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The Monterey Agreement and the Napa Agreement: History Repeating Itself?

While applauding the settlement success of the seven parties who negotiated the Monterey Agreement, defendants forget the 23 water contractors and the members of the public who were not invited to the table….

The [State Water Project] entitlements represent nothing more than hopes, expectations, water futures, or as the parties refer to them, 'paper water'…. Consequently, there is a huge gap between what is promised and what can be delivered.

Planning and Conservation League v. Department of Water Resources
(2000) 83 Cal. App. 4th 892, 905, 908 n. 5.

Overview

The Planning and Conservation League (PCL) appreciates the opportunity to submit a written statement supplementing their oral testimony, exploring the parallels between the 1994 Monterey Agreement and the proposed Napa Agreement, including lessons for the latter that can be learned from the former.

In late 1994, closed-door negotiations in Monterey between the Department of Water Resources (DWR) and a select group of agricultural and urban water contractors produced the blueprint for the Monterey Amendments, the most sweeping set of contract revisions in the four-decade history of the State Water Project. PCL devoted seven years to litigation and mediation in response to the Monterey Agreement, culminating in a landmark judicial ruling and subsequent

settlement agreement offering hope of greater openness, public accountability and environmental responsibility in the State Water Project. In consultation with PCL and their co-plaintiffs as well as the state water contractors, DWR is presently preparing a new Environmental Impact Report on a revised "Monterey Plus" project, providing the public another opportunity to participate in new statewide environmental review before final disposition of the amendments and water bank transfer that were the subjects of the litigation.

Against that background, PCL expresses strong concern that the Napa Agreement is a throwback to the discredited model of closed-door negotiations and unlawfully expedited implementation that characterized the 1994 Monterey Agreement. The similarities extend beyond the familiar cast of characters (including some of the same agencies and water contractors, and even the same facilitator) to include equally familiar errors of process and substance. Ironically, the December 1994 Bay Delta agreement, negotiated in the same month as the Monterey Agreement, included some of the environmental stakeholders who were not invited to participate at Monterey. Considerations of environmental equity were a consistent theme in the CALFED negotiations, and the integrated components made in the 2000 CALFED Record of Decision repeatedly recognized the need to honor environmental and water quality commitments.

Yet at this precarious time in the history of CALFED, where the funding for the environmentally beneficial aspects of the 2000 ROD and the commitment of federal and state agencies to enforce baseline environmental requirements are already in serious doubt, the Napa Agreement would institutionalize the bias toward advancing the water supply components of the program at the expense of the environment. In effect, the Napa Agreement amounts to a drastic redefinition and extension of the CALFED water supply program that threatens to permanently prevent realization of numerous environmental commitments recorded in the ROD and existing regulatory standards.

Under these circumstances, PCL particularly objects to the notion that huge new increases in Delta pumping could be summarily implemented after mere preparation of a Bureau of Reclamation biological opinion, and without further federal and state environmental review in compliance with NEPA and CEQA. The dramatic changes proposed in Napa bear no resemblance to the sorts of "routine managerial actions" that could be construed as adjustments in existing operations rather than new action. Moreover, aggressive joint operation of the state and federal projects proposed in the Napa Agreement cannot be understood outside the context of the Monterey Amendments, and requires answers to questions that are already pending before DWR in its preparation of the "Monterey Plus" EIR.

The Monterey Agreement: Closing the Door

During the drought-ridden early 1990s, several of the most powerful agricultural and urban contractors in California's State Water Project met in an attempt to resolve protracted disputes over article 18, the provision in the long-term project contracts addressing procedures during temporary or permanent shortage. Article 18(a) established a priority for urban water users in the event of a temporary shortage, and article 18(b) required that if the project became unable to deliver on the full amount (4.23 million acre-feet) specified in Table A of the contracts, each contractor's allocation (then known as "entitlements") must be proportionately reduced to conform to available

supplies. Historic deliveries have averaged half or less of these allocations, and were roughly 2 million acre-feet between 1980 and 1994.

The 1994 Monterey Agreement, a set of "principles" designed to resolve conflicts between urban and agricultural state water contractors over the enforcement of SWP contract shortage provisions, were negotiated in closed meetings with DWR and a small group of urban and agricultural contractor representatives. These meetings excluded key stakeholders, including the environmental community, area of origin contractors, and members of the public served by the State Water Project.

DWR declined to prepare an Environmental Impact Report supporting implementation of the Monterey Agreement, despite its fundamental changes in the statewide operation and financing of the project, including redefinition of the procedures for allocations in times of shortage, and fee simple transfer of a key state asset, a conservation and storage facility known as the Kern Fan Element of the Kern Water Bank, to the largest agricultural state water contractor. Instead, DWR delegated the task of EIR preparation to the Central Coast Water Authority a local joint powers agency with no statewide expertise or authority.

The PCL Decision and Settlement Agreement: Opening the Door

PCL challenged CCWA's EIR, and the validity of the State Water Project contract amendments resulting from that agreement, joined by two co-plaintiffs (Citizens Planning Association, a Santa Barbara County-based planning group, and Plumas County Flood control and Water Conservation District, an area-of-origin contractor). After five years of litigation and numerous inconsequential attempts of the state water contractor signatories and DWR to derail review of the merits, the plaintiffs achieved a decisive legal victory in *PCL v. DWR*, which became final after Supreme Court denial of review in December 2000.

The appellate court found the previous attempt to approve Monterey defective in both process and substance. Holding that CCWA erroneously prepared the EIR, the court ruled that CEQA required DWR, the only entity with the requisite statewide authority and expertise, to assume its proper role as lead agency. The court found that DWR's attempt to delegate that authority impermissibly insulated the department from "public awareness and possible reaction to the individual members' environmental and economic values." (*PCL v. DWR*, 83 Cal.App.4th at p. 907.)

PCL also held that the CCWA EIR was fatally defective under CEQA for failing to analyze implementation of pre-Monterey state water contract terms, and particularly the permanent shortage provisions of article 18(b), as part of the EIR's no-project alternative. In the event of a permanent shortage (i.e., inability to reliably deliver the full 4.23 million annual acre-feet (MAF) of previously-labeled "entitlements" listed in Table A of the project contracts), pre-Monterey article 18(b) required the proportional reduction of each contractor's amount listed in Table A to match the available supply.

The relationship between so-called "entitlements" and land-use planning was central to the court's holding that the EIR failed to address the "no project" alternative. The court connected this

error to the risk of statewide land-use decisions made on the basis of "paper" water entitlements not grounded in real, deliverable water. The court openly criticized the false expectation that the State Water Project will deliver on its full "entitlement" level of 4.23 MAF when the project's historic capability has only been roughly half this level or less. The ruling therefore noted the "huge gap between what is promised and what can be delivered, " as well as the "humbler, leaner reality" of project capability (83 Cal.App.4th at 908.)

PCL required DWR to prepare an entirely new EIR, finding that CCWA's 1995 EIR "failed to meet the most important purpose of CEQA, to fully inform the decision makers and the public of the environmental impacts of the choices before them." (*PCL v. DWR,* 83 Cal.App.4th at 920.) The court found it unnecessary to adjudicate the other CEQA deficiencies identified by the plaintiffs after analyzing the defects in the lead agency selection and no project assessment, observing that "DWR, with its expertise on the statewide impacts of water transfers, may choose to address those issues in a completely different and more comprehensive manner." (*Id.*)

Finally, the court of appeal found that the plaintiffs had properly initiated a validation challenge to the Monterey Amendments, including DWR's transfer of the Kern Fan Element to Kern County Water Agency. (Just prior to finality in the superior court, the Kern agency had retransferred it to the Kern Water Bank Authority, a joint powers agency more than half-controlled by one of the county's largest private agribusiness companies). The court rejected defendants' procedural challenge based on the theory that nonparty state water contractors were indispensable to the validation challenge.

Rather than returning to the superior court, the plaintiffs engaged in two years of mediated settlement discussions with DWR, CCWA, the state water contractors, and other interested parties. These discussions produced a court-ordered settlement agreement in May 2000. The full text of this agreement is available on DWR's website (http:// www.montereyamendments.water.ca.gov/).

The settlement agreement provides new procedural and substantive protections responding to the concerns raised in the litigation, defining a new project commonly described as "Monterey Plus." The agreement requires new contract amendments deleting the term "entitlement" from key contract provisions, and imposes new reporting requirements on DWR to city, county and regional planning agencies providing information on SWP delivery capabilities under a range of hydrologic conditions, and historic delivery figures. It provides assurances from DWR that future negotiations on permanent transfers and project-wide contract amendments will occur in public. It provides funding to plaintiffs to support a variety of public purposes, ranging from technical studies to the establishment of a locally run watershed forum in Plumas County. It imposes new land use restrictions on the Kern Water Bank, and commits DWR to prepare a new study of the transfer, development and operation of the bank as part of the EIR, followed by its own independent judgment on this matter. Members of the public will therefore have an opportunity to suggest alternative operating arrangements to maximize the bank's contribution to the state's environment. The operation of the bank is already the subject of a vigorous statewide debate.

Finally, the settlement agreement is designed to ensure that no final decision is reached on the Monterey Amendments until after DWR prepares a comprehensive new statewide EIR addressing the original Monterey Amendments and new settlement terms. Accordingly, the Monterey Amendments cannot be construed as a *fait accompli.* Representatives of the plaintiffs and

the contractors regularly meet with DWR in "EIR Committee" meetings pursuant to the settlement.

Napa Agreement: Reclosing the Door?

The closed-door sessions framing the Napa Agreement have disturbing parallels to the Monterey Agreement experience on both procedural and substantive grounds. They indicate that key history lessons have not been learned. In terms of process, the Napa negotiations have excluded key stakeholders, even including plaintiff members of the new committee on the "Monterey Plus" EIR who were meeting at the very same time. A short list of stakeholders "not invited to the table" include the environmental community, as well as Delta farmers and water districts, upstream interests such as those on the Trinity River, fishing and wildlife interests, and numerous local governments. If the Napa Proposition is pursued at all, it must be pursuant to an exemplary and open public process grounded in full environmental review, rather than reverting to the discredited and parochial closed-door tactics of the Monterey Agreement.

In terms of substance, expedited implementation of Napa would result in massive new pumping south of the Delta far beyond levels authorized under current operating criteria, as well as fundamental changes in the joint operation of the state and federal projects, resulting in dramatic and foreseeable new environmental impacts that demand new NEPA and CEQA review. The "suite of actions" proposed in Napa extends well beyond existing commitments, magnifying and expediting the supply-side component of CALFED without even honoring the environmental and water quality requirements in the CALFED ROD. On the supply side, the agreement assumes that changes in joint operation of the state and federal projects, combined with new water transfers and reduced flow to San Francisco Bay, would make possible an increase in Delta pumping. Estimates of that increase have widely varied, but South of Delta water users have estimated it at 1 million acre-feet. As the Monterey Amendments were to the state water contracts, Napa as presently proposed to a fundamental transformation of the program, not a minor change in operations.

The Napa Proposition's pumping program would perpetuate and compound the same institutional problem addressed in the Monterey case, juggling the management of the state and central projects in a misguided attempt to evade the 'huge gap" between what the projects have promised and what can be delivered. Both systems would rely on the expectation of "surplus" water (liberalized as 'interruptible" water under Article 21 of the Monterey Amendments). But Napa leaves unexplained how its increased Delta diversions could coexist with the satisfaction of existing regulatory requirements, such as Delta water quality and fisheries protection standards, endangered species requirements, and environmental components of the CALFED ROD.

The implications for "paper water" and induced growth are potentially staggering, since Napa's assumptions about exports are a throwback to the same "aura of unreality" about water system capabilities criticized in *PCL v. DWR*. If the expected "surplus" in the CVP does not materialize, summary implementation of Napa's pumping program could render it impossible to meet the numerous environmental commitments specified in the 2000 ROD. Implementation under these circumstances would do serious damage to any future prospect of "balance" in the CALFED program, and would arguably conflict with each of the "solution principles" referenced in the CALFED ROD (reduce conflicts in the system, be equitable, be affordable, be durable, be implementable, have no significant redirected impacts). Moreover, key issues affecting the

environmental consequences of Delta exports will also arise in DWR's statewide review of the "Monterey Plus" project, such as regulatory and environmental constraints on deliveries, the consequences of joint operations, and recent peer review criticisms of the CALSIM II model currently used for both the SWP and CVP. In scoping comments, BOR requested DWR to "examine in detail" how Monterey Plus "would affect CVP access to Delta export capacity from both a historical and a future condition perspective," as well as the environmental and socioeconomic consequences of these effects.

Summary approval of key Napa changes under the rubric of a BOR biological opinion would erroneously rely on a NEPA exception that narrowly excludes revised operating procedures that are merely "routine managerial actions" from the definition of major federal actions. (See *Upper Snake River Chapter of Trout Unlimited v. Hodel* (9th Cir. 1990) 921 F.2d 232, 235.) By contrast, Napa is anything but a routine managerial action, and amounts to an end-run around the specific environmental commitments in the CALFED ROD and a new integrated project. "Major actions" under NEPA, like projects under CEQA, include expansion or revision of ongoing programs that are not subject to this *de minimis* exception. (See *Westlands Water District v. United States* (E.D. Cal. 1994) 850 F.Supp. 1388, 1421-22.)

Expedited approval of part of the Napa program by BOR is also likely to run afoul of NEPA and CEQA principles preventing implementation of key program components based upon segmented environmental review. The direct, cumulative and synergistic effects of Napa must be fully addressed, and alternatives and mitigation must be fully studied. Likewise, the 2003 Sacramento Superior Court decision upholding the CALFED program EIR repeatedly relied on the project's commitment to implementation of its environmental components, and anticipated the need for further site-specific environmental review of specific project components. (*Bay Delta Programmatic Environmental Impact Report Coordinated Procedings* (Sacramento Superior Court, No. JC 4152 (April 1, 2003 ruling on submitted matter).) That decision acknowledges the importance of meeting the environmental components of CALFED and further site-specific review, and that key water supply and environmental quality issues have not yet been addressed in CALFED's environmental review.

Conclusion

If the appellate decision in *PCL v. DWR* signaled a renewed emphasis on realism in water and land use planning, the Napa Agreement may ultimately prove to be dependent upon "water worth little more than a wish and a prayer." (83 Cal.App. 4th at p. 914.) If it is to be pursued at all, which we do not presently recommend, it demands prior satisfaction of existing environmental commitments, as well as thorough new environmental study.