2012 WL 3329619
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, Sixth District, California.

CALIFORNIA AMERICAN WATER, Plaintiff,
v.
CITY OF SEASIDE, Defendant.
Sierra Club, Plaintiff and Appellant,
v.
Monterey Peninsula Water Management District, Defendant and Respondent;
Security National Guaranty, Inc., et al., Real–Parties in Interest and Respondents.

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Filed August 15, 2012

(Monterey County Super. Ct. No. M66343)

(Monterey County Super. Ct. No. M108149)

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Opinion

ELIA, J.

***1** In 2008, respondent California American Water (Cal–Am) and respondent Security National Guaranty, Inc. (SNG) filed a joint application with the Monterey Peninsula Water Management District (MPWMD or District) for a permit to create a water distribution system to serve a coastal development project known as the Monterey Bay Shores Ecoresort (Ecoresort), which SNG proposes building on property it owns in Sand City. This is the second lawsuit and the second appeal arising out of the joint application for the water distribution permit.

In this case, the Sierra Club appeals the trial court's order denying its petition for a writ of administrative mandamus, which

had challenged the District's decision to grant the permit application. Sierra Club argues the District failed to consider adverse environmental impacts on the Carmel River "associated with" granting the permit application and thereby violated its duty to protect public trust resources under its rules and regulations, in particular District Rule No. 22. Sierra Club urges us to interpret the rule broadly and require the District to make a more detailed inquiry into the effects associated with granting the permit on the Carmel River. Sierra Club challenges the sufficiency of the District's findings to enable judicial review, as well as the sufficiency of the conditions the District imposed when it approved the permit application. We reject these contentions and will affirm the judgment denying the writ.

Facts

Brief Statement of the Case: Project at Issue & Principal Parties

The controversy leading to the challenged order involves the distribution of water from the Seaside Basin (which underlies the cities of Seaside, Sand City, Monterey, Del Rey Oaks, and portions of unincorporated areas in Monterey County) to the Ecoresort. The Ecoresort, as currently proposed, will include a 161–room hotel, 88 "visitor-serving" condominium units, 92 residential condominium units, a restaurant, conference facilities, and a spa. SNG plans to build the Ecoresort on the site of a sand-mining operation that closed in 1986 and the project includes plans for dune restoration. The project proposes using "green" technologies, including wind power, solar energy, living roofs, and green walls. According to a project brochure, the Ecoresort has been "designed to maximize [water] conservation and efficiency of use, employ on-site water recycling, stormwater pre-treatment, and wetland and groundwater recharge. The resort will harvest rain water ... for non-potable uses," "reuse wastewater within the site," and treat surplus graywater and stormwater, which will be used to recharge the aquifer.

Respondent District "was created in 1977 with the enactment of the Monterey Peninsula Water Management District Law. [Stats.1977, ch. 527, § 1, p. 1672, 72B West's Ann. Wat.—Appen. (1995 ed.) §§ 118–1, 118–101.][1] In establishing the [District], the Legislature recognized the shortage of water resources in the Monterey Peninsula area and declared the need for 'integrated management of ground and surface water supplies, for control and conservation of storm and wastewater, and for promotion of the reuse and reclamation of water.' (§ 118–2.) Toward these objectives of conservation, the [District] was empowered to store water, appropriate water rights, control waste and exportation, and maintain proceedings to prevent interference with beneficial water use. (§ 118–328.) Its authority includes the right to approve the establishment or expansion of water distribution systems. (§ 118–363.)" (*California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 473 (*California American*).)

1	Further unspecified section references are to the Water Code Appendix.

***2** Respondent Cal–Am is an investor-owned public utility that extracts groundwater from the Seaside Basin and delivers it to locations in its service area in Monterey County.

Respondent SNG is a real estate developer that owns land overlying the Seaside Basin and produces groundwater from it. SNG submitted an application to Sand City to develop the Ecoresort in or before 1998. The city council for Sand City certified a final environmental impact report (EIR) and approved the project in December 1998. That same year, the District denied a proposal that would have used wells on SNG's property to create a water distribution system for the Ecoresort. The key issues at that time were the hydrolic impacts of the plan and SNG's purported lack of water rights. As we shall explain, SNG subsequently acquired adjudicated water rights in the Seaside Basin.

The project size and water demands of the Ecoresort were reduced in 2008. In September 2008, SNG and Cal–Am applied to the District for a permit to create a water distribution system to serve the Ecoresort using off-site wells. In January 2009, the city council for Sand City adopted a December 2008 addendum to the previously certified final EIR and approved the project once again. After the District denied the water distribution permit in early 2009, litigation ensued, which we shall describe in greater detail below. The superior court ordered the District to set aside its denial of the permit and rehear the matter. That order was affirmed by this court in *California American, supra,* 183 Cal.App.4th 471. The District conducted further hearings in July and August 2010 and granted the water distribution permit subject to conditions.

Appellant Sierra Club is a non-profit, environmental organization that opposed issuance of the water permit for the Ecoresort on the ground that the project will result in increased pumping from the Carmel River, which will adversely affect the endangered steelhead trout population on the river. Sierra Club spoke at public hearings, submitted letters in opposition to the project, and appeared as amici curiae in the previous litigation. After the District granted the water distribution permit, Sierra Club filed a petition for writ of mandate and a complaint for declaratory relief, asking the trial court to direct the District to set aside its order approving the permit. The superior court consolidated the Sierra Club's action with the action that was at issue in *California American.* The court denied Sierra Club's writ petition and request for declaratory relief. Sierra Club appeals.

To properly frame the issues in this case, we shall review the history of water rights litigation on the Monterey Peninsula relating to the project at issue, including the prior appeal. The issues presented involve two primary sources of water: the Seaside Basin (hereafter sometimes "Basin") and the Carmel River Basin (hereafter sometimes "River"). The Seaside Basin is divided into two subareas, the Coastal subarea and the Laguna Seca subarea. The permit at issue involves the extraction of water from the Coastal subarea of the Basin.

State Water Resources Control Board Order 95–10 and County Ordinance No. 3310

***3** "It is well documented that water availability is a critical problem throughout Monterey County.... In 1988, the County passed Ordinance No. 3310, finding that because of expanded water usage 'the potential exists that Monterey County's allocation of water will be exhausted so as to pose an immediate threat to the public health, safety, or welfare.' In 1995, the State Water Resources Control Board [(SWRCB)] issued Order No. 95–10 and related Decision No. 1632. Order No. 95–10 found that [Cal–Am], which was the principal supplier of water to the Monterey Peninsula, had diverted excess water from the Carmel River basin 'without a valid basis of right,' causing environmental harm. Cal–Am was ordered to substantially limit its diversions, to mitigate the environmental effects of its excess usage and to develop a plan for obtaining water legally. Decision No. 1632 similarly found that '[e]xisting diversions from the Carmel River have adversely affected the public trust resources in the river.' " (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 108.)

Action to Adjudicate Water Rights

In 2003, Cal–Am filed an action entitled *California American Water v. City of Seaside* (Monterey Superior Court Case No. M66343, hereafter *California American* Action), which sought a declaration of rights among the parties interested in the production and storage of groundwater from the Seaside Basin. Cal–Am also "requested an injunction 'requiring the reasonable use and coordinated management of groundwater within the Seaside Basin,' along with the appointment of a watermaster to administer the resulting decision." (*California American, supra,* 183 Cal.App.4th at p.474.) Cal–Am's complaint named multiple defendants, including the cities of Seaside, Monterey, and Sand City and SNG. The District intervened, resulting in multiple cross-complaints among the parties. The Sierra Club appeared in that action as amicus curiae in support of the District. Seaside, Sand City, and other "Water User Defendants" joined Cal–Am in requesting approval of a stipulated judgment, which was opposed by the District and a second intervener, the Monterey County Water Resources Agency.[2] (*Ibid.*)

2	The other "Water User Defendants" included the City of Del Rey Oaks; Granite Rock Company; D.B.O. Development; the Muriel Calabrese 1987 Trust; Alderwood Group; Pasadera Country Club; Laguna Seca Resort; Bishop, McIntosh & McIntosh; the York School; and Monterey County.

Exercising its authority under article X, section 2 of the California Constitution, the superior court adjudicated the rights of the parties. In its amended decision filed on February 9, 2007 (hereafter Seaside Basin Adjudication or Adjudication), the court partially rejected the stipulation and set forth its findings regarding the status and permissible use of the Seaside Basin. (*California American, supra,* 183 Cal.App.4th at p. 474.) The court found that the Basin was in overdraft and "that groundwater production from the Basin had exceeded its 'Natural Safe Yield'[3] in each of the preceding five years, which could lead to deleterious intrusion of seawater in the area. It therefore created and defined the position of 'Watermaster,' a

13–member group, and it adopted a 'Physical Solution' to provide coordinated management of the groundwater resources and thereby 'maximize the reasonable and beneficial use of [w]ater resources' in a manner consistent with the California Constitution and the public's interest in a maximum natural yield. The court's specifically stated objective was 'to ultimately reduce the drawdown of the aquifer to the level of the Natural Safe Yield; to maximize the potential beneficial use of the Basin; and to provide a means to augment the water supply for the Monterey Peninsula.' " (*Id.* at pp. 474–475.) The Watermaster's function was to oversee the process and implement regulations to ensure compliance with the Physical Solution. (*Id.* at p. 475.)

3	"Natural Safe Yield" was defined as "the quantity of Groundwater existing in the Seaside Basin that occurs solely as a result of Natural Replenishment."

***4** One aspect of the Physical Solution was to allocate water rights within the Basin. The court divided the ground water producers into two groups (" 'Alternative Producers' " and " 'Standard Producers' ") and assigned different rights and obligations to each group. SNG is an Alternative Producer and Cal–Am is a Standard Producer. The Physical Solution does not require any reduction in the amount of water that can be produced by an Alternative Producer in the Coastal subarea. On the other hand, beginning three years after entry of judgment in the Adjudication, a Standard Producer's allocation diminishes every three years. Moreover, "the production or non-production of water from the Basin by an Alternate Producer has no effect on the amount of water [that] can be produced" by a Standard Producer.

"The court set forth a method of calculating the amount each producer was permitted to extract from the basin, subject to a determination by the Watermaster and the court that continued pumping at the designated amount would cause 'Material Injury to the Seaside Basin or to the Subareas or will cause Material Injury to a Producer due to unreasonable pump lifts.' In the event of such injury, the court specified the method of calculating the 'modified Operating Yield' and concomitant revised production allocations. Toward the goal of augmenting the total yield of the basin, the court's decision provided for artificial means (i.e., recapture, storage, and recovery), transfer of allocations, utilization of reclaimed water for irrigation, and specified schedules of reduction in extractions when required by the court, the Watermaster, or 'other competent governmental entity.' The court further ruled that each producer was 'prohibited and enjoined from [p]roducing [g]roundwater from the Seaside Basin except pursuant to a right authorized by this decision, including Production Allocation, Carryover, Stored Water Credits, or Over–Production subject to the Replenishment Assessment.'[4] If Cal–Am were to intrude on a water defendant's production allocation, the decision spelled out the substantive and procedural consequences of the harm caused by the intrusion." (*California American, supra,* 183 Cal.App.4th at p. 475.)

4	"Carryover" was defined as "that portion of a [p]arty's Production Allocation that is not [e]xtracted from the Basin during a particular Administrative Year." "Over–Production" referred to either extraction exceeding the Natural Safe Yield or extraction in excess of an individual producer's base water right. "Replenishment Assessment" meant assessment levied by the Watermaster based on the amount of overproduction by any party in the previous year. The amount of the assessment was to be determined by the cost of artificial replenishment with nonnative water sufficient to offset the degree of overproduction.

"Addressing the [District's] complaint in intervention, the court rejected the District's request to be the Watermaster in favor of a 13–member collaborative group. [Responding to the District's] assertion of exclusive authority to regulate groundwater pumping under the separation of powers doctrine, the court pointed out that the District itself had requested a physical solution, thereby conceding that the court had superior authority to regulate the use of the basin. Water Code section 10753, the court noted, precluded any local agency's adoption and implementation of groundwater management plans to the extent that its service area is already managed by 'a court order, judgment, or decree.'[5] Accordingly, 'the District will not be able in the future to adopt a Groundwater management plan for the Seaside Basin. Clearly the [L]egislature contemplated that courts had the power to develop management plans for aquifer management even if a water management district already existed in a geographical area.' The court acknowledged that 'the District possesses certain authority, which it is free to exercise according to the legislative mandate which created it. However, it is apparent [that] the [L]egislature did not intend that all of the powers it granted to the District be held exclusively by the District, [or] else it would not at a later time have created the Monterey County Water Resources Agency and endowed it with many of the powers granted to the [District].' Should the powers of the Watermaster overlap those of the [District,] the court would, under its retained jurisdiction, be in a position to

resolve any resulting conflict. One conflict already asserted by the District was the [Watermaster's alleged interference with the District's] authority 'regarding maintenance and modification of the Operating Safe Yield.'[6] The court rejected this assertion, finding that its decision did not conflict with 'any procedure or plan currently in place by the District to establish an Operating Yield for the Basin.' " (*California American, supra,* 183 Cal.App.4th at pp. 475–476.)

5	Subdivision (a) of Water Code section 10753 provides: "Any local agency, whose service area includes a groundwater basin, or a portion of a groundwater basin, that is not subject to groundwater management pursuant to other provisions of law or a court order, judgment, or decree, may, by ordinance, or by resolution if the local agency is not authorized to act by ordinance, adopt and implement a groundwater management plan pursuant to this part within all or a portion of its service area."

6	"Operating Safe Yield" was defined as "the maximum amount of [g]roundwater resulting from Natural Replenishment that this Decision, based upon historical usage, allows to be produced from each Subarea for a finite period of years" without material injury. The decision established the operating yield for the basin and each subarea to be maintained for three years or until the Watermaster (with the court's concurrence) determined that continued pumping at that level would cause material injury to the basin, to one of the two affected subareas, or to a producer. The Watermaster was then to determine a modified operating yield in accordance with specified principles, procedures, and criteria.

***5** The Adjudication awarded SNG 149 acre feet per year (AFY) of "alternative production allocation rights." As noted before, SNG's water allocation does not reduce over time. Moreover, as a general principle, the Adjudication established a preference for using inland wells rather than coastal wells. It also allowed one water rights owner to deliver water to another water rights holder; thus, the parties are not limited to using the wells on their own properties.

Finally, the court's order "specified the means by which the parties could obtain future adjudication of their rights. De novo review of Watermaster decisions, for example, was to be pursued within 30 days by noticed motion." (*California American, supra,* 183 Cal.App.4th at p. 476.) The court also reserved jurisdiction over future controversies, stating: " 'Full jurisdiction, power and authority are retained by and reserved by the Court upon the application of any [p]arty or by the Watermaster, by a noticed motion to all [p]arties, to make such further or supplemental orders or directions as may be necessary or appropriate for interpretation, enforcement, or implementation of this Decision.' The court did not purport to retain authority to adjust any producer's base water right or production allocation, except upon intervention by a new party and then only under certain conditions. As to other remedies between the parties, the court stated that 'Nothing in this Decision shall either expand or restrict the rights or remedies of the [p]arties concerning any subject matter that is unrelated to the use of the Seaside Basin for Extraction and/or Storage of Water as allocated and equitably managed pursuant to this Decision.' " (*Id.* at pp. 476–477.)

SNG & Cal–Am's Application for a Permit to Distribute Water to Ecoresort

As noted previously, the size and water demands of the Ecoresort were reduced in 2008. In September 2008, Cal–Am and SNG filed a joint application with the District for a water distribution permit (Application or Permit Application) that would allow Cal–Am to pump water that was allocated to SNG under the Adjudication from the Seaside Basin to serve the Ecoresort. In accordance with the preference stated in the Adjudication, SNG and Cal–Am proposed using Cal–Am's inland wells in the coastal subarea, rather than SNG's onsite wells to reduce any concerns regarding potential salt water intrusion into the aquifer. They sought to extract up to 90 AFY of the 149 AFY allocated to SNG under the Adjudication for distribution to the Ecoresort site. The parties also submitted the Application to the Watermaster, which determined that the proposal was consistent with the Adjudication.

The District's Board of Directors (Board) conducted three public hearings on the Application between November 2008 and February 2009, and voted four to three to deny the Application until further environmental review could be obtained pursuant to the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.). (*California American, supra,* 183 Cal.App.4th at p. 477.) "On March 26, 2009, the Board similarly voted to adopt findings of denial. The Board majority specifically directed the [District] to prepare a new [EIR] focus[ing] on the potential impacts of the project on the Carmel River as well as on the Seaside Basin." (*Ibid.*) The Board's concerns at that time included uncertainty over the source of the water supply and potential adverse effects on the river. The new EIR was also to evaluate possible alternative sources of water and mitigation measures that would be less environmentally damaging. Some of the Board's concerns were based on issues raised after Sand City approved the addendum to its prior EIR in 2009. (*Ibid.*)

2009 Order Clarifying Prior Adjudication

***6** In April 2009, SNG, Cal–Am, and Sand City, moved in superior court for an order enforcing or clarifying the Adjudication. SNG asserted that by revising pumping allocations the District had ignored the Physical Solution, had disregarded the Watermaster's jurisdiction, and had improperly purported to reexamine factual issues that had been decided in the Adjudication. (*California American, supra,* 183 Cal.App.4th at p. 477.) "SNG sought declaratory and injunctive relief to invalidate the Board's denial of the permit. Cal–Am added the argument that the [District] had exceeded its statutory authority under the Monterey Peninsula Water Management District Law (Stats.1977, ch. 527, § 1, p. 1672, 72B West's Ann. Wat.—Appen. (1995 ed.) ch. 118, p. 401.)" (*Ibid.*) Seaside argued that the Board's findings went " 'too far' " by interfering with the Physical Solution established by the Adjudication and urged the court to issue declaratory relief to clarify the findings and rationale in the amended decision. (*Id.* at p. 478.)

In its opposition, the District argued that its denial had been made without prejudice, and that as a responsible agency it was required under CEQA to review projects that might have significant negative effects on the environment. The District further maintained that it had properly exercised its statutory authority and duty, and that any doubts should be resolved in favor of the Board's findings. (*California American, supra,* 183 Cal.App.4th at p. 478.)

In its ensuing order dated May 11, 2009, the superior court found that "[h]olders of water rights in the Seaside Basin ('Basin') are entitled to use specified amounts of the available water" as set forth in the Adjudication and that "usage by the holders of those rights needs to be accomplished in the manner most beneficial to preservation of the integrity of the basin. Therefore, for example, production and use of water from inland wells is preferable to use of water from wells adjacent to the seashore." The court also held that "efficient usage of water from the Seaside Basin may require that Basin water be temporarily stored with water from non-basin sources" and that "[a]ny attempts by any agency or organization to impose obligations on the use of Basin water rights must be viewed with concern for the integrity of the Physical Solution." More specifically, the court found that although the District had authority to issue water distribution permits, it "cannot exercise that authority in contravention of the Physical Solution imposed by the Amended Decision for management of the Basin." Accordingly, the court ruled that "the Physical Solution governs the environmental aspects of Seaside Basin [groundwater] usage" and that "no [p]arty to this adjudication can require environmental review under [CEQA] with regard to such usage." The court held that to the extent that the District's findings denying the Application, in particular its Findings 17 through 21,[7] were inconsistent with the principles set forth in the court's order, and "specifically to the extent that any of the findings reference a need for CEQA review of the impact of the application on Seaside Basin production the findings impinge upon the decision and cannot stand." The court held that "[a]s a matter of law, commingling of water and storage from different sources does not transmute Carmel River water into Seaside Basin water, nor Seaside Basin water into Carmel River water. [District] has authority to require an accounting of water quantity to satisfy itself that no Carmel River water is being used but it cannot make environmental decisions based upon mere storage of water from two sources. So, for example, if there is a wheeling agreement between parties within the Seaside Basin which includes a provision for 'front loading' ... production of water from the Seaside Basin that was adequate to cover draw down by another Party with adjudicated water rights, there would be no issue as to Carmel [R]iver water." The court therefore ordered the District to set aside its denial of the Application, rehear the matter, and reconsider the Application in light of the court's ruling.

7	The Board's Finding 17 reflected the Board's determination that an additional EIR ("Subsequent EIR") was needed to determine whether approval of the application " 'could result in potential near-term adverse impacts to the Seaside Groundwater Basin.... A related issue is the timing and implementation of 10% triennial reductions in production for Standard Producers in order to attain the Court-ordered "natural safe yield," and the cumulative effect of [Cal–Am] service to [the resort] in light of these other actions.' Finding 18 pertained to the Board's determination that alternative sources of basin water 'could possibly be available to enable SNG to exercise its water rights in a less environmentally damaging manner,' thus contributing to the need for a subsequent EIR. Finding 19 generally asserted the need for a 'Subsequent EIR' 'in order to make an informed decision on the environmental effects of the proposed project as it relates to water supply,' by consolidating all environmental information at hand into one document to which the public would be entitled to comment before a decision was made. Finding 20 expressed the Board's opinion that approval of the application 'could involve new significant environmental effects or a substantial increase in the severity of previously identified significant effects due to a change in the project from an on-site well supply to the [Cal–Am] system as the source of supply.' Likewise, finding 21 suggested the possibility of 'new significant environmental effects or a substantial increase in the severity of previously identified significant effects due to a change in the circumstances (setting) under which the project is undertaken....' " (*California American, supra,* 183 Cal.App.4th at p. 479, fn. 7.)

***7** In May 2009, shortly after the trial court issued its order, SNG and Cal–Am signed a front-loading water delivery agreement, which specified how water distribution for the Ecoresort site would operate.

District's Appeal

The District appealed the trial court's order, arguing that the court had "exceeded its jurisdiction and violated the doctrine of separation of powers by restricting the District's authority to require environmental review of subsequent permit applications by the water-producing parties." (*California American, supra,* 183 Cal.App.4th at p. 473.) This court found no error and affirmed the court's order. (*Ibid.*) In doing so, we rejected the District's contention that the court's order obstructed the District's efforts to control the parties' use of water from the Carmel River, stating "The court's careful wording of its ruling left ample room for the District's exercise of its authority under the applicable constitutional and statutory mandates." (*Id.* at p. 482.)

District Hearings After Remand

On remand, the District conducted two hearings on the water distribution permit application in July and August 2010. Larry Silver, counsel for the Sierra Club, submitted five letters to the Board and spoke at both hearings.

In its first letter, Sierra Club urged the District Board to deny the Application. Alternatively, it argued that the Board was required to find that the project will have significant impacts on the Carmel River and either order a further EIR or condition the issuance of the permit by prohibiting Cal–Am from offsetting its production for the Ecoresort by increasing diversions from the River and by prohibiting Cal–Am from using water set aside under the Aquifer Storage and Recovery (ASR)

project[8] to serve the resort. Sierra Club argued that it was reasonably foreseeable that the production of water from the Basin to serve the Ecoresort will have secondary effects on the River and will cause Cal–Am to increase its diversion of water from the River to serve its other customers, up to the limit set by an existing Cease and Desist Order. Sierra Club argued this was also likely to occur because of incentives created by the carryover credit provisions in the Adjudication and urged the Board to apply 87 percent of the amount of water pumped to serve the Ecoresort as a credit against permissible production from the River. Sierra Club also asserted that unless the District imposes conditions of approval that eliminate adverse effects on the River, project approval will violate the Environmental Protection Act.

8	In 2007, the SWRCB issued order 2007–0042, which authorized the District and Cal–Am to divert up to 2,426 AFY of water from the Carmel River for storage in the Seaside Basin. The parties entered into an agreement with the National Marine Fisheries Service (NMFS) and the California Department of Fish and Game to implement the ASR project so that water produced from ASR wells would be used to offset Cal–Am's diversions from the river that would otherwise occur during the low flow season.

The superior court had issued an order, based on the parties' stipulation, directing the Board to make a final decision on the Application by its July 2010 meeting. But at its July 2010 meeting, the Board requested additional analysis of issues raised by Board members and in Sierra Club's letter. The Board therefore continued the hearing on the Application to its August 2010 meeting.

***8** On July 26, 2010, Sierra Club submitted a second letter to the Board, which made several of the same arguments as its first letter. In addition, Sierra Club argued that there were new environmental effects that must be considered due to changes in the project, including: (1) SWRCB cease and desist order No.2009–0060(CDO); (2) the Adjudication; and (3) the fact that the project had been redesigned regarding how water is to be delivered. Sierra Club asserted that triennial reductions in Basin usage mandated by the Adjudication that go into effect in 2012 will cause Cal–Am to increase production from the River.

On July 30, 2010, SNG and Cal–Am brought an ex parte application in the *California American* Action that asked the court to find four members of the Board in contempt and order approval of the Application. The court denied the ex parte application, but issued an order reminding the District of its "limited function" with respect to this matter. The court ruled that the District "only has the right to require an accounting of water that is used to assure that no Carmel River water is being used...." The court reminded the District that "no environmental review may be made regarding the use of Seaside Basin water and that commingling of water from two sources does not result in any environmental impacts." The court ordered the Board to make a final decision on the Application at its August 2010 meeting "based solely on the record before it at the close of the public hearing on July 19, 2010" and to report its final decision to the court by August 23, 2010.

After the ex parte order issued, Sierra Club sent the Board three more letters with further argument regarding the Application. Sierra Club's letter dated August 4, 2010 included the declarations of two expert witnesses: (1) Joyce Ambrosius, a fishery biologist with the NMFS, and (2) John Williams, Ph.D., an environmental biologist and former member of the Board. In addition to the points it raised before, Sierra Club argued that penalty provisions in the Adjudication will cause Cal–Am to shift production from the Basin to the River to serve its customers other than the Ecoresort.

Prior to their August Meeting, the Board members received a memorandum from District counsel responding to their questions and the Sierra Club's letters. Among other things, District counsel advised the Board that under the Adjudication, Cal–Am's right to Basin water "is constrained by the fixed amount of SNG's right as an Alternative Producer, regardless of whether SNG actually produces any groundwater. For this reason, the Application will not reduce the amount of Seaside Basin water available to Cal–Am, and will not increase its incentive to divert water from the Carmel River."

At the August 16, 2010 Board meeting, District staff advised the Board that they had met with Cal–Am and crafted additional conditions to the permit to address the Board's concerns. Staff had added language to the proposed findings of approval and revised the conditions of approval. Staff recommended approving the Application, subject to 33 conditions of approval. Staff explained that the California Coastal Commission is typically the last agency to act on any coastal development project. Condition No. 5 required that SNG's coastal development permit be approved for the District's permit to be valid. Condition No. 29 provided that only water from the coastal subarea of the Seaside Basin may used to serve the Ecoresort and set forth an accounting protocol that requires Cal–Am to provide more frequent and detailed data than it provided at the time to show that front-loading is actually occurring. Staff advised the Board that the Application had been conditioned in such a way to "preclude any additional Carmel River water being needed to be pumped to serve the [Ecoresort]." Both District counsel and

staff disagreed with the Sierra Club's key assertions.

***9** At the August 16, 2010 meeting, the Board voted unanimously to set aside their 2009 denial and to approve the Application with findings of approval and the 33 conditions of approval recommended by District staff.

Sierra Club's Petition for Writ of Mandate and Complaint for Declaratory Relief

On September 15, 2010, Sierra Club filed a petition for writ of mandate and complaint for declaratory relief that asked the court to direct the Board to set aside its approval of the Permit Application. The petition alleged that District had violated: (1) District Rule No. 22; (2) the public trust doctrine; (3) Public Resources Code section 21005 by disregarding information disclosure requirements under CEQA; and (4) CEQA Guidelines 15162 and 15065. The declaratory relief cause of action sought a declaration that District has regulatory authority to condition the permit to prevent Cal–Am from diverting water from the River.

Cal–Am and the District answered the petition.

In February 2011, Sierra Club filed a motion seeking a hearing on the writ petition. The motion made many of the same arguments Sierra Club had raised before the Board. Sierra Club also argued that "District imposed no conditions on the permit relating to any effects on the Carmel River and its public trust resources...." Sierra Club asserted that the District violated its own regulations, ignored the CDO, and erred by failing to examine impacts "associated with" the permit. It argued that "associated impacts" include direct, indirect and cumulative impacts of granting the permit and that the District failed to fulfill its duties under CEQA because it did not have sufficient information about the project's environmental impacts before approving it. Sierra Club argued that given future constraints on pumping from the Basin mandated by the Adjudication, it is likely Cal–Am will elect to produce more water from the River within the ceiling imposed by the CDO. It argued that even if Cal–Am remains within its production limits, the District still had a duty to mitigate impacts on the River and that the District abused its discretion when it failed to condition the permit to prohibit diversions from the River.

Cal–Am, SNG, and the District opposed the motion. Cal–Am and SNG argued that Sierra Club's motion ignored existing orders implementing the Adjudication and the front-loading agreement; they asserted that the District's conditions of approval insured that no River water would be used for the project and that there was no evidence to support Sierra Club's claims of impacts on the River. They argued that although Sierra Club participated in the prior litigation, it ignored the court's prior orders and "raised the same arguments repeatedly." They asserted that no further environmental review was required under the Physical Solution, the Adjudication, or *California American.* They asserted that the District did consider whether there would be impacts on the River and properly exercised its discretion by adopting additional conditions. They argued, moreover, that Sierra Club did not present any expert opinion, public testimony or other facts that required the Board to undertake further environmental review and there was no evidence that the conditions imposed were inadequate to assure there will be no impacts on the River. The District argued that it properly exercised its discretion by requiring a strict accounting of water usage.

***10** The trial court denied Sierra Club's petition for writ of mandate and concluded that there was no merit to the claim for declaratory relief. This appeal followed.

Discussion

Contentions on Appeal

Sierra Club contends that the District has a duty under the public trust doctrine and CEQA to protect the River and other public trust resources, and that the District's rules and regulations implement that duty. Sierra Club argues that the Board failed to consider adverse impacts on the Carmel River "associated with" granting the Permit Application and thereby violated its duty under its Rule 22.[9] In particular, it contends that the District failed to identify impacts on the River that will result if Cal–Am offsets increased production from the Basin to serve the Ecoresort by increasing diversions from the River to serve its other customers. Sierra Club argues that the "associated with" language in Rule 22 is broad and that this court

should interpret the rule broadly as requiring a more detailed inquiry than the Board made in this case. Sierra Club contends that the District had a duty to address the effects associated with granting the permit on the Carmel River and was required to mitigate any potential harm by adding a condition to the permit that prohibited Cal–Am from shifting water production for its other customers to the River and thereby increasing diversions from the River. Sierra Club contends that by approving the permit without such a condition, the District abdicated its duties to protect the public trust and provide integrated water management. Sierra Club asserts the District's findings are broadly conclusory and do not trace the analytical route by which the District concluded that the Application complied with Rule 22.

9	Sierra Club uses the terms "regulation" and "rule" interchangeably in referring to the District's rules. We shall refer to the matter at issue as a "rule," since that is the language the District uses. (See <http://www.mpwmd.dst.ca.us/rules/2011/20111222/TOC.htm [as of April 17, 2012].)

The District argues that Sierra Club has failed to demonstrate that the District did not proceed in a manner required by law because Sierra Club ignores the court orders that limited the District's discretion and constrained the extent to which it could undertake environmental review. The District argues that by implementing the front loading agreement suggested by the court, the parties ensured that the environmental impacts of the project were within the purview of the Physical Solution and that the River would not be impacted. The District also argues that its decision was supported by its findings and that its findings were supported by the evidence.

Cal–Am and SNG argue that the permit was within the purview of the Adjudication and that the District properly approved it. They assert that each of Sierra Club's arguments rests on the faulty premise that the water distribution system at issue will impact the River and that there was no evidence that serving the Ecoresort will alter Cal–Am's operations regarding the River or that the front loading agreement and the conditions imposed by the District are inadequate to protect the River.

Standard of Review

***11** The parties dispute the standard of review. Sierra Club argues that the trial court's decision is subject to de novo review; respondents urge us to apply the substantial evidence standard.

Code of Civil Procedure section 1094.5 governs judicial review by administrative mandate of any final decision or order by an administrative agency. (*Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 313 (*Wences*).) It provides in part: "(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. [¶] (c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (Code Civ. Proc., § 1094.5)

Under subdivision (c) of Code of Civil Procedure section 1094.5, the trial court's review of an adjudicatory administrative decision is subject to two possible standards of review, depending upon the nature of the right involved. (*Wences, supra,* 177 Cal.App.4th at p. 313, citing Code Civ. Proc., § 1094.5, subd. (c).) If the administrative decision involves or substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence. (*Wences, supra,* 177 Cal.App.4th at p. 313, citing *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143 (*Bixby*).) In all other cases, the superior court's review is limited to examining the administrative record to determine whether the adjudicatory decision was supported by substantial evidence. (*Bixby, supra,* 4 Cal.3d at p. 144.) Generally, cases involving permit applications do not involve fundamental vested rights. (*SP Star Enterprises, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 459, 470.)

Regardless of the nature of the right involved or the standard of review applied by the trial court, "an appellate court reviewing the superior court's administrative mandamus decision always applies a substantial evidence standard." (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1058 (*JKH*) citing *Bixby, supra,* 4 Cal.3d at pp. 143–144.) In a case such as this, where the superior court properly applied substantial evidence review, "the appellate court's function is identical to that of the trial court. It reviews the administrative record to determine whether *the*

agency's findings were supported by substantial evidence, resolving all conflicts in the evidence and drawing all inferences in support of them." (*Id.* at p. 1058, fn. omitted, italics added.) "If the administrative findings are supported by substantial evidence, the next question is one of law—whether those findings support the agency's legal conclusions or its ultimate determination. [Citation.] If the administrative record reveals the theory upon which the agency has arrived at its ultimate decision, the decision should be upheld so long as the agency found those facts that as a matter of law are essential to sustain the decision." (*Id.* at pp. 1058–1059, citing *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 (*Topanga I*).)[10]

10	Although Sierra Club does not assert any CEQA violations per se, we note that the judicial review of an administrative agency's compliance with CEQA is subject to the same standard of review we employ here. (Pub. Res.Code, § 21168 [review of quasi-judicial decision-making by an administrative agency is by administrative mandamus pursuant to Code Civ. Proc., § 1094.5; "the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record"].)

***12** Sierra Club argues that the *superior court* erred in a variety of ways, including when it concluded that Cal–Am lacked incentive to offset its production from the Basin for the Ecoresort by diverting water from the River, when it determined that there was no factual or causal connection between production for the Ecoresort and the River, and when it concluded that Sierra Club had "failed to 'deal with the factual circumstances of the case.' " But under our standard of review, we review the actions of the District, not the correctness of the superior court's ruling.

Although Sierra Club does not challenge the District's decision on the grounds that the District failed to comply with CEQA, the definition of "substantial evidence" employed in CEQA cases is instructive. "[S]ubstantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (Pub.Res.Code, § 21080, subd. (e)(1).) It "is not argument, speculation, unsubstantiated opinion or narrative...." (Pub.Res.Code, § 21080, subd. (e)(2).) "Mere uncorroborated opinion or rumor does not constitute substantial evidence." (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 900 (*Porterville*).) "An agency may rely on the expertise of its planning staff in determining whether a project will not have a significant impact on the environment. [Citation.] Unsubstantiated fears and desires of project opponents do not constitute substantial evidence. [Citation.] '[I]n the absence of a specific factual foundation in the record, dire predictions by nonexperts regarding the consequences of a project do not constitute substantial evidence.' " (*Id.* at p. 901.)

Issues Regarding the Record on Appeal

Cease & Desist Order No. 2009–0060 is Not in the Administrative Record

In January 2008, the SWRCB gave notice that it intended to issue a cease and desist order against Cal–Am because Cal–Am had failed to comply with the conditions of SWRCB Order 95–10 and continued to illegally divert water from the Carmel River. Cal–Am requested a hearing and several interested parties intervened, including the District, the Watermaster, cities in the Seaside Basin, and the Sierra Club. In October 2009, after conducting eight days of hearings, the SWRCB issued a 64–page CDO (SWRCB Order No.2009–0060).

Before discussing the CDO further, we note that Sierra Club quotes from, cites extensively to, and bases two of its arguments on the CDO. Although Sierra Club asserts that the CDO was part of the administrative record in this case, it does not provide this court with any citations to the administrative record when discussing the CDO. Instead, Sierra Club provides us with an Internet address where we can view the CDO and cites directly to the CDO.

Each and every statement in a brief regarding matters that are in the record on appeal, whether factual or procedural, must be supported by a citation to the record. This rule applies regardless of where the reference occurs in the brief. (Cal. Rules of

Court, rule 8.204(a)(1)(C); *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247; *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239 [record citations in statement of facts do not cure failure to include pertinent record citations in argument portion of brief].) Moreover, as we stated in *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738, "It is the duty of counsel to refer us to the portion of the record supporting his contentions on appeal." "It is neither practical nor appropriate for us to comb the record on [the appellant's] behalf." (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 888.) This is especially true in a case such as this involving a large, complex record.[11] When an opening brief fails to make appropriate references to the record in connection with points urged on appeal, this court may treat those points as waived or may disregard them. (*Nwosu v. Uba, supra,* 122 Cal.App.4th at p. 1246; *Dominguez v. Financial Indem. Co.* (2010) 183 Cal.App.4th 388, 391.) As noted, Sierra Club has failed to comply with this requirement, citing repeatedly to the CDO without citing to the record on appeal. Cal–Am and SNG's brief also cites to the CDO.

11	The administrative record consists of 3948 pages; the other record components add approximately 250 pages.

***13** There is a second problem with the CDO. In its opening brief on appeal, Sierra Club states, at least three times, that the CDO is "part of the Administrative Record," but does not provide any record citations that support that assertion. We have reviewed the record carefully and cannot find a copy of the CDO in the administrative record or any other part of the record on appeal. In spite of Sierra Club's representations to the contrary, that is probably why it cites to the Internet and the CDO directly, rather than the record on appeal. Generally, documents and facts that were not presented to the trial court (or the administrative agency in a case such as this) are not part of the record on appeal and will not be considered by the appellate court. (*Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632 (*Pulver*).) On appeal, the parties cannot make arguments that rely on facts outside the record; statements in the briefs that are based on improper matter may be disregarded by the appellate court. (*Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625; *Pulver, supra,* at p. 632.) We do note, however, that the District's finding of approval No. 24 (which is not at issue on appeal) lists the CDO as supporting evidence. Sierra Club could have cited finding No. 24 as support for its claim that the CDO was in the record; but it did not, requiring this court to expend needless time determining whether or not this document was in the record.

Another way Sierra Club could have addressed this problem was by asking this court to take judicial notice of the CDO. (Evid.Code, §§ 459, 452, subd. (c) [official acts of an executive department of any state].) But Sierra Club has not asked us to take judicial notice of the CDO or any other matter. Since the District relied on the CDO as evidence in support of its finding No. 24, we shall exercise our discretion to take judicial notice of the CDO on our own motion. (Evid.Code, §§ 459, 452, subd. (c); *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 37, fn. 2.) However, having taken judicial notice of the CDO, we have the discretion to decide what effect to give the matter in deciding the issues on appeal. (*Doers v. Golden Gate Bridge, Highway & Transp. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1.) Moreover, although we may take judicial notice of the records of a court or an agency that has adjudicatory functions, "[j]udicial notice of findings of fact does not mean those findings are true, but simply that they were made. [Citations.] Thus, while a court can take judicial notice that a court [or other trier of fact] made a particular ruling, it cannot take judicial notice of the truth of a factual finding made in another action." (*People v. Moore* (1997) 59 Cal.App.4th 168, 178.) In this case, we shall review the CDO as part of the background history of the adjudication of water issues on the Monterey Peninsula and to the extent that the District and the Board relied on the CDO in granting the Permit Application, but we shall disregard Sierra Club's arguments based on evidence presented in the CDO proceedings.

Background: Findings and Orders in CDO

Returning to the CDO, we note that the proceedings before the SWRCB that led to the CDO took place in 2008 and 2009, about the same time as the initial hearings before the District on the Permit Application. In the CDO, the SWRCB found that "... Order 95–10 require[d] Cal–Am to diligently implement actions to terminate its unlawful diversions" from the Carmel River. Although Cal–Am diverted 3,376 AFY under legal rights, it continued to divert an additional 7,602 AFY "without a basis of right for the past 14 years," and in the 10–year period before the CDO was issued "Cal–Am has not made any meaningful progress toward reducing the amount of its unlawful diversions. Further, Cal–Am has not diligently implemented smaller water supply projects that could have enabled Cal–Am to reduce its illegal diversion from the river and to alleviate serious condition affecting the survival of steelhead.... [¶] The lower 6.5 miles of the riverbed are dry for five to six months of each year, due primarily to Cal–Am's diversions. Cal–Am's diversions from the river continue to have an adverse effect on the fish, wildlife and riparian habitat of the river, including the threatened steelhead. Since the adoption of Order 95–10, the California Central Coast Steelhead has been declared as threatened under the Endangered Species Act, and the Carmel River has been declared as critical habitat for the survival of the steelhead." The SWRCB observed that the Adjudication of the

Seaside Basin groundwater will decrease the supply of water available to Cal–Am's customers by about 2.8 percent in 2009 and found that the District views water illegally diverted from the river by Cal–Am "as available water supply for growth. Because water has been available for growth, the peninsula cities and their residents have had little incentive to support or pay for ... projects to obtain a legal supply of water that can be substituted for the illegal diversions from the river." The SWRCB therefore ordered Cal–Am to "diligently implement actions to terminate its unlawful diversions from the Carmel River and ... terminate all unlawful diversions from the river no later than December 31, 2016."

***14** The CDO prohibited Cal–Am from diverting water from the river "for new service connections or for any increased use of water at existing service addresses resulting from a change in zoning or use." The order established a schedule of annual reductions in Cal–Am's *illegal* diversions from the River for 2009 through 2017 and projected that illegal diversions would be reduced to zero by Water Year[12] 2016–2017 when the Coastal Water Project begins production.

12	"Each water year runs from October 1 to September 30 of the following year."

The CDO directed Cal–Am to undertake a number of other water projects and reduction measures to reach mandated reduction requirements and ordered Cal–Am to provide detailed quarterly reports to SWRCB summarizing its progress on those projects. The CDO modified some of the conditions on Order 95–10 and deleted a condition relating to the Seaside Basin "because [the Watermaster] will determine the manner in which water may be withdrawn from the groundwater basin." The CDO provides that it shall remain in effect until Cal–Am certifies "that it has obtained a permanent supply of water that has been substituted for the water illegally diverted from the Carmel River" and the Deputy Director for Water Rights concurs.

The record is not entirely clear on the status of the CDO. It appears that Cal–Am and the District have challenged the CDO in court and that enforcement of the CDO may have been stayed.[13] As we have noted, the District referred to the CDO at the hearing on the Permit Application in August 2010. At the hearing on Sierra Club's petition for writ of mandate in April 2011, the trial court stated that the CDO was "in operation now."

13	We take judicial notice of this court's file in *Monterey Peninsula Water Management District, et al., v. Superior Court,* Case No. H035234, which reveals that after the SWRCB issued the CDO, Cal–Am and the District filed petitions for writ of mandate and complaints for declaratory relief in the superior court challenging the CDO. The SWRCB moved for a change of venue and the District requested a stay of the CDO. The Monterey County Superior Court granted the stay request and the motion for change of venue and transferred the writ petitions to Santa Clara County Superior Court. In April 2010, this court denied the District's petition for writ of mandate challenging the superior court's change of venue and stay orders.

Evidence Submitted by Sierra Club After July 19, 2010

On July 30, 2010, the trial court ordered the District to make a decision on the Permit Application based on the evidence in the record as of July 19, 2010. As we have noted, after July 19, 2010, Sierra Club submitted four more letters to the Board. Sierra Club attached evidentiary materials to its August 4, 2010, letter, including (1) the declaration of Joyce Ambrosius, a fishery biologist, which was submitted as evidence in the CDO proceedings; and (2) the declaration of John Williams, Ph.D., an environmental biologist, which was submitted in the mandate proceedings challenging the CDO on the question of the propriety of a stay.

In contrast to the CDO (which is not in the administrative record but was considered by the District when it granted the Permit Application), although the declarations attached to Sierra Club's letter are in the administrative record, the court ordered the Board not to consider them. The Board was well aware of the court's order. At its August 2010 meeting, District staff reminded the Board of the court's order and told the Board that it "may only address" evidence that was before it as of

July 19, 2010. Sierra Club did not object and told the Board that its letters could "be fairly characterized as legal argument."

***15** On appeal, Sierra Club does not challenge the Board's decision to close the record or the superior court's order directing the Board to make a decision based on the record as of July 19, 2010. But in its brief on appeal, Sierra Club relies on evidentiary materials that were not properly before the Board. In summary, although this material is physically in the record on appeal, it was not considered by the Board. For the purpose of our review, we shall disregard evidence that was not properly before the Board, as well as Sierra Club's argument based on that evidence.

Alleged Rules Violations

District Rules at Issue

Sierra Club relies on the following District ordinance and rules. In August 2005, the District adopted ordinance No. 122, "Creating An Impact–Based System For Water Distribution System Permits." When it adopted the ordinance, the District made the following findings: "3. ... that regulating all water distribution systems, ... is necessary to protect District water resources and to assure that sufficient water will be available for present and future beneficial use by all District inhabitants and lands.... The need for these protective efforts has been heightened by [Order] 95–10, and the listing of the California red-legged frog and steelhead as threatened species under the federal Endangered Species Act ..., resulting in the need to protect the public trust resources of the Carmel River.... [¶] 4. The [District] has enacted, by ordinance, a set of Rules and Regulations to implement its statutory authority. District Rule 11 defines the terms used in the regulation of water distribution systems.... District Rules 20, 21, 22, 40, 54–56, 60, 114 and 173 further define procedural and substantive rules that regulate these systems."

Sierra Club's principal argument on appeal is that the Board's decision on the Permit Application violated District Rules, rule 22, subdivisions (B)(3), (B)(6), and (D)(1)(i) (hereafter Rule 22). Subdivision B of the Rule 22 contains Board findings. It provides in relevant part: "B. *FINDINGS* [¶] In order to protect public trust resources, prior to making its discretionary decision to grant or deny any Permit to Create or Establish any Water Distribution System, ... the Board ... shall determine: ... [¶] 3. Whether the proposed Water Distribution System would result in significant environmental effects that cannot be mitigated by conditions attached to the Permit; and ... [¶] 6. Whether the Source of Supply is shared by any other Water Distribution System, and if so, the extent to which cumulative impacts may affect each Source of Supply, and species and habitat dependent upon those Sources of Supply."[14]

14	The District defined: (1) "Permit" as "any written approval by the staff or Board of the [District], based on an application, request, or appeal"; (2) "Source of Supply" as "the Groundwater, surface water, Reclaimed Water sources, or any other water resource where a Person, Owner or Operator gains access by a Water–Gathering Facility"; and (3) "Water Distribution System" as "all works within the District used for the collection, storage, transmission or distribution of water from the Source of Supply to the Connection of a system providing water service to any Connection including all Water–Gathering Facilities and Water–Measuring Devices. In systems where there is a water meter at the point of Connection, the term 'Water Distribution System' shall not refer to the User's piping; in systems where there is no water meter at the point of Connection, the term 'Water Distribution System' shall refer to the User's piping." (District Rule No. 11.)

***16** Subdivision D of Rule 22, entitled "Mandatory Conditions of Approval," provides in relevant part: "1. ... In addition to the following mandatory conditions, the Board or hearing officer may impose other conditions in granting the Permit: ... [¶] (i) Permit shall identify which mitigation measures, if any, are required to address potential adverse environmental impacts *associated with* the proposed Water Distribution System, and specify funding mechanism, if applicable." (Italics added.)

Sierra Club contends that the District failed to comply with these provisions of Rule 22 because it "failed to identify impacts on the River that would result if Cal–Am chose to offset any augmented production from the Seaside Basin to serve SNG by diverting water from the Carmel River to serve other customers previously served with Seaside Basin water (so long as it was below SWRCB production limits)."

Interpretation of District Rules

Sierra Club urges us to interpret the phrase "associated with" in Rule 22, arguing that it is analogous to the phrase "related to," which was construed by the court in *Chawanakee Unified School District v. County of Madera* (2011) 196 Cal.App.4th 1016 (*Chawanakee*). *Chawanakee* analyzed the amendment of Government Code section 65996, which governs methods of considering and mitigating impacts on school facilities by legislative or adjudicative acts. The *Chawanakee* court explained that the phrase "related to" is generally interpreted broadly by the courts and encompasses both logical and causal connections. (*Chanawakee, supra,* at p. 1028.) The court stated that "[u]se of the term 'related to' with 'environmental effect' [in Government Code section 65996] appears to include both direct effects on the school facilities and indirect effects on parts of the environment other than the school facilities." (*Ibid.*) The court also stated that "the [CEQA] Guidelines' definition of 'effect' uses the term 'related to' in its expansive description of indirect or secondary effects." (*Ibid.,* citing Cal.Code Regs., tit. 14, §§ 15000 et seq. (hereafter CEQA Guidelines) & § 15358, subd. (a)(2).)

Sierra Club argues that the CEQA Guidelines use the terms "related to" and "associated with" interchangeably, citing CEQA Guideline 15130, subdivisions (a)(1), (a)(2) and (b)(1)(B). We are not persuaded that because the phrase "associated with" appears in subdivision (a)(2) of the Guideline and the word "related" appears in other subdivisions of the Guideline that the Guideline uses the two phrases interchangeably.

Sierra Club asserts that since Rule 22 contains the terms "associated impacts" and "cumulative impacts," this court should interpret the rule broadly and find that the District "intended to require, in connection with water distribution permit analysis, a more detailed inquiry" that required consideration of both the cumulative impacts and the associated impacts of granting the Permit Application. Sierra Club then argues that "[a]ny potential effect on the Carmel River through increased diversions" from the River to offset increased production in the Basin is an impact associated with the Permit Application, which the District had a duty to mitigate.

Respondents do not respond to Sierra Club's rule interpretation argument. We shall assume, without deciding, for the purpose of our analysis that the phrase "associated with" in Rule 22(D)(1)(i) should be interpreted broadly.

Analysis of Alleged Rules Violations

We begin by reviewing the nature of SNG's water right. Under the Adjudication, SNG's water allocation as an Alternative Producer is "a prior and paramount right ... in perpetuity" over that of any the Standard Producers. As long as SNG limits its use to its own property and adopts reasonably feasible water conservation methods, SNG's water rights are not subject to any reductions. Standard Producers are required to reduce their groundwater extractions if the court, the Watermaster, or other competent governmental entity requires a reduction. Only after Standard Producers have reduced their extractions to zero may an Alternative Producer be required to reduce its extractions.

***17** Sierra Club argues that "[u]nder the Adjudication ... Cal–Am has substantial incentive in any year to reduce its production from the Seaside Basin as much as possible to maximize its carry-over credits and to avoid the cost of replenishment assessments due to over-production." This argument assumes that producing SNG's water right will impact the amount of water available for Cal–Am to serve its other customers. But the Adjudication provides for separate water allocations to Cal–Am (which it uses to serve its existing customers) and SNG (which SNG is not currently using) from the existing water in the Basin. Cal–Am was awarded 77.55 percent of the operating yield in the Coastal subarea, SNG was awarded 2.89 percent of the operating yield in that subarea, and the remaining 19.56 percent was awarded to other producers with water rights in the Coastal subarea. As District counsel noted, Cal–Am's right to Basin water is "constrained by the fixed amount of SNG's right as an Alternate Producer, regardless of whether SNG actually produces any groundwater." We fail to see how the use of the portion of Basin water that was allocated separately to SNG will affect the manner in which Cal–Am serves its other customers. As the trial court observed, this argument is really an attack on the carryover and replenishment provisions of the Adjudication, which the trial court's previous ruling prohibits.[15]

15	In response to Sierra Club's incentives argument, District staff advised the Board that in addition to the requirements of the Adjudication, the front-loading agreement, and the District's conditions, Cal–Am is subject to the District's Quarterly Water Supply Budget and Strategy, which requires Cal–Am to first use its Basin groundwater rights, then to use water that's been injected through the ASR project, before Carmel River water may be used.

In reviewing this point, we are also mindful that only Standard Producers like Cal–Am are entitled to carry-over credits; Alternative Producer's like SNG are not entitled to carryover credits. Since the Application involves the production of SNG's water allocation, there will be no carry-over credits. Thus, we fail to see how the Application creates an incentive for Cal–Am to shift production[16] to the river to maximize carry-over credits.

16	Sierra Club argues that a chart prepared by District staff for the CDO proceedings demonstrates that Cal–Am shifted production from the Coastal subarea in 2005 and 2009. We are not persuaded that the chart shows a shift in production. The chart indicates that Cal–Am's actual production for customers in its main system from both the River and the Coastal subarea was below the production limits set by Order 95–10 and the Adjudication for every year between 2005 and 2009, except for production from the Basin in 2007. However, the chart does not consider Cal–Am's carryover credits from the previous year, which more than covered its Basin overdraft in 2007. Each year during the period in question, production from the River remained 5 to 7 percent below production limits even after the production limits were reduced in 2008 and 2009. Although the chart shows that Cal–Am was below its production limits for the years in question, it does not necessarily prove a shift in production in 2005 and 2009.

At its August 2010 meeting, the District's counsel and staff reviewed the limitations on District discretion established by the Adjudication, the trial court's May 2009 order, and this court's holdings in *California American.* In a written memorandum that was part of the public record, counsel reminded the Board that groundwater management of the Seaside Basin is controlled by the Adjudication and that no party to the Adjudication could require environmental review under CEQA with regard to Seaside Basin usage. Counsel advised that "the District may only evaluate impacts that would result from use of Carmel River water" and that "[w]ith respect to concerns about impacts on the Carmel River, the trial court held that commingling water from the Carmel River and the Seaside Basin in storage tanks does not implicate effects on the Carmel River as a matter of law." Counsel stated that pursuant to the court's ex parte order of July 30, 2010 (which is not challenged on appeal) the District "only has the right to require an accounting of water that is used to assure that no Carmel River water is being used" to serve the project.

***18** Counsel advised that "[u]nder these orders, the Board retains the discretion to determine whether ... the ... permit will cause the use of water from the Carmel River and whether that use will result in significant environmental impacts. In exercising this discretion, the Board can evaluate the adequacy of the current front-loading agreement and determine whether it provides sufficient detail to ensure that the ... permit will not divert Carmel River water to serve the Project. The District may remedy any ambiguities in the front-loading agreement, without requiring [a supplemental EIR], by imposing conditions ... that are designed to ensure that no Carmel River Water will be used to serve the Project. District staff have proposed conditions designed to make the front-loading agreement more specific and enforceable such that the District can account for water use related to the project." Counsel advised the Board that it could require preparation of a supplemental EIR "only" if it found "that (1) the Application cannot be conditioned to avoid the increased diversions; and (2) any increased diversions from the Carmel River will result in new or more severe significant impacts on the environment" and that if the Board made such a decision, it needed to make detailed findings to support that decision based on substantial evidence.

The front-loading agreement stated that Cal–Am and SNG entered into the agreement "(1) to make clear that they intend[ed] to comply with the terms of the [Adjudication and the court's May 2009 order]; (2) to ensure operationally that only Seaside Basin water is produced and stored for the benefit of the SNG property in advance of SNG demand for such water, and (3) to provide assurance (in addition to accounting and reporting requirements) that there will be no temporal or other impact on waters produced or stored from other sources, including without limitation, the Carmel River." SNG agreed to lease up to 90 AFY of its allocated water rights under the Adjudication to Cal–Am. Cal–Am agreed to produce SNG's basin water "as frequently as necessary ... in an amount that ensures that the SNG property will be supplied only with Seaside Basin water" and store it in Cal–Am's Hilby tanks or other storage facility in advance of actual usage by the Ecoresort.

The record reflects that the Board was aware of the requirement to comply with its own rules. Staff told the Board that "[R]ule 22 D ... guides our actions." The District's Finding No. 9, which by its terms addresses the requirements of Rule 22(B)(3), concluded that approval of the Application "would not result in significant adverse impacts to" the Basin or the River. Finding No. 9 observed that in the Adjudication, the court had determined the natural safe yield for the Basin; specified the pumping rights of property owners, including 149 AFY for SNG; and determined that serving SNG's parcel from Cal–Am wells further inland is an overall benefit to the integrity of the Basin and part of the Physical Solution. Finding No. 9 also concluded that the front-loading agreement, "with adequate documentation as required in [the District's] Conditions of Approval # 29 and # 30, is consistent with the [trial court's] May 11, 2009 ... finding [(which this court affirmed in *California American*)] that with adequate 'front-loading,' there is [*sic*] no resultant adverse impacts to the [River]."

Condition of Approval No. 29 provides that Cal–Am "shall implement strict water accounting methods approved by the [District's] General Manager to track [Cal–Am] production sources to ensure: (a) only water from wells in the Coastal Subareas of the Seaside Basin wells serve the [SNG] parcel ... and (b) no Carmel River Basin water is produced by [Cal–Am] to serve the subject parcel, consistent with the May 11, 2009 Court Order and the [front-loading agreement]. [Cal–Am] shall submit weekly reporting of daily [Ecoresort]-related water production data in the manner and form as prescribed by the District," as per Attachment 3 to the conditions. Staff told the Board that the purpose of this condition was to obtain "the data showing that front-loading is actually occurring."

Attachment 3 requires that starting one month before the master meter is set on the Ecoresort, Cal–Am is to provide the District with: (1) daily production records for its wells in the Coastal subarea on a weekly basis; (2) daily outflow records for Cal–Am's Hilby tanks on a weekly basis during the period November through April;[17] and (3) for the first two years of actual operation, weekly records of water delivery to the SNG property during the period November through April. Attachment 3 stated that at the time the permit was granted, Cal–Am was providing daily production records and water delivery records to the District on a monthly basis and did not provide outflow records. Thus, the District increased the frequency of reporting and the type of reporting it had previously required to insure that only Basin water is used to supply the Ecoresort. Staff advised the Board that the District's general manager and Cal–Am's general manager had "worked together on this data set so we know it's an achievable data set in terms of how the Cal–Am system works."

17	During this time period, "flow in the Carmel River at the Highway 1 Bridge gage exceeds 40 cubic feet per second and Cal–Am is required to minimize its pumping from the Seaside ... Basin" pursuant to SWRCB Order WR 98–04.

***19** Condition No. 30 required Cal–Am to submit a written water accounting protocol "regarding the sole use of Seaside Wells to serve the [Ecoresort] project" within 90 days of approval of the Permit Application and stated that the protocol should include the components itemized in Attachment 4 to the conditions. Attachment 4 contained details regarding: (1) the frequency and duration of water to be pumped to insure sufficient amounts of water are stored for the Ecoresort; (2) back-up wells in case of well failure; (3) estimating monthly water demand; (4) maintaining a buffer in case of unexpected demand from the Ecoresort; and other matters. It specifies "what wells are going to be turned on to ensure" that front-loading occurs. The protocol is designed to be an "instruction manual" for Cal–Am's employees and must be approved by the District's general manager.

Returning to Rule 22, even interpreting the rule broadly, we are not persuaded that the Board's decision to grant the Permit Application violated the District's rules. As our review of the record illustrates, the Board complied with its obligation under Rule 22(B)(3) to determine "[w]hether the proposed Water Distribution System would result in significant environmental effects that cannot be mitigated by conditions attached to the Permit." In its Finding No. 9, the District specifically found that granting the permit would not result in significant impacts to either the Basin or the River that could not be mitigated by the conditions attached to the permit. The findings of the Adjudication, the nature of SNG's water rights, the front-loading

agreement, the strict water accounting, and the establishment of a detailed water delivery protocol insured that only Basin water would be used for the Ecoresort.

As we have noted, Rule 22(B)(6) required the District to determine "[w]hether the Source of Supply is shared by any other Water Distribution System, and if so, the extent to which cumulative impacts may affect each Source of Supply, and the species and habitat dependent upon those Sources of Supply." The District's Finding No. 12, which by its terms addresses Rule 22(B)(6), concludes that "[w]ith adequate documentation as required in ... Conditions of Approval # 29 and # 30, the source of water supply is the [Cal–Am] water distribution system, solely from wells in the Seaside Basin, consistent with the court's orders and the front-loading agreement. The cumulative effects of [issuing the permit] do not result in significant adverse impacts to the source of supply due to actions by the Superior Court to reduce Seaside Basin pumping to the natural safe yield." Thus, the District acknowledged that, as set forth in the Adjudication, the Basin was a shared source and users other than SNG had rights to use water in the Seaside Basin. The District also concluded that the conditions it imposed requiring a strict water accounting and adherence to the water protocol would insure that only water from the Basin will be used to serve the Ecoresort, and that the cumulative impacts of providing water to SNG had already been addressed by the court in the Adjudication (which defined SNG's water right) and the court's subsequent rulings. We perceive no violation of District Rule 22(B)(6).

Rule 22(D)(1)(i) required the District to "identify which mitigation measures, if any, are required to address potential adverse environmental impacts *associated with* the proposed Water Distribution System, and specify funding mechanism, if applicable." (Italics added.) Sierra Club's primary contention on appeal is that the District ignored alleged impacts on the Carmel River associated with granting this permit. But as we have already explained, the parties and the District acted to insure that there would be no potential adverse environmental impacts on the River associated with this permit application. The trial court had held that "the Physical Solution governs the environmental aspects of the Seaside Basin groundwater usage" and that no party to the Adjudication "can require environmental review under CEQA with regard to such usage." The court had also held that "[a]s a matter of law, commingling of water and storage from different sources does not transmute Carmel River water into Seaside Basin water" or vice versa, that the District has "authority to require an accounting of water quantity to satisfy itself that no Carmel River water is being used, but it cannot make environmental decisions based upon mere storage of water from two sources," and that if there is an agreement between "Parties within the Seaside Basin [that] includes a provision for 'front loading' or 'prior to delivery' production of water from the Seaside Basin that was adequate to cover draw down from another Party with adjudicated water rights, there would be no issue as to Carmel [R]iver water." SNG and Cal–Am entered into just such an agreement. The District reviewed the agreement and imposed conditions requiring a strict water accounting and preparation of a water protocol related to the permit at issue, which enable the District to exercise oversight over water delivery to the Ecoresort and insure that no River water will be used. Working with the parties, the District identified the mitigation measures necessary to insure that no River water will be used for the Ecoresort, within the parameters set by the court in the Adjudication and its May 2009 order, and thereby complied with the requirements of Rule 22(D)(1)(i).

***20** For all these reasons, we reject Sierra Club's contention that the District violated Rule 22.

Sufficiency of the District's Findings to Enable Judicial Review

Sierra Club argues that the District's findings are broadly conclusory and do not trace the analytical route by which the District concluded that SNG and Cal–Am had complied with Rule 22. As Sierra Club notes, "[t]he findings of an administrative agency must be sufficient to enable the parties to determine whether and upon what basis they should seek review and to allow a reviewing court to determine the basis for the agency's action. (*Topanga* [*I, supra,*] 11 Cal.3d 506, 514....) However, great specificity is not required. It is enough if the findings form an analytic bridge between the evidence and the agency's decision. (*Id.,* at p. 515.) In addition, findings are to be liberally construed to support rather than defeat the decision under review. [Citation.] '[W]here reference to the administrative record informs the parties and reviewing courts of the theory upon which an agency has arrived at its ultimate finding and decision it has long been recognized that the decision should be upheld if the agency "in truth found those facts which as a matter of law are essential to sustain its ... [decision]." [Citations.]' " (*Topanga Assn. for a Scenic Community. v. County of Los Angeles* (1989) 214 Cal.App.3d 1348, 1356–1357 (*Topanga II*).)

In support of its argument, Sierra Club quotes only District Finding No. 6, which states, "The Application ..., along with supporting materials, is in accordance with District Rules 21 and 22." Sierra Club also mentions Finding No. 12, which we have already reviewed. Sierra Club fails to mention that Findings Nos. 7–11 and 13–20 also address different aspects of Rule 22. Moreover, each of the District's findings cites the specific subdivision of Rule 22 that it addresses and is followed by a list of the evidence that supports each finding. The District's findings and citation to the evidence clearly meet the

requirements of *Topanga I* and *Topanga II.*

Sierra Club also argues that the District failed to take into account the findings of the CDO regarding Cal–Am's unlawful diversions from the River. But the record reflects the contrary. As noted, the District relied on the CDO as evidence in support of its Finding No. 24.

Sufficiency of the Conditions Imposed by the District

Sierra Club argues that the District had a duty under Rule 22 to "mitigate any potential harm by attaching a condition to the [permit] prohibiting Cal–Am from increasing its diversions from the River to offset loss of (or augmented) production from the [Basin] associated with water service to SNG." At the August 2010 Board meeting, Sierra Club proposed adding a condition that required the District's general manager to determine periodically "whether Cal–Am has shifted its production." On appeal, Sierra Club asserts that the amount of any production "offset [should] be deducted from the ensuing year's maximum production allowance (as calculated under the ... CDO)." In essence, Sierra Club argues that the conditions attached to the permit are insufficient to insure that no River water will be used.

***21** Condition 2 of Order 95–10 provided that one of the ways Cal–Am could terminate its unlawful diversions from the River was to "obtain water from other sources of supply and make one-for-one reductions in its unlawful diversions...." While the Permit Application was pending, Sierra Club asked the SWRCB "for a determination whether the one-for-one reduction of Condition 2 of ... Order 95–10" applies to the water that will be pumped to serve the Ecoresort. SWRCB responded that because water being supplied from the Basin had been allocated to SNG by the Adjudication, Cal–Am was not required to make one-for-one reductions to serve this project. It added that "Cal–Am should not in any case supply this project with Carmel River water" and "recommend[ed] that the District require Cal–Am to implement strict water accounting methods" to insure that River water does not serve the Ecoresort.

We have carefully reviewed the conditions imposed by the District as part of its decision to grant the permit and are satisfied that the water accounting and water protocol mandated by Conditions Nos. 29 and 30 and Attachments Nos. 3 and 4 are sufficient to insure that no River water will be used to supply the Ecoresort within the parameters of the Adjudication and the court's May 2009 order. The conditions provide for weekly accounting to (and thus oversight by) the District of the water that will be front loaded to serve SNG's property. The conditions require Cal–Am to report the amount of water pumped from the Basin to the storage tanks, and during the critical time frame, the amount of water flowing out of the tanks and the amount of water actually delivered to the Ecoresort. They require that a certain amount of water be pumped as a buffer and provide for contingencies in the event one of the wells fails. In light of the trial court's May 2009 order that commingling and storage of water from different sources does not transmute Basin water into River water and vice versa, and the fact that SNG's water allocation is separate and distinct from that water allocated to Cal–Am, we hold the existing conditions are sufficient.

Moreover, Sierra Club does not point to any evidence that indicates that the conditions imposed by the District are insufficient to insure that River water will not be used to serve the Ecoresort. Sierra Club's arguments to the contrary, "[u]nsubstantiated fears and desires of project opponents do not constitute substantial evidence. [Citation.] '[I]n the absence of a specific factual foundation in the record, dire predictions by nonexperts regarding the consequences of a project do not constitute substantial evidence.' " (*Porterville, supra,* 157 Cal.App.4th at p. 901.)

For all the reasons set forth above, we conclude that the evidence supports the District's findings and the findings support its decision to grant the permit with conditions. We hold that the District did not abuse its discretion and that the trial court properly denied the writ petition.

Declaratory Relief Complaint

Although respondents' briefs address the propriety of the trial court's decision on the declaratory relief complaint, Sierra Club does not challenge the trial court's ruling on the declaratory relief cause of action. Consequently, that issue is not before us on appeal.

Disposition

The judgment is affirmed.

WE CONCUR:

RUSHING, P.J.

PREMO, J.

All Citations

Not Reported in Cal.Rptr., 2012 WL 3329619