on the 41,000 afy transfer with the Los Angeles County Superior Court as part of its "return" to the trial court's writ of mandate as directed in the *Friends I* decision. Thereafter, the petitioner voluntarily dismissed that action, resulting in its termination. As a result, both the CLWA 2004 EIR and the 41,000 afy water transfer are no longer subject to challenge in the *Friends I* action. This litigation finality brings further certainty to the permanent 41,000 afy water transfer.

- Seventh, as stated above, CLWA's amended water supply contract documenting the 41,000 afy water transfer remains in full force and effect, and no court has ever questioned the validity of the contract or enjoined the use of this portion of CLWA's SWP Table A Amount.

For all these reasons, the City has determined based on substantial evidence that it remains appropriate to rely on available water from the 41,000 afy water transfer as part of CLWA's overall SWP Table A water supplies. Furthermore, based on the above, it is reasonable to conclude that even if a court finds the CLWA EIR legally deficient, that court, like all others before it, will again refuse to enjoin the 41,000 afy water transfer, and instead require further revisions to that EIR. Therefore, the City has determined that substantial evidence supports the conclusion that the pending legal challenges to the 41,000 afy water transfer are unlikely to have a substantial adverse impact on the amount or reliability of SWP water available to CLWA.

(h) *California Water Impact Network v Newhall County Water District* Los Angeles Superior Court Case No. BS103167.

On May 16, 2006, the California Water Impact Network filed a complaint alleging that the Water Supply Assessment (WSA) for the Gate-King Industrial Park project, which was recently approved by Newhall County Water District, is inadequate. Much like other litigation described above, this most recent case raises issues relating to the WSA's treatment of the 41,000 afy water transfer, the 2005 UWMP, CalSim-II, and global warming. The City has reviewed the WSA prepared for the Gate-King Industrial Park project and, for reasons explained in depth in this Additional Water Analysis and these responses, believes that the allegations contained in the complaint are without merit and the City believes that the WSA complies with the requirements of Water Code §10910. In addition, the City considers the filing of an action in the Superior Court premature until the City has had the chance to make its own determination on the adequacy of the WSA.

2. LITIGATION CONCERNING THE ADEQUACY OF THE UWMPS FOR THE CLWA SERVICE AREA

(a) *Friends of the Santa Clara River v Castaic Lake Water Agency* (2004) 123 Cal.App.4th 1 (*2000 UWMP* decision).[12]

In the *2000 UWMP* decision, the Fifth District Court of Appeal invalidated the 2000 UWMP for the CLWA service area, because the Plan's description of perchlorate contamination failed to address the time needed to implement the available method for treating the contaminated water, and failed to describe the reliability of the groundwater supply during that implementation period.

In response to that decision, in 2005, CLWA and the retail water purveyors in the Santa Clarita Valley adopted the Amended 2000 UWMP and, in particular, the "Groundwater Perchlorate Contamination Amendment and Other Amendments."[13] The Amended 2000 UWMP addressed the time needed to implement the available method for treating the perchlorate-contaminated water in the local groundwater basin, and described the reliability of groundwater supplies during that treatment implementation period, as required by the Court of Appeal in the *2000 UWMP* decision. The Amended 2000 UWMP was never challenged in litigation.

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12 A copy of the 2000 UWMP decision is presented in **Appendix Z** of the Final Additional Analysis.

13 A copy of the "Groundwater Perchlorate Contamination Amendment and Other Amendments" is presented in **Appendix B** of the Final Additional Analysis.

(b) *California Water Network, et al. v. Castaic Lake Water Agency, et al.*, Ventura County Superior Court No. CIV 23935 (2005 UWMP litigation)

In December 2005, as required by law, CLWA and the local retail purveyors adopted the new 2005 UWMP for the CLWA service area. Thereafter, in February 2006, two environmental groups filed a complaint to initiate the 2005 UWMP litigation, challenging the adequacy of the 2005 UWMP on multiple grounds. By stipulation, the parties have agreed to transfer the 2005 UWMP litigation from Ventura County to the Los Angeles County Superior Court.

The main arguments presented in the 2005 UWMP litigation are that the 2005 UWMP overstates the reliability of both groundwater and surface water supplies, fails to provide an adequate discussion of perchlorate contamination, fails to adequately address the reliability of the 41,000 afy water transfer, relies on DWR's "flawed" model for predicting SWP deliveries, fails to address the effect of global warming and regulatory water quality controls on water deliveries from the SWP, and fails to identify the impact of private wells on the Santa Clarita River watershed.

The City acknowledges that the legal challenge to the adequacy of the 2005 UWMP has been filed and creates some uncertainty, but has concluded based on substantial evidence in the record as a whole that the 2005 UWMP remains legally adequate, despite the pending litigation, unless and until it is set aside by a court of competent jurisdiction. In addition, the allegations of legal inadequacy made by petitioners in the 2005 UWMP litigation were raised in multiple hearings before both CLWA and the Newhall County Water District, during their respective reviews of the adequacy of the 2005 UWMP prior to adoption of the updated plan. These water agencies responded to, and based on substantial evidence rejected, the allegations of UWMP inadequacy.

3. LITIGATION CONCERNING THE SEMITROPIC GROUNDWATER STORAGE PROJECTS

(a) *California Water Impact Network, et al. v. Castaic Lake Water Agency*, Ventura County Superior Court No. 215327

In 2002, CLWA stored an available portion of its Table A Amount (24,000 acre-feet) in Semitropic Water Storage District's groundwater storage program. CLWA's approval of this groundwater storage project and the related negative declaration was challenged under CEQA in the Ventura County Superior Court (*California Water Impact Network, et al. v. Castaic Lake Water Agency, et al.*, Ventura County Superior Court No. 215327). After a hearing, the trial court entered judgment in favor of CLWA, finding that CLWA's approval of both the project and the negative declaration did not violate CEQA. Petitioners appealed that judgment to the Second District Court of Appeal (Division 6).

(b) *California Water Impact Network, et al. v. Castaic Lake Water Agency*, Appellate Court 2d Civil No. B177978

In an unpublished decision, dated March 23, 2006, the Second District Court of Appeal affirmed the Ventura County Superior Court judgment and rejected each of the arguments, challenging the 2002 CLWA/Semitropic groundwater banking project. The Court of Appeals specifically rejected claims that: (a) CLWA was not the proper lead agency to prepare the CEQA analysis for the banking project; (b) the perchlorate contamination would be spread by the project; (c) the banking project would induce growth; (d) the project would have significant air quality and other environmental impacts; (e) the invalidation of the 2000 UWMP also invalidated the project; and (f) the project approval violated the Public Trust Doctrine.[14]

In 2004, CLWA stored 32,522 acre-feet of available Table A Amount with Semitropic Water Storage District. No legal challenge was made to CLWA's approval of this project or to the negative declaration prepared under CEQA for the project.

In accordance with the terms of CLWA's storage agreements with Semitropic, 90 percent of the banked water, or a total of 50,870 acre-feet, is recoverable through 2013 to meet CLWA water demands in the Santa Clarita Valley when needed. Each account has a term of ten years for the water to be withdrawn and delivered to CLWA. CLWA plans to use this 50,870 acre-feet supply in dry years only.

4. OTHER PENDING STATEWIDE OR REGIONAL LITIGATION MATTERS

Comments have pointed to several recent court decisions and rulings, which the comments claim "compromise" the 41,000 afy water transfer and suggest that there will be a "probable lack of sufficient water availability" for the Gate-King Industrial Park project and the Santa Clarita Valley. The City of Santa Clarita does not concur with these comments.

The City has conducted an evaluation of the pending statewide or regional water-related litigation matters set forth below, and has taken into account the potential uncertainty created by such litigation. Nonetheless, the City finds that substantial evidence supports its conclusion that the water supplies analyzed in the Additional Analysis and supporting documents are sufficient to serve the Gate-King Industrial Park project, in conjunction with other existing and planned development in the Valley, despite the uncertainties created by the pending litigation.

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14 A copy of the Second District Court of Appeal's unpublished decision is included in **Appendix Y** of the Final Additional Analysis.

(a) *In Re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, (2005) 133 Cal.App.4th 154 (also referred to as *Laub v. Davis*); review granted by the California Supreme Court.

In response to concerns over the San Francisco Bay and the Sacramento-San Joaquin Delta (Bay-Delta), several federal and state agencies with management or regulatory responsibility over the Bay-Delta formed CALFED whose purpose is to devise a long-range plan to address water supply, water quality, ecological and other concerns of the Bay-Delta system. After years of study, analysis, and significant public participation, CALFED adopted a program to be administered over the next 30 years (the CALFED Program), which includes measures for improving the Bay-Delta ecosystem, water quantity and quality, and Delta levee stability. In 2000, the Secretary of the California Resources Agency certified the Final Program EIS/EIR, and CALFED adopted the record of decision (ROD) for the CALFED Program in accordance with NEPA and CEQA. Petitioners filed a petition for writ of mandate challenging the program EIS/EIR under CEQA and asserting various non-CEQA claims. The trial court found the Program EIS/EIR adequate under CEQA and dismissed the non-CEQA claims.

On appeal, petitioners challenged the trial court's ruling on numerous grounds. The Third District Court of Appeal rejected many of the petitioners' CEQA claims, but identified three areas where the EIS/EIR was inadequate. First, the appellate court held that the EIS/EIR erred by failing to identify the sources of water needed to carry out the CALFED Program activities. Second, although the appellate court generally rejected attacks on the EIS/EIR's alternatives analyses, it held that the EIS/EIR was flawed because none of the alternatives considered an alternative that called for reducing the export of water from the Delta to southern California. The record contained evidence supporting CALFED Program's premise that more water would have to be exported to southern California to accommodate anticipated population growth, particularly in light of the declining availability of Colorado River water and other supplies. CALFED rejected reduced-export alternatives because they were inconsistent with the project objective of meeting this demand. Nonetheless, the Court of Appeal found that the EIS/EIR should have included an alternative that assumed reduced water exports from the Bay-Delta region to southern California.

On November 15, 2005, the state Attorney General and others filed a petition for review with the California Supreme Court of the Court of Appeal decision. On January 25, 2006, the California Supreme Court granted review of the decision. As a result, the appellate court decision has been de-published. As such, the appellate court decision has no legal force and effect at this time.

Importantly, the comments also suggest that, in light of the appellate court decision, "it is imperative for CLWA to be cautious in reporting the SWP reliability." See, C-WIN letter, p. 3. The City disagrees with this characterization.

The appellate court decision stated that the EIS/EIR should have considered an alternative calling for reduced water exports from the Bay-Delta to southern California. It did not suggest that this alternative was the one CALFED should have selected; it stated only that the alternative should have been included and analyzed in the EIS/EIR for those agencies actually making decisions based on the CALFED Program activities. The Court of Appeal did not render a decision as to the *reliability* of SWP supplies.

(b) *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674 (*SWRCB Cases*).

Comments submitted on the Gate-King Industrial Park Additional Analysis state that the Third District Court of Appeal in the *SWRCB Cases*, "ordered that existing salinity standards" in the 1995 Bay-Delta Water Quality Control Plan (Bay-Delta Plan) "be upheld," which "means that more water must be left in the San Joaquin River and the Bay Delta and therefore there is less water to pump to southern California." C-WIN letter, p. 1. The City of Santa Clarita does not concur with this characterization of the case.

The *SWRCB Cases* include eight appeals and three cross-appeals in seven coordinated cases challenging various aspects of the State Water Resources Control Board's (State Board) 2000 Bay-Delta Water Rights Decision (Decision 1641). The 173-page decision is a comprehensive look at the Delta and the relationship between water quality and water rights as it applies to the Delta. Decision 1641 was the State Board's effort to implement the 1995 Bay-Delta Plan. In Decision 1641, the State Board sought to allocate responsibility among various water rights holders for meeting the water quality objectives in the 1995 Bay-Delta Plan. Decision 1641 assigned much of that responsibility to the Central Valley Project (CVP), operated by the U.S. Bureau of Reclamation (Bureau), and the SWP, operated by DWR. Decision 1641 also dealt with two separate petitions filed by the Bureau and DWR.

Several lawsuits were filed challenging various aspects of Decision 1641. The plaintiffs in the *SWRCB Cases* included water districts in the Central Valley and the San Francisco Bay Area that use exported Delta water, Delta exporter groups, water districts within the Delta, and environmental groups. The cases were consolidated before the Sacramento County Superior Court. In 2003, the trial court issued its decision upholding Decision 1641 in all but two respects. The eight appeals and three cross-appeals followed.

On the issue of salinity standards, the 1995 Bay-Delta Plan required that implementation of the salinity objectives be achieved by a date certain. However, the State Board authorized delayed implementation of the salinity objectives, despite the fact that there was nothing in the 1995 Bay-Delta Plan that allowed the Board to do so. The appellate court found that by "taking these actions, the Board failed to adequately implement the 1995 Bay-Delta Plan and instead effectively amended the 1995 Bay-Delta Plan without complying with the procedural requirements for amending a water quality control plan." *Id*. at 734-735. Consequently, the appellate court ordered that the "Board must either fully implement the southern Delta salinity objectives as set forth in the 1995 Bay-Delta Plan or must duly amend the plan." *Id*. at 735.

Thus, it does not follow, as the comment letters suggest, that this ruling will necessarily lead to less water available for import to southern California. The appellate court simply required the State Board to comply with the objectives as set out in the Bay-Delta Plan, *or* to follow the appropriate procedure for amending the Bay-Delta Plan. Further, the appellate court agreed that the Board was not required to tell the Bureau and DWR exactly *how* they were to meet the salinity objectives. *Id*. at 734. (Meeting salinity standards may be achieved in numerous ways, including construction of barriers, and is not limited to regulating pumping; see discussion below regarding SWRCB Order WR 2006-0006.)

Therefore, although it is possible that meeting the salinity requirements could lead to less water being available if the Bureau and DWR were to employ decreased pumping in order to achieve the salinity objectives, the appellate court did not make a determination on this issue. In addition, the appellate court left it to the State Board's discretion to amend the salinity objectives set forth in the Bay-Delta Plan, in which case the Bureau and DWR would not be required to meet the Plan's existing salinity objectives.

Further, the comments submitted on the Gate-King Industrial Park Additional Analysis do not state how the holding in this case concerning the salinity objectives relates to the CLWA 41,000 afy water transfer. Presumably, the case arguably has the potential to affect the amount of water exported from the Bay-Delta to southern California, although nothing in the decision does that at this time. As a result, the City of Santa Clarita finds that the Gate-King Industrial Park Additional Analysis' use of supply estimates for SWP water in wet, average and dry years, estimates that are obtained from DWR, represent the best available information for use in a project-level environmental analysis.

(c) *State Water Resources Control Board Order WR 2006-0006.*

Comments submitted on the Gate-King Industrial Park Additional Analysis state that the SWRCB Order WR 2006-0006 issued on February 15, 2006, soon after the Third District Court of Appeal decision in the *SWRCB Cases*, requires "DWR and the CVP to shut down their pumps if the salinity standards are not met which means that more water must be left in the San Joaquin River and the Bay Delta and therefore

there is less water pumped to southern California." C-WIN letter, p. 1. The City of Santa Clarita does not concur with this characterization of the SWRCB Order.

In SWRCB Order WR 2006-0006, the State Board issued a cease and desist order requiring the DWR and Bureau to take corrective action under a time schedule to correct threatened violations of their permits and license. *SWRCB Order*, p. 1. Their permits and license require DWR and the Bureau to meet salinity objectives at three locations in the southern Delta between April 1 and August 31 of each year. *Id.*, p. 2. Starting April 2006, the State Board is now requiring DWR and the Bureau to meet the adopted salinity standards set forth in Decision 1641, but not immediately. Instead, it allows the two agencies until July 1, 2009, to meet the adopted salinity objectives. *Id.*, p. 28-29. This is the date by which the agencies now predict completion of a "permanent barriers project or equivalent measures" that will enable the agencies to meet the salinity objectives. In the interim, the two agencies are required to provide the State Board with a detailed plan and schedule for compliance with the conditions set forth in the Order. *Id.*, p. 29-30.

In the event that DWR or the Bureau project a potential exceedance in the salinity objectives prior to July 1, 2009, the two agencies are required to immediately inform the State Board of the potential exceedance, and describe the corrective actions they are initiating to avoid the exceedance. *Id.*, p. 30. The "corrective actions" may include, but are not limited to "additional releases from upstream [CVP] facilities or south of the Delta [SWP] or CVP facilities, modification in the timing of releases from Project facilities, reduction in exports, recirculation of water through the San Joaquin River, purchases or exchanges of water under transfers from other entities, modified operations of temporary barriers, reductions in highly saline drainage from upstream sources, or alternative supplies to Delta farmers (including overland supplies)." *Id*.

In response to comments, the State Board determined that DWR and the Bureau were partially responsible for the salinity problems at certain locations because of export pumping. Decision 1641, which allocated the responsibility for implementing the salinity objectives of the 1995 Bay-Delta Plan, noted that the implementation of a "barrier program" could help improve salinity concentrations and that DWR and the Bureau were working together on such a program. (*State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 711.) To the extent that the comment letters on the Gate-King Industrial Park Additional Analysis infer that meeting the salinity objectives will necessarily result in less water to pump to southern California, such an assumption is not accurate because it assumes that the only way to control salinity is to reduce export pumping. While the reduction of exports is listed as one means of improving salinity concentrations, it is only one of many such methods. As noted above, implementation of a barrier program is another means for improving salinity concentrations and, in fact, DWR and the Bureau are working on such a program. In addition, the Order itself emphasizes that constructing permanent barriers is not the exclusive method for compliance with the salinity objectives, and that

additional potential corrective actions to avoid potential exceedance of the salinity objectives include actions such as additional releases from upstream CVP facilities or south of the Delta SWP or CVP facilities, modifications in the timing of releases from Project facilities, reduction in exports, purchases or exchanges of water under transfers from other entities, modified operations of temporary barriers, and several other options. *Id*. pp. 23, 30.

Thus, the assertion in comments submitted on the Gate-King Industrial Park Additional Analysis that DWR and the Bureau must "shut down their pumps if the salinity standards are not met" is not accurate. The State Board's amended approval of the "Water Quality Response Plan" (WQRP) requires that DWR and the Bureau be in compliance with the conditions contained in their permits and license, including salinity objectives, in order to enable "joint points of diversion" (JPOD) operations, and orders that JPOD operations must cease if such conditions are not met. Hence, if the salinity objectives are not met, DWR and the Bureau may not conduct JPOD operations. However, this means that they are only restricted from use of *one another's* facilities - they are not restricted from using their *own* facilities. As such, DWR and the Bureau are not being ordered to "shut down their pumps." *Id*., pp. 25, 32-33.

As to the Board's Order that DWR and the Bureau take corrective actions under a time schedule to correct threatened violations of their permits and license in order to meet the salinity objectives, it is true that a complete failure to meet the salinity requirements by the time schedule (July 1, 2009) could result in further action by the Board. However, the Order encourages communication by requiring DWR and the Bureau to submit plans and schedules detailing how DWR and the Bureau intend to meet the objectives, periodic updates and progress reports, and notification to the Board if DWR and the Bureau anticipate a potential exceedance of the salinity objectives, or if an exceedance has occurred. *Id*., p. 29-31. The Order states that in the event of an exceedance, the Executive Director will *make a recommendation* to the State Board *regarding whether to take enforcement action*. *Id*., p. 30. In deciding *whether* to initiate enforcement action, the Executive Director must consider the extent to which the non-compliance was beyond DWR's or the Bureau's control and the actions taken to correct the exceedance. *Id*.

Lastly, the Order provides that upon the failure of any person to comply with the requirements contained in the Order (by July 1, 2009), the State Board may request the Attorney General to petition the Superior Court for injunctive relief, as appropriate. *Id*., pp. 28-32. The State Board also may issue monetary fines. *Id*., p. 32. However, nowhere does the Order mandate that DWR and the Bureau shut down their pumps.

(d) *Natural Resources Defense Council v. Rodgers,* 381 F.Supp.2d 1212 (E.D. Cal. 2005) (*Rodgers* decision).

Comments submitted on the Gate-King Industrial Park Additional Analysis state that the *Rodgers* decision shows there is "paper water" associated with CVP water supplies and that "it is clear that the actual historic deliveries to the Friant Contractors from 1988-1997 was well under half of contracted amounts." C-WIN letter, p. 2. Other comments point to this decision and state that "[b]oth the SWP and CVP are experiencing shortfalls in water deliveries vs. the amounts contracted." Friends letter, p. 1. These comments do not appear to summarize fairly or accurately the pertinent portions of the *Rodgers* decision. Nor do the comments make any attempt to explain the connection between the *Rodgers* decision and Santa Clarita Valley water supplies, including the 41,000 afy water transfer.

In the *Rodgers* decision, plaintiff, an environmental organization, brought an action against the Bureau, U.S. Fish and Wildlife Service (USFWS), and another federal agency, alleging that, under the federal Endangered Species Act (ESA), the agencies failed to examine critical issues in biological opinions before the Bureau executed the renewal of long-term water supply contracts for delivery of CVP water to various irrigation and water districts.

The *Rodgers* decision contains no reference to or discussion of SWP supplies. The comments also do not explain how this ESA action involving CVP water supplies, which are not used as a water source for the Santa Clarita Valley, could be applicable to the Gate-King Industrial Park project, and the City finds that it is not applicable to the proposed project.

(e) *Planning and Conservation League v. United States Bureau of Reclamation,* U.S. District Court, Northern District of California, Case No. C 05-3527 CW (*PCL/Bureau* decision).

Comments submitted on the Gate-King Industrial Park Additional Analysis state that the CalSim-II computer model is flawed, and provide articles and other attachments that are critical of DWR's use of the CalSim-II model, pointing out that "[a]ll of [the] documents [provided] clearly lay out the problems for anyone who wants to rely on CalSim II as the predictor of reliability for the SWP." C-WIN letter, p. 2-3. Although not referred to in the comment letters, other comments submitted by the same organizations have criticized DWR's reliance upon the CalSim-II model, claiming that the model overstates the amount of water the SWP can deliver during average and dry years. Those comments rely on the *PCL/Bureau* decision as authority for limiting future SWP water deliveries because of flaws in DWR's CalSim-II model. The City of Santa Clarita is aware of the criticisms leveled against DWR's CalSim-II model, including the criticisms noted in the following documents:

- *A Strategic Review Of CALSIM II And Its Use For Water Planning, Management And Operations In Central California*, submitted to the California Bay-Delta Authority Science Program Association of Bay Governments, by A. Close, *et al.*, dated December 4, 2003;

- *Musings On A Model: CalSim II In California's Water Community*, San Francisco Estuary and Watershed Science, Vol. 3, Issue 1 (March 2005), Article 1, by Inês C. Ferreira, *et al.*;

- *An Environmental Review Of CalSim II: Defining "Full Environmental Compliance" And "Environmentally Preferred" Formulations Of The CalSim II Model*, by Jeffrey T. Payne, *et al.*, dated November 2005;

- *Gerald Johns' Memo*, prepared by Jan de Leeuw, dated October 23, 2005; and

- *On The Adequacy Of CALSIM II For Environmental Impact Analysis And SWP Reliability Analysis*, prepared by Arve R. Sjovold, dated August 12, 2004; and *Some Insights On Water Deliveries To Settlement Contractors*, prepared by Arve R. Sjovold, dated October 24, 2004.

Like any computer model, CalSim-II is subject to criticism, but the City has nonetheless considered DWR's view that CalSim-II is a generally well-rated and accurate model for California's two largest water projects, CVP and SWP. DWR has explained that:

> *"CALSIM II is a general water resources planning software developed by DWR. CALSIM II, developed through a collaborative effort by DWR and Reclamation, represents a comprehensive simulation of the SWP and CVP. ...[¶] CALSIM II provides a reasonable planning level simulation of existing project operations, recognizing that the operating environment and regulatory requirements for the projects are in a constant state of transition and change. Since CALSIM II is not a detailed operations model, it does not capture many of the complexities of forecasted and actual operations of project facilities. In determining the suitability of these studies to a particular analysis, the user should consult all documentation that accompanies this release and the [Technical Coordination Team] and [Benchmark Study Team] as appropriate."*[15]

One of the above articles[16] states that:

> *"The CalSim II model is the most prominent water management model in California, and has become central to a variety of water management and policy issues and controversies. ... CalSim II is a complex model of a complex part of California's changing multi-purpose water system. As such, analytical controversies and misunderstandings are inevitable. ...While CalSim II is generally seen as a significant improvement over previous models, a wide variety of ideas are suggested for improvements."*

The City further acknowledges that the CalSim-II model, like other computer models, contains several perceived strengths as well as weaknesses, several of which were noted in the article, *A Strategic Review Of CALSIM II And Its Use For Water Planning, Management And Operations In Central California*, by A. Close, *et al.*, dated December 4, 2003, pp. 6-9. The City further acknowledges that CalSim-II is not a perfect model; no computer model is perfect. However, on balance, and after considering the various articles

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15 See, http://modeling.water.ca.gov/hydro/studies/Version2_Benchmark.html; see also "CalSim II: Simulation of Historical SWP-CVP Operations," Technical Memorandum, Department of Water Resources, Bay-Delta Office, November 2003. Copies of these report and technical memorandum are found in **Appendix G** of the Final Additional Analysis.

16 *Musings On A Model: CalSim II In California's Water Community*, San Francisco Estuary and Watershed Science, Vol. 3, Issue 1 (March 2005), Article 1, by Inês C. Ferreira, *et al*. Please refer to **Appendix AG** of the Final Additional Analysis.

criticizing the CalSim-II model, the City agrees with DWR's determination that CalSim-II is a "useful and appropriate tool for assessing the delivery capability of the SWP."[17] The City further believes that, despite criticisms of CalSim-II, it is still appropriate to rely on DWR for information based on the CalSim-II model, unless and until a new or updated model is known to exist and available for use.

As stated above, other comments rely on the *PCL/Bureau* decision to support the claim that SWP delivery reliability is suspect, because DWR's CalSim-II model is flawed. The City does not believe that the comments properly characterize the *PCL/Bureau* decision.

In the *PCL/Bureau* decision, the federal court issued an order granting plaintiff's motion for a preliminary injunction on February 15, 2006, which has enjoined construction of the "Intertie" project until the case is decided on the merits. (The Intertie project is a proposed pipeline project that would connect the main delivery canals of two water diversion projects, the federal CVP and the state SWP, in California's Central Valley. The proposed pipeline is known as the "Delta-Mendota Canal/California Aqueduct Intertie." At issue is the Bureau's decision to rely on an Environmental Assessment/Negative Declaration for environmental review of the Intertie project under both NEPA and CEQA *in lieu* of an EIS/EIR.)

In granting the preliminary injunction, the federal court stated that its reasoning was explained in an earlier court order granting plaintiff's application for a temporary restraining order issued on February 3, 2006. In that February 3, 2006 Order, the court addressed plaintiff's claim that an EIS/EIR was required for the Intertie project because the existing environmental documents that found no significant impacts were based on CalSim-II modeling, which, according to plaintiff, was "too unreliable to rule out the potential for significant impacts." Order, p. 9.[18] In response to that claim, the federal court did not appear concerned with the perceived shortcomings of the model, but rather the Bureau's failure to *disclose* the shortcomings. In fact, the court specifically stated that the use of CalSim-II "alone does not show that Defendant [Bureau] was arbitrary and capricious in reaching its finding of no significant impact." *Id*. at 11.

In short, the federal court did not prohibit the Bureau or any other agency from using or relying on the CalSim-II model, but rather, stated that the Bureau could rely on the model, provided it disclosed relevant shortcomings in the data or model itself, citing *Lands Counsel v. Forester of Region One of the U.S. Forest Service*, 395 F.3d 1019, 1032 (9th Cir. 2004) (finding that non-disclosure of relevant shortcomings in model violated NEPA). *Compare*, *Sierra Club v. Castle*, 657 F.2d 298, 332 (D.C. Cir. 1981) (upholding EPA's

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17 For a copy of the DWR letter to Mindy McIntyre, Planning and Conservation League, dated April 20, 2006, please refer to **Appendix Q** of the Final Additional Analysis.

18 For a copy of the federal court's "Order Granting Plaintiff's Application for Temporary Restraining Order," dated February 3, 2006, including the federal court's later "Order Granting Plaintiff's Motion for Preliminary Injunction," dated February 15, 2006, please refer to **Appendix AJ** of the Final Additional Analysis.

reliance on modeling because it provided necessary disclosure). Here, based on a review of the above reports, the City of Santa Clarita is apprised of all known, perceived shortcomings with DWR's CalSim-II model; nonetheless, the City believes that substantial evidence supports its conclusion that the model remains the best available data for assessing SWP operations and constraints.