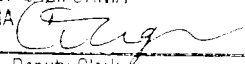


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**FILED**

OCT 28 2008

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SONOMA  
By   
Deputy Clerk

8 SUPERIOR COURT OF CALIFORNIA  
9 COUNTY OF SONOMA

10 SONOMA COUNTY WATER COALITION,  
NORTH COAST RIVERS ALLIANCE,  
11 WESTSIDE ASSOCIATION TO SAVE  
AGRICULTURE, ATASCADERO CREEK  
12 GREEN VALLEY CREEK WATERSHED  
COUNCIL, O.W.L. FOUNDATION, RUSSIAN  
13 RIVER WATERSHED PROTECTION  
COMMITTEE, BELLEVUE TOWNSHIP,  
14 SEBASTOPOL WATER INFORMATION  
GROUP, FRIENDS OF THE EEL RIVER,  
15 PETALUMA RIVER COUNCIL, COAST  
ACTION GROUP, BLUCHER CREEK  
16 WATERSHED COUNCIL, COMMUNITY  
ALLIANCE WITH FAMILY FARMERS,  
17 FOREST UNLIMITED and ELEANOR KNEIBLER,

SCV 240367

DECISION RE:  
WRIT OF MANDATE

18 Petitioners/Plaintiffs,

19 v.

20 SONOMA COUNTY WATER AGENCY,  
SONOMA COUNTY WATER AGENCY  
21 BOARD OF DIRECTORS (aka SONOMA  
COUNTY BOARD OF SUPERVISORS),  
22 and DOES 1-20, inclusive,

23 Respondents/Defendants,

24 and DOES 21-50, inclusive,

25 Real Parties in Interest.,  
26 \_\_\_\_\_ /

27 //

28 /

I.  
INTRODUCTION

The Legislature has declared that “every urban water supplier should make every effort to ensure the appropriate level of reliability in its water service sufficient to meet the needs of its various categories of customers during normal, dry, and multiple dry water years.” The Act includes the Legislative pronouncement that “[a] long-term, reliable supply of water is essential to protect the productivity of California's businesses and economic climate.” Water Code § 10610.2.

Petitioners here seek a peremptory writ of mandamus, declaratory relief, temporary and permanent injunctive relief, costs, and attorney's fees. This writ is sought pursuant to, *inter alia*, Water Code section 10651, which provides that judicial review of an urban water management plan shall address whether the respondent has proceeded in the manner required by law and if its action is supported by substantial evidence.<sup>1</sup>

Petitioners challenge the 2005 Urban Water Management Plan (“Plan”) prepared by the Sonoma County Water Agency (“SCWA”), pursuant to the Urban Water Management Planning Act, codified at Water Code §§ 10610 et. Seq. (“Act” or “UWMPA”).<sup>2</sup> Relief is sought pursuant to the Act and the Public Trust Doctrine. In

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<sup>1</sup>Review is also sought pursuant to Code of Civil Procedure section 1085, which provides that a writ of mandate “may be issued by any court . . . to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station.” Petitioners seek a peremptory writ of mandate, and declaratory relief pursuant to Code of Civil Procedure section 1060, which provides, in pertinent part, that “[a]ny person . . . who desires a declaration of his or her rights or duties with respect to another . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action, in the superior court . . . for a declaration of his or her rights and duties in the premises . . . .” Petitioners also request temporary and permanent injunctive relief pursuant to Code of Civil Procedure sections 526 and 527 and Civil Code section 3422, which authorize this Court to issue temporary and permanent injunctive relief where, and if, the respondents have violated duties owed to the petitioners and threaten unlawful action which might cause irreparable harm to the petitioners.

<sup>2</sup>Unless otherwise stated, all statutory references are to the Water Code.

1 general, Petitioners allege that the Plan (AR 66697-66851) fails to adequately and  
2 accurately inventory, assess and allocate ground and surface water resources.  
3 overlooks ground and surface water contamination, overstates water supplies,  
4 understates water demands, and thus threatens to induce unsustainable urban  
5 development throughout the area that will outpace water supplies. Respondents are  
6 hereinafter collectively referred to as "Respondents" or "SCWA" or "Agency".

7 The court determines that the Plan is not supported by substantial evidence, and  
8 accordingly, the court grants the writ of mandate vacating approval of the Plan. The  
9 court remands this matter to Respondents, who shall comply with statutory  
10 requirements in preparing its Urban Water Management Plan.

11 As more fully discussed below, the Plan has identified a potential shortfall in  
12 water supply, starting in 2020. This shortfall ranges from 2,646 afy,<sup>3</sup> increasing to  
13 15,479 afy by 2030. To address this shortfall, the Plan relies upon certain assumptions,  
14 with the admonition in Section 1-4 that those agencies intending to utilize the Plan "as a  
15 reference for analysis of water availability are encouraged to check with the [SCWA] or  
16 their appropriate water contractor for updated information regarding" the Plan's  
17 assumptions. These assumptions include the construction of facilities for the  
18 transmission of water; that the listing of salmonid species under the federal Endangered  
19 Species Act will not reduce the water supply; and that the necessary licenses required  
20 to meet the potential shortfall will be obtained. To address these potential shortfalls,  
21 the Plan relies on voluntary reductions by its wholesale customers, and reduced  
22 allocations. In addition, the Plan contemplates that the SCWA may petition the State  
23 Water Resources Control Board for relief from the temporary flow requirements in the  
24 Russian River and Dry Creek in order to allow for increased availability of water.

25 Under the Plan, while the *volume* of available water may be adequate to meet  
26 future demands, the *availability* of that water has not been adequately addressed. Even  
27

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28 <sup>3</sup>As used herein, "afy" or "af/y" refers to acre feet per year.

1 if there is a sufficient volume of water to draw from, access may be limited for other  
2 reasons, such as environmental considerations and the existence of suitable facilities  
3 for the transmission of that water. In addition, the Plan is flawed for lack of compliance  
4 with the governing statutes relative to the method and scope of preparation.

5 With regard to the anticipated additional 26,000 afy of Russian River flows  
6 necessary to support the anticipated demand, the SCWA does not yet possess the  
7 rights to such flow, and there are factors which the Plan admits may affect the ability to  
8 obtain those necessary rights. If the SCWA's application for the increased diversions is  
9 rejected, allowing diversion only at current levels, the projected demand may exceed  
10 the available supply of water in less than ten years.

11 As more fully explained below, the court has determined that the Plan is deficient  
12 as follows:

- 13 (1) The SCWA failed to coordinate with relevant agencies as required by the  
14 Act;
- 15 (2) The Plan fails to include the degree of specificity required by the Act;
- 16 (3) The Plan fails to adequately consider environmental factors, specifically,  
17 the effect of changed water flows during periods of water shortfalls on the  
18 salmonids, and other potential implications of the Environmental Species  
19 Act;
- 20 (4) The Plan fails to adequately address the effect of recycled groundwater  
21 on the availability of water supply in the future; and
- 22 (5) The Plan fails to quantify with reasonable specificity the scope of water  
23 demand management measures which are relied upon to address the  
24 anticipated water shortfalls.

## 25 II.

### 26 STANDARD OF REVIEW

27 In addressing the claims raised herein, the court is guided by Legislative policy,  
28 to wit:

1           ... (a) The management of urban water demands and efficient use of water  
2 shall be actively pursued to protect both the people of the state and their  
3 water resources.

4           (b) The management of urban water demands and efficient use of urban  
5 water supplies shall be a guiding criterion in public decisions.

6           (c) Urban water suppliers shall be required to develop water management  
7 plans to actively pursue the efficient use of available supplies.”

8 Water Code § 10610.4.

9           In 1983 the California Legislature adopted the Urban Water Management Plan  
10 Act, Water Code §§10610.2(a), (b).<sup>4</sup> To achieve the goal of water conservation and  
11 efficient use, urban water suppliers are required to develop water management plans  
12 that include long-range planning to ensure adequate water supplies to serve existing  
13 customers and future demands for water. Section 10610.2(d)(e).) The UWMPA requires  
14 plans to address specific issues, and sets forth the procedural steps that urban water  
15 suppliers must follow when preparing, reviewing, and amending their plans. (Sections  
16 10631-10633, 10640-10645).

17           “In 1983, the Legislature adopted the UWMP Act to promote the active  
18 management of urban water demands and efficient water usage in order  
19 to protect the people of the state and their water resources. (Stats.1983,  
20 ch. 1009, § 1, p. 3556.) To achieve the goal of water conservation and  
21 efficient use, urban water suppliers are required to develop water  
22 management plans that include long-range planning to ensure adequate  
23 water supplies to serve existing customers and future demands for water.  
24 (§ 10610.2, subds.(d) & (e).) The plans must consider a 20-year time  
25 horizon (§ 10631, subd. (a)) and must be updated at least once every five  
26 years on or before December 31, in years ending in five and zero (§  
27 10621, subd. (a)). The UWMP Act requires plans to address specific  
28 issues. (§§ 10631, 10632 & 10633.) It also sets forth the procedural steps  
that urban water suppliers must follow when preparing, reviewing, and  
amending their plans. (§§ 10640-10645; see generally Waterman,  
Addressing California's Uncertain Water Future By Coordinating  
Long-Term Land Use and Water Planning: Is A Water Element in the  
General Plan the Next Step?(2004) 31 Ecology L.Q. 117, 162-166  
[overview of the UWMP Act].)”

*Friends of the Santa Clara River v. Castaic Lake Water Agency* (2004) 123 Cal.App.4th

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<sup>4</sup>Unless otherwise indicated, all statutory references are to the Water Code.

1 at 8.

2 In requiring that “urban water suppliers” such as SCWA develop “water  
3 management plans to achieve conservation and efficient use,” the UWMPA imposes  
4 specific duties on each water supplier to “[i]dentify and quantify, to the extent  
5 practicable, the existing and planned sources of water available to the supplier,”  
6 including both surface and ground waters. §§10610.4(c), 10631(b). The UWMPA  
7 directs further that each water supplier “shall include, as part of its urban water  
8 management plan, an assessment of the reliability of its water service to its customers  
9 during normal, dry, and multiple dry water years” and shall “describe plans to  
10 supplement or replace” potentially unreliable or unavailable future sources with  
11 “alternative sources.” Section 10631(c).

12 Section 10631 requires that agencies such as the SCWA, in creating water  
13 management plans,

- 14 (a) “[d]escribe the service area of the [water] supplier, including  
15 current and projected population, climate, and other  
16 demographic factors affecting the supplier’s water  
17 management planning;”
- 18 (b) “[i]dentify and quantify, to the extent practicable, the existing  
19 and planned sources of water available to the supplier,”  
20 including detailed information respecting existing and  
21 planned use of groundwater;
- 22 (c) “For any water source that may not be available at a  
23 consistent level of use, given specific legal, environmental,  
24 water quality, or climatic factors, describe plans to  
25 supplement or replace that source with alternative sources or  
26 water demand management measures, to the extent  
27 practicable.”<sup>5</sup>
- 28 (d) “[d]escribe the opportunities for exchanges or transfers of  
water on a short-term or long-term basis;”

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<sup>5</sup>Respondents argue that the limitation “to the extent practical” does not require a water agency creating a Plan to “spend time and money today to create a detailed plan to meet a contingency that may or may not occur 20 years from now....” The court disagrees with the meaning ascribed to that term by Respondents, and to the implication of insignificance attributed to that language by Petitioners. By identifying inconsistent years of availability of water supply, the SCWA is obliged to address those forthcoming deficiencies, governed by notions of reasonableness and practicality.

- 1 (e) quantify past, current, and projected water use, broken down  
by specific water use sectors;
- 2 (f) “[p]rovide a description of the supplier’s water demand  
3 management measures,” including detailed information  
4 regarding their implementation with respect to a wide array of  
existing or potential management practices;
- 5 (g) provide “[a]n evaluation of each water demand management  
measure identified;”
- 6 (h) “[i]nclude a description of all water supply projects and water  
7 supply programs that may be undertaken by the urban water  
8 supplier to meet the total projected water use,” including “a  
9 detailed description of expected future projects and  
programs” that may be employed to increase future water  
supplies;
- 10 (i) “[d]escribe the opportunities for development of desalinated  
water;” and
- 11 (j)-(k) provide additional information regarding water supply and  
12 demand management measures.

13 In *Friends of the Santa Clara River v. Castaic Lake Water Agency* (2004) 123  
14 Cal.App.4th 1, the court reversed a denial of a petition for writ of mandate which alleged  
15 that an urban water management plan was adopted in violation of the UWMPA. The  
16 concern there was over two layers of an aquifer contaminated with perchlorate. As  
17 written, the plan contemplated that there will be dry years, and that during those dry  
18 stretches, the contaminated water would be treated to restore full production capacity.  
19 However, the treatment facilities had not yet been built, and the plan failed to address  
20 interim measures to cover the reduction in water.

21 “The UWMP mentions ‘a groundwater cleanup plan ... being developed  
22 (UWMP, § 1.6A.) to address the perchlorate contamination, but it does not  
23 mention what stage of development has been reached or how much  
24 longer it will take to complete and implement that plan. Assuming the  
25 length of time needed to implement the plan is uncertain, the UWMP  
26 does not describe the factors that have caused that uncertainty....the  
27 UWMP does not state how fast the perchlorate contamination is  
28 spreading in either the Saugus Formation or the Alluvial Aquifer, how far it  
might reach within the 20-year period covered by the UWMP, or how the  
rate of migration is affected by factors, such as the increased use of  
Saugus Formation in dry years. To the extent that the answers to these  
timing issues are uncertain, the UWMP does not discuss how this  
uncertainty affects the reliability of the supply of groundwater. More  
specifically, the UWMP does not state how it reached the implicit  
determination that the quantities of groundwater set forth in the UWMP

1 met the reliability criterion of 90 percent, i.e., there was a 90 percent level  
2 of certainty that those amounts would be available” Id., 123 Cal.App.4th  
at 12-13.

3 Finding that the plan violated Section 10631(b)(c), the court determined that the plan did  
4 not address the reliability of groundwater since, due to existing perchlorate  
5 contamination, there may be sources that are not available at a consistent level and  
6 the implementation of treatment processes could not be implemented instantaneously.  
7 Further, the holding was based on Section 10610.2(d), inasmuch as the plan did not  
8 show that the agency made every effort to ensure the appropriate level of reliability in  
9 [their] water service sufficient to meet the needs of [their] various categories of  
10 customers during normal, dry, and multiple dry years. Since the agency did not proceed  
11 in a manner required by law, the matter was remanded to the superior court with  
12 directions to grant the petition for a writ of mandate vacating approval of the plan.

13 In determining whether the Plan complies with law, and applicable to Petitioners'  
14 claims herein, the inquiry is whether there was a prejudicial abuse of discretion. In  
15 determining whether there was an abuse of discretion, the court must determine  
16 whether *either* of the following has been established; (1) whether the SCWA has not  
17 proceeded in a manner required by law, or (2) whether the SCWA's actions are not  
18 supported by substantial evidence. *Friends of the Santa Clara River v. Castaic Lake*  
19 *Water Agency* (2004) 123 Cal.App.4th 1 at 8-9.<sup>6</sup> In reviewing for substantial evidence, a  
20 determination that an opposite conclusion would have been equally or more reasonable,  
21 or which argument is better after weighing conflicting evidence, is not the test. *Ebbetts*  
22 *Pass Forest Watch v. California Dept. of Forestry And Fire Protection* (2008) 43 Cal.4th  
23 936. In applying the substantial evidence standard to an agency's decision, all  
24 reasonable doubts are to be resolved in favor of the administrative finding and decision.  
25 *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141

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26  
27 <sup>6</sup>The court notes that the standard of review is similar to that applicable to  
28 mandamus proceedings brought under the California Environmental Quality Act  
("CEQA"). *Friends of the Santa Clara River v. Castaic Lake Water Agency* (2004) 123  
Cal.App.4th 1 at 8-9.



1 Cal.App.4th 86. The court must review the findings, conclusions, and determinations  
2 reached by the SCWA to determine whether there is enough relevant information and  
3 reasonable inferences to support the subject conclusion, even if other conclusions may  
4 also be reached. *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th  
5 1173.

6 III.

7 STANDING

8 Respondents raise the threshold issue of standing, that is, whether any of the  
9 named Petitioners have standing to object to the 2005 Urban Water Management Plan  
10 which is the subject of this proceeding. The court takes judicial notice, on its own  
11 motion, of the date that the Petition was originally filed (March 19, 2007) and notes that  
12 the Plan was adopted December 12, 2006 (AR 66698; 66784-66785).

13 To have standing to seek a writ of mandate, a party must be "beneficially  
14 interested" (Code Civ. Proc., § 1085), i.e., have "some special interest to be served or  
15 some particular right to be preserved or protected over and above the interest held in  
16 common with the public at large." This standard ... is equivalent to the federal "injury in  
17 fact" test, which requires a party to prove by a preponderance of the evidence that it has  
18 suffered "an invasion of a legally protected interest that is '(a) concrete and  
19 particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Associated*  
20 *Builders & Contractors v. San Francisco Airports Comm'n* (1999) 21 Cal.4th 352,  
21 361-62 (citations omitted).

22 Petitioners consist of nonprofit corporate entities, unincorporated associations,  
23 and one individual plaintiff.

24 A. Respondent's Standing Challenge Based On The Corporations Code

25 Respondents argue that there is a lack of standing because no formal action was  
26 taken on behalf of the members of the organizations and corporations to file the lawsuit.

27 Respondents point to a requirement that corporations, and unincorporated  
28 associations, must act through resolutions by a duly elected Board of Directors (Corp.

1 Code §5210), and that certain Petitioners failed to do so before filing this action.  
2 Respondents point to O.W.L Foundation, a California non-profit corporation, which  
3 allegedly had no meetings to discuss the Plan, had no minutes which reflect any  
4 discussion of the Plan, and adopted no resolutions concerning the Plan. See  
5 Deposition of Person Most Knowledgeable ("PMK") of O.W.L. Foundation D.T., Exh. A  
6 to Mitchell Dec., pp: 41:6-13; 45:4-12; 45:18-20; 47:10-25; and 48:1-8.) Another  
7 example was Friends of the Eel River, a nonprofit public benefit corporation. It is  
8 alleged that this entity's Board of Directors failed to meet regarding the Plan before the  
9 lawsuit was filed, that there are no minutes that reflect any reference to the Plan, and  
10 that there are no resolutions by the Board with respect to the Plan. (PMK of FOER  
11 D.T., Exh. B to Mitchell Dec., pp. 25:18-27:1.) With respect to unincorporated  
12 associations, Respondents point to Petitioner Coastal Action Group ("CAG"), a "group  
13 of like interested parties" without any formal organization. Noting that it has 20 to 40  
14 members, the decision to file the lawsuit was made in an informal phone call involving  
15 between four and seven of its members. (PMK of CAG D.T., Exh. C to Mitchell Dec.,  
16 pp. 27:19-29-17; 37:4-5.) When asked to describe harm to the members, the PMK  
17 described that "poor planning could injure all ratepayers," although it was conceded that  
18 only approximately 4 of the 40 members are ratepayers of the Agency or its contractors.  
19 (Id., pp. 37:4-5; 65:11-19). Bellevue Township is simply a geographic area in Southwest  
20 Santa Rosa, with a self appointed "interim mayor". It has no rules, no members, no  
21 taxing authority, no dues, no governing documents, and there were no meetings to  
22 discuss the Plan. (PMK of the Township D.T., Exh. D to Mitchell Dec., pp 8:7-12;  
23 11:13-16; 19:6-14; 58:15-25.) The North Coast River Alliance ("NCRA") is a "loosely  
24 knit group" consisting of four Board members, with no other members. There was no  
25 Board meeting to discuss the Plan or joining the lawsuit. (PMK of NCRA D.T., Exh. E to  
26 Mitchell Decl., pp. 25:3-26:18; 34:11-35:11.) Finally, it is argued that the Sonoma  
27 County Water Coalition has no real human members; it is an association of  
28 associations. (Petition, ¶12).

1 Respondents contend that the filing of the complaint, without the consent.  
2 authority, or direction of the Board of Directors of the corporate petitioners, violates  
3 Corporations Code § 5210, which provides, in pertinent part, as follows:

4 "The activities and affairs of a corporation shall be conducted and all  
5 corporate powers shall be exercised by or under the direction of the  
6 board."

7 Petitioners Friends of the Eel River, O.W.L. Foundation, Westside Association to  
8 Save Agriculture, Forest Unlimited, Community Alliance with Family Farmers, and  
9 Russian River Watershed Protection Committee are organized as public benefit  
10 corporations. First Amended Verified Petition (filed March 10, 2008) at ¶¶ 14, 16, 17,  
11 20, 24 and 25.

12 The Petitioners organized as unincorporated associations are North Coast Rivers  
13 Alliance, Coast Action Group, Sonoma County Water Coalition, Atascadero Creek  
14 Green Valley Creek Watershed Council, Blucher Creek Watershed Council, Bellevue  
15 Township, Petaluma River Council, and Sebastopol Water Information Group. See,  
16 First Amended Verified Petition (filed March 10, 2008) at ¶¶ 12, 13, 15, 18, 19, 21, 22  
17 and 23.

18 Petitioners point to Corporations Code § 5141, which is contained within Title 1,  
19 Division 2, applicable to such entities:

20 "No limitation upon the activities, purposes, or powers of the corporation  
21 or upon the powers of the members, officers, or directors, or the manner  
22 of exercise of such powers, contained in or implied by the articles or by  
23 [Corporations Code provisions that govern dissolution] shall be asserted  
24 as between the corporation or member, officer or director and any third  
25 person, except in a proceeding: (1) by a member or the state to enjoin the  
26 doing or continuation of unauthorized activities by the corporation or its  
27 officers, or both, in cases where third parties have not acquired rights  
28 thereby, (2) to dissolve the corporation, or (3) by the corporation or by a  
member suing in a representative suit against the officers or directors of  
the corporation for violation of their authority."

29 Arguing that the exceptions contained in § 5141 are inapplicable, Petitioners  
30 assert that Respondents have no "standing" to complain of the actions taken by  
31 Petitioners herein. In response, Respondents argue that the filing of the lawsuits  
32 violated the *statutory* limitations imposed by Corporations Code section 5210, rather

1 than some internal bylaw or article. Since section 5141(a) does not govern limitations  
2 on statutory violations, but rather only on internal violations, the entire basis for the “no  
3 standing to challenge standing” argument is unsupported.

4 The court determines that, pursuant to Corporations Code § 5141, Respondents  
5 are each a “third person” which may not assert against “the corporation or member,  
6 officer or director” any “limitation upon the activities, purposes, or powers of the  
7 corporation or upon the powers of the members, officers, or directors, or the manner of  
8 exercise of such powers” which are otherwise specified or implied by the articles of the  
9 corporation as defined by Corporations Code § 154. If a corporation acts without  
10 authority under its articles and by-laws in bringing suit, only a limited classes of persons  
11 have standing to object. Respondents are not within those enumerated classes.

12 With regard to the unincorporated associations, the Corporations Code  
13 provisions that govern unincorporated associations, set forth in Title I, Division 3,  
14 impose only minimal requirements for the operation of such entities. §§ 18000 *et seq.*  
15 The provisions of the Corporations Code that provide for the governance of  
16 unincorporated associations set standards for membership termination, voting,  
17 amending governing documents, mergers, and dissolution, none of which apply here.  
18 See §§ 18300-18420. Unlike the Code’s provisions governing general corporations  
19 (Division 1) and public benefit corporations (Division 2), the Code does not include a  
20 provision in Division 3 requiring unincorporated associations to operate through a board  
21 of directors. Compare §§ 300(a) and 5210 with §§ 18300-18240. The Code does not  
22 impose any requirements for the unincorporated petitioners’ authorization of this lawsuit.  
23 Thus, as to these parties, Respondent’s statutory argument fails.

24 Respondents point to *Dominguez v. Superior Court* (1983) 139 Cal.App.3d 692.  
25 Involved there was Corporations Code § 208, which is identical to Corporations Code §  
26 5141 (section 208 applies to general corporations, and 5141 applies to public benefit  
27 corporations). Both involve *ultra vires* challenges to corporate entities based on  
28 violations of internal articles or bylaws. In *Dominquez*, the Court held that an *ex post*

1 *facto* ratification of a previously unauthorized corporate action was meaningless if it was  
2 beyond the statute of limitations. Respondents argue that the rationale of this case  
3 would also apply to a case involving section 5141, since the statutes have identical  
4 language. However, in *Dominguez* the court acknowledged that it was presented with  
5 one of the limited circumstances where a third party is permitted to contest the  
6 operations of a corporation: a proceeding by the state to dissolve the corporation.  
7 *Dominguez, supra*, 139 Cal.App.3d at 695 (“a full reading of [Corporations Code section  
8 208] shows the state is excepted” from the bar against outsiders’ attacks on corporate  
9 authorization). Thus, under section 208, the state’s Superintendent of Banks was  
10 permitted to contest a dissolved bank’s authorization of the suit that challenged the  
11 Superintendent’s takeover of the bank. *Id.* If the suit had not involved a proceeding by  
12 the state to dissolve the bank, the third party – the Superintendent – would not have had  
13 standing to argue that the bank improperly authorized the suit. Here, because this case  
14 does not involve any of the statutory exceptions provided in either section 5141 or  
15 section 208, respondents are not statutorily authorized to challenge the organizational  
16 petitioners’ authorization of the instant Petition.

17 Respondents also rely on *Dominguez*, asserting that any authorization effected  
18 after the 90 day statute of limitations has run is ineffective. Inasmuch as the court has  
19 determined that Respondents do not have standing to object to the entities’ party-status,  
20 this issue is moot.

21 B. Alleged Lack of Beneficial Interest

22 Respondents next assert that Petitioners lack standing because they are not  
23 beneficially interested.

24 “To have standing to seek a writ of mandate, a party must be “beneficially  
25 interested” (Code Civ. Proc., § 1085), i.e., have “some special interest to  
26 be served or some particular right to be preserved or protected over and  
27 above the interest held in common with the public at large.” This standard  
28 ... is equivalent to the federal “injury in fact” test, which requires a party to  
prove by a preponderance of the evidence that it has suffered “an  
invasion of a legally protected interest that is ‘(a) concrete and  
particularized, and (b) actual or imminent, not conjectural or hypothetical.’”  
*Associated Builders & Contractors v. San Francisco Airports Comm’n*

1 (1999) 21 Cal.4th 352, 361-62 (citations omitted).

2 In *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79  
3 Cal.App.4th 1223, 1233-1234, the court addressed the "citizen action" exception to the  
4 beneficial interest requirement for purposes of standing:

5 "There are two prongs to the test for the beneficial interest required to  
6 pursue an action in mandamus. The first...is whether the plaintiff will  
7 obtain some benefit from issuance of the writ or suffer some detriment  
8 from its denial. The plaintiff's interest must be direct... and it must be  
9 substantial. Also, it generally must be special in the sense that it is over  
and above the interest held in common by the public at large. ..The  
second prong of the beneficial interest test is whether the interest the  
plaintiff seeks to advance is within the zone of interests to be protected or  
regulated by the legal duty asserted." [Citations omitted].

10 The *Waste Management* court described the citizen action exception to the  
11 beneficial interest requirement, applicable where "the question is one of public right and  
12 the object of the action is to enforce a public duty-in which case it is sufficient that the  
13 plaintiff be interested as a citizen in having the laws executed and the public duty  
14 enforced. In determining whether the exception applies, the court must engage in a  
15 balance of the interests involved, "and the interest of a citizen may be considered  
16 sufficient when the public duty is sharp and the public need weighty." " *Id.*, 79  
17 Cal.App.4th at 1236.-1237. Pertaining to entities as compared with individual citizens,  
18 the *Waste Management* court stated as follows:

19 "when a nonhuman entity claims the right to pursue a citizen suit, the  
20 issue must be resolved in light of the particular circumstances presented,  
21 including the strength of the nexus between the artificial entity and human  
22 beings and the context in which the dispute arises. (See *Roberts v. Gulf*  
23 *OilCorp.* (1983) 147 Cal.App.3d 770, 797 [195 Cal.Rptr. 393].) Among the  
24 factors which may be considered are whether the corporation has  
25 demonstrated a continuing interest in or commitment to the subject matter  
26 of the public right being asserted (see *Environmental*  
27 *ProtectionInformation Center v. Department of Forestry & Fire Protection*,  
28 *supra*, 43 Cal.App.4th at p. 1019; *American Friends ServiceCommittee v.*  
*Procurier* (1973) 33 Cal.App.3d 252, 255 [109 Cal.Rptr. 22]); whether the  
entity is comprised of or represents individuals who would be beneficially  
interested in the action (see *Brotherhood of Teamsters & Auto Truck*  
*Drivers v. Unemployment Ins. Appeals Bd.*, *supra*, 190 Cal.App.3d at pp.  
1521-1522); whether individual persons who are beneficially interested in  
the action would find it difficult or impossible to seek vindication of their  
own rights (see *Driving Sch. Assn. of Cal. v. San Mateo Union High Sch.*  
*Dist.* (1992) 11 Cal.App.4th 1513, 1519 [14 Cal.Rptr.2d 908]; *McDonald v.*  
*Stockton Met. Transit Dist.*, *supra*, 36 Cal.App.3d at p. 443); and whether

1 prosecution of the action as a citizen's suit by a corporation would conflict  
2 with other competing legislative policies (see *Nowlin v. Department of*  
3 *Motor Vehicles*, supra, 53 Cal.App.4th at pp. 1538-1539)." *Id.*, 79  
4 Cal.App.4th at 1238.

5 Before the court engages in balancing the competing factors, it must address  
6 objections made to the declaration filed by Mr. Volker, to wit, hearsay and lack of  
7 foundation. In addition, Respondents argue that the verified petition may not serve as  
8 substantive evidence to support the issue of standing. With respect to the verified  
9 petition, the court determines that it not sufficient to support the issues of standing.

Code of Civil Procedure 446(a) provides:

10 "When the verification is made by the attorney for the reason that the  
11 parties are absent from the county where he or she has his or her office,  
12 or from some other cause are unable to verify it, or when the verification is  
13 made on behalf of a corporation or public agency by any officer thereof,  
14 the attorney's or officer's affidavit shall state that he or she has read the  
15 pleading and that he or she is informed and believes the matters therein  
16 to be true and on that ground alleges that the matters stated therein are  
17 true. *However, in those cases the pleadings shall not otherwise be*  
18 *considered as an affidavit or declaration establishing the facts therein*  
19 *alleged.*" (Italics added).

20 Here, the First Amended Verified Petition For Writ Of Mandate And Complaint For  
21 Declaratory and Injunctive Relief was verified by counsel, on the stated basis that the  
22 represented parties are located outside of the county where counsel's office is  
23 maintained. As such, the verified allegations may not be considered.

24 Petitioners submitted, in support of their standing argument, a Reply Declaration  
25 of Stephan C. Volker and Exhibits A to N Thereto, Exhibits O-Z, and AA-BB.

26 Respondents object to this declaration on grounds of hearsay and lack of foundation.  
27 These objections are overruled.

28 The court determines that the issues here presented are those of a public right.  
The object of this Petition is to enforce public duty arising from the UWMPA.  
Considering Exhibits O through ZZ of the Volker declaration, the court determines that  
Petitioners have standing. Standing is also conferred pursuant to the "public interest"  
exception to the beneficial interest requirement.

1 "An exception to the general requirement that only persons who are  
2 beneficially interested may seek mandamus exists ' where the question  
3 is one of public right and the object of the mandamus is to procure the  
4 enforcement of a public duty, ... Under such circumstances ' the relator  
5 need not show that he has any legal or special interest in the result, since  
6 it is sufficient that he is interested as a citizen in having the laws executed  
7 and the duty in question enforced. ' (Ibid.) These liberal standing  
8 requirements have been applied to individuals acting in the public interest  
9 to protect against effects of environmental abuse. *Liadlaw Environmental*  
10 *Services, Inc. v. Local Assessment Committee* (1996) 44 Cal.App.4th 346,  
11 354.

12 Where the question presented is one of public right, and the writ would compel  
13 enforcement of a public duty, plaintiff need not show any special interest in the result. "It  
14 is sufficient that he is interested as a citizen in having the laws executed and the duty in  
15 question enforced." [Citing *Green v. Obledo* (1981) 29 Cal.3d 126, 144].

#### 16 IV.

#### 17 SURFACE WATER SYSTEM AS DESCRIBED BY THE PLAN AT SECTION 2

18 Most of the Agency's water supply is obtained from the Russian River and from  
19 the groundwater. All of the water supplied by the Agency is sold wholesale to water  
20 retail agencies. The Russian River watershed drains an area of 1,485 square miles that  
21 includes much of Sonoma and Mendocino counties. The headwaters of the Russian  
22 River are located in central Mendocino County, approximately 15 miles north of Ukiah.  
23 The Russian River is approximately 110 miles in length and flows generally southward  
24 to Mirabel Park, where it changes course and flows westward to the discharge point at  
25 the Pacific Ocean near Jenner, approximately 20 miles west of Santa Rosa.

26 The Plan describes two federal projects that impound the water supply diverted  
27 and delivered by the Agency through its transmission system: the Coyote Valley Dam  
28 on the Russian River east of the city of Ukiah in Mendocino County (forming Lake  
Mendocino), and the Warm Springs Dam on Dry Creek (a tributary of the Russian River)  
northwest of the City of Healdsburg in Sonoma County (forming Lake Sonoma). The  
Agency has the right to control releases from the water supply pools of both reservoirs.

The Pacific Gas & Electric Company (PG&E) Potter Valley Project ("PVP")  
includes a diversion tunnel to transfer Eel River water to the Russian River watershed.



1 Water for the PVP is stored in Lake Pillsbury on the Eel River. Water from Lake  
2 Pillsbury is released to the Eel River. Some of this water is re-diverted 12 miles  
3 downstream at Cape Horn Dam to the Potter Valley Power Plant in the Russian River  
4 watershed through PG&E's diversion tunnel. The water then flows through the East Fork  
5 of the Russian River to Lake Mendocino. PVP diversions are regulated by a license  
6 issued to PG&E by FERC. Early fall releases of water stored in Lake Mendocino  
7 resulting from PVP diversions are important to the fall migration of threatened Chinook  
8 salmon in the Russian River watershed.

9 The PVP imports water from the Eel River into the Russian River watershed.  
10 Lake Sonoma and Lake Mendocino, and their associated facilities, collectively referred  
11 to in the Plan as the Russian River Project, are subject to minimum instream flow  
12 requirements for Dry Creek and the Russian River. Flood management releases from  
13 both reservoirs are controlled by the United States Army Corps of Engineers (USACE).  
14 The Agency diverts water from the Russian River near Forestville and conveys the  
15 water via its transmission system (including diversion facilities, treatment facilities,  
16 pipelines, water storage tanks, and booster pump stations) to its wholesale customers.

17 The Coyote Valley Dam impounds water, forming Lake Mendocino on the East  
18 Fork of the Russian River. Lake Mendocino captures water from two sources: (1) runoff  
19 from a drainage area of approximately 105 square miles and (2) diverted Eel River  
20 water downstream of the PG&E generating station and not consumed by agricultural  
21 irrigation. Natural drainage and stream flow (as opposed to reservoir releases)  
22 contribute the majority of the Russian River flow downstream of Coyote Valley Dam and  
23 above Dry Creek during the rainy season (November through April). During the drier  
24 months of May through October, water released from Lake Mendocino accounts for  
25 most of the water in the Russian River upstream of Dry Creek.

26 Lake Sonoma lies approximately 10 miles northwest of the City of Healdsburg on  
27 Dry Creek. Runoff from a drainage area of approximately 130 square miles contributes  
28 water to Lake Sonoma. Lake Sonoma has a design capacity of 381,000 ac-ft at the

1 spillway crest and a design water supply pool capacity of 245,000 ac-ft. The Agency  
2 controls water supply releases from Lake Sonoma and the USACE manages flood  
3 control releases.

4 Natural drainage and stream flow (as opposed to reservoir releases) contribute  
5 the majority of the Dry Creek flow downstream of Warm Springs Dam during the rainy  
6 season (November through April). During the dry season (May through October),  
7 reservoir releases contribute the majority of the flow in Dry Creek. Such reservoir  
8 discharges supply flow to meet minimum instream flow requirements and municipal,  
9 domestic, and industrial demands in the lower Russian River area. Water from Lake  
10 Sonoma via reservoir releases and runoff from other tributaries contribute to meeting  
11 these demands.

12 According to the Plan, in addition to surface water, groundwater is an important  
13 source of water in Sonoma County because it provides the domestic water supply for  
14 most of the unincorporated portion of the County, and is a primary source of water for  
15 agricultural uses. Groundwater, extracted from three wells located along the Russian  
16 River, also provides a portion of the Agency's water supply. Some of the contractors  
17 and other Agency customers have their own local groundwater supplies.

18 The Agency's transmission system extends from the Agency's Russian River  
19 diversion facilities located near Forestville to the Santa Rosa, Petaluma, and Sonoma  
20 valleys.

## 21 V.

22 THE SCWA FAILED TO COORDINATE WITH FERC, NOAA FISHERIES,  
23 THE STATE WATER RESOURCES CONTROL BOARD,  
24 AND THE U.S. ARMY CORPS OF ENGINEERS

25 Section 10620(d)(2) provides that “[e]ach urban water supplier shall coordinate  
26 the preparation of its plan with other appropriate agencies in the area, including other  
27 water suppliers that share a common source, water management agencies, and  
28 relevant public agencies, to the extent practicable.” The court determines that the

1 SCWA failed to coordinate the preparation of the Plan with the Federal Energy  
2 Regulatory Commission (“FERC”), NOAA Fisheries (formerly the U.S. Fish and Wildlife  
3 Service), the State Water Resources Control Board (“SWRCB”), and the U.S. Army  
4 Corps of Engineers (“USACE”).

5 The Plan includes an assumption that “regulatory agencies may make different  
6 decisions or take different actions than those assumed by the Agency, which may affect  
7 the availability of water and the adequacy of the Agency’s transmission system.” (AR  
8 66709). In addressing the water supply versus future demand, the plan concludes that  
9 there is an adequate water supply through 2030 “except for single-dry years, starting in  
10 2020. In single-dry up years starting in 2020, the Agency will work with its contractors to  
11 reduce water demands..., utilize emergency local sources, or both.” (AR 66767).

12 The Plan includes a description of coordination with various agencies, as  
13 contained in Table 1-1 at Section 1-3 of the Plan. (AR 66708) This included SCWA’s  
14 contractors and customers, wastewater agencies, the counties of Marin and Sonoma,  
15 and with the general public. However, under the Act, the SCWA must coordinate with, to  
16 the extent practical, water suppliers that share a common source; water management  
17 agencies; and otherwise undefined “appropriate” and “relevant” agencies in the area.

18 A. The Extent To Which the SCWA Must Coordinate With Other Agencies

19 The court determines that the SCWA never secured the input of the very  
20 agencies whose review is essential to an informed assessment of potential restrictions  
21 on SCWA’s future planned diversions of water. Rather than confer with the agencies  
22 that control SCWA’s future supplies, Respondents consulted only with their existing and  
23 potential customers – SCWA’s contractors, two counties, and several local waste water  
24 agencies. (AR 66708).

25 The Plan must be coordinated with agencies “in the area” to the extent practical.  
26 As described in Section 1.3 of the Plan, the Agency coordinated with the City of Cotati,  
27 the North Marin Water District, the City of Petaluma, the City of Santa Rosa, the City of  
28 Rohnert Park, the City of Sonoma, the Valley of the Moon Water District, the Town of

1 Windsor, the Forestville Water District, the Marin Municipal Water District, the Novato  
2 Sanitation District, the Petaluma Wastewater Treatment Facility, the Santa Rosa  
3 Subregional Reclamation System, the Sonoma Valley County Sanitation District, and  
4 the Town of Windsor Water Reclamation Division. (Plan at Section 6.2). However, the  
5 question remains as to whether the SCWA was obliged to coordinate the Plan with  
6 those agencies that are the subject of the Petition.

7 The SCWA's discretion is limited to the mandate of the governing statutes in  
8 order to effectuate the purpose of the Act. The coordination with "other appropriate  
9 agencies in the area, including other water suppliers that share a common source, water  
10 management agencies, and relevant public agencies" is mandatory. Section  
11 10620(d)(2). Although the statute limits such coordination to agencies "in the area," the  
12 SCWA's Plan must "actively pursue the efficient use of available supplies" (Section  
13 10610.4). Respondents argue that the Act does not specify what such "coordination"  
14 should consist of, and by use of the phrases "relevant," "in the area," and "to the extent  
15 practicable," the Legislature meant to afford the urban water supplier discretion with  
16 respect to determining which public agencies are the most important ones with which to  
17 coordinate. According to Respondents, Petitioners' claim that the control of the future  
18 water supply includes the authority of the Federal Energy Regulatory Commission, the  
19 National Marine Fisheries Service ("NMFS"), the State Water Resources Control Board,  
20 and the U.S. Army Corps of Engineers, is factually wrong. According to Respondents,  
21 most of the Agency's formal coordination during the process of drafting the Plan took  
22 place with the most relevant public agencies "in the area" – the Agency's water  
23 contractors. Respondents argue that discussions between the water contractors and the  
24 Agency with respect to the contractors' expected demands, future conservation  
25 programs, and future sources of local supply, were extensive and critical to the  
26 Agency's preparation of its Plan. (AR 50776-50778; AR 66764-66766; AR  
27 40930-41453)

28 /

1 During an administrative hearing concerning the proposed Plan, a representative  
2 of the SCWA and its contractors addressed the board of directors on December 5,  
3 2006. First, Mr. Jasperse stated that the SCWA, in preparing the proposed Plan,  
4 utilized certain assumptions. One relied upon the model that was used by FERC to  
5 modify the PVP license. At the time of the hearing, it was stated that the SCWA learned  
6 that the modeling assumptions used were incomplete, and that the SCWA would attend  
7 a public hearing on December 14, 2006 which would include, inter alia, FERC and  
8 NOAA. It was further explained that additional meetings would be necessary in the  
9 future to determine what changes may be needed to ensure that all modeling is  
10 accurate. Mr. Jasperse stated that the agency did not yet know if there would be any  
11 impact on the agency's water supply, although there was knowledge that somewhat less  
12 water would probably flow into Lake Mendocino. At that same hearing, Mr. Selsky stated  
13 that several important water supply assumptions were made. First, that the listing of the  
14 three salmonid species under the Endangered Species Act would not reduce the  
15 amount of water that could be diverted from the Russian River. Second, that the PVP  
16 FERC license interpretation or modifications would not reduce the amount of water that  
17 could be diverted from the Russian River. Third, that the water project would be  
18 constructed as described in the EIR Notice of Preparation. (AR 50774-50778). A review  
19 of this portion of the administrative record indicates the relevance of the public agencies  
20 involved, and underscores the need for coordination of the ultimate Plan with these  
21 agencies.

22 Respondents argue that such coordination was unnecessary, since there was  
23 frequent and continuing communication between the SCWA and these agencies.  
24 Further, Respondents argue that it would be, essentially, futile to coordinate since the  
25 agencies in question would not be in a position to provide answers or responses without  
26 first proceeding with formal hearings, and public input. As to this latter point, the court  
27 notes that the Biological Assessment, relied on as support by Respondents, was  
28 provided to several agencies for comment. There is no basis for any assumption that

1 some comment could not have been obtained from these agencies with respect to the  
2 proposed Plan. Concerning the assertion that the previous history of communication  
3 between the SCWA and these agencies was sufficient, the court determines that there  
4 is no evidence in the administrative record that any of these agencies was presented  
5 with the proposed Plan prior to adoption, particularly as to the potential shortfalls.

6  
7 B. Whether the agencies allegedly omitted agencies should have been  
8 involved in coordinating the Plan

9 Considering the foregoing scope of the SCWA's duties under the Act, it must  
10 next be determined the extent to which such obligations were unfulfilled.

11 (1) State Water Resources Control Board

12 The State Water Resources Control Board ("SWRCB") controls whether or not  
13 the SCWA will be able to receive permits to release additional water, including the  
14 additional 26,000 acre feet for which it has applied in connection to its proposed Water  
15 Project. (AR:66710, 66713). The Plan itself provides that the SCWA "recognizes that  
16 regulatory agencies may make different decisions or take different actions than those  
17 assumed by the Agency, which may affect the availability of water and the adequacy of  
18 the Agency's transmission system." (AR 66709). The Plan further provides that the  
19 SCWA's ability to deliver water is based on the intended construction and operation of  
20 facilities described in its Notice of Preparation of the environmental impact report. The  
21 Plan specifically recognizes that the SWRCB and the National Marine Fisheries Service  
22 "could impose requirements that would change the Water Project." (AR 66710).

23 Clearly, communicating with the SWRCB is practical, as evidenced by the substantial  
24 communication regarding other issues prior to the development of the Plan. To exclude  
25 this agency on the basis that it is not "in the area" would constitute an abuse of  
26 discretion. Along with other agencies, the SWRCB participates and to an extent  
27 controls a common water source and is involved in the water management process.

28 Clearly, the participation of this agency would be considered relevant to the purposes

1 required to be addressed under the Act.

2 Respondents point to formal appearances by the SCWA before the SWRCB  
3 itself in 2004 in connection with approval of temporary urgency change petitions. In  
4 2004, SCWA was granted a temporary urgency change order approving a petition  
5 regarding water rights permits. A cover letter from the Chief of the SWRCB, Mike P.  
6 Floyd, includes a telephone number to call with regard to questions about the Order.  
7 (AR 12819). The permit in question concerned a temporary water permit, and related  
8 flow discharges, that were in effect through December 31, 2004, years before this Plan  
9 was completed. Of particular note, pertinent to the issues here involved, are the  
10 "Comments Regarding The Petition" found at section 3.0 of the Temporary Urgency  
11 Change Order. (AR 12824-12825). Note was made that the SWRCB received written  
12 comments from the National Marine Fisheries Service and the California Department of  
13 Fish and Game regarding the proposed temporary urgency change. The proposed  
14 Change Order apparently triggered comments concerning dry-year requirements for that  
15 year, and the effect of the proposed change on water storage levels and the survival of  
16 listed fish species. It is true that the SWRCB held public hearings in connection with the  
17 requested Petition in 2004, a fact upon which Respondents rely. However, just as the  
18 SWRCB solicited comments, so should the SCWA in preparing the Plan. It is not  
19 enough to assume that the agency would have no comments, or that its position would  
20 be the same as that presented in 2004. In fact, the foreseeable circumstances  
21 addressed by the Plan have not been addressed by the SWRCB.

22 In 2005, the SCWA provided a "Report To The State Water Resources Control  
23 Board On Water Conservation". (AR 40930-40957). This report responded to a  
24 request made in February, 2005 from the Chief of the Division of Water Rights of the  
25 SWRCB. The request was for additional information addressing "a detailed plan of  
26 water conservation efforts that will offset future increases in demand, which in turn will  
27 result in no increase in Russian River diversions." (AR 40936). In this response, the  
28 SCWA noted that "[t]o prepare its 2005 UWMP, the Water Agency and its contractors

1 began a process in November 2004 to estimate future demands." In connection  
2 therewith, the SCWA noted that future demands, future water savings, and a  
3 cost-benefit analysis for each conservation measure will be evaluated. Further, mention  
4 was made of technologies that were being evaluated to determine the feasibility of new  
5 water conservation measures. This report addressed present and future conservation  
6 methods, and in addition, addressed the potential for increased diversion of water to  
7 satisfy future water needs. (AR 40930-40957). Portions of the SCWA's year 2000  
8 Urban Water Management Plan were provided as part of this report. (AR 40934). This  
9 provides further support for the relevance of the SWRCB, and the practicality of such  
10 coordination.

11 The SCWA argues that it has had ongoing contact with SWRCB staff about  
12 pending Agency water rights applications and other issues. The record discloses that  
13 the SCWA has "taken a proactive approach to developing a cooperative relationship"  
14 with agencies, including the SWRCB, in recent years prior to December, 2007. This  
15 included, inter alia, facilitation of a Water Rights Solutions Group which addressed  
16 issues pertaining to "water rights challenges of the Russian River basin." This group  
17 was broadly represented, including agricultural and environmental representatives, and  
18 representatives of regulatory agencies including the SWRCB. (AR 70477-70478).  
19 Another example is found at AR 12685, which reflects an informational report sent to  
20 SWRCB from the SCWA, concerning presentations involving endangered species, a  
21 water quality monitoring program update, and an update on the status of the Russian  
22 River. On June 17, 2004, the SCWA sent information regarding a pilot study that was  
23 being considered. The transmittal letter of that date proposed a meeting with the  
24 SWRCB staff to discuss the pilot study, including "steps that will need to be completed  
25 to authorize changed flows for study purposes....[which] may include (1) identification of  
26 the changes in D1610 minimum flows that the State Water Board might be willing to  
27 consider and the process for State Board consideration; ...(3) identification and  
28 completion of any impact analysis that may be necessary; and (4) the preparation and



1 filing of any necessary petitions with the State Water Board.” (AR 12645).

2 The Act contemplates that in addressing the potential shortfall, and the purposes  
3 of the Act, the SCWA shall coordinate with other agencies to effectuate the purposes of  
4 the Plan. It is noted that Appendix C contemplates that, in the event of a severe water  
5 supply shortage, “the Agency could also petition the State Water Resources Control  
6 Board for temporary relief from the minimum instream flow requirements in the Russian  
7 River and Dry Creek, in order to conserve the remaining water supply in Lake Sonoma  
8 and Lake Mendocino.” The relevance of this agency to the Plan is clear. The  
9 importance of this agency to the overall process of the supply and delivery of water is  
10 equally clear. Regardless of prior dealings, the SCWA had a responsibility under the  
11 Act to coordinate its Plan with the SWRCB, and it failed to do so.

12 The court determines that the SWRCB is a relevant public agency as  
13 contemplated by Section 10620(d)(2). The Plan itself notes that the SCWA will need to  
14 obtain additional water rights from the SWRCB. It is undisputed that the SWRCB is a  
15 water management agency.

16 Respondents argue that it is impractical to coordinate with the SWRCB since  
17 nothing could be learned, and no direction could be taken, due to the agency's need to  
18 vote on any application following public hearing. Further, Respondents argue that  
19 Section 10620(d)(2) does not require a formal “consultation” about the actual text of the  
20 Plan, and that there is no requirement in the Act that draft Plans must be circulated to  
21 all public agencies having regulatory authority over the supplier. Respondents argue  
22 that, by requiring unspecified “coordination” only “if practicable” with “appropriate” or  
23 “relevant” agencies “in the area,” the Legislature gave water suppliers discretion as to  
24 the extent of such coordination. Respondents point to the ongoing agency contacts as  
25 satisfying the coordination requirement of the Act.

26 Under the Act the SCWA “shall coordinate” the preparation of the Plan with  
27 appropriate agencies. By its own terms, the Plan omitted this agency from the list of  
28 agencies with which coordination occurred. Indeed, the administrative record discloses

1 a history of communication between the SCWA and the SWRCB as to issues similar to  
2 those addressed by the Plan. The proposed findings, conclusions, and solutions  
3 described in the Plan which directly involve the SWRCB should have been the subject  
4 of coordination, particularly related to the Plan's conclusions addressing anticipated  
5 future shortfalls.

6 The court determines that, for the purposes of the water storage and  
7 transmission system that is the subject of the Plan, the SWRCB is "in the area" as  
8 contemplated by the Act.

9 (2) U.S. Army Corps of Engineers ("USACE")

10 As described in the Plan, at Section 2.3.2,

11 "the Agency and the Mendocino County Russian River Flood Control and  
12 Water Conservation Improvement District have water right permits  
13 authorizing storage up to the design capacity of 122,500 acre-feet per  
14 year (ac-ft/yr) in the reservoir. The design water supply pool capacity of  
15 Lake Mendocino is 72,000 ac-ft. The Agency controls releases from the  
16 water supply pool in Lake Mendocino. However, the USACE manages  
17 flood control releases when the water level exceeds the top of the water  
18 supply pool elevation. The USACE allows the Agency to encroach into the  
19 flood pool in the spring so that the summer water supply pool can be  
20 increased to 86,000 ac-ft."

21 Under the Plan, "[f]lood management releases from both [Lake Sonoma and  
22 Lake Mendocino] reservoirs are controlled by the United States Army Corps of  
23 Engineers (USACE)." (AR 25626; 66718). Three major reservoirs provide water supply  
24 storage for the Russian River watershed: Lake Pillsbury on the Eel River, Lake  
25 Mendocino, and Lake Sonoma. Coyote Valley Dam impounds Lake Mendocino, and is  
26 located on a tributary of the Russian River. Warm Springs Dam impounds Lake  
27 Sonoma, and is located at the confluence of Warm Springs Creek and Dry Creek. Lake  
28 Mendocino is a multipurpose reservoir providing flood protection to areas below Coyote  
Valley Dam and which also supplies water for domestic, industrial, and agricultural use.  
With respect to flood control, the flood control pool is typically large enough to store  
runoff. However, there are reductions in the lake level occurring during late spring and  
early summer. When the water level rises above the top of the water supply pool, and

1 into the flood control pool, the USACE determines releases. (AR 25623-25624).

2 Addressing the first issue, to wit, whether there is an obligation to coordinate the  
3 Plan with the USACE, the court determines that this agency shares a common source  
4 with the SCWA, and that it is a "relevant public agency" as contemplated by the Act.

5 Respondents offer portions of the administrative record in support of their argument that  
6 the SCWA has, by virtue of its considerable prior dealings, in effect coordinated its  
7 water plan with the USACE. This latter point will be addressed below. However, as to  
8 the relevance of USACE relative to the requirements under the Act, the court notes that  
9 the parties entered into a memorandum of understanding which addresses, in part, the  
10 effect on coho salmon and steelhead trout in the Russian River which would result from  
11 an increase in the amount of water diverted from the Russian River (AR 20058-20066).  
12 This is precisely the sort of environmental concern that could affect the flow  
13 requirements potentially necessary to meet the increased demand during multiple dry  
14 years.

15 In September of 2004, the USACE wrote a letter seeking formal consultation on  
16 matters related to the proposed Biological Assessment. This document addresses  
17 environmental concerns relative to changes in water flow. Of interest in this letter is the  
18 statement that the time line to proceed through the SWRCB process to modify water  
19 flow could be as long as five years. It was recognized that over the past six years, there  
20 had been extensive collaborative efforts by various agencies, including the agencies  
21 that are the subject of this Petition claiming error. The ultimate purpose of the  
22 Biological Assessment is to provide protection for listed salmon and steelhead and to  
23 promote the opportunity for recovery of these populations and the Russian River basin.  
24 An offer was made to work collaboratively with the SCWA. (AR 20016-20018).

25 Respondents argue that, even if the court determines that coordination is  
26 required under the Act, any meetings concerning the Plan would be useless since these  
27 are agencies that cannot act without public hearings and other public due process  
28 rights. The letter described above mitigates against any such interpretation. In fact, the

1 various documents pointed out by Respondents support that the parties frequently  
2 communicated, and continued to communicate, about matters jointed affecting the  
3 SCWA and the USACE. The record does not support an inability, or futility, to  
4 coordinate with this agency.

5 As part of the record, the Russian River Biological Assessment was submitted.  
6 This is offered by Respondents as evidence of the efforts made to work with the  
7 USACE, and the coordination efforts between that agency and the SCWA. As  
8 evidenced by the Executive Summary, the project was undertaken to evaluate the  
9 potential effects of the project resulting from certain activities in the Russian River and  
10 the potential effect on salmonid species and their habitat. The proposed changes to the  
11 project that were addressed, in part, by the Assessment include modified flow releases  
12 from the warm Springs Dam and Coyote Valley Dam (after the SWRCB modifies the  
13 SCWA's water-right permits). In addition, the assessment was intended to address  
14 additional water supply measures to meet future demand while protecting fish habitat.  
15 In addressing the flow proposal that was a part of this assessment, it was noted that the  
16 goal is to maintain a suitable rearing habitat for the listed salmonids. The executive  
17 summary then noted that "lower flow rates necessary for suitable rearing habitat would  
18 make it more difficult for SCWA to meet future supply demands of the water  
19 contractors," and that "additional water-supply measures would be needed so that  
20 SCWA could continue to meet all of its contractors' demands for water." The summary  
21 addressed some of the measures under consideration, noting that the SCWA was  
22 reviewing the types and feasibility of these facilities to meet water supply needs. Upon  
23 review of this assessment, it seems clear that the subject matter is relevant to the  
24 scope and substance of the Plan. The issue, then, is whether participation in this  
25 Biological Assessment satisfies the requirement that the SCWA coordinate with  
26 relevant agencies. The court determines that the Russian River Biological Assessment  
27 does not satisfy the requirement of coordination. For example, the Plan addresses  
28 future water supply and demand, noting an anticipated shortfall beginning in 2020. In

1 addition to conservation, the Plan contemplates at Section 7 utilizing emergency local  
2 sources. Considering the anticipated increase in water supply use, even that currently  
3 permitted under existing licenses, it is reasonable to assume that the USACE (as well  
4 as other agencies) may provide input that could affect the ultimate conclusions of the  
5 Plan. This input was not received. Regardless of the extensive history of cooperation  
6 between the SCWA and the USACE, the Plan should have been the subject of  
7 coordination between these agencies. In fact, it is precisely due to this history that  
8 mitigates in favor of such coordination. Respondents point out that as between the  
9 Agency and USACE, although the USACE owns the Lake Sonoma and Lake  
10 Mendocino facilities, the Agency has the right to release water from those reservoirs for  
11 water supply purposes, and the USACE has no control over such releases. (AR  
12 68164). However, the record discloses that the USACE does in fact control aspects of  
13 the water delivery system, and its input as to the anticipated shortages and plan to  
14 address the same is certainly relevant.

15 Respondents argue that the SCWA has had constant contact and discussions  
16 with various entities, including the USACE, on issues relating to the Agency's water  
17 supply for the past 10-plus years. Respondents point to the fact that since 1997 the  
18 Agency has been engaged in ongoing formal consultation under Section 7 of the  
19 federal Endangered Species Act with NMFS and USACE about the impact of the  
20 Agency's water supply activities on the three salmonid species listed under ESA. (AR  
21 20058-20066; 25503-25508). As a part of this formal consultation, a "Public Policy  
22 Facilitating Committee" was formed, comprised of representatives of NMFS, USACE,  
23 and the SCWA (among others). (AR 20058-20066; 25503-25508). The purpose of the  
24 committee was to receive reports from the Agency and its ESA consultant, as well as  
25 public comment, on the analysis of the impact of the Agency's activities on the listed  
26 species and proposals to mitigate those impacts. This committee met over 19 times  
27 from 1998 through 2006. (AR 68995). These formal meetings of the working group  
28 were comprised of staff from the participating agencies, and met on an ongoing basis.

1 The meetings included working together on studies evaluating the impact of the  
2 Agency's activities on listed species. (AR 69005-69009). According to Respondents,  
3 due to this history of meetings and consultation, when the Agency prepared its Plan, it  
4 had a full understanding of the potential constraints on its existing and future water  
5 supply operations that might be required by NMFS. Indeed, these potential constraints  
6 are, as asserted by Respondents, fully set forth in the 2004 Russian River Biological  
7 Assessment.

8 The court determines that USACE is a water supplier that shares a common  
9 source with the SCWA; and that it is a relevant public agency in the area. The Act  
10 requires coordination, and is not satisfied by assumptions of what the agency would  
11 likely offer in connection with the anticipated future shortfalls. The Plan should have  
12 been coordinated with USACE, and it was not.

13 (3) Federal Energy Regulatory Commission ("FERC")

14 FERC controls SCWA's diversions of Eel River water under PG&E's Potter  
15 Valley Project's license. Thus, Petitioners argue that FERC has a regulatory role in  
16 managing the Agency's facilities and supplies, and therefore should have been  
17 consulted during the Plan's preparation. The Plan includes an acknowledgment that  
18 diversion of water by P,G & E from the Eel River Watershed into the Russian River  
19 watershed "has been a source of controversy" but that the diversion was ongoing for  
20 100 years. Based on this history, the SCWA postulated its "reasonable" assumption  
21 that the PVP diversions into the Russian River watershed would continue. (AR  
22 66709-66714). There is no disagreement as to the importance of the continued  
23 diversion of water from the Eel River as part of the water management plan. The issue  
24 here presented, however, is whether the Agency sufficiently coordinated the Plan with  
25 FERC.

26 Respondents claim that, with respect to FERC, the Agency was an active  
27 participant in the FERC proceedings that resulted in the 2004 amendment to PG&E's  
28 license for the Potter Valley Project, and Agency staff have a detailed understanding of

1 the operations of the PVP and its impact on water supplies in the Russian River basin.  
2 For example, the Agency has developed a sophisticated model to evaluate the impact  
3 of changes in PVP operation on flows into the Russian River watershed. (AR  
4 10378-10417). The terms of PG&E's license for the Project have been set until 2022.  
5 This history, according to Respondents, excuses any further need to coordinate with  
6 FERC, particularly since there is nothing presently pending at FERC. Respondents  
7 point to its constant contact and discussions with FERC on issues relating to the  
8 Agency's water supply for the past 10-plus years.

9 As contained in the Plan, FERC retains authority over the Potter Valley Project  
10 ("PVP"), which diverts more than 159,000 acre feet annually from the Eel River to the  
11 Russian River, supplying most of the Russian River's summer flow. (AR 66710);  
12 *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859,  
13 866. NOAA Fisheries, along with the SWRCB, SCWA, and the U.S. Army Corps of  
14 Engineers, control water releases from Warm Springs Dam (Lake Sonoma) on Dry  
15 Creek, a principal tributary of the Russian River, and from Coyote Dam (Lake  
16 Mendocino) on the Russian River's main stem. (AR 25626, 66718). Together, water  
17 from the PVP, Warm Springs Dam and Coyote Dam provide most of respondents'  
18 summer water supply from the Russian River.(AR 25623-25624).

19 A review of the administrative record discloses the substantial issues that arise  
20 from projected changes in flow from water sources. For example, counsel for the  
21 SCWA submitted a motion to intervene in order to protest a proposal pending before  
22 FERC. This proposal involved, in general, a request by Pacific, Gas and Electric  
23 Company to amend the minimum flow release schedule for the PVP. Arguing that the  
24 projections were flawed, the SCWA asserted that the flow changes could impact on,  
25 inter alia, Russian River irrigation, fisheries, and other beneficial uses. (AR  
26 10327-10375).

27 It is clear that Respondents failed to coordinate with FERC as to the Plan. The  
28 specific issues raised include future supply and demand. While it is conceivable that

1 FERC will add little or nothing to the analysis, without coordinating as required by  
2 statute, such is unknown.

3 (4) NOAA Fisheries (formerly the U.S. Fish and Wildlife Service)

4 NOAA Fisheries, along with the SWRCB, SCWA, and the U.S. Army Corps of  
5 Engineers, control water releases from Warm Springs Dam (Lake Sonoma) on Dry  
6 Creek, a principal tributary of the Russian River, and from Coyote Dam (Lake  
7 Mendocino) on the Russian River's main stem. (AR 25626, 66718). Together, water  
8 from the PVP, Warm Springs Dam and Coyote Dam provides most of respondents'  
9 summer water supply from the Russian River. (AR 25623-25624).

10 There is no evidence of any coordination with NOAA Fisheries. The record  
11 does, however, support that this agency bears a role in controlling water releases from  
12 water sources shared by the SCWA. Although there is a record of communication  
13 between these two agencies, none relates specifically to the Plan.

14 VI.

15 THE PLAN FAILS DUE TO FAILURE TO ADDRESS THE IMPACT OF  
16 FUTURE WATER SUPPLY SHORTFALLS

17 As stated previously, the Plan concludes that there will be adequate water  
18 supplies throughout the planning period," except as to "single-dry years, starting in  
19 2020." The magnitude of the potential shortfalls is 15% of normal demand by 2030.  
20 The Plan relies on working with the SCWA's contractors to reduce water demands  
21 pursuant to the Water Contingency Analysis (Exhibit "C") and "to utilize emergency local  
22 sources, or both." (Section 7-1).

23 The Plan does address sources of water and conservation measures. However,  
24 as more fully addressed below, the environmental factors potentially affecting the need  
25 for increased flow have not been adequately addressed.

26 A. Water Supply Limitations

27 Section 1063(c) requires that an UWMP "describe plans to supplement or  
28



1 replace" any "source that may not be available at a consistent level of use." Clearly,  
2 increased water flow is one of the alternative sources relied upon by the Plan. At the  
3 same time, the Plan notes a physical constraint to the use of this increased flow.  
4 Specifically, the Plan provides that the present capacity of the transmission system  
5 physically constrains the ability to deliver water, particularly during high demand periods  
6 in the summer months. (Section 4.1.1). At the same time, Table 7-6 identifies shortfalls  
7 ranging from 2,646 afy to 15,479 afy by 2030. The future water supply projections  
8 assume that the planned infrastructure improvements (referred to herein as "Water  
9 Project") will be approved and constructed. The Plan points out that such a Water  
10 Project has been initiated since the early 1990's, but that it continues to be subjected to  
11 legal challenges. The SCWA has entered into a legal agreement ("Restructured  
12 Agreement") which addresses the maximum water allocations for customers. This, in  
13 turn, is premised on the SCWA's ability to increase water flow, and the construction of  
14 the Water Project. (Section 4.1.2) The Plan, in addressing this issue, projects  
15 completion of the Water Project in 2020. (Table 4-10). This would provide sufficient  
16 time to allow for the increased water flow. The Plan is sufficient in this regard.

17 B. Water Demand Management Measures

18 During the Years of potential shortfall, the Plan contemplates that "the Agency  
19 would work with its contractors to reduce water demands as described in Appendix C"  
20 beginning on AR 66817. The contents of Appendix "C" are summarized as follows:

- 21 • The SCWA is a water wholesaler, and as such, cannot impose use  
22 restrictions on end users of water in the event of a shortage; such  
restrictions must be taken by the wholesale customers of SCWA;
- 23 • In the event of a water shortage, the SCWA approved a water  
24 allocation methodology ("Restructured Agreement") describing the  
25 manner in which the SCWA is to allocate water to its customers in  
26 the event of a temporary impairment of the capacity of water  
27 delivery. Further, under the SCWA's water rights permits, it may  
impose a 30% deficiency in deliveries from the Russian River  
whenever the quantity of water in storage at Lake Sonoma drops  
below a certain level before July 15 of any year. The  
circumstances justifying the deficiency are more fully described in  
this Appendix C;

- The Plan confirms that the water supplies are sufficient to meet transmission system demands, “except in a critically dry year” as noted in Section 7 of the Plan. If it appeared that a water supply shortage might occur, the Plan refers to a first stage of action which involves notification by the SCWA of that possibility to its contractors, customers, and the general public. In such case, the contractors and customers would be encouraged to voluntarily reduce demand and to maximize use of local water supplies. In addition, the Plan calls for the SCWA to publicize the potential shortage, and to encourage non-Agency and agricultural converters from the Russian River and Dry Creek “to reduce diversions to the extent possible”

If the measures initiated in the first phase are unsuccessful such that the transmission system demands exceed the available water supply, the Plan contemplates that the SCWA would calculate the amount of water available to its contractors, customers, and other users, and utilize the existing allocation methodology contained in the Restructured Agreement to limit allocation to such users. Further, in the event of a severe water supply shortage, the SCWA noted the right to petition the State Water Resources Control Board for relief from the temporary flow requirements in the Russian River and Dry Creek, thus conserving the Lake Sonoma and Lake Mendocino water supply.

- The Plan includes a response in the event of a “catastrophic” interruption of supply.

Section 10631(c), as noted above, provides that a plan must, “[f]or any water source that may not be available at a consistent level of use, given specific legal, environmental, water quality, or climatic factors, describe plans to supplement or replace that source with alternative sources or water demand management measures, to the extent practical.” In addition to addressing alternative water sources, the Plan relies on management of existing resources. Section 10610.2.(a)(4) provides that “[a]s part of its long-range planning activities, every urban water supplier should make every effort to ensure the appropriate level of reliability in its water service sufficient to meet the needs of its various categories of customers during normal, dry, and multiple dry water years.” Thus, the issue here to be determined is whether the Plan, through management measures, has adequately addressed this stated purpose.

Section 10632 provides that the Plan shall provide an urban water shortage contingency analysis which includes each of the following elements:

/

- 1 (1) Stages of action to be undertaken by the urban water supplier in  
2 response to water supply shortages, including up to a 50 percent  
3 reduction in water supply, and an outline of specific water supply  
4 conditions which are applicable to each stage.

5 Appendix "C" of the Plan contains a Water Shortage Contingency Analysis which  
6 addresses action to be undertaken by the SCWA in response to water supply  
7 shortages, including up to a 50 percent reduction in water supply, and an outline of  
8 specific water supply conditions which are applicable to each stage. The Plan  
9 addresses each such stage, and also incorporates the Restructured Agreement For  
10 Water Supply (AR 32424-32487).

- 11 (2) An estimate of the minimum water supply available during each of  
12 the next three water years based on the driest three-year historic  
13 sequence for the agency's water supply.

14 Appendix "C" refers to Table 7-7, noting that no supply reduction is projected  
15 under this scenario

- 16 (3) Actions to be undertaken by the urban water supplier to prepare  
17 for, and implement during, a catastrophic interruption of water  
18 supplies including, but not limited to, a regional power outage, an  
19 earthquake, or other disaster.

20 Appendix "C" includes a "Catastrophic Supply Interruption Plan-Water Code  
21 Section 10632(c)" section which includes actions summarized in Table 3.

- 22 (4) Additional, mandatory prohibitions against specific water use  
23 practices during water shortages, including, but not limited to,  
24 prohibiting the use of potable water for street cleaning.
- 25 (5) Consumption reduction methods in the most restrictive stages.  
26 Each urban water supplier may use any type of consumption  
27 reduction methods in its water shortage contingency analysis that  
28 would reduce water use, are appropriate for its area, and have the  
ability to achieve a water use reduction consistent with up to a 50  
percent reduction in water supply.

Penalties or charges for excessive use, where applicable.

Appendix "C" describes that the SCWA, as a wholesale supplier, has no ability to  
directly restrict the use of water, or to impose financial penalties, on end users.

However, the Plan does incorporate the Restructured Agreement For Water Supply

1 (AR 32424-32487), specifically, at Section 3.5(e) of that agreement. This section does  
2 address prohibitions, penalties, and outlines a plan for consumption reduction.

- 3 (6) An analysis of the impacts of each of the actions and conditions  
4 described in subdivisions (a) to (f), inclusive, on the revenues and  
5 expenditures of the urban water supplier, and proposed measures  
6 to overcome those impacts, such as the development of reserves  
7 and rate adjustments.

8 Appendix "C" includes an analysis as required under this subsection.

- 9 (7) A draft water shortage contingency resolution or ordinance.  
10 A mechanism for determining actual reductions in water use  
11 pursuant to the urban water shortage contingency analysis.

12 The Plan includes an allocation methodology in Attachment 1. Those  
13 purchasing water from the SCWA would need to adopt individual contingency  
14 resolutions in the event of a water shortage. Appendix "C" also includes a monitoring  
15 procedure in the event of allocation pursuant to Section 3.5 of the Restructured  
16 Agreement For Water Supply (AR 32424-32487).

17 The purpose of the UWMPA is "to provide assistance to water agencies in  
18 carrying out their long-term resource planning responsibilities to ensure adequate water  
19 supplies to meet existing and future demands for water." Water Code § 10610.2(b).  
20 Here, the Plan includes a water shortage contingency analysis, a component of which  
21 are stages of action to be undertaken in response to water supply shortages, and an  
22 outline of specific water supply conditions which are applicable to each stage.

23 Considering the foregoing, the court determines that the SCWA has proceeded  
24 according to law, except as otherwise determined herein.

- 25 C. The Plan Assumes That Water Diversions from Warm Springs Dam Will  
26 Not Be Reduced in Order to Protect Threatened and Endangered Species  
27 in the Russian River and Eel River

28 In the Plan's "Assumptions" section, Respondents assume that "the listing of  
three salmonid species as threatened or endangered under the Endangered Species  
Act (ESA) will not reduce the amount of water [the Russian River] can supply,  
principally from the water stored in Lake Sonoma (Warm Springs Dam), using its

1 Russian River diversion facilities.” Plan at 1-4. The Plan similarly assumes, without  
2 further analysis, that the FERC license for the PVP “will not be modified, or that any  
3 license modifications (and the terms of any new license) will not reduce the amount of  
4 water available for diversion by the Agency.” Plan at 1-4. According to Petitioners,  
5 Respondents’ assumption fails to take into account the fact that the PVP license is  
6 subject to Endangered Species Act (“ESA”) restrictions and other federal environmental  
7 laws, and therefore may be subject to flow adjustments at any point in the future when  
8 necessary to protect fish and wildlife, including during critically dry and multiple dry  
9 years.

10 In response, Respondents assert that the Plan’s assumption that PVP flows will  
11 continue is reasonable given the factors discussed in the Plan, each of which is  
12 supported by substantial evidence in the record: the flows have been in place for 100  
13 years and extensive agricultural, municipal, and commercial economies have  
14 developed in reliance on the flows (AR:54108-54110); FERC recognizes the  
15 importance of the diversions to the Russian River watershed); and, as the SWRCB has  
16 recognized, the flows are critical for the fall migration of Chinook salmon in the Russian  
17 River (AR 12827). Finally, because the Agency will update its Plan by the end of 2010  
18 and every five years thereafter, if in the future it appears more likely that FERC will  
19 order a further reduction in PVP flows into the Russian River watershed, the Agency  
20 can address that in an updated Plan.

21 Both Petitioners and Respondents point to the Biological Assessment. Some  
22 guidance is found in the executive summary, addressing the issue of flow management.  
23 Noting that decreased flows improve the habitat for the listed fish species, the summary  
24 goes on to state as follows:

25 “The goal of the Flow Proposal is to maintain suitable rearing habitat for  
26 listed salmonids. Because the lower flow rates necessary for suitable  
27 rearing habitat would make it more difficult for SCWA to meet future  
28 supply demands of the water contractors, additional water-supply  
measures would be needed so that SCWA could continue to meet all of  
its contractors’ demands for water. Some of the measures under  
consideration include an aquifer storage and recovery (ASR) program.

1 additional diversion facilities. and new raw water pipeline. SCWA is  
2 reviewing the types and feasibility of these facilities to meet water supply  
needs.(Biological Assessment, Executive Summary, p. xl)

3 Essentially, the issue here addressed is this- the Plan assumes that the  
4 endangered species, the subject of which was addressed in the Biological Assessment,  
5 will not reduce the amount of water that could be supplied, relying principally on the 100  
6 year history involving flow releases. The Biological Assessment is a product of a joint  
7 assessment by the USACE, SWCA, NOAA Fisheries, and a Mendocino County flood  
8 control district. The SCWA entered into a Memorandum of Understanding with NMFS  
9 and USACE for a consultation under Section 7 of the ESA on the impacts of SCWA  
10 and USACE operations on the listed species. (AR 26949-26852) In September 2004,  
11 the SCWA and USACE submitted to NMFS the Russian River Biological Assessment,  
12 (“Biological Assessment”) a detailed analysis of the impact of their actions on the listed  
13 species, containing proposals for changes in operation to benefit the species. (AR  
14 26851)

15 Petitioners allege that the Order Amending License in the FERC proceedings  
16 contained provisions allowing FERC to revisit the issue of permissible flows, depending  
17 upon the state of the endangered fish, prior to the relicensing in 2022. *California*  
18 *Sportfishing Protection Alliance v. FERC* (9th Cir. Ct. App. Nos. 04-73498, et seq.,  
19 Petitioners’ Excerpts of Record Vol. 4 (January 28, 2004): Tab 20: Order Amending  
20 License, Articles 51-58. Petitioners allege that, given this uncertainty in the availability  
21 of the water supply, the Plan fails to account for such potential flow reductions, in  
22 violation of the UWMPA. Thus, Petitioners argue that the SCWA did not “proceed in a  
23 manner required by law.

24 The Biological Assessment explicitly states that actions taken to protect listed  
25 species will *reduce* water supplies available to the SCWA. The Biological Assessment  
26 refers to analysis of the “additional water-supply measures” needed to “meet future  
27 supply demands of water contractors.” These analyses are *exactly* what is required by  
28 the UWMPA’s section 10631(c), which mandates “[f]or any water source that may not

1 be available at a consistent level of use, given specific legal [and] environmental  
2 factors, [the Plan must] describe plans to supplement or replace that source with  
3 alternative sources or water demand management measures, to the extent practicable.”  
4 The issues raised by the Biological Assessment are “environmental factors” that may  
5 affect the consistent water supply, and in particular, the increased demand that the Plan  
6 relies on during shortfall periods. The Plan dismisses these environmental concerns,  
7 using what amounts to the following logic: over a 20 year period, the SCWA can  
8 determine the most likely outcome of regulatory decisions; and given the facts currently  
9 available, there is no known impediment to the availability of water to address the  
10 potential shortfall in supply. The Plan admits that “regulatory agencies may make  
11 different decisions or take different actions than those assumed by the [SCWA], which  
12 may affect the availability of water and the adequacy of the Agency’s transmission  
13 system.” (Section 1.6). However, the Plan fails to address the known issues raised by  
14 increased or decreased flows and the salmonid population. Historically, violations of  
15 the Endangered Species Act have significantly affected the availability of water from the  
16 SCWA’s primary sources. Even the Plan itself is inherently inconsistent on this issue. It  
17 concludes its analysis with the following:

18 “Given the analysis set forth in the Biological Assessment and the  
19 Agency’s ongoing communications with NMFS’ staff, it is reasonable to  
20 assume that with the implementation of mitigation measures, ESA  
21 constraints will not affect or impair the water supply available to the  
22 Agency for delivery to its transmission system customers.”(AR 66733)

23 However, the Plan admits that NOAA Fisheries’ Biological Opinion “may require  
24 the Agency to modify its water supply facilities or operations.” (AR 66733). Further, it  
25 states that “[i]t is uncertain what modifications NMFS may ultimately require the Agency  
26 to implement . . . for future operations, including an increase in the Agency’s Russian  
27 River diversions.” *Id.* Thus, the SCWA clearly recognizes that its operations “may be  
28 modified” because of the existence of the listed species, and it acknowledges that the  
extent of those modification is uncertain. This directly undercuts the Plan’s assumption  
that “ESA constraints will not affect or impair the water supply available to the Agency

1 for delivery,” and throws substantial doubt on the reliability of the Agency’s key water  
2 supplies in the future.

3 The assertion by Respondents that the above-noted deficiency can be  
4 addressed through future plans is insufficient to comply with statutory directives. The  
5 Act requires agencies to “[i]dentify and quantify, to the extent practicable, the existing  
6 and planned sources of water available to the supplier” for five year periods, over the  
7 course of 20 years. Section 10631(a)(b). The Plan does not presently identify how the  
8 environmental issues presented are to be addressed, including alternative measures in  
9 the event that these environmental factors serve to limit the increased flow necessary.

10 In *Friends of Santa Clara River*, the Plan noted contamination of an aquifer relied  
11 on for water, noted that effective treatments were developed, and noted that a plan was  
12 worked out to remove the contamination from the aquifer. Finding that plan to be  
13 insufficient, the Court of Appeal determined that the plan did not address what stage of  
14 development was reached, or how long it would take to implement that plan. The court  
15 specifically noted that the process referred to in that plan was subject to CEQA review,  
16 and that this review would increase the time needed to implement that process.

17 Here, the Plan relies heavily upon the assumed approval of a group of planned  
18 future projects, collectively called the Water Supply, Transmission, and Reliability  
19 Project (“Water Project”). (AR 66710, 66749-66750). This Water Project would  
20 substantially increase SCWA’s Russian River diversions, by up to one-third, from  
21 75,000 ac-ft/yr. to 101,000 ac-ft/yr. (AR 66713, 66730). Respondents assume that  
22 they will construct and operate all of the facilities now planned for the Water Project.  
23 (AR 66710, 66749-66751). At the same time, the Plan admits that “State and federal  
24 agencies, including the National Marine Fisheries Service (under the ESA) and the . . .  
25 .SWRCB[] (which issues water rights permits) could impose requirements that would  
26 change the Water Project.” (AR 66710). The Plan admits that the SCWA has only  
27 applied for such an increase, but does not yet possess the rights to the additional  
28 26,000 ac-ft of Russian River flows. (AR 66730). Even if the Water Project is completed



1 within the anticipated time frame, approval of a permit for an increase in Russian River  
2 diversions is tenuous for the reasons stated. If Respondents' application for the  
3 increased diversions are rejected, allowing diversions only at their current levels, the  
4 projected demand would outstrip the available supplies by 2016 in multiple dry year  
5 periods. (AR 66767-66770). The UWMPA demands not only a full analysis of the  
6 uncertainties of this critical future supply, but equally important, a full discussion of  
7 SCWA's "plans to replace that source with alternative sources."

8 D. The Plan Does Not Adequately Address the Threats Posed to Water  
9 Supplies by the Disposal of Treated Sewage Water into the Russian River  
10 Watershed at Locations Upstream of Groundwater Wells and Intakes for  
11 SCWA Drinking Water Supplies

12 The Plan provides that the SCWA does not supply recycled water to offset  
13 potable water uses. (AR 66761). However, the plan does address at Section 5 the use  
14 of recycled water by its contractors. As noted by the Plan, the use of recycled water  
15 reduces peak demands on the SCWA's water supply system (AR 66756-66762). For  
16 example, the Santa Rosa Subregional Reclamation System disposes wastewater which  
17 is not recycled into the Russian River. The treatment level is tertiary. In 2005, 3681  
18 acre-feet per year were disposed; is projected that in 2020 7,362 acre-feet will be  
19 disposed. (AR 66761). As shown in Table 5-6, Santa Rosa used 344 acre-feet during  
20 2005 for urban purposes that offset potable water use. (AR 66760-66762).

21 The Act includes the objective to ensure that water supplies are not  
22 contaminated in order to prevent adverse impacts on water quality. Contaminated  
23 water, if a source relied on in the Plan, affects the issue of reliability. Sections  
24 10610.2(a)(5), (9). Petitioners claim that the Plan fails to address threats to SCWA's  
25 water supply from the planned use of treated sewage water for irrigation. Further claim  
26 is made that the long-term availability of potable water may be severely threatened in  
27 areas whose surface or groundwater may be contaminated by treated sewage.

28 In a 2006 letter from Randy Poole, the General Manager of the SCWA, to the  
City of Santa Rosa, Mr. Poole provided comments regarding the draft Environmental

1 Impact Report involving Santa Rosa's recycled water program. The letter indicates  
2 that the SCWA operates six collector wells along the Russian River which supply  
3 drinking water for approximately 600,000 people in Sonoma and Marin counties.  
4 Mention was made of the potential for an expanded water supply system which could  
5 include new collectors upstream of existing collectors. Mr. Poole stated that the SCWA  
6 was concerned that Santa Rosa's project could detrimentally affect the quality of  
7 drinking water, and in particular, the SCWA's supply facilities due to the presence of  
8 pathogens and inorganic and organic compounds that may be present in the  
9 wastewater.(AR 03907-03909).

10 According to Petitioners, the Plan fails to acknowledge these concerns. The  
11 Plan states that "no impacts to water supplies due to water quality deficiencies are  
12 foreseen to occur in the next 25 years." (AR 66754-66755). Since the SCWA does  
13 not supply recycled water to offset potable water uses, the issue to be here determined  
14 is whether the Plan should have, but did not, consider use of recycled water by  
15 contractors and the potential effect of said use on the reliability of drinking water that is  
16 the subject of the Plan. (AR 66761-66762). The Act requires the SCWA to provide  
17 descriptions of its groundwater management strategy, including "the manner in which  
18 water quality affects water management strategies and supply reliability." §§ 10631(b),  
19 10634, 10635. The Plan fails to address these concerns, except to the extent that  
20 generalized statements are made dismissing such concerns. While it is true that  
21 Sections 10633(f) and (g) of the Act specifically "encourage the use of recycled water"  
22 and require "optimizing the use of recycled water" by the water agency, to the extent  
23 that it may affect the reliability of water sources it must be addressed. The likelihood of  
24 any future disposal of treated wastewater to the Russian River upstream of the  
25 Agency's facilities is *not* pure speculation, as shown by Mr. Poole's letter. Even though  
26 any future project to discharge wastewater to the Russian River or for the beneficial use  
27 of recycled water would be subject to CEQA requirements, the potential impact of such  
28 eventuality must be considered in connection with the Plan.

1 E. The Plan Fails To Explain How, When, And To What Extent Its Water  
2 Conservation Program Will Reduce Water Demand

3 Water Code Sections 10631(f)(g) provide that a plan shall include:

4 "(f) ... a description of the supplier's water demand management  
5 measures. This description shall include all of the following:

6 (4) An estimate, if available, of existing conservation savings on  
7 water use within the supplier's service area, and the effect of the  
8 savings on the supplier's ability to further reduce demand."

9 Section 10631(g) requires the Plan to include:

10 "An evaluation of each water demand management measure listed  
11 in paragraph (1) of subdivision (f) that is not currently being  
12 implemented or scheduled for implementation. In the course of the  
13 evaluation, first consideration shall be given to water demand  
14 management measures, or combination of measures, that offer  
15 lower incremental costs than expanded or additional water  
16 supplies. This evaluation shall do all of the following:

- 17 (1) Take into account economic and noneconomic factors,  
18 including environmental, social, health, customer impact, and  
19 technological factors.  
20 (2) Include a cost-benefit analysis, identifying total benefits and  
21 total costs.  
22 (3) Include a description of funding available to implement any  
23 planned water supply project that would provide water at a  
24 higher unit cost.  
25 (4) Include a description of the water supplier's legal authority to  
26 implement the measure and efforts to work with other relevant  
27 agencies to ensure the implementation of the measure and to  
28 share the cost of implementation."

21 According to Petitioners, the Plan does not include how, when, and to what  
22 extent it will reduce the demand for water. (AR 66764-66766). The Plan, according to  
23 Petitioners, in calculating projected water demands, bases the projections upon a  
24 predicted substantial reduction in water use based on future implementation of water  
25 conservation and best management measures. The Plan does not describe how each  
26 measure functions, whether or not it has been fully implemented, or its effectiveness.  
27 According to Petitioners, the Plan is defective since it precludes informed evaluation of  
28 how, and whether, the SCWA plans to supply sufficient water to meet expected future

1 demands.

2 In response, Respondents point to Water Code Section 10631(j):

3 'Urban water suppliers that are members of the California Urban Water  
4 Conservation Council and submit annual reports to that council in  
5 accordance with the "Memorandum of Understanding Regarding Urban  
6 Water Conservation in California," dated September 1991, may submit  
7 the annual reports identifying water demand management measures  
8 currently being implemented, or scheduled for implementation, to satisfy  
9 the requirements of subdivisions (f) and (g)"

10 The Agency is a member of the California Urban Water Conservation Council  
11 (CUWCC). AR06:05:13030-13081. Under the MOU, the Agency submits annual reports  
12 to CUWCC which identify the BMPs being implemented by the Agency.

13 The issue to be determined is whether the report, contained at Appendix 2 of the  
14 Plan, satisfies the requirements imposed by statute. (AR 66719-66816). The court  
15 determines that the report submitted pursuant to Section 10631(j), and the Plan, does  
16 not include any supporting data to demonstrate the water savings from its participation  
17 in the California Urban Water Conservation Council. The Plan does not provide the  
18 dates by which the claimed measures will be in effect. As such, the Plan is not  
19 supported by substantial evidence.

## 20 VII.

### 21 VIOLATION OF THE PUBLIC TRUST DOCTRINE

22 In *Environmental Protection and Information Center V. California Department of*  
23 *Forestry and Fire Protection* (2008) 44 Cal.4th 459, 515, the Supreme Court addressed  
24 a challenge to an approved logging plan arising from a settlement. The court addressed  
25 "two distinct public trust doctrines" there at issue: "the common law doctrine, which  
26 involves the government's 'affirmative duty to take the public trust into account in the  
27 planning and allocation of water resources" and "a public trust duty derived from  
28 statute, specifically Fish and Game Code section 711.7, pertaining to fish and wildlife."  
In that case, the court observed that although the two doctrines overlap, "the duty of  
government agencies to protect wildlife is primarily statutory."

1 Here, the duties which are the object of this mandamus action are primarily  
2 statutory. As such, and considering the complex nature of the water distribution system  
3 and forecasting related thereto, the court abstains from invoking the Public Trust  
4 Doctrine in deference to the regulatory oversight being provided by public authorities.  
5 See, for example, *Center For Biological Diversity, Inc. V. FPL Group, Inc.* (2008) 166  
6 Cal.App.4th 1349.

7 VIII.

8 ATTORNEYS FEES

9 Petitioners seek recovery of their attorney's fees and litigation costs pursuant to  
10 Code of Civil Procedure sections 1021.5 and 1032, and Government Code section 800.  
11 Petitioners seek an award of attorney's fees under each of their causes of action herein  
12 pursuant to Code of Civil Procedure section 1021.5, in that the successful disposition of  
13 this Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive  
14 Relief and Attorney's Fees will result in the enforcement of an important right affecting  
15 the public interest; a significant benefit will be conferred upon the general public and a  
16 large class of persons arising from enforcement of state laws and regulations protecting  
17 the quantity and quality of the State's waters and associated public trust interests; and  
18 the necessity and financial burden of private enforcement are such as to make the  
19 award appropriate. Petitioners seek to recover their attorney's fees pursuant to  
20 Government Code section 800, which authorizes the award of up to \$7,500 in attorney's  
21 fees to petitioners in actions to overturn agency actions, such as those at issue herein,  
22 that are arbitrary and capricious. Additionally, petitioners request reimbursement of  
23 their litigation costs pursuant to Code of Civil Procedure section 1032, subdivision (b),  
24 which provides in pertinent part that: "[e]xcept as otherwise expressly provided by  
25 statute, a prevailing party is entitled as a matter of law to recover its costs in any action  
26 or proceeding." In light of the determinations made herein, the court will address any  
27 claims for attorneys fees pursuant to a separate motion, to be filed within 30 days of the  
28 date of service of this order.

1 III

2 II

3 I

4 **IT IS SO ORDERED**

5 Dated: October 28, 2008

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Hon. Gary Nadler  
Judge of the Superior Court


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PROOF OF SERVICE BY MAIL

I certify that I am an employee of the Superior Court of California, County of Sonoma, and that my business address is 600 Administration Drive, Room 107-J, Santa Rosa, California, 95403; that I am not a party to this cause; that I am over the age of 18 years; that I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service; and that on the date shown below I placed a true copy of the foregoing attached papers in an envelope, sealed and addressed as shown below, for collection and mailing at Santa Rosa, California, first class, postage fully prepaid, following ordinary business practices.

Date: October 28, 2008

Denise L. Gordon  
COURT EXECUTIVE OFFICER

by  \_\_\_\_\_

Deputy Clerk

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