SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

SANTA CLARITA OAK CONSERVANCY, CALIFORNIA OAK FOUNDATION and SANTA CLARITA ORGANIZATION FOR PLANNING THE ENVIRONMENT, Plaintiffs and Petitioners, vs. CITY OF SANTA CLARITA, a municipal corporation, SANTA CLARITA CITY COUNCIL, and DOES 1-25, inclusive, Defendants and Respondents.	CASE NO. BS 084677 **STATEMENT OF DECISION**
GATE KING PROPERTIES, et al., Real Parties in Interest.	

Having taken the matter under submission on August 9, 2007, after parties' submission of proposed Statements of Decision, having considered all the evidence admitted and the parties' oral and written arguments, the Court rules as follows:

Petitioners Santa Clarita Oak Conservancy, California Oak Foundation, and Santa Clarita Organization for Planning the Environment ("Petitioners") seek a Writ of Mandate commanding Respondents City of Santa Clarita and Santa Clarita City Council ("City" or "Respondents") to set

aside its decision certifying the recirculated Final Additional Analysis ("FAA") to the Environmental Impact Report ("EIR") for the Gate King Industrial Park. The Gate-King Project is a research and development/industrial park, consisting of approximately 106 lots on 508.2 acres, of which 68 lots on 170.1 acres will be used for industrial development. The remainder will be retained in open space. (Supplemental Administrative Record ("SAR") volume 24: page 6324) The project's water demand is estimated to be 386 acre feet per year ("afy"). (SAR 10:2620; 24:6341.)

The City originally certified an EIR for the Gate-King Industrial Park Project ("Gate King") in June of 2003 and approved the project which is the subject of this action. (SAR 10:2619.) The 2003 Gate King EIR included a discussion of available water supplies, including the City's reliance on the availability of 41,000 afy of surface water transferred from the Kern County Water Agency to the Castaic Lake Water Agency ("CLWA") in 1999 ("41,000 afy Transfer"). (*Id.*) CLWA is the "wholesale" water agency to the Newhall County Water District ("NCWD"). NCWD has agreed to annex the project and supply water to it. (SAR 10:2620; 24:6324). Various parties challenged the certification of the Gate King EIR, which was upheld by this Court. (*Id.*)

On appeal, the Court of Appeal reversed and directed this Court to issue a writ of mandate vacating the City's certification of the 2003 EIR on the grounds that the EIR failed to contain substantial evidence of sufficient water supplies. (*California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219 ("*California Oak*").) The Court of Appeal held that the Gate King EIR did not sufficiently address uncertainties relating to CLWA's entitlement to the 41,000 afy Transfer. (*Id.*) The Court of Appeal found no other defects in the 2003 EIR. (*Id.* at 1236-41.) On February 15, 2006, this Court issued a Writ of Mandate ordering the City to "certify a Final Environmental Impact Report complying with CEQA consistent with the Court of Appeal's opinion in *California Oak* []."

On March 28, 2006, the City recirculated a "Draft Additional Analysis to the Final Environmental Impact Report for the Gate-King Project" ("DAA"), which "completely replace[d]" the water analysis presented in the 2003 EIR. (SAR 10:2615 – 25:6725.) As required under Public Resources Code section 21151.9 and Water Code section 10910, the DAA included a Water Supply Analysis ("WSA") prepared by NCWD. The WSA analyzed the sufficiency of water supplies for the project and concluded that: (1) the project had been included in NCWD's and CLWA's most recent

2005 Urban Water Management Plan ("UWMP") (SAR 24:6321-6351); (2) that, "[b]ased on the analysis set forth in this WSA and as supported by the documents relied on for its preparation, NCWD's total projected water supplies available during the ensuing twenty years will meet the projected water demands associated with the Gate-King Project and existing and other planned uses within NCWD's service area" (SAR 24:6351); and (3) that, based on a number of factors, including the Department of Water Resources ("DWR")'s and the court's treatment of the 41,000 afy to date, it is "unlikely" that DWR's on-going preparation of an EIR and any litigation arising out of it will "unwind" a completed and executed water transfer of 41,000 afy. (SAR 24:6331.) NCWD also based its conclusion about the sufficiency of water on State Water Project ("SWP") water reliability projections provided by DWR in its State Water Project Delivery Reliability Report. (SAR 24:6329.)

Further, the DAA discussed other concerns affecting the reliability of SWP water, providing information about climate change, the reliability of the CALSIM II model (one of DWR's water reliability modeling tools), and other SWP water issues, such as salinity in the Bay Delta. The DAA also acknowledged DWR's on-going ability to curtail Table A water deliveries of SWP water, including the 41,000 afy based on "environmental considerations." (SAR 10:2628, 2657; 31:8038-8040.) After acknowledging that these factors could affect the reliability of SWP deliveries, the DAA evaluated the likelihood that these factors in fact would significantly undermine DWR's, CLWA's and NCWD's water supply reliability projections. The DAA concluded that

> these events do not significantly affect the reliability of the transfer amount, and therefore, it is still appropriate for the City of Santa Clarita to conclude that CLWA and NCWD properly included the transfer amount as part of CLWA's 95,200 afy Table A Amount [].

(SAR 10:2662.)

The City held a public comment period to receive comments on the DAA from March 31, 2006 through May 8, 2006, and the City's Planning Commission held a public hearing on May 2, 2006 to receive public testimony on the DAA. (SAR 10:2612; 28:7240.) On May 25, 2006, the City published the "Final Additional Analysis to the Environmental Impact Report for the Gate-King

///

////

Industrial Park" ("FAA"). (SAR 28:7234 – 37:9677.)[1] The FAA responded to comments regarding the reliability of the 41,000 afy Transfer, and affirmed the finding that, despite some uncertainty, it was appropriate for the City to conclude that the 41,000 afy Transfer was sufficiently reliable to consider it to be an available water source for planning purposes. (SAR 31:8047-8075.) On June 6, 2006, the City's Planning Commission adopted a resolution recommending re-certification of the Gate King EIR with the FAA. (SAR 38:9699-9702.) On July 11, 2006 the City Council adopted a resolution recertifying the Gate King EIR with the FAA. (SAR 38:9944-9949.) The City issued a Notice of Determination regarding the recertification on July 13, 2006. (SAR 38:9950-9951.)

On August 16, 2006, the City filed a Return to Peremptory Writ of Mandate and Request for Discharge ("Return") with this Court. On October 2, 2006, Petitioners filed an Objection to Return to Peremptory Writ and Request for Discharge.

Standard of Review

To establish a violation of the California Environmental Quality Act ("CEQA"), Petitioners must show an abuse of discretion in that the City either failed to proceed in the manner required by law or the determination or decision is not supported by substantial evidence. (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* ("Vineyard") (2007) 40 Cal. 4th 412, 426, Code Civ. Proc. § 1094.5(b); Pub. Resources Code §§ 21168, 21168.5.) This requires "scrutiny of the nature of the alleged defect" depending upon whether petitioners' claim is predominantly "one of improper procedure or a dispute over the facts." (*Vineyard,* 40 Cal.4th 412, 435.) As explained by the California Supreme Court in *Vineyard,* "while we determine *de novo* whether the agency has employed the correct procedures, . . . we accord greater deference to the agency's substantive factual conclusions," for a court's task "is not to weigh conflicting evidence and determine who has the better argument." (*Id.*)

"Substantial evidence" is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other

[1] As the final CEQA document, the FAA includes the DAA plus responses to comments and modifications to the text of the DAA where required. (14 Cal. Code of Regs. § 15362 (b); hereafter "CEQA Guidelines."

conclusions might also be reached." CEQA Guidelines § 15384(a); *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 393.) Substantial evidence may include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts, but not argument, speculation, unsubstantiated opinion, or clearly erroneous evidence. (Pub. Res. Code §§ 21080(e)(1)(2), 21082.2(c).)

"[I]n applying the substantial evidence standard, the reviewing court must resolve reasonable doubt in favor of the administrative finding and decision. As such, if there are conflicts in the evidence, their resolution is for the agency." (*River Valley Preservation Project v. Metropolitan Transit Dev. Bd.* (1995) 37 Cal.App.4th 154, 168.) Determinations in an EIR must be upheld if supported by substantial evidence, and the mere presence of conflicting evidence in the administrative record does not invalidate them. (*Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1143.) An agency's approval of an EIR may not be set aside on the ground that an opposite conclusion would have been equally or more reasonable. (*Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 393.) The Court passes only upon the EIR's sufficiency as an informative document, not upon the correctness of its environmental conclusions. (*Laurel Heights* at 392.) An EIR's informational content needs to be adequate to fulfill its informational purpose. It need not be perfect: "CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive. The absence of information in an EIR does not per se constitute a prejudicial abuse of discretion." (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26.)

"As with all substantial evidence challenges, an appellant challenging an EIR for insufficient evidence must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal. A reviewing court will not independently review the record to make up for appellant's failure to carry his burden." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266; *see also Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018 at 1029 ["plaintiffs bear the burden of proving a prejudicial abuse of discretion by establishing that the agencies' decisions are not supported by substantial evidence or that they failed to proceed in a manner required by law"].)

A. The City Was Not Legally Precluded From Relying on the 41,000 afy Transfer Pending Completion of Litigation Surrounding the Monterey Agreement and DWR's Programmatic EIR.

Petitioners contend that the City is precluded from relying on the 41,000 afy Transfer for planning purposes. The argument rests predominantly on the relationship between the 41,000 afy Transfer and on-going proceedings involving the Monterey Agreement, summarized hereafter.

In 1999, CLWA entered into a contract with the Kern Delta Water District for transfer of 41,000 afy. The CLWA certified an EIR for the 41,000 afy Transfer tiered on the earlier program EIR that had been prepared for the Monterey Agreement, a multi-party agreement among SWP contractors setting forth allocations and other provisions concerning SWP deliveries.

In *Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892 ("*PCL*"), the PCL successfully challenged the Monterey Agreement program EIR. The Court of Appeal held that the EIR should have been prepared by DWR as the lead agency, rather than by one of the contractors, and that a new EIR must be prepared and certified by DWR. The Court did not invalidate the Monterey Agreement or enjoin the water transfers effected thereunder, but directed the trial court to consider whether the Monterey Agreement should remain in place pending preparation of DWR's new EIR, and to retain jurisdiction pending certification of DWR's EIR.

In *Friends of Santa Clara River v. CLWA* (2002) 95 Cal.App.4th 1373 ("Friends I"), the Court of Appeal ordered CLWA's EIR for the 41,000 afy Transfer decertified because it had been tiered from the Monterey Agreement EIR, adjudged inadequate: "We have examined all of appellant's other contentions and find them to be without merit. If the PCL/tiering problem had not arisen, we would have affirmed the judgment" (*Friends*, *supra*, at 1387.) The Court did not issue any ruling affecting CLWA's ability to continue to use and rely on water supplies from the 41,000 afy Transfer, leaving it to the trial court's discretion whether to enjoin CLWA's use of the water pending its completion of a new EIR. (*Friends*, *supra*, at 1388.)

In September 2002, on remand to the Los Angeles County Superior Court, the *Friends* petitioners applied under CEQA section 21168.9 to enjoin CLWA from continuing to use and rely on water from the 41,000 afy Transfer. The trial court rejected that request, and in December 2003, the Court of Appeal affirmed the trial court's ruling allowing CLWA to continue to use and rely on water

from the 41,000 afy Transfer pending completion of its new EIR. (*Id.*; *see also Friends of the Santa Clara River v. Castaic Lake Water Agency*, 2003 WL 22839353 ("*Friends II*") at SAR 34:8741.)

Meanwhile, in May 2003, before the trial court acted on remand, the parties to the PCL litigation entered into the Monterey Settlement Agreement. Section II of that Agreement provides that SWP would continue to be administered and operated in accord with both the Monterey Amendments and the terms of the Monterey Settlement Agreement. (SAR 34:8832.) The Monterey Settlement Agreement did not invalidate or vacate the Monterey Amendments, or any water transfer effected under them. The Agreement called for DWR to prepare a programmatic EIR for the Monterey Amendment and to evaluate the environmental impacts of eight completed water transfers, including the 41,000 afy Transfer, within the broad context of the Monterey Agreement.

In December, 2004, CLWA certified a new EIR for the 41,000 afy which did not tier off of the Monterey Agreement EIR. DWR did not object to CLWA acting as lead agency for the 41,000 afy Transfer and, in fact, commented favorably on the CLWA's EIR. (SAR 31:8049-8050.) That EIR was again subsequently challenged. (*California Water Impact Network v. Castaic Lake Water Agency*, LASC Case No. BS 098724.)

In March, 2007, the California Supreme Court decided *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412. In *Vineyard*, plaintiff challenged the EIR for a large, residential development project on the basis that the project's projected water supply was so uncertain that the EIR effectively failed to identify the source of the water needed to supply the project in the long term.[2] According to the petitioner, this failure of the EIR could not be cured since the EIR improperly deferred analysis of the project's true water supply impacts.

The Sunrise Douglas EIR projected water supplies to come from two sources: groundwater supplies in the near-term and additional surface water sources in the long-term. With respect to long-term supplies, the court held that the EIR had failed to proceed in accordance with law for failure to provide sufficient information. It leaves "too great a degree of uncertainty regarding the long-term availability of water for this project. Factual inconsistencies and lack of clarity in the [analysis] leave

[2] The Sunrise Douglas project would demand approximately 22,000 afy based on a projected build-out of 22,000 units of housing, housing approximately 60,000 people.

the reader[,] and the decision-maker[,] without substantial evidence for concluding that sufficient water is, in fact, likely to be available for the Sunrise Douglas project at full buildout." (*Vineyard,* 40 Cal.4th at 439.) With respect to the need to identify replacement supplies, the court held that, "[w]here, despite a full discussion, it is impossible to confidently determine that anticipated future water sources will be available, CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingences." (*Vineyard*, 40 Cal.4th at 432.)

On the other hand, the court upheld as adequate the Sunrise Douglas EIR's analysis of near-term groundwater supplies and held that the EIR's conclusions should not be set aside if supported by substantial evidence. Despite *some uncertainty* about the availability of the near-term supplies, which had been specifically identified but were subject to competing demands, the court held that substantial evidence supported the city's determination that the supplies were sufficiently reliable to be used for planning purposes and did not require an analysis of replacement sources. (*Vineyard,* 40 Cal.4th at 436-438; see also *Western Placer Citizens for an Agric. and Rural Env't v. County of Placer* (2006) 144 Cal.App.4th 890, 908 [an EIR need not identify a "guaranteed" source of water; "if an EIR were required to identify a guaranteed source of water, then no EIR would ever be sufficient."].)

In April, 2007, Department 13 of the Los Angeles Superior Court issued a Statement of Decision in Case No. BS 098724 (the second challenge to CLWA's 2004 EIR referred to above) and ruled that (1) the 41,000 afy Transfer was final and not subject to invalidation; (2) that CLWA was the proper lead agency to have prepared the EIR on the 41,000 afy and; (3) that CLWA was not required to await preparation of DWR's programmatic EIR on the Monterey Agreements before it could certify its own EIR.[3] The court nonetheless identified an analytical "hole" in CLWA's EIR based on its failure to explain the relationship between DWR's ability to impact the 41,000 afy Transfer as a result of its programmatic EIR and the three future water supply scenarios CLWA studied in its EIR. However, like all other courts that have faced this issue, the court refused to invalidate the Transfer or set it aside pending correction of this analytical defect.

[3] The court grants Petitioner's Request for Judicial notice of the trial court's Statement of Decision in *California Water Impact Network v. Castaic Lake Water Agency*, Case No. BS 098724.

1. *PCL, Friends of the Santa Clara River* and *California Oak* Do Not Preclude Reliance on the 41,000 afy Transfer

Petitioners contend that legal uncertainties surrounding the 41,000 afy Transfer due to the *PCL* and *Friends* lawsuits and the on-going preparation by DWR of a programmatic EIR preclude the City from relying on water from that transfer for planning purposes. Specifically, Petitioners contend that because *PCL* requires the Department of Water Resources ("DWR") to prepare an EIR analyzing the effects of the eight SWP water transfers completed under the Monterey Agreement, none of those transfers, including the 41,000 afy Transfer, are sufficiently reliable for planning purposes until DWR has completed and certified that EIR.

PCL, Friends and *California Oak* do not preclude reliance on the 41,000 afy Transfer for planning purposes. While the Courts of Appeal could have simply said that all EIRs requiring reliance on the 41,000 afy Transfer must await the certification of a new FEIR by DWR (and resolution of any litigation challenging such FEIR), they have not done that. In fact, no court has said that.

Although the Court in *Friends* and *California Oak* observed that CLWA "may be able to cure the PCL problem by awaiting action by the [DWR] complying with the PCL decision, then issuing a subsequent EIR, supplement to EIR, or addendum . . . tiering upon a newly certified Monterey Agreement EIR" (*California Oak, supra*, 133 Cal.App.4th at 1229," n.6), neither court said that local water or planning agencies must await the DWR Programmatic EIR. In fact, the *California Oak* court made it clear that as long as the basis for the decision was transparent and reasoned, it was *up to the City* to decide whether the 41,000 afy is sufficiently reliable for planning purposes. (*Id.* at 1237-38, emphasis added.)

2. The Monterey Settlement Agreement and DWR's Pending EIR Does Not Preclude Reliance on the Transfer.

The Monterey Settlement Agreement does not prohibit local agencies from relying on the 41,000 afy Transfer. Rather, the Settlement Agreement simply requires DWR to conduct an "[a]nalysis of the potential environmental [impacts] relating to" several undisputedly final and completed water transfers, not just of the 41,000 afy Transfer (SAR 34:8834) and to analyze all of the transfers in the same manner, even though seven of them, defined in the Agreement as the

"Attachment E Transfers," were beyond challenge. (*Id.*) All of the water transfers were effected as permanent transfers under the Agreement and are to be analyzed in the same way in DWR's new EIR and no material distinction is made between them. Nothing in the Settlement Agreement requires cities and counties to stop land use planning efforts until the DWR's EIR is certified, and no court has so held.

Nor is the fact of DWR's pending programmatic EIR a bar to the City's reliance on the 41,000 afy. While it is possible that DWR's EIR could impact the Transfer (a fact disclosed in the FAA), the preparation of that EIR by DWR is not a legal prerequisite for the approval of this Project by the City. Further, NCWD, the expert water agency that prepared the WSA for the Gate-King project, determined that it is "unlikely" that DWR's on-going preparation of an EIR and any litigation arising out of it will "unwind" completed and executed water transfers, such as the 41,000 afy Transfer. (SAR 24:6331.) The City's reliance on this conclusion was reasonable, based on evidence that showed (1) that DWR has treated and continues to treat the 41,000 afy as a valid, final transfer (SAR 31:8046); (2) that the 41,000 afy Transfer was memorialized in a 1999 supply contract amendment approved by DWR (SAR 31:8050); (3) that DWR has allocated and delivered the water in accordance with the transfer since 2000, seven years ago and increased CLWA's SWP maximum Table Amount by that amount (*Id.*); (4) that CLWA has paid $47 million for the water, monies which have been delivered and which were financed by tax-exempt bonds (*Id.*); (5) that DWR has always treated the transfer as a "permanent" and final Table A transfer and has stated that it is consistent with the implementation of the Monterey Amendments (*Id.*); (6) that DWR praised CLWA's 2004 EIR as a comprehensive and thorough analysis (SAR 10:2672); (7) that no court has ever set aside the Transfer pending preparation of CLWA's EIR or SWR's programmatic EIR; and (8) that DWR included the 41,000 afy in its most recent SWP Reliability Projections. (SAR 10:2671; 31:8050-8051.) These factors support the City's conclusion that neither the DWR (nor the courts) are likely to significantly disturb the 41,000 afy Transfer.

In summary, contrary to Petitioners' arguments, no *legal* bar exists to the City's reliance on the 41,000 afy Transfer for planning purposes. *California Oak* held that it was up to *the City* to determine whether or not to rely on the 41,000 afy Transfer in its planning pending the completion of the

litigation. The Court stated: "*[T]he question is whether the entitlement should be used for purposes of planning future development*, since its prospective availability is legally uncertain. *Although this decision must be made by the City*, the EIR is intended to serve as an informative document to make government action transparent. Transparency is impossible without a clear and complete explanation of the circumstances surrounding the reliability of the water supply." (*Id.* at 1237-38; emphasis supplied.)

The City's recirculated FAA transparently discussed the uncertainties related to the 41,000 afy Transfer, including disclosing the possibility that future actions by DWR could adversely impact the Transfer. Based on the evidence before it, the City reasonably concluded that it was unlikely that the 41,000 afy would cease to be available to serve this project and other projects.

3. The Invalidation of CLWA's EIR Does Not Undermine the City's EIR.

Petitioners contend that the April 2007 Statement of Decision invalidating of CLWA's EIR for the 41,000 afy Transfer in *California Water Impact Network v. Castaic Lake Water Agency* (Case No. BS 098724) undermines the adequacy of the City's FAA, which was certified in July, 2006. But as recognized by the *California Oak* court:

> It is well-established that once a project is approved, new information does not require reopening the approval. (*SCOPE, supra*, 106 Cal.App.4th at p. 723; Cal.Code Regs., tit. 14, § 15162, subd. (c).) Gate King is thus correct that it is "simply too late to raise this [the invalidation of the UWMP 2000] as an issue." (133 Cal.App.4th at 1243.)

As with the invalidation of the 2000 UWMP in the *California Oak* case, the setting aside of CLWA's EIR nearly a year after the City's certification of the FAA cannot re-open the validity of that certification. When the City certified the Gate King FAA in July, 2006, it was entitled to assume that the CLWA's certified EIR was adequate to support CLWA's approval of the 41,000 afy Transfer. (*State of California v. Superior Ct.* (1990) 222 Cal.App.3d 1416, 1419.)

But in any event, the City's FAA anticipated the possibility that CLWA's EIR might be invalidated, but concluded that the Transfer was still likely to prove reliable. The City's FAA said:

> "[T]he City has determined that it is reasonable to conclude that *even if a court finds that the CLWA 2004 EIR legally deficient*, that court, like all others before it, will again refuse to enjoin the permanent 41,000 afy water transfer, and instead require further revisions to the EIR." (SAR 31:8052 (emphasis added).)

That is what happened. Although the court in Department 13 found an "analytical hole" in CLWA's EIR, it refused to set aside the Transfer.

Finally, Petitioners suggest that the City's FAA suffers from the same "analytical hole" as identified in CLWA's EIR, namely that the FAA should have predicted how the outcome of DWR's programmatic EIR might affect the three allocation scenarios examined in the CLWA's EIR—namely (1) a pre-Monterey Amendments scenario without Article 18 cutbacks, (2) a pre-Monterey Amendments scenario with Article 18 cutbacks and (3) a post-Monterey Amendments scenario.

The defect identified in the CLWA EIR does not apply to the FAA. First, Petitioners' failure to exhaust their administrative remedies with respect to these arguments bars them from raising them for the first time now. (Pub. Res. Code § 21177(a); *Sierra Club v. California Coastal Comm'n* (2005) 35 Cal.4th 839, n. 20; *Central Delta Water Agency v. State Water Res. Control Bd.* (2004) 124 Cal.App.4th 245, 274.)

Assuming *arguendo,* that Petitioners' arguments are not barred, CEQA imposes on the City no duty to examine in its project EIR the three "Monterey" allocation scenarios assessed in CLWA's EIR for the 41,000 afy. Public Resources Code § 21002.1 provides that "[t]he purpose of an [EIR] is to identify the significant effects on the environment *of* [*the*] *project* . . . ." (emphasis added.) In CLWA's EIR, the "project" was a 41,000 afy Transfer. In the City's FAA, the "project" was a local industrial park project. None of the Monterey allocation scenarios are a direct or indirect environmental consequence of approval of *this* project. Petitioners stretch CEQA beyond its limits to suggest that the City's FAA should have contained a detailed environmental assessment of the 41,000 afy Transfer, a project under the jurisdiction of a different agency, and with very different environmental ramifications.

Rather, under CEQA, the FAA was required to contain a reasoned and adequate assessment of whether there will be sufficient water to serve *the project* and, to the extent water is deemed *not* available, the environmental impacts of acquiring needed water. (*California Oaks* at 448, *Vineyard* at 432.) In this case, the FAA contained a reasoned, good faith analysis, identified specific, available water supplies, and discussed the reliability of those supplies. Acknowledging potential uncertainties (including DWR's ability to curtail Table A deliveries in the future based on "environmental

considerations,") of the available supplies, the FAA nonetheless concludes that DWR's future activities are "unlikely to 'unwind' [a] completed and executed...transfer[]." (SAR 24:6331) There is no "analytical hole" here. The FAA identifies water available to serve the project, discusses the degree of uncertainty related to those identified supplies, and based on substantial evidence, concludes that the supplies are *sufficiently* reliable to use for planning purposes.

4. The FAA was not required to identify supplies to replace the 41,000 afy

Petitioners claim that *California Oak* and *Vineyard* required the City to identify permanent replacement water supplies to serve the project, should the 41,000 afy Transfer at some point cease to be available. Petitioners misread *California Oak* and *Vineyard*. Rather, *California Oak* requires that the City explain why it can rely on the 41,000 afy Transfer, despite the legal uncertainties, ***or*** identify additional water supplies for the project. (*California Oak, supra*, 133 Cal.App.4th at 1242 [emphasis added].) It does not require that the City do both. (See also *id.* at 1244 calling for the EIR to demonstrate how "demand for water would be met without the 41,000 afy entitlement, ***or*** of why it is appropriate to rely on the 41,000 afy Transfer in any event." (*Id.* at 1242 [emphasis added].) "Whether the [41,000 afy] entitlement should be used for purposes of planning future development" is a decision that "must be made by the City." (*Id.* at 1237-1238.)

In the FAA, the City chose to rely upon the continued availability of 41,000 afy Transfer in its water supply analysis and to explain why. As ordered by the Court of Appeal, it provided a reasoned analysis based on substantial evidence as to why it was appropriate to do so. (SAR 10:2615 – 25:6726; SAR 28:7234 – 37:9677.) Having done so, the City was not required to also identify water supplies to replace the 41,000 afy.

Nor does *Vineyard Area Citizens* require the City to identify replacement sources of water. In *Vineyard*, the Supreme Court held that "where, despite a full discussion, it is *impossible to confidently determine* that anticipated future water sources will be available, CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingences." (*Vineyard*, 40 Cal.4th at 432.) Here, it was *not* impossible to confidently determine that the 41,000 afy would continue to be available based on the record before the City. While *some* uncertainty existed, there was sufficient certainty for the City to confidently

predict that water supplies would in fact continue to be available. The *Vineyard* court does not require a *guarantee* of certainty for an EIR's water analysis to be considered adequate, just a "likelihood of actually proving available." (*Id.*)

In fact, whether a specifically identified source, such as the 41,000 afy, is *sufficiently* reliable is the kind of factual dispute that *Vineyard Area Citizens* cautioned should be subject to deference as long as the City's conclusion is supported by substantial evidence. (*Vineyard Area Citizens*, 40 Cal.4th at 436.) In *Vineyard,* the court applied this deferential approach to City's conclusion about the reliability of near-term groundwater supplies (5,000 afy). Although the 5,000 afy was specifically identified as available to serve the development, the EIR acknowledged there were competing demands for it. (*Id.*) "*While much uncertainty remains*," the court said, "the record contains substantial evidence demonstrating *a reasonable likelihood* that a water source the provider plans to use for the Sunrise Douglas project . . . will indeed be available at least in substantial part to supply the Sunrise Douglas project's near-term needs." (*Id.* at 437, emphasis added.) The *Vineyards* court did not require either a guarantee of availability or an analysis of replacement sources for the 5,000 afy of near-term supplies.

Here, as in *Vineyards,* the FAA discloses "potential uncertainty" over the 41,000 afy, but also explains why the City concluded that this specifically identified source was not *so* uncertain as to not "bear a likelihood of actually proving available" or to require identification of replacement sources. Under well-established principles, this Court must defer to the City's factual conclusion.

Finally, *Vineyard* recognizes that CEQA does not require the city to "reinvent the water planning wheel" each time it approves an individual development project if a water planning agency has already included the project in its most recently adopted Urban Water Management Plan. (UWMP) (*Vineyard*, 40 Cal.4th at 434.)[4] "The analysis in an individual project's CEQA evaluation may incorporate [an UWMP's] previous overall water planning projections," and need not "reinvent the wheel." (*Id.* at 434; see also Water Code §10910 (c)(1), (2) and (3), allowing incorporation of an UWMP analysis into an EIR) In *Vineyard,* the Sunrise Douglas project was *not* accounted for in the

[4] A UWMP must describe estimated past, present and future water sources, supply and demand for at least 20 years into the future. (Water Code §§ 10610-10656)

applicable UWMP. Here, in contrast, the Gate King project was fully accounted for in NCWD's most recently adopted UWMP, and this information was incorporated into the FAA. (SAR 10:2621; 24:6326.) Under CEQA and the Water Code, the City was entitled to incorporate the UWMP's projections of available water supplies, which included the 41,000 afy, into its water supply analysis. This is what it did.

B. Substantial evidence supports City's reliance on 41,000 afy water transfer

As noted, *California Oak* held that, as long as the City's conclusions were supported by substantial evidence, it is within the City's province to decide whether to rely on the 41,000 afy Transfer for planning purposes. (*California Oak, supra*, 133 Cal.App.4th at 1237-38.)

The FAA, here, contains a discussion of *why* the City chose to rely on the 41,000 afy as a reliable source, despite the identified uncertainties. While disclosing that future activities by DWR involving SWP water (including its programmatic EIR) *could* affect the 41,000 afy Transfer, the FAA concludes that such DWR's future activities were "unlikely" to "unwind" executed and completed agreements with respect to the permanent transfer of SWP Water Amounts." (SAR 10:2661-2664.) To support this conclusion, the FAA explains that the 41,000 afy Transfer was completed in 1999; CLWA has paid approximately $47 million for the additional Table A Amount, the monies have been delivered, the sales price has been financed through CLWA by tax-exempt bonds, and DWR has increased CLWA's SWP maximum Table A Amount and delivered or made available to CLWA the 95,200 afy because it was a permanent transfer/reallocation of SWP Table A entitlement between SWP contractors. (SAR 31:8046-8050.)[5]

The FAA also explains that DWR itself lists the 41,000 afy as part of CLWA's allocation in its published "Notices to State Water Project Contractors" (SAR 31:8046); treats the transfer as a permanent and final transfer (*Id.*); did not object to CLWA's preparation of its own EIR for the 41,000

[5] Included in the DAA's and FAA's Appendices are the necessary documents to support the FAA's analyses, including the Water Supply Assessment prepared by NCWD PCL decision (SAR 34:8916-8936), the Monterey Settlement Agreement (SAR 34:8816-8897), the Sacramento County Superior Court's "Order Pursuant to Public Resources Code Section 21168.9" (SAR 36:9410-9413), the *Friends* decision (SAR 34:8771-8779), the Los Angeles County Superior Court's Judgment on remand in the *Friends* litigation (SAR 34:8781-8791), CLWA's final EIR for the 41,000 afy Transfer (SAR 16:4029 – 19:5126), and CLWA's Resolution certifying that EIR (SAR 33:8522-8527).

afy (SAR 31:8051) and expressly allocates the 41,000 afy as part of Castaic Lake Water Agency's 95,200 afy in its 2005 State Water Project Delivery Reliability Report (SAR 22:05930), which contains "DWR's current information regarding the annual water delivery reliability of [SWP] for existing and future levels of development . . . , assuming historical patterns of precipitation." (SAR 22:5874.) This evidence—unrefuted by Petitioners—supports the City's determination that, although *possible*, it is *unlikely* that DWR will impose conditions on the Transfer that will significantly impair DWR's own projections about its reliability. (SAR 24:6331.) While the City's determinations about the reliability of the 41,000 afy contain a degree of projection, "[d]rafting an EIR . . . necessarily involves some degree of forecasting." (CEQA Guidelines 15144.) Where an agency uses its best efforts to disclose and forecast all that it reasonably can about the reasonable likelihood of future activities, it has complied with CEQA. (*Id.*)

Importantly also, Petitioners have not produced substantial evidence that DWR *will* significantly change DWR's own projections concerning the reliability of SWP water. Rather, Petitioners simply speculate that DWR might do so. Nor have Petitioners shown why the evidence relied on by the City to conclude such a result is "unlikely" is insubstantial, incorrect or flawed. Petitioners' failure to explain why the evidence favorable to the City's determination is lacking is "fatal" to its case. A reviewing court will not make up for appellant's failure to carry its burden. (*Defend the Bay, supra*, 119 Cal.App.4th 1261 at 1266.)

The City reviewed the evidence provided by the expert water agencies, NCWD, CLWA and DWR, as well as the views of commentators opposed to the City considering the 41,000 afy Transfer, and determined that the 41,000 afy was *sufficiently* reliable to be able to confidently use it for planning purposes. This determination is supported by substantial evidence in the record, and thus, comports with CEQA. (*Vineyard Area Citizens*, 40 Cal.4th at 436.)

C. The FAA properly relied on data developed by DWR using the CalSim II model.

Petitioners' criticize the City's reliance on DWR's use of the CALSIM II model and contend that other experts have said the model does not reliably predict water supplies. However, as stated in CEQA Guidelines section 15151 "[d]isagreement among experts does not make an EIR inadequate." Rather, section 15151 provides that "[an] EIR should summarize the main points of disagreement

among the experts. The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal. App. 4th 1383, 1390-91) The City, after disclosing and discussing the expert controversy, appropriately chose to rely upon DWR's Reliability Report, which includes water supply availability data developed using the CALSIM II model. Substantial evidence in the record supports City's determination that DWR, the state's expert agency on water supplies, reasonably employed CALSIM II as the best available tool for assessing water supplies in California.

Petitioners focus on the "Strategic Review of CALSIM II and its Use for Water Planning, Management and Operations in Central California" ("Strategic Review") contending that the Strategic Review supports their contention that CALSIM II should not be used for absolute predictions. (SAR 35:9107-9150.) In relying on DWR's Reliability Report, the City acknowledged the Strategic Review, recognized that it identified some weaknesses with the model, but concluded – as did the Strategic Review – that CALSIM II is a valuable tool for planning purposes. (SAR 31:8074; 35:9110.) In fact, the Strategic Review viewed CALSIM II as "a very impressive modeling effort on the part of all those involved with its development and application," (SAR 35:9110, 9132) and concluded: "Few, if any, modeling organizations in the country have consistently done as good a job on model development and application for such a large, complex, and controversial system as the modeling group which developed CALSIM II. . . . Most areas and suggestions for improvement . . . are meant to aid the model developers in moving further and faster in the direction they are already heading." (SAR 35:9127.) That same experts believe the model can be improved does not detract from it being the best available currently.

Petitioners suggest that the use of CALSIM II for making absolute predictions about future SWP water deliveries conflicts with DWR's and the United States Bureau of Reclamation position on the model, but DWR and the Bureau of Reclamation's ("Bureau") primary position paper on this issue: "Peer Review Response: A Report by DWR/Reclamation in Reply to the Peer Review of the CALSIM II Model" ("Peer Review Response") does not support this. (SAR 37:9592-9660.) The Peer Review Response, which responds to the Strategic Review, states that the CALSIM II Model *can* be

used to make absolute predictions in certain circumstances, including for "local planning efforts by project contractors and local agencies." (SAR 37:9619.)

Petitioners further argue that in an unpublished U.S. District Court opinion, *Planning and Conservation League v. U.S. Bureau of Reclamation*, ("*PCL/Bureau*") the Bureau "essentially admitted that the model is too unreliable for making absolute predictions." But the decision only highlights a fact which is not in dispute, and which the City prominently disclosed in the FAA: there are perceived shortcomings to the CALSIM II model. The *PCL/Bureau* decision (discussed in the FAA, included in the FAA's appendices), did not restrict "the Bureau or any other agency from using or relying on the CalSim-II model but, rather, stated that the Bureau could rely on the model, provided it disclosed relevant shortcomings in the data or model itself." (SAR 31:8074; *see also* 34:8938-8955.) The FAA did disclose these shortcomings.

Finally, the City's responses to comments by the Planning and Conservation League and California Water Impact Network were appropriate. (*See* SAR 31:8097-8098, 8102-8103.) In those responses the City recognized that the CALSIM II model has shortcomings, but concluded that it may still be relied on, as it is relied upon by experts DWR and the Bureau. (*Id.*) CEQA requires nothing more. (*See Greenbaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 412-13 [agency has discretion to determine what methodology to use].)

D. The FAA properly evaluated the potential impact of global warming on water supplies.

The FAA appropriately concluded, based on adequate review of global warming literature and relevant studies, that the impact of climate change on water supplies was too speculative to conduct further meaningful quantitative review.

The FAA reviewed literature on global climate change, and has a seven-page discussion of the issue in Topical Response 3. (SAR 31:8076-8082.) The FAA recognizes that a broad consensus has concluded that the global climate is warming and that this change may adversely impact California's water supplies. (*Id.*) After reviewing the relevant studies, however, the FAA determined that the timing and extent of any impact to water supplies remains highly uncertain. (*Id.*) While DWR and other agencies and institutions continue to study the implications of global warming on water supplies, the FAA notes that DWR itself has determined that the science "has not reached a level at which it can

be quantitatively incorporated into delivery projections of the SWP." (SAR 31:8077.) The FAA states that the City reviewed these studies and DWR's approach and independently determined that it would be speculative to try to quantify the effects of climate change on water supply reliability at this point. (SAR 31:8082.)

CEQA permits such an approach. Given DWR's expert opinion that the quantitative impact of global warming on water supplies is speculative, CEQA did not require further analysis of those impacts. CEQA Guidelines § 15145 provides: "If, after thorough investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact." (*See also Marin Municipal Water Dist. v. KG Land California Corp.* (1991) 235 Cal.App.3d 1652, 1662-63 [upholding approach in which EIR investigated potential long-term impacts, but found analysis would be speculative].)

Petitioners argue that the City was required to make a "good faith effort to analyze the potential impacts on supply reliability based on the available data." It did. FAA Topical Response 3 contains an adequate discussion of global warming, including a summary of the various studies which examine the potential impact on water supplies in California. (SAR 31:8076-8082.) It recognizes that some studies have concluded that less water will be available as a result of global warming. (SAR 31:8078, 8080.) However, the FAA also reviewed studies that found that global warming may result in more water for California. (*Id.*) After summarizing the main points of these studies, the City exercised its discretion as lead agency, and chose to adopt DWR's expert opinion that quantifying the impact of global warming on water supplies at this time would be speculative:

> [B]ased on the above data, the City agrees with DWR that it would be speculative at this time to quantify the effects of climate changes on the reliability of the SWP . . . [a]t this time, the City believes it is appropriate to terminate any further analysis of potential future climatic changes, consistent with Section 15145 of the California Environmental Quality Act Guidelines.

(SAR 31:8082.)

Climate change is clearly an issue of vital importance, particularly to water supplies in California. DWR, the state agency with the most expertise on water supplies in California, has determined that the science on global warming has not reached a point where it can be "quantitatively

incorporated into delivery projections of the SWP." (SAR 31:8077.) The City Council of the City of Santa Clarita is in no better position to do so and CEQA does not require it to do so.

1. The FAA adequately addressed State Water Resources Control Board Order 2006-0006.

The FAA adequately addresses the State Water Resources Control Board's Order 2006-0006 ("Order")[6] concerning the maintenance of salinity standards in the Sacramento Bay Delta. Petitioners argue that the City must forecast the "extent to which meeting the salinity standard in DWR's State Water Board permit may result in reductions to SWP deliveries." However, as explained by the FAA, there are a variety of overlapping methods by which DWR may comply with the Order. (SAR 31:8070-8071.) After examining these methods and considering the current efforts underway by DWR to meet the salinity standards, as well as noting that, even if DWR were to be found in violation of the Order, a reduction in water deliveries is not required. The City's conclusion that the Order does not result in a reduction of State Water Program supplies to the DWR is supported by the evidence.

As described in the FAA, in the event that DWR or the Bureau projects that there may be a "potential exceedance in the salinity objectives" of the Board Order the "two agencies are required to immediately inform the State Board . . . and describe the corrective actions they are initiating to avoid the exceedance." The 'corrective actions' may include, but are not limited to:

> [A]dditional releases from upstream [CVP] facilities or south of the Delta [SWP] or CVP facilities, modification in the timing of releases from Project facilities, reduction in exports, recirculation of water through the San Joaquin River, purchases or exchanges of water under transfers from other entities, modified operations of temporary barriers, reductions in highly saline drainage from upstream sources, or alternative supplies to Delta farmers (including overland supplies).

(SAR 31:8070.) The FAA finds that, "While the reduction of exports is listed as one means of improving salinity concentrations, it is only one of many such methods. As noted above, implementation of a barrier program is another means for improving salinity concentrations and, in fact, DWR and the Bureau are working on such a program." (*Id.*)

---

[6] Although the text of the Order itself was not included in the Administrative Record, it is apparent the City had access to the Order as part of its deliberations, as the City's FAA contains a detailed analysis of it. It appears to have been inadvertently omitted from the Supplemental Administrative Record. The Court grants Real Parties' Request for Judicial Notice of SWRCB Order 2006-0006 under Evidence Code §452.

The FAA further notes that, even if there was an "exceedance," an enforcement action would not be automatic, as the Executive Director of the State Water Board would first have to consider if any action was appropriate and whether the "non-compliance was beyond DWR's or the Bureau's control." (SAR 31:8071.) Given the variety of methods available to DWR and the Bureau to meet the salinity standards, the current efforts towards implementation of a barrier program, and the administrative provisions of the Order, the FAA appropriately concludes that "nowhere does the Order mandate that DWR and the Bureau shut down their pumps." (*Id.*) Analyzing the impacts of speculative future enforcement actions is not required under CEQA.

CONCLUSION

As directed by *California Oak*, the City has adequately analyzed the uncertainties surrounding the 41,000 afy water Transfer and explained in good faith the basis for its reliance on that Transfer. That analysis need not be exhaustive, but with a sufficient degree of analysis to make a decision which intelligently takes account of environmental consequences. (CEQA Guidelines § 15151.) Perfection is not required: adequacy, completeness and a good faith effort at full disclosure are. The City's determinations are not an abuse of discretion, but supported by substantial evidence.

The Court accepts the City's Return to the Writ of Mandate and the Final Additional Analysis to the Environmental Impact Report for the Gate-King Industrial Park as adequate and, accordingly, IT IS SO ADJUDGED that the Peremptory Writ of Mandate is DISCHARGED.

Counsel for respondent shall prepare, serve and lodge in Department 85 a proposed order/judgment discharging the writ on or before August 21, 2007.

Objections to this Statement of Decision and proposed order and judgment shall be served and filed on or before August 31, 2007.

DATED: August 15, 2007

Dzintra L. Janavs
Judge of the Superior Court