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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Fresno & Sacramento)

In re BAY-DELTA PROGRAMMATIC ENVIRONMENTAL IMPACT REPORT COORDINATED PROCEEDINGS.	JCCP No. 4152
DON LAUB et al., Plaintiffs and Appellants, v. JOSEPH GRAHAM (GRAY) DAVIS et al., Defendants and Respondents.	C044267 (Fresno County Super. Ct. No. 00CG11667)
REGIONAL COUNCIL OF RURAL COUNTIES et al., Plaintiffs and Appellants, v. STATE OF CALIFORNIA et al., Defendants and Respondents; DEPARTMENT OF WATER RESOURCES et al., Real Parties in Interest and Respondents; SAN JOAQUIN RIVER GROUP AUTHORITY et al., Interveners and Respondents.	C044577 (Sacramento County Super. Ct. No. 00CS01331)

APPEAL from the Superior Court of the County of Sacramento, Patricia C. Esgro, Judge. Reversed in part and affirmed in part.

Brenda J. Southwick and Rebecca Dell Sheehan for Plaintiffs and Appellants Laub, Jacobsen, Sheely and California Farm Bureau Federation.

Gibson, Dunn & Crutcher and Alan Neal Bick; Gibson, Dunn & Crutcher and Christopher H. Buckley, Jr., as pro hac vice, for Plaintiff and Appellant California Farm Bureau Federation.

Nomellini, Grilli & McDaniel, Dante John Nomellini, Sr., Daniel A. McDaniel, Dante John Nomellini, Jr.; Thomas M. Zuckerman and John Herrick for Plaintiffs and Appellants Central Delta Water Agency, R.C. Farms, Inc., Zuckerman-Mandeville, Inc., Mussi, and South Delta Water Agency.

Kerr & Wagstaffe, James M. Wagstaffe and Keith K. Fong for Plaintiff and Appellant Regional Council of Rural Counties.

Bill Lockyer, Attorney General, Tom Greene, Chief Assistant Attorney General, J. Matthew Rodriquez, Senior Assistant Attorney General, Daniel L. Siegel, Danae J. Aitchison, Gordon B. Burns, Virginia A. Cahill, and Peter Southworth, Deputy Attorneys General for Defendants and Respondents State of California, Davis, California Resources Agency, Nichols, California Environmental Protection Agency, Hickox, Department of Water Resources, Hannigan, Wright, CALFED Bay-Delta Program, and Department of Fish and Game.

Heller Ehrman White & McAuliffe, Nicholas W. van Aelstyn, Patricia K. Oliver, and Alissa B. Kolek for The Nature Conservancy as Amicus Curiae on behalf of Defendants and Respondents State of California, Davis, California Resources Agency, Nichols, California Environmental Protection Agency, Hickox, Department of Water Resources, Hannigan, Wright, CALFED Bay-Delta Program, and Department of Fish and Game.

Kronick, Moskovitz, Tiedemann & Girard, Clifford W. Schulz, and Eric N. Robinson for Real Parties in Interest and Respondents State Water Contractors, Kern County Water Agency, and Tulare Lake Basin Water Storage District.

Sonnenschein Nath & Rosenthal and Kevin T. Haroff; Squire, Sanders & Dempsey, Kevin T. Haroff, and Olive Lee Thaler for Real Party in Interest and Respondent Santa Clara Valley Water District.

Jeffrey Kightlinger, Linus S. Masouredis, and Adam C. Kear for Real Party in Interest and Respondent The Metropolital Water District of Southern California.

Kronick, Moskovitz, Tiedemann & Girard, Daniel J. O'Hanlon, and Jon D. Rubin for Real Party in Interest and Respondent Westlands Water District.

Somach, Simmons & Dunn, Stuart L. Somach, Andrew M. Hitchings, and Nicholas A. Jacobs for Real Party in Interest and Respondent Glenn-Colusa Irrigation District.

O'Laughlin & Paris and Tim O'Laughlin for Interveners and Respondents.

In response to concerns over the decline of water quality and the ecology of the San Francisco Bay and the Sacramento-San Joaquin Delta (Delta) and concerns over recurrent shortages of water for beneficial uses, 18 state and federal agencies with management or regulatory responsibility over the Bay-Delta formed CALFED to devise a long-range plan to address those concerns. After many years of study and analysis, including significant public participation, CALFED adopted a program (the CALFED Program or Program) to be administered over the next 30 years, which includes measures for improving the Bay-Delta ecosystem, water quality and quantity, and Delta levee stability. On August 28, 2000, the Secretary of the California Resources Agency certified the final Programmatic Environmental Impact Statement/Environmental Impact Report (PEIS/R) and CALFED

adopted the Record of Decision (ROD) for the Program in accordance with the National Environmental Policy Act (42 U.S.C. § 4321 et seq.) and the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.).

Appellants, who include the California Farm Bureau Federation (Farm Bureau), the Central Delta Water Agency (CDWA) and the Regional Council of Rural Counties (RCRC), filed petitions for writ of mandate challenging the PEIS/R under CEQA and asserting various non-CEQA claims based on actions taken or anticipated under the Program. The trial court found the PEIS/R satisfactory under CEQA and dismissed the non-CEQA claims as either premature or not properly stated.

Appellants challenge the trial court's rulings on a number of grounds. Among other things, they contend the PEIS/R does not contain a sufficient discussion of adverse environmental impacts, mitigation measures or alternatives. They also argue CALFED provided inadequate responses to public comments and the PEIS/R should have been re-circulated when new information about the Program was revealed late in the proceedings. Finally, appellants contend they have stated viable non-CEQA claims arising from conduct associated with implementation of the Program.

Following a summary of the facts and proceedings relevant to this matter, we first address appellants' CEQA issues. We reject appellants' challenges to the adequacy of the PEIS/R's analysis of Program impacts on the environment and, in particular, agriculture. With one exception, we also reject

appellants' challenges to the adequacy of the PEIS/R's treatment of mitigation measures and alternatives. We also disagree with appellants' arguments regarding CALFED's responses to public comments and conclude there was no need for CALFED to re-circulate the PEIS/R due to CALFED's responses to public comments regarding the Environmental Water Account (EWA).

As to three matters, we agree with appellants the PEIS/R is legally insufficient. First, we conclude the PEIS/R improperly fails to discuss an alternative to the Program that requires reduced exports of water from the Delta. Second, we conclude the PEIS/R fails to include an adequate discussion of the environmental impacts of diverting water from various potential sources to meet the Program's goals. Third, we conclude certain significant information relating to the EWA should have been included in the PEIS/R.

Finally, we reject certain non-CEQA claims raised by appellants as either not properly stated or not adequately preserved for appeal.

We reverse the judgment in part.

FACTS AND PROCEEDINGS

I

Introduction

Although the central focus of the CALFED Program is the environmental health of the Bay-Delta estuary, the problems that exist in that area cannot be divorced from the more generalized

problems of water quality, quantity, and allocation that have long been a fact of life in the State of California (State).

"California is blessed with many lakes and streams, abundant winter snows and ample rains, but it is also plagued by a 'water problem.' The problem of water supply is critical in California and made more so by the State's expanding population. Unfortunately, from a water supply point of view, population rarely seems to grow in the areas most endowed with domestic water supplies. The State water problem stems not only from the unprecedented recent growth of population, but also from the concurrent growth of industry and agriculture. California suffers in addition because for many years construction of water conservation works has not kept pace with the increasing need for water." (1 Rogers & Nichols, Water for California (Bancroft-Whitney 1967) § 1, p. 20 (hereafter Rogers & Nichols).)

Although the foregoing was written nearly 40 years ago, the problems recognized at that time continue in some form or another today. Added to the mix is a growing concern for the preservation and restoration of the State's natural resources and environment for the sake of endangered or threatened plant and animal species. Methods for solving water shortage and allocation problems in the past have become less palatable in today's more environmentally sensitive political climate, making the search for solutions ever more difficult.

The CALFED Program is the latest attempt to break the impasse among the various interest groups competing for water in

California. One of the intractable problems the Program seeks to address is the disparity between the amount of water needed to satisfy the demands and desires of the State's various beneficial users and the amount of water available for such use. "Historically, the resolution of the physical fact of water scarcity in California has focused almost exclusively on the development and augmentation of water supplies. In the best tradition of the old West, water scarcity was viewed as something to be conquered rather than managed. Substantial amounts of public resources were invested in the construction and operation of vast storage and conveyance facilities." (Howitt et al., Competition for California Water: Alternative Resolutions (U. Cal. Press 1982) *The Economics of Water Allocation,* at p. 137.)

Those days are over. Limits of the developed water supply in the State are being reached, and there is fierce competition for what remains. (Gardner et al., Competition for California Water: Alternative Resolutions (U. Cal. Press 1982) *Agriculture,* at pp. 11, 14.) It is now recognized that each new project to harness greater amounts of water comes at a price beyond the cost of construction and maintenance. A new water reservoir or conveyance facility may mean the destruction of many acres of farmland or wildlife habitat. Water diverted from a stream or other watercourse to some beneficial use may mean less water passing to the sea through which fish migrate or a reduction in the natural barrier to saltwater intrusion. Water

allocated to one area of the State may mean less water available for another area.

Another problem the Program seeks to resolve is the inequality between water availability and water demand in the different regions of the State. At the risk of oversimplification, this problem is primarily one of supply exceeding demand in the northern regions coupled with the opposite condition in the central and southern regions. This is not just a matter of reallocation. Water taken from one area to convert a desert in another area into a productive agricultural community may retard development in the area of origin.

To aid in our examination of the CALFED Program and the issues raised in these coordinated proceedings, we first place the Program in its proper geographic and historic context. The Program is not an isolated effort to restore the ecological health of the Bay-Delta or to resolve conflicts among the State's water users. The problems giving rise to CALFED have lasted for decades, and the Program is the latest, and certainly the most comprehensive and ambitious, attempt to provide relief to those dependent on this State's limited water resources.

II

Geographic Setting

The Delta is a maze of tributaries, sloughs, and islands covering over 738,000 acres in five counties. The legal boundary of the Delta is roughly triangular, with the three vertices being Sacramento in the north, Vernalis in the south and Pittsburg in the west. (*United States v. State Water*

Resources Control Bd. (1986) 182 Cal.App.3d 82, 107.) The Bay-Delta estuary includes California's two largest rivers, the Sacramento, which flows into the Delta from the north, and the San Joaquin, which flows into the Delta from the south. Water that accumulates in these rivers flows through the Delta and, if not diverted elsewhere, into Suisun Bay. From there it continues to the San Francisco Bay and on to the Pacific Ocean. (Rogers & Nichols, *supra*, § 26, p. 42.)

The Delta originally consisted of overflow and seasonally inundated land. Today, this area is crisscrossed by the Sacramento and San Joaquin Rivers and many meandering sloughs, creating over 50 islands protected by levees that, along with the adjacent mainland, contain highly productive farmland. (Littleworth & Garner, California Water (Solano Press Books 1995) p. 126 (hereafter Littleworth & Garner); Hundley, The Great Thirst (U. Cal. Press 2001) pp. 393-394 (hereafter Hundley).) The Delta also contains major transportation networks, towns, homes and businesses. Because this area is drying out due to exposure to sun and wind by farming, it has been sinking at an annual rate of two to five inches, faster than any other place on earth. "Islands that were at sea level a century ago are now as much as twenty to thirty feet below sea level and protected by old and increasingly precarious levees." (Hundley, *supra*, at p. 394.)

The Delta is the hub for distribution of water emptying into the Bay-Delta estuary to other regions in the State, including the Central Valley and Southern California. Average

annual precipitation in California is approximately 24 inches. However, this amount varies from area to area, with a low of almost nothing in the southern desert regions and a high of 100 inches in the mountainous north coast regions. (Littleworth & Garner, *supra*, at p. 2.) Sixty percent of the precipitation that falls over the State eventually evaporates or is transpired by trees and other vegetation. The rest, approximately 71 million acre-feet, ends up as runoff that gathers in streams and other watercourses. Half of this runoff flows through the Delta. (Rieke, The Bay-Delta Accord: A Stride Toward Sustainability (1996) 67 U.Colo. L.Rev. 341, 343 (hereafter Rieke)).

California's Central Valley stretches nearly 500 miles from Redding in the north to Bakersfield in the south, and more than a hundred miles from the Sierra Nevada in the east to the coastal ranges in the west. (Rogers & Nichols, *supra*, § 26, p. 42.) Average annual precipitation in the Central Valley ranges from five inches in the south to more than 30 inches in the north, with more than three-fourths of this precipitation occurring between December and April. (*Id.*, § 27, pp. 43-46.) The water flow of the Sacramento and San Joaquin Rivers is also seasonal, with rains and melting snow creating high flow in the spring and early summer. (See *Rank v. Krug* (D.C. Cal. 1950) 90 F.Supp. 773, 784.)

The Central Valley has been described as "[a] phenomenally rich and broad alluvial plain" watered by streams draining the Sierra Nevada in the east and the coastal ranges in the west.

(Hundley, *supra*, at p. 235.) However, precipitation in the area comes mostly after the end of the crop-growing season. (*Ibid.*) Originally, the Central Valley floor had approximately 922,000 acres of riparian vegetation supported by a watershed of more than 40,000 square miles. The Sacramento River alone was bordered by up to 500,000 acres of riparian forest. But transformation of the Central Valley into the nation's leading agricultural area has resulted in the loss of 99 percent of native grasses, 89 percent of riparian woodlands, and 95 percent of wetlands in this area. (Carle, Drowning the Dream: California's Water Choices at the Millennium (Praeger 2000) p. 144 (hereafter Carle).)

The overall amount of water runoff in the State varies from year to year. In 1977, total runoff was 15 million acre-feet; in 1983, it was 135 million acre-feet. (Littleworth & Garner, *supra*, at p. 2.)

The State has 450 groundwater basins capable of storing approximately 850 million acre-feet of water. However, only half of this water is close enough to the surface to be pumped economically. (Littleworth & Garner, *supra*, at p. 2.) Because the amount of water used in the State has consistently exceeded the amount of developed water available, groundwater reserves have been shrinking at a rate of over a million acre-feet per year. (Hundley, *supra*, at p. 2; Littleworth & Garner, *supra*, at p. 3.) Most of this groundwater overdraft has been in the Central Valley. (Coppock et al., Competition for California

Water: Alternative Resolutions (U. Cal. Press 1982) *The Problem, The Resource, The Competition,* at p. 3.)

III

Population Growth and Water Projects

The first settlers to the San Francisco area encountered scant fresh water supplies, and these proved inadequate to meet the boom of the later gold rush era. (Hundley, *supra*, at p. 172.) After some early efforts to enlist private enterprise to meet the city's water needs, the city turned its attention to public water projects and distant water supplies. The city eventually settled on the Tuolumne River--which drains a large portion of the Sierra Nevada, including the Hetch Hetchy Valley 170 miles to the east--for its water. (*Id.* at pp. 172-173.) In 1901, San Francisco filed for rights to Tuolumne River water. (*Id.* at p. 174.) However, due to intense opposition, the project did not move forward until 1913. (*Id.* at pp. 175-186.) Eventually, a dam was built, creating the Hetch Hetchy Reservoir. San Francisco began importing water from the Tuolumne River in 1923 (Carle, *supra*, at p. 140) and a similar project was undertaken later to import water from the Mokulumne River to areas on the east side of the San Francisco Bay. This water began flowing in 1930. (*Ibid.*)

Early residents of Southern California struggled with problems of drought and limited water supply. When available above-ground sources were exhausted, wells were drilled to tap groundwater sources. (Rogers & Nichols, *supra*, § 91, p. 122.) By 1905, the population of Los Angeles had grown to 220,000. By

1920, the population was 576,000 and, during the next decade, it doubled to over a million. (Carle, *supra*, at p. 74.) During this period, groundwater use in Southern California reduced artesian wells from 2,500 to 22. (Littleworth & Garner, *supra*, at p. 11.)

Faced with the necessity of importing water to the area to meet the needs of its growing population, Los Angeles began searching for new water sources. Shortly after 1900, it began acquiring land in the Owens Valley, 238 miles north on the eastern slope of the Sierra Nevada, in order to gain control of the water supply in the area. The city eventually acquired 97 percent of the available privately held land in Inyo and Mono Counties. (*County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 799.) In 1908, Los Angeles commenced construction of an aqueduct to bring Owens Valley water to Southern California. This project was completed and water began flowing in 1913. (Rogers & Nichols, *supra*, § 91, p. 122; Hundley, *supra*, at p. 155.)

Soon thereafter, Los Angeles began looking further north to Mono Lake as a source of additional water to meet its growing needs. (Rogers & Nichols, *supra*, § 7, p. 23.) Mono Lake is the second largest lake in the State and sits at the base of the Sierra Nevada near the east entrance to Yosemite National Park. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 424.) In 1940, the Division of Water Resources, the predecessor of the State Water Resources Control Board (SWRCB), granted Los Angeles a permit to appropriate water from four

fresh water streams that emptied into Mono Lake. The city constructed facilities to divert about half of this flow into the existing Owens Valley aqueduct. In 1970, the city completed a second aqueduct from Owens Valley and thereafter began diverting nearly the entire flow of these four streams. (*Ibid.*) Until these diversions were curtailed by court action (discussed *infra*), the level of Mono Lake had dropped considerably and the surface area had receded by one-third. (*Ibid.*)

Not long after completion of the first phase of the Owens Valley project, Los Angeles explored the feasibility of importing water from the Colorado River. (Rogers & Nichols, *supra*, § 7, pp. 23-24.) In 1928, the Metropolitan Water District of Southern California (Metropolitan) was created for the purpose of combining the financial resources of cities and communities in Southern California to bring water to the area. (*Metropolitan Water Dist. v. Imperial Irrigation Dist.* (2000) 80 Cal.App.4th 1403, 1415.) Metropolitan constructed the Colorado River Aqueduct to bring in water from the Colorado River. This water began flowing in 1941. An offshoot of the Colorado River Aqueduct, the San Diego Aqueduct, was also constructed to supply Colorado River water to San Diego County. (Rogers & Nichols, *supra*, § 7, pp. 23-24; Hundley, *supra*, at pp. 230-231.)

Because of the interstate and international nature of the Colorado River, California's rights to its water, as well as those of several other states and Mexico, are governed by a series of agreements, treaties, laws, and court decisions. Under these legal constraints, California is limited in a normal

year to 4.4 million acre-feet of Colorado River water plus no more than half of any surplus water available. Of this amount, agricultural users receive 3.8 million acre-feet, with the balance going to urban users. (Hundley, *supra*, at p. 221.)

Historically, California has used more than its normal-year entitlement of Colorado River water. This has been made possible through under-use by Arizona and Nevada and the availability of surplus water. However, because both Arizona and Nevada are approaching full use of their respective apportionments, the United States Secretary of the Interior has directed California to devise a plan to live within its 4.4 million acre-feet entitlement.

The Central Valley has undergone dramatic change since the first settlement of California. During those early years, winter rains and spring runoff brought annual floods that soaked half a million acres of tule swamps in the valley. (Carle, *supra*, at p. 143.) Seasonal flooding caused serious damage to farms and cities along the Sacramento and San Joaquin Rivers. (Hundley, *supra*, at pp. 235-237.) Early attempts at coordinated flood control in this area began in 1911. In that year, the Legislature created a State Reclamation Board and vested it with all authority over protective works in the Sacramento River Valley. (*Id.* at pp. 237-239.) In conjunction with the U.S. Army Corp of Engineers, the Reclamation Board implemented a valley-wide plan, the Sacramento Flood Control Project, to establish a network of levees and bypasses to prevent flooding. (*Id.* at p. 239.)

Later efforts were made to adopt a comprehensive plan for the entire Central Valley. (Hundley, *supra*, at pp. 242-247.) These efforts culminated in the Central Valley Project (CVP), which was approved by the State Legislature in 1933. (Stats. 1933, ch. 1042, p. 2643; Wat. Code, § 11100 et seq.) The CVP is the nation's largest water reclamation project (*County of San Joaquin v. State Water Resources Control Bd.* (1997) 54 Cal.App.4th 1144, 1147), with total reservoir capacity of more than 8.5 million acre-feet in its principal dams (Rogers & Nichols, *supra*, § 53, p. 61). The CVP is also the State's largest water supplier, delivering approximately 7.3 million acre-feet of water to over 250 water contractors, primarily for agricultural use. (Littleworth & Garner, *supra*, at pp. 5, 18.)

Operation of the CVP involves impounding the natural flow of the San Joaquin River at Friant Dam and diverting the water through the Friant-Kern Canal to the southern reaches of the San Joaquin Valley. (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 99.) The other major aspect of the CVP involves impounding the waters of the Sacramento River at Shasta Dam. The water allowed to flow past Shasta Dam in the Sacramento River is augmented by water brought through a tunnel from the Trinity River and from reservoirs formed by Folsom and Nimbus Dams on the American River. This water eventually flows into the Delta. About 30 miles south of Sacramento, the Delta Cross Channel regulates the flow of water through the Delta to the Tracy Pumping Plant. There, it is lifted into the Delta Mendota Canal through which it flows to the Mendota Pool and

eventually replaces the natural flow of the San Joaquin River. (*Ibid.*)

Although the CVP was originally a State project, the lingering effects of the Great Depression made it impossible for the State to sell bonds for it and the federal government took control of the project. (Littleworth & Garner, *supra*, at p. 18; Hundley, *supra*, at pp. 252-257; see *United States v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 728 [94 L.Ed. 1231, 1237].) The United States Bureau of Reclamation (USBOR) operates the CVP pursuant to appropriative water rights granted by the SWRCB. (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 97.) Construction of the CVP began in 1937, with first water delivery in 1940. (Rogers & Nichols, *supra*, § 52, p. 60.)

Operation of the CVP helped to transform agriculture in the Central Valley. Agriculture is one of the foundations of this State's prosperity, providing employment for one in 10 Californians and a variety and quantity of foodstuffs that both feed the nation and provide a significant source of exports. In 1889, the State's 14,000 farmers irrigated approximately one million acres of farmland between Stockton and Bakersfield. (Hundley, *supra*, at pp. 101-102.) By 1981, the number of acres in agricultural production had risen to 9.7 million. (Littleworth & Garner, *supra*, at p. 5.) More recently, the amount of agricultural land in the State has declined. From 1982 to 1992, more than a million acres of farmland were lost to other uses. Between 1994 and 1996, another 65,827 acres of

irrigated farmland were lost (Carle, *supra*, at p. 176), and this trend is expected to continue. (Hundley, *supra*, at p. 525; Bruvold et al., Competition for California Water: Alternative Resolutions (U. Cal. Press 1982) *Municipal and Domestic Use*, at pp. 37, 38)

Despite recent reductions in farmland, agriculture remains by far the largest user of the State's developed water supply (Littleworth & Garner, *supra*, at pp. 5-6), with the CVP supplying 30 percent of the amount used by agriculture.

At the time of the PEIS/R, approximately 641,000 acres in the Bay-Delta were classified as "prime farmland, farmland of statewide importance, and unique farmland, or land with high statewide significance for agricultural production." In 1996, the San Joaquin River region of the Bay-Delta estuary contained 3,751,089 acres of important farmland, and the Sacramento River region contained 2,442,276 acres. Approximately 493,000 acres of important farmland were mapped for the Bay Region of Contra Costa, Solano, Napa, and Sonoma Counties, and in other regions, including Southern California, important farmland amounted to approximately 2.1 million acres.

From 1940 to 1970, the population of Los Angeles doubled to 3 million, and the populations of Los Angeles, Orange, Ventura and San Diego Counties increased two and one-half times, to 10 million. When Colorado River water began flowing into the State in 1941, the amount of water available to Southern California exceeded local needs. The member communities of Metropolitan did not begin using all of the water brought into the State from

the Colorado River until the 1960's. (Hundley, *supra*, at pp. 230-231.)

In 1951, the SWRCB reported that "'[t]he greatest challenge' facing the state . . . was 'redistribution of the water supply from areas of surplus to areas of deficiency.'" (Hundley, *supra*, at p. 279.) That year, the Legislature authorized construction of the State Water Project (SWP), another large water storage and delivery system. However, it was not until 1959, when the Legislature passed the California Water Resources Development Bond Act (the Burns-Porter Act) (Wat. Code, § 12930 et seq.) authorizing $1.75 billion in bonds, and the electorate approved the bonds the following year, that construction of the SWP began. (*Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 898; *Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900, 903.)

The SWP consists of a series of 21 dams and reservoirs, five power plants and 16 pumping plants stretching from Lake Oroville in Butte County to Lake Perris in Riverside County. (*Goodman v. County of Riverside*, *supra*, 140 Cal.App.3d at p. 903.) Under the SWP, water from the Feather River is stored behind Oroville Dam, from which it is released to flow into the Sacramento River as needed. That water flows through the Delta to the Clifton Court Forebay, where a portion enters the South Bay Aqueduct for delivery to the Santa Clara Valley. The greater portion of this water is lifted into the California Aqueduct for transport through the San Joaquin Valley and into

the southern part of the State. (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 100.)

Discussions leading to approval of the SWP were marked by a good deal of acrimony between northern and southern California interests. (Rogers & Nichols, *supra*, § 87, p. 115.) Southern Californians objected to the project because of area-of-origin laws that were enacted in the early 1930's in conjunction with the CVP. Those laws protect the future water needs of users in areas where water originates. (See discussion *infra*.) Southern Californians did not want to pay for the SWP without assurances that northern Californians would not later prevent delivery of water based on superior water rights. (Hundley, *supra*, at pp. 245, 281.) Northern Californians objected to the project because they did not want to give up water that might someday be needed for future development. (Rogers & Nichols, *supra*, § 87, p. 115.) Northern Californians argued that people should come to the water, not vice versa. (Hundley, *supra*, at p. 286.)

The Burns-Porter Act was approved despite nearly unanimous opposition by legislators from the northern part of the state. (Hundley, *supra*, at pp. 285-286.) To satisfy northern concerns, the Legislature enacted the Delta Protection Act (Wat. Code, §§ 12200-12220), which recognizes the unique "salinity intrusion" problems of the Delta and provides "for the protection, conservation, development, control and use of the waters in the Delta for the public good." (Wat. Code, § 12200; see *United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 139.) To placate the south, area-of-origin

laws were amended to provide that water supply contracts entered into pursuant to the SWP could not be abrogated while bonds to pay for the project are outstanding. Some of those bonds are not scheduled to be paid off until 2029. (Hundley, *supra*, at p. 284.)

The Department of Water Resources (DWR) obtained appropriative rights from the SWRCB for operation of the SWP. (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 106.) Under the Burns-Porter Act, the DWR was directed to enter into contracts for the sale of SWP water, with the proceeds used to repay the cost of the project. (*Antelope Valley-East Kern Water Agency v. Local Agency Formation Com.* (1988) 204 Cal.App.3d 990, 993.) The DWR entered into contracts with 29 agricultural or urban water suppliers throughout the State. "These contractors received entitlements to an annual amount of water in return for which they repay a proportionate share of the financing and maintenance of the SWP facilities. Under the SWP, water contractors 'are obligated to pay for their contractual entitlements of water' from the project, 'whether the water is delivered or not.'" (*Planning & Conservation League v. Department of Water Resources*, *supra*, 83 Cal.App.4th at p. 899.)

The SWP originally contracted to provide 4.2 million acre-feet of water per year. (Littleworth & Garner, *supra*, at p. 5.) However, because of the environmental movement of the 1970's, construction of the entire project has never been completed. (See *Santa Clarita Organization for Planning the Environment v.*

County of Los Angeles (2003) 106 Cal.App.4th 715, 721-722; Hundley, *supra*, at pp. 312-313.) The facilities that have been completed deliver only about half of the forecasted amount of water. (*Ibid.*)

Delivery of SWP water began in 1971. (Carle, *supra*, at p. 150.) The SWP supplies water to users from San Francisco to Southern California, serving approximately two-thirds of all Californians. (*Metropolitan Water Dist. v. Imperial Irrigation Dist.*, *supra*, 80 Cal.App.4th at p. 1411, fn. 8.) Metropolitan is by far the SWP's largest contractor, receiving about half of all water delivered. (*Id.* at p. 1418.) Seventy percent of SWP urban water users are in Southern California. (Carle, *supra*, at p. 150.) However, because of the various other sources of water available to Southern California, including Owens Valley and the Colorado River, Southern California water requirements did not catch up with available SWP water until 1988. (Hundley, *supra*, at p. 299.)

As growth, and hence water consumption, has increased in the northern parts of the State in recent years, less water has been flowing into the Delta and, consequently, saltwater intrusion from the San Francisco Bay has increased. During periods of low flow and drought, saltwater advanced far enough inland to be drawn into pumps sending water to the south. (Hundley, *supra*, at p. 314.) In 1965, the Interagency Delta Committee released a plan for a 43-mile-long "Peripheral Canal" beginning on the Sacramento River 15 miles below Sacramento, running along the eastern edge of the Delta, and ending at State

and federal pumping plants near Tracy. This canal was designed to allow water diversion into the Delta for salinity control while permitting delivery of higher quality water to the south. (*Id.* at p. 315.)

Battle raged over the peripheral canal until 1980, when the Legislature passed a bill to authorize construction. Voting on the bill was generally along north-south lines, with northern legislators opposed. Voters also approved Proposition 8, providing added protection to the Delta. (Hundley, *supra*, at pp. 317, 324-325.) However, in 1982, the voters approved a referendum reversing the canal and the Delta protection legislation. (*Id.* at pp. 328, 331-332.) Subsequent attempts to resurrect the canal project have failed. (*Id.* at pp. 332-333.)

The availability of sufficient water to meet the State's growing needs continued to be a problem in the 1980's and 1990's. This problem was exacerbated by a persistent drought that occurred between 1987 and 1992. (Hundley, *supra*, at pp. 557, 559.) In 1991, DWR organized a drought water bank to allow for large-scale water transfers to relieve shortages. (*Planning & Conservation League v. Department of Water Resources*, *supra*, 83 Cal.App.4th at pp. 900-901.)

Article 18 of the basic contracts entered into between DWR and water contractors for SWP water provides for the reallocation of water among the contractors during years of temporary shortage. When there are water shortages due to drought or other temporary causes, allocation to agricultural users is reduced by up to 50 percent in a given year or a total

of 100 percent in any series of seven years before there is any reduction in municipal or industrial supplies. Any necessary further reductions are allocated among all users.

In 1990, the DWR implemented article 18 to reduce agricultural deliveries by 50 percent. Allocations to all users were reduced in 1991 and 1992. Disputes arose among agricultural and urban users and DWR over the proper application of article 18. Agricultural contractors argued that shortages were not due to the drought, and hence not subject to article 18, but rather were due to the failure to complete construction of the entire SWP. After months of negotiations, these parties agreed on a statement of 14 principles that came to be known as the Monterey Agreement. (*Planning & Conservation League v. Department of Water Resources, supra,* 83 Cal.App.4th at pp. 900-901.) The Monterey Agreement, which was first implemented in 1995, altered DWR's allocation of water to the SWP contractors. (*Id.* at p. 897.)

IV

Ecological Conditions

The expansion of agriculture, population increases and the side effects of the various water projects have taken a toll on the State's natural environment. The State has been called an "'epicenter of extinction,'" with at least 73 native species lost forever. (Carle, *supra*, at p. 144.) Transformation of the Central Valley has resulted in the loss of nearly all native grasses, riparian woodlands, and wetlands. (*Ibid.*) Only about 18 percent of the Central Valley's original salmon spawning

habitat remains. (*Id.* at p. 146.) "Upstream water development, depletion of natural flows and the export of water from the Delta have changed seasonal patterns of inflow, reduced annual outflow and muted the natural variability of flows into and through the Delta."

Seven hundred thousand acres of overflow and seasonally inundated land in the Delta have been converted to agricultural or urban uses. As discussed earlier, flood control activities and land development in the late 1800's and early 1900's created leveed Delta islands and the loss of wetlands, thereby reducing habitat for wetland wildlife species. Wetland losses in the Delta have also reduced the available area for biological conversion of nutrients necessary for wetland wildlife. Many of the remaining Delta stream sections "have been dredged or channelized to improve navigation, increase stream conveyance during periods of flood, and facilitate water export."

The construction of levees in the Delta has also resulted in the loss of sloughs, which "provide warmer, highly productive habitat for seasonal spawning, rearing, and foraging for many aquatic organisms, as well as important organic carbon productivity for all habitats of the Bay-Delta." Floodplains that once provided seasonal habitat for fish and wildlife as well as sediment and nutrients for flooded lands have been all but eliminated.

In addition to the conversion of natural habitat to agricultural, urban or flood control uses, the pumping of water from the Delta for use elsewhere has had a significant negative

impact on ecological functions. Tidal aquatic habitats that link wetlands with open-water habitats are used as foraging and resting places for shorebirds, wading birds, and waterfowl. Resident and migratory fish use such habitats for spawning, rearing, foraging, and escape cover. However, when natural freshwater outflows through the Bay-Delta decrease due to water exports, the tidal aquatic habitats are compressed and move upstream into areas unsuitable for nursery habitat and the creation of new tidal marshes. (Rieke, *supra*, at pp. 344-345.) The diversion of Bay-Delta water also harms the ecosystem by drawing fish into the pumps or into the vicinity of predators. (Fullerton, *Principles for Agreement on Bay/Delta Standards Between the State of California and the Federal Government* (1995) 2 Hastings West-Northwest J. of Environmental Law and Policy 103, 106-107 (hereafter Fullerton).) The Resources Agency has reported that more than 300 unscreened diversions on the upper Sacramento River alone cause up to 10 million juvenile salmonids to be pulled into the pumps annually, resulting in the loss of 100,000 adult fish.

Tests conducted during the 1980's and early 1990's revealed high levels of selenium, bromide salts, Diazinon (a popular residential pesticide), and other wastes that have been added to the Delta by industrial discharge, drainage runoff, and saltwater intrusion. "On a single day enough mercury for 31,000 thermometers washes down the Sacramento River into the [B]ay and [D]elta." (Hundley, *supra*, at pp. 398-399.)

Although agriculture sometimes provides important habitat for birds and other animals, it can also cause considerable environmental harm. (Ruhl, *Farms, Their Environmental Harms, and Environmental Law* (2000) 27 Ecology L.Q. 263, 275 (hereafter Ruhl).) Farms often pollute ground and surface water, replace wildlife habitat, erode soils, contribute sediment to lakes and rivers, and deplete water resources. (*Id.* at p. 266.) The Central Valley is home to two-thirds of the State's dairies, and their cows create a considerable amount of waste. Creeks in the Central Valley often contain 200 times more ammonia than the level poisonous for fish. And cows are not the only source of farming waste. Chicken manure contains twice as much phosphorous as human waste. (*Id.* at p. 286; see also Hundley, *supra*, at pp. 425-438.) "Overall, runoff of topsoil, silt, sediment, manure, nutrients, chemicals, and other pollutants from agricultural nonpoint sources is the leading source of impairment in the Nation's rivers, affecting 60% of the impaired river miles." (Ruhl, *supra*, at p. 290, fn. omitted.) In 1991, the SWRCB identified agriculture as the contributor of over 58 percent of the pollution in the State's rivers.

Due to the many adverse environmental impacts described above, two fish species, the winter run salmon and the Delta smelt, had been listed under the Endangered Species Act by the spring of 1993. Petitions to list other species had also been filed. These listings soon resulted in the imposition of restrictions on the operations of the CVP and SWP, thereby significantly affecting the amount of water exported from the

Delta. (Rieke, *supra*, at p. 345; Fullerton, *supra*, at p. 105; Carle, *supra*, at p. 188; Hundley, *supra*, at pp. 406-407.)

V

Related SWRCB Water Quality Proceedings

For many years, the SWRCB failed to adopt a water-quality plan adequate to stem the tide of declining fish populations in the Bay-Delta and its tributaries. The federal Environmental Protection Agency warned California officials that protective measures were required to satisfy federal Clean Water Act mandates. (Rieke, *supra*, at p. 345.) Disputes arose over impacts to the quality of Bay-Delta water caused by water transfers under the CVP and SWP. (Id. at pp. 345-346.)

In 1978, the SWRCB adopted a Water Quality Control Plan for the Delta and Suisun Marsh (Water Right Decision 1485 or D-1485), which was intended to take into account the effects of the water projects. (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at pp. 97-98.) In D-1485, the SWRCB established water quality standards for salinity control to protect beneficial uses and for the protection of fish and wildlife. In adopting standards to protect beneficial uses, the SWRCB employed a so-called "without project" level of protection, whereby water quality would be restored to the level that would have existed had the water projects never been constructed. (*Id.* at p. 115.)

D-1485 also modified the permits held by the USBOR and the DWR regarding the CVP and SWP respectively so as to compel the release of enough water into the Delta or the reduction in

exports from the Delta to maintain the water quality standards set in the water quality control plan. (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 119.)

D-1485 led to years of litigation that ended when the Court of Appeal decided that, while the use of a "without project" standard was appropriate, the SWRCB erred in failing to consider the impacts on environmental degradation from upstream diverters and polluters. (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at pp. 119-120.) The court explained: "[W]e think the imposition of without project standards upon the projects represents one reasonable method of achieving water quality control in the Delta. But in order to fulfill adequately its water quality planning obligations, we believe the Board cannot ignore other actions which could be taken to achieve Delta water quality, such as remedial actions to curtail excess diversions and pollution by other water users." (*Id.* at p. 120, italics omitted.) However, in light of scheduled SWRCB hearings to adopt new standards, the court concluded it was unnecessary to remand for revision of the earlier standards. (*Ibid*.)

In 1987, the SWRCB began hearings on the revision of water quality standards for the Bay-Delta estuary. (Littleworth & Garner, *supra*, at p. 131.) The next year, the SWRCB issued a report calling for a reduction in water exports from 6 or 7 million acre-feet to 5.5 million acre-feet and the adoption of stringent conservation measures. Northern California interests criticized the plan for failing to guarantee a specific volume

of water for flushing the Bay-Delta of pollutants. (Hundley, *supra*, at pp. 404-405.) San Joaquin Valley farmers and Southern California water agencies found fault with the report insisting that it was based on a false premise, that is, that water quality problems in the Bay-Delta are caused by a shortage of fresh water rather than the polluting practices of those in the areas surrounding the Delta. Based on this criticism, the SWRCB dropped any mention of limiting water exports from the report. However, when the SWRCB issued its final report in 1991, the Environmental Protection Agency rejected it as failing to provide enough water for the Bay-Delta. (*Id.* at pp. 405-406.)

In 1992, Congress passed the Central Valley Project Improvement Act (CVPIA), which elevated fish and wildlife protection and restoration to the status of a primary purpose of the CVP. The CVPIA set aside 800,000 acre-feet of CVP agricultural water for environmental and wildlife protection purposes, created a $50 million annual fund for fish and wildlife protection, and prohibited new water contracts. (Hundley, *supra*, at p. 406.) The CVPIA also authorized marketing of conserved water to the highest bidder. (Carle, *supra*, at pp. 160-161.) According to a later report of a senate select committee evaluating CALFED, "[e]nvironmentalists considered the [CVPIA] a victory," while "agricultural leaders considered it a disaster."

That same year, more than 100 State water agencies and 50 public interest groups signed a Memorandum of Understanding (MOU) regarding urban water conservation in California. The MOU

identified 16 Best Management Practices for urban water use and committed the signatories to certain implementation efforts between 1991 and 2001. The MOU established the California Urban Water Conservation Council to monitor progress in conservation. (Littleworth & Garner, *supra*, at p. 270.)

In 1993, the federal Environmental Protection Agency, National Marine Fisheries Service, Fish and Wildlife Service, and Bureau of Reclamation issued proposed water quality standards for the Bay-Delta estuary and designated critical habitat for two fish species, the Delta smelt and the splittail. These actions galvanized agricultural and urban water users, who developed a joint proposal to address Delta water problems. Their proposal included export limits and closure of diversions during critical periods. It also included non-flow measures, such as diversion screens, waste discharge controls, fishing controls, and habitat restoration. (Littleworth & Garner, *supra*, at p. 135.)

As noted earlier, the Owens Valley canal was extended north to Mono Lake in 1940. The following year, Mono Lake began shrinking due to Southern California diversions. (Carle, *supra*, at p. 183.) In 1983, the State Supreme Court issued a decision concluding that the public trust doctrine (discussed *infra*) limits the amount of water that can be taken out of Mono Lake. (See *National Audubon Society v. Superior Court*, *supra*, 33 Cal.3d 419.) By 1986, the lake was 37 feet lower than when diversions began. (Hundley, *supra*, at p. 343.) In 1994, the SWRCB issued Decision 1631, restricting diversions from Mono

Lake until the lake again reaches a level of 6,377 feet above sea level. (Littleworth & Garner, *supra*, at p. 102.)

In December 1994, the SWRCB issued a draft water quality plan for the Delta. In 1995, following public hearings, the SWRCB adopted a final Bay-Delta Water Quality Control Plan. It is appropriate to note at this point that we grant the San Joaquin River Group Authority's request for judicial notice as to exhibits 1 and 7 only. We deny the request as to all other exhibits, finding them to be irrelevant to this proceeding.

After adoption of the 1995 Bay-Delta Plan, the SWRCB conducted water rights proceedings to assign responsibility to water users to meet the flow-dependent objectives of the 1995 Bay-Delta Plan. As an alternative, the SWRCB invited water rights holders and other interested parties to reach settlement agreements on the allocation of responsibility to meet flow dependent objectives. One such agreement, the San Joaquin River Agreement, was presented to the SWRCB as a means of meeting April to May pulse flow objectives and October salmon attraction flows in the San Joaquin River. Having a proposed term of 12 years, the San Joaquin River Agreement is intended to provide a mechanism for conducting the Vernalis Adaptive Management Plan, an experiment "to determine the relative impact of flow in the San Joaquin River and exports in the Delta on Chinook salmon in the lower San Joaquin River." The Vernalis Adaptive Management Plan is "designed to assess the effect of export pumping at various specific river flows, which range from 3,200 [cubic feet per second] to 7,000 [cubic feet per second]. [Citation.]

Under the Vernalis Adaptive Management Plan experiment, the flows at Vernalis during the April-May pulse flow period could be lower than is required by the objectives in the 1995 Bay-Delta Plan, and the export pumping rates would be lower than the pumping rates allowed in the Plan." Pursuant to the San Joaquin River Agreement, some water rights holders would provide water for the Vernalis Adaptive Management Plan and other flows for which they will receive $3 million per year from the USBOR and $1 million from the DWR.

On December 29, 1999, SWRCB issued Decision No. 1641, which is currently the subject of another appeal pending in this Court. Among other things, Decision No. 1641 recognized the San Joaquin River Agreement and approved the Vernalis Adaptive Management Plan.

VI

CALFED

In June 1994, 18 state and federal agencies with management or regulatory authority over the Bay-Delta, including the California Resources Agency, SWRCB, DWR, California Department of Fish and Game, USBOR, Marine Fisheries Service, U.S. Fish and Wildlife Service, Army Corps of Engineers, and Environmental Protection Agency (collectively CALFED), signed an agreement (the Framework Agreement) to coordinate their activities in three areas: (1) operating the SWP and CVP to accommodate environmental mandates; (2) establishing water quality standards; and (3) developing a long-term strategy for managing the Delta. (Rieke, *supra*, at p. 362.)

In December 1994, the CALFED agencies signed a Statement of Principles for the Bay-Delta Standards (the Bay-Delta Accord) setting interim Bay-Delta water quality standards and water project constraints for the following three years. These standards were later extended until no later than September 15, 2000. (Fullerton, *supra*, at p. 103; Littleworth & Garner, *supra*, at p. 136.) To protect water quality, the Bay-Delta Accord called for additional fresh water flows through the Delta of 0.4 million acre-feet in years of normal rainfall and 1.1 million acre-feet in critically dry years. To provide a measure of protection for water supplies to beneficial users, the Bay-Delta Accord provided that any additional water needs arising from further listings under the Endangered Species Act would be met by water purchases financed by the federal government. (Rieke, *supra*, at p. 348.)

The Bay-Delta Accord also included a commitment to develop and fund nonflow-related ecosystem restoration projects, commonly referred to as "Category III" projects, to address "unscreened water diversions, waste discharges, water pollution prevention, fishery impacts due to harvest and poaching, land-derived salts, exotic species, fish barriers, channel alterations, riparian wetland loss, and other causes of estuarine habitat degradation." The Bay-Delta Accord incorporated salinity standards, significant reductions in Delta exports during the critical spring period, increases in San Joaquin River flows, reductions in export pumping, restrictions on the take of endangered species, real time operation of Delta

pumps so that pumping is reduced when necessary for environmental protection but increased when environmentally safe, and a $180 million fund to improve habitat conditions through upstream restoration. (Fullerton, *supra*, at p. 104.)

As a direct result of the Framework Agreement and the Bay-Delta Accord, the CALFED agencies launched the CALFED Program, "an unprecedented effort to build a framework for managing California's most precious natural resource: water." (See Rieke, *supra*, at p. 362.) The Program is divided into three phases. Phase I is concerned with identifying Bay-Delta problems, developing a mission statement and guiding principles, and devising preliminary solution alternatives. During phase II, a preferred program alternative is identified, environmental documents created, and a plan for the first seven years of development devised. Phase III involves implementation of the Program.

Phase I began in May 1995 with a series of public workshops to define the problems of the Bay-Delta and to devise potential alternative solutions. These efforts resulted in the development of a mission statement, solution principles, and objectives. The Program's mission statement reads as follows: "The mission of the CALFED Bay-Delta Program is to develop a long-term comprehensive plan that will restore ecological health and improve water management for beneficial uses of the Bay-Delta system." Consistent with this mission statement, CALFED identified the following primary objectives for the Program:

(1) “*Ecosystem Quality*--Improve and increase aquatic and terrestrial habitats and improve ecological functions in the Bay-Delta to support sustainable populations of diverse and valuable plant and animal species.”

(2) “*Water Supply*--Reduce the mismatch between Bay-Delta water supplies and the current and projected beneficial uses dependent on the Bay-Delta system.”

(3) “*Water Quality*--Provide good water quality for all beneficial uses.”

(4) “*Vulnerability of Delta Functions*--Reduce the risk to land use and associated economic activities, water supply, infrastructure, and the ecosystem from catastrophic breaching of Delta levees.”

Fifty action categories and hundreds of individual actions were initially devised to achieve the Program’s objectives. The action categories became the building blocks for identifying alternatives, with each alternative being a combination of action categories. In order to narrow the alternatives, CALFED defined approaches to resolve four “critical conflicts” among beneficial users: fisheries and diversions; habitat and land use/flood protection; water supply availability and beneficial uses; and water quality and land use. Thirty-two approaches were identified for resolving these conflicts, resulting in a list of 100 alternative approaches. These 100 alternatives were eventually narrowed to 10.

In late 1995 and early 1996, the CALFED agencies executed a “Memorandum of Understanding For Preparation of Environmental

Impact Statement/Report" to coordinate preparation of a single environmental document to satisfy the requirements of both CEQA and National Environmental Policy Act. (*Laub v. U.S. Dept. of Interior* (9th Cir. 2003) 342 F.3d 1080, 1083.)

In 1996, the electorate passed Proposition 204, the Safe, Clean, Reliable Water Supply Act, which committed nearly $1 billion to water conservation and water quality efforts. Under the terms of the Bay-Delta Accord, CALFED has begun the review and funding of various category III projects using Proposition 204 funds, stakeholder contributions, CVPIA restoration funds, and federal appropriations.

In April 1996, CALFED conducted eight public meetings, one workshop and a meeting of the Bay-Delta Advisory Council to discuss the 10 alternatives. The Bay-Delta Advisory Council has 26 members representing the business, environmental, and agricultural sectors and stakeholders of the water community. Based on comments received and further analysis, CALFED staff concluded that four "common" programs (water quality, levee system integrity, ecosystem quality, and water use efficiency) must be combined with two variable components (storage and conveyance) in order to satisfy the Program's objectives. In other words, all Program alternatives would be nearly identical with respect to everything except water storage and conveyance.

Phase I of the Program was completed in August 1996. In phase II, two additional "common" components were added to the alternatives. A water transfer component was spun off of the water use efficiency component and a watershed component was

created out of the water quality component. Thus, six common components were combined with two variable components.

The common components coincide with six programs designed in conjunction with the CALFED Program: the Ecosystem Restoration Program, the Water Quality Program, the Water Use Efficiency Program, the Water Transfer Program, the Watershed Program, and the Levee System Integrity Program. Each of these programs is itself a complex set of programmatic actions intended to meet one or more of the goals of the CALFED Program.

The Ecosystem Restoration Program is the most extensive of the components. The plan for the Ecosystem Restoration Program identifies general measures intended to restore, rehabilitate or maintain ecological processes, habitats and species. Representative measures include: "Protecting, restoring, and managing diverse habitat types representative of the Bay-Delta and its watershed"; "Acquiring water from sources throughout the Bay-Delta's watershed to provide flows and habitat conditions for fishery protection and recovery"; "Restoring critical in-stream and channel-forming flows in Bay-Delta tributaries"; "Reconnecting Bay-Delta tributaries with their floodplains through construction of setback levees, the acquisition of flood easements, and the construction and management of flood bypasses for both habitat restoration and flood protection"; and "Modifying or eliminating fish passage barriers, including removing dams, constructing fish ladders, and constructing fish screens that use the best available technology."

The PEIS/R explains that the "Ecosystem Restoration Program would result in additional water use in the Delta due to new flow targets and conversion of land use from agriculture to wetlands and marshes." The Ecosystem Restoration Program has a target of from 353,933 to 388,933 acres of agricultural land to be seasonally flooded or cooperatively managed to provide wildlife habitat.

The Ecosystem Restoration Program identifies 19 plant or animal species for which the goal of the Program is recovery, i.e., return to the level required for removal from the list of endangered or threatened species. Twenty-five other species are targeted for contribution to recovery. These are species with habitat ranges outside the Program area or for which CALFED actions can have only a limited effect. Other species are designated for maintenance, enhancement or other actions.

The Ecosystem Restoration Program identifies general measures that may be undertaken to achieve its species recovery goals, including: "Provid[ing] sufficient high flows during spring (March-May) to sustain high-flow dependent ecological functions"; "Maintain[ing] sufficient year round base flows to sustain aquatic streamflow dependent ecological processes, habitat, and species"; and "Provid[ing] sufficient flow during the first yearly significant rain event to sustain habitat and species dependent on such flow." Other actions identified for the Ecosystem Restoration Program include: "Increasing coldwater releases from Whiskeytown Lake to Clear Creek to allow restoration of the habitat along this 18-mile stream segment for

salmon and steelhead spawning and rearing"; "Developing a long-term agreement with Pacific Gas and Electric Company (to provide appropriate compensation for energy losses) to monitor temperatures and provide bypass flows in the lower North Fork and South Fork segments of Battle Creek to maintain suitable temperatures for holding, spawning, and rearing habitat for spring-run and winter-run [C]hinook salmon and steelhead"; and "Increasing Feather River flows in the 'low-flow' channel to a maximum of 2,500 cubic feet per second and reducing the flows through Thermalito Forebay and Afterbay released to the Feather River." According to the Ecosystem Restoration Program's Strategic Plan for Ecosystem Restoration, "the [Ecosystem Restoration Program] identifies over 600 programmatic actions that, after being refined and prioritized, will be implemented throughout the Bay-Delta ecosystem and near—shore ocean environment over the 30 or more year implementation period of the Program."

The goal of the Water Quality Program component is "to provide good water quality for environmental, agricultural, drinking water, industrial, and recreational beneficial uses." The PEIS/R identifies a number of general actions associated with water quality improvement, including: "Reducing the loads and impacts of bromide, total organic carbon (TOC), pathogens, nutrients, salinity, and turbidity" by "source reduction, alternative sources of water, treatment, storage and, if necessary, conveyance improvements"; "Reducing the impacts of pesticides through (1) development and implementation of best

management practices . . . for both urban and agricultural uses; and (2) support of pesticide studies for regulatory agencies, while providing education about and assistance with implementation of control strategies for regulated pesticide users"; "Reducing mercury levels in rivers and the estuary by source control at inactive and abandoned mines"; and controlling salinity in the Delta by "(1) using storage capacity to maintain Delta outflow and to adjust the timing of outflow, (2) managing exports, and (3) making modifications to the Delta and [San Francisco] Bay."

The plan for the Water Quality Program identifies a number of programmatic actions designed to improve existing adverse conditions of Bay-Delta estuary water. In order to improve dissolved oxygen concentration in affected areas of the Bay-Delta estuary, the plan lists several priority actions, including: "Encourage continued removal of oxygen-depleted substances from the [Stockton Regional Wastewater Control Facility], the Port of Stockton, and other National Pollution Discharge Elimination System (NPDES) and Waste Discharge Requirement (WDR) permittees"; and "Provide technical and financial assistance and regulatory incentives for implementing [best management practices] to control oxygen depletion." To improve drinking water, the plan identifies a number of potential actions, including: For agricultural drainage, "[t]reat drainage, relocate discharge points, release drainage during ebb tidal flows, implement [best management practices], and modify land management practices to reduce loadings of

[total dissolved solids], nutrients, [total organic carbon], salinity, and selenium. . . .” For urban runoff, “[t]reat drainage, relocate outfalls, encourage a watershed-based approach to permitting that evaluates cumulative impacts by using methods such as [total maximum daily load] of pollutants that affect drinking water quality.”

The Water Quality Program plan also discusses the interrelationship between the water quality and ecosystem restoration components of CALFED. One of the priority actions identified for the Bay-Delta region is to manage ecosystem restoration projects so as to minimize adverse impacts to drinking water. The Water Quality Program plan explains: “CALFED ecosystem restoration and other habitat restoration projects may cause adverse impacts on drinking water quality, particularly with regard to additional production of [total organic carbon] from natural and created wetlands. CALFED should locate habitat restoration projects to avoid and reduce [total organic carbon] pollution at intakes. Further research is warranted on this issue. Substantial uncertainty exists concerning [total organic carbon] production and possible loadings from wetlands restoration, particularly with respect to production of more reactive [total organic carbon] fractions. Proposals to evaluate these impacts have been developed by the U.S. Geological Survey (USGS) and DWR. CALFED should promote or implement these proposals.”

The Water Use Efficiency Program component is designed to accelerate the implementation of cost-effective actions to

conserve and recycle water throughout the State in order to increase water supplies available for beneficial uses. The primary aspects of this component are: "1) support ongoing urban and agricultural sector processes for certifying and endorsing local agency implementation of cost-effective efficiency measures; 2) provide technical and planning assistance to local agencies and districts developing and implementing water use efficiency measures; and 3) institute a competitive grant/loan incentive program to encourage water use efficiency investments in the urban and agricultural sectors." According to the PEIS/R: "The Water Use Efficiency Program includes actions to assure efficient use of existing and any new water supplies developed by the Program. Efficiency actions can alter the pattern of water diversions and reduce the magnitude of diversions, providing ecosystem benefits. Efficiency actions also can result in reduced discharge of effluent or drainage, improving water quality."

The PEIS/R states that the Water Use Efficiency Program "has identified potential recovery of currently irrecoverable water losses of over 1.4 million acre-feet annually by 2020." However, the Water Use Efficiency Program makes no attempt at the programmatic level to allocate the costs associated with the various efficiency measures or even to determine if those measures are cost-effective.

The Water Transfer Program component is a framework of "actions, policies, and processes that, collectively, will facilitate water transfers and the further development of a

statewide water transfer market." Actions proposed include: "Establishing a California Water Transfer Information Clearinghouse to provide a public informational role"; "Streamlining the water transfer approval process"; and "Improving the accessibility of state and federal conveyance and storage facilities for the transport of approved water transfers."

In order to provide flexibility in achieving environmental goals while providing water reliability, the Water Transfer Program will use an EWA to bank excess water when available. The EWA will provide water for the protection and recovery of fish beyond that which is available through existing regulatory actions. It will benefit water users by providing additional water for fish without the necessity of reducing exports. "EWA assets will be managed by the federal and state fishery agencies (U.S. Fish and Wildlife Service, National Marine Fisheries Service, and California Department of Fish and Game) in coordination with project operators and stakeholders, through the CALFED Operations Group."

To provide regulatory stability for the benefit of those dependent on export water, the Water Transfer Program contains a commitment that, for the first four years of Program implementation, there will be no reduction in CVP or SWP deliveries beyond those mandated by existing regulations. "This commitment will be based on the availability of three tiers of assets. Tier 1 is baseline environmental protection, provided by existing regulation and operational flexibility. The

regulatory baseline consists of the biological opinions on winter-run Chinook salmon and delta smelt, 1995 Delta Water Quality Control Plan, and 800,000 acre-feet . . . of CVP yield pursuant to CVPIA Section 3406(b)(2). . . . [¶] Tier 2 consists of the assets in the EWA combined with the benefits of the Ecosystem Restoration Program and is an insurance mechanism that will allow water to be provided for fish when needed without reducing deliveries to water users. . . . Tier 3 is based upon the commitment and ability of the CALFED agencies to make additional water available should it be needed. . . . Tier 3 assets may include additional purchases from willing sellers or consensual 'borrowing' of water beyond the collateral-based borrowing which is allowed as part of the EWA (Tier 2)."

The Watershed Program component is designed to provide financial and technical assistance to local watershed programs. It has two parts: "to provide assistance--both financial and technical--for local watershed stewardship," and "to promote collaboration and integration among watershed efforts." The Watershed Program is composed of five primary elements: "Coordination and assistance," "Adaptive management and monitoring," "Education and outreach," "Integration with other CALFED programs," and "Watershed processes and relationships." The Watershed Program supports local watershed activities that are beneficial to the Bay-Delta by providing guiding principles, such as promoting activities that address multiple ecosystem issues and possess sufficient flexibility to permit adaptive management.

The final common component of the CALFED Program is the Levee System Integrity Program. That component focuses on improving levee stability and channel integrity. Levee system improvements are integrated with other Program components by improving habitat quality and, at the same time, improving water supply reliability and protecting water quality. Regarding land conversion, the PEIS/R discloses that levee restoration efforts will cause both temporary and permanent land disturbance. "Land disturbed temporarily during construction would be restored through revegetation and likely would return to preconstruction conditions. . . . Other land would be permanently affected by the larger footprint of the new levees. . . . In total, an estimated range of 34,000-35,000 acres could be permanently affected by the Levee System Integrity Program."

The remaining two components of the alternatives formulated for the CALFED Program are storage and conveyance. Storage includes both ground and surface water storage. Up to 6.0 million acre-feet of new storage is considered for the CALFED Program, with potential sites on Sacramento and San Joaquin River tributaries and in-Delta storage at various island sites. The conveyance component refers to the method by which water will be transported from north to south of the Delta.

Twelve alternatives were identified during phase II of the Program that varied with respect to water conveyance and storage only. These alternatives were evaluated in a draft PEIS/R issued in March 1998.

Also in 1998, the State Legislature formed a select committee to review the progress of the CALFED Program. The committee issued a report on September 24, 1998. In the report, the committee pointed out that DWR predicts water shortages for the Twenty-First Century, and water needs will be exacerbated by CALFED's proposal to convert farmland to wetlands. The committee also complained about a perceived willingness by CALFED to accede to political pressure. The report states: "CALFED has created a tenuous future for itself by bending to perceived political winds. The Program's March 1998 EIS/EIR listed three alternatives that included a variety of scientific and technical solutions to Bay-Delta problems. When public uproar surfaced over the possibility of an environmentally unpopular choice, CALFED shifted to 'staged implementation.' The change has generated another political wind shift, blowing in from Southern California. CALFED now finds itself moving at a frantic pace to announce a preferred alternative, a move that seems willing to sacrifice science for political expediency." The committee chided CALFED that the conversion of farmland under the Program in order to increase fish and wildlife habitat violates CALFED's sixth principle that Program solutions should not involve a redirection of significant negative impacts. Finally, the committee criticized CALFED's reluctance to pursue storage options in a meaningful way.

After public comment on the draft PEIS/R, the 12 alternatives were narrowed to four, which were included in the final PEIS/R issued in July 2000. The four Program alternatives

vary only with respect to the method of conveyance of water from the north to the south of the Delta and the optional use of new storage. Alternative 1 retains the current configuration of Delta conveyance channels with some improvements in the south Delta. Alternative 2 adds improvements in the north Delta to the changes proposed in alternative 1 and a 10,000 cubic foot per second diversion facility on the Sacramento River. Alternative 3 adds to the changes in alternative 2 a channel connecting the Sacramento River north of the Delta to the SWP and CVP export facilities in the south Delta. The fourth alternative, the preferred program alternative, adds elements similar to those in alternatives 1 and 2 with a diversion facility on the Sacramento River and a channel to the Mokelumne River considerably smaller than that proposed in alternative 2.

On August 28, 2000, the Resources Agency certified the final PEIS/R and CALFED adopted the ROD for the Program. Among other things, CALFED adopted the preferred program alternative identified in the PEIS/R. Attached to the ROD were two agreements reached by the CALFED agencies, an "Implementation Memorandum of Understanding" and an "Environmental Water Account Operating Principles Agreement." (*Laub v. U.S. Dept. of Interior*, *supra*, 342 F.3d at p. 1083.)

VII

History of the Current Legal Proceedings

On September 27, 2000, RCRC, CDWA, R. C. Farms, Inc., Zuckerman-Mandeville, Inc., Ruddi Mussi and the South Delta Water Agency (collectively the RCRC Petitioners) filed a

petition in the Sacramento County Superior Court against the State, the State Resources Agency, the California Environmental Protection Agency, and the respective secretaries of those agencies (*Regional Council of Rural Counties v. State of California* (Super. Ct. Sacramento County, 2000, No. 00CS01331) (hereafter *RCRC v. State*). Named as real parties in interest were DWR, the United States of America, and various heads of federal agencies, including Bruce Babbitt, the then Secretary of the Department of the Interior, and Carol Browner, the then head of the Environmental Protection Agency.

RCRC is a non-profit corporation providing representation for 28 rural California counties encompassing approximately 40 percent of the State's land area. CDWA is a political subdivision of the State encompassing approximately 120,000 acres of Delta land in the western portion of San Joaquin County that is primarily dedicated to agriculture. CDWA is empowered to protect the water rights of landowners within its jurisdiction. South Delta Water Agency is a political subdivision of the State encompassing approximately 148,000 acres of south Delta land primarily dedicated to agriculture. The general purpose of South Delta Water Agency is to protect the water supply for lands within its jurisdiction from intrusion of ocean salinity and to assure a dependable supply of water. The remaining RCRC Petitioners are owners of agricultural land in the Delta.

As amended, the petition contained two causes of action: one alleging non-compliance with CEQA and the other purporting

to state a claim for reverse validation. In their CEQA claim, the RCRC Petitioners alleged a plethora of deficiencies in the PEIS/R as well as other defects in the environmental review process. In their reverse validation claim, the RCRC Petitioners alleged the ROD contains a number of contractual commitments of State funds that are invalid for many reasons, including the absence of legislative authorization and the unauthorized gift of State assets. They also alleged the ROD's commitment of no decrease in exports and an increase in water exported to CVP water contractors violates State law.

On December 12, 2000, the trial court granted a motion to intervene filed by the San Joaquin River Group Authority, the San Joaquin River Exchange Contractors Water Authority, and various irrigation districts located south of the Delta.

Answers were filed on behalf of the State Water Contractors, a mutual benefit corporation representing the interests of 27 public agencies in the San Francisco Bay Area, the Central Valley, and Southern California, the Santa Clara Valley Water District, a member of the State Water Contractors, the Westlands Water District, a holder of water rights in Fresno and Kings Counties, San Joaquin County, the San Joaquin County Flood Control and Water Conservation District, and Metropolitan.

At about the same time the RCRC Petitioners initiated *RCRC v. State*, the Municipal Water District of Orange County filed a separate petition in Los Angeles County Superior Court alleging that the PEIS/R and ROD violate CEQA. (*Municipal Water District of Orange County v. California Resources Agency* (Super. Ct. Los

Angeles County, 2000, No. BC 237574) (hereafter *Municipal Water District v. Resources Agency*).) The real parties in interest named in this proceeding were various State agencies, including the California Environmental Protection Agency, the California Department of Fish and Game, and the California Department of Food and Agriculture (CDFA). The Petition alleged, among other things, the CALFED Program, if unmodified, "will significantly and detrimentally impact the water supply reliability, quality and conveyance of water" from the Delta to Southern California.

On September 28, 2000, the Farm Bureau, Don Laub, Debbie Jacobsen, and Ted Sheely (collectively the Farm Bureau Petitioners) filed suit in federal district court against CALFED and various agency officials challenging the PEIS/R under CEQA and National Environmental Policy Act. The Farm Bureau "is a non-governmental, non-profit, voluntary membership California corporation" whose purpose is "to work for the protection of agriculture and the rural environment, and to find solutions to the problems of the farm, the farm home and the rural community throughout the Central Valley and the State. Its members consist of 53 county Farm Bureaus and, through them, more than 94,000 individual family members, including over 20,000 members within the Central Valley counties of Calaveras, Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced, Stanislaus, Tulare and Tuolumne." (*Laub v. U.S. Dept. of Interior*, *supra*, 342 F.3d at p. 1086.) Laub and Jacobsen are owners and operators of approximately 1,040 acres of agricultural land on the east side of the San Joaquin Valley and are members of the Fresno County

Farm Bureau, which is a member of the State Farm Bureau. Sheely owns and/or farms more than 1,000 acres of land in Fresno and Kings Counties and is a member of the Fresno County Farm Bureau.

The federal district court dismissed the CEQA claims against the State defendants, but retained jurisdiction over the National Environmental Policy Act claims against all defendants. (*Laub v. U.S. Dept. of Interior*, *supra*, 342 F.3d at p. 1084.) The CEQA claims were refiled in State court in Fresno County on December 19, 2000, against the State defendants only. (*Laub v. Davis* (Super. Ct. Fresno County, 2000, No. 00CE0511667) (hereafter *Laub v. Davis*).)

On April 2, 2001, the foregoing matters were coordinated in Sacramento County under the title Bay-Delta Programmatic EIR Cases, Judicial Council Coordination Proceeding No. 4152 (the Bay-Delta Coordinated Proceeding). The Municipal Water District of Orange County later dismissed its petition. On May 14, 2001, the Honorable Patrica Esgro was appointed coordination judge for the Bay-Delta Coordinated Proceeding.

On August 3, 2001, the trial court granted The Bay Institute's motion to intervene in *RCRC v. State*. The Bay Institute has over 2,500 members and is dedicated to the protection and restoration of the ecosystems in the San Francisco Bay, the Delta, and the rivers, streams, and watersheds tributary to them.

On August 13, 2001, Metropolitan moved to intervene in *Laub v. Davis*. Also on August 13, the State demurred to the second cause of action (reverse validation) of the amended petition in

RCRC v. State. The trial court sustained the State's demurrers without leave to amend, explaining that a validation proceeding is not a proper vehicle for scrutinizing the CALFED Program.

On January 18, 2002, the RCRC Petitioners moved to amend their first amended petition. In addition to the CEQA claim, the proposed amendment contained three new causes of action: (1) a taxpayer claim alleging improper transfer of water to private parties; (2) a mandamus claim seeking to protect the petitioners' water rights; and (3) a declaratory relief claim seeking to dictate the rules under which CALFED may operate. The court granted the motion on the condition that the new causes of action are severed and trail the CEQA claim.

On March 14, 2002, the State moved for judgment on the pleadings in *Laub v. Davis*, asserting the CEQA claim is barred by the applicable statute of limitations. The State also demurred to the first amendment to the first amended petition in *RCRC v. State*, asserting the claims in the non-CEQA causes of action are not ripe for adjudication.

The trial court denied the State's motion for judgment on the pleadings in *Laub v. Davis*, concluding the claims were equitably tolled during the pendency of the federal court action. On July 25, 2002, the court sustained with leave to amend the State's demurrers to the non-CEQA claims in the first amendment to the first amended petition in *RCRC v. State*.

On August 26, 2002, the RCRC Petitioners filed a second amendment to the first amended petition in *RCRC v. State*, containing the same causes of action but with additional detail.

On October 18, 2002, the RCRC Petitioners filed an amendment to their petition naming the following Doe respondents: Patrick Wright, the Director of CALFED; the DWR; Thomas Hannigan, the Director of the DWR; the California Department of Fish and Game; and Robert Hight, the Director of the California Department of Fish and Game. The RCRC Petitioners also named a number of Doe real parties in interest, including the United States Department of Land Management, the United States Geological Survey, the City of Sacramento, the City and County of San Francisco, and the Natural Heritage Institute.

On November 4, 2002, the State Water Contractors, Metropolitan and others moved to strike or dismiss the State water law allegations contained in the CEQA claim of *RCRC v. State*. The trial court granted the motion, concluding the water law claims "are premature, outside the scope of the CEQA process, and not supported by the administrative record."

On January 31, 2003, the State moved for judgment on the pleadings on the non-CEQA claims in the second amendment. The Kern County Water Agency similarly filed demurrers and a motion to strike those claims. On April 10, 2003, the trial court ruled that nearly all of the matters added to the petition in the second amendment concerned events occurring after the original petition was filed and, therefore, required a supplemental pleading rather than an amended pleading. A supplemental pleading requires leave of the court, for which the RCRC Petitioners failed to ask. The court further ruled that,

if leave had been sought, it would have been denied because the supplemental pleading would have complicated the CEQA matter and there was no prejudice to the RCRC Petitioners in being forced to file a new petition.

On April 1, 2003, the trial court ruled on the CEQA claims in the Bay-Delta Coordinated Proceeding, rejecting all of the petitioners' arguments and concluding the PEIS/R satisfies the requirements of CEQA. Judgment was thereafter entered against the Farm Bureau Petitioners in *Laub v. Davis* and against the RCRC Petitioners in *RCRC v. State*. On June 6, 2003, the Laub Petitioners filed a notice of appeal. The State filed a notice of cross-appeal. On July 17, 2003, the RCRC Petitioners filed a notice of appeal. We ordered that these appeals be consolidated. On April 1, 2004, the State moved to dismiss its cross-appeal. We grant the State's motion to dismiss.

DISCUSSION

I

CEQA Claims

A. Generally

We first address appellants' CEQA claims. Appellants contend the PEIS/R and the process leading up to adoption of the ROD violated CEQA for a number of reasons. Among other things, they argue the PEIS/R does not adequately address impacts of the CALFED Program on agriculture and agricultural water in the State. They further argue the PEIS/R's treatment of alternatives and mitigation measures was deficient and CALFED

did not provide responses to all public comments received during the environmental review process. Finally, appellants argue the PEIS/R should have been recirculated after significant aspects of the Program were revealed late in the environmental review process. We shall address each of these arguments in turn, after first discussing the general requirements of CEQA.

A lead agency must prepare an environmental impact report (EIR) on any project it intends to carry out or approve "that may have a significant effect on the environment." (Pub. Resources Code, § 21100, subd. (a).) An EIR is an informational document, the purpose of which "is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided." (Pub. Resources Code, § 21002.1, subd. (a).)

"The [EIR] is '"the heart of CEQA"' and the 'environmental "alarm bell" whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.' [Citation.] It is intended, further, '"to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action."' [Citation.] 'Because the EIR must be certified or rejected by public officials, it is a document of accountability. If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond

accordingly to action with which it disagrees . . . . The EIR process protects not only the environment but also informed self-government.'" (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1229.)

In order to perform its informational role, the EIR must contain facts and analysis, not the agency's bare conclusions or opinions. "This requirement enables the decision-makers and the public to make an 'independent, reasoned judgment' about a proposed project." (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.)

While an adequate EIR must contain sufficient information to enable decision makers to make intelligent choices that take account of environmental consequences (Cal. Code Regs., tit. 14, § 15151; hereafter Guidelines), it need only "reflect a good faith effort at full disclosure; [CEQA] does not mandate perfection, nor does it require an analysis to be exhaustive." (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26.)

CEQA is not concerned with the ultimate decision reached by the agency on a proposed project, only the content of the EIR. Whether right or wrong, the ultimate decision of the agency "is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829 (hereafter *Santiago County Water Dist.*).)

The present matter involves a program EIR. CEQA applies to a broad range of projects, from the approval of a single use permit to approval of a general plan. (Guidelines, § 15378, subd. (a)(1).) To accommodate these different types of projects, CEQA provides different types of EIR's. (*Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 527.) A "program EIR" is one "which may be prepared on a series of actions that can be characterized as one large project" and are related in specified ways, such as "individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways." (Guidelines, § 15168, subd. (a)(4).) "A program EIR is designed to '(1) Provide an occasion for a more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action, [¶] (2) Ensure consideration of cumulative impacts that might be slighted in a case-by-case analysis, [¶] (3) Avoid duplicative reconsideration of basic policy considerations, [¶] (4) Allow the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts, [and] [¶] (5) Allow reduction in paperwork.' (Guidelines, § 15168, subd. (b).)" (*Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency*, *supra*, at p. 531.)

For projects consisting of a policy, plan, program or ordinance, CEQA encourages tiering of EIR's. "'Tiering' is 'the

coverage of general matters and environmental effects in an [EIR] prepared for a policy, plan, program or ordinance followed by narrower or site-specific [EIR's] which incorporate by reference the discussion in any prior [EIR] and which concentrate on the environmental effects which (a) are capable of being mitigated, or (b) were not analyzed as significant effects on the environment in the prior [EIR].' (Pub. Resources Code, § 21068.5.)" (*Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency*, *supra*, 82 Cal.App.4th at p. 528.) Through Public Resources Code section 21093, the Legislature has encouraged tiering of EIR's "when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous environmental impact reports." (Pub. Resources Code, § 21093.)

B. The PEIS/R Analysis of Program Impacts on the Environment

1. Impacts on Agriculture

a. Introduction

Appellants take issue with the PEIS/R's analysis of Program impacts on agricultural resources. They argue the analysis does not adequately address either the direct or the indirect impacts of converting agricultural resources to other uses.

Certain general principles relating to EIR's and certain observations regarding the nature of appellants' arguments and

respondents' replies are necessary to an understanding of the manner in which we resolve this particular issue on the merits.

An EIR must set forth all significant effects of a project on the surrounding environment. (Pub. Resources Code, § 21100, subd. (b)(1).) A significant effect on the environment is a "substantial, or potentially substantial, adverse change[] in physical conditions which exist within the area" of the project. (Pub. Resources Code, § 21100, subd. (d).) To be significant, an impact must be both substantial and adverse. (Guidelines, § 15382; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266.)

In order to assess a project's impacts, an EIR must first place the project in its proper perspective by describing the existing environment. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.) The existing environment "will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." (Guidelines, § 15125, subd. (a); see *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 86.) It encompasses "the physical conditions which exist within the area which will be affected by a proposed project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. . . . The 'environment' includes both natural and man-made conditions." (Guidelines, § 15360.) If the description of the existing environment of a project is inaccurate or incomplete, the analysis that follows

will be flawed and the EIR does not comply with CEQA. (*Cadiz Land Co. v. Rail Cycle*, *supra*, at p. 87.)

b. Impacts Arising from the Conversion of Agricultural Land

Turning to the arguments, the Farm Bureau contends one aspect of the existing environment that must be taken into consideration in assessing impacts is the fact that land proposed for conversion to other uses under the Program is currently in agriculture production. RCRC similarly argues agricultural resources are "components of the physical environment that must be evaluated in an EIR." RCRC further argues the PEIS/R "considered *only* the social and economic effects flowing from the conversion of agricultural lands" and not the land conversion itself.

Although the arguments of the Farm Bureau and RCRC appear to be the same, they contain one significant difference. In summarizing its argument, RCRC states: "[T]here can be no legitimate dispute that the conversion of agricultural resources--which can result in loss of habitat, dust pollution, and reduction in groundwater recharge-–presents potentially significant *environmental* impacts that must be analyzed specifically in an EIR." In other words, the conversion of agricultural land to other uses may have a significant environmental impact because such conversion may lead to the loss of habitat or have other environmentally harmful consequences. This argument is merely a restatement of the

basic CEQA requirement that an EIR discuss the adverse environmental impacts of a project. While this is not subject to dispute, it hardly assists RCRC. Adverse environmental impacts must be discussed whether or not the project involves the conversion of land currently in agricultural production.

The Farm Bureau's argument is not the same. The Farm Bureau asserts the conversion of agricultural land to other uses, in and of itself, is a potentially adverse environmental impact, whether or not there is a corresponding physical change in the environment.

Metropolitan argues appellants are seeking a per se rule under which the amount of land currently used for agricultural purposes is a baseline condition and any reduction in that amount will always be a significant adverse environmental impact. Metropolitan is only partly correct. Appellants do contend the current amount of agricultural land is the baseline from which environmental impacts must be assessed. However, appellants do not seek a per se rule. They argue the fact that agricultural land converted in a project must be taken into consideration, along with other factors, in determining whether there is a significant environmental impact.

The Nature Conservancy requests we take judicial notice of the 2003 Annual Report of the California Bay-Delta Authority, the entity established on January 1, 2003 to oversee the CALFED Program. (See Wat. Code, § 79410 et seq.) The Nature Conservancy asserts this report shows that 87 percent of the land that had been protected for ecosystem purposes under the

CALFED Program up to the date of the report "'has remained as privately owned agricultural land.'" The implication the Nature Conservancy seeks from this report is that appellants' concerns over the conversion of agricultural land are unjustifiably exaggerated.

The Nature Conservancy argues the annual report is an official act of a governmental agency subject to judicial notice under Evidence Code section 452, subdivision (c). This section permits judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." "Official acts include records, reports and orders of administrative agencies." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518.)

While we can take judicial notice of an official report of an administrative agency, this does not mean we can take judicial notice of all the facts stated therein. "Judicial notice of a matter means that the court will recognize the existence of that matter of law or fact without the need for formal proof and generally means that the court will treat the matter as true." (2 Jefferson, Cal. Evidence Benchbook (3d ed. 2005) Judicial Notice, § 47.8, p. 1123.) An official report may be subject to judicial notice. However, the most it may prove is that the report was issued and the author made the statements or reached the conclusions stated therein. "The truth of any factual matters that might be deduced from official records is not the proper subject of judicial notice." (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91

Cal.App.4th 875, 885.) Because the Nature Conservancy is attempting to establish the truth of statements made in the annual report, not the fact that the report was issued or that the statements were made, its request for judicial notice is denied. We consider its argument on this point no further.

Turning then to the essence of the Farm Bureau's arguments, in support of its contention that the PEIS/R was required to consider the conversion and, thus, the loss, of agricultural land as a potentially significant impact in and of itself, the Farm Bureau cites Public Resources Code section 21095. It reads in part: "(a) The Resources Agency, in consultation with the Office of Planning and Research, shall develop an amendment to Appendix G of the state guidelines, for adoption pursuant to Section 21083, to provide lead agencies an optional methodology to ensure that significant effects on the environment of agricultural land conversions are quantitatively and consistently considered in the environmental review process." (Pub. Resources Code, § 21095, subd. (a).) The Farm Bureau argues this section, along with related provisions, demonstrates a legislative intent to protect the agricultural nature and productivity of land, not just its physical attributes.

The trial court disagreed, explaining: Public Resources Code section 21095, subdivision (a) "discusses methodologies 'to ensure that significant effects on the *environment* of agricultural land conversions are quantitatively and consistently considered' in the EIR process. The emphasis is on the environmental effects on *land* that happens to be

agricultural. The Court believes that CEQA directs attention of policymakers to projects that affect agricultural lands because these are areas where other important environmental values (e.g., wildlife and habitat) often may be found."

The Farm Bureau insists the trial court erred in its interpretation of Public Resources Code section 21095. However, because our review is de novo, we are not concerned with the trial court's reasoning. (*Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1277.) Like the trial court, we review the PEIS/R to determine if it satisfies the requirements of CEQA. Thus, the question presented to this court on the Farm Bureau's contention is twofold: (1) Is the PEIS/R required to consider the conversion of agricultural land to other uses to be a potentially adverse impact regardless of whether such conversion results in a physical change to the land? (2) Does the PEIS/R satisfy this requirement?

The Farm Bureau goes to great lengths to convince us that the answer to the first question is "yes." In addition to Public Resources Code section 21095, the Farm Bureau discusses other sections of the Public Resources Code, appendix G of the Guidelines, a land evaluation and site assessment system devised to examine the agricultural value of land, the legislative history of the various code sections, and several state and federal court decisions. However, the Farm Bureau virtually ignores the second question. The closest it comes to dealing with it is to acknowledge that "the Resources Agency made the factual finding that the [P]rogram's conversion of agricultural

land to project uses resulted [*sic*] in a significant impact on the environment." In effect, the Farm Bureau concedes the PEIS/R treats the conversion of agricultural land to other uses, in and of itself, as a potentially significant impact.

Nevertheless, the Farm Bureau argues this impact analysis is "far less specific" than the description of the project itself. The degree of specificity required in an EIR must correspond with the degree of specificity of the proposed project. (Guidelines, § 15146.) According to the Farm Bureau, the PEIS/R and related documents provided substantial detail about particular locations where agricultural land would have to be converted to other Program uses, but the analysis of the impacts of such conversion "was belated, terse and inadequate, simply asserting that such impacts were 'unavoidable.'"

In *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109 (hereafter *Galante Vineyards*), the petitioners challenged the certification of an EIR for the construction of a dam and reservoir. The petitioners claimed the EIR did not adequately study the project's impacts on local viticulture and agriculture. The trial court issued a peremptory writ directing the water management district to void the certification of the EIR and to prepare a supplemental EIR focusing on viticultural issues. (*Id.* at pp. 1113-1116.)

The Court of Appeal affirmed. The court first concluded the EIR did not contain a sufficient description of the viticulture in the project area: "The 'Land Use, Planning and Recreation' chapter of the final EIR describes the land uses

surrounding the project site as consisting: 'generally of undeveloped forested open space. The Wilderness Area stretches further south and adjacent to the project site. . . . Land use to the north includes very low density rural residential properties and limited grazing. *East and west of the project site is mostly undeveloped land with some grazing, agriculture and scattered rural residential use.* No development has been proposed for the project site and surrounding area.' The 'Climate and Air Quality' chapter of the final EIR describes the area as *'sparsely populated, with no industry other than several vineyards in the Cachagua Valley.'* The italicized sentences constitute the only references in the EIR to viticulture or wineries, despite the fact that the District had previously been advised of the importance of viticulture in the Cachagua area . . . ." (*Galante Vineyards, supra,* 60 Cal.App.4th at p. 1122.)

Having found the description of the environmental setting inadequate, the court concluded "a proper analysis of project impacts was impossible." (*Galante Vineyards, supra,* 60 Cal.App.4th at p. 1122.) Evidence had been presented that the introduction of a wine grape pest spread by vehicles carrying infected soil from other areas would cause injury to the viticulture industry in the area. Also, additional traffic and construction would cause "fugitive dust" and lead to the introduction of the Pacific spider mite, to which grapevines are highly susceptible. (*Id.* at p. 1123.) The court indicated that, while "[t]he final EIR acknowledges that impacts from

fugitive dust will be significant and unavoidable, even with mitigation measures," this acknowledgment did not adequately explain how adverse the impacts would be. (*Id.* at p. 1123.) The EIR also failed to discuss impacts to agriculture from climatic changes occasioned by the presence of the reservoir in the area. (*Id.* at pp. 1123-1124.)

The PEIS/R at issue in the present matter is significantly different from the EIR at issue in *Galante Vineyards*. Here, the presence of extensive agricultural land in the Program area is set forth in considerable detail, including general location, acreage and crop types. The PEIS/R describes the Program area as "an important agricultural region for both California and the United States." The PEIS/R notes that the Program area "encompasses approximately 85% of total California irrigated land" and covers portions of 39 counties that contribute 95 percent of California's agricultural production. The PEIS/R contains tables listing the total number of acres of important agricultural land in the various regions of the Program area in 1996 and breaking down the number of acres dedicated to different types of crops.

The PEIS/R describes the agricultural land in the Delta Region as follows: "Today, of the nearly 750,000 acres in the Delta, about 641,000 acres are rich farmland. Most of this area is classified as prime farmland, farmland of statewide importance, and unique farmland, or land with high statewide significance for agricultural production. The Delta's rich peat and mineral soils support several types of agriculture. . . ."

For the San Francisco Bay Region, the PEIS/R states: "Approximately 493,000 acres of farmland categorized as important were mapped in 1996 for the [San Francisco] Bay Region, including large acreages in Contra Costa, Solano, Napa, and Sonoma Counties." The PEIS/R states the Sacramento River Region included 2.4 million acres of important farmland in 1996 and that, except for the major cities, land uses in the region are principally agriculture and open space. In the San Joaquin River Region, land use in the mountain and foothill areas is predominantly grazing and open space, while in the valley it is agricultural. According to the PEIS/R, there were 3,751,000 acres of important farmland in this region in 1996. The remaining portion of the Program area contains 462,000 acres of important farmland.

In the discussion of potential Program impacts, the PEIS/R states that, "[b]ecause of the general and programmatic nature of this document, it is impossible to specifically define the land use changes that will result from implementing the Program. The extent and specific locations of the Program actions have yet to be decided. To evaluate the environmental consequences of Program actions at a programmatic level, it is necessary to estimate the amount of land that could be disturbed by Program actions. The Program identified the maximum ranges of acreage that could be affected by the various Program elements to give decision makers and the public a sense of the 'worst-case' land use impact."

The PEIS/R then explains how the conversion of some of the State's vast agricultural land to other uses could have a significant environmental impact. Under significance criteria, the PEIS/R states that an impact to agricultural land is considered significant if the Program action would result in "[p]ermanent or long term reduction in agricultural acreage in a region or the conversion of any lands categorized as prime, statewide important, or unique farmland." Based on an assumed worst-case scenario, the PEIS/R designates the conversion of agricultural land to non-agricultural uses by the Program as a significant impact.

Section 7.1 of the PEIS/R is entitled "Agricultural Land and Water Use." In a table entitled "Summary of Potentially Significant Adverse Impacts and Mitigation Strategies Associated with the Preferred Program Alternative," the first entry reads: "Conversion of prime, statewide important, and unique farmlands to project uses." In a section dealing with consequences of the Program's common components, the PEIS/R states: "The Ecosystem Restoration Program involves conversion of land in the Delta Region to habitat and ecosystem restoration, levee setbacks, and floodways. In general, agriculture is the dominant land use on the nonconveyance side of levee structures in the Delta. The Ecosystem Restoration Program could convert up to 112,000 acres of important farmland. Although some of these agricultural uses may be shifted to the Central Valley or elsewhere, this conversion is a potentially significant unavoidable adverse impact on agricultural land use." The PEIS/R also explains that

"[l]evee system integrity measures could convert up to 35,000 acres of land in the Delta to Program uses, most of which would likely be important agricultural land," and "[a]ll Program alternatives . . . include the possibility of in-Delta storage, which could result in potentially significant impacts on agricultural lands in the region." The PEIS/R describes the possibility of agricultural land conversions in other Program areas due to the common components and optional new storage.

Later, the PEIS/R states: "Actions associated with the Ecosystem Restoration, Levee System Integrity, and Water Quality Programs, and the Storage and Conveyance elements could convert up to a maximum of 243,000 acres of existing prime, statewide important, and unique farmland to Program uses. The loss of agricultural lands in these categories cannot be fully mitigated and is considered potentially significant. . . ." In another section, the PEIS/R lists those results of Program actions that would be considered adverse effects. On the top of the list is "[p]ermanent or long-term reduction in acres of irrigated land in a region."

Although a response to a public comment said, "'impairment in the productivity of agricultural land' is not an environmental impact under CEQA," this is a reference to economic impacts alone. Elsewhere, the response states: "We agree that conversion of important farmlands may be a potentially significant environmental impact and that the impact is included in CEQA Guidelines appendix G. Section 7.1 treats the conversion of agricultural land as a potentially significant

unavoidable impact of the Program." The response also states: "As used in CEQA, the 'existing environment' contains both natural and human-made features. Section 7.1 describes the existing environment as it pertains to agriculture."

The Farm Bureau does not explain what additional information the PEIS/R should have included about potential impacts to specific parcels of agricultural land or to agricultural land in general. Nor does the Farm Bureau explain how additional information would have made the PEIS/R a more effective informational document for decision makers and the public.

What the Farm Bureau appears to dislike is not the level of detail about impacts to agricultural land but the conclusion that such impacts are *unavoidable*. The Farm Bureau argues this assertion "conflicts with [CALFED's] identification of a feasible alternative during the scoping phase that would resolve the 'conflict between habitat and the existing land use' by 'improv[ing] habitat quality and protect[ing] existing land uses in the Bay-Delta system in ways that do not entail converting existing land uses to other uses.'" The Farm Bureau argues that, "while it may be 'unavoidable' to convert 'some' agricultural land, it is not therefore 'unavoidable' to convert the hundreds of thousands of acres of agricultural land at issue in this case."

The Farm Bureau's argument is in effect a challenge to the PEIS/R's alternatives analysis. The Farm Bureau argues the PEIS/R is deficient in concluding there are no Program

alternatives that would entail less agricultural land conversion. We shall address this argument later, in connection with appellants' challenge to the PEIS/R's alternatives analysis. For now, we conclude the Farm Bureau has not raised a viable challenge to the PEIS/R's analysis of impacts from agricultural land conversion.

Having rejected this challenge to the PEIS/R's impacts analysis, we necessarily dispose of the Farm Bureau's related argument that the trial court erroneously concluded CALFED properly determined the conversion of agricultural land to habitat will not have an adverse environmental impact. The trial court stated: "While many typical projects result in conversions of land to more intensive use, the anticipated land acquisitions and land use controls here are designed to restore habitat. Also, while many projects result in the depletion of streams for consumptive uses or the degrading of quality due to industrial processes, one of CALFED's purposes is to increase the water for instream uses, benefiting surface water quality and aquatic species. In view of CALFED's restorative goals, the Resources Agency was well within its discretion to view less intensive uses of land and water as generally producing less than significant impacts on the environment."

The problem with the trial court's analysis is that, as we have explained, CALFED found just the opposite--that the conversion of agricultural land to Program uses *is* a potentially adverse impact. However, this does not assist the Farm Bureau. As indicated previously, we review the PEIS/R de novo and are

not concerned with the trial court's reasoning. (*Fat v. County of Sacramento*, *supra*, 97 Cal.App.4th at p. 1277.) Since the PEIS/R adequately discloses adverse impacts to agricultural land, the fact that the trial court was wrong in this regard is of no concern.

We also dispose of RCRC's argument that the trial court erred in concluding agricultural land might suffer greater harm if the Program is not implemented. RCRC argues "[a] determination that a project's benefits override its significant environmental impacts cannot serve as a substitute for the specific findings required by CEQA." Because the PEIS/R specifically found the conversion of agricultural land is an adverse impact of the Program, there was no attempt to substitute a finding that the Program's benefits override its adverse impacts for the specific findings required by CEQA.

Finally, we reject Metropolitan's request for judicial notice of various legislative history materials concerning Public Resources Code section 21095 and related provisions and the Farm Bureau's request for judicial notice of federal regulations relating to the land evaluation and site assessment program. Having concluded the PEIS/R adequately addresses the impacts of agricultural land conversion, it is unnecessary to determine if CALFED was obligated to do so.

c. Impacts Arising from the Conversion of Agricultural Water

The Farm Bureau contends the PEIS/R fails to evaluate the impacts associated with the redirection of agricultural water to other uses. According to the Farm Bureau, the Program contemplates the reallocation of 400,000 acre-feet of water to the Ecosystem Restoration Program and 580,000 acre-feet to the EWA in the first year. The Farm Bureau argues this reallocation "will indisputably cause a change in the physical conditions within the area affected by the program rendering it a potentially significant impact under CEQA." The PEIS/R states that "CEQA does not recognize a change in the use of water by itself as a significant environmental impact."

In *County of Amador v. El Dorado County Water Agency*, *supra*, 76 Cal.App.4th 931, a local water agency and an irrigation district devised a two-part plan to bring water to their area for consumptive use. The first part of the plan involved bringing approximately 17,000 acre-feet of water per year from three High Sierra lakes. The second part involved purchasing a hydroelectric project and shifting its focus from hydroelectric power to both hydroelectric power and consumptive uses. The agencies prepared an EIR for the first part of the plan but determined the second part was exempt. (*Id.* at p. 940.)

This court concluded the second part of the plan was not exempt from CEQA. While the "existing facilities" exemption would have applied to a simple ownership transfer of the

hydroelectric project, this was more than a simple transfer. It involved a change in operation to permit consumptive uses of the project's water. We stated: "A project that shifts from nonconsumptive to consumptive use is not a negligible expansion of current use. It is a major change in focus, and thus does not fall within the '*existing facilities*' categorical exemption." (*County of Amador v. El Dorado County Water Agency*, *supra*, 76 Cal.App.4th at p. 967.) We also concluded the second part of the plan did not fall within the "ongoing project" exemption, again "[b]ecause of the remarkable change in proposed operation from nonconsumptive to consumptive use . . . ." (*Id.* at p. 968.)

The State argues the foregoing case does not hold that a change in the use of water away from agriculture is *necessarily* an adverse impact. We agree. However, that is not the question. As long as the change in water use has a *potential* for affecting the environment, CEQA analysis is required. The State further argues "agricultural" water is not treated differently in the PEIS/R from other water. Metropolitan likewise argues it is water, not "agricultural" or "municipal" water, that is treated as a physical resource for purposes of CEQA. This may be so. However, the question here is whether the conversion of water from one use to another, whatever those uses may be, will have a potentially significant impact on the environment.

The Farm Bureau's argument that the PEIS/R failed to analyze the impact of converting agricultural water to other

uses assumes that the water appropriated for Program uses will come from agriculture. However, the PEIS/R states the source of Program water has not yet been determined. In responses to comments, the PEIS/R explains: "At the current programmatic stage, the locations and sources of additional water needed are not yet decided. Sources of additional water could be urban or agricultural conservation, willing sellers of water, or new storage." A later response states: "A combination of sources, which may include storage, conservation, and voluntary water transfers, may be used to provide necessary water for environmental purposes."

Without knowing the source of Program water, it would have been speculation for the PEIS/R to try and analyze the impacts on agriculture of water conversion. "[W]hen the nature of future development is nonspecific and uncertain, an EIR need not engage in 'sheer speculation' as to future environmental consequences." (*Marin Mun. Water Dist. v. KG Land California Corp.* (1991) 235 Cal.App.3d 1652, 1662.) Such speculation can serve no useful purpose of CEQA. (*Atherton v. Board of Supervisors* (1983) 146 Cal.App.3d 346, 351.)

But the fact that the PEIS/R may not have identified the source for Program water is itself problematic. Water is the key to the CALFED Program. While land is needed for the creation of habitat, the expansion of levees, the construction of diversion facilities and other Program uses, water is the essential ingredient to achieving the Program's twin purposes of ecosystem restoration and water reallocation. Yet the PEIS/R

appears to have deferred consideration of the source of water. We shall discuss the PEIS/R's failure to identify the source of water needed to satisfy the Program's goals in a later section of this opinion.

2. Other Impacts

a. Impacts to Food Supply

The Farm Bureau contends the PEIS/R fails to analyze the reduction in the human food supply that will result from the retirement of agricultural land and the redirection of agricultural water to other uses.

A mandatory finding of significance is required where "[t]he environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly." (Guidelines, § 15065, subd. (a)(4).)

In the responses to comments, the PEIS/R states: "There is currently a sufficient surplus in the national food system that the market would allow replacement" of certain crops such as feed corn, alfalfa, wheat, pears, and almonds. The Farm Bureau argues the PEIS/R contains no evidence to support this conclusion.

As stated earlier, an EIR "must contain facts and analysis, not just the bare conclusions of a public agency. An agency's opinion concerning matters within its expertise is of obvious value, but the public and decision-makers, for whom the EIR is prepared, should also have before them the basis for that opinion so as to enable them to make an independent, reasoned

judgment." (*Santiago County Water Dist., supra*, 118 Cal.App.3d at p. 831; see also *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736.)

The State responds to the Farm Bureau by arguing that the effects of a proposed project on the human food supply are not environmental impacts but economic impacts that do not require CEQA analysis.

The CEQA Guidelines provide: "Economic or social effects of a project shall not be treated as significant effects on the environment." (Guidelines, § 15131, subd. (a).) For example, the need for childcare caused by a project is a socio-economic impact and need not be analyzed. (See *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1989) 209 Cal.App.3d 1502, 1516.) However, economic and social changes may be used "to determine that a physical change shall be regarded as a significant effect on the environment. Where a physical change is caused by economic or social effects of a project, the physical change may be regarded as a significant effect in the same manner as any other physical change resulting from the project. Alternatively, economic and social effects of a physical change may be used to determine that the physical change is a significant effect on the environment. . . ." (Guidelines, § 15064, subd. (e).)

Thus the question is not whether the PEIS/R's conclusion that there is a sufficient food supply to make up for any losses attributable to the Program is supported by evidence, but, instead, whether the decrease in the food supply occasioned by

agricultural conversion will result in a physical change in the environment or, in the alternative, will contribute to making the agricultural conversion a significant impact.

The Farm Bureau does not suggest any decrease in the food supply will lead to a physical change in the environment. Its claim must therefore be that such decrease contributes to the significance of the agricultural conversion. However, we have already determined the PEIS/R adequately discloses the adverse impacts of converting agricultural land and water. Therefore, discussion of any further impact from a decreased food supply would add little if anything to the PEIS/R's informational value. Moreover, the Farm Bureau provides no evidence to support its assertion that reducing farm acreage would necessarily result in a reduction in the food supply. Thus, an analysis of the effect of the Program on the human food supply is not necessary to this PEIS/R.

b. Indirect Social and Economic Impacts Arising from Agricultural Conversions

RCRC contends the trial court erred in concluding the PEIS/R need not consider economic and social impacts of the Program. However, RCRC follows this up with an argument that the PEIS/R considered *only* socio-economic impacts. We are thus left to wonder what it is RCRC finds objectionable--that the PEIS/R did not consider socio-economic factors or that it considered *only* such factors. Since we are not required to engage in speculation as to the true nature of litigants'

arguments on appeal, we will consider RCRC's contentions on this issue no further.

The Farm Bureau argues the disclosures in the PEIS/R relating to the indirect impacts of agricultural conversion are inadequate.

In identifying significant environmental impacts of a project, both "[d]irect and indirect significant effects . . . shall be clearly identified and described, giving due consideration to both the short-term and long-term effects." (Guidelines, § 15126.2.) Economic and social changes caused by a project must be considered in determining whether a physical change in the environment is significant. (Guidelines, § 15064, subd. (e).)

According to the Farm Bureau, the PEIS/R failed to analyze the "well known and common phenomenon" of conversion of agricultural land leading to the depletion of agricultural infrastructure and, in turn, the conversion of more agricultural land.

The State counters that the Farm Bureau failed to exhaust its administrative remedies regarding this contention.

"No action or proceeding may be brought pursuant to [Public Resources Code] Section 21167 unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination." (Pub. Resources Code, § 21177, subd.

(a).) "It is well settled as a general proposition that a litigant will not be afforded relief in the courts unless and until he has exhausted available administrative remedies." (*In re Strick* (1983) 148 Cal.App.3d 906, 911.) The doctrine of exhaustion is a fundamental rule of procedure. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 293.) A primary purpose of the doctrine is to lighten the load on the courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the desired relief. (*Duffy v. State Bd. of Equalization* (1984) 152 Cal.App.3d 1156, 1164; *Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 982.)

In its letters commenting on the March 1998 and June 1999 draft PEIS/R's, the Farm Bureau said nothing about the inadequacy of the indirect impacts analysis. The Farm Bureau argues it mentioned the inadequacy of such analysis in its August 2000 letter commenting on the final PEIS/R. In that letter, the Farm Bureau mentioned what it considered to be the most glaring failures of the PEIS/R: "The absence of a cumulative impacts analysis"; "The absence of an agricultural resources mitigation protocol"; and "Complete failure to address proposals . . . regarding Partnership For Restoration in order to facilitate Endangered Species Act compliance . . . ." This was followed by another section entitled "Indirect Effects of Converting Agricultural Resources to Other Uses, Resulting in More Urban Sprawl." In that section, the Farm Bureau stated: "As more farmers and ranchers are forced to consider other options, the agricultural community shrinks and the necessary

infrastructure begins to disappear. When the rural community dissipates, land that can be sold to developers will be converted to additional urban development. Thus, every failed agricultural community fostered by CALFED's takeover of agricultural resources (or funding of same) will breed urban sprawl as the affected communities seek alternative means of survival."

The foregoing was not a complaint about the inadequacy of the indirect impacts analysis in the draft PEIS/R. At most it was an assertion that the analysis of growth-inducing impacts (to be discussed later) was inadequate. The Farm Bureau argues it "specifically pointed out in this section that 'CALFED's environmental evaluation fails to discuss the assessment of proposed conservation measures' such that they will 'have no significant redirected impacts.'" Redirected impacts have nothing to do with indirect impacts. Redirected impacts concern CALFED's goal of not fixing one problem by creating another one somewhere else.

Project opponents must voice their grievances with specificity during administrative proceedings. (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197-1198.) "The essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories *before* its actions are subjected to judicial review." (*Id.* at p. 1198.) The Farm Bureau failed to provide CALFED with an opportunity to address any purported inadequacy of the PEIS/R's indirect impacts

analysis. It has therefore waived the argument for purposes of this appeal.

c. Local Impacts from Increased Water Exports

In its opening brief, RCRC included a one-page section entitled "The [PEIS/R] Failed to Consider the Program's Localized Impacts." There, RCRC argues the PEIS/R "should have examined the impacts in terms of the increased water exports through the Delta along with the potential for increased salinity and harm to fish and wildlife." RCRC further argues CALFED may not "ignore the local impacts of its program on RCRC's member counties-–counties from which CALFED propose[s] to take more water-–by assuming that the greater good outweighs any local impacts."

The State argues RCRC waived this argument by failing to provide more than introductory comments and omitting legal citations. It is the general rule that, where a point is raised in an appellate brief without argument or legal support, "it is deemed to be without foundation and requires no discussion by the reviewing court." (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647.) However, there was no need to provide further argument here. Legal argument for the requirement to analyze *all* environmental impacts in the EIR is found elsewhere in RCRC's brief. A claim that necessary information has been excluded from the PEIS/R requires no further explanation. It is incumbent on respondents to demonstrate that the information was included.

The State next argues local impacts of the Program *were* analyzed in the PEIS/R. Specifically, in the Water Supply and Water Management section, the PEIS/R states: "Potential long-term adverse impacts on specific regional agricultural and urban water supplies could result from increased water transfers. Areas with adequate water supplies could transfer portions of those supplies to areas with higher economic return from the use of water. Water transfers can affect third parties (those not directly involved in the transaction), local groundwater, environmental conditions, or other resource areas." It also states that "[t]emporary local impacts on water supply reliability could occur during construction of the Program's proposed facilities."

In the Vegetation and Wildlife section, the PEIS/R states that "[s]ome transfers of water could locally reduce the availability of wetland, riparian, and other habitats for some species . . . ." Water storage construction "could potentially fragment riparian corridors and disrupt historical movement patterns of some wildlife." The PEIS/R indicates that, "[b]ecause of the uncertainty that is inherent for the current programmatic analysis, this document concludes that some reservoir sites under consideration could result in significant unavoidable impacts on these resources."

Greater detail about local impacts of Program components would have been difficult given the unsettled nature of the Program at this stage. The PEIS/R states: "Water transfers would affect water quality primarily through changes to river

flow and water temperatures. In addition, the source of water for a transfer and the timing, magnitude, and pathway of each transfer would determine the potential for significant impacts. . . . Because specific transfers can invoke both beneficial and adverse impacts, at times on the same resource, net effects must be considered on a case-by-case basis."

The State argues the PEIS/R adequately analyzes how the Program could affect fish and wildlife, salinity and the bioavailability of mercury, and groundwater extraction. However, the State does not address RCRC's argument about the effects on Northern California counties from increased water exports through the Delta. Logic tells us that increased exports from the Delta require increased imports to the Delta. Increased imports to the Delta must come from somewhere, and that somewhere will likely be the counties represented by RCRC. The PEIS/R makes no attempt to analyze the impacts to those counties from the flow of additional water to the Delta for export elsewhere. But, as discussed previously, the PEIS/R does not disclose the source of Program water. It indicates such water may come from conservation, willing sellers or storage. Without knowing the source of Program water, it would have been speculation to assess local impacts of water diversion. An EIR is not required to engage in speculation. (*Marin Mun. Water Dist. v. KG Land California Corp.*, *supra*, 235 Cal.App.3d at p. 1662.) We shall address the PEIS/R's failure to identify the source of water later.

d. Growth Inducing Impacts

The Farm Bureau contends the PEIS/R is deficient in concluding the Program will have no growth-inducing impacts. The Farm Bureau argues there are at least two ways the Program will stimulate growth: (1) "the proposed conveyance and storage programs will improve delivery and increase water supplies for urban users"; and (2) "the conversion of farmland to habitat through the [Ecosystem Restoration Program] will damage the agricultural infrastructure via indirect impacts" and lead to urbanization.

The State argues the Farm Bureau has waived its challenge to the lack of analysis of growth-inducing impacts by failing to raise it in the administrative proceedings. We agree in part. As noted earlier, the Farm Bureau's August 2000 letter commenting on the final PEIS/R mentioned that the retirement of agricultural land for Program purposes will lead to further urbanization. However, there was no mention of the improved delivery of water and increased urban supplies causing urban growth. Thus, the only issue preserved for appeal is whether the PEIS/R should have mentioned that the retirement of farmland could damage agricultural infrastructure thereby facilitating urbanization.

"[An] EIR must discuss growth-inducing impacts even though those impacts are not themselves a part of the project under consideration, and even though the extent of the growth is difficult to calculate." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342,

368.) In determining if a project has growth-inducing impacts, courts generally look to whether the project sets in motion market forces that can lead to economic pressure for growth. In *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, the Court of Appeal found the city council's adoption of a negative declaration for a proposed road and sewer project violated CEQA. The city council had argued that because the project involved no building construction and the type of development to follow was unknown, preparation of an EIR at that stage was unnecessary. (*Id.* at p. 1333.) The Court of Appeal disagreed: "Construction of the roadway and utilities cannot be considered in isolation from the development it presages. Although the environmental impacts of future development cannot be presently predicted, it is very likely these impacts will be substantial." (*Id.* at p. 1336.) According to the court, CEQA requires preparation of an EIR that considers the "most probable development patterns." (*Id.* at p. 1337.)

In *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, the county certified a negative declaration for the construction of a golf course and attendant facilities on a parcel used for grazing. (*Id.* at pp. 147-148.) The record contained substantial evidence supporting a fair argument that the proposed golf course could have a significant adverse growth-inducing effect on the surrounding area. (*Id.* at p. 152.) The county's initial project study said that, "'[a]lthough the project site as well as surrounding lands are covered by the provision of a Williamson Act Land Contract,

staff cannot completely negate the possibility of future estate residential development,'" and that "'[e]xperience tells us that quite often a golf course project of this nature acts as a catalyst which triggers requests for residential development.'" (*Id.* at p. 153.)

The Court of Appeal rejected the project proponent's argument that an EIR was unnecessary because growth-inducing impacts are too remote and speculative, explaining: "'[T]he fact that future development may take several forms,' or that it may never occur, 'does not excuse environmental review' of the project which is the catalyst for the projected future growth. [Citation.] The record here clearly contains substantial evidence supporting a fair argument the proposed country club may induce housing development in the surrounding area. The fact that the exact extent and location of such growth cannot now be determined does not excuse the County from preparation of an EIR. . . . [R]eview of the likely environmental effects of the proposed country club cannot be postponed until such effects have already manifested themselves through requests for amendment of the general plan and applications for approval of housing developments." (*Stanislaus Audubon Society, Inc. v. County of Stanislaus, supra,* 33 Cal.App.4th at pp. 158-159.)

The State argues the PEIS/R adequately discusses growth-inducing impacts, but cites only entries examining whether increased water supplies will induce growth. The State cites nothing to suggest the PEIS/R analyzed growth-inducing impacts caused by agricultural land retirement.

However, despite raising the argument here and in its comment letter, the Farm Bureau cites no evidence to support its assertion that retirement of agricultural land will lead to urbanization. Without evidence supporting a fair argument that such an effect will occur, CALFED was under no obligation to analyze it. (See *Stanislaus Audubon Society, Inc. v. County of Stanislaus*, *supra*, 33 Cal.App.4th at p. 152.) Although common sense suggests urban growth must take land currently put to other uses, we may not simply assume there will be such growth upon the agricultural lands converted to non-agricultural use under the Program.

e. Cumulative Impacts to Agriculture

The Farm Bureau contends the PEIS/R's discussion of the Program's cumulative impacts to agriculture is inadequate. According to the Farm Bureau, the cumulative impacts analysis failed to include pre-implementation projects undertaken by CALFED agencies and failed to consider present and future projects outside the Program area that will contribute to agricultural conversion. The Farm Bureau further argues the projects that were considered in the PEIS/R did not involve agricultural impacts.

An EIR must discuss the cumulative impacts of a project when those impacts are cumulatively considerable. (Guidelines, § 15130, subd. (a).) "'Cumulative impacts' refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." (Guidelines, § 15355.) "[T]he incremental effects of

an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." (Pub. Resources Code, § 21083, subd. (b)(2).)

A cumulative impact analysis that understates the severity and significance of such impacts impedes meaningful public discussion of the project and skews the decision-maker's perspective of the project's environmental consequences, alternatives, mitigation measures, and, ultimately, the appropriateness of project approval. (*Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 431.)

In *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, the EIR for a 1.5 square mile construction project did not include an analysis of additional traffic noise and air pollution on two local schools. The EIR indicated "additional traffic noise near the schools would be 'insignificant' and additional air pollution would occur throughout the project area despite any feasible mitigation measures." (*Id.* at p. 1023.) The Court of Appeal concluded this analysis violated the requirement that the EIR discuss cumulative impacts. The court explained: "[T]he relevant issue to be addressed in the EIR on the plan is not the relative amount of traffic noise resulting from the project when compared to existing traffic noise, but whether any additional amount of traffic noise should be considered significant in light of the serious nature of the traffic noise problem already existing around the schools." (*Id.* at p. 1025.)

In *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397, the Court of Appeal concluded an EIR for an exploratory oil and gas well contained an insufficient analysis of cumulative impacts. (*Id.* at pp. 404-405.) The EIR stated: "'The cumulative impact [*sic*] associated with this project and the two other projects in the area which are pending or have been approved and not constructed include increased traffic on State Route 150 and a minor increase in air emissions.'" (*Id.* at p. 406.) While the EIR mentioned only two other related projects, the record revealed "a great deal more drilling" in the project area. (*Id.* at p. 409.) The court also found the EIR's statement about increased traffic and a minor increase in air emissions inadequate, explaining: "The use of phrases such as 'increased traffic' and 'minor increase in air emissions,' without further definition and explanation, provides neither the responsible agency nor the public with the type of information called for under CEQA." (*Id.* at p. 411.)

In the present matter, section 3.5 of the PEIS/R, entitled "Summary of Cumulative Impacts," states: "The [PEIS/R] focuses on a general overview of cumulative impacts and associated mitigation strategies. As a programmatic planning-level document, the [PEIS/R] does not analyze site-specific impacts of future projects at proposed locations. The impact analysis document therefore cannot predict with certainty which impacts will occur and what site-specific mitigation measures will be imposed. Similarly, a detailed analysis of the Program's contributions to cumulative impacts and the methods to mitigate

those cumulative impacts cannot be analyzed with certainty at the programmatic level. Based on the type of information considered at the programmatic level, this document identifies those cumulative impacts to which Program actions likely will contribute. The document also includes mitigation strategies that, when applied to an individual project, will serve to avoid, reduce, or mitigate the project's contribution to cumulative impacts."

This is followed by a brief discussion of cumulative impacts in the various regions within the Program area. Essentially, these entries indicate the preferred program alternative could have significant cumulative impacts to all resource types, including agriculture, "when added to the development of water management projects, environmental restoration projects, and urbanization listed in Attachment A."

Attachment A lists 18 projects that may contribute to cumulative impacts. These projects are: (1) "American River Water Resource Investigation"; (2) "American River Watershed Project"; (3) "CVPIA"; (4) "CCWD Multi-Purpose Pipeline Project"; (5) "Delta Wetlands Project"; (6) "Hamilton City Pumping Plant Fish Screen Improvement Project"; (7) "Interim South Delta Plan"; (8) "Montezuma Wetlands Project"; (9) "Pardee Reservoir Enlargement Project"; (10) "Red Bluff Diversion Dam Fish Passage Program"; (11) Sacramento River Flood Control System Evaluation (partial)"; (12) "Sacramento Water Forum Process"; (13) "Trinity River Restoration Program"; (14) "[East Bay Municipal Utility District] Supplemental Water Supply

Project"; (15) Sacramento County M&I Water Supply Contracts"; (16) "Urbanization (future population growth is included in modeling assumptions for the Preferred Program Alternative)"; (17) "West Delta Water Management Program"; and (18) "Sacramento River Conservation Area Program."

This list is followed by a brief description of each project. For example, the Montezuma Wetlands Project is described as follows: "This project calls for constructing facilities to receive up to 20 million cubic yards of approved dredged materials from ports and navigation channels in the San Francisco Bay Estuary and to distribute the materials over a 2,394-acre diked bayland site near Collinsville in Solano County, adjacent to Suisun Marsh. After filling the subsided baylands, the levees would be breached to enable tides and ebb to flow over the constructed foundation of tidal channels and low marsh plains. The marsh design includes high marsh and marsh ponds that would seldom be reached by tides. [¶] The project would restore 1,822 acres of tidal wetlands on the bayland site. Project construction is proposed to be in four phases to minimize temporary losses of wetlands during construction and to facilitate engineered placement of the dredged materials. Each completed phase would be hydrologically independent, with a single connection to Montezuma Slough or the Sacramento River."

Cumulative impacts specific to agriculture are discussed in chapter 7. Section 7.1.10 discusses the long-term trend in conversion of agricultural land in the Program area, primarily

to urban uses, and sections 7.2.10 and 7.5.10 discuss cumulative impacts to agricultural economics.

Even given the above, the Farm Bureau contends there is no evidence that CALFED considered the pre-implementation projects that already have converted more than 29,000 acres of agricultural land to other uses. The Farm Bureau identifies 22 projects that were approved by CALFED before completion of the PEIS/R. Some examples are "*Liberty Island Acquisition*–-acquisition and conversion of 4,760 acres of agricultural land in fee"; "*Stone Lakes National Wildlife Refuge Land Acquisition*--acquisition and conversion of 658 acres of agricultural land in fee"; "*Lower San Joaquin River Floodplain Protection and Restoration Project*--acquisition and conversion of 600 acres of agricultural land in fee and 1,950 acres via easement"; and "*Oakdale and South San Joaquin Irrigation Districts*--conversion of 50,000 acre-feet of agricultural water."

The State counters that the PEIS/R considered these early implementation projects as part of the Ecosystem Restoration Program as a whole and, therefore, the cumulative impacts of those projects were included in the discussion of the Program's impacts on agriculture. This argument is supported by the record. The PEIS/R states the Bay-Delta Accord "included a commitment by the agency and stakeholder signatories to develop and fund non-flow-related ecosystem restoration actions to improve the health of the Bay-Delta ecosystem. This commitment is commonly referred to as 'Category III.'" The PEIS/R explains that "[t]he Category III actions were required to be consistent

with any alternative configuration and provide early implementation benefits." The PEIS/R continues: "To date, CALFED's Ecosystem Restoration Program has received more than 800 proposals and has funded 272 projects . . . ." According to the PEIS/R, "[a]s the long-term Program developed, the priorities and project selection processes were revised to ensure that expenditures were consistent with the overall direction of the Program and efficiently targeted ecosystem restoration through adaptive management."

The PEIS/R further explains that, to the extent category III projects result in the conversion of agricultural resources to habitat, this conversion will be factored into the overall Ecosystem Restoration Program goals. The PEIS/R states: "The Ecosystem Restoration Program would coordinate and assist in restoration activities currently under way and future activities outside the Ecosystem Restoration Program that could lead to the habitat restoration goals identified in the program. For example, actions under the [CVPIA] and the Central Valley Habitat Joint Venture are designed to protect and restore significant areas of land in the Central Valley. To the extent that these activities and programs establish habitat that is also proposed in the Ecosystem Restoration Program, the amount of land needed to achieve the Ecosystem Restoration Program goals would be reduced."

In the responses to comments, the PEIS/R states: Category III projects "funded to date include land acquisition, either in fee or using a conservation easement. Only a small portion of

the lands acquired have been converted away from agricultural use. In most instances, agricultural practices have continued on the acquired lands." Elsewhere the responses state: "To date, CALFED has funded more than $200 million for early implementation of ecosystem restoration projects through its Category III grant program . . . . All ecosystem restoration projects approved for early implementation have been consistent with the objectives of the Ecosystem Restoration Plan. Thus, the land uses in these ecosystem projects are included in the land conversion estimates provided for the Ecosystem Restoration Plan . . . ."

The Farm Bureau next contends the PEIS/R failed to consider 20 projects occurring outside the CALFED Program area that will convert substantial agricultural resources. Those projects include: "The Consumnes Preserve partners' land and water acquisitions"; "The Suisun Marsh and San Pablo Bay land acquisitions (outside the CALFED Program)"; "The U.S. Department of Agriculture land acquisition programs"; "New Endangered Species Act listings (state and federal) that will require additional in-stream flow prescriptions or purchases ([f]or example, Northern Coho, Splittail and Sturgeon)"; "Retirement of salt impaired lands in the San Joaquin Valley"; and "Trinity River required minimum flows."

The State argues the Farm Bureau has waived this argument by failing to identify the 20 projects with particularity and by failing to explain "why each item qualifies as a past, present, or probable future project that contributes to cumulative

impacts at a programmatic level. But, the Farm Bureau says, its argument regarding the 20 projects "is straight-forward [*sic*] and requires no additional elaboration . . . ."

We agree with the State that the Farm Bureau cannot simply provide vague references to purported projects without some explanation as to why they should have been included in the cumulative impacts analysis. For example, it is unclear what the Farm Bureau means by its reference to "Open Space Districts that purchase agricultural land and convert it to habitat or parks." This does not appear to be a project, and there is no indication of where this activity is occurring, if at all. Moreover, the PEIS/R states that between 1993 and 1995, some 71,000 acres of agricultural land were converted to habitat and other open space uses statewide and that new agricultural land was created to mitigate these losses to some degree. There is no reason to believe such mitigation would not occur in the future as well. The Farm Bureau also refers to the "[r]etirement of salt impaired lands in the San Joaquin Valley." Again, this does not appear to be a reference to a specific project and there is no indication this activity will actually take place or will impact agricultural resources. Thus, whether viewed as a matter of waiver or simply a failure to provide a complete argument, the Farm Bureau's references to purported projects, without further explanation, is insufficient to place the PEIS/R's cumulative impacts analysis in question.

The Farm Bureau lastly contends the projects that were considered by CALFED in its cumulative impacts analysis did not

involve impacts to agriculture. The State disagrees and says that CALFED undertook a systematic approach to identifying projects that may have cumulative impacts. According to the State: "The whole purpose behind the CALFED plan's ecosystem restoration element was to coordinate existing and planned local, state, and federal restoration actions to achieve the plan's ecosystem quality objective."

Whether the State undertook a systematic approach to identifying past, present, or future projects with cumulative impacts and whether the overall CALFED purpose was to coordinate projects, the question remains whether the PEIS/R adequately identified the cumulative impacts of the Program.

Regarding agricultural resources, the PEIS/R states: "A long-term trend in the Program study area has been conversion of agricultural lands to other, primarily urban, uses. As an example, between 1994 and 1996, the five Delta counties lost 12,288 acres of prime, statewide important, and unique agricultural lands. Most of this loss occurred as a result of urbanization of farmland in and near cities in the five-county area. During this same 2-year period, 14,689 acres of agricultural lands in those five counties were committed, largely through the planning process, to future urbanization and nonagricultural uses. Statewide, between 1994 and 1996, over 55,000 acres of agricultural lands in these categories . . . have been converted, mostly to urban uses. Between 1993 and 1995, some 71,000 acres of Williamson Act-contracted lands were converted to public improve-ments [*sic*] statewide, of which

about half were for habitat and other public open space uses. . . . Urbanization of farmland in the Central Valley and foothill areas is expected to continue into the foreseeable future. Population projections for 2020 show California's population at 47.5 million, a substantial increase over the 1995 level of 32.1 million."

The PEIS/R continues: "Other water-related initiatives that are not part of the Program, such as the CVPIA, have reduced water availability to agriculture, potentially idling cropland or forcing a change to lower value crops . . . . Wildlife habitat projects outside or only partially within the Program, including the Yolo Basin Wildlife Area, the Stone Lakes [National Wildlife Refuge], and the proposed North Delta [National Wildlife Refuge], potentially could convert up to 51,000 additional acres of prime, statewide important, or unique farmland from agricultural production to habitat."

In addition to the foregoing, section 7.1.10 states that "[f]or agricultural land and water use, the analysis and conclusions regarding the significance of the Preferred Program Alternative's contribution to cumulative impacts are essentially the same as the analysis and conclusions regarding the Preferred Program Alternative's long-term impacts. This is partially due to the long-term nature of the Program and the wide range of actions that falls [*sic*] within the scope of the Program's potential future actions." Section 7.1.7 discusses long-term impacts of the Program and is 10 pages long. Sections 7.2.10 and 7.5.10 discuss cumulative impacts to agricultural economics.

It is readily apparent the PEIS/R's cumulative impacts analysis did take into consideration impacts to agriculture. The Farm Bureau nevertheless argues the list of projects with cumulative impacts (appen. A of the PEIS/R) does not include projects with agricultural impacts but instead only "projects that impact habitat."

We cannot agree. Several of the listed projects will affect agriculture. For example, the objectives of the Interim South Delta Program include "improv[ing] water levels and circulation in south Delta channels for local agricultural diversions . . . ." The Sacramento River Flood Control System Evaluation is intended to test the flood protection system along the Sacramento River and the lower reaches of some tributaries for the benefit of adjacent lands. The West Delta Water Management Program involves a 1981 agreement "to ensure that the State will maintain a water supply that is dependable and of adequate quality for agricultural uses . . . ." According to the PEIS/R, "[s]ince the agreement was signed, an unstable agricultural economy, continuing problems with subsidence, levee instability, and loss of wetland and riparian habitats have necessitated a more comprehensive planning approach."

Furthermore, the Farm Bureau misunderstands the purpose of the project list. Projects undertaken for the purpose of improving habitat or other conditions for fish and wildlife may have a direct impact on agriculture. For example, the Montezuma Wetlands Project is intended to restore 1,822 acres of tidal wetlands. This could have the effect of eliminating farmland.

The Red Bluff Diversion Dam Fish Passage Program includes evaluation of long-term solutions to fish passage issues. According to the PEIS/R, "[o]peration of the Red Bluff Diversion Dam under the [National Marine Fisheries Service] biological opinion has substantially reduced, but not eliminated, fish passage problems and has created water delivery problems during planting and harvest seasons." The study is intended to find ways to improve this condition, thereby potentially improving water delivery for agriculture. Inclusion of projects on the list merely sets the stage for the cumulative impacts analysis, much like a discussion of the many drilling operations in the project area would have done in *Whitman v. Board of Supervisors*, *supra*, 88 Cal.App.3d 397.

In addition, under the category of urbanization, the PEIS/R states: "Urbanization is expected to result in significant conversion of agricultural lands throughout the state and in Program study areas. According to the October 1995 American Farmland Trust Summary, the population is expected to triple in California's Central Valley between now and 2040, putting tremendous pressure on agricultural land and public services. If more compact and efficient placement of growth occurred, about 474,000 acres of farmland would be converted. The report concluded that low-density urban sprawl could consume more than 1 million acres of farmland by 2040. A 1992 study by the Association of Bay Area Governments that projected land use patterns based on population growth, found that an addition of 331,530 acres of urbanized land would be required (a 37%

increase by 2005) if full development in the 12-county Bay-Delta Region occurred, including affecting 39,511 acres of mostly farmed wetlands in the Delta."

By its very nature as a programmatic document, the PEIS/R addresses cumulative impacts of a program that will stretch over the next 30 years. In the PEIS/R, CALFED has attempted to identify related projects and activities that are not included in the Program and to consider cumulative impacts of those projects with those anticipated within the Program. "'An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. . . . The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.'" (*City of Lomita v. City of Torrance*, *supra*, 148 Cal.App.3d at p. 1068.) The PEIS/R satisfies this good faith disclosure obligation. Having so concluded, we have no occasion to consider the funding for the projects identified by the Farm Bureau and therefore deny the Farm Bureau's request for judicial notice of a federal-state cost sharing agreement.

C. The PEIS/R Analysis of the Source of Program Water

The Farm Bureau contends the PEIS/R describes a program that will require nearly 1 million acre-feet of water (400,000 acre-feet for the Ecosystem Restoration Program and 580,000 acre-feet for the EWA in the first year alone) while improperly deferring identification of the source until some undetermined date in the future. The State says that a programmatic EIR, because of its inherent generality, need not be specific about the source of Program water. According to the State, it is sufficient that a programmatic EIR identify *potential* sources of water and then leave the ultimate determination for disclosure in project-level environmental documents.

An EIR must contain an accurate and complete description of the proposed project. "Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal . . . and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193.)

As noted previously, water is the essential ingredient of the CALFED Program. Restoration of wildlife habitat in the Program areas will require significant amounts of water. Although apparently a matter of some disagreement, the PEIS/R explains that the conversion of irrigated agricultural land to

wetlands will result in the use of at least twice as much water per acre. In addition, increased stream flow is a primary goal of the Ecosystem Restoration Program. The PEIS/R states: "The Ecosystem Restoration Program would result in additional water use in the Delta due to new flow targets and conversion of land use from agriculture to wetlands and marshes."

The PEIS/R further states: "Ecosystem restoration would increase the use of in-stream flows for environmental purposes but reduce water supplies available for diversion from rivers and the Delta." However, one of the objectives of the water supply reliability component of the Program is to "[i]mprove export water supplies to help meet beneficial use needs." Under the preferred program alternative, annual Delta exports would increase by 250-380 thousand acre-feet or, with new storage, 490-900 thousand acre-feet, with a lower increase in dry or critical years.

Although water use efficiency is a component of the Program, the PEIS/R acknowledges that conservation measures alone will not generate the amount of new water needed to meet the Program's objectives. The PEIS/R also states: "[T]he Water Use Efficiency Program would not necessarily equate to reduced water demand from a statewide perspective. Specifically, reduced demand would not be directly proportional to reduced Delta exports. Reduced water demand would simply increase available supply for consumption in another region of the state."

Water transfers also would not satisfy the Program's water needs. The PEIS/R's Water Transfer Program Plan states: "[W]ater transfers cannot substitute for increases in new water supply in the Bay-Delta system. Current storage capacity may not be sufficient to solve water supply and reliability problems, particularly with respect to transfers of water across the Delta. Furthermore, increasing demand in source areas may limit the amount of water made available for transfer. Since available storage space is critically linked to conveyance capacity, a lack of storage may negatively affect the amount of water that can be transferred."

Even if new storage and conveyance facilities are constructed, this will not produce new water for many years. The ROD states: "Actions initiated in the first four years of Stage 1 to improve storage and conveyance capacity . . . will substantially increase water supply reliability in the later years, but these benefits will not be realized until the new facilities come on line." The ROD states that CALFED Agencies must identify and purchase water for the various CALFED projects.

"CEQA contemplates consideration of environmental consequences at the '"earliest possible stage, even though more detailed environmental review may be necessary later."'" (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 370 (hereafter *Rio Vista*).) "Choosing the precise time for CEQA compliance involves a balancing of competing factors. EIR's and negative declarations should be

prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment." (Guidelines, § 15004, subd. (b).) "Where a lead agency is using the tiering process in connection with an EIR for a large-scale planning approval, such as a general plan or component thereof . . . , the development of detailed, site-specific information may not be feasible but can be deferred, in many instances, until such time as the lead agency prepares a future environmental document in connection with a project of a more limited geographic scale, as long as deferral does not prevent adequate identification of significant effects of the planning approval at hand." (Guidelines, § 15152, subd. (c).)

In *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729 (hereafter *Al Larson Boat Shop*), the Court of Appeal concluded an EIR that deferred environmental analysis of specific projects within a master plan amendment until project level EIR's did not violate CEQA. In that case, the Harbor Commissioners prepared a first-tier EIR for an amendment to a port master plan. The amendment and EIR described six anticipated projects to increase cargo-handling capacity over the following five years. (*Id.* at pp. 736-737, 742.)

The court found no abuse of discretion "in the Board's decision to tailor [the amendment] and the [final program EIR] to a consideration of alternatives to the overall five-year

plan, which included the six 'anticipated projects,' while reserving without limitation the approval of each 'anticipated' project and its location to the project EIR." (*Al Larson Boat Shop, supra,* 18 Cal.App.4th at p. 744.) The court explained: "The concept of tiering supports allowing the agency and the public to first decide whether it is a good idea to increase Port capacity in a given five-year period at all, or by means of the six 'anticipated projects.' If that decision is made in the affirmative then each individual project can be reviewed in-depth on its merits in a project EIR with no weight claimed for any supposed 'approval' of the individual project or 'planning' of its location. On the other hand, if the agency rejects the overall goal then further consideration of the six 'anticipated' projects can be dropped." (*Ibid.*)

In *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223 (hereafter *No Oil*), Occidental Petroleum Corporation sought approval of the following project: "'The drilling of two exploration wells on an approximate 1/2-acre portion of a 2-acre site at one of the following locations: [¶] 15147 Pacific Coast Highway or [¶] 146 Entrada Drive; [¶] The establishment of three oil drilling districts comprising a total of 594 acres; [¶] The development of a permanent drilling and production facility on approximately 2 acres at one of the above locations. [¶] The permanent drilling and production site would contain a single 155-foot oil derrick and up to 60 oil and natural gas wells to tap pools estimated at 10,000 feet below the earth's surface. Occidental estimates that the pools

contain between 25 and 60 million barrels of oil and between 50 and 120 billion cubic feet of natural gas. [¶] The derrick will be mobile, mounted on a track to allow placement of the structure over each of the drilling locations (wells), located in a subsurface well cellar.' (Italics omitted.)" (*Id.* at p. 230, fn. omitted.)

The city adopted three ordinances to permit the project to go forward. (*No Oil, supra,* 196 Cal.App.3d at p. 231.) However, the trial court issued a writ of mandate commanding the city to set aside the ordinances. The court concluded, among other things, that since the project contemplated only four possible oil pipeline routes for delivery of any oil obtained in the project, "the EIR should have contained a detailed description of the environmental effects of each route." (*Id.* at p. 232.)

The Court of Appeal reversed. The appellate court indicated the pipeline was a single facet of a larger project and that, "while the EIR had to contain a discussion of the pipeline's environmental effects, there was no need to discuss every potential route the pipeline may take." (*No Oil, supra,* 196 Cal.App.3d at p. 235.) The court explained that "information presented to the planning and environment committee of City Council, which became part of the administrative record, indicates that until the quantity and quality of the oil extracted during the exploration phase is analyzed, Occidental will not know whether it is financially desirable to proceed with the project, where the oil will be transported, or the

specifications of the pipeline to be constructed. Until the oil is analyzed, any in-depth discussion of the proposed pipeline would be mere speculation." (*Id.* at p. 237.) The court concluded: "[T]he EIR in the case at bench properly deferred an in-depth consideration of the environmental effects of each proposed pipeline route until such time as a marketable amount of oil is verified to exist and an application for approval of a pipeline is presented to the board of transportation. [¶] Upon our review of the EIR, CEQA, its Guidelines and the applicable cases, we conclude that the EIR adequately informed City Council of the environmental risks associated with the entire project including the pipeline. A detailed environmental analysis of each potential route the pipeline might take was not necessary at this stage." (*Id.* at pp. 237-238.)

In *Rio Vista*, *supra*, 5 Cal.App.4th 351, an EIR associated with a county waste management plan was determined to be adequate. The plan analyzed existing facilities, determined the need for additional facilities and identified siting criteria and potentially suitable sites to accommodate projected needs. However, it did not recommend any specific sites for hazardous waste disposal facilities. (*Id.* at pp. 363-364.) The Plan was intended as "an initial or primary working document to be updated and reviewed periodically." (*Id.* at p. 363.) Nevertheless, the EIR recognized that "the plan could allow certain projects to proceed, which could have adverse impacts, such as potential future hazardous waste facilities, upon a finding of consistency with the Plan." (*Id.* at p. 366.)

The petitioners challenged the EIR for failing to describe potential future projects and facilities. The Court of Appeal rejected this challenge, explaining: "The flaw in appellant's argument is that the Plan makes no commitment to future facilities other than furnishing siting criteria and designating generally acceptable locations. While the Plan suggests that new facilities may be needed by the County, no siting decisions are made; the Plan does not even determine that future facilities will ever be built. Both the Plan and the [final program EIR] consistently state that no actual future sites have been recommended or proposed." (*Rio Vista, supra,* 5 Cal.App.4th at p. 371.) The court continued: "The Plan does not propose a single project divided into parts; it merely serves as a hazardous waste management assessment and overview, with any separate future projects, when identified, to be accompanied by additional EIR's." (*Id.* at p. 372.)

Although each of these cases upheld an EIR that deferred evaluation of specific aspects of a plan, including specific projects contemplated by the plan, they nevertheless suggest that an EIR must evaluate the impacts of the deferred activities to the extent the overall plan commits to a particular course of action. In *Al Larson Boat Shop*, the EIR considered "alternatives to the overall five-year plan, which included the six 'anticipated projects,' while reserving . . . the approval of each 'anticipated' project and its location to the project EIR." (*Al Larson Boat Shop*, *supra*, 18 Cal.App.4th at p. 744.) In other words, as we have noted, the EIR examined whether it

was a good idea to increase port capacity over the next five years by means of the six projects. Later EIR's would examine the specifics of the individual projects.

The court in *No Oil* concluded the EIR was not required to examine each of the four potential pipeline routes, but it was required to "contain some discussion of the pipeline's effects." (*No Oil*, *supra*, 196 Cal.App.3d at p. 233.) The draft EIR had "discussed the pipeline in terms of construction noise, risk of upset, mitigation measures, and impact on traffic and aesthetics." (*Id.* at p. 234.) The final EIR "set forth a description of each route's destination, the uses of the land that the pipeline would cross, the schools located along the route, the public entities from which a permit would be required, and the pipeline construction's effect on traffic." (*Ibid.*) It also discussed "concerns regarding the rate at which the pipeline could be constructed, the risk of polluting the City of Santa Monica's . . . water supply, dust and vehicle emissions caused by pipeline construction, and the risk of spills, fires and explosions." (*Ibid.,* fns. omitted.)

In *Rio Vista*, the court concluded the EIR was not required to discuss specific waste disposal facilities because the plan under review did not commit to construction of any such facilities. However, the EIR did discuss the potential impacts of waste facilities in general and the difficulty of mitigating such impacts. (*Rio Vista*, *supra*, 5 Cal.App.4th at pp. 365-367.) It also said the plan may have environmental impacts through the

approval of facilities that are consistent with the plan. (*Id.* at p. 366.)

The State argues a first-tier EIR for a program such as that presented here need only recognize that water must be supplied for the project and identify possible sources of that water. The State asserts the PEIS/R described the potential sources of water "in detail" as well as the impacts of relying on those sources. The State argues CEQA requires nothing more.

We are not persuaded. The State does not cite where in the PEIS/R or elsewhere the environmental documents describe the potential sources of water "in detail." The State asserts that pages C-022964 and C-022966-022967 of the administrative record identify the source of water for the Ecosystem Restoration Program as "willing sellers along the pertinent rivers and new storage." The PEIS/R states at page C-022964 that "surface water acquisitions through the Ecosystem Restoration Program could reallocate supplies from willing sellers to in-stream uses." At pages C-022966 and 022967, the PEIS/R contains tables showing estimated water acquisitions from willing sellers along various rivers in the Program area to meet Ecosystem Restoration Program needs. One table shows such acquisitions with new storage and one without new storage. The PEIS/R states: "When new Sacramento River and San Joaquin River Regions surface storage is included in the Preferred Program Alternative, fewer water acquisitions are required to meet Ecosystem Restoration Program flow targets. New storage also could be operated to

provide Ecosystem Restoration Program flows for other tributaries by exchange agreements."

The PEIS/R does not provide any basis for the estimates of water that will be made available from willing sellers along the various rivers. On the contrary, a response to comments states that "[t]he amount and source of water that will be transferred by willing sellers is not currently quantifiable." Nor does the PEIS/R identify what new storage is contemplated. In responses to comments, the PEIS/R states: "CALFED's Preferred Program Alternative includes a groundwater and surface water storage component with potential facility locations in the Sacramento and San Joaquin Valleys and in the Delta. New groundwater storage and conjunctive use projects will be implemented under the principle of local management and control. Surface water storage options include development of new off-stream storage reservoirs or expansion of existing storage reservoirs. Development of new on-stream surface water storage reservoirs is not proposed."

In phase II of the CALFED review process, 52 potential storage locations were evaluated. The list was later reduced to 12. At present, the Program proposes 0 to 6 million acre-feet of new storage at one or more undetermined locations. The PEIS/R states: "Considering the magnitude of conflicts over available water in California, CALFED believes it must continue to evaluate and implement a broad range of water management options to achieve the Program's objectives. Therefore, new storage will be developed and constructed, together with

aggressive implementation of water conservation, recycling, and a protective water transfer market, as appropriate to meet CALFED Program goals. Future site-specific evaluations, the environmental review process, and permit applications will be coordinated under CALFED's Integrated Storage Investigation."

Regarding the impacts of potential water sources, the State cites the PEIS/R's discussion of impacts anticipated from the common components of the Program. The PEIS/R states that "[p]otentially significant and unavoidable adverse impacts on existing land uses could result from land conversions associated with new or expanded surface water storage. Specific land use impacts would depend on the location of any new storage facilities." Elsewhere it states: "Storage facilities could result in conversion of agricultural land in the foothill or mountain areas in the Sacramento River Region, a potentially significant and unavoidable adverse impact." A response to comments states that, "[i]n some localized areas, water transfers could result in fallowing or different crops, if a grower chooses to market his or her water rather than grow other crops."

These portions of the PEIS/R do not address impacts of the various water sources. Because the water sources are uncertain, the impacts are uncertain. "A project description that omits integral components of the project may result in an EIR that fails to disclose the actual impacts of the project." (*Dry Creek Citizens Coalition v. County of Tulare*, *supra*, 70 Cal.App.4th at p. 26.) In *Santiago County Water Dist.*, *supra*,

118 Cal.App.3d 818, an EIR for the operation of a sand and gravel mine contained no information on the source of water needed for the mine or the environmental effects of supplying such water. The county nevertheless approved the project on the condition that "'[p]rior to commencement of mining operations or the issuance of a sand and gravel extraction permit, the operator shall establish an adequate water supply and appurtenant system to supply the water needs of the mining operation, processing plant and reclamation irrigation.'" (*Id.* at p. 828.)

The Court of Appeal reversed, concluding information about the water supply for the project was lacking in two ways. First, the EIR stated the local water district had no facilities in the area and additional pumping and storage may need to be installed. Instead of specifying the equipment needed, the EIR indicated "'[t]he developer will furnish the District with detailed plans of works.'" (*Santiago County Water Dist.*, *supra*, 118 Cal.App.3d at p. 829.) The Court of Appeal concluded this was not enough: "The construction of additional water delivery facilities is undoubtedly one of the significant environmental effects of the project. As such, a description of the necessary construction had to be included if the EIR was to serve its informational purpose. [Citations.] Because of this omission, some important ramifications of the proposed project remained hidden from view at the time the project was being discussed and approved." (*Id.* at pp. 829-830, fn. omitted.)

As to the water supply, the EIR disclosed that a large amount of water would be consumed by the mine and that the local water district "'has indicated their ability to supply the water.'" (*Santiago County Water Dist.*, *supra*, 118 Cal.App.3d at p. 830.) The Court of Appeal concluded this, too, was inadequate. First, the record did not support the assertion that the water district had assured a supply of water. (*Id.* at pp. 830-831.) Second, the assertion was insufficient to fulfill the EIR's informational purpose. According to the court: "The EIR must contain facts and analysis, not just the bare conclusions of a public agency. An agency's opinion concerning matters within its expertise is of obvious value, but the public and decision-makers, for whom the EIR is prepared, should also have before them the basis for that opinion so as to enable them to make an independent, reasoned judgment." (*Id.* at p. 831.)

The court also concluded the EIR was deficient in failing to discuss the effects of water delivery to the mine "on water service elsewhere in the Water District's jurisdiction." (*Santiago County Water Dist.*, *supra*, 118 Cal.App.3d at p. 831.) According to the court, "[t]he conclusion that one of the unavoidable adverse impacts of the project will be the '[i]ncreased demand upon water available from the Santiago County Water District' is only stating the obvious. What is needed is some information about how adverse the adverse impact will be." (*Ibid.*)

In *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182 (hereafter *Stanislaus*

Natural Heritage Project), the public agency approved an EIR for the construction of a 25-year, 29,500-acre, 5,000-unit resort and residential community without an on-site water source. (*Id.* at pp. 188-189.) The EIR indicated the project's water supply "'will involve any one of a number of the following: offsite groundwater, water purchases and exchanges, participation in water conservation projects with other water districts in exchange for water saved; utilization of wastewater effluent, both onsite and acquired offsite; development of groundwater storage facilities in Madera County; utilization of the California Aqueduct and Delta-Mendota Canal for exchange deliveries; and playing an active role in the existing trading network among California water districts south of the Delta.'" (*Id.* at p. 194.)

The Court of Appeal concluded the EIR was inadequate. The project in question "called for over 18,700 acres of open space, 5,000 residential units of various sizes and types clustered in 5 villages, a hotel and conference center, 6 golf courses, a swim and tennis club, a winery and vineyard, a research campus and certain supporting facilities. It envisioned that development would occur in four overlapping phases over twenty-five years. Phase 1 was to be completed in year 15. Phase 2 would begin in year five and end in year fifteen. Phase 3 would begin in year 10 and end in year 20. Phase 4 would begin in year 15 and end in year 25." (*Stanislaus Natural Heritage Project, supra,* 48 Cal.App.4th at p. 188.) The EIR indicated the completed project would require 13,000 acre-feet of water

per year and acknowledged the site of the project did not contain enough water. (*Id.* at pp. 189, 194.) The EIR "stated that 'because adequate water supplies for the project at full buildout have not been secured, provision of those supplies could result in potentially significant impacts' and that '[a]dditional environmental review of further water acquisition projects will be required as part of the water acquisition process or as part of further detailed project-level review for future phases of development.'" (*Id.* at p. 195.)

The Court of Appeal concluded the EIR violated the fundamental information purpose of CEQA. (*Stanislaus Natural Heritage Project, supra,* 48 Cal.App.4th at p. 195.) The court rejected the developer's argument that less detail was justified by the programmatic nature of the EIR: "[A] decision to 'tier' environmental review does not excuse a governmental entity from complying with CEQA's mandate to prepare, or cause to be prepared, an [EIR] on any project that may have a significant effect on the environment . . . ." (*Id.* at p. 197.) The court continued: "'[T]iering is not a device for deferring the identification of significant environmental impacts that the adoption of a specific plan can be expected to cause. The County in this case could not make an informed decision on whether to adopt the Diablo Grande Specific Plan without being informed, to some reasonable degree, of the environmental consequences of supplying water to a 5,000-residential-unit development which has no on-site water source. Indeed, the environmental consequences of supplying water to this project

would appear to be one of the most fundamental and general 'general matters' to be addressed in a first-tier EIR." (*Id.* at p. 199, fn. omitted.)

The State argues *Santiago County Water District* and *Stanislaus Natural Heritage Project* are inapposite because both involved project-level EIR's. This is not true as to *Stanislaus Natural Heritage Project* and, at any rate, is a distinction without a difference. The question is not whether environmental analysis must be included in a programmatic rather than a project EIR but whether analysis may be deferred to a later time. In both *Santiago County Water District* and *Stanislaus Natural Heritage Project*, the issue was whether the EIR could defer CEQA analysis of the need to provide water to the project.

In light of the overarching importance of water to the success of the CALFED Program, merely listing *potential* sources of water, indicating that the ultimate source determination will be made later, and deferring CEQA analysis of the need to provide water to the Program violates the PEIS/R's basic informational purpose. "Water is too important to receive such cursory treatment." (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles*, *supra*, 106 Cal.App.4th at p. 723.)

The PEIS/R says potential water sources will be willing sellers, conservation efforts and new or enlarged water storage. The exact mix cannot yet be determined. However, the PEIS/R acknowledges that willing sellers and conservation efforts will not likely be enough to supply all the water needed by the

Program and, therefore, forced appropriation of water from current users or expanded water storage will be necessary. Forced appropriation of water may mean, as the Farm Bureau argues, that even more farmland will be retired, with the attendant impacts on agricultural production.

And, given today's climate of antipathy toward massive water storage projects and recent efforts to decommission existing dams and reservoirs, any attempt to expand water storage by the use of dams or reservoirs will likely meet with stiff resistance. As one commentator put it: "Probably no single form of water development has as much impact on environmental quality and recreation as dams. Dams eliminate productive bottom lands which are essential to wildlife (and in many areas essential to farmers as well). Loss of winter range for big game has been a major problem of impoundments throughout the West. . . . [¶] For migratory fish such as steelhead trout and salmon, dams are formidable barriers to up-stream spawning migrations. . . . [¶] In addition, conditions below an impoundment change as a result of new temperature and flow regimes. . . ." (Erman et al., Competition for California Water: Alternative Resolutions (U. Cal. Press 1982) *Environmental Quality and Recreation,* at p. 103, fns. omitted.) The PEIS/R attempts to forestall the inevitable battle over water allocation and storage, and the effects of such on the environment, by leaving the source of Program water undefined.

"An EIR may not define a purpose for a project and then remove from consideration those matters necessary to the

assessment whether the purpose can be achieved." (*County of Inyo v. City of Los Angeles* (1981) 124 Cal.App.3d 1, 9.) The PEIS/R may not be able to provide a precise determination of the sources for Program water. However, because the Program is premised on such water being available, the PEIS/R must include an analysis of the impacts of supplying such water, from whatever source. Without such analysis, a proper evaluation of the Program and its alternatives and mitigation measures is not possible. CALFED has approved a Program requiring large amounts of water to fulfill its objectives without analyzing the environmental impacts of supplying such water. This will not do.

Finally, this does not mean the PEIS/R must identify the ultimate source of water for the Program. Obviously, the dynamics of the Program will not allow such identification at this early stage with any precision. As stated by the court in *Stanislaus Natural Heritage Project*: "We are not concluding respondent must first find a source of water for the 'project' before an EIR will be adequate. We are concluding that an EIR for this project must address the impact of supplying water for the project. . . . [T]he decision to approve the EIR of this project does require recognition that water must be supplied, that it will come from a specific source or one of several possible sources, of what the impact will be if supplied from a particular source or possible sources and if that impact is adverse how it will be addressed. . . ." (*Stanislaus Natural Heritage Project*, *supra*, 48 Cal.App.4th at pp. 205-206.)

Water is the life blood of the CALFED Program and the environmental impacts of acquisition of water from the various potential sources are an essential component of a public and informed decision to proceed with the project.

D. The PEIS/R Analysis of Program Alternatives

1. Introduction

Appellants challenge the adequacy of the PEIS/R's alternatives discussion. They argue the alternatives included were inadequate because they varied only as to two of the eight components of the Program, conveyance and storage. They further argue the PEIS/R should have included an alternative involving less conversion of farmland and another involving reduced exports of water to Southern California. Finally, they argue the alternatives discussed in the PEIS/R were not feasible because they involved violations of state water laws.

"[I]t is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects . . . ." (Pub. Resources Code, § 21002.) A feasible alternative is one that is "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors." (Pub. Resources Code, § 21061.1.)

An EIR must discuss a reasonable range of alternatives for the proposed project or its location that "(1) offer[s]

substantial environmental advantages over the project proposal [citation]; and (2) may be 'feasibly accomplished in a successful manner' considering the economic, environmental, social and technological factors involved." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 566.) The EIR need not consider every possible alternative. (Guidelines, § 15126.6, subd. (f).) The required range "is governed by a 'rule of reason' that requires the EIR to set forth only those alternatives necessary to permit a reasoned choice." (Guidelines, § 15126.6, subd. (f).) Thus, perfection is not the rule. (*Long Beach Sav. & Loan Assn. v. Long Beach Redevelopment Agency* (1986) 188 Cal.App.3d 249, 264.) "CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose." (*Citizens of Goleta Valley v. Board of Supervisors*, *supra*, at p. 566.) The substantial evidence test applies to review of an EIR's range of alternatives. (See *id.* at pp. 565-567.)

2. The Process of Selecting Alternatives

The first step in assessing the adequacy of project alternatives is to determine whether the project objectives were properly established. As we point out later (*infra* at p. 142), appellants do not challenge the Program objectives. However, as noted a moment ago, they do challenge the adequacy of the discussion of Program alternatives. Only alternatives that

"could feasibly attain most of the basic objectives of the project" need to be included in an EIR. (Guidelines, § 15126.6, subd. (f).)

The PEIS/R states: "The mission of the CALFED Bay-Delta Program is to develop a long-term comprehensive plan that will restore ecological health and improve water management for beneficial uses of the Bay-Delta system." As noted earlier, the PEIS/R identifies four primary objectives to address this mission:

(1) "*Ecosystem Quality*--Improve and increase aquatic and terrestrial habitats and improve ecological functions in the Bay-Delta to support sustainable populations of diverse and valuable plant and animal species."

(2) "*Water Supply*--Reduce the mismatch between Bay-Delta water supplies and the current and projected beneficial uses dependent on the Bay-Delta system."

(3) "*Water Quality*--Provide good water quality for all beneficial uses."

(4) "*Vulnerability of Delta Functions*--Reduce the risk to land use and associated economic activities, water supply, infrastructure, and the ecosystem from catastrophic breaching of Delta levees."

CALFED pursued an elaborate process for identifying and narrowing the alternatives that would achieve the Program's goals. Phase I of the Program began in 1995 and involved a lengthy public process to develop potential alternatives. Fifty action categories were selected and, within these categories,

hundreds of individual actions were identified. The action categories became the building blocks for devising alternatives, with each alternative being a combination of action categories. The PEIS/R explains that, "[g]iven the large number of categories and the range of perspectives on solutions to Bay-Delta problems among stakeholders and CALFED agencies, thousands of potential alternatives could have been identified."

In recognition of the breadth of the Program and the number of potential alternatives, CALFED devised a methodology for keeping the number of alternatives to a manageable level. CALFED defined approaches to resolve four "critical conflicts" existing between beneficial uses and Bay-Delta resources. Those critical conflicts are:

"*Fisheries and Diversions.* The conflict between fisheries and diversions results primarily from fish mortality attributable to water diversions. This includes direct loss at pumps, reduced survival when young fish are drawn out of river channels into the Delta, and reduced spawning success of adults when migratory cues are altered. The effects of diversions on species of special concern have resulted in regulations that restrict the quantities and timing of diversions.

"*Habitat and Land Use and Flood Protection.* Habitat to support various life stages of aquatic and terrestrial biota in the Bay-Delta has been lost because of land development and construction of flood control facilities to protect developed land. The need for habitat affects land development planning as well as levee maintenance and planning. Efforts to restore the

balance often require that land used for agricultural production be dedicated to habitat.

"*Water Supply Availability and Beneficial Uses.* As water use and competition for water have increased during the past several decades, conflict also has increased among users. A major part of this conflict is between the volume of in-stream water needs and out-of-stream water needs, and the timing of those needs within the hydrologic cycle.

"*Water Quality and Land Use.* Water quality can be negatively affected by land use, and ecosystem water quality needs are not always compatible with urban and agricultural water quality needs."

CALFED then defined alternate approaches for resolving these conflicts and alternate degrees of resolution. For example, "[a]pproaches for resolving the water supply availability and beneficial uses conflict included: (1) a demand reduction approach, and (2) a supply enhancement approach." This resulted in the identification of 32 separate approaches to resolving the four critical conflicts. Teams of experts were assembled to develop preliminary solution alternatives from these 32 approaches, leading to a list of 100 preliminary, single-focus solution alternatives.

At this point, alternatives development was transferred from the experts to CALFED staff "in order to ensure maximum sensitivity to the policies and positions of the CALFED agencies and stakeholder groups." Staff explored ways to combine the single focus alternatives into ones that addressed all the

conflict areas in a more balanced way. Duplicate actions within a combined alternative were eliminated, and actions that were redundant or not compatible with the combined alternative were eliminated. In this way, the 100 single-focus alternatives were reduced to 31 combined alternatives and then to 20. These 20 alternatives were presented to the stakeholders, members of the Bay-Delta Advisory Council and the public at a workshop. Based on input received at the workshop, the list of alternatives was further reduced to 10.

The various alternatives considered by CALFED staff utilized different combinations of water management tools and varied in the level of effort applied to actions intended to address water use efficiency, water quality, ecosystem quality and levee system vulnerability. The two components of the Program that involved distinctly different approaches among the alternatives were conveyance and water storage. "For example, one alternative contained modest efforts in Bay and Delta habitat restoration and water pollution source control, moderate efforts in system stabilization, and extensive conjunctive use and groundwater storage efforts. This alternative included an in-Delta surface storage component but no isolated conveyance component. Another alternative contained extensive efforts in Bay and Delta habitat restoration and water pollutant source control, modest efforts in system stabilization, and moderate conjunctive use and groundwater storage efforts. This alternative contained a large isolated conveyance component but no surface storage component."

In April 1996, CALFED conducted eight public meetings, one workshop and one meeting of the Bay-Delta Advisory Council to discuss the 10 alternatives. From the comments received, CALFED reached the following conclusions: (1) "The best possible source [of] water quality is of paramount importance to urban water supplies." (2) "Delta levees will be needed to protect agriculture, infrastructure, and habitat no matter how water is conveyed in the Delta." (3) "Ecosystem actions in the Program need[] a single coherent vision of ecosystem restoration." (4) "Water use efficiency must be strongly pursued in all the alternatives." (Emphasis omitted.)

CALFED devised a list of solution principles designed to "provide an overall measure of the acceptability of alternatives and guide the design of the institutional part of each alternative." These solution principles are:

"*Reduce conflicts in the system.* Solutions will reduce major conflicts among beneficial uses of water.

"*Be equitable.* Solutions will focus on solving problems in all problem areas. Improvement for some problems will not be made without corresponding improvements for other problems.

"*Be affordable.* Solutions will be implementable and maintainable within the foreseeable resources of the Program and stakeholders.

"*Be durable.* Solutions will have political and economic staying power and will sustain the resources they were designed to protect and enhance.

"*Be implementable.* Solutions will have broad public acceptance and legal feasibility, and will be timely and relatively simple to implement compared with other alternatives.

"*Pose no significant redirected impacts.* Solutions will not solve problems in the Bay-Delta system by redirecting significant negative impacts, when viewed in their entirety, within the Bay-Delta or to other regions of California."

CALFED staff evaluated the 10 alternatives using these six solution principles and adopted a pattern whereby four "common" programs (water quality, levee system integrity, ecosystem quality, and water use efficiency) would be combined with two variable components (storage and conveyance). Staff concluded the four common components "were necessary in each of the alternatives to achieve the Program's purpose and needed to be composed of the same actions in all alternatives." Thereafter, three basic alternative approaches were formulated around different conveyance options: "existing system conveyance, modified through-Delta conveyance, and dual-Delta conveyance." A storage option for each alternative was also considered.

In phase II of the Program, two additional components were added to the alternatives, a water transfer component and a watershed component. Thus, six common components were combined with two variable components in the three basic alternative approaches. Seventeen variations of the three alternative approaches were then considered to refine further the two variable components, storage and conveyance. The list of 17 was later reduced to 12. This narrowing of alternatives "primarily

focused on technical deficiencies and the conveyance options used in each alternative. Additionally, if alternatives provided the same conveyance function with similar impacts, the less expensive alternatives were retained. Alternatives with lower costs but higher adverse impacts were eliminated."

The 12 remaining alternatives were evaluated in the March 1998 draft PEIS/R. Based on agency and public comments on the draft PEIS/R and additional technical analysis, the alternatives were narrowed to the four that were eventually included in the final PEIS/R. These four alternatives "vary primarily in their approach to water conveyance. Three basic alternative approaches were formed around different configurations of Delta conveyance: existing system conveyance, modified through-Delta conveyance, and dual-Delta conveyance. Each approach includes the same set of actions for water use efficiency, water quality, levee system integrity, ecosystem quality, water transfers, and watersheds. A range of storage options was evaluated for each alternative to support these programs and the Delta conveyance, and to seek a balance between attainment of Program objectives and cost effectiveness."

As described earlier, alternative 1 involves maintaining the existing Delta conveyance structures but adding some specific improvements in the southern part of the Delta, such as constructing a "new 15,000-[cubic feet per second] screened intake with low-lift pumps" at the head of the Clifton Court Forebay. Alternative 2 involves a modified through-Delta conveyance. It includes many of the same improvements as in

alternative 1 plus some other improvements in the northern part of the Delta, such as constructing a fish ladder or equivalent structure to convey fish "upstream, past the pumps and screens that are associated with the diversion structure, to the Sacramento River." Alternative 3 involves dual-Delta conveyance whereby existing Delta channels would be modified and a new canal or pipeline would be constructed connecting the Sacramento River north of the Delta to the SWP and CVP south of the Delta. This alternative includes many of the same improvements in the north and south Delta as in the first two alternatives. "The Preferred Program Alternative incorporates elements similar to some of the elements in Alternatives 1 and 2. While it includes a diversion facility on the Sacramento River and channel to the Mokelumne River, the size of this facility would be considerably smaller than Alternative 2."

3. The Legality of the Selected Alternatives

CDWA contends the PEIS/R does not satisfy the CEQA requirement of presenting a range of reasonable alternatives, because each of the alternatives described in the PEIS/R, including the preferred program alternative, includes illegal actions. In particular, CDWA argues the alternatives "seek to increase exports over existing levels," in violation of Water Code sections 11460 et seq. and 12200 et seq.; article 10, section 2 of the California Constitution; and the public trust doctrine. Therefore, CDWA argues, the alternatives are not feasible, i.e., "capable of being accomplished in a successful

manner within a reasonable period of time, taking into account economic, environmental, *legal*, social, and technical factors." (Guidelines, § 15364, italics added.)

Article X, section 2 of the State Constitution prohibits waste or unreasonable use of the state's waters. It reads, in relevant part: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent to which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. . . ." This provision also protects riparian and appropriative water rights to the extent of reasonable use.

Water Code section 11460 et seq. protects the beneficial water rights of areas of origin. Water Code section 11460 reads: "In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."

Water Code section 12200 contains the legislative finding that "the merging of fresh water with saline bay waters and

drainage waters and the withdrawal of fresh water for beneficial uses [in the Delta] creates an acute problem of salinity intrusion into the vast network of channels and sloughs of the Delta. . . ." Water Code section 12203 states: "It is hereby declared to be the policy of the State that no person, corporation or public or private agency or the State or the United States should divert water from the channels of the . . . Delta to which the users within said Delta are entitled." Water Code section 12205 reads: "It is the policy of the State that the operation and management of releases from storage into the Sacramento-San Joaquin Delta of water for use outside the area in which such water originates shall be integrated to the maximum extent possible in order to permit the fulfillment of the objectives of this part."

The public trust doctrine recognizes the state's ownership of "all of its navigable waterways and the lands lying beneath them 'as trustee of a public trust for the benefit of the people.'" (*Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 416.) The public trust doctrine "is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." (*National Audubon Society v. Superior Court*, *supra*, 33 Cal.3d at p. 441.)

The trial court concluded the legality of actions proposed in the various Program alternatives was not properly before it.

The court indicated those issues should be decided in the first instance by the SWRCB. The court explained the PEIS/R is only required to "recognize and discuss" those legal issues, not resolve them. Finally, the trial court concluded claims regarding the legality of the alternatives are premature.

The State argues the trial court properly concluded claims regarding violation of state water law are premature. According to the State, "[t]he PEIS/R and ROD did not authorize any actions that would be in violation of the cited laws or commit any agency to a particular result." On the contrary, the PEIS/R repeatedly assures readers that all Program actions will be consistent with state water laws.

We agree with the State. CDWA's claim of illegality is based on a statement in the ROD that CALFED will commit to no net loss of water deliveries for the first four years of the Program. However, in this same provision, CALFED states its commitment is "subject to specified conditions and legal requirements."

The PEIS/R itself repeatedly assures that all actions taken under the Program will be subject to legal constraints. Chapter 8 is entitled "Compliance with Applicable Laws, Policies, and Plans and Regulatory Framework." Section 8.2.2 states: "The Delta Protection Act of 1959 requires adequate water supplies for multiple uses (for example, agriculture, municipal and industrial, and recreation) in the Delta. The Act also provides for Delta water exports under certain conditions that are spelled out in the California Water Code and other regulatory

requirements. . . .” Section 8.2.4 discusses SWRCB Decision 1485. It states: “In 1978, the SWRCB adopted the [Water Quality Control Plan] for the Sacramento-San Joaquin Delta and Suisun Marsh (1978 Delta Plan). At the same time, the SWRCB adopted Water Right Decision-1485 (D-1485). . . . D-1485 required water diverters to comply with the water quality objectives in the 1978 Delta Plan. The objectives in the plan were designed to protect natural resources by maintaining Delta water quality in at least as good condition as its condition would have been in the absence of the CVP and SWP. . . .”

Section 8.2.9 discusses riparian and appropriative water rights. It states that riparian rights are based on ownership of property adjacent to a water body and are not lost if unused, whereas appropriative rights are based on first-in-time use of water and can be lost if unused. Appropriative rights obtained after 1914 are controlled by the SWRCB. “The SWRCB issues appropriative rights with conditions to protect other water rights holders, including Delta and upstream riparian water users, and to protect the public interest, including fish and wildlife resources.” According to the PEIS/R, “[t]he quantity and quality of water used by existing riparian and senior appropriative users can be limited only by subsequent appropriations in limited circumstances when the senior rights are not legally injured.” However, “during times of water shortage, all riparian water rights holders must share the available supply according to each landowner’s reasonable requirements and uses.”

Section 8.7 discusses area of origin water laws. It states: "When the CVP and the SWP were being planned and developed, area-of-origin provisions were added to the California Water Code to protect local northern California supplies from being depleted as a result of the projects. County-of-origin statutes reserve water supplies for counties in which the water originates, if the SWRCB determines that an application for assignment or release from priority of state water rights filings will deprive the county of water necessary for its current and future development. Provisions of watershed protection statutes require that elements of the CVP and SWP not deprive the watershed or the area where water originates (or immediately adjacent areas that can be conveniently supplied with water) of the prior right to water that could be reasonably required to supply the present and future beneficial needs of the watershed area, any of its inhabitants, or property owners."

Finally, section 8.5 discusses the public trust doctrine. It states that, "[w]hen planning and allocating water resources, the State of California must consider the public trust and preserve for the public interest the uses protected by the trust." Section 8.5 further states that, "in administering water rights laws and approving water diversions, the State also has a duty of continuous supervision over the taking and use of appropriated water to protect these public trust uses."

Common Response No. 13 of the PEIS/R discusses area-of-origin water rights issues. It states: "The Program fully intends to implement its actions in a manner consistent with

California water rights, including existing laws and regulations protecting areas of origin. This intention is supported by understanding that the CALFED Program does not have any legal or regulatory jurisdiction over water rights or their application. These authorities are vested in the SWRCB (Board) and in the justice system (the courts). . . .” The response continues: “The Water Transfer Program Plan has generated many comments about CALFED’s impacts on water rights. However, the Water Transfer Program Plan does not propose any changes to the legal structure in which the current water market operates. The program plan does include recommendations and proposals to streamline approval procedures; clarify operational requirements, such as reservoir refill and carriage water requirement; and require additional analysis and disclosure. The program does not propose any change to existing water rights or other California Water Code provisions that regulate water transfers in California.” Lastly, the response states: “CALFED also received comments expressing concern that future source area water needs have not been considered. However, impact analyses completed as part of the Programmatic EIS/EIR incorporated projections of future increases in source area demands, as estimated for the year 2020 by DWR’s Bulletin 160-98.”

CDWA’s argument that the alternatives described in the PEIS/R are not feasible assumes CALFED does not mean what it says. Even if the Program calls for an increase in water exports, the PEIS/R assures that such increase will not come at

the expense of area-of-origin or other water rights protected by law. Absent evidence to the contrary, we will not presume the CALFED agencies will violate existing law in the performance of the Program. Furthermore, as discussed previously, the PEIS/R does not identify the ultimate sources for Program water, including the sources for any increase in exports. Therefore, CDWA's assumption that Program water will come from water rights holders is premature.

4. The Lack of Alternatives for the Six Common Components

Appellants contend the PEIS/R is deficient in failing to include alternatives for six of the eight Program components. CDWA, in particular, argues that "it can by no means be fairly said that Respondents' four alternatives in its [PEIS/R] which 'vary primarily with regard to conveyance' and hold the other six programs constant are to the 'project as a whole' or to the 'project in its entirety' or to the 'overall' thirty-year [Preferred Program Alternative]."

In rejecting challenges to the PEIS/R's alternatives analysis, the trial court said: "The required CEQA process was satisfied as CALFED used a multi-year, multi-phase, participatory process to develop program alternatives. . . . [T]he final configuration of program alternatives in the EIR is not the entire story. The final configuration is the result of many intermediate steps to consider and study a wide range of potentially feasible alternatives. An agency is required to use

'reasonable diligence to investigate project alternatives.' The total record supports the Court's determination that a reasonable range of program alternatives was considered." (Fn. omitted.)

But CEQA requires that the EIR *describe* a range of reasonable alternatives to the project. (Guidelines, § 15126.6, subd. (a).) A lead agency makes an initial assessment during scoping as to which potential alternatives are feasible, and the EIR should set forth the alternatives that were considered but rejected in this assessment, along with the reasons therefore. "[A]gency consideration of otherwise reasonable alternatives in the administrative record cannot replace the CEQA mandated discussion of alternatives in the EIR." (*Citizens of Goleta Valley v. Board of Supervisors*, *supra*, 52 Cal.3d at p. 569.) The purpose of an EIR is to provide information to decision makers and the public so that they may decide for themselves if the project is appropriate. (Guidelines, § 15126.6, subd. (f).) Undisclosed alternatives that were considered and rejected by the agency do not further this purpose.

The State and Metropolitan argue appellants are not challenging the sufficiency of the alternatives analysis but CALFED's discretion to set Program objectives. Metropolitan then says a challenge to the Program's objectives is unavailing, because the setting of objectives is a quasi-legislative act subject to review under Code of Civil Procedure section 1085 and Public Resources Code section 21168.5 and, therefore, may be set aside only if "'arbitrary, capricious, entirely lacking in

evidentiary support, or unlawfully or procedurally unfair.'" Metropolitan argues the selection of project objectives is a policy matter that should be left to the discretion of the lead agency.

The objectives of the Program take on importance because, as noted previously, an EIR need only examine in detail alternatives that "could feasibly attain most of the basic objectives of the project." (Guidelines, § 15126.6, subd. (f).) The basic mission of the CALFED Program is twofold: (1) "to develop a long-term comprehensive plan that will restore ecological health" to the Bay-Delta, and (2) to "improve water management for beneficial uses of the Bay-Delta system." The PEIS/R explains that, because both of these objectives are essential to the success of the CALFED Program, only alternatives that would satisfy both were carried forward for detailed consideration. CALFED staff concluded the common components are necessary in all alternatives to achieve the Program's dual purposes.

We need not decide the level of deference we should accord to an agency's selection of project objectives. Appellants do not challenge the factual basis for either the Program's dual mission of restoring ecological health and improving water management for beneficial uses or the four objectives of improving ecosystem quality, reducing the mismatch of water supply and demand, improving water quality, and reducing risks to Delta functions. Thus, there is no occasion to assess, based

on whatever standard is appropriate, whether the objectives are supported by the record.

The Farm Bureau argues a lead agency may not preordain the outcome of the alternatives analysis by defining the project's objectives in an unreasonably restrictive manner. In *Citizens Against Burlington, Inc. v. Busey* (D.C. Cir. 1991) 938 F.2d 190, the federal court said "an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action." (*Id.* at p. 196.)

The Farm Bureau points out that, in response to comments complaining about CALFED's failure to consider an alternative with reduced impacts to agriculture (discussed *infra*), CALFED indicated CEQA does not require consideration of alternatives inconsistent with the Program's objectives. The Farm Bureau argues CALFED, in effect, concluded "the only way to restore the Bay-Delta was to convert 243,000 acres of agricultural land and 400,000 acre-feet of agricultural water to environmental uses." The Farm Bureau further argues that "by assuming that the program objectives required the conversion of 243,000 acres of agricultural land and 400,000 acre-feet of agricultural water, and only considering a single alternative which contemplates such conversion, Respondents defined the objectives of CALFED in an unreasonably narrow manner, thereby *impermissibly predetermining the result of the EIR*."

The Farm Bureau's argument is based on a faulty understanding of the Program objectives. As discussed previously, the primary mission of CALFED is twofold--ecosystem restoration and improved water management. Other objectives of the Program are improved water quality and improved Delta functions. The Farm Bureau concentrates on the single objective of ecosystem restoration and ignores the rest. During the alternatives scoping process, CALFED determined the six common components were necessary to each alternative in order to satisfy *all* of the Program's objectives. The Farm Bureau does not challenge this conclusion.

CDWA argues the failure to consider alternatives to the six common components was a failure to consider alternatives to the Program as a whole. CDWA relies on several Court of Appeal decisions to support this argument. In *Big Rock Mesas Property Owners Assn. v. Board of Supervisors* (1977) 73 Cal.App.3d 218, the petitioners challenged the EIR associated with a tentative tract map for a proposed residential subdivision. The appellate court found the EIR adequate, notwithstanding that it did not describe alternatives to the amount of grading proposed for the project or the location and character of a proposed access road. The court explained: "Petitioners contend the EIR does not meet the requirements of California law in that it fails to discuss 'alternatives to the enormous amount of grading and the filling and construction of an unlawfully steep access road in a natural canyon.' The pertinent statute and EIR guidelines require that an EIR describe alternatives to the proposed *project*.

[Citation.] We interpret such requirement as applicable only to the project as a whole, not to the various facets thereof, such as grading and access roads." (*Id.* at pp. 226-227, fn. omitted.)

In *A Local & Regional Monitor v. City of Los Angeles* (1993) 16 Cal.App.4th 630, the petitioner challenged an EIR for the first phase of a multiphase commercial development project. Among other things, the petitioner argued the EIR failed to analyze traffic impacts and mitigation associated with 214 dirt-hauling trucks required for the project. The court rejected this argument, explaining: "[T]he EIR is not deficient because it does not describe alternatives to excavation trucks because the statutes do not require alternatives to various facets of the project. [Citation.] Rather, the EIR must discuss proposed alternatives to the project as a whole . . . ." (*Id.* at p. 642, fn. 8.)

In *Al Larson Boat Shop*, *supra*, 18 Cal.App.4th 729, the petitioners challenged a programmatic EIR for an amendment to a port master plan and an amendment containing a five-year plan to increase cargo handling capacity through six anticipated projects. In that case, the court found no abuse of discretion in the fact the EIR only provided alternatives to the five-year plan, not the six individual projects. (*Id.* at p. 744.)

Rather than assist CDWA, the foregoing cases demonstrate the PEIS/R need not include alternatives that vary as to each of the eight components of the Program. Instead, the PEIS/R is required to include alternatives to the Program as a whole.

RCRC argues CALFED attempted to evade its alternatives obligation by "arbitrarily" designating six components of the Program as "common." We disagree. In the PEIS/R, CALFED explained that "many of the problems in the Bay-Delta system are interrelated" and "[p]roblems in one resource problem area cannot be solved effectively without addressing problems in all four problem areas at once." The ROD states: "All aspects of the CALFED Program are interrelated and interdependent. Ecosystem restoration is dependent upon water supply and conservation. Water supply depends upon water use efficiency and consistency in regulation. Water quality depends upon improved conveyance, levee stability and healthy watersheds. The success of all of the elements depends upon expanded and more strategically managed storage."

If, as CALFED concluded, the only alternatives to the Program as a whole that will satisfy the Program objectives include the six common components in substantially the same form, there was no obligation to include alternatives that varied on these six components. In effect, CALFED concluded any alternative that varied with respect to the common components is not feasible. There was nothing arbitrary in CALFED's conclusion in this regard.

None of the appellants has mounted an effective challenge to the lack of alternatives for the six common components. Although appellants point out the lack of alternatives to these components and argue such lack of alternatives violates CEQA, they do not present any viable alternative (except as discussed

below) that should have been included in the PEIS/R or explain how the presentation of alternatives to the common components would have improved the informational value of the PEIS/R.

CDWA discusses a potential alternative to one aspect of the Water Quality Program. According to CDWA, CALFED proposes to meet the water quality objectives of the Program by focusing on improving water quality at the source, i.e., improving in-stream water, whereas another approach would be to improve water quality at the treatment plant. However, CDWA does not cite any evidence that this alternative was ever proposed to CALFED during the environmental review process. No action may be brought to challenge an EIR "unless the alleged grounds for noncompliance . . . were presented to the public agency orally or in writing by any person during the public comment period . . . ." (Pub. Resources Code, § 21177, subd. (a).)

CDWA also argues CALFED improperly rejected alternatives using modest to moderate levels of effort to meet Program objectives. The State argues such alternatives were rejected in favor of a more flexible approach that would vary effort as needed. CDWA argues: "The rejection of the alternatives with a 'low or even moderate level[] of implementation' on these grounds is nonsensical. It is clearly unreasonable to even suggest that a lower level of effort directed at the project objectives will somehow not meet those project objectives, yet a higher level will. That is nonsense. Clearly *all* levels of effort will meet the project's objectives, after all they were in fact precisely designed to meet the project's objectives."

We see nothing "nonsensical" in CALFED concluding that a flexible level of effort would meet Program objectives while an unvarying modest or moderate level would not. We believe CALFED could reasonably conclude a modest or moderate level of ecosystem restoration activities, for example, may not be sufficient to bring listed fish or wildlife off the endangered species list. Furthermore, CDWA does not point out where any party ever proposed such a reduced effort alternative for the Program. (See Pub. Resources Code, § 21177, subd. (a).)

There is nothing in the record to suggest any party ever proposed alternatives to the common components of the Program. The only portions of the common components that are challenged here are the EWA and the commitment of no reduced exports. However, RCRC does not cite anything in the record to suggest any alternative to the EWA was ever suggested. This, of course, is not surprising given the unsettled nature of the EWA at the programmatic level (to be discussed later). Nor does RCRC provide any basis for asserting that CALFED incorrectly concluded there are no alternatives to the EWA. As for water exports, we address alternatives to this aspect of the Program below.

5. The Necessity for an Alternative that Reduces the Conversion of Agricultural Land and Water

The Farm Bureau contends the PEIS/R was required to include an alternative that calls for reduced conversion of agricultural land and water. The Farm Bureau argues CALFED determined early

in the scoping process that an alternative limiting conversion of agricultural land and water is feasible, but such an alternative was not carried forward in the analysis. The State counters that CALFED never concluded an alternative with less conversion of agricultural land is feasible and, at any rate, the proposals that are included in the PEIS/R do not call for a particular amount of agricultural land to be converted but instead indicate a maximum amount.

The State has the better argument. The record does not support the Farm Bureau's assertion that CALFED determined an alternative with less agricultural conversion is feasible. A public workshop information package dated December 4, 1995, described an existing land use pattern approach to meeting CALFED's objectives. That approach would not have required conversion of agricultural land to habitat. However, this workshop document did not say such an approach was a feasible alternative, only that it was a starting point for "assembling preliminary alternatives."

In another document, Robin Reynolds of the CDFA told CALFED: "The CDFA believes that objective analysis would show that it is feasible to achieve many of the CALFED program goals related to ecosystem restoration, without the significant and unmitigated adverse impacts on prime agricultural land or the beneficial use of the Bay-Delta system for agriculture." This document is an undated memorandum reflecting the opinion of one member of CDFA. Standing alone, it cannot be taken to reflect CDFA's view of the feasibility of achieving the Program's goals

without significant impacts to agriculture and certainly cannot be taken to reflect CALFED's view of the matter. More importantly, it addresses "many of the CALFED program goals related to ecosystem restoration," not all, or even most, of the goals of the Program.

The Farm Bureau also argues CALFED recognized that an alternative with *limited* conversion of agricultural water was feasible. The Farm Bureau relies on another portion of the workshop information package described above, where CALFED identified two approaches to resolving the conflict between water supply availability and beneficial uses: a "Demand Reduction Approach" and a "Supply Enhancement Approach." The Farm Bureau argues the supply enhancement approach would not require conversion of agricultural water to in-stream uses.

CALFED did not say a pure supply enhancement approach was feasible, only that the two approaches, demand reduction and supply enhancement, "bracket[ed]" the range of possible alternatives. CALFED indicated the universe of feasible alternatives would be found between these two extremes.

The Farm Bureau argues CALFED was required to consider an alternative calling for the conversion of less than 243,000 acres of agricultural land and 400,000 acre-feet of agricultural water. However, this argument presupposes that the alternatives included in the PEIS/R call for the conversion of those amounts of land and water. They do not. The preferred program alternative estimates the conversion of from 191,100 to 242,900 acres of agricultural land. The responses to comments state:

"[T]he number of acres of Important Farmland that CALFED could convert (243,000 acres) is a worst-case scenario that is unlikely to occur. For instance, the number includes a large acreage for seasonal wetlands, which likely will be accomplished through leasing agricultural land for winter flooding. In this type of action, no conversion would take place." Similarly, nowhere in the PEIS/R is it stated that all 400,000 acre-feet of water would come from agricultural sources.

Furthermore, during the scoping process, CALFED reduced the amount of agricultural land proposed for conversion. Appendix M of a phase I summary report, which listed 10 draft alternatives, indicated that "[a]pproximately 300,000 to 400,000 acres of land would be permanently retired, using willing sellers, to reduce agricultural water consumption and improve water quality." In an August 13, 1996 letter to the Farm Bureau, CALFED stated that "[t]he ten draft alternatives included both temporary fallowing during periods of shortage, and permanent land retirement. Permanent retirement was included in the alternatives as a measure to improve water quality by reducing discharges from drainage problem lands, and as a demand management/water use efficiency measure. The amount of permanent land retirement varied among the alternatives from a low range of 70,000 to 100,000 acres of permanent land retirement, to an upper end of 750,000 to 850,000 acres. . . ." However, later CALFED determined that agricultural land retirement would not be used as a means of reducing water demand. In addition, an alternative calling for more ecosystem restoration was rejected

during the scoping phase because, among other things, it involved a redirection of impacts to agriculture and land use.

According to the responses to comments, the Ecosystem Restoration Program seeks to reduce agricultural conversion by "encourag[ing] 'wildlife friendly' agricultural practices to support existing agricultural productivity while contributing to overall improvements for species dependent on pastures, harvested grain fields, and crops." It also "recommends developing and implementing 'wildlife-friendly' agricultural practices throughout much of the [Ecosystem Restoration Program] focus area." The responses state: "To meet the land needs of the Program, CALFED will first look to use of existing state and federal land. If additional land is required, CALFED will obtain easements where practical and compatible with the intended use."

Furthermore, CALFED did consider alternatives with reduced conversion of agricultural land. According to the responses to comments, when the list of 100 alternatives was reduced to 31, among the resulting alternatives "were minimal and moderate ecosystem restoration actions with a greatly reduced potential to cause significant effects on agricultural lands." However, following several workshops and public meetings, and based on input received, "CALFED concluded that these actions would not achieve the basic CALFED Program objective of restoring ecological health to the Bay-Delta system."

In sum, the alternatives scoping process resulted in a reduction in the amount of agricultural land that would

potentially be converted to other uses under the Program. Furthermore, the alternatives included in the PEIS/R do not call for a rigid conversion of 243,000 acres of agricultural land and 400,000 acre-feet of agricultural water. These were established only as maximums, with lower amounts more likely to occur. In light of the flexibility in the land conversion numbers, there was no need for the PEIS/R to include an alternative with a specific lower amount of agricultural conversion.

6. The Necessity for an Alternative that Reduces Water Exports

Appellants contend the PEIS/R should have included an alternative with reduced exports of water from the Delta. Instead, they argue, all the alternatives included in the PEIS/R call for an increase in exports.

The State and Metropolitan counter that a reduced water exports alternative was considered but rejected as infeasible in light of projected population growth and the Program's water supply reliability goal. The record contains evidence that significant exports from the Delta will be needed in the future to meet water demands in Southern California. According to a California water plan update, the State's population is expected to increase from 30 to 49 million by 2020, with half of that increase in the South Coast Region, thereby increasing water demand in that area. The PEIS/R explains that California has historically used more than its proper allocation of Colorado River water, and the Secretary of the Interior has announced

that California will have to live within its allocation when surplus water is not available and Arizona and Nevada use their full apportionment. Southern California has also been constrained in its use of Mono Lake water. "Population growth and increased demand, combined with a possibility of reduced supplies from the Colorado River, mean the South Coast Region's annual shortages for 2020 could amount to 0.4 [million acre-feet] for average years and 0.8 [million acre-feet] in drought years; this is before consideration of the additional 1- to 3-[million acre-feet] environmental water needs, which could reduce existing SWP supplies from the Delta."

Water conservation efforts will not be enough to meet this increased demand. The PEIS/R's responses to comments explain: "[W]ater use efficiency alone will not suffice to reduce the mismatch between Bay-Delta water supplies and current and projected beneficial uses dependent on the Bay-Delta system." According to the ROD, "reliance solely on water use efficiency measures does not allow the flexibility of water management tools necessary to achieve the water supply, water quality, and ecosystem quality objectives of the Program."

The State argues that halting delivery of water to areas south of the Delta would exacerbate rather than reduce the mismatch between the beneficial uses in these areas and available water supplies and would redirect significant impacts to a group of people currently dependent upon the Delta--most of the state's citizens.

CDWA responds that reliance on Delta exports actually reduces water supply reliability for areas south of the Delta. According to CDWA, "[b]y relying on Delta exports, the importing areas are subject to the inherent 'unreliableness' [*sic*] of the Delta as [a] firm source of their water supply given the nature of the delicate Delta ecosystem and the numerous competing needs of fish and wildlife and water users, both within and outside of the Delta, which rely upon the Delta." CDWA argues that decreasing exports would increase reliability by "gradually reducing the importing areas[']reliance on the 'unreliable' Delta and shifting them to 'more reliable' non-Delta sources of water, including, e.g., local groundwater supplies and in some cases the ocean, as well as boosting their local efforts in maximizing their existing supplies via water conservation, water reuse, and the like." Requiring self-reliance by export users, CDWA argues, would also increase water reliability for in-Delta users.

The CALFED Program includes a significant commitment to water conservation and the use of alternative sources of water. However, the CALFED agencies concluded these efforts alone would not be enough to meet rising water demands in the areas south of the Delta. As stated in the responses to comments, "[w]hile water conservation is an important part of any Bay-Delta solution, conservation does not represent a complete and comprehensive solution to all of the problems plaguing the Bay-Delta. Water conservation alone will not adequately address the degraded Bay-Delta ecosystem, declining water quality, a levee

system vulnerable to failure, or the uncertainty of water supplies to meet beneficial uses."

Appellants do not challenge this determination. Rather, their challenge is directed at the Agency's goal of reducing the mismatch between water supply and demand. As we have said, appellants do not contend this goal is unsupported by the record. The record contains evidence that more water will be needed for export south of the Delta to meet a growing population. CALFED concluded an alternative with reduced Delta exports would not meet all of the Program's goals, in particular this reallocation goal.

But CALFED's rejection of a reduced exports alternative is premised on the false assumption that, for an alternative to be feasible, it must meet *all* of the Program's goals. Guidelines section 15126.6, subdivision (b) reads: "Because an EIR must identify ways to mitigate or avoid the significant effects that a project may have on the environment (Pub. Resources Code, § 21002.1), the discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, *even if these alternatives would impede to some degree the attainment of the project objectives,* or would be more costly." (Italics added.) Subdivision (f) reads: "The range of alternatives required in an EIR is governed by a 'rule of reason' that requires the EIR to set forth only those alternatives necessary to permit a reasoned choice. The alternatives shall be limited to ones that would avoid or

substantially lessen any of the significant effects of the project. Of those alternatives, the EIR need examine in detail only the ones that the lead agency determines could feasibly attain *most* of the basic objectives of the project. The range of feasible alternatives shall be selected and discussed in a manner to foster meaningful public participation and informed decision making." (Italics added.)

City of Carmel-by-the-Sea v. U.S. Dept. of Trans. (9th Cir. 1997) 123 F.3d 1142 involved a project to realign State Highway 1 near the City of Carmel-by-the-Sea. The "Purpose and Need" section of the final EIR defined the desired level of service for the new highway for the next 20 years as Level of Service C, which is "in the zone of stable flow, but speeds and maneuverability are more closely controlled by the higher volumes." (*Id.* at p. 1149, fn. 3; see also *id*. at p. 1155.) The city and others challenged the EIR on a number of grounds, including the adequacy of the alternatives discussion. The petitioners argued selection of Level of Service C as a goal for the project preordained the alternative selected. (*Id.* at p. 1155.)

After first finding the selection of Level of Service C was a reasonable goal for the project and that other goals, such as environmental and financial concerns, were also considered (*City of Carmel-by-the-Sea v. U.S. Dept. of Trans., supra,* 123 F.3d at p. 1157), the court concluded there were a number of alternatives that achieved the project's goals. (*Id.* at p. 1159.) The court explained: "Each of the alternatives

considered in the Final Environmental Impact Statement/Report achieved the project goals, from traffic delay to safety to environmental impact, in varying degrees. No one alternative fulfilled all the goals completely. For example, alternative 7 likely best satisfied the traffic goals, but it was costly and failed to conform to local planning specifications. Alternatives 3, 4 and 6 each had advantages from an environmental and traffic standpoint, although none were consistent with local planning and none reached the Level of Service C goal. Alternative 1C Modified meet [*sic*] the traffic goals, but was arguably less attractive from an environmental standpoint--even though these concerns were assuaged by the mitigation plans adopted. These proposals span the spectrum of 'reasonable' alternatives and satisfied the requirements of the National Environmental Policy Act." (*Ibid.*)

Thus, in *City of Carmel-by-the-Sea v. U.S. Dept. of Trans.*, *supra*, 123 F.3d 1142, the court concluded the EIR contained sufficient alternatives to the project notwithstanding the fact none of the alternatives fulfilled all of the project goals completely.

In *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, the petitioners challenged the alternatives analysis for a planned, 96-unit condominium project with two buildings and a density of 28.3 units per acre. (*Id.* at p. 485.) The final EIR analyzed a no action alternative and three others, "two single-family residential developments and a single-structure, multi-residential development." (*Id.* at p.

488.) The petitioners argued the alternatives analysis was flawed because the alternatives considered were not feasible. Those alternatives provided lower density, whereas the primary objective of the project was to provide high-density housing. (*Id.* at pp. 488-489.)

The Court of Appeal found the mismatch between the alternatives included in the EIR and the project's primary objective was not a problem, explaining: "Admittedly, the primary objective of the project is to provide high-density housing consistent with existing planning goals; however, other objectives include developing a vacant area that is highly visible and historically disturbed in a manner that is sensitive to surrounding developments, the natural habitat and open space associated with the river, thereby providing a valuable addition to the downtown area. While these alternatives do not meet the primary development objective of providing high-density housing, they do satisfy all the secondary project objectives. This is sufficient because alternatives need not satisfy all project objectives, they must merely meet 'most' of them. (CEQA Guidelines, § 15126.6, subd. (a).)" (*Mira Mar Mobile Community v. City of Oceanside*, *supra*, 119 Cal.App.4th at p. 489.)

In *Mira Mar Mobile Community v. City of Oceanside*, *supra*, 119 Cal.App.4th 477, the court concluded the EIR contained feasible alternatives even though the alternatives did not meet the *primary* objective of the project.

As discussed earlier, the present matter involves the future allocation of the State's water. New water sources must

be obtained and/or demand reduced. When there is insufficient water to meet all projected beneficial uses, choices must be made. To provide more water for in-stream uses, for the creation of wetlands or for export to Southern California, it may be necessary to take water from somewhere else. One solution may be to create new water storage facilities. However, as explained earlier in connection with the failure of the PEIS/R to discuss impacts from the potential sources of Program water, this is a solution not necessarily welcomed by everyone.

In order to meet the water supply reliability objective of the Program, all of the alternatives proposed in the PEIS/R call for increased exports of water to areas south of the Delta, or at least no reduction in the amount of water exported. Because the PEIS/R does not specify the source of water for the Program, it is uncertain where the water will come from to meet this commitment. In order to supply water south of the Delta, it may be necessary to take water from other beneficial users, such as farmers, or to build new storage facilities. However, a reasonable alternative to this approach would be to reduce the amount of water exported south of the Delta, thereby reducing the amount of water that must be redirected from other users or impounded in new or existing reservoirs. Although such an alternative would not completely satisfy the CALFED goal of reducing the mismatch between Bay-Delta water supplies and beneficial uses, it could satisfy the other Program goals.

The feasibility of such a reduced exports alternative is clear, notwithstanding the projected population growth that undergirds the commitment not to reduce exports. As stated previously, it is projected that the state's population will grow from 30 to 49 million by the year 2020, and that half of this growth will be in Southern California. Such population growth requires water. However, if there is no water to support the growth, will it occur as projected? Population growth is not an immutable fact of life. Stable populations have been established in such states as New York, Pennsylvania, Connecticut, and Rhode Island. (Carle, *supra*, at p. 196.) Inflow of new residents to California continues to exceed outflow because conditions in the State are conducive to population growth. One aspect of these conditions is the availability of water. However, as the State reaches the limit of available water and must seek other sources such as desalination, water will become more expensive to obtain and California's appeal will lessen.

Years ago some argued that people should follow the water, not vice versa. While it is not the function of this Court to advocate one position or the other, this argument nevertheless points out a glaring defect in the PEIS/R. CALFED conducted its environmental analysis by assuming certain population growth in the State over the next 15 years and then finding ways to provide water to that population. But CALFED appears not to have considered, as an alternative, smaller water exports from the Bay-Delta region which might, in turn, lead to smaller

population growth due to the unavailability of water to support such growth. Taking an assumed population as a given and then finding ways to provide water to that population overlooked an alternative that would provide less water for population growth leaving more for other beneficial uses. CALFED apparently assumed that the California population would grow as projected regardless of the availability of water and did not consider whether, if less water was supplied, population growth would be affected accordingly, leading to less demand.

An EIR is required to provide a range of alternatives necessary to permit a reasoned choice. (Guidelines, § 15126.6, subd. (f).) "A major function of the EIR is to ensure thorough assessment of all reasonable alternatives to proposed projects by those responsible for the decision." (*Kings County Farm Bureau v. City of Hanford*, *supra*, 221 Cal.App.3d at p. 733; see also *County of Inyo v. City of Los Angeles*, *supra*, 71 Cal.App.3d at p. 203.) In this instance, a reasonable choice would be between (1) diverting more water south of the Delta by redirecting water from other users or creating new water storage and (2) diverting less water south of the Delta, thereby lessening or eliminating the need for redirection or new storage.

The California Supreme Court has stated that "an EIR for any project subject to CEQA review must consider a reasonable range of alternatives to the project, or to the location of the project, which: (1) offer substantial environmental advantages over the project proposal (Pub. Resources Code, § 21002); and

(2) may be 'feasibly accomplished in a successful manner' considering the economic, environmental, social and technological factors involved. (Pub. Resources Code, § 21061.1 . . . .)" (*Citizens of Goleta Valley v. Board of Supervisors*, *supra*, 52 Cal.3d at p. 566, italics omitted.) An alternative with reduced exports of water may well be environmentally superior to one that requires redirection of water from existing streams or construction or expansion of water storage facilities. Water exported south of the Delta must come from sources flowing into the Delta. Where one of the objectives of the ecosystem restoration component of the Program is to increase stream flows for the benefit of fish and wildlife, an alternative that does not require diversion of stream flows into the Delta would obviously benefit the environment. And, for the reasons stated earlier, an alternative that does not require construction or expansion of reservoirs will avoid the negative environmental impacts of dam construction.

An alternative with reduced exports would also appear to be feasible, at least in the long term as population growth adjusts to the new realities of water availability. Although such alternative would not completely satisfy the water allocation objective of the Program, it could satisfy other objectives.

Those deciding the future of this state to the extent it depends upon the allocation of its most precious resource should be presented with all available choices. The PEIS/R should have

included an alternative that assumed reduced water exports from the Bay-Delta region.

E. The PEIS/R's Analysis of Mitigation Measures

1. Introduction

The Farm Bureau challenges the adequacy of the PEIS/R's mitigation measures as they relate to impacts on agricultural resources.

A public agency that carries out or approves a project having significant environmental impacts must mitigate or avoid those impacts whenever feasible. (Pub. Resources Code, § 21002.1, subd. (b); see also Guidelines, § 15021, subd. (a)(2).) Upon identification of significant environmental effects of a project, approval must be preceded by an EIR that includes one or more of the following findings: "(1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment. [¶] . . . [¶] (3) Specific economic, legal, social, technological, or other considerations including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the [EIR]." (Pub. Resources Code, § 21081.) These findings must be accompanied by supporting facts. (*Rio Vista*, *supra*, 5 Cal.App.4th at p. 374.)

The substantial evidence test applies to the adequacy of an EIR's discussion of mitigation measures. (See *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027

(hereafter *Sacramento Old City Assn*.).) Our role "is not to determine the correctness of the findings on mitigation of environmental effects, but only to assess 'whether they are supported by substantial evidence . . . .' [Citation.] We must 'consider the evidence as a whole'; that a discussion of mitigation measures is 'imperfect in various particulars does not necessarily mean it is inadequate.'" (*Rio Vista*, *supra*, 5 Cal.App.4th at p. 381.)

2. Mitigation Measures Included in the PEIS/R

If an activity being evaluated is a program, the mitigation measures may consist of policy statements included in the program that will serve to guide project-specific mitigation in the future. (See Guidelines, § 15126.4, subd. (a).) Hence, the PEIS/R here does not include specific mitigation measures for particular impacts. It states: "Because this Programmatic EIS/EIR does not evaluate site-specific actions, no specific mitigation measures are presented. Instead, general mitigation strategies are identified as ways to avoid, minimize, restore, or compensate for potentially significant adverse impacts. For some resources, specific mitigation measures are provided as examples to display the array of techniques available in order to carry out the strategy. For example, construction activities can cause erosion of soils that leads to adverse impacts on water quality. A mitigation strategy would be to avoid and minimize the impact. Mitigation measures available to carry out this strategy include conducting work during dry periods and

using erosion-control fencing or straw bales, water detention basins, and so forth."

In connection with the significant impacts to agricultural resources, the PEIS/R lists the following 31 general mitigation measures:

"1. Site and align Program features to avoid or minimize effects on agriculture.

"2. Examine structural and nonstructural alternatives to achieve project goals in order to avoid effects on agricultural land.

"3. Implement features that are consistent with local and regional land use plans.

"4. Involve all affected parties, especially landowners and local communities, in developing appropriate configurations to achieve the optimal balance between resource effects and benefits.

"5. Retain water allocations from retired drainage-impaired lands within existing water districts.

"6. Support the testing and application of alternative crops to idled farmland (for example, agroforestry or energy crops).

"7. Provide water supply reliability benefits to agricultural water users.

"8. Support the California Farmland Conservancy Program in acquiring easements on agricultural land in order to prevent its conversion to urbanized uses and increase farm viability. Focus

on lands in proximity to where any conversion effect takes place.

“9. Restore existing degraded habitat as a priority before converting agricultural land.

“10. Focus habitat restoration efforts on developing new habitat on public lands before converting agricultural land.

“11. If public lands are not available for restoration efforts, focus restoration efforts on acquiring lands that can meet ecosystem restoration goals from willing sellers where at least part of the reason to sell is an economic hardship (for example, lands that flood frequently or where levees are too expensive to maintain).

“12. Use farmer-initiated and developed restoration and conservation projects as a means of reaching Program goals.

“13. Where small parcels of land need to be acquired for waterside habitat, seek out points of land on islands where the ratio of levee miles to acres farmed is high.

“14. Obtain easements on existing agricultural land for minor changes in agricultural practices (such as flooding rice fields after harvest) that would increase the value of the agricultural crop(s) to wildlife.

“15. Include provisions in floodplain restoration efforts for compatible agricultural practices.

“16. Purchase water for habitat purposes so that the same locality is not affected over the long term.

“17. Use a planned or phased habitat development approach in concert with adaptive management.

“18. Minimize the amount of water supply required to sustain habitat restoration acreage.

“19. Develop buffers and other tangible support for remaining agricultural lands. Vegetation planted on these buffers should be compatible with farming and habitat objectives.

“20. In implementing levee reconstruction measures, work with landowners to establish levee reconstruction methods that avoid or minimize the use of agricultural land.

“21. Work with landowners to establish levee subsidence [best management practices] that avoid effects on land use practices. Through adaptive management, further modify [best management practices] to reduce effects on agricultural land.

“22. Implement erosion control measures to the extent possible during and after project construction activities. These erosion control measures can include grading the site to avoid acceleration and concentration of overland flows, using silt fences or hay bales to trap sediment, and revegetation areas with native riparian plants and wet meadow grasses.

“23. Protect exposed soils with mulches, geotextiles, and vegetative ground covers to the extent possible during and after project construction activities in order to minimize soil loss.

“24. Use rotational fallowing to reduce selenium drainage.

“25. When it appears that land within an agricultural preserve may be acquired from a willing seller by a State CALFED agency for a public improvement as used in Government Code Section 51920, advise the Director of Conservation and the local

governing body responsible for the administration of the preserve of the proposal.

"26. Limit the number of acres that can be fallowed (in order to produce transferable water) in a given area (district or county) or the amount of water that can be transferred from a given area.

"27. Support assistance programs to aid local entities in developing and implementing groundwater management programs in water transfer source areas.

"28. Dredged materials will be analyzed, dredged and handled in accordance with permit requirements. Permits will incorporate mitigation strategies identified in Section 5.3 to prevent release of contaminants of concern.

"29. Utilize the criteria and objectives in the Water Transfer Program, in conjunction with existing legal constraints on water transfers, to protect against adverse effects due to water transfers. The criteria for future water transfer proposals include:

"Water transfers must be voluntary.

"Water market transactions must result in the transfer or exchange of water that truly increases the utility of the supply, not water that a transferor has never used or water that would have been legally available for downstream use in the absence of a transfer.

"Water rights of all legal water users must not be impaired.

"Transfers must not cause overdraft or degradation of groundwater basins, or impair correlative rights of overlying users.

"Entities receiving transferred water should be required to show that they are making efficient use of existing water supplies.

"Water rights holders (whether districts or individuals) must play a strong role in determining whether water to which they have a right is transferred.

"The beneficial and adverse impacts on fiscal integrity of the districts and on the economy of agricultural communities in source and receiving areas cannot be ignored.

"30. Implement seepage control measures.

"31. Support local groundwater management that reduces overdraft and third-party effects, including reduction or discontinuation of groundwater pumping."

The various agencies that signed the ROD committed to adopting specific mitigation measures in connection with projects undertaken under the Program. The ROD states: "Projects and activities that implement the CALFED Preferred Program Alternative will be monitored to ensure that mitigation strategies developed in the Final Programmatic EIS/EIR are considered, adopted and implemented."

The Farm Bureau contends the mitigation measures included in the PEIS/R for agricultural impacts are inadequate because CALFED failed to specify performance standards to ensure that any of the proposed measures will be undertaken at the project

level. The Farm Bureau cites Guidelines section 15126.4, subdivision (a)(1)(B), which states in relevant part: "Formulation of mitigation measures should not be deferred until some future time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way."

The trial court rejected the Farm Bureau's contention, explaining: "The EIR does not improperly defer mitigation as alleged by the petitioners. CEQA only requires feasible mitigation measures. While site-specific mitigation measures may be required when a particular parcel is acquired for a water storage project, general mitigation strategies are reasonable and appropriate for a programmatic EIR. These strategies can be tailored later to the circumstances of future specific land conversions. Detailed mitigation measures are often infeasible, wasteful of resources, and not especially illuminating in the context of a general program or plan." (Fns. omitted.)

We agree with the trial court. In *Sacramento Old City Assn.*, *supra*, 229 Cal.App.3d 1011, this court considered a development project in a downtown area that would have adverse impacts on parking availability. (*Id.* at p. 1020.) The EIR for the project did not include specific mitigation measures. Instead, it required preparation of a "Transportation Management Plan (TMP) to reduce project-related traffic and parking impacts," and listed potential mitigation measures. The draft EIR stated: "Mitigation measures to reduce projected parking

impacts have been developed with the overall goal being an overall area parking utilization rate of 90 percent during the critical weekday afternoon period." (*Id.* at p. 1021.) The draft EIR then listed *potential* mitigation measures, including "Limit the Size of 'Short-Term' Weekday Events," "Provide Satellite Parking," "Promote Alternative Transportation Modes for Attendees," and "Construct Additional Parking." (*Id.* at pp. 1021-1022.)

We found the mitigation measures sufficient under the circumstances, explaining: "[F]or kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process (e.g., at the general plan amendment or rezone state), the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated." (*Sacramento Old City Assn.*, *supra*, 229 Cal.App.3d at pp. 1028-1029.)

The Farm Bureau contends reliance on *Sacramento Old City Assn.* is misplaced, because the general mitigation measures adopted there contained a performance standard--that the overall level of parking utilization not exceed 90 percent. However, this supposed performance standard was not the basis for our decision to uphold the EIR. We were persuaded instead by the

breadth of the potential mitigation measures proposed. As we explained: "The City in the present case has . . . committed itself to mitigating the impacts of parking and traffic. The City approved funds for a major study of downtown transportation. [¶] The draft EIR discussed several options for mitigating the parking problem. The EIR section on mitigation noted: 'Impacts to area parking conditions could be partially mitigated by redesigning the project to provide on-site parking or by constructing additional parking in the study area which would be designated for Convention Center attendees. The *Downtown Sacramento Parking Study* (Wilbur Smith Associates 1/88) notes a proposal to expand Lot E (12th & I) to provide 381 spaces, and describes the East End Garage (1,058 spaces on I Street between 10th and 11th). Both projects would be available to the general public but could be designated for Convention Center use in order to accommodate large concurrent events. The study also describes development of a Lot C structure, which could provide a net increase of 733 spaces on H Street between 14th and 15th Street. In addition, the recently completed Hyatt Regency Ho[t]el is intended to provide some public parking. This additional parking was not included in the demand analysis.'" (*Sacramento Old City Assn.*, *supra*, 229 Cal.App.3d at p. 1029.)

In *Rio Vista*, *supra*, 5 Cal.App.4th 351, the public agency adopted a hazardous waste disposal plan that contained a siting analysis for treatment, storage and disposal facilities and designated general areas within the county that met the siting

criteria. (*Id.* at p. 364.) The EIR prepared for the plan indicated that "each specific facility may have different potential consequences, such that specific irreversible impacts and mitigation measures are more appropriately discussed in 'future CEQA documents for any proposed facility.'" (*Id.* at p. 367.)

The Court of Appeal approved the EIR despite the absence of specific mitigation measures, "given the broad, nebulous scope of the project under evaluation." (*Rio Vista*, *supra*, 5 Cal.App.4th at p. 376.) The court explained: "The general statement of mitigation measures in the [final program EIR] is consistent with the general nature of the Plan. Any further and more detailed statement of mitigation measures at this formative stage in the County's hazardous waste disposal plan would have been neither reasonably feasible nor particularly illuminating." (*Id.* at p. 377.) The court continued: "[W]e find significant respondent's adoption of the siting criteria and other mitigation measures to be applied to any future projects. Under the Plan, for those mitigation measures which the County cannot presently formulate precisely absent a proposal for a specific facility, a firm commitment has been made to future mitigation of significant impacts." (*Ibid.*) Finally, the court said: "Any vagueness or perceived inconsistency in the mitigation measures described in the [final program EIR] is, we find, inherent in the discussion of general, countywide impacts in a planning program which has not approved a particular site or facility for development. Thus, many specific mitigation

measures can only be ‘recommended’ until a specific facility is proposed. The generic description of mitigation measures and alternatives is, in our view, appropriate to the present, preliminary status of the hazardous waste management and disposal program represented by the Plan.” (*Id.* at p. 381.)

The Farm Bureau contends the inadequacy of the mitigation measures for agricultural resources in the present matter is highlighted by a comparison with the mitigation measures adopted for impacts to vegetation and wildlife. Those measures contain a number of requirements for replacement and repair of habitat taken for Program purposes. For example, mitigation measure No. 2 for vegetation and wildlife reads: “Restore and enhance sufficient in-kind wetland and riparian habitat or rare natural communities and significant natural areas at offsite locations (near project sites) before or at the time that project impacts are incurred. Replace not only acreage lost, but also habitat value loss.” Mitigation measure No. 27 reads: “Restore riparian vegetation disturbed by on-site construction activities immediately following construction.”

The State contends the mitigation strategies for impacts to vegetation and wildlife are similar to those for impacts to agricultural land. According to the State, mitigation measures for both types of resources include compensation at off-site locations as a potential strategy for second-tier projects. We disagree. As indicated, mitigation measures for the loss of wildlife habitat include repair or replacement of all habitat lost. No such mitigation measure exists for agriculture

resources. The closest measure is No. 8, which reads: "Support the California Farmland Conservancy Program in acquiring easements on agricultural land in order to prevent its conversion to urbanized uses and increase farm viability. Focus on lands in proximity to where any conversion effect takes place." This is not a commitment to repair or replace agricultural land lost to the Program. The mitigation measures for vegetation and wildlife contain more than a dozen measures that require restoration of habitat.

The State further contends restoration of vegetation and wildlife habitat is supported by state and federal law. Among other things, the State cites Fish and Game Code section 1301, which states: "[I]t is the policy of the State to acquire and restore to the highest possible level, and maintain in a state of high productivity, those areas that can be most successfully used to sustain wildlife and which will provide adequate and suitable recreation." While the State acknowledges that other laws provide for the protection of agricultural land (see, e.g., Pub. Resources Code, §§ 10201, subd. (d), 10202; Food & Agr. Code, § 821), it argues that specific statutes direct how species policies shall be implemented but no comparable statutes exist for farmland.

Regardless of whether state and federal law is more protective of wildlife habitat than agricultural land, the overall objectives of the CALFED Program support the greater protection afforded to vegetation and wildlife habitat reflected in the mitigation measures. Because one of the objectives of

the Program is to restore vegetation and wildlife habitat lost over many years of urban and agricultural development, it should come as no surprise that repair or replacement of such habitat destroyed in pursuit of the Program would be adopted as a mitigation measure just to maintain the status quo.

The same cannot be said of agricultural resources. As stated in the PEIS/R, and as we shall discuss later, a requirement to replace all agricultural resources lost in pursuit of the Program is not feasible at the programmatic level. The determination of whether such resources can be replaced or protected must await a specific project. Thus, the Farm Bureau's comparison of mitigation measures for agricultural resources and those for vegetation and wildlife habitat is not apt.

The Farm Bureau contends the real reason mitigation measures for agricultural resources are not as protective as those for vegetation and wildlife habitat is not that the Program was designed to protect the latter but because the State Resources Agency was concerned with the cost of replacing agricultural resources. The Farm Bureau cites an issue paper prepared by CALFED staff that states: "If agricultural resource mitigation was incorporated as part of the CALFED Program, it would make land and water acquisition for fish and wildlife purposes, to the extent presumed to be required, too expensive."

The Farm Bureau cites nothing to suggest this issue paper, which may represent the opinion of only one staff member, became the official position of CALFED or otherwise informed the

mitigation measures adopted. At any rate, the opinion does not overshadow the obvious differences between the two types of resources in light of the Program's purposes.

3. The Necessity for a Mitigation Measure that Prohibits the Use of Categorical Exemptions

The Farm Bureau contends the PEIS/R should have included a mitigation measure prohibiting the use of categorical exemptions for the conversion of agricultural land to habitat. In the alternative, the Farm Bureau argues the PEIS/R should have disclosed whether or not categorical exemptions will be used. The Farm Bureau asserts that, because the mitigation measures adopted in the PEIS/R are only proposals to be considered at the project level, the use of categorical exemptions at the project level will mean those mitigation measures will never be implemented.

Public Resources Code section 21084, subdivision (a) requires the Secretary of the State Resources Agency to adopt "a list of classes of projects which have been determined not to have a significant effect on the environment and which shall be exempt" from CEQA. "Pursuant to this authority, the secretary has created 29 classes of 'categorical exemptions,' which are set forth in the CEQA guidelines." (*Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644, 653, disapproved on other grounds in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576, fn. 6.)

The trial court concluded the adoption of a mitigation measure prohibiting the use of categorical exemptions "would have been infeasible and futile since the Resources Agency does not have legal authority over all other agencies participating in the CALFED program." But the same can be said about any of the mitigation measures included in the PEIS/R. To adopt this reasoning would mean no mitigation measure could ever be adopted in a programmatic EIR that governs the operation of individual projects involving multiple agencies. However, the agencies that signed the ROD committed to the terms of the Program, including mitigation measures. The law requires nothing more.

The Farm Bureau argues CALFED believes conversion of agricultural land to habitat is subject to both class 13 and class 17 exemptions. The Farm Bureau requests that we take judicial notice of the briefs filed by the parties and the ruling of the court in an unrelated action in which the State asserted a class 13 exemption for the creation of a conservation easement over agricultural land. We grant the request. The Farm Bureau also requests we take judicial notice that the State "is taking the position *in court* that projects that convert agricultural land to habitat are exempt from CEQA review." We deny this request, as the indicated fact is not a proper subject of judicial notice.

"Class 13 consists of the acquisition of lands for fish and wildlife conservation purposes including (a) preservation of fish and wildlife habitat, (b) establishing ecological reserves under Fish and Game Code Section 1580, and (c) preserving access

to public lands and waters where the purpose of the acquisition is to preserve the land in its natural condition." (Guidelines, § 15313.) The Farm Bureau argues this exemption applies only to the preservation of wildlife habitat in its natural condition, not the conversion to habitat of land being used for other purposes.

"Class 17 consists of the establishment of agricultural preserves, the making and renewing of open space contracts under the Williamson Act, or the acceptance of easements or fee interests in order to maintain the open space character of the area. The cancellation of such preserves, contracts, interests, or easements is not included and will normally be an action subject to the CEQA process." (Guidelines, § 15317.) The Farm Bureau argues this exemption applies only to the establishment of agricultural preserves, Williamson Act contracts, or the acceptance of easements, not the conversion of agricultural land to habitat.

Regardless of whether the two indicated exemptions apply to the conversion of agricultural land to habitat, no exemption applies to a project that has significant environmental impacts. Guidelines section 15300.2, subdivision (c) states: "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." Thus, the PEIS/R need not state that categorical exemptions do not apply. If there is a reasonable possibility that a project will have a significant effect on the

environment, whether individually or cumulatively, any categorical exemption that might otherwise apply cannot be used. This must be determined on a project-by-project basis.

Finally, as to the Farm Bureau's argument that the PEIS/R should have disclosed whether or not categorical exemptions would be used, this assumes that the answer is "yes" or "no." However, as we have indicated, the answer is "maybe." The determination must be made on a project-by-project basis. We see no reason why the PEIS/R should disclose that the affected agencies will follow the law in this regard.

4. The Necessity for a Mitigation Measure Requiring the Proportional Replacement of Agricultural Land

On April 8, 1999, CDFA proposed that the following mitigation measure be included in the PEIS/R: "If CALFED acquires prime or unique farmland, or farmland of statewide importance for non-agricultural use, a proportionate area of analogous land in proximity shall be preserved in agricultural use in perpetuity by easement or other method." The mitigation measure is not included in the final PEIS/R. The ROD states: "Protection of off-site lands to mitigate conversions of farmlands is addressed in mitigation strategy 8 of Section 7.1 [support for the California Farmland Conservancy Program]. However, the exact amounts to be protected would depend on the project specific effects of conversion, as measured in the second-tier environmental document. The feasibility of this mitigation strategy would also need to be evaluated at the

project-specific level, and would depend on the number of voluntary participants in the easement program and the cost of acquiring the easements. . . . At a programmatic level, the feasibility of this measure is too uncertain. This mitigation measure is therefore not adopted for technical and administrative considerations."

The Farm Bureau contends the record does not support CALFED's determination that proportional protection of farmland is infeasible. In its trial brief on CEQA issues, the State cited six documents that purportedly support the rejection of a "mandatory replacement ratio for every acre of converted agricultural land . . . ." However, at most, these documents support a conclusion that the creation of new farmland to replace that converted for Program uses would be costly, but not necessarily infeasible.

The CDFA-proposed mitigation measure is different. CDFA did not suggest *replacement* of all converted agricultural acres but *protection* of a like number of acres. Thus, the cost of creating new irrigated farmland is irrelevant. The question is whether obtaining easements or similar protection over existing farmland is feasible.

Initially, the State argues the Farm Bureau has forfeited its argument in support of the mitigation measure proposed by CDWA by failing to cite CALFED's findings pertinent to that proposed measure. The State cites *City of Lomita v. City of Torrance*, *supra*, 148 Cal.App.3d 1062, where the court indicated Lomita's claim that the mitigation measures "were not properly

identified nor adequately analyzed" was insufficient because Lomita failed to explain "in what fashion or to what extent this is true" and failed to state "what *was* included on this point so as to demonstrate its inadequacy." (*Id.* at p. 1070.)

Here, however, the Farm Bureau identified the mitigation measure proposed by CDFA, and indicated this measure was not adopted in the PEIS/R. The Farm Bureau cited the evidence relied upon by the State below to support rejection of the mitigation measure. The Farm Bureau need do nothing more to raise the issue on appeal.

The State contends CALFED did in fact adopt a mitigation measure to preserve agricultural land through conservation easements. The State cites measure No. 8, which, as previously noted, reads: "Support the California Farmland Conservancy Program in acquiring easements on agricultural land in order to prevent its conversion to urbanized uses and increase farm viability. Focus on lands in proximity to where any conversion effect takes place." According to the State, "[t]his measure would provide funding to the Department of Conservation to obtain easements through its existing program and administrative structure, focusing on lands threatened with urbanization in proximity to where a CALFED project would take place."

We cannot agree that this is a mitigation measure to preserve agricultural land through the use of easements. A mitigation measure that encourages support for the California Conservancy Program in acquiring agricultural easements is a far cry from a measure that requires easements to be obtained over

an amount of land equal to that converted under the Program. The one requires some type of effort to achieve a favorable result, while the other requires the actual result.

Next, the State argues CALFED properly rejected a "no net loss" policy for agricultural land as infeasible. The ROD states: "Protection of off-site lands to mitigate conversions of farmlands is addressed in adopted mitigation strategy 8 of Section 7.1. However, the exact amounts to be protected would depend on the project-specific impacts of conversion, as measured in the second-tier environmental document. The feasibility of this mitigation strategy would also need to be evaluated at the project-specific level, and would depend on the number of voluntary participants in the easement program and the cost of acquiring the easements. At a programmatic level, the feasibility of this measure is too uncertain. This mitigation measure is therefore rejected for technical and economic considerations."

The Farm Bureau responds by arguing the State is judicially estopped from claiming a mitigation measure requiring one-for-one easements for agricultural conversion is infeasible. The Farm Bureau asserts the State took an inconsistent position in another case involving a development project in the City of Elk Grove, where the State argued easements could be obtained as a means of mitigating the loss of agricultural land.

"Judicial estoppel is an equitable doctrine aimed at preventing fraud on the courts. It is applied to keep litigants from playing 'fast and loose with the court.'" (*In re Marriage*

of Dekker (1993) 17 Cal.App.4th 842, 850.) Judicial estoppel may arise where a party takes advantage of certain self-serving averments or conduct in one court proceeding and then later attempts to contradict himself in another. (See *In re Marriage of Toth* (1974) 38 Cal.App.3d 205, 212.) Judicial estoppel applies when: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud or mistake." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) "Judicial estoppel is an extraordinary remedy that should be applied with caution." (*Kelsey v. Waste Management of Alameda County* (1999) 76 Cal.App.4th 590, 598.)

The Farm Bureau contends all five requirements for judicial estoppel are met here. We disagree. In order for the fourth requirement (inconsistent positions) to apply, "seemingly conflicting positions 'must be clearly inconsistent so that one necessarily excludes the other.'" (*Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th at p. 182.) The position taken by the State in the Elk Grove case was that an easement was a feasible mitigation measure for the conversion of 295 acres of mainly agricultural land in the area of the proposed project. In the present matter, the State does not argue easements cannot be used to mitigate agricultural land conversions. On the

contrary, mitigation measure No. 8 encourages the use of easements. In the present matter, CALFED concluded a mitigation measure requiring one-for-one easements for the entire CALFED Program is not feasible. In other words, while a particular agricultural conversion might be mitigated by the use of an agricultural easement, it is not feasible to require this mitigation method for all agricultural conversions ultimately required by the Program. This is a different issue from that presented in the City of Elk Grove case and, therefore, judicial estoppel is inapplicable.

The State argues CALFED properly concluded the use of agricultural easements must be determined on a project-by-project basis and cannot be mandated at the program level. According to the State, the ability to use easements will depend on such circumstances as the size and location of the agricultural conversion. Thus, only a mitigation measure encouraging the use of agricultural easements, as in measure No. 8, is appropriate at the programmatic level. Furthermore, the State argues, because agricultural land is in private hands, the ability to use agricultural easements will depend on willing landowners. And, the cost of agricultural easements in a given case may be prohibitive. The record contains evidence suggesting the cost of an agricultural easement near an urban area may be close to the value of a fee interest in the property.

We agree with the State. It is impossible at the programmatic level to mandate that agricultural easements be

obtained on a one-for-one basis for all agricultural acres converted to Program uses. Such a determination must be made on a project-by-project basis. Furthermore, the use of agricultural easements is not true mitigation, in the sense of reducing the adverse impact of Program actions. An easement only guarantees the use of existing agricultural land for agricultural purposes; it does not replace the agricultural land converted to other uses. In other words, use of an easement does nothing to mitigate the existing conversion. It only helps to avoid future conversions. By contrast, the mitigation measures proposed in the PEIS/R, such as siting Program features to reduce harms to agriculture, restoring existing degraded habitat before creating new habitat, using public lands wherever possible, and using easements to modify agricultural practices while leaving land in agricultural production, are designed to minimize the amount of agricultural land lost in the first place. For all of these reasons, we must reject the arguments that a mitigation measure calling for a proportional replacement of agricultural lands was necessary to the PEIS/R.

5. The Necessity for a Mitigation Measure Establishing an Agricultural Water Account

The Farm Bureau contends the State Resources Agency arbitrarily determined it is unnecessary to adopt a mitigation measure for the loss of agricultural water. CDFA proposed: "To the extent that CALFED actions result in any increase in water demand, CALFED shall develop the water supply necessary to meet

that demand from mechanisms other than the permanent redirection of existing agricultural water supplies." CDFA further proposed: "CALFED will establish an Agricultural Water Account (AWA), similar in concept to the [EWA]. The CALFED policy shall be that a portion of any newly developed CALFED water supply is identified as agricultural mitigation water, based on the amount of agricultural water redirected to other uses as a result of CALFED actions."

CALFED concluded mitigation of agricultural water conversions is unnecessary. In the responses to comments, the PEIS/R states: "[A] change in the use of water by itself is not a significant environmental impact requiring mitigation." The ROD provides: "While the CALFED Program does not include an Agricultural Water Account, the water supply reliability actions as outlined in Sections 2.2.4 and 2.2.5 of the ROD are intended to provide greater certainty of water supplies for agricultural and other users."

We note that the PEIS/R's assertion that a change in water use is not a significant impact is incorrect. As discussed earlier, a change in the use of water *can* result in a significant environmental impact, depending on the circumstances. (See *County of Amador v. El Dorado County Water Agency*, *supra*, 76 Cal.App.4th at pp. 967-968.)

The Farm Bureau argues there is no evidence to support the conclusion that the Program's redirection of agricultural water to other uses will result in no adverse impacts to agriculture. The State disagrees and argues "[t]he Resources Agency

specifically found that the CALFED plan would have beneficial impacts on water supply reliability." The ROD states: "Based on the use of alternative water management tools, including water use efficiency measures, water recycling, and water transfers, as well as conveyance improvements, the [EWA], and new storage, the Preferred Program Alternative will improve water supply reliability and water management flexibility." Elsewhere, the ROD states: "Compared to the No Action Alternative and existing conditions, the Preferred Program Alternative provides significant improvements in terms of its ecosystem quality, water quality, water supply reliability, and levee system integrity effects."

However, it cannot be assumed CALFED's general determination that the Program will improve water supply reliability was intended to apply to each resource area, including agriculture. On the contrary, the PEIS/R states "a change in the use of water by itself is not a significant environmental impact requiring mitigation." Thus, based on this assertion, there was no occasion for CALFED to assess whether the redirection of water from one resource area to another would cause an adverse impact. At any rate, CALFED's bare assertion of no adverse impact will not suffice. "To facilitate CEQA's informational role, the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions." (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.*, *supra*, 42 Cal.3d at p. 935.)

The State next argues the Farm Bureau incorrectly assumes the redirection of water from agriculture to other uses necessarily creates an adverse impact to agriculture. The State cites portions of the PEIS/R which, it asserts, show that various Program features will be beneficial to agriculture. However, other provisions show there may be a detriment to agriculture from water use changes in some regions.

But all of this is beside the point. As indicated earlier, the PEIS/R fails to specify the source for water needed by the Program. Without knowing the source, it is impossible to determine what effects changes in water use occasioned by the Program will have on agriculture. Hence, any consideration of whether CALFED should be required to devise a mitigation measure for adverse impacts to agriculture from water diversion is premature and will have to depend on CALFED's further consideration regarding the source of water for the Program.

F. Improper Segmentation of the Program Through Early Implementation Projects

The Bay-Delta Accord, adopted in 1994, "included a commitment by the agency and stakeholder signatories to develop and fund non-flow-related ecosystem restoration actions to improve the health of the Bay-Delta ecosystem. This commitment is commonly referred to as 'Category III.'" "The[se] Category III actions were required to be consistent with any alternative configuration and provide early implementation benefits." To the extent the Category III projects result in the conversion of

agricultural resources to habitat, this is factored into the overall Program goals discussed in the PEIS/R.

The Farm Bureau contends CALFED improperly segmented the Program before adoption of the PEIS/R, by approving and carrying out 22 early implementation projects that converted more than 29,000 acres of farmland to other uses. These 22 projects include: "*Liberty Island Acquisition*--acquisition and conversion of 4,760 acres of agricultural land in fee"; "*Stone Lakes National Wildlife Refuge Land Acquisition*--acquisition and conversion of 658 acres of agricultural land in fee"; "*Lower San Joaquin River Floodplain Protection and Restoration Project*--acquisition and conversion of 600 acres of agricultural land in fee and 1,950 acres via easement"; and "*Oakdale and South San Joaquin Irrigation Districts*--conversion of 50,000 acre-feet of agricultural water . . . ."

Segmentation of a program is improper. (See Guidelines, § 15165.) "[P]ublic agencies shall not undertake actions concerning the proposed public project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before completion of CEQA compliance." (Guidelines, § 15004, subd. (b)(2).) Recognizing these limitations, CALFED established five conditions for approval of early implementation projects. Such projects must: (1) "have appropriate environmental documentation"; (2) "have no significant environmental impacts"; (3) "have no significant adverse cumulative impacts"; (4) "not limit the choice of a

reasonable range of alternatives"; and (5) "not affect the selection of a Preferred Program."

The Farm Bureau contends CALFED failed to satisfy these conditions. On the first condition, the Farm Bureau argues none of the early implementation projects was preceded by environmental documentation. On the second and third conditions, the Farm Bureau argues CALFED concedes the conversion of agricultural land is a significant impact and that the individual conversions have cumulative impacts. As to the fourth condition, the Farm Bureau argues that converting farmland prior to approval of the Program precludes the possibility of considering an alternative that preserves existing land uses. Finally, on the fifth condition, the Farm Bureau points out that CALFED's rationale for going forward with the early implementation projects was that those projects are consistent with the preferred program alternative. Hence, approval of those early projects restricted CALFED to approval of the preferred program alternative.

The State counters that the presence of environmental documentation for the early implementation programs is not at issue. The present matter concerns the adequacy of the PEIS/R, a document that addresses environmental impacts of the Program as a whole, not individual projects. At any rate, the State argues, the early implementation projects were conditioned on compliance with CEQA. The State further argues state agencies only approved six of the 22 projects and approval of the early implementation projects did not prejudice the environmental

analysis or preordain adoption of the preferred program alternative.

We agree with the State that the present matter involves whether the PEIS/R complies with CEQA, not whether the early implementation projects were conditioned on CEQA compliance, caused significant environmental impacts, or preordained the course of the Program. The trial court explained: "As early as 1997, the multi-year, multi-component scope of the Category III program was publicly known. Petitioners should have brought their segmentation challenges at that time, as grants were initially made, based on the obvious scope of the Category III program. Rather than challenge individual projects or the scope of the Category III program at that time, they belatedly challenge it now. Petitioners did not raise their Category III challenges within the 180-day period allowed by law. The claim is time barred." (Fns. omitted)

The Farm Bureau responds to the trial court's holding by contending the Farm Bureau "is not seeking to invalidate or set aside these early implementation projects . . . ." According to the Farm Bureau, its claim is that CALFED "violated the legal requirements that prohibit an agency from undertaking 'interim projects' (here, the Early Implementation Projects) that are part of a program prior to completion of the programmatic environmental document unless certain conditions are satisfied." The Farm Bureau argues "[t]he issue on appeal is not whether these Early Implementation Projects should be set aside (which they cannot be), but whether the CALFED programmatic process

(i.e., the [PEIS/R]) was prejudiced by the early implementation of agricultural conversions."

We cannot accept that characterization of the issue before us. If, as the Farm Bureau argues, its claim is that CALFED violated the legal prohibition against undertaking interim projects because the approval of those projects in some manner drove the programmatic process, then the Farm Bureau is challenging the fact of the approval of those interim projects. That is, it is the fact that these projects were approved without considering their programmatic implications that the Farm Bureau opposes. The question is whether, at the time of the project being approved, the agency properly considered all of its implications, including cumulative impacts to the overall program of which it is a part. And any claim regarding these early implementation projects is time-barred. (Pub. Resources Code, § 21167, subd. (a).) The question here is whether, at the programmatic level, the agency considered the cumulative impacts of any related, separate projects already approved. As discussed earlier, CALFED did consider the cumulative impacts of these early projects.

As noted, even if the early projects were improperly approved, it is too late to challenge them now. Approval of early implementation projects without CEQA compliance does not preclude future operation of the CALFED Program. Each step of the Program, including projects undertaken before Program approval and those undertaken thereafter, must be judged on its own merits. While the Program assumes CEQA compliance with

respect to each of its individual projects, the adequacy of the PEIS/R does not depend on whether that compliance actually occurred.

G. Adequacy of the Responses to Comments

Appellants challenge the adequacy of CALFED's responses to public comments.

CEQA requires a lead agency to consider public comments when they are received in a timely fashion (Pub. Resources Code, § 21091, subd. (d)(1)) and to prepare written responses (Pub. Resources Code, § 21091, subd. (d)(2)(A)). "The written response shall describe the disposition of each significant environmental issue that is raised . . . ." (Pub. Resources Code, § 21091, subd. (d)(2)(B).) "It is not enough for the EIR simply to contain information submitted by the public and experts. Problems raised by the public and responsible experts require a good faith reasoned analysis in response." (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles*, *supra*, 106 Cal.App.4th at p. 723.) "'In particular, the lead agency must explain in detail its reasons for rejecting suggestions and proceeding with the project despite its environmental effects.'" (*Stanislaus Natural Heritage Project*, *supra*, 48 Cal.App.4th at p. 191.) "The requirement of a detailed analysis in response ensures that stubborn problems or serious criticism are not 'swept under the rug.'" (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles*, *supra*, at p. 723.)

"The public agency need not respond to every comment raised in the course of the review and consultation process, but it must specifically respond to the most significant environmental questions raised in opposition to the project." (*Gallegos v. State Bd. of Forestry* (1978) 76 Cal.App.3d 945, 954.) "[T]he determination of the sufficiency of the agency's responses to comments on the draft EIR turns upon the detail required in the responses. [Citation.] Where a general comment is made, a general response is sufficient." (*Browning-Ferris Industries v. City Council* (1986) 181 Cal.App.3d 852, 862.)

Following release of the June 25, 1999 draft PEIS/R, CALFED received approximately 1,500 comment letters from individuals and organizations and approximately 2,400 form letters or pre-printed postcards. During August and September 1999, CALFED held 16 public hearings throughout the state, at which 760 individuals presented testimony. The PEIS/R includes three volumes of comments and responses thereto. Twenty-three "common responses" are included to address "similar comments received in great numbers." For example, a common response is provided that addresses "uncertainty about the use of a [PEIS/R] and the makeup of the CALFED Bay-Delta Program . . . ." Another common response addresses the role of water conservation in the CALFED Program. The common responses are followed by responses to individual comments. These individual responses are then followed by the comments themselves.

The Farm Bureau contends the PEIS/R failed to respond to comments received concerning the source of water needed for the

Program. The Farm Bureau further contends the PEIS/R was "less than forthcoming in responding to the related issue of whether water purchases from 'willing sellers' would result in water being redirected from agricultural to environmental uses."

As discussed earlier, the PEIS/R does not designate a source for water needed to meet Program objectives. Because the source has not yet been determined, the PEIS/R could not be more forthcoming in disclosing whether water purchases would result in the redirection of water from agricultural to environmental uses. The Farm Bureau's objection is not to the lack of a response to comments regarding water sources but to the substance of the response provided. We have already addressed this objection elsewhere in the opinion.

The Farm Bureau next contends CALFED "misplaced" nearly 200 public comment letters and, consequently, provided no responses to them. The Farm Bureau specifically discusses half a dozen of these letters that, it argues, raise matters not addressed in the PEIS/R's responses to comments. The State says the nearly 200 letters were not misplaced, but were reviewed and received proper responses. The State argues the fact the letters were not included in the administrative record originally filed in this matter is not evidence those letters were misplaced. As to the six letters cited by the Farm Bureau, the State argues they "did not require an individual response, because they were adequately addressed in the Common Responses, or were otherwise cumulative." The State asserts only letters requiring individual responses were reproduced in the PEIS/R.

We need not address the Farm Bureau's arguments on this issue. Because we conclude the PEIS/R is defective in its failure to analyze the impacts of supplying water for the project and its failure to include an alternative with reduced water exports from the Delta, it will be necessary for CALFED to prepare a new PEIS/R and invite a new set of public comments. If CALFED failed to provide responses to all comment letters the first time around, it will have an opportunity to correct its mistake later.

H. The Adequacy of the Descriptions of the Environmental Water Account

CDWA contends CALFED failed to include a complete and stable description of the EWA in the PEIS/R and, therefore, the EWA was adopted without any meaningful environmental review.

As explained earlier, creation of the EWA is proposed as part of the Water Transfer Program to bank excess water when supplies are available. The purpose of the EWA is to provide water for the protection and recovery of fish beyond that which is available through existing regulatory means while avoiding the necessity of reducing exports to other beneficial users.

The ROD states that, in order to address water supply reliability concerns, CALFED is taking the following action, among others: "Establishing an EWA with an average of 380 [thousand acre-feet] of water set aside annually in the first years to provide additional water for fishery purposes beyond the regulatory baseline. Water assets will be acquired by

CALFED Agencies, consistent with the goals of the CALFED Water Transfer Program."

CDWA argues adoption of the EWA was improper, because details about it were not worked out until after the close of the public comment period on the draft PEIS/R. CDWA asserts the PEIS/R was required to include a full description of the EWA and an analysis of its impacts, mitigation measures and reasonable alternatives, but CALFED "did not get past the initial description stage." Both CDWA and the Farm Bureau argue that, because significant details about the EWA did not come to light until after the close of public comments on the draft PEIS/R, CALFED was required to recirculate the PEIS/R.

According to the State, "[t]he various *components* of a proposed [EWA] are established in the CALFED plan, and are therefore analyzed in the PEIS/R at a general level of detail, commensurate with the general nature of the plan." The State argues a second-tier EIR has since been completed for the EWA that contains much more detail. Metropolitan likewise argues the final PEIS/R did not add significant new information about the EWA and, therefore, did not require recirculation. We should at this point note we deny the State's and the Farm Bureau's requests for judicial notice of documents relating to second-tier environmental review conducted on the EWA and projects undertaken to provide water for the EWA. Those documents were not before CALFED and are not relevant to this proceeding.

The trial court concluded the analysis of the EWA was sufficient for a programmatic EIR, explaining: "[T]he need for recirculation of a draft programmatic EIR, which on its terms contemplates additional project-specific review and public comment, is less essential than in the case of a project EIR where the environmental review may well be the last step before project approval and construction." The court continued: "The general parameters of an [EWA], a water transfer program, were discussed both in an early Phase II Report (1998) and in a revised Phase II report, set forth as a technical appendix to the revised draft EIR." (Fn. omitted.) The court explained that water storage and its environmental consequences were described in the draft EIR's. The court concluded: "The 1999 discussion elicited several public comments, and the CALFED agencies prepared a 'Common Response' discussing many of these EWA concerns as part of the final EIR. Additionally, the final programmatic EIR contemplated additional, second tier environmental review as the EWA became operational." (Fn. omitted.)

Appellants' arguments raise two primary issues: (1) Did the PEIS/R include sufficient analysis of the proposed EWA? (2) Did the amount of new information revealed after close of the public comment period require recirculation? Because we have already concluded this matter must be remanded for preparation of a new PEIS/R, we need not resolve the second issue. We presume a new PEIS/R prepared for public review and comment will contain any new information revealed after the close of the

public comment period. However, in order to aid the parties on remand, we discuss the requirements for an adequate CEQA analysis of the EWA.

CDWA contends CALFED was required to provide analysis of the EWA in the PEIS/R because, despite the absence of specific detail about the EWA, the ROD committed CALFED to use an EWA, in whatever form, to meet Program goals. RCRC likewise argues deferral of CEQA analysis will mean "[t]he EWA was created without any analysis of alternative means of achieving its environmental water supply and project water replacement functions." The Farm Bureau argues deferral of EWA analysis until the project level will mean CALFED will never consider programmatic impacts of the EWA.

According to the State, because the EWA is described at a general level of detail in the PEIS/R, a general level of CEQA analysis is sufficient. The State argues certification of the PEIS/R and approval of the ROD did not irreversibly commit CALFED to an unanalyzed course of action. The State explains: "The detailed information in the ROD about how an [EWA] might be structured in the first few years of operation provides information about a second-tier project subject to second-tier environmental review." The State insists CALFED should not "be faulted for providing other agency decision makers and members of the public with as much information as possible about the developing concept of an EWA, how it related to the CALFED plan, and how a second-tier EWA project would be structured and implemented during the first seven years after the ROD."

Appellants have the better argument. An EIR must contain sufficient detail and analysis of the project to provide the public and decision makers with the information necessary to choose a course of action that intelligently takes account of the environmental consequences of the project. (Guidelines, § 15151.) "An accurate, stable and finite description of a project is basic to an informative and legally sufficient EIR. [Citation.] A curtailed or distorted description of the project may 'stultify the objectives of the reporting process.'" (*Kings County Farm Bureau v. City of Hanford*, *supra*, 221 Cal.App.3d at p. 738.) The EIR must also contain a sufficient analysis of impacts, mitigation measures and alternatives to satisfy its informational function.

The final PEIS/R reflects uncertainty about the operation of the EWA: "Through the development of an EWA, the Program intends to provide flexibility in achieving environmental benefits while reducing uncertainties associated with environmental water requirements. Flexible management of water operations could achieve fishery and ecosystem benefits more efficiently than a fully prescriptive regulatory approach. The Program believes that operations using an EWA can achieve substantial fish recovery while providing for continuous improvement in water supply reliability and water quality. A variety of potential approaches are available to define and operate an EWA. Although an EWA has significant potential, a number of major issues and details must be resolved before this approach can be fully implemented[.] These include: [¶]

Determine which environmental protections would be provided through prescriptive standards and which would be provided through an EWA. [¶] Investigate various approaches for implementing an EWA. [¶] Developing [*sic*] accounting methodologies. [¶] Determine reliability of existing legal mechanisms to assure intended use of EWA water released for in-stream purposes. [¶] Determine how much existing surface and groundwater storage, water purchase contract water, and water generated from conservation and recycling projects will be needed by an EWA."

Common Response 21 addresses many of the comments received from the public seeking more details about the EWA. It states: "The EWA functions primarily by changing the timing of some flow releases from storage and the timing of water exports from the south Delta pumping plants to coincide with periods of greater or lessor [*sic*] vulnerability of various fish to Delta conditions." The response explains that, during Stage 1 of the Program, the EWA will not substitute for existing prescriptive measures for fish protection but will seek to avoid new prescriptive measures by making more water available as needed. The response explains: "The EWA will be authorized to acquire, bank, transfer and borrow water and arrange for its conveyance. EWA assets will be managed by the federal and state fishery agencies . . . in coordination with project operators and stakeholders, through the CALFED Operations Group. Initial acquisition of assets for the EWA will be made and funded by Federal and State agencies . . . . Subsequently, it is

anticipated that acquisitions and cost allocations among beneficiaries will be made pursuant to a public process that could involve other agencies and other potentially affected parties in asset acquisition." A substantial portion of the assets needed for the EWA during the first few years "will come from access to existing [p]roject flexibility, new changes in project flexibility (for example, joint point of diversion and export/inflow ratio flexibility) and through voluntary purchases (estimated at $50 million annually) on the water transfer market. . . ."

The response continues: "CALFED will develop rules for storing, conveying, and borrowing of EWA water. At the same time, CALFED will develop an accounting process to track the EWA water. Like other parts of the CALFED Program, the EWA will be adaptively managed as experience is gained with its use and effectiveness. In the future, the EWA may gain additional assets as new facilities are implemented or operational changes are made. How EWA will share in the use of these facilities will be determined as these are developed."

The foregoing disclosures establish that, while all of the operating details of the EWA had not yet been worked out, the use of an EWA in some form to meet Program goals was established. In *No Oil*, *supra*, 196 Cal.App.3d 223, the Court of Appeal concluded the EIR was not required to include analysis of every potential route the oil pipeline might take. (*Id.* at p. 235.) However, the court indicated that, "since it is conceded that any oil extracted for production will be transported by

pipeline, the EIR must, at a minimum, contain some discussion of the pipeline's effects if it is to satisfy CEQA requirements." (*Id.* at p. 233.)

In the present matter, the PEIS/R was required to include analysis of the use of an EWA to satisfy some of the water requirements of the Program. This is true notwithstanding the programmatic nature of the document. A programmatic EIR can "[a]llow the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts[.]" (Guidelines, § 15168, subd. (b)(4).) "A program EIR will be most helpful in dealing with subsequent activities if it deals with the effects of the program as specifically and comprehensively as possible." (Guidelines, § 15168, subd. (c)(5).)

There is little analysis of the EWA in the PEIS/R. Regarding impacts, the PEIS/R states in several places that "[m]anagement of the EWA may magnify the effects of [the Water Transfer Program]." The PEIS/R indicates the Water Transfer Program will have positive or negligible impacts in most Program regions. Two exceptions are the Sacramento and San Joaquin River Regions, for which the PEIS/R states: "Potential long-term adverse effects on specific regional agricultural and urban water supplies could result from increased water transfers. Areas with adequate water supplies could transfer portions of those supplies to areas with higher economic return from the use of water. Water transfers can affect third parties (those not

directly involved in the transaction), local groundwater, environmental conditions, or other resource areas. . . .” The PEIS/R describes no mitigation measures or alternatives associated with the EWA.

Metropolitan argues information on the EWA in the draft PEIS/R, and a fortiori the final PEIS/R, was sufficient to allow for meaningful public comment and provided a catalyst for finalization of the EWA. However, most of the EWA-related public comments on the draft PEIS/R were requests for more detail about such things as how water will be managed and who will pay for it. Despite concerns expressed in the comments about environmental impacts of the EWA, no further impact analysis was provided in the final PEIS/R.

Although the PEIS/R itself describes the EWA in general terms, another document entitled “California’s Water Future: A Framework for Action” (the Framework Agreement) contains much more detail. The Framework Agreement was issued approximately one month *before* CALFED released the final PEIS/R. The Framework Agreement describes itself as a “blueprint” for addressing conflicts over restoration of the Bay-Delta and states: “This summer, CALFED agencies will issue the final programmatic EIS/EIR and a [ROD], and then proceed to Stage 1. . . . This framework document sets out actions anticipated to be included in a proposed preferred alternative for implementing Stage 1. These actions depend upon CALFED concluding its programmatic environmental review and subsequent site-specific analyses. . . .”

The Framework Agreement describes the EWA in generally the same terms as specified in the PEIS/R's Common Response 21. However, attached to the Framework Agreement, in appendix C, is a table detailing the sources of water to be credited initially to the EWA. The table is reproduced below:

ENVIRONMENTAL WATER ACCOUNT

INITIAL ASSETS

Action Description	Water Available Annually (Average)
SWP Pumping of (b)(2) [Ecosystem Restoration Program] Upstream Releases	40,000 acre-feet
EWA Use of Joint Point	75,000 acre-feet
Export/Inflow Ratio Flexibility	30,000 acre-feet
500 [cubic feet per second] SWP Pumping Increase	50,000 acre-feet
Purchases--South of Delta	150,000 acre-feet
Purchases--North of Delta	35,000 acre-feet
TOTAL	380,000 acre-feet

(Fns. omitted)

Appendix C further states: "In addition to assets to be acquired annually, as shown in the table above, an initial one-time deposit of water equivalent to 200 [thousand acre-feet] of south-of-Delta storage will be acquired from a variety of sources to assure the effectiveness of the EWA and provide assurances for SWP and CVP water supply/deliveries." It also states that "[s]ource shifting agreements with south-of-Delta

water providers for 100 [thousand acre-feet] will be used to enhance the effectiveness of the EWA, and to help provide assurance that SWP and CVP water deliveries and operations will not be affected by EWA operations."

The disclosures in appendix C of the Framework Agreement regarding the amount of water to be allocated to the EWA initially, including the sources of that water, is significant information that should have been included in the final PEIS/R. The State's argument that this information is more appropriately included in a project level EIR is unavailing. Use of a programmatic EIR is not an excuse to defer analysis of the significant impacts of the program. (Guidelines, § 15152, subd. (b).) To the extent CALFED is able to resolve issues regarding the structure of the EWA before the PEIS/R is issued, that information should be disclosed in the PEIS/R. That information may then be made a part of the CEQA analysis.

II

Non-CEQA Claims

A. Introduction

The first amended petition in *RCRC v. State* contained two causes of action, one alleging noncompliance with CEQA and the other asserting a claim for validation of state action. In the validation claim, the RCRC Petitioners alleged the ROD contains contractual commitments of state funds and increased water exports that are unlawful. The State demurred to the second

cause of action, and the trial court sustained the demurrers without leave to amend.

The RCRC Petitioners moved to amend the first amended petition to add three new causes of action: (1) a taxpayer claim alleging improper transfer of water to private parties; (2) a mandamus claim seeking to protect the petitioners' water rights; and (3) a declaratory relief claim seeking to dictate the rules under which CALFED may operate. The trial court granted the motion on condition that the new causes of action would be severed and would trail the CEQA claim. Later, the court sustained the State's demurrers to the non-CEQA claims, this time with leave to amend.

The RCRC Petitioners filed a second amendment to the first amended petition containing the same three non-CEQA causes of action but with additional detail. The Kern County Water Agency filed demurrers to the second amendment, and the State moved for judgment on the pleadings. The trial court concluded the second amendment was not properly filed because it contained allegations of conduct occurring after the original petition was filed. The court entered judgment against the RCRC Petitioners on the second through fourth causes of action.

The State requests that we take judicial notice of a number of decisions of the SWRCB, excerpts from the ROD and its attachments, and various legislative history materials. The trial court granted judicial notice of most of these materials (item Nos. 1-5, 8-10, 11-14), and they are part of the record on appeal. Those items are properly before us already and need no

further judicial notice. We grant the State's request for judicial notice as to item Nos. 6 and 7, which are two additional SWRCB decisions. Item No. 15 is a final EIS/EIR for the EWA. As indicated previously, we deny judicial notice of this item. The final two items, Nos. 16 and 17, are the final PEIS/R and volume 1 of the responses to comments. Because these items are already part of the record on appeal, judicial notice is unnecessary.

B. The Validation Claim Made Pursuant to Government Code Section 53511

CDWA, one of the RCRC Petitioners, contends the trial court erred in sustaining demurrers to the validation claim in the first amended petition. CDWA argues the ROD contains many commitments of state funds and other assets and therefore is subject to a validation proceeding.

Government Code section 53511 authorizes a local agency to bring an action "to determine the validity of its bonds, warrants, contracts, obligations or evidences of indebtedness pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure." (Gov. Code, § 53511.) Government Code section 17700 grants the same power to "[t]he state or any state board, department, agency, or authority . . . ." (Gov. Code, § 17700.) Code of Civil Procedure section 860 reads: "A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days

thereafter, bring an action in the superior court . . . to determine the validity of such matter. The action shall be in the nature of a proceeding in rem."

Validation actions also may be brought by private parties. Code of Civil Procedure section 863 reads: "If no proceedings have been brought by the public agency pursuant to this chapter, any interested person may bring an action within the time and in the court specified by Section 860 to determine the validity of such matter. . . ."

CDWA contends a validation action is appropriate here because the ROD contains a number of commitments of state funds, thus bringing it within the category of "bonds, warrants, contracts, obligations or evidences of indebtedness," as specified in Government Code section 53511. According to CDWA, the ROD "is a mix of contracts between governmental entities, approvals and statements of obligations." CDWA argues the ROD "is much more than a simple notice of determination for CEQA purposes and includes various agreements, obligations and determinations of plans of action including those contained in the two (2) appendices and ten (10) attachments."

CDWA relies on several entries in the ROD that, it argues, involve financing and financial obligations. In the introduction, the ROD states: "California and the Federal government in partnership, are launching the largest, most comprehensive water management program in the world. . . . [I]t is the most significant investment in storage and conveyance in decades." Under "Overview," the ROD states: "California

taxpayers, stakeholders and the Federal Government will be called upon to invest billions of dollars over the next decade on CALFED programs."

Under "Funding," the ROD states: "In Stage 1, CALFED plans to invest over $1 billion in [Ecosystem Restoration Program] projects, in accordance with the priorities established in the Strategic Plan, in addition to funds necessary for the EWA. To be successfully implemented, the [Ecosystem Restoration Program] must have at least $150 million from dedicated funding sources annually through Stage 1. (There may be many ways to achieve this.) An additional $50 million will be required annually for the EWA for the first four years. It is anticipated that additional funding to support the EWA will be needed beyond the first four years. . . . [¶] For the [Ecosystem Restoration Program], the CALFED Agencies propose a combination of State funding (including Proposition 204 funds), Federal funding, and user fees. Consistent with this proposal, the State has allocated over $173 million in FY 2000-2001, including $100 million from Proposition 204, $35 million from the general fund, $25 million from Proposition 13, and $13 million from Proposition 12. Additionally, through FY 2000, Federal funds in the amount of $190 million have been provided through Reclamation."

A later section on funding reads: "Initial State and Federal funding for Stage 1 water use efficiency programs outlined in this section are identified within Proposition 204, Proposition 13, the CVPIA, the Reclamation Reform Act, Title XVI

of P.L. 102-575, and various accounts in the Federal Farm Bill and related [Natural Resources Conservation Services] appropriations. Funding for the completion of the Water Use Efficiency Program will be determined through the Legislative and Congressional budget processes. The CALFED governing body will determine additional funding needs by the middle of 2004, which will be based upon the results of the program review and stakeholder input. Future funding, if necessary, may be sought through a bond measure that may also fund other out-year costs of the CALFED Program."

The State contends the only "contracts" subject to Government Code section 17700 are those having "a requisite connection with financing," and the ROD is not such a contract. While the ROD may anticipate financing for various projects and discuss the sources of that financing, it does not itself establish the financing or authorize the expenditure of any funds. The State Water Contractors similarly argue that, without authorization of a specific project involving the expenditure of funds, there is nothing to validate.

The question presented here is one of statutory construction. Government Code section 17700 authorizes an action "to determine the validity of its bonds, warrants, *contracts*, obligations or evidences of indebtedness . . . ." (Gov. Code, § 17700, italics added.) The ROD may be viewed as a *contract* among the signatories to proceed in a particular manner to solve the problems associated with the Bay-Delta and State water. This contract cites the likely sources of early

financing for the Program. However, is that enough to bring the ROD within the purview of Government Code section 17700?

In *City of Ontario v. Superior Court* (1970) 2 Cal.3d 335, a group of taxpayers brought suit under Government Code section 53511 challenging a contract to construct an automobile racing stadium. In considering whether the complaint had been timely served, the state high court discussed the breadth of Government Code section 53511: "It lists, as matters for validation under chapter 9, 'bonds, warrants, contracts, obligations or evidences of indebtedness' . . . . There is no limitation or qualification on the word 'contracts,' and it would therefore appear to include a multipurpose municipal contract such as the Ontario Motor Stadium Agreement. Yet the legislative history of the statute suggests a contrary result. First, the Legislative Counsel's digest of the bill proposing section 53511 characterized the measure as one allowing 'a local agency to bring an action to determine the validity of evidences of indebtedness.' Second, section 53511 was enacted as part of chapter 3 of part 1, division 2, title 5, of the Government Code. Chapter 3 is entitled 'Bonds,' and deals exclusively with the power of local agencies to sell their bonds, replace defaced or lost bonds, and pledge their revenues to pay or secure such bonds. If section 53511 was intended to be a provision of general application, logically it should have been placed in article 4 ('Miscellaneous') of chapter 1 ('General') of the same part, in which a group of such unrelated matters are collected. Third, the key language of section 53511--'bonds, warrants,

contracts, obligations or evidences of indebtedness'--was taken directly from section 864 of chapter 9; under well-known canons of statutory interpretation, it should ordinarily be given the same meaning as it had in the earlier statute. But as a perusal of the companion 1961 legislation reveals, when chapter 9 was adopted it was made applicable only to such matters as the legality of the local entity's existence, the validity of its bonds and assessments, and the validity of joint financing agreements with other agencies. If section 53511 was intended to reach any and all contracts into which an agency may lawfully enter, the restricted language of section 864 was inappropriate for that purpose. Finally, that language is peculiarly inapt for expressing such a general meaning in any event, as it lists the word 'contracts' in the midst of four other terms which all deal with the limited topic of a local agency's financial obligations." (*City of Ontario v. Superior Court*, *supra*, 2 Cal.3d at pp. 343-344.)

CDWA contends *City of Ontario* is not controlling here because it involved Government Code section 53511, not 17700, and, in any event, the discussion about the meaning of the word "contract" in the statutes was dictum.

We are not persuaded. Government Code sections 53511 and 17700 use nearly identical language. "[E]very statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect. [Citation.] Legislative intent will be determined so far as possible from the language of the statutes, read as a whole."

(*County of Fresno v. Clovis Unified School Dist*. (1988) 204 Cal.App.3d 417, 426.) Government Code section 17700 was enacted in 1994, after *City of Ontario* was decided. (See Stats. 1994, ch. 242, § 2, p. 1832.) "It is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the legislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts. [Citation.]" (*City of Long Beach v. Payne* (1935) 3 Cal.2d 184, 191.)

In matters of statutory interpretation, our fundamental concern is with legislative intent. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724.) In our view, when the Legislature used the same language in Government Code section 17700 as had been used in the related Government Code section 53511 and had been interpreted narrowly by the state Supreme Court in *City of Ontario*, the Legislature intended this same narrow meaning. As for CDWA's assertion that the discussion in *City of Ontario* was only dictum, "the dicta of our Supreme Court are highly persuasive." (*Evans* v. *City of Bakersfield* (1994) 22 Cal.App.4th 321, 328.) We are convinced by the reasoning of the high court that Government Code section 17700 was not intended to encompass a contract like the ROD that does not itself establish financial obligations.

CDWA nevertheless cites Court of Appeal decisions subsequent to *City of Ontario*, which, it argues, recognize a

broader interpretation of Government Code sections 53511 and 17700. In *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, the court stated that "contracts" within the meaning of Government Code section 53511 "do not refer generally to all public agency contracts, but rather to contracts involving financing and financial obligations." (*Friedland v. City of Long Beach, supra,* at p. 843.) According to CDWA, "[t]he reference to 'financial obligations' would appear to extend well beyond validation of a contract which is the basis for payment of bonds or other third party financing."

We fail to see how the reference to "financial obligations" expands the reach of Government Code sections 53511 and 17700 beyond contracts that themselves establish financing or financial arrangements. In *Friedland v. City of Long Beach*, *supra*, 62 Cal.App.4th 835, the court discussed the purpose of validation proceedings: "A key objective of a validation action is to limit the extent to which delay due to litigation may impair a public agency's ability to operate financially. [Citation.] A validation action fulfills a second important objective, which is to facilitate a public agency's financial transactions with third parties by quickly affirming their legality. 'The fact that litigation may be pending or forthcoming drastically affects the marketability of public bonds . . . . [T]he possibility of future litigation is very likely to have a chilling effect upon potential third party lenders, thus resulting in higher interest rates or even the

total denial of credit,' which may impair a public agency's ability to fulfill its responsibilities." (*Id.* at p. 843.)

Friedland involved (1) a lease between the City of Long Beach and the Long Beach Aquarium of the Pacific (AOP), (2) a pledge by the Redevelopment Agency of Long Beach of certain transient occupancy taxes as security for the payment of debt service on bonds issued by a proposed aquarium, as provided for in an owner participation agreement, (3) a pledge by the City of Long Beach of the City's Tidelands Operating Funds as additional security for the payment of debt service on bonds issued by the aquarium, as provided for in a city pledge agreement, and (4) an agreement by the Long Beach Board of Harbor Commissioners to subordinate and defer its rights to receive payments of transient occupancy taxes. (*Id.* at p. 844.) The court concluded the various components of this arrangement "constituted pledges of funds from various sources to insure repayment of AOP bonds in the event that Aquarium revenues could not repay that debt. Thus, they were proper subjects of the Validation Action." (*Id.* at p. 845.) The ROD contains nothing like the financial arrangements in *Friedland*.

Meaney v. Sacramento Housing & Redevelopment Agency (1993) 13 Cal.App.4th 566 was a validation action brought by school districts challenging an agreement between the county and a redevelopment agency to use tax increment financing to pay for the construction of a proposed courthouse. The agreement provided: "'During the life of the Project, the Agency agrees to set aside from the tax increment, as defined below, the

amount the County would have received in property taxes from the . . . Project Area . . . but for the division of Property taxes in accordance with Health and Safety Code Section 33670. Such amounts shall be used for the purpose of assisting the County in financing the costs for plans and specifications and construction for a new County courthouse and other Agency approved County public facilities consistent with the Redevelopment Plan.'" (*Id.* at p. 573.)

The Court of Appeal found this to be a proper validation action, explaining: "The reference to 'contracts' [in Government Code section 53511] confers on the School Districts authority to bring the present action under Code of Civil Procedure section 860. The meaning of the term was exhaustively analyzed in *City of Ontario v. Superior Court*[*, supra,*] 2 Cal.3d [at pages] 342-344. The court noted that, while the statute does not expressly qualify the term, the legislative history and statutory context indicated that it does not apply generally to all municipal contracts but rather should be construed in pari materia with the other terms in the statute. Narrowly construed in this sense, the term still applies to contracts such as the Courthouse Agreement, that is, to financial obligations in 'joint financing agreements' between local agencies. (*Id.* at p. 343.)" (*Meaney v. Sacramento Housing & Redevelopment Agency*, *supra*, 13 Cal.App.4th at p. 577.)

Meaney is consistent with *City of Ontario* and authorizes a validation action only where the agreement itself establishes a financial arrangement. The ROD does not establish any financing

for the CALFED Program or commit to any financial arrangements. Nor does it authorize the expenditure of any funds. At most, the ROD discusses the financing that will be needed to meet the Program's objectives and is expected to be established elsewhere. This is not enough to give rise to a validation action.

C. RCRC's Second Amendment to the First Amended Petition

In the first amendment to the first amended petition, the RCRC Petitioners asserted three non-CEQA causes of action. The second cause of action alleged a taxpayer claim under Code of Civil Procedure section 526a. That section reads in relevant part: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf . . . ." Although the terms of this statute suggest it applies only to local governments, it has been judicially extended to include state agencies and their officials. (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240.)

The third cause of action asserted a claim seeking traditional mandamus under Code of Civil Procedure section 1085. That section authorizes an action "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . . ."

The fourth cause of action asserted a claim under Code of Civil Procedure section 1060. That section reads: "Any person interested under a written instrument . . . , or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property, . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action . . . for a declaration of his or her rights and duties in the premises . . . ."

After the trial court sustained demurrers to these three causes of action in the first amendment, the RCRC Petitioners filed a second amendment to the first amended petition containing the same causes of action but with more detail. The State moved for judgment on the pleadings and the Kern County Water Agency demurred. The trial court concluded nearly all the factual allegations added in the second amendment concern events occurring after the original petition was filed and, therefore, should have been presented in a supplemental rather than an amended pleading. A supplemental pleading requires leave of court, which the RCRC Petitioners failed to seek. The court further concluded that, if leave had been sought, it would have been denied.

"Matters which occur after the filing of a complaint may not be alleged by amendment to the complaint, but must be brought into the action by means of a supplemental complaint." (*Hebert v. Los Angeles Raiders, Ltd.* (1991) 23 Cal.App.4th 414, 426.) Supplemental complaints are governed by Code of Civil

Procedure section 464, subdivision (a), which reads: "The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer."

CDWA does not dispute the second amendment contains allegations of conduct occurring after the original petition was filed or that post-petition conduct must be alleged in a supplemental rather than an amended petition. CDWA also does not dispute the RCRC Petitioners failed to seek leave to file a supplemental petition. Instead, CDWA argues the court abused its discretion in concluding leave to file a supplemental petition would have been denied if sought.

In explaining why leave to file a supplemental petition would have been denied, the trial court expressed its reluctance "to further complicate and extend this litigation since it mainly concerns CEQA issues that are to be expedited . . . ." The court indicated there would be no prejudice to the RCRC Petitioners because "[t]hey are not barred from filing a separate lawsuit asserting causes of action based on facts occurring after the original petition." By so ruling, the court effectively precluded the RCRC Petitioners from seeking leave to amend.

CDWA argues allowing the non-CEQA claims to go forward would not have prolonged the litigation, because the court severed and trailed those claims.

Although courts should generally exercise liberality in allowing a supplemental pleading that alleges facts pertinent to the case, a "motion to file a supplemental pleading is addressed to the sound legal discretion of the court, and its ruling will not be disturbed on appeal in the absence of a showing of a manifest abuse of that discretion." (*Flood v. Simpson* (1975) 45 Cal.App.3d 644, 647.) We find no such abuse here. The trial court entered its final ruling on the CEQA claim on April 1, 2003, nine days before it concluded the second amendment had been filed improperly. Thus, by the time the court was deciding whether the petitioners could proceed with the second amendment, it had already disposed of the CEQA claim.

CEQA matters are entitled to court preference over all other civil actions in order that such matters may be quickly heard and decided. (Pub. Resources Code, § 21167.1.) Although the trial court severed the non-CEQA claims from the CEQA claim and ordered that the non-CEQA claims trail, any appeal of the court's ruling on the CEQA claim would have to await resolution of the other claims. The one final judgment rule precludes appeal of an order granting or denying a writ of mandate until resolution of the entire action. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696-697.) "[A]n appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining." (*Morehart v.*

County of Santa Barbara (1994) 7 Cal.4th 725, 743.) By allowing an amendment and subsequent litigation of the non-CEQA claims, the court would have significantly prolonged final resolution of the CEQA claim. Furthermore, as the trial court indicated, claims relating to matters occurring after the original petition was filed may be asserted in a separate proceeding. Thus, prejudice to the RCRC Petitioners in disallowing a supplemental petition was minimal.

Although we conclude the trial court properly rejected the second amendment, that does not preclude our examination of the non-CEQA claims asserted by the RCRC Petitioners. Prior to its ruling on the second amendment, the trial court sustained demurrers to the first amendment, which also contained the three non-CEQA claims. That ruling is properly subject to review on appeal from the final judgment.

However, in arguing the merits of the non-CEQA claims, CDWA relies exclusively on the allegations of the second amendment. CDWA argues the second amendment contains sufficient allegations to state viable non-CEQA claims, even ignoring the allegations of post-petition conduct. But the second amendment is not before us. As indicated, that pleading was rejected by the trial court, and we find no abuse of discretion in this regard. Thus, CDWA is restricted to relying on the allegations of the first amendment. By ignoring the allegations of the first amendment, CDWA has waived any review of the trial court's order rejecting that pleading.

DISPOSITION

The judgment in *Laub v. Davis* is reversed. The judgment in *RCRC v. State* is reversed only as to the CEQA cause of action. In all other respects, it is affirmed. Those matters are remanded to the trial court with directions to grant the petitions for writ of mandate vacating respondents' certification of the PEIS/R and adoption of the ROD. In light of the mixed results we have reached, the parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 27(a)(4).)

HULL, J.

We concur:

SIMS, Acting P.J.

BUTZ, J.