TOPICAL RESPONSE 1: CLWA'S 41,000 AFY WATER TRANSFER

California Water Impact Network (C-WIN) and Friends of the Santa Clara River (Friends) have submitted comments on the Draft Additional Analysis for the Gate-King Industrial Park project, claiming that the Additional Analysis should not include or rely on the transfer in 1999 to Castaic Lake Water Agency (CLWA) of 41,000 acre-feet per year (afy) of State Water Project (SWP) Table A water supplies (hereafter referred to as "41,000 afy water transfer"). They assert that the Additional Analysis should not include or rely on CLWA's 41,000 afy water transfer because it is the subject of litigation and on that basis they claim it is not "final."

In addition, C-WIN states that the 41,000 afy water transfer is "further compromised" by recent court decisions concerning regional water supplies. It is asserted that these litigation challenges create uncertainty regarding the availability and reliability of water supplies for the Santa Clarita Valley. Please refer to **Topical Response 2: Litigation Concerning Water Supplies**, which discloses various litigation matters concerning water supplies, summarizes the status of such litigation, and explains why the City of Santa Clarita (City) concurs with conclusions reached by the expert water agencies, CLWA, Newhall County Water District (NCWD), Valencia Water Company, and Santa Clarita Water, a Division of CLWA (SCWD), that it is appropriate to include the 41,000 afy water transfer as part of CLWA's available SWP water supplies for planning purposes.

For the reasons discussed below, the City has determined that it is appropriate for the Gate-King Industrial Park Additional Analysis to rely on CLWA's SWP water supplies, including the 41,000 afy water transfer.

1. SWP OVERVIEW

As stated in the Gate-King Industrial Park Additional Analysis, from 1951 through 1959, the California Legislature authorized and funded construction of the SWP facilities, which are managed and operated by the California Department of Water Resources (DWR). SWP water supplies are used for both urban and agricultural uses throughout California.[1] The SWP facilities consist of a complex system of dams, reservoirs, power plants, pumping plants, canals, and aqueducts to deliver water throughout California.

At the inception of the SWP, DWR entered into individual water supply contracts with agricultural and urban water suppliers (SWP contractors). The contracts were the method used to fund construction and operation of the SWP facilities for the delivery of water to the SWP contractors. Each such contract sets forth the annual amount of water to which a SWP contractor is contractually entitled, which is stated in

1 Urban water uses also are referred to as "municipal and industrial," or "M&I," uses.

"Table A" to the contract (Table A Amount or allocation). However, the amount of SWP water actually available for delivery in any year may be an amount less than the contractor's maximum Table A amount due to hydrology, operational constraints, environmental constraints, and a number of other factors. The Table A Amount was previously referred to as "SWP entitlement."[2]

There are currently 29 SWP contractors that have entered into water supply contracts with DWR. A SWP contractor may annually request that DWR deliver water in the following year in any amount up to the SWP contractor's Table A Amount. The SWP contracts provide that in a year when DWR is unable to deliver the full amount of contractor requests, deliveries to contractors are reduced so that total deliveries equal total available supply for that year. CLWA's annual contractual Table A Amount is 95,200 afy. In the fall of each year, CLWA, along with all the other SWP contractors, submits a request to DWR for an allocation for the following year. DWR utilizes the factors noted above to "allocate" water among all contractors who have made requests, so that each contractor receives a percentage of its Table A Amount.

For example, if the SWP allocation is 40 percent of the Table A Amounts, each contractor receives 40 percent of its Table A Amount. If the allocation is 100 percent (as in 2006), each SWP contractor could receive the entire contractual Table A Amount. Therefore, CLWA's annual allocation is based on its total contractual Amount. **Table 1** indicates the actual Table A allocations made through the SWP since 1978.

The 41,000 afy water transfer amount is not kept "separate" as some have suggested. Since 2000, DWR has been including the 41,000 afy in the Table A Amount that is allocated in all allocations made to CLWA (based on its total annual allocation of 95,200 acre-feet). DWR has been *delivering* and the CLWA service area *receiving* water supply, including a percentage of the 41,000 afy, since calendar year 2000. While SWP contractors that receive water from the Delta currently hold Table A Amounts totaling approximately 4.13 million afy, the amount of Table A water actually delivered by the SWP may be less in some years due to hydrology, and operational and environmental constraints. Given existing SWP facilities, hydrology, operational and environmental conditions, and SWP contractor demands, the SWP is available to meet 100 percent of the SWP contractors' Table A requests this year (2006).[3] This 100

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2 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 Table A "entitlements" *are not equivalent to actual deliveries of water* because the amount of SWP water actually available for delivery in any given year may be an amount less than the Table A Amount. For example, the amount of SWP water actually available for delivery in any given year may be *reduced* due to several factors, including drought periods, increased SWP operational constraints, environmental water requirements/constraints (e.g., the listing of several fish species as endangered or threatened), water quality concerns, and other factors.

3 See, DWR "*News for Immediate Release*," dated April 18, 2006, which is found in **Appendix J** of the Final Additional Analysis.

percent allocation of the Table A Amount to SWP contractors would add up to 4.13 million afy, distributed among the SWP contractors.[4]

Table 1
Actual SWP Annual Allocations

Year	Percent Allocation	
	To Agricultural Contractors	To Urban (M&I) Contractors
1978 to 1989	100	100
1990	50	100
1991	0	30
1992	45	45
1993	100	100
1994	50	50
1995	100	100
1996	100	100
1997	100	100
1998	100	100
1999	100	100
2000	90	90
2001	39	39
2002	70	70
2003	90	90
2004	65	65
2005	90	90
2006	100	100

Source: California Department of Water Resources, State Water Project Analysis Office, 2006.

This available supply varies from year to year. For example, in 2003, DWR approved deliveries of Table A Amount allocations, totaling 3.71 million acre-feet (or 90 percent of the 4.13 million acre-foot Table A Amount).[5] In 2002, DWR approved deliveries of Table A Amounts, totaling 2.89 million acre-feet (70 percent).[6] In 2001, DWR approved deliveries of Table A Amounts, totaling 1.61 million acre-feet (39 percent),[7] and in 2000, DWR approved deliveries of Table A Amounts, totaling 3.42 million acre-feet (90 percent).[8]

4 The original long-term water supply contracts between DWR and the SWP contractors assumed maximum annual Table A water deliveries of 4.23 million afy, assuming full development of the SWP. Currently, the maximum Table A Amounts for the SWP contractors that receive their supply from the Delta total approximately 4.13 million afy. (See, Final Additional Analysis, **Appendix AQ** [*SWP Delivery Reliability Report*, Public Review Draft, November 16, 2005, p. 7].)

5 See, DWR Bulletin 132-04, *Management of the California State Water Project*, September 2005, excerpts of which are provided in **Appendix O** of the Final Additional Analysis.

6 See, DWR Bulletin 132-03, December 2004 (**Appendix N** of the Final Additional Analysis).

7 See, DWR Bulletin 132-02, January 2004 (**Appendix M** of the Final Additional Analysis).

8 See, DWR Bulletin 132-01, December 2002 (**Appendix L** of the Final Additional Analysis).

The original plan for the SWP included constructing additional water storage and conveyance facilities as SWP contractor demands increased; however, very little new construction of SWP storage facilities has occurred since the SWP facilities were initially completed, and those facilities were never fully completed as contemplated in the 1950s. Although future construction or other actions could improve the quantity and reliability of SWP supplies, those actions would entail their own environmental reviews, potential litigation delays, and multi-year constructions periods.

2. CLWA'S 41,000 AFY WATER TRANSFER ACQUISITION

In 1999, CLWA purchased 41,000 afy of SWP Table A Amount from Kern County Water Agency (KCWA), acting on behalf of its member district, Wheeler Ridge-Maricopa Water Storage District. This purchase brought CLWA's total annual SWP Table A Amount to 95,200 afy; that purchase is generally referred to as the 41,000 afy water transfer.

The 41,000 afy water transfer was memorialized in a DWR/CLWA water supply contract amendment (Amendment No. 18), which reflects the *increase* in CLWA's annual allocation of SWP Table A Amounts from 54,200 afy to 95,200 afy. This increase reflects the permanent allocation of the 41,000 afy to CLWA (95,200 - 54,200 = 41,000).[9] As reported in the Gate-King Industrial Park Additional Analysis, the 41,000 afy water transfer has been completed, CLWA paid approximately $47 million for the additional Table A Amount, the monies have been delivered, the sales price has been financed through CLWA by tax-exempt bonds, and DWR increased CLWA's SWP Table A allocation, starting in calendar year 2000, because it was a permanent transfer/reallocation of SWP Table A water between SWP contractors.

Some comments have suggested that CLWA's 41,000 afy water transfer has not been approved by DWR. This is not correct. The 41,000 afy water transfer was approved by DWR on March 31, 1999, in the fully-executed amendment to CLWA's water supply contract (Amendment No. 18). Other comments have asserted that the 41,000 afy water transfer was not a "permanent" transfer of SWP Table A water. This also is incorrect. As stated by DWR in Bulletin 132-00, dated December 2001, at page 94, Amendment No. 18 "provided for the *permanent* transfer of 41,000 afy of SWP agricultural entitlement by CLWA from KCWA, . . . The transfer is consistent with implementation of the Monterey Amendment, which provides for the *permanent* transfer of up to 130,000 afy of agricultural entitlement to urban agencies." (Emphasis

9 A copy of "Amendment No. 18 to the Water Supply Contract between the State of California, Department of Water Resources and Castaic Lake Water Agency," dated March 31, 1999, is presented in **Appendix A** of the Final Additional Analysis.

added.) Importantly, since 2000, DWR has included the 41,000 afy in all allocations made to CLWA, based on CLWA's total annual Table A allocation of 95,200 acre-feet.[10]

To further support the fact that CLWA's 41,000 afy water transfer was a "permanent" transfer/ reallocation of SWP Table A Amount from one SWP contractor to another, in Bulletin 132-04 (September 2005), at page 120, DWR identified all eight Table A transfers, including the 41,000 afy water transfer, as "permanent" transfers under the Monterey Amendments. Furthermore, DWR has confirmed that the parties to the Monterey Settlement Agreement "recognize that the Kern-Castaic Lake Water Agency 41,000 afy Table A transfer is subject to pending litigation and agree that jurisdiction with respect to that litigation remain[s] in the Los Angeles County Superior Court and that nothing in the [Monterey Settlement Agreement] is intended to predispose the remedies or other actions that may occur in the pending litigation." In that same Bulletin, at page 120, DWR has also pointed out that the potential environmental effects of all eight "permanent Table A transfers" under the Monterey Amendments, including the 41,000 afy water transfer, will be analyzed in DWR's new Monterey EIR.[11] (The Monterey Amendments and related Monterey Settlement Agreement are discussed in further detail below). Thus, there is no basis to distinguish the 41,000 afy transfer and the other permanent Table A transfer, except for the California Environmental Quality Act (CEQA) litigation discussed in **Section 6**.

3. MONTEREY AMENDMENTS

In 1994, disputes arose between DWR and many agricultural and urban SWP contractors regarding the availability and distribution of water through SWP facilities. To avoid potential litigation, those parties met in Monterey, California, to attempt to resolve their ongoing disputes and, after negotiations, they agreed to a statement of principles, which became known as the "Monterey Agreement." The Monterey Agreement, signed by DWR and many of the agricultural and urban SWP contractors, established principles to be incorporated into contract amendments (the "Monterey Amendments"), which were primarily intended to increase the reliability of all SWP water supplies, stabilize SWP's rate structure, and increase water management flexibility for all SWP contractors. To date, all but two SWP contractors have accepted the Monterey Amendments. The Monterey Amendments included, among other benefits, water transfers among SWP contractors. Specifically, under the Monterey Amendments, SWP contractors may transfer unneeded Table A water to other contractors on a permanent basis, which provides financial relief from SWP charges for the seller and additional water supplies for the buyer. The Monterey

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10 Please see **Appendix R** through **X** of the Final Additional Analysis for DWR's "Notices to State Water Project Contractors," informing them of increases or decreases in approved Table A Amounts from 2000 to 2006. In the 2006 Notice, CLWA's Table A allocation is shown as 95,200 afy, and in all of the prior Notices, CLWA's Table A allocation is shown in two places, once under the "San Joaquin Valley" heading, which shows the allocation at 12,700 afy, and again under the "Southern California" heading, which shows the allocation at 82,500 afy, totaling 95,200 afy.

11 See, DWR Bulletin 132-04 (September 2005), p. 120 (**Appendix O** of the Final Additional Analysis).

Amendments have facilitated the transfer of 130,000 afy of SWP Table A Amounts from agricultural to urban SWP contractors.[12] Many such transfers were implemented soon after the Monterey Amendments became effective. CLWA's 41,000 afy water transfer was one of the water transfers effected by the Monterey Amendments.

4. ENVIRONMENTAL REVIEW OF MONTEREY AMENDMENTS AND SUBSEQUENT LITIGATION

A Program EIR was prepared and certified to analyze the environmental effects of implementing the Monterey Agreement/Monterey Amendments. The adequacy of the Program EIR was challenged in litigation filed in 1995 in the Sacramento County Superior Court, and the Superior Court upheld the adequacy of the Program EIR. Before and after the Sacramento County trial court's decision, DWR and the agricultural and urban SWP contractors who had executed the Monterey Agreement began implementing various amendment provisions, including the completion of permanent transfers of Table A Amounts among agricultural and urban SWP contractors. Again, CLWA's 41,000 afy water transfer was one of eight water transfers effectuated by the Monterey Amendments. The trial court's decision was subsequently appealed. On appeal, the petitioners sought an injunction to prevent further implementation of the Monterey Agreement during the appeal. However, the appellate court denied the requested injunction.

The appellate court ultimately reversed the trial court's decision. The appellate court held that the Program EIR was improperly prepared by the Central Coast Water Agency, as "Lead Agency" under CEQA, rather than by DWR, which should have been the "Lead Agency." The appellate court also found that the EIR did not sufficiently discuss implementation of a "no project" alternative, and concluded that a new EIR must be prepared and certified.

The appellate court then remanded the case to the Sacramento County trial court and directed that the trial court issue a writ of mandate vacating certification of the EIR and retaining jurisdiction until DWR, as lead agency, prepared and certified an EIR in accordance with CEQA. The appellate court further directed that the trial court consider whether the Monterey Amendments may continue to be

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12 Neither the Monterey Agreement nor the Monterey Amendments created a new right to carry out permanent transfers of SWP Table A Amounts. That right had existed since the early 1960s through Article 41 of the SWP contracts. The Monterey Amendments simply provided a vehicle through which the SWP agricultural contractors promised that they would support such Article 41 transfers up to 130,000 acre feet. The Monterey Amendments also did not limit the SWP contractors' rights to implement permanent transfers under existing law other than those described in the Monterey Amendments. (See, e.g., Water Code §§382, 383.)

implemented while the new EIR is being prepared. (*Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892.)[13]

The appellate court decision invalidated certification of the Program EIR, but did not set aside, invalidate or otherwise vacate the Monterey Amendments or enjoin the water transfers effected thereunder. Instead, the appellate court directed the trial court to consider under CEQA whether the Monterey Amendments should remain in place pending DWR's preparation of a new EIR, and to retain jurisdiction pending certification of that EIR. In addition, no court orders have ever been issued to "stay" further implementation of the Monterey Amendments.

5. THE MONTEREY SETTLEMENT AGREEMENT

In March 2001, before the Sacramento County trial court had acted on remand, the parties to the *PCL* litigation entered into settlement negotiations. In May 2003, DWR, Central Coast Water Authority, Planning and Conservation League, certain SWP contractors (including CLWA) and other entities entered into a final settlement of the *PCL* litigation (the "Monterey Settlement Agreement").[14] Under the Monterey Settlement Agreement, the parties expressly agreed that the SWP would continue to be administered and operated in accordance with both the Monterey Amendments and terms of the Monterey Settlement Agreement:

> *"Pending the Superior Court's issuance of an order discharging the writ of mandate in the underlying litigation, the Parties will jointly request that the Superior Court enter an order approving this Settlement Agreement, and an order, pursuant to California Public Resources Code Section 21168.9, authorizing on an interim basis the administration and operation of the SWP . . . in accordance with the Monterey Amendments, [and] the terms of this Settlement Agreement. ..." (Final Additional Analysis,* ***Appendix AF*** *[Monterey Settlement Agreement, p. 9].)*

The Monterey Settlement Agreement did not set aside, invalidate, or otherwise vacate the Monterey Amendments, or any of the water transfers effectuated under the Monterey Amendments. On June 6, 2003, the Sacramento County Superior Court issued the requested order, pursuant to CEQA (Pub.Res.Code Section 21168.9), approving both the Monterey Settlement Agreement and the administration and operation of the SWP pursuant to the Monterey Amendments and the terms of the approved agreement.[15]

Section III(C)(4) of the Monterey Settlement Agreement required DWR to carry-out an "[a]nalysis of the potential environmental effects relating to" eight water transfers under the Monterey Amendments,

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13 The decision, *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, hereafter referred to as "*PCL*," is presented in **Appendix AI** of the Final Additional Analysis.

14 The Monterey Settlement Agreement is presented in **Appendix AF** of the Final Additional Analysis.

15 The Sacramento County trial court's Order is presented in **Appendix AR** of the Final Additional Analysis.

seven so-called "Attachment E Transfers" and the 41,000 afy water transfer, also referred to in the agreement as the "Kern-Castaic Transfer." Further, the Monterey Settlement Agreement obligated DWR to evaluate all eight of the water transfers in the same manner, even though seven of them, defined in the agreement as the "Attachment E Transfers," were no longer subject to legal challenge. (See, Final Additional Analysis, **Appendix AF** [Monterey Settlement Agreement, Sections III(C)(4), III(D), III(E), pp. 11-12].) The point of the DWR review of the eight transfers was not to determine whether to continue the transfers, because seven of them beyond CEQA challenge, and the eighth, the 41,000 afy transfer, was also a permanent transfer, but it was still subject to litigation. Rather, the point of the DWR review of all eight transfers was to examine the environmental effects of such transfers in light of the Monterey Agreement as a whole.

In fact, Section III(D) of the Monterey Settlement Agreement affirmed that none of the parties could challenge the effectiveness or validity of the Attachment E Transfers, which had been litigated in other forums or had become final without challenge by the expiration of applicable statutes of limitations. According to CLWA and other signatories to the Agreement, this is why Section III(D) referred to the Attachment E Transfers as "final." (See, Final Additional Analysis, **Appendix AF** [Monterey Settlement Agreement, Section III(D), p. 12].) The 41,000 afy water transfer was not included among the Attachment E transfers, only because the 41,000 afy water transfer was then under the jurisdiction of the Los Angeles County Superior Court and that litigation was ongoing.[16]

Section III(E) protects the jurisdiction of the Los Angeles County Superior Court in connection with the then-pending CEQA litigation challenging the validity of CLWA's EIR on the 41,000 afy water transfer. Section III(E) states, in part: "nothing in this Settlement Agreement is intended to predispose the remedies or other actions that may occur in that pending litigation." As set forth below, Section III(E) provides:

> *"Acknowledgement and Agreement Regarding Kern-Castaic Transfer [the 41,000 afy water transfer]. With respect to Section III(C)(4)(b) regarding the Kern-Castaic Transfer, the Parties* recognize that such water transfer is subject to pending litigation in the Los Angeles County Superior Court *following remand from the Second District Court of Appeal. (See* Friends of the Santa Clara River v. Castaic Lake Water Agency, *95 Cal.App.4th 1373, 116 Cal.Rptr.2d 54 (2002);* review denied *April 17, 2002.) The Parties agree that* jurisdiction *with respect to that litigation should* remain *in that court and that* nothing in this Settlement Agreement is intended to predispose the remedies or other actions that may occur in that pending litigation." *(*Emphasis added.*) (Final Additional Analysis, **Appendix AF** [Monterey Settlement Agreement, Section III(E), p. 12].)*

16 In Section VII(I), the parties further agreed that, should the certification of DWR's new EIR be challenged, the challenging parties must stipulate to the continued administration and operation of the SWP during the pendency of that challenge, and, should that challenge be successful, during any future challenges to future DWR EIR's. In turn, Section VII(I), subdivision (1), limits the grounds on which DWR's return to the writ of mandate can be legally challenged, and Section VII(J) prohibits any future litigation challenging the validity of any Monterey Amendments (or any portions thereof). Finally, Sections VII(L) and IX provide that all disputes regarding the Monterey Settlement Agreement must be mediated.

The Monterey Settlement Agreement does not preclude CLWA, a signatory to that agreement, from using the 41,000 afy water transfer as part of its overall SWP Table A supplies for planning purposes. First, the language of the Monterey Settlement Agreement, quoted above, does not state that CLWA may not rely on the 41,000 afy water transfer (also referred to as the Kern-Castaic transfer). Second, nothing in the Monterey Settlement Agreement precludes a project EIR from referencing and using all of CLWA's SWP Table A supplies in analyzing available water supplies for the Santa Clarita Valley. Given that the 41,000 afy water transfer was specifically covered by the Monterey Settlement Agreement, if the parties to that agreement had intended to preclude reliance on the 41,000 afy water transfer, they surely could and would have spelled out that prohibition. Rather than prohibiting CLWA or others from relying on the 41,000 afy water transfer, the Monterey Settlement Agreement simply clarified that the transfer was (and remains today) under the jurisdiction of the Los Angeles County Superior Court.

In addition, the Monterey Settlement Agreement allows implementation of the Monterey Amendments and validates the water transfers that already had taken place by the time that agreement took effect. The only reason the 41,000 afy water transfer was not included on the list of "final" transfers in Attachment E for purpose of that agreement was that it was the subject of ongoing litigation. The 41,000 afy water transfer was both a permanent and final reallocation of SWP Table A Amounts from one SWP contractor to another (CLWA), just as were the other seven transfers; the pending 41,000 afy water transfer litigation did not convert that transfer from permanent to temporary.

Importantly, DWR, itself, includes the 41,000 afy to CLWA in its published "Notices to State Water Project Contractors." For example, on April 18, 2006, DWR sent its notice to SWP contractors stating that DWR was increasing its allocation of 2006 SWP water to its contractors. The table attached to that Notice listed all such contractors' Table A Amounts, and their approved allocations. CLWA's Table A Amount is listed under the Southern California heading in the amount of 95,200 afy, which includes CLWA's 41,000 afy. If DWR, the agency that administers the SWP, did not consider CLWA's 41,000 afy water transfer to be both a permanent and final reallocation of SWP Table A Amounts, it would not publish CLWA's total Table A allocation at 95,200 afy.[17]

Contrary to comments received from C-WIN and Friends, which attempt to place a cloud over CLWA's reliance upon the 41,000 afy water transfer, the terms of the Monterey Settlement Agreement make clear that the agreement was intended to protect the Los Angeles County Superior Court's jurisdiction in the pending 41,000 afy water transfer litigation. Nothing in that agreement characterized the 41,000 afy water transfer as not final. And, nothing in that agreement prohibited any party, agency, or other entity from relying on the 41,000 afy water transfer for planning purposes.

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17 DWR's April 18, 2006, "Notice to State Water Project Contractors" is presented in **Appendix S** of the Final Additional Analysis.

6. CLWA ENVIRONMENTAL REVIEW OF 41,000 AFY WATER TRANSFER AND LITIGATION

Prior to completion of the 41,000 afy water transfer, the proposed transfer was the subject of environmental review by CLWA and KCWA and its member district. The agencies selling the 41,000 afy of SWP Table A Amount to CLWA assessed the environmental consequences of the proposed transfer within their service area in a Final EIR, dated June 1998. That EIR was certified in 1998 and was not challenged in court. As a result, that EIR is conclusively presumed to be valid (Pub. Res. Code §21167.2).

CLWA also prepared a supplemental Final EIR, which assessed the environmental effects of CLWA's acquisition of the 41,000 afy within its service area. The Board of Directors of CLWA certified the Supplemental Final EIR in March 1999. Thereafter, in April 1999, a lawsuit was brought in the Los Angeles County Superior Court challenging the adequacy of the EIR under CEQA (*Friends of the Santa Clara River, et al. v. Castaic Lake Water Agency, et al.*, Case No. BS 056954, also referred to as "*Friends*"). The Los Angeles County trial court in the *Friends* litigation ruled in favor of CLWA and upheld the adequacy of the EIR under CEQA.

In October 2000, the *Friends* petitioners filed an appeal. During the pendency of the *Friends* appeal, the Third District Court of Appeal issued the *PCL* decision, which found the Monterey EIR inadequate and ordered it decertified.[18] On appeal in *Friends*, the Second District Court of Appeal considered the *Friends* petitioners' multiple arguments, and concluded that CLWA's EIR on the 41,000 afy water transfer must be decertified, not because the EIR was substantially inadequate or failed to support the analysis of the transfer's approval, but only because it had been "tiered" from the Monterey EIR, recently found to be inadequate:

> *"We have examined all of appellant's other contentions and find them to be* without merit. *If the* PCL/*tiering problem had not arisen,* we would have affirmed the judgment."[19] *(*Emphasis added.*)*

Nonetheless, like the Third District Court of Appeal in the *PCL* decision, the Second District Court of Appeal in *Friends* refused to issue any ruling affecting CLWA's ability to continue to rely on the 41,000

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18 Please refer to **Appendix AI** of the Final Additional Analysis for the *PCL* decision.

19 The January 2002 *Friends* decision entitled, *Friends of the Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373, is found in **Appendix AA** of the Final Additional Analysis. The *Friends* decision provides useful factual background information concerning the Monterey Amendments, the Monterey Amendments EIR, water transfers authorized by the Monterey Amendments, the local agency environmental review of the 41,000 afy water transfer, CLWA's acquisition of the 41,000 afy, and the relationship between the *PCL* decision and the *Friends* decision. See, Final Additional Analysis, **Appendix AA** [*Friends* decision, pp. 1376-1384].

afy water transfer, leaving 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.[20]

In December 2002, on remand to the Los Angeles County Superior Court, the *Friends* 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 request. Specifically, the trial court maintained its jurisdiction over the matter and authorized CLWA to utilize any of the 41,000 afy subject to the following order:

> *"Respondent [CLWA] will not be prohibited from using the water to which it is entitled, but Petitioner may renew its application for such prohibition based upon evidence of the actual use of such additional water for purposes it considers improper."*[21]

The *Friends* petitioners never pursued the trial court's suggestion for them to "renew" their request to prohibit the use of the 41,000 afy water transfer "based upon evidence of the actual use of such additional water for purposes it considers improper." Instead, the *Friends* petitioners appealed the trial court's judgment and, again, requested that the use of the 41,000 afy water transfer be prohibited.

However, on December 1, 2003, in an unpublished decision, the Second District Court of Appeal affirmed the trial court's ruling allowing CLWA to utilize and rely on the 41,000 afy water transfer pending completion of its new EIR.[22] Significantly, petitioners and others in the *Friends II* decision argued that the trial court's determination of whether to enjoin CLWA's use of the 41,000 afy water transfer should be based on the status of the *PCL* litigation and DWR's new EIR for the Monterey Amendments the same argument they advance here. In making that argument, they relied on language in the original *Friends* decision in which the Court of Appeal suggested that *as one option* CLWA "may be able to cure the *PCL* problem by awaiting action by the DWR complying with the *PCL* decision, then issuing a subsequent EIR, supplement to EIR, or addendum to EIR . . . tiering upon a newly certified Monterey Agreement EIR."[23] The Court of Appeal in *Friends II*, however, rejected this argument, explaining:

> *"Amici misapprehend our directions to the trial court. As explained above, those directions are found in the dispositional language of our opinion. That language directed the trial court,* inter alia*, to "consider such orders it deems appropriate under [Pub.Res.Code] section 21168.9." [Citation.] That section grants the trial court broad powers to fashion equitable relief. [Note.]* Amici's argument that the exercise of said discretion was to be based upon the status of either the PCL litigation or the new EIR for the Monterey Agreement is at odds with the clear dispositional language we employed. *The two paragraphs in our opinion upon which* amici *rely were merely suggestions as to how respondent could proceed and a statement that, in exercising its discretion whether to grant equitable relief pending completion of a new EIR for this project, the trial court could ascertain, and if it so chose, rely upon the status of the PCL litigation*

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20 See, Final Additional Analysis, **Appendix AA** [*Friends* decision, p. 1388].

21 For the trial court's decision, please refer to **Appendix AA**, p. 2 ¶6, of the Final Additional Analysis.

22 For the Court of Appeal's unpublished opinion, please refer to **Appendix Y** of the Final Additional Analysis [*Friends of the Santa Clara River v. Castaic Lake Water Agency*, 2003 WL 22839353 (*Friends II*)].

23 Please see **Appendix Y** of the Final Additional Analysis (*Friends II*, p. 16).

> *and new Monterey Agreement EIR."* (Emphasis added; *Final Additional Analysis*, ***Appendix Y*** *[*Friends II, *p. 17].)*

The Court of Appeal not only refused to enjoin the 41,000 afy water transfer, but also made it clear that CLWA's use of that water is not legally bound to either the *PCL* litigation or to DWR's new EIR for the Monterey Amendments.

Accordingly, neither the *PCL* litigation, the Monterey Settlement Agreement, nor the *Friends* or *Friends II* litigation has changed the status of the 41,000 afy water transfer from a permanent, final allocation of SWP Table A water to a "temporary or non-final" water transfer. To the contrary, the Monterey Settlement Agreement specifically provides that the SWP will continue to be administered and operated in accordance with both the Monterey Amendments and the terms of the Settlement Agreement, and the *Friends* trial court issued its Judgment permitting CLWA to continue to use the 41,000 afy, a decision that the Second District Court of Appeal affirmed. Thus, the two courts charged with responsibility over the 41,000 afy water transfer have determined that CLWA may continue to use the water to which it is entitled pending preparation of CLWA's new EIR.

Furthermore, CLWA completed and, on December 22, 2004, certified its new EIR on the 41,000 afy water transfer.[24] The CLWA 2004 EIR fully analyzed the environmental implications of the 41,000 afy water transfer without tiering from the Monterey EIR.[25] 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. There was no opposition filed to CLWA's return, which challenged the adequacy of CLWA's 1999 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.

CLWA's 2004 EIR is currently the subject of two other legal challenges brought by C-WIN and Planning and Conservation League in January 2005. Despite the pending litigation, however, an EIR is presumed adequate under CEQA, and the plaintiff in a CEQA action has the burden of proving otherwise.[26] Because the CLWA 2004 EIR was overturned solely because it tiered from a later-decertified Monterey EIR and would otherwise have been affirmed, and because CLWA has now completed and certified the 2004 EIR approving the 41,000 afy water transfer without tiering from a Monterey EIR, the City has

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24 For a copy of CLWA Resolution No. 2354 certifying the Final EIR on the 41,000 afy transfer, and approving that project, please refer to **Appendix I** of the Final Additional Analysis.

25 CLWA's Draft and Final EIR (SCH No. 1998041127) for the 41,000 afy water transfer are incorporated by reference and available for public review and inspection at the City of Santa Clarita, 23920 Valencia Boulevard, Santa Clarita, California, Contact: Mr. Jason Mikaelian, AICP, (661) 255-4330.

26 See, e.g., Pub.Res.Code §21167.3(b), CEQA Guidelines §15231; *Barthelemy v. Chino Basin Water Dist.* (1995) 38 Cal.App.4th 1609, 1617.

determined, based on substantial evidence in the record as a whole, that it remains appropriate for the Gate-King Industrial Park Additional Analysis to include those water supplies in its water supply and demand analysis, while acknowledging and disclosing the potential uncertainty created by the pending litigation.

On a related matter, the City has noted that DWR submitted a comment letter on CLWA's 2004 EIR for the 41,000 afy water transfer project. In that letter, DWR stated that CLWA's 2004 EIR "adequately and thoroughly discusses the proposed project and its impacts."[27] DWR's letter specifically addressed DWR's new Monterey EIR and the relationship between that EIR and the CLWA 2004 EIR, stating:

> *"The DEIR provides a good discussion of the relationship between the 41,000 acre-feet Table A transfer and the current Monterey Plus [the new Monterey EIR] process. DWR will analyze the effects of all Table A transfers that were part of the Monterey Amendment to the SWP contracts [e.g., both the 41,000 afy and the Attachment E transfers] in the Monterey Plus EIR."* Id.

DWR's comment letter contains no statement or suggestion that the 41,000 afy water transfer is contingent on DWR's approval, or on DWR's new Monterey EIR, or is in any other way not permanent.

7. UNCERTAINTIES CONCERNING CLWA'S 41,000 AFY WATER TRANSFER

The comment letters argue that the pending litigation challenges to CLWA's 2004 EIR for the 41,000 afy transfer, and DWR's preparation of a new Monterey Agreement EIR, introduce an element of potential uncertainty regarding the 41,000 afy water transfer. The City has acknowledged and considered these potential uncertainties, and concluded that, based on a review of all the surrounding circumstances, these events do not significantly affect the reliability of the transfer amount. Therefore, the City has concluded that it is still appropriate to rely on the transfer amount as part of CLWA's 95,200 afy Table A Amount, for the reasons discussed below.

- 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 the completed transfer 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 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

27 For a copy of the DWR letter, dated July 30, 2004, commenting on CLWA's EIR for the 41,000 afy water transfer, please refer to **Appendix P** of the Final Additional Analysis.

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 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 supply that was transferred, 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, should have no 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.

Other comments have stated that the Monterey Settlement Agreement requires that DWR's new Monterey EIR analyze, among others, the 41,000 afy water transfer; and, therefore, water from that transfer should not be relied upon until DWR completes its new EIR. The City does not concur with these comments.

First, nothing in either the Monterey Settlement Agreement or the related court orders preclude CLWA from using or relying upon the 41,000 afy water transfer, which remains intact pending completion of the DWR EIR. Second, nothing in the terms of the Monterey Settlement Agreement precludes CLWA from proceeding with its 2004 EIR to address the environmental implications of the 41,000 afy water transfer.

Again, if the Monterey Settlement Agreement had intended such a result, then it is reasonable to assume that provisions would have been included in that agreement making it clear that CLWA could not proceed with its own EIR on the 41,000 afy water transfer. In fact, no such provisions were included in the Monterey Settlement Agreement, because such provisions would have interfered with the jurisdiction of another court in the separately pending 41,000 afy water transfer litigation. Finally, although the Monterey Settlement Agreement requires the new Monterey EIR to analyze the potential environmental effects relating to CLWA's 41,000 afy water transfer as well as the other permanent transfers, it does not, and cannot, preclude CLWA from conducting its own environmental review of that transfer. Indeed, CLWA *was required* by court order to prepare a new EIR to address the environmental implications of the 41,000 afy water transfer.[28] In the meantime, however, there are no court orders precluding CLWA from using or relying on that water supply. And, as discussed below, CLWA already has completed and certified the 2004 EIR, which has addressed the environmental impacts of the 41,000 afy water transfer, without tiering or relying on the decertified 1995 Monterey EIR.

In short, CLWA's 2004 EIR provides the environmental analysis for the 41,000 afy water transfer, which is required by CEQA and the orders and opinions issued in the 41,000 afy water transfer litigation. Nothing in CEQA or any law, regulation, or agreement constrains or limits CLWA's discretion to proceed with its own EIR on the 41,000 afy water transfer.

For all these reasons, The City of Santa Clarita has determined that it remains appropriate to rely on the 41,000 afy water transfer as part of CLWA's SWP Table A water supplies. Furthermore, based on the above, the City has determined that it is reasonable to conclude that even if a court finds the CLWA 2004 EIR legally deficient, that court, like all others before it, will again refuse to enjoin the permanent 41,000 afy water transfer, and instead require further revisions to that EIR. Therefore, the pending legal challenges to the 41,000 afy water transfer should have no impact on the amount of SWP water available to CLWA as a result of the completed 41,000 afy water transfer.

8. OTHER LITIGATION CONCERNING THE 41,000 AFY TRANSFER

The CLWA 41,000 afy water transfer also has been the subject of two recent court decisions. The first court case involved a published appellate court decision in *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219. In the *California Oak Foundation* decision (the decision setting aside the first EIR for this project), the Court of Appeal invalidated an EIR under CEQA for the Gate-King project

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28 In the Judgment granting the writ of mandate setting aside CLWA's certification of the 41,000 afy EIR, the trial court specifically retained "jurisdiction until respondent Castaic Lake Water Agency certifies an Environmental Impact Report that complies with the California Environmental Quality Act and is consistent with the views expressed by the Court of Appeal Opinion, filed January 10, 2002, Case No. B145283." (Final Additional Analysis, **Appendix AC** [Judgment Granting Peremptory Writ of Mandate, dated October 25, 2002, p. 2, ¶3].)

located in the City of Santa Clarita, because the EIR did not explain how demand for water would be met if the 41,000 afy water transfer were set aside, or, alternatively, why it is appropriate to rely on the 41,000 afy transfer in any event. The above analysis explains in detail why it is appropriate to rely on the 41,000 afy water transfer as part of CLWA's SWP water supplies. None of this information or analysis was contained in the Gate-King EIR. In short, the Gate-King Industrial Park Additional Analysis supplies the information supporting the decision to rely on the 41,000 afy transfer, which the *California Oaks* court indicated was needed. A copy of the *California Oak Foundation* decision is provided in Appendix 3.0-21 of the Draft Additional Analysis.

The second court case involved a separate legal challenge under CEQA to an EIR for the West Creek project, located in Los Angeles County. This separate legal challenge was brought in Santa Barbara County Superior Court in *Santa Clarita Organization for Planning the Environment v. County of Los Angeles*, Case No. 1043805 (*West Creek* litigation). After a hearing, the Santa Barbara County Superior Court issued an Order determining that the EIR prepared for the West Creek project contained substantial evidence in the record to support Los Angeles County's decision to rely on the 41,000 afy water transfer for planning purposes. The Order noted that substantial evidence appeared in the record to support the County's decision to rely on the 41,000 afy water transfer, while acknowledging and disclosing the potential uncertainties involving the 41,000 afy water transfer created by pending litigation. The Order summarized the evidence, including the fact 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 adequate despite pending legal challenges. A copy of the trial court Order in the *West Creek* litigation is provided in **Appendix AU** of this Additional Analysis. The *West Creek* decision is currently on appeal.

In conclusion, one of the primary purposes of this Additional Analysis topical response is to respond to public comments and to inform decision makers and the public of pending and related litigation concerning CLWA's 41,000 afy water transfer, so that the information can be taken into account in determining whether there is adequate water supply for the Gate-King Industrial Park project, in addition to existing and planned future uses in the Santa Clarita Valley. In making that informed decision, the law does not require a showing of freedom from all legal challenges for a source of water to be included in overall SWP water supplies. Based on the above information, the City has determined that CLWA's 41,000 afy water transfer is sufficiently certain, so that it is not only permissible, but also reasonable, to include the 41,000 afy in CLWA's water supply sources for the Santa Clarita Valley.