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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - CENTRAL

IMPERIAL IRRIGATION DISTRICT,

Petitioner,

v.

THE METROPOLITAN WATER DISTRICT OF SOUTHER CALIFORNIA; and Does 1 through 20, inclusive,

Respondents.

COACHELLA VALLEY WATER DISTRICT; PALO VERDE IRRIGATION DISTRICT; CITY OF NEEDLES; and Does 21-40, Inclusive,

Real Parties In Interest

Case No. 19STCP01376

Assigned for all purposes to The Honorable Judge Daniel S. Murphy, Department 32

REPLY TO JOINT OPPOSITION OF RESPONDENT AND REAL PARTIES

Trial Date: November 23, 2020
Time: 8:30 am

Petition Filed: April 18, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I.
INTRODUCTION

This case distills to a couple of uncontested facts. The Metropolitan Water District of Southern California ("MWD") committed to increase its Drought Contingency Plan ("DCP") water contribution obligation to Lake Mead by 250 taf in the March Approval. There is no factual dispute that 250 taf is enough to cover 390 square miles in a foot of water and serve 2.25 million people and 750,000 homes. It is an enormous amount of water.

The issue in this case is whether MWD's commitment to increase its obligation by that enormous amount of water is exempt from the California Environmental Quality Act ("CEQA") as a minor alteration of an existing facility with negligible or no expansion of use. MWD does not, and cannot, refute that increasing its water commitment by 250 taf is a massive expansion of use, which renders the exemption inapplicable. MWD agrees that expansion of use is the key consideration under the Class 1 categorical exemption. Yet, its Opposition focuses on MWD's capacity to obtain water to offset the significantly increased contribution, which is irrelevant.

MWD does not dispute that the December Approval is not an existing facility. MWD concedes that it will be drawing on various water sources to offset its 250 taf obligation. These sources are set out in its Integrated Resources Plan ("IRP"). MWD concedes that its water supply comes from rivers that are natural resources. It has no response to the indisputable fact that rivers are not facilities or structures to which the Class 1 categorical exemption applies.

MWD also does not refute that its 250 taf commitment and the offsetting measures it takes are unusual circumstances that also render the Class 1 categorical exemption inapplicable. There is no dispute that unusual circumstances exist when a project has characteristics that distinguish it from projects the exemption is intended to cover. Class 1 projects are exempt because they do not change the environmental baseline, and, therefore, do not produce cognizable impacts under CEQA. The Opposition admits that MWD will be drawing on all of its resources to offset the 250

taf commitment and concurrently manage its ongoing water shortage through its IRP. There is more than a fair argument that the 250 taf commitment and corresponding IRP offsetting measures change the baseline, and are unusual circumstances. There is also more than a fair argument that impacts resulting from the baseline change are reasonably possible, particularly given the undisputed history of environmental impacts resulting from increasing reliance on California's in-state water supply to offset Colorado River ("River") reductions. There can be no doubt that unusual circumstances exist in this case because reliance on the in-state water supply due to a 250 taf commitment to the River will unquestionably alter the environmental baseline.

There is no merit to MWD's exhaustion claim. CEQA's exhaustion requirement does not apply when an exemption determination is not preceded by public hearings at which members of the public had the opportunity to raise any concerns or objections to the proposed project. That exception unquestionably applies here. MWD concedes that its General Manager made the exemption determination before the March Approval was placed on the agenda for a public meeting. The exemption determination was not before the MWD Board. Despite the fact that exhaustion was not required, MWD was nevertheless reasonably apprised of the issues raised in this case through IID's comments and other comments in the record.

There is equally no merit to MWD's standing claim. MWD's argument is based on legal propositions the Supreme Court rejected in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155 ("*Plastic Bag*"). *Plastic Bag* held that public interest standing applies to CEQA actions, and a CEQA petitioner need not have a beneficial interest. Imperial Irrigation District ("IID"), as a public agency, has public interest standing to bring this action.

While a beneficial interest is not necessary, IID also has beneficial interest standing. Contrary to MWD's claim, IID is not required to establish it will be adversely affected by the environmental impacts of the March Approval. *Plastic Bag* is clear that a petitioner has a

beneficial interest in a CEQA proceeding when that party is adversely affected by a governmental action in any fashion. MWD's Opposition admits it adopted the March Approval to adversely affect IID, which affords IID standing.

II.
THE CLASS 1 EXEMPTION DOES NOT APPLY TO THE MARCH APPROVAL

A. The March Approval Is an Expansion of Use that Disqualifies the Project for a Class 1 Categorical Exemption

There is no dispute the "key consideration" in determining when the Class 1 categorical exemption applies is whether there is "negligible or no expansion of an existing *use*" of existing facilities. (14 C.C.R. §15301 [emphasis added]; see ROB 37:4-6.)[1] Here, there is no dispute the March Approval expanded the *use* of MWD's facilities by 250 taf rendering the categorical exemption of Section 15301 inapplicable. Case law on this point is consistent and clear.

MWD's Opposition concedes the March Approval authorized an increase in the use of its water facilities and resources. Indeed, MWD states "Metropolitan began considering taking on a larger role in the LBDCP to fill the potential void in meeting California's LBDCP obligations." (ROB 20:26-27.) MWD defines the March Approval as its assumption of "responsibility to make the up to 250,000 AF of California's DCP Contribution that IID had agreed to make." (ROB 23:27-24:1.) The Opposition states, "Metropolitan determined that this *additional commitment* could be managed within the framework of its existing facilities, operations and supplies…" (ROB 8:23-25 [emphasis added].) By MWD's own admission, the March Approval expanded the use of its facilities by 250 taf.

MWD's Opposition wrongly focuses on whether the March Approval expanded its facilities, and not whether the March Approval expanded the ***use*** of those facilities. MWD states (i) the March Approval "did not result in an increase or expansion of existing facilities or

[1] All references to ROB are to the Joint Opposition Brief (Corrected) of Respondent and Real Parties ("Opposition"). All references to POB are to IID's Opening Brief.

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operations" (ROB 38:16-17), and (ii) IID has not identified "any specific new or modified facility that would be required for Metropolitan to make any DCP Contribution." (ROB 40:19-20.) MWD claims IID's argument that "the March Approval will result in a 'significant expansion of use' ignores the substantial evidence establishing that Metropolitan's existing water resources can accommodate the potential contribution of 250,000 AF." (ROB 34:11-13.)

MWD's arguments ignore the fact that "negligible or no expansion of use" is the "key consideration – not whether MWD expands the facilities themselves. (14 C.C.R. §15301.) None of the cases MWD cites holds otherwise. In *Turlock Irrigation Dist. v. Zanker* (2006) 140 Cal.App.4th 1047, 1065-66 ("*Turlock*"), the court upheld a Class 1 categorical exemption for consumer water conservation rules. The court stated, "[t]he rules clearly pertain to the operation of an existing facility with only minor alteration of the facilities (installation of meter mechanisms on existing meter connectors) *and the rules do not permit expansion of previous use*." (*Id*., at 1065 [emphasis added].) *Turlock* did not concern a commitment by the agency to provide more water. Rather, it merely involved consumer regulations to restrict use of water the agency was already committed to provide the consumer.

MWD incorrectly cites *North Coast Rivers Alliance v. Westlands Water District* (2014) 227 Cal.App.4th 832 (*"North Coast*") for the proposition that mere operation of its existing water storage and distribution system—without regard to use—qualifies the March Approval for the existing facilities exemption. (ROB 38:17-19.) However, *North Coast* was clear that the "key consideration" was whether there was an expansion of the existing facilities' use. (*Id*., at 868.) *North Coast* held the exemption applied because "[t]he amounts of CVP water at stake were the quantities specified in the chain of prior contracts between Water Districts and the Bureau" and those terms and quantities "continued without change." (*Id*.) Unlike in *North Coast*, the March

Approval is a new 250 taf increase in the amount of water used for MWD's water contribution obligation at Lake Mead.

The issue is not whether MWD's existing physical system can handle an additional 250 taf, as MWD argues, but whether a commitment to provide that additional water is a non-negligible expansion of use. (14 C.C.R. §15301.) For example, a project approval that results in more emissions from an existing smokestack would not be presumed to have no potential environmental impact under CEQA. The fact that the smokestack has the capacity to put out the additional smoke does not change the fact that it is putting out more smoke. In this context, the Supreme Court held that the baseline for determining impacts is not what the facilities were authorized to emit under prior permits, but what the facilities were actually emitting when the environmental review is performed. (*Communities for a Better Environment v. South Coast Air Quality Management Dist*. (2010) 48 Cal.4th 310, 316.)

County of Amador v. El Dorado County Water Agency (1999) 76 Cal.App.4th 931 ("*County of Amador*") is on point in its holding that reallocating 17 taf of water within an existing water system from one type of use to another was "not a negligible expansion of current use…and thus does not fall within the 'existing facilities' categorical exemption." (*Id.* at 967.) Here, MWD's March Approval resulted in the increased use of 250 taf—over 14 times the amount deemed unacceptable for the existing facilities exemption in *County of Amador*. The exemption cannot apply here.

MWD absurdly claims *County of Amador* does not apply because the case involved converting water to a consumptive use from a non-consumptive use (power generation). MWD argues that its DCP water contribution obligation "prevents consumptive use of Colorado River water." (ROB 41:27-28.) MWD's argument is meritless. Here, MWD is expanding its DCP participation by committing to contribute an additional 250 taf of water from its system, which it

must offset through reliance on other water resources that had not been previously committed for that purpose.

The Class 1 categorical exemption does not hinge on the purpose of an expansion of use. The exemption applies to projects which continue existing operations without change, because those projects do not change the environmental baseline, and, in turn, could not have a cognizable impact under CEQA. (*North Coast*, *supra*, at 872-873.) A non-negligible expansion of use changes the baseline and, as a result, eliminates the presumption that the project could not have cognizable impacts under CEQA. (*Id*.) Here, the March Approval creates a new 250 taf obligation to supply water. This enormous expansion of use, and significant baseline change, disqualifies the March Approval from a Class 1 categorical exemption.

B. MWD's Water Supply Is Not an Existing Facility

The Opening Brief makes two points. First, the December Approval, on which MWD based its Class 1 exemption determination (AR 1601; *see also* ROB 36:18-22), is not an existing facility. Second, MWD's water sources are not facilities under the Class 1 exemption.

MWD does not dispute the December Approval is not an existing facility. Instead, MWD declares "the existing facilities relied upon in the March Approval are Metropolitan's existing *water supply* and storage system." (ROB 42:17-18, emphasis added.)

MWD has no response to the fact that its water supply is not an existing facility, and, therefore, not subject to the Class 1 categorical exemption. MWD simply asserts its water supply is part of its "system" and jumps to the wrong conclusion that anything which is part of its self-described "system" is a Class 1 facility. MWD ignores the fact that the Class 1 exemption describes facilities in terms of structures or equipment. It has no response to the holding in *Azusa* that "a 'facility' is something that is built, constructed, installed, or established to perform some

particular function or to serve or facilitate some particular end. (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1193 ("*Azusa*").)

MWD does not and cannot refute that a "water supply" does not meet the "facility" definition. MWD does not manufacture water. MWD admits its "two primary ***sources of supply*** are water imported from the Colorado River via the Colorado River Aqueduct ("CRA") and water imported from the State Water Project via the California Aqueduct" which comes from the Feather and Sacramento Rivers. (ROB 11-12, emphasis added.) These two primary sources of MWD's water supply are natural resources. They are not facilities as defined by *Azusa*.

The environmental consequences of adjusting use of MWD's water supply to offset an enormous additional DCP water contribution are not exempt from CEQA review because MWD's water supply is not an existing facility.

Contrary to MWD's unsubstantiated claim, *Azusa* does not support MWD's argument in the least. The court in *Azusa* held that the Class 1 categorical exemption did not apply to reopening an 80-acre landfill. (*Azusa*, *supra*, at 1192.) The court concluded that a landfill, which involved excavation, did not fall within the meaning of a "facility." (*Id*.)

III.
MWD PROVES THE UNUSUAL CIRCUMSTANCES EXCEPTION APPLIES

Even if the March Approval could fit within the Class 1 categorical exemption, which is not the case, the unusual circumstances exception renders the exemption inapplicable. MWD does not dispute that the fair argument standard of review as articulated in *Respect Life* applies to both (1) whether the project involves unusual circumstances and (2) whether environmental impacts due to the unusual circumstances are reasonably possible. (ROB 44:8-14; *Respect Life South San Francisco v. City of South San Francisco* (2017) 15 Cal.App.5th 449, 458 ("*Respect Life*").) The fair argument standard is a "low threshold" test. (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.)

It is also undisputed that unusual circumstances exist when a project's characteristics differ from projects a categorical exemption is intended to cover. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105.) There is no dispute the exception applies when a significant environmental impact due to those circumstances is reasonably possible. (14 C.C.R. §15300.2(c).) The exception applies here because MWD made a new 250 taf water commitment in the March Approval requiring MWD to draw on its in-state water supply, which MWD acknowledges comes from the Feather and Sacramento Rivers (ROB 11-12), to address reduced River water deliveries. Such responses have historically resulted in significant environmental impacts that burden California to this day. (POB 9:23-10:10; AR 9575-9578.) Unlike the typical Class 1 projects, which do not change the environmental baseline, the 250 taf increased water commitment is a massive baseline change, which reasonably could result in impacts under CEQA.

MWD's Opposition proves that the March Approval will draw on its northern California water sources to offset the 250 taf commitment. The Opposition is abundantly clear that depleting MWD's current storage to meet its increased DCP water contribution obligation will impact the natural water supply sources it must draw on to replace that storage.. The Opposition explains how MWD's IRP "uses an adaptive approach to manage [MWD's] sophisticated water supply portfolio***, balance future water demands with future supplies***, and ensure that Metropolitan avoids severe shortages." (ROB 14:16-18, emphasis added.) MWD's Opposition explains how offsets will also be achieved through its Urban Water Management Plan ("UWMP") and its Water Surplus and Drought Management ("WSDM"), which "evaluates anticipated annual imported supplies, demands and available storage to determine how best to maximize management of wet year supplies and minimize impacts of dry year shortages." (ROB 14:22-23; 15:1-4.)

The Opposition not only describes how these programs will offset the depletion of MWD's storage as a result of the March Approval, but also admits these programs are embedded in its exemption determination. (ROB 19:11-14 ["The CEQA exemption determination was supported by Metropolitan's long-term and short-term planning tools, including the IRP, UWMP and WSDM Plan."].)

This means the consequences of using its storage to supply an additional 250 taf ultimately involves increasing MWD's use of northern California water sources. To offset its commitment to supply an additional 250 taf, MWD, by its own admission, will draw on those other water sources. MWD will not just be relying on its limited stored water and the unquantified and speculative conservation measures identified on the one page of the staff PowerPoint presentation at the March Approval meeting. (See AR 1580.)

All of this establishes that the unusual circumstance exception to the Class 1 categorical exemption applies.

The Opening Brief points out that it was reasonably possible that MWD would be required to draw on its other sources because (i) MWD engaged in an accounting sleight of hand to produce a 30-percent reduction of its overall contribution obligation (by shifting from average demand to median demand) (POB 16:24-27; AR 1338, 1578, 2512-2513); (ii) MWD identified only one *quantified* water source – stored water that was barely enough to meet the estimated contribution based on the median figures in the March Approval and 250 taf less than would be necessary using the average figures in the December Approval (POB 18:4-10; AR 1580, 2512-2513); (iii) the other water sources identified on the one PowerPoint slide at the March Approval hearing were unquantified and largely speculative conservation measures (POB 17:19-18:3; AR 1580), and (iv) MWD was already dealing with continual water shortages, which it expected would exist during the life of the DCP. (POB 19:6-14; AR 9423.)

None of MWD's arguments address the foregoing points. In explaining the unusual circumstances exception, IID noted the March Approval does not involve a localized facility, but a geographically dispersed water distribution system and water resources that exist over a broad geographic area. (POB 30:10-14.) In response, MWD wrongly claims the Central Valley Project was held to be an existing facility in *North Coast*. (ROB 38:2-5.) On the contrary and as discussed in detail above, *North Coast* involved a contract for a local water provider to continue delivering water it was already receiving from the CVP, with no expansion of use, which is not the case here. (*North Coast*, *supra*, 227 Cal.App.4th 832.)

Contrary to MWD's claim, IID did not state that MWD identified only one water source. IID stated MWD identified only one *quantified* water source, involving storage. (POB 17:14-18:3; 32:3-32:12; AR 1580 [three possible sources presented at March Approval hearing].)

MWD does not dispute it is in a continual water shortage position, which it expects to last during the life of the DCP. (AR 9423.) MWD wrongly claims the Opening Brief does not present evidence of MWD's water shortage. Not only does the Opening Brief document the shortage (POB 19:6-14), but MWD does not dispute that evidence, including that, according to its own estimate, "foreseeable challenges and risk scenarios were identified that point to the potential of 200 taf of additional water conservation and local supplies needed to address these risks." (AR 9342.)

Instead, MWD claims it can manage its water shortage "by relying on its broadly diversified water supply portfolio." (ROB 45:19.) The Opposition then states MWD will attempt to avoid a shortage by using its IRP to balance future water demand (which would include the additional DCP water contribution) with future supplies (which would come from Feather and Sacramento Rivers). (ROB: 45:21-28; 11-12.)

MWD's water shortage is notable because it shows that MWD will need to offset the additional 250 taf contribution from the rivers that are its water supply sources. Once again, the Opposition proves that will occur through its IRP. MWD's Request for Judicial Notice ("RJN") underscores the point. Notably, *MWD was short 234 taf even during such a wet year as 2019* and determined that it was required to "satisfy the projected supply/demand gap primarily with takes from its record dry-year storage balance." (RJN, Ex. C at 3.) Thus even in one of the wettest years on record, MWD was required to deplete its dry year storage balance, on which the March Approval relies to meet the additional DCP contribution.

IID cited *Voices for Rural Living v. El Dorado Irrigation Dist.* (2012) 209 Cal.App.4th 1096, 1109 ("*Voices*"), which held that a water agency's commitment to supply water for 216 dwelling units (far less than the 250 taf in question here) is an unusual circumstance because the sheer amount of water that was committed distinguished the project from the types of projects contemplated by the Class 3 categorical exemption. (POB 31:7-26.) MWD absurdly claims *Voices* does not apply because MWD will be reducing its River water consumption and, therefore, it is conserving water rather than increasing consumptive use of water. (ROB 46:17-47:4.) The argument ignores the fact that the March Approval increases MWD's commitment to provide water. The demand on MWD's river water sources is increasing, not decreasing, as a result of the March Approval. MWD's response does not negate the significance of the *Voices* holding.

The background facts in the Opening Brief discuss at length how adjusting water supplies and reallocating intrastate water supplies to address reduced River water deliveries has historically resulted in significant environmental impacts, which demonstrates how it is reasonably possible the baseline changes in the March Approval could produce impacts under CEQA. (POB 9:23-10:10.) In the unusual circumstances discussion, the Opening Brief

inadvertently cites the wrong page in the record in referring back to this history (AR 19975 instead of AR 9575). The Opposition pounces on the citation error, but fails to respond to the discussion in the statement of facts, which explains the point in detail. (ROB 46:10-16.)

None of MWD's arguments address the fundamental reason the March Approval is an unusual circumstance. The reallocation of resources and supplies across its system, which MWD admits will occur, has the potential to change the environmental baseline and result in impacts under CEQA. These circumstances distinguish the March Approval from typical Class 1 projects, which inherently do not have that potential.

IV.
IID DID NOT FAIL TO EXHAUST ADMINISTRATIVE REMEDIES

Under Public Resources Code Section 21177(e), there is no exhaustion requirement, when, as in this case, the exemption determination was made before the public meeting on the project, or when, as in this case, the agency did not disclose the basis for its exemption determination. Nevertheless, MWD was fairly apprised of IID's claims, even though there was no exhaustion requirement here.

A. There Is No Exhaustion Requirement in this Case

The exhaustion requirement in Public Resources Code Section 21177(a) "does not apply to any alleged grounds for noncompliance with this division for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing before the approval of the project, or if the public agency failed to give the notice required by law." (Pub. Res. Code §21177(e).) The Supreme Court held that the exhaustion requirement in Section 21177(a) applies to categorical exemptions only "as long as the public agency ***gives notice of the ground*** for its exemption determination, ***and that determination is preceded by public hearings at which members of the public had the opportunity to raise any concerns or***

objections to the proposed project." (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 291 ("*Tomlinson*") [emphasis added]; *see also* ROB 25:8-12 [stating the same proposition].)

Here MWD neither held public hearings on its exemption determination nor provided notice of the grounds for MWD's exemption determination. First, no public hearing preceded the exemption determination for the March Approval. MWD's board did not hold a hearing because—pursuant to MWD's policy and practice regarding exemption determinations—the MWD board does not determine whether a project is exempt. Instead, pursuant to State CEQA Guidelines Section 15025 (14 C.C.R. §15025), MWD's board has delegated authority to determine whether a project is exempt to its staff. (ROB 18:23-24; 18:27-28.) Accordingly, MWD staff made the exemption determination before the agenda for the March Approval was posted. (AR 1566, 1592.) The exemption determination was not circulated for public comment, nor was the determination agendized for any action by the MWD board when it acted on the March Approval. Thus, there was no hearing on MWD's exemption determination before it was made.

Second, MWD failed to provide notice of the ground for its exemption determination. The agenda notice for MWD's March Approval did not specify the basis for the General Manager's determination that the project is exempt from CEQA. (AR 1592.) The notice merely states "the General Manager has determined that the proposed actions are exempt or otherwise not subject to CEQA." (*Id.*) The report for the March Approval only states the project was a minor modification of the December Approval. (AR 1601.) Neither document explains the basis for the General Manager's exemption determination. Technical information regarding the March Approval was not publicly disclosed until the day before the board meeting on the March Approval. (AR 1569-1584; AR 19982.) MWD's internal communications, which show MWD was manipulating data regarding the amount of water it would be required to contribute under the

March Approval, were not part of the agenda package.[2] (AR 19266, 19432, 19970-19971.) MWD simply failed to provide notice of the ground for its exemption determination.

A petitioner is not required to exhaust administrative remedies when an agency provides ineffective or misleading notice, which prevents the petitioner from effective comment before the agency invoked a CEQA exemption. (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1150-1151 ("*McQueen*") (disapproved on another ground in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.App.4th 559).) An agency must give notice of an exemption determination sufficient to permit interested parties to meaningfully address the basis for the exemption before exhaustion applies. (*Save the Plastic Bag Coalition v. County of Marin* (2013) 218 Cal.App.4th 209, 225-226 ("*Plastic Bag II*").)

In *Plastic Bag II*, a county disclosed that it would rely on an exemption, but the basis for the exemption was not disclosed until the day of the hearing. (*Id*., at 225.) The court held that the "belated identification of the grounds for the exemption does not qualify as adequate notice sufficient to permit interested parties to meaningfully address the basis for the exemptions." (*Id.*, at 225-226.) As in *Plastic Bag II*, IID could not be expected to raise all of the issues MWD asserts were necessary when MWD failed to provide notice of the basis for its exemption determination.

In sum, MWD's exemption determination was made *before* the public meeting on the project, MWD did not hold a hearing on the exemption determination, and MWD did not fully disclose the basis of its determination. Exhaustion is thus unnecessary under Pub. Res. Code Section 21177(e).

B. MWD Was Fairly Apprised of IID's Claim

[2] MWD does not dispute that it manipulated its data in an attempt to justify reliance on the exemption. (POB 16:13-17:13.)

Even if Pub. Res. Code Section 21177(a) applied, the exhaustion requirement is satisfied if *anyone* presents the grounds for noncompliance with CEQA during the public comment period provided by CEQA or prior to the close of the public hearing on the project before the issuance of the notice of determination. (*Hines v. California Coastal Com*. (2010) 186 Cal.App.4th 830, 853, citing *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 791–792; *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 711.)

Less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding. (*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 163 ("*Citizens*"); *see also Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1052 ("*SCOPE*") [declining to depart from the less stringent standard articulated in *Citizens* with respect to exhaustion by an experienced environmental advocacy organization].)

When exhaustion applies, the question is whether the agency is fairly apprised of the central claims. (*Save the Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal.App.5th 665, 685 citing *SCOPE, supra*, at 1052; *California Native Plant Society v. County of El Dorado* (2009) 170 Cal.App.4th 1026, 1056.)

MWD was fairly apprised of IID's central claims in this litigation. The administrative record, which MWD certified, contains a comment letter from Musick Peeler, which MWD acknowledges "assert[s] arguments about alleged CEQA violations like those IID alleges in its Opening Brief." (ROB 28:26-27; AR 17785-17796.) MWD admits that it received the Musick Peeler letter in advance of its March Approval. (ROB 29:4-6.)

In addition, IID's comment letter and its general manager's testimony fairly apprised Metropolitan of its central claims regarding the March Approval that: (i) the Class 1 categorical exemption did not apply (AR 19982); (ii) the March Approval is not the same project as the

December Approval (AR 19983 ["Without IID's consent or participation in the DCP, the 'project' of a MWD 'go it alone' DCP is not the same 'project' as was previously approved."]); (iii) reallocating the DCP water contributions was not a minor alteration of an existing facility (AR 19983 ["It is an unbelievable assumption in the board memorandum that only one minor modification will be needed for a lower priority water rights holder to sign multiple agreements on behalf of a senior priority water rights holder."]); and (iv) MWD failed "to identify and analyze the far-reaching environmental consequences and environmental impacts that can occur as a result" of the approval. (AR 19983.) IID's general manager highlighted the very water supply imbalance presented by the DCP that MWD was not considering. (AR 19981 ["the MWD obligation could be almost 2 million acre-feet, and it is not irrational to believe that there will be a public clamor, if not an outright demand, to find that water in the Imperial Valley."].) It cannot be said that IID failed to fairly apprise MWD of the water supply challenges and the reasons the March Approval did not qualify for a Class I categorical exemption. (*Save the Agoura Cornell Knoll, supra,* 46 Cal.App.5th at 685.)

V.
IID HAS STANDING

IID has both public interest standing and standing by direct beneficial interest. MWD's argument to the contrary relates to beneficial interest standing, which the Supreme Court has held is not necessary in a CEQA action.

First, IID has public interest standing for its CEQA challenge. In *Plastic Bag, supra*, 52 Cal.4th 155, the Supreme Court affirmed its long held rule that "strict rules of standing that might be appropriate in other contexts have no application where broad and long-term [environmental] effects are involved." (*Plastic Bag, supra,* at 170 quoting *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 272.) The Supreme Court stated, "'where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the

[petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.'" (*Id.*, at 166, quoting *Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100–101.) Cases cited by MWD do not contradict this clear, longstanding principle. (ROB 32.)

IID seeks to require MWD to carry out its legal responsibilities under CEQA. Past decisions reducing MWD's reliance on River water have resulted in widespread environmental concerns that are well acknowledged. (AR 9575.) The March Approval further reduces MWD's reliance on River water and, in so doing, creates the potential for similar widespread environment consequences. IID's public interest standing to raise these concerns under CEQA is incontrovertible.

Second, while not necessary to establish its standing, IID is beneficially interested in the March Approval. "The requirement that a petitioner be 'beneficially interested' has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (*Plastic Bag, supra,* at 165; see also *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 205 ["Public agencies with a stake in the outcome of another agency's CEQA proceedings have a sufficient beneficial interest to establish standing to challenge a CEQA approval."].)

In *Plastic Bag* the Supreme Court held that a petitioner is not required to be affected by a particular adverse environmental impact to qualify as a beneficially interested party in a CEQA suit. (*Plastic Bag, supra*, at 170 ["We have never so limited the scope of the beneficial interest requirement. It is not unusual for business interests whose operations are directly affected by a government project to raise a CEQA challenge to the government's environmental analysis."].) MWD's argument to the contrary is based on *Bozung v. Local Agency Formation Com.* (1975) 13

Cal.3d 263, 272 (ROB 30:18-19), but *Bozung* merely said an allegation that the petitioner would be so affected was sufficient in that case.

While IID has a long history of promoting environmental protection (AR 18651; 19975-19976.), in *Plastic Bag* the Supreme Court held it is not necessary to show long-standing involvement in environmental issues. (*Plastic Bag, supra*, at 170.) MWD's claim to the contrary is based on a misleading quote from *Environmental Protection Info. Ctr. v. Department of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 481. (ROB 32.) MWD fails to mention that the quote is the Supreme Court's description of a proposition it was not deciding that comes from *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223. MWD fails to inform the Court that in *Plastic Bag*, the Supreme Court rejected *Waste Management* and the very proposition MWD asserts. (*Plastic Bag, supra,* at 170.)

Plastic Bag is clear that a petitioner has a beneficial interest in a CEQA proceeding when that party is adversely affected by a governmental action in any fashion. (*Plastic Bag, supra,* at 170.) The Supreme Court held that a coalition of plastic bag manufacturers and suppliers had standing to bring a CEQA challenge to a city ordinance banning the use of plastic bags. The Court held that business interests whose operations are directly affected by a government project have standing in their own right to challenge that action under CEQA. (*Id.*)

There is no dispute that IID was adversely affected by the March Approval. MWD admits it adopted the March Approval to adversely affect IID's efforts to petition for federal assistance to address ongoing environmental impacts to the Salton Sea, which have resulted from the reduced availability of River water. (ROB 33:20-22 & 25-26.) There was nothing improper about IID approaching the federal government. IID was not seeking to impose a regulatory burden on MWD in doing so.

The March Approval also adversely affected IID in other ways that establish IID's standing. MWD assumed IID's DCP contribution, which was the product of years of planning by IID, MWD and the Real Parties. (POB 13:21-23.) IID holds senior water rights among the five California agencies that draw water from the River. (POB 9:8-10.) MWD acknowledges that IID is still an implementing party of the 2007 Guidelines, which is affected by implementation of the DCP. (ROB 32:1-2.)

MWD's political differences with IID over environmental protection of the Salton Sea do not justify MWD taking actions that violate the law. This lawsuit does not seek to impose a regulatory burden on MWD as a business competitor with no discernable concern for environmental protection, as MWD asserts. *Plastic Bag* found that such considerations do not apply when, as in this case, a petitioner seeks CEQA compliance on grounds that are appropriate for any CEQA petitioner to raise. (*Plastic Bag*, *supra*, at 170.)

"The purpose of a standing requirement is to ensure that the courts will decide only actual controversies between parties with a sufficient interest in the subject matter of the dispute to press their case with vigor." (*Plastic Bag*, *supra*, at 170, quoting, *Common Cause v. Board of Supervisors*, (1989) 49 Cal.3d 432, 439.) IID meets these standards for standing.

VI.
THIS CASE IS NOT MOOT

Through extra-record evidence, MWD asserts that updated modeling predicts overall demand for DCP water contributions may be less than was projected at the time of the March Approval. MWD absurdly claims this litigation is moot because on remand it would merely approve another exemption based on its capacity to obtain water to offset the current modeling. By now, it should be clear that MWD's capacity is irrelevant. On remand, MWD would be required to evaluate the potential impacts of the expansion of use under CEQA, rather than avoiding that required evaluation by declaring the project exempt.

In fact, the term of the DCP ends December 31, 2025. The Opposition and extra-record evidence shows this case is not moot because MWD has yet to make the additional 250 taf DCP water contribution. (*See* ROB 50:5 [only discussing ICS]; AR 1611 [ICS is distinct from DCP ICS]; and AR 1610 [ICS, that is not converted to DCP ICS, is not a DCP contribution]; *see also* RJN, Ex. B at 17-18 [establishing the same proposition].) Moreover, the hydrological conditions of the River can change at any point in the years to come.

In other words, unlike the cases MWD relies on in its Opposition, the project here has in no way been completed. In fact, *Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888 established that even completion of a project will not necessarily moot a CEQA action. (*See also California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 280, fn. 31 [EIR for project necessitating removal of trees not rendered moot by removal of the trees because additional mitigation measures could be ordered, or the project could be modified, reconfigured or reduced].)

VII.
CONCLUSION

For all of the foregoing reasons, the March Approval is not exempt from CEQA. IID requests that the Court grant this petition, and, pursuant to Public Resources Code section 21168.9, direct MWD to vacate the March Approval and mandate that MWD and the Real Parties suspend all activities authorized by the March Approval.

DATED: October 26, 2020

COX, CASTLE & NICHOLSON LLP

By: _____

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PROOF OF SERVICE

I, Ramona S. Lee, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 2029 Century Park East, Suite 2100, Los Angeles, California 90067-3284. On October 26, 2020, I served a copy of the within document(s):

REPLY TO JOINT OPPOSITION OF RESPONDENT AND REAL PARTIES

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Los Angeles, California addressed as set forth below.

☐ by placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to an agent for delivery.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Please see attached Service List.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 26, 2020, at Los Angeles, California.

Ramona S. Lee

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