State of California | California Natural Resources Agency

Memorandum

Date: SEP 20 2016

To: Mark W. Cowin, Director

From: Kevin Faulkenberry, Principal Engineer
South Central Region Office
Division of Integrated Regional Water Management
Department of Water Resources

Subject: Monterey Plus Revised Proposed Project and Revised Environmental Impact Report

TIME FACTOR:

In accordance with the Sacramento County Superior Court's Peremptory Writ of Mandate, November 24, 2014 (Writ), and subsequent order on May 18, 2016, DWR of Water Resources (DWR) must submit the Monterey Plus Final Revised EIR to the Court on September 28, 2016. It is requested that the Director review and approve the Final Revised EIR and Exhibits by September 20 to allow timely filing of these documents with the Court.

SUMMARY:

The purpose of this memorandum is to request decisions below with regard to your consideration of the Monterey Plus Revised proposed project which is the Monterey Amendment and the Settlement Agreement with additional analysis related to the transfer, development, use and operation of the Kern Water Bank (KWB).

BACKGROUND:

In 1994, DWR and a group of State Water Project (SWP) water contractors negotiated a set of principles designed to modify the long-term SWP water supply contracts. This set of principles came to be known as the Monterey Agreement. As an action covered by the California Environmental Quality Act (CEQA), the Monterey Agreement was the subject of an Environmental Impact Report (EIR) prepared by the Central Coast Water Agency (CCWA), a joint powers agency composed of two SWP contractors, and certified by CCWA in October 1994. Following CCWA's certification of the EIR, DWR and all but two of the SWP contractors approved most of the principles of the Monterey Agreement and authorized execution of an amendment to the long-term water supply contract. This amendment is known as the Monterey Amendment and included the transfer of the KWB Lands. In 1995 and 1996, acting pursuant to their respective authorities, DWR and the participating SWP contractors executed the Monterey Amendment (virtually identical amendments were separately executed by DWR and each SWP contractor) and DWR and Kern County Water Agency executed contracts transferring the KWB Lands.

In 1995, the CCWA's EIR for the Monterey Agreement was subject to judicial challenge. In 2000, the Third District Court of Appeal ordered that the EIR be

SURNAME DWR 155 (Rev 7/11)	Kevin Faulkenberry by Cathy Crothers	C/O Tompkins 9/19/2016 C/O for M. Anderson	9/16/16	9/19/16

decertified on the grounds that DWR should have been the lead agency and that the EIR was, in part, inadequate. In May 2003, the parties to the litigation negotiated a settlement agreement, which was confirmed on June 6, 2003, by Superior Court order, whereby DWR committed to a process for including the plaintiffs and contractors in the development of a new EIR on the Monterey Amendment and the parties agreed to certain additional elements (Settlement Agreement). The elements, or objectives, the parties agreed to achieve are:

- Communicate SWP supply reliability information to SWP contractors and local planning jurisdictions and clarify related SWP contract language;
- Enhance public review of SWP contract amendments and public participation in environmental review;
- Provide assurance regarding finality of certain Table A transfer and transfer of title to the Kern Fan Element land and assurances regarding environmental protection of Kern Fan Element lands.
- Increase SWP watershed enhancement activities in Plumas County and improve Plumas County's access to SWP water.
- Providing funding to plaintiffs to implement the Settlement Agreement including watershed restoration projects.

In approving the Settlement Agreement and issuing its related orders, the Superior Court did not invalidate the Monterey Amendment or DWR's approval of the Monterey Amendment. DWR has been operating pursuant to the Monterey Amendment since 1996 and implementing the Settlement Agreement and the Court Order approving the Settlement since 2003.

On February 1, 2010, Director Snow certified the Monterey Plus EIR. In April of 2010, Director Cowin decided to "...carry out the [Monterey Plus] proposed project by continuing to operate under the existing Monterey Amendment to the State Water Project long-term water supply contracts (including the Kern Water Bank transfer) and the existing Settlement Agreement entered in *PCL v. DWR* (including the Attachment A amendments to the State Water Project long-term water supply contracts) in accordance with the terms of those documents as previously executed by the Department and the other parties to those documents[.]"

MONTEREY PLUS REVISED EIR:

Several parties challenged the adequacy of the Monterey Plus EIR under CEQA. In 2014, the Monterey Plus EIR was found by the Sacramento County Superior Court to comply with CEQA in all aspects except with respect to the development, use, and operation of the KWB. The Superior Court specified that DWR is to correct the deficiencies and recertify the EIR without reopening the non-defective portions of the

EIR. Upon recertification, only those portions of the Monterey Plus Revised EIR (REIR) that are new or changed shall be subject to challenge under CEQA by petitioners or other interested parties.

DWR developed the Monterey Plus Draft REIR making changes to the 2010 Monterey Plus EIR as a result of DWR's re-analysis of the Kern Fan Element (KFE) property transfer and a new analysis of the KWB development and continued use and operation. Since DWR decertified the Monterey Plus EIR, pursuant to the Court's order, the Final Revised EIR also includes, without modification, the 2007 Draft EIR, and the 2010 Final EIR. (The REIR has the same State Clearinghouse No. (2003011118) as the Monterey Plus EIR.)

The REIR supplements and does not supersede the analysis of the Monterey Plus EIR. The Monterey Plus EIR focused on the transfer of the KFE property. The REIR did not identify any new impacts or changes to impacts caused by the transfer of the KFE property; therefore the Monterey Plus EIR fully disclosed all impacts caused by the transfer of the KFE property. Consequently, the major focus of the REIR is on the development and continued use and operation of the KWB as a locally owned and operated groundwater banking and recovery project.

The Draft REIR describes and analyzes the development and continued use and operations of the KWB, located within Kern County, near Bakersfield, California. The analysis identified potentially significant impacts, before mitigation, related to groundwater levels and quality, Kern River water quality, the Cross Valley Canal, terrestrial biological resources, erosion, hazardous materials, waterborne disease, cultural and paleontological resources, greenhouse gas emissions, and cumulative impacts. Potentially significant and unavoidable impacts were found only related to cumulative growth-related impacts. The Draft REIR identified hazardous sites on or near KWB Lands that have been remediated.

DWR circulated the Draft REIR for public and agency comment from April 28, 2016 through June 13, 2016. During the comment period, DWR held public hearings in Fresno and Bakersfield on June 1 and 2, 2016, respectively. DWR received five written letters and e-mails commenting on the Draft REIR. In addition, three individuals provided oral comments on the Draft REIR at the June 1, 2016, public hearing in Fresno, two of which also submitted written comments.

The Final REIR consists of the response to comments, the comments, the Draft REIR, and related appendices and without modification, the 2007 Draft EIR, and the 2010 Final EIR. As required by CEQA Guidelines Section 15132, the Final REIR includes a list of persons, organizations, and public agencies that commented on the Draft REIR; comments and recommendations received on the Draft REIR either verbatim or in summary; and DWR's responses to significant environmental points raised in the review and consultation process. On September 2, 2016, copies of the responses to comments were sent via email and regular mail to the three public and local agencies, as well as the San Manuel Band of Mission Indians that submitted comments on the Draft REIR. This meets the requirements of Public Resources Code Section 21092.5.

DIRECTOR DECISIONS:

CEQA requires that public agencies like DWR make a number of determinations when approving a proposed project which could have a significant impact on the environment. Therefore, following completion of the public review process and preparation and circulation of the Monterey Plus Final Revised EIR, DWR (as lead agency) will consider taking the following actions:

- Certify the Monterey Plus Final REIR (CEQA Guidelines Section 15090);
- adopt a revised mitigation monitoring and reporting program with respect to any mitigation measures (CEQA Guidelines Section 15091[d]) (for this revised EIR, KWBA is responsible for the revised mitigation monitoring and reporting program);
- adopt revised findings with respect to any significant environmental effects (CEQA Guidelines Section 15091);
- adopt a revised statement of overriding considerations with respect to any significant and unavoidable impacts (CEQA Guidelines Section 15093);
- make a new determination with KWBA (as a responsible agency) with regard to whether or not to continue the use and operation of the KWB by KWBA; and
- file a notice of determination (CEQA Guidelines Section 15094).

Your decisions below with regard to the proposed project completes the review and consideration required in the Sacramento County Superior Court ruling in *Rosedale et al. v. California Department of Water Resources* and *Central Delta Water Agency et al. v. California Department of Resources* (Sacramento County Superior Court Case Nos. 34-2010-80000703 and 34-2010-80000561) finding that the Monterey Plus EIR "fails to adequately describe, analyze, and (as appropriate) mitigate the potential impacts of the proposed project associated with the anticipated use and operation of the KWB, particularly as to potential groundwater and water quality impacts." Your decision will also complete the review and consideration required by the Sacramento County Superior Court's November 24, 2014 Writ of Mandate, specifying among other things, that:

1) The use and operation of the KWB is severed from the remainder of the Monterey Plus Project.

2) DWR shall vacate its February 1, 2010 certification of the Monterey Plus EIR. (DWR decertified the EIR on December 11, 2014, and has prepared this Monterey Plus Revised EIR in response to the Court ruling and in accordance with Public Resources Code, Section 21168.9.)

3) DWR shall revise the Monterey Plus EIR's project description to include the development, use and operation of the KWB as a water banking and recovery project, and revise the Monterey Plus EIR as necessary to correct the CEQA error with respect to the analysis of the potential impacts associated with the transfer, development, use and operation of the KWB as a water banking and recovery project, as identified in the Court's Rulings on Submitted matter (March 5, 2014). DWR's preparation of the revised Monterey Plus EIR shall be in accordance with the Court's rulings in the Rosedale and Central Delta matters.

4) DWR's May 2010 Monterey Plus Project decision as it related to the KWB's use and operation will remain in place on an interim basis pending preparation of an adequate EIR. At the conclusion of the revised Monterey Plus EIR process, DWR (as lead agency) and KWBA (as responsible agency) shall make a new determination regarding whether to continue the use and operation of the KWB by KWBA.

If you make the decisions set forth in this memorandum, please have your office call me, at (559) 230-3320 for distribution. If you have any questions or need additional information about the Revised EIR or the proposed project, please call me at (559) 230-3320 or Mary U. Akens, Senior Staff Counsel, at (916) 653-1037.

RECOMMENDATION:

We recommend that, after reviewing and considering the attached Final Revised EIR, you make the decisions below.

Craig Trombly, Acting Chief State Water Project Analysis Office — Date: 9/19/2016

Spencer Kenner, Chief Counsel — Date: 9/19/16

for Mark E. Andersen, Acting Deputy Director State Water Project — Date: 9/19/2016

Gary Bardini, Deputy Director Integrated Water Management — Date: 9/19/2016

Carl A. Torgersen, Chief Deputy Director — Date: 9/20/16

Director Decisions Regarding Monterey Plus Revised Final Environmental Impact Report

If, after review and consideration of the Monterey Plus Final Revised Environmental Impact Report attached as Exhibit A, you decide that DWR should continue the use and operation of the KWB by KWBA you should indicate that decision by signing the following statements in the manner prescribed by Sections 15090-15094 of the CEQA Guidelines:

1. *Section 15090 of the CEQA Guidelines states: (a) "Prior to approving a project the lead agency shall certify that:*
   (1) The final EIR has been completed in compliance with CEQA.
   (2) The final EIR was presented to the decision-making body of the lead agency and that the decision-making body reviewed and considered the information contained in the final EIR prior to approving the project; and
   (3) The final EIR reflects the lead agency's independent judgment and analysis.

I certify that the Monterey Plus Final Revised EIR has been completed in compliance with CEQA, that the Final Revised EIR was presented to me in my capacity as DWR's decision-making body, and that the Final Revised EIR reflects DWR's independent judgment and analysis. I have reviewed and considered the information contained in the Final Revised EIR prior to approval of the project.

Mark W. Cowin, Director

2. *Section 15091(a) of the CEQA Guidelines states: "No public agency shall approve or carry out a project for which an EIR has been certified which identifies one or more significant environmental effects of the project unless the public agency makes one or more written findings for each of those significant effects, accompanied by a brief explanation of the rationale for each finding."*

I adopt the Findings and Determinations, attached as Exhibit B, which meet the requirements of CEQA Guidelines Section 15091. To the extent that these findings conclude that various mitigation measures are feasible and within DWR's responsibility and jurisdiction, I direct DWR to implement these measures, thereby incorporating them as part of the proposed project.

Mark W. Cowin, Director

3. *Section 15093(b) of the CEQA Guidelines states: "When the lead agency approves a project which will result in the occurrence of significant effects which are identified in the final EIR but are not avoided or substantially lessened, the agency shall state in writing the specific reasons to support is action based on the final EIR and/or other information in the record."*

I adopt the Statement of Overriding Considerations, attached as Exhibit C, which meets the requirements of CEQA Guidelines Section 15093.

Mark W. Cowin, Director

4. *Section 15091(d) of the CEQA Guidelines requires the agency to "also adopt a program for reporting on or monitoring the changes which it has either required in the project or made a condition of approval to avoid or substantially lessen significant environmental effects."*

I adopt the Mitigation, Monitoring and Reporting Program, attached as Exhibit D, which meets the requirements of CEQA Guidelines Section 15091(d).

Mark W. Cowin, Director

5. *CEQA Guidelines Sections 15091(a) and (b) describe what an agency must do when it decides whether and how to approve or carry out a project.*

After considering the Final Revised EIR, including all issues raised during preparation of the Revised EIR, and in conjunction with making findings under CEQA Guidelines Section 15091, I direct DWR to carry out the proposed project by continuing the use and operation of the KWB by KWBA.

I have determined that DWR has eliminated or substantially lessened all significant effects on the environment where feasible as shown in the findings under CEQA Guidelines Section 15091.

In addition, I have determined that any remaining significant effects on the environment found to be unavoidable under CEQA Guidelines Section, 15091 are acceptable due to overriding considerations as described in CEQA Guidelines, Section 15093.

Mark W. Cowin, Director

6. *CEQA Guidelines Section 15094 states that "[t]he lead agency shall file a Notice of Determination within five working days after deciding to carry out or approve a project."*

I direct DWR to complete, execute, and file the Notice of Determination, attached as Exhibit E, with the Governor's Office of Planning and Research within five business days of the decision to continue to carry out the project.

Mark W. Cowin, Director

Attachment(s):

Exhibit A	Monterey Plus Final Revised EIR
Exhibit B	Findings and Determinations
Exhibit C	Statement of Overriding Considerations
Exhibit D	Mitigation, Monitoring and Reporting Program
Exhibit E	Notice of Determination