

**ROBERT C. WILKINSON**

1428 West Valerio  
Santa Barbara, California 93101 USA

tel: (1-805) 569-2590 fax: (1-805) 569-2718  
E-mail: wilkinso@lifesci.ucsb.edu

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Ms. Delores Brown  
Chief, Mitigation and Restoration Branch  
Department of Water Resources  
3251 S Street  
Sacramento, CA 95816

By E-mail: [delores@water.ca.gov](mailto:delores@water.ca.gov)

**RE: Comments in Response to DWR's Notice of Preparation for  
Environmental Impact Report for "Monterey Plus"**

Thank you for providing an opportunity for public comment and input on scoping for the Environmental Impact Report (EIR) for "Monterey Plus". I am submitting comments as a concerned citizen. Although these comments are offered as my own, I am a member of the Department of Water Resources' California Water Plan Update (Bulletin 160-03) Advisory Committee. The following comments are submitted in the interest of improved public policy with regard to water resources management.

**DWR's Special Responsibility**

DWR is both a major purveyor of water in California, and the ostensibly neutral and objective public entity charged with planning and administering water policy in the state in the public interest and public trust. These tasks at times appear to be in conflict. DWR is asking the citizens of the state to place trust in its analysis of the environmental impacts of its project and in its assessment of future water supplies and uses in California. At the same time, DWR is appropriating large amounts of water to sell, and it is making claims with regard to its own capabilities and supply reliability. It is therefore of critical importance that the department strive for objectivity, transparency, and accountability in its conduct of the new EIR process.

As the courts have clearly indicated, DWR failed to provide this important public agency role in its previous EIR effort on the same matter. Objectivity, transparency, and accountability were not in notable evidence. The result was a deeply flawed EIR and costly and time-consuming litigation to correct the deficiencies. The appeals court ruled

unanimously that DWR failed to comply with the law.<sup>1</sup> Upon DWR's petition to the California Supreme Court, not a single justice voted to grant review of the appellate ruling. Having seriously and substantively failed to comply with the California Environmental Quality Act in its first effort, and having been clearly directed by the courts to go back and do it right, DWR is now finally embarking on a second try. As the court admonished DWR in *PCL v DWR*, "CEQA compels process. It is a meticulous process designed to ensure that the environment is protected."<sup>2</sup> The public has a right to expect a very different approach to the analysis this time around.

DWR's burden is in fact more than properly framing this new EIR in the scoping process and then fully and properly analyzing the impacts and alternatives as dictated by CEQA. DWR is the contracting entity on behalf of the citizens of California and the bond-holders for the SWP dating back to the original Burns-Porter Act.<sup>3</sup> As such, DWR's assessment of its own legal rights and capabilities to extract and divert water to sell, and its analysis of the impacts of the "project" as defined in the current scoping process, must be beyond reproach.

To restore and fulfill this public trust, DWR must rise well beyond past performance. The current scoping process is the first test of DWR's recognition of both its legal responsibilities and its obligations.

### **The Monterey "Agreement" and "Amendments" as a Project**

The 1994 Monterey Agreement was in fact a "deal" made in secret meetings in Monterey. DWR met with six contractors in closed and unnoticed sessions to acknowledge the reality that the State Water Project (SWP) could not deliver anything close to its contract or "entitlement" amounts as set forth in "Table A" of the SWP contracts. During the 1980s, the SWP delivered just under 2 million acre feet per year (maf) on average. (See the SWP deliveries graph below.) During the drought, the SWP's deliveries dropped to a low of about 0.5 maf against contract "entitlements" of over 4.2 maf. Farmers and urban agencies were cut short, and the Metropolitan Water District of Southern California (MWD) had its "requests" for SWP water deliver "adjusted" down by DWR.

The appellate court in *PCL v DWR* noted that the contracts (pre-Monterey) provided the mechanism to correct the problem: "Those who negotiated the existing long-term contracts anticipated water shortfalls and incorporated article 18 as a mechanism for resolving both temporary and permanent shortages."<sup>4</sup> Rather than invoke the contract provisions that were designed to deal with this situation (correct the Table A amounts to reflect reality), DWR chose to change the terms of the contracts and eliminate the existing mechanism.

**Article 18(b) contract provision was included to deal explicitly with the possibility of the present permanent shortage situation**

Article 18(b) was written into the SWP contracts specifically to address the situation, foreseen as a possibility by the contracting parties at the time the contracts were signed and therefore included, that the SWP might not be capable of delivering full entitlement amounts. In the event of a permanent shortage, 18(b) “shall” be invoked. The language is clear; invoking 18(b) is a necessary and required action in the event that the SWP cannot deliver the water.

Both “tests” in paragraph 1 of 18(b) seem to be met:

*“In the event that ...the State is unable to construct sufficient additional conservation facilities to prevent a reduction in the minimum project yield”*

or, (Note: 18(b) stipulates only “or”, not “and”):

*“... if for any other reason there is a reduction in the minimum project yield, which, notwithstanding preventative or remedial measures taken or to be taken by the State, threatens a permanent shortage in the supply of project water to be made available to the contractors: ...”*

Under these circumstances, by the terms of the contracts:

The annual entitlements and the maximum annual entitlements of all contractors, except to the extent such entitlements may reflect established rights under the area of origin statutes, shall, by amendment of Table A included in Article 6(b), and of Article 7(b), respectively, be reduced proportionately by the State to the extent necessary so that the sum of the revised maximum annual entitlements of all contractors will then equal such reduced minimum project yield . . . .”<sup>5</sup>

Note that the language in the contracts indicates a *mandate* that the state correct the contracts to reflect reality. The language is explicit:

*“...shall ... be reduced proportionately by the State to the extent necessary so that the sum of the revised maximum annual entitlements of all contractors will then equal such reduced minimum project yield . . . .”*

In the scoping of the new EIR, it will be important for DWR to include a full examination of the option of correcting the pre-Monterey contracts according to this provision. As the court of appeal noted, this must be included in the EIR’s assessment of the “no project”

alternative. Correcting the Table A amounts according to the 18(b) provision would not necessarily change the pre-Monterey provisions for differential pricing and delivery reliability between agricultural and urban users. This should be examined as well.

DWR also sought to transfer real property under state ownership (the Kern Fan) and its water system without public notice and without direct compensation to the state. An indirect deal involving “retirement” of SWP agricultural entitlement volumes was later advanced as due consideration for the state’s asset. The “water bank” asset on, and underlying, this Kern Fan and its operation (and profits) were to be transferred under the deal. According to the settlement agreement, the EIR is to include all aspects of the Kern Bank transfer. This should include the various sources of water that find their way into the bank (e.g. San Joaquin River water via the Friant-Kern Canal, Kern River water, SWP water, and other sources), the reliability of and legal rights to those waters, the water extracted and sold from the bank, and other issues relating to the bank.

The deal cut in Monterey in 1994 was originally designed to avert litigation by and between the specific parties involved. It was not necessarily a deal that prioritized or protected the interests of the people of California who own the SWP. The subsequent EIR prepared by one these parties on behalf of the state (CCWA, one of the participating parties in the Monterey meetings) was deemed deficient under CEQA. After nearly a decade of litigation to correct the problem and a lengthy mediation that ultimately produced a proposed settlement, the state has a new opportunity to fulfill its duties, this time with the benefit of input from constituencies who were not invited to the Monterey meetings. The new EIR will, one would hope, make up for the serious failure of DWR in round one.

It is essential from the standpoint of the public interest that DWR clearly identify and frame the new “project” and then proceed with a proper EIR analysis under the requirements of the law. As the court in *County of Inyo v. City of Los Angeles* noted: “an accurate, stable and finite project definition is the *sine qua non* of an informative and legally sufficient EIR.”<sup>6</sup>

### **Specific Elements to be Included in the Scope of the EIR**

The scope of the EIR should include the following elements:

#### ***DWR Water Rights and “Surplus” Water***

The state has legal rights to certain waters from the Feather River watershed, and it pumps “surplus” water out of the delta. Most of the water DWR extracts from the delta is in fact unclaimed “surplus” water, not Feather River water. Because DWR is a

“junior” appropriator relative to most of the other entities with claims to water within the watershed, this surplus water may not exist under a number of circumstances. (We have seen recently what reliance on “surplus” Colorado River water can lead to.)

The EIR should clearly set forth DWR’s water rights and the amounts of water DWR is extracting as “surplus”. Under pre-Monterey contracts, “surplus” water is accounted for differently than in the proposed project. The EIR should clearly identify the impacts under a no-project option and under the proposed changes. Under both, the EIR needs to clearly identify the basis for assumptions regarding where the “surplus” water (renamed “interruption” water in the Monterey contracts) is coming from and who else may have senior claims to it (e.g. area of origin users, diverters with water rights senior to DWR, etc.).

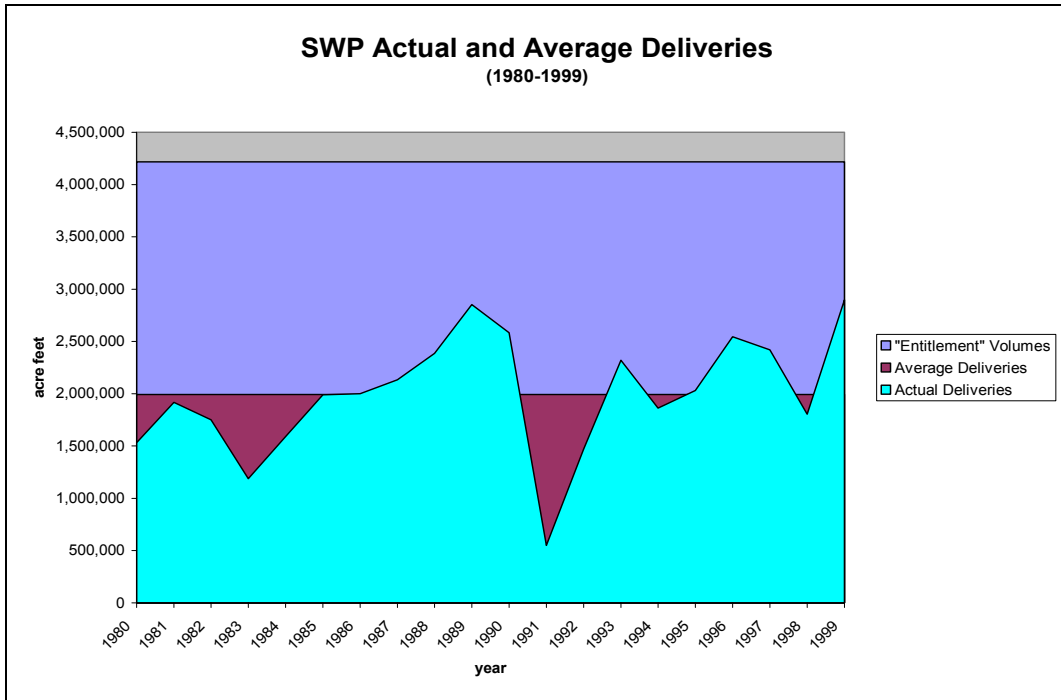
The EIR should also clearly set forth the full range of constraints under law to restore and protect the delta ecosystem and species that rely on it, and it needs to make a reasonable effort to project ahead and consider further constraints. These legal requirements for flows, salinity, temperature, and other factors may seriously limit the old notion that ample “surplus” water is available for extraction from the delta.

If “surplus” water is unavailable to DWR due to uses by more senior appropriators and/or upstream users exercising their legal claims to water, and/or due to water quality, environmental, and other legal requirements, the SWP’s ability to deliver water will be impacted. This is unquestionably the case. It would appear that the mid-1900s notions (when the SWP was originally established) of “surplus” water assumed that virtually all water flows were available for diversion and extraction. What was considered “surplus” then may now be understood to be critical flows for threatened and endangered species. The EIR should examine both the definition and the impacts of “surplus” water, or the lack of it, under pre-Monterey conditions and under the proposed project.

The impacts of extracting both surplus water and water to which DWR holds rights should be examined in the EIR.

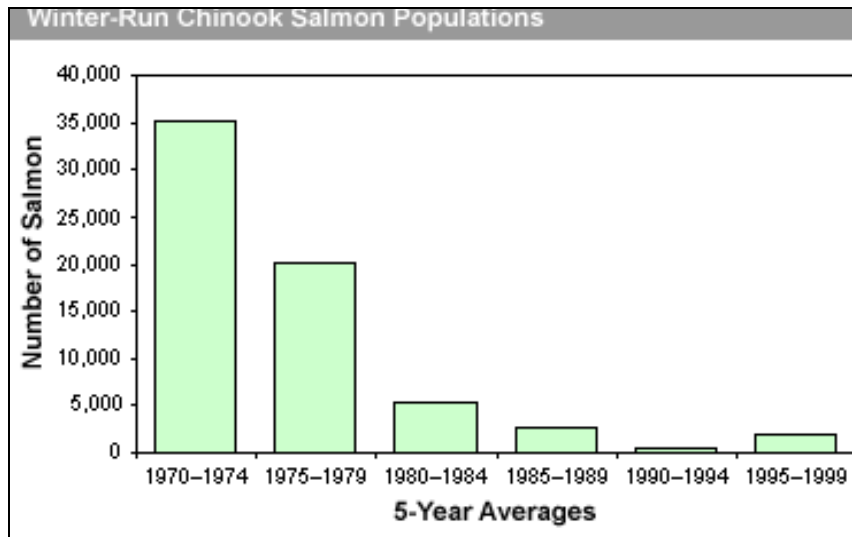
### ***DWR’s Assertion of SWP Reliability***

DWR released a draft report in 2002 asserting that the SWP can *reliably* extract and deliver – *on average over time* – about 1 million acre feet *more water* than it delivered in the 1980s or the 1990s.<sup>7</sup> During the 1980s, the bay-delta ecosystem was deteriorating and certain fish populations were in serious trouble. In the 1990s, several fisheries collapsed and several species were listed. The following graph indicates the actual and average deliveries of the SWP. Note both the high degree of variability (reliability) in deliveries. Also note the steady average of 2 mafy through the past two decades. (Data for 2000, 2001, and 2002 appear to follow both the trends in variability and averages, though DWR had an all-time high year in these three years.)



Sources: DWR Bulletins 132 from 2001 and 1990.

As noted, during the time represented in the graph, ecosystems were seriously impacted and species declined sharply and were listed. In 1990, the winter run Chinook salmon, an anadromous fish, became the first salmon run to be listed under the *Endangered Species Act* in the United States. The run had declined from 118,000 in 1969 to just 533 adults in 1989. The following graph indicates the decline of the winter run Chinook salmon since the 1970s.



Source: Natural Resources Defense Council, 2001. Based on the California Department of Fish and Game, <http://www.nrdc.org/greengate/water/divertedf.asp>

A reasonable conclusion is that water extractions are related to environmental impacts and that increased extractions are at least partly responsible for declines in fish populations. The EIR will need to examine the impacts of changes in extractions under both pre-Monterey and proposed project conditions. An increase of 50% in extractions from the delta (from an average of 2 mafy to 3 mafy) as set forth in DWR's draft reliability report, requires careful analysis in the EIR for a wide range of impacts.

### ***Integrated Assessment of the SWP and CVP***

The State Water Project and the Central Valley Project extract water from the delta in a coordinated management program – including pumping, storage, and conveyance. Both systems must therefore be examined in an integrated way. The joint operation of the SWP and CVP, together with impacts of extractions, shortages, physical constraints, and legal constraints must be examined. The Bureau of Reclamation has submitted comments in this scoping process requesting that the EIR examine potential impacts on the CVP. Similar comments were submitted by commenters on the SWP reliability draft report prepared by DWR.

Neither the SWP nor the CVP can deliver all the water that users might like to have, or even volumes that have been contracted for. Both systems are constrained by various physical and legal limits, and both are causing serious environmental impacts including impacts on threatened and endangered species.

Given that neither system can deliver the full volumes of water they “promised” to users back in the mid-1900s, the EIR will need to analyze both the limits of the systems and the tradeoffs between them. For example, how can the SWP extract and deliver an additional million acre feet of water per year – reliably and on average over time – without seriously impacting both CVP operations and the environment.

### ***The No Project Alternative***

The no project alternative in this EIR needs to include a careful examination of the impacts of managing the limited water supplies in the SWP system under provisions and terms included in the pre-Monterey contracts. The “existing conditions” as described in CEQA are the pre-Monterey contracts. The law also requires that the EIR examine “what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services.”<sup>8</sup>

The court in *PCL v DWR* provided the following comment on CEQA and the no project alternative:<sup>9</sup>

“CEQA is a comprehensive scheme designed to provide long-term protection to the environment. [Citation.] In enacting CEQA, the Legislature declared its intention that all public agencies responsible for regulating activities affecting the environment give prime consideration to preventing environmental damage when carrying out their duties. [Citations.] CEQA is to be interpreted ‘to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.’ [Citation.]” (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112.)

Both the mandate and the mechanism of CEQA are carefully crafted and well ingrained into the law of this state. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 943.) The environmental impact report, with all its specificity and complexity, is the mechanism prescribed by CEQA to force informed decision making and to expose the decision-making process to public scrutiny. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1123.) The EIR is, as the courts have said repeatedly, the “‘heart of CEQA,’” “an ‘environmental “alarm bell,”” and a “document of accountability.”” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 (*Laurel Heights*)).

CEQA requires that the no project alternative discussed in an EIR address “existing conditions” as well as “what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services.” (Guidelines, former § 15126, subd. (d)(4), now § 15126.6, subd. (e)(2).)

The settlement agreement indicates that DWR has agreed to include in the new EIR, as part of the no project alternative:<sup>10</sup>

An analysis of the effect of pre-Monterey Amendment SWP contracts, including implementation of Article 18 therein. This analysis shall address, at a minimum, (a) the impacts that might

result from application of the provisions of Article 18(b) of the SWP Contracts, as such provision existed prior to the Monterey Amendments, and (b) the related water delivery effects that might follow from any other provisions of the SWP Contracts.

### ***Implications of Limits and the Requirement for Restoration***

In response to environmental damage, Congress, the legislature, administrative agencies, and the courts have established requirements for *restoration* of environmental systems and species.<sup>11</sup> *Restoration* is defined by the National Research Council as:<sup>12</sup>

Returning an ecosystem to a close approximation of its condition prior to disturbance. Accomplishing restoration means ensuring that ecosystem structure and function are recreated or repaired, and that natural dynamic ecosystem processes are operating effectively again.

The law requires restoration of listed species, not just maintenance at reduced levels. To accomplish this requirement, the EIR must examine the impacts of the proposed project on ecosystems it impacts.

The “Racanelli Decisions” in 1986 (*United States v. State Water Resources Control Board*) broadened the scope of responsibility for restoring the delta to all diverters in the watershed.<sup>13</sup> Judge Racanelli held that all diverters of water flowing into the delta, and extractors from it, were responsible for meeting restoration needs. Water rights of parties should not govern water quality standards for the Delta. The CALFED process is proceeding in accordance with the framework established by the courts in the 1980s and since.

The new EIR will need to take a broad view of the potential impacts of the proposed project and it must proceed under the logic of watershed management developed in the Racanelli decisions and since.

### ***Land-Use Planning and Water for “Average-Intelligence” Growth***

The California legislature has addressed the issue of water scarcity and management and promulgated new laws since DWR’s first ill-fated EIR effort. In 2001, California finally legislated a meaningful link between water supplies and development. Initially proposed as a one-sentence bill (“No lead agency shall approve a development project unless the applicant identifies a long-term, reliable supply of water to serve the proposed

project.”<sup>14</sup>), it emerged ten years later as law (with additional verbiage and qualifications).<sup>15</sup>

As of January 1, 2002, projects of 500 units of more must show that adequate water supplies are available for the project. The law amends the code in part as follows:<sup>16</sup>

The legislative body of a city or county or the advisory agency, to the extent that it is authorized by local ordinance to approve, conditionally approve, or disapprove the tentative map, shall include as a condition in any tentative map that includes a subdivision a *requirement that a sufficient water supply shall be available.*

If the public water system fails to deliver the written verification as required by this section, the local agency or any other interested party may seek a writ of mandamus to compel the public water system to comply.

The claims of DWR regarding reliability, and the impacts associated with extraction, diversion, and use of those amounts, must be examined in the new EIR. Land-use decisions are being made based on DWR’s assertions of reliability.

### ***Minimizing the Need for Inter-Basin Transfers***

The implicit logic of California water policy has been that moving water from one watershed to another is the only way to meet the water “needs” of the state. Often the development and use of local water resources, and especially groundwater, has been neglected due the preoccupation with large interbasin transfers. In 2001, a little-noticed provision in SB 672 regarding urban water management plans requires that the state of California in its state water plan (Bulletin 160-03), examine ways to “*minimize the need to import water from other hydrologic regions.*”<sup>17</sup> A new focus, and legal mandate, has been placed on developing *local* water supply sources, including re-use. The specific section of the law is worth quoting:<sup>18</sup>

The department, as a part of the preparation of the department's Bulletin 160-03, shall include in the California Water Plan a report on the development of regional and local water projects within each hydrologic region of the state, as described in the department's Bulletin 160-98, to improve water supplies to meet municipal, agricultural, and environmental water needs and *minimize the need to import water from other hydrologic regions.*

The legislation then sets forth the range of local supply options to be considered.<sup>19</sup>

The report shall include, but is not limited to, regional and local water projects that use technologies for desalting brackish groundwater and ocean water, reclaiming water for use within the community generating the water to be reclaimed, the construction of improved potable water treatment facilities so that water from sources determined to be unsuitable can be used, and the construction of dual water systems and brine lines, particularly in connection with new developments and when replacing water piping in developed or redeveloped areas.

The EIR will need to take this new legal requirement into consideration as it examines alternatives to the proposed project. Specifically, the EIR needs to consider alternatives to both existing and proposed levels of extraction of water from the delta.

### **Summary**

DWR's task and responsibilities with regard to this EIR are considerable. The "Monterey Plus" project, and the no project alternative, along with other appropriate project alternatives that may be identified, will require careful analysis. CEQA requires, as noted above, a level of analysis that provides the public and decision-makers with sufficient understanding of the issues and potential impacts to make informed decisions. These decisions will include both water management and land-use decisions, as well as ecosystem restoration decisions.

I look forward to seeing the new and improved EIR process address these issues in the spirit worthy of the public trust.

Sincerely,

Robert C. Wilkinson

## Sources

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<sup>1</sup> *Planning and Conservation League et al. v. Department of Water Resources et al.* (2000) 83 Cal.App.4th 892 (*PCL v. DWR*)

<sup>2</sup> *Planning and Conservation League et al. v. Department of Water Resources et al.* (2000) 83 Cal.App.4th 892 (*PCL v. DWR*), p.26

<sup>3</sup> See: Water Code, § 12930 et seq.

<sup>4</sup> *Planning and Conservation League et al. v. Department of Water Resources et al.* (2000) 83 Cal.App.4th 892 (*PCL v. DWR*), p.20

<sup>5</sup> The court in *Planning and Conservation League et al. v. Department of Water Resources et al.* (2000) 83 Cal.App.4th 892) cited this contract language at pp.6-7.

<sup>6</sup> *County of Inyo v. City of Los Angeles (III)* (1977) 71 Cal.App.3d 185, 199.

<sup>7</sup> State Water Project Delivery Reliability Report, 2002. <http://swpdelivery.water.ca.gov/>

<sup>8</sup> See CEQA and 14 Cal. Code Regs. §1512.6(e)(2).

<sup>9</sup> *Planning and Conservation League et al. v. Department of Water Resources et al.* (2000) 83 Cal.App.4th 892 (*PCL v. DWR*), pp.23-25

<sup>10</sup> See: Settlement Agreement at <http://www.montereyamendments.water.ca.gov/>

<sup>11</sup> For example, CVPIA, CALFED, <http://calfed.water.ca.gov/general/overview.html>, *National Audubon Society et al., Petitioners, v. The Superior Court of Alpine County, Respondent; Department of Water and Power of The City of Los Angeles et al., Real Parties in Interest*, 33 Cal.3d 419, S.F. No. 24368. Supreme Court of California. Feb 17, 1983. Available at: [http://ceres.ca.gov/theme/env\\_law/water\\_law/cases/National\\_Audubon\\_v\\_Sup\\_Ct.html](http://ceres.ca.gov/theme/env_law/water_law/cases/National_Audubon_v_Sup_Ct.html)

<sup>12</sup> National Research Council. 1992. *Restoration of Aquatic Ecosystems*. National Academy Press: Washington D.C.

<sup>13</sup> The Racanelli Decisions, [\*United States v. State Water Resources Control Board\*](#), (1986) 182 Cal.App.3d 82.

<sup>14</sup> Original Language, AB 455 (In its entirety).

<sup>15</sup> SB 221, Kuehl

<sup>16</sup> Section 66473.7 is added to the Government Code, as amended by SB 221. (Emphasis added.)

<sup>17</sup> SB 672, Machado. California Water Plan: Urban Water Management Plans. (The law amended Section 10620 of, and adds Section 10013 to, the Water Code) SEC. 2. Section 10013 to the Water Code, 10013. (a) SB 672, Machado. California Water Plan: Urban Water Management Plans. September 2001

<sup>18</sup> SEC. 2. Section 10013 to the Water Code, 10013. (a) SB 672, Machado. California Water Plan: Urban Water Management Plans. September 2001, (Emphasis added.)

<sup>19</sup> SEC. 2. Section 10013 to the Water Code, 10013. (a) SB 672, Machado. California Water Plan: Urban Water Management Plans. September 2001.