

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FIVE

SONOMA COUNTY WATER COALITION, )  
et al., )  
 )  
Petitioners and Respondents, )  
 )  
v. ) **Case No. A124556**  
 )  
SONOMA COUNTY WATER AGENCY, )  
SONOMA COUNTY WATER AGENCY )  
BOARD OF DIRECTORS, )  
 )  
Respondents and Appellants. )

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**RESPONDENTS' BRIEF**

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Appeal from Sonoma County Superior Court  
Case No. SCV-240367  
Honorable Gary Nadler, Judge of the Superior Court,  
Department 20, (707) 521-6726

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## I. INTRODUCTION

This case seeks informed and balanced water supply planning to meet future growth in an ecologically sustainable manner. Petitioners/respondents Sonoma County Water Coalition, et al. (“petitioners”) include 14 citizens organizations<sup>1</sup> from throughout Sonoma County with decades of experience in studying and managing ground and surface water resources to sustain a broad and diverse spectrum of agricultural, municipal, recreational, and fish and wildlife uses. Petitioners seek to uphold the Judgment of the Honorable Gary Nadler of the Sonoma County Superior Court (“trial court”) setting aside respondents/appellants Sonoma County Water Agency, et al.’s (“the Agency’s”) 2005 Urban Water Management Plan (“the Plan”) because it (1) was not coordinated with other water supply regulators and (2) fails to provide the detailed water supply information required by the Urban Water Management Planning Act, Water Code section 10610 *et seq.* (“UWMPA”).

The UWMPA requires urban water suppliers, in coordination with other resource agencies, to adopt an updated urban water management plan every five years to “carry[] out their long-term resource planning

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<sup>1</sup>Sonoma County Water Coalition, North Coast Rivers Alliance, Westside Association to Save Agriculture, Atascadero Creek Green Valley Creek Watershed Council, O.W.L. Foundation, Russian River Watershed Protection Committee, Bellevue Township, Sebastopol Water Information Group, Friends of the Eel River, Petaluma River Council, Coast Action Group, Blucher Creek Watershed Council, Community Alliance With Family Farmers, and Forest Unlimited. Petitioners also include Eleanor Kneibler, a cattle rancher and gardener.

responsibilities to ensure adequate water supplies to meet existing and future demands for water.” Water Code §10610.2(b).<sup>2</sup> Contrary to the UWMPA’s prescribed coordination requirement (§ 10620(d)(2)), in preparing its Plan the Agency failed to consult with the four resource agencies that control flows in the Russian River from which the Agency proposes to divert its future water supply: the U.S. Army Corps of Engineers, the Federal Energy Regulatory Commission, the National Oceanic and Atmospheric Administration’s Fisheries Service, and the State Water Resources Control Board. In part due to its failure to coordinate with these agencies, the Agency’s Plan mistakenly assumes that the Agency will receive substantially increased supplies from the Russian River, in potential conflict with the increased flows needed to restore its endangered salmonid fishery. Because of these and other UWMPA violations, as explained below, the trial court’s ruling setting the Plan aside should be affirmed.

## **II. STATEMENT OF THE CASE**

### **A. FACTUAL BACKGROUND**

The Agency is a wholesale water supplier for several water companies and public agency customers located in Sonoma and Marin Counties.<sup>3</sup> The Agency acts as the local sponsor for federal flood protection

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

<sup>3</sup>The Agency’s customers include the Marin Municipal Water District, North Marin Water District, City of Petaluma, City of Rohnert Park, City of Santa Rosa, City of Sonoma, Valley of the Moon Water District, Town of Windsor, City of Cotati, Forestville Water District, and the California-

and water supply projects known collectively as the Russian River Project. Stats. 1949, c. 994 (*reprinted in West's Cal. Water Code Appendix, Vol. 71A, Section 53-1 (1999 and 2009 suppl.)*). In that capacity, the Agency currently diverts up to 75,000 acre-feet per year (AFY) from the Russian River for municipal, industrial and agricultural uses. Administrative Record ("AR") Plan<sup>4</sup> 66729-66730.

The Russian River and its tributaries are home to chinook and coho salmon and steelhead trout, and are widely used by fishermen, canoeists, swimmers, and other recreationalists. AR Box 19, File 04, Page 41676 ("19:04:41676"), 19:05:42432 (Fig. WR-1), 26:19:55010-55017, 66718, 66732. Due to the Russian River's declining water quality and quantity, all three of its salmon species are now threatened with extinction. The Central California Coast coho salmon was listed as threatened by the former National Marine Fisheries Service (now known as the National Oceanic and Atmospheric Administration Fisheries Service ("NOAA")) on October 31, 1996. 61 Federal Register ("Fed. Reg.") 56138; AR12:07:25616; AA1:71, 111. The Central California Coast steelhead trout was listed as threatened by NOAA on August 18, 1997. 62 Fed. Reg. 43937; AR12:07:25616; AA1:71, 111. NOAA listed the California Coastal chinook salmon as threatened on September 16, 1999. 64 Fed. Reg. 50393; AR12:07:25616;

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American Water Company. AR66715.

<sup>4</sup>The Agency's Plan appears as a separate file in the digital Administrative Record, and thus has no separate "box" or "file" number.

AA1:71, 111.

As Sonoma County's population grew over 50 percent between 1980 and 2000, the water quality of the Russian River and its tributaries (and adjacent water tables) was adversely impacted by altered flows due to diversions to urban uses, increasing sediment, elevated summer water temperatures, increasing contamination by pathogens, mercury and other pollutants, and declining dissolved oxygen levels. AR19:04:41574, 41672, 41676-41677, 41686, 26:19:54971. These adverse changes have degraded habitat for salmonids and other fish and wildlife, and impair recreational, agricultural, and municipal water uses. AR07:11:16551, 19:04:41676, 41686, 41789. Due to its declining water quality, the Russian River has been designated as water quality-impaired under section 303(d) of the Clean Water Act by the United States Environmental Protection Agency and the State Water Resources Control Board. *Id.* Degraded water quality has allowed the proliferation of invasive warm water species that eat young salmon such as the pike minnow. AR25:04:51537-51538, 51550, 26:19:55033.

At the same time that Sonoma County's population is *growing*, its ability to accommodate and sustain this growth is *declining*. AR19:04:41870-41872, 19:05:42428. Harmful ground and surface water management practices, including excessive groundwater pumping and surface water diversions, construction on steep slopes and in erosive soils, excessive and ill-designed gravel mining, and other harmful resource

extraction practices, are impairing and in some cases severely depleting the County's watershed resources and ground- and surface-water recharge systems. *See* AR19:04:41685-41689, 41719, 26:19:54971. As a consequence, now more than ever before, Sonoma County urgently needs comprehensive watershed and water supply analysis and planning, and careful monitoring and regulation of land use and water resource development.

In the absence of a complete and accurate Plan, as required by the UWMPA, neither the Agency nor Sonoma County<sup>5</sup> can perform its statutory duties to plan, manage, and regulate Sonoma County's imperiled ground and surface water resources, nor will either be able to intelligently plan for, or accommodate, future population growth. For these reasons, this Court should affirm the trial court's judgment requiring the Agency to correct its UWMP to accurately assess the significant threats to ground and surface water quality and quantity, potential limitations on the future availability of water supplies, the demands on those supplies, and all reasonable mitigation measures and alternatives that may be utilized to protect and restore the quality and quantity of Sonoma County's water supplies in the future.

## **B. LEGAL BACKGROUND**

The UWMPA requires public water agencies to develop a long-range

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<sup>5</sup>Both the Agency and Sonoma County are governed by the five members of the County's Board of Supervisors, who also sit, *ex officio*, as the Agency's 5-member Board of Directors. Stats. 1949, c. 994, §4; *reprinted in* West's Water Code App. § 53-4 (1999).

comprehensive plan every five years to “provide assistance to water agencies in carrying out their long-term resource planning responsibilities to ensure adequate water supplies to meet existing and future demands for water.” §§10610.2(b), 10621. The plans are of great importance not only to these agencies, but also to the state as a whole, because as the UWMPA recognizes, “[t]he waters of the state are a limited and renewable resource subject to ever-increasing demands” and “[t]he conservation and efficient use of urban water supplies are of statewide concern.” §10610.2(a)(1), (2). Accordingly, the UWMPA provides that “[t]he management of urban water demands and efficient use of water shall be actively pursued to protect both the people of the state and their water resources.” §10610.4(a).

To assure planning for current and future water needs, the UWMPA directs that each “plan shall describe and evaluate sources of supply, reasonable and practical efficient uses, reclamation and demand management activities.” §10615. It sets forth detailed requirements for the contents of each plan, mandating, *inter alia*, that they:

- (a) “[d]escribe the service area of the [water] supplier, including current and projected population, climate, and other demographic factors affecting the supplier’s water management planning;”
- (b) “[i]dentify and quantify, to the extent practicable, the existing and planned sources of water available to the supplier,” including detailed information respecting existing and planned use of groundwater;
- (c) “[d]escribe the reliability of the water supply and vulnerability to seasonal or climatic shortage” of supplies in average, dry, and multiple dry water years,

and “[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;”

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

§10631, emphasis added. Thus, the UWMPA requires a detailed description and analysis of current and future water demands and supplies, a study of the reliability of water sources included in the plan, and a clear description of alternative water sources that could be used to fill potential gaps in the plan’s future water supplies. §§ 10615, 10631. The only

appellate court to construe the UWMPA has recognized that “[w]ithout a reliable analysis of the availability of water, the UWMP is fatally flawed. The public and the various governmental entities that rely on the UWMP may be seriously misled by it and, if the wrong set of circumstances occur, the consequences to those who relied on the UWMP, as well as those who share a water supply with them, could be severe.” *Friends of the Santa Clara River v. Castaic Lake Water Agency* (2004) 123 Cal.App.4th 1, 15.

Ignoring the UWMPA’s specific mandates and the caselaw’s call for their vigorous enforcement, the Agency urges a lax construction of the Act that allows urban water suppliers to sidestep its most important requirements. Appellants’ Opening Brief (“AOB”) at 8-9. The Act does not direct that agencies merely supply “basic data,” as the Agency asserts (AOB at 8), but rather, it requires full disclosure and careful analysis of water supplies and projected demand, identification and assessment of alternative supplies where supply uncertainties emerge, and detailed contingency planning to avoid shortfalls during droughts and other emergencies. *Friends of the Santa Clara River, supra*, 123 Cal.App.4th at 8-9 and 13-15, citing §§10610.2(d) and (3), 10631, 10632 and 10633. The Agency argues that the Act’s use of the phrase “to the extent practicable” in four provisions confers discretion to reinterpret the Act’s directives. AOB at 9. The trial court properly rejected this approach, agreeing with petitioners that construction of the UWMPA’s requirements is a judicial, not agency, prerogative “governed by notions of reasonableness and



practicality.” AA2:350. This Court should uphold this standard in evaluating the Agency’s actions.

### III. STANDARD OF REVIEW

The parties agree that appellate court review of an agency’s decision under section 10651 “is precisely the same as the role of the superior court and, therefore, the lower court’s findings of fact and conclusions of law are not binding on the appellate court.” *Friends of the Santa Clara River, supra*, 123 Cal.App.4th at 9; AOB at 6. Thus, this Court reviews the Agency’s decision *de novo*.

In reviewing the Agency’s actions, this Court must determine if the Agency abused its discretion. §10651. “Abuse of discretion is established if the supplier has not proceeded in a manner required by law or if the action by the water supplier is not supported by substantial evidence.” *Id.* The trial court properly utilized this dual standard of review. AA2:348-353. The Agency claims to the contrary that this Court may only ask whether there is *substantial evidence* to support the findings in the Agency’s Plan. AOB at 6. Since the UWMPA also requires this Court to determine whether the Agency has “not proceeded in a manner required by law,” §10651, the Agency’s position must be rejected. Further, under the latter standard, this Court must review the Agency’s actions *de novo*, “scrupulously enforc[ing] all legislatively mandated” requirements. *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (enforcing the similar standard under Pub. Res.

Code §21168.5).<sup>6</sup>

By ignoring the second prong of the standard of review, the Agency sweeps aside the legal deficiencies in the Plan that do *not* pertain to disputed factual conclusions in the record. These flaws are substantial. Petitioners established, and the trial found, that (1) the Agency failed to coordinate the Plan’s preparation with other relevant public agencies, (2) the Plan fails to assess the impact on water availability of actions taken to protect endangered fish species, (3) the Plan failed to address the threat to ground and surface water supplies from treated wastewater, and (4) the Plan failed to properly account for water conservation. AA2:348, 362-376, 380-385, 387-388. Each of these omissions involves the Agency’s failure to “proceed[] in a manner required by law.” Each, as the *Friends of the Santa Clara River* Court explained, is clearly subject to *de novo* review in which this Court must, consistent with CEQA’s identical standard of review, “scrupulously enforce all legislatively mandated” requirements. *Vineyard Area Citizens, supra*, 40 Cal.4th at 439.

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<sup>6</sup> This Court may refer to CEQA cases to determine the proper standard of review. *Friends of the Santa Clara River, supra*, 123 Cal.App.4th at 9 (UWMPA’s standard of review “is similar to Public Resources Code section 21168.5,” and therefore case law under this CEQA provision informs review under the UWMPA).

#### IV. ARGUMENT

##### A. THE AGENCY VIOLATED THE UWMPA BY FAILING TO COORDINATE WITH THE U.S. ARMY CORPS OF ENGINEERS, FERC, NOAA, AND THE STATE WATER RESOURCES CONTROL BOARD.

The UWMPA sets out specific procedures that water suppliers must follow to ensure that they develop sufficient information for an adequate Plan. *See, e.g.*, §§ 10620, 10621, 10640, 10641, 10642. Here the Agency failed to abide by the statute’s requirements to coordinate with relevant agencies, as explained below. §§ 10620, 10642. Therefore, the trial court’s order requiring the Agency to coordinate with water supply regulators should be affirmed.

##### 1. The Coordination Requirement.

The UWMPA mandates 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.” §10610.2(a)(4). Accordingly, UWMPA section 10620 provides that each urban water supplier “*shall* coordinate the preparation of its plan with other appropriate agencies in the area, including other water suppliers that share a common source, *water management agencies*, and *relevant public agencies*, to the extent practicable.” §10620(d)(2), emphasis added. However, the Agency did not proceed in the manner required by law because it failed to coordinate its Plan with the U.S. Army Corps of Engineers (“USACE”), the State Water Resources Control Board (“SWRCB”), the Federal Energy

Regulatory Commission (“FERC”), and NOAA Fisheries (formerly NMFS). AR66708. Rather than including all agencies that determine its water supply, the Agency coordinated only with its customers, including local wastewater agencies, Marin and Sonoma Counties, and its water retailers. AR66708. By thus conferring only with agencies influencing *demand*, and ignoring those controlling *supply*, the Agency did exactly what the UWMPA is intended to prevent – allowing demand to outstrip supply. The trial court properly ruled that the Plan was deficient due to this error. AA2:362-376.

**2. The Agency Was Required to Coordinate with the Four Agencies.**

The Agency was required to coordinate with the four agencies controlling its supplies in order to comply with the UWMPA. The Agency argues that its coordination efforts satisfied the UWMPA because its water contractors comprised the whole of the “relevant agencies in the area for which the type of coordination contemplated by the Act was practicable and appropriate.” AOB at 42. The Agency contends that the agencies omitted from its coordination efforts are not “appropriate” or “in the area,” nor was it “practicable” to coordinate with them. AOB at 42-48. These attempted excuses fail. The UWMPA’s language does not confer discretion on the Agency to ignore the Act’s imperative that it consult with agencies controlling its supply such as the four omitted from its coordination process.

**i. The Four Agencies Were Appropriate for Coordination.**

USACE, FERC, NOAA, and SWRCB were appropriate agencies for the Agency to consult during the Plan's preparation because they control the Agency's primary water supply: the Russian River. As the Plan admits, "regulatory agencies may make different decisions or take different actions than those assumed by the Agency, which may affect the availability of water and the adequacy of the Agency's transmission system." AR66709. These four regulatory agencies directly affect the availability of the Russian River's water for diversion by the Agency, and possess operational knowledge essential to responsible water planning. For these reasons, as discussed below, their input is critical to assuring the reliability of the Plan's projected supplies. Indeed, the Plan's shortcomings are due in part to the Agency's failure to accurately predict and project the availability of supplies from the Russian River flows (and water diversion projects) controlled by these four agencies.

Yet, none of these agencies were consulted during the Plan's preparation. The Agency's failure to consult with the four agencies that ultimately control the quantity and quality of the Russian River's future water supplies violates section 10620(d)(2).

**a. USACE**

The Agency should have included USACE in its Plan coordination efforts because USACE exercises authority over the Agency's Russian

River supplies. USACE owns and operates the two principal dams on the Russian River, Coyote Valley Dam (forming Lake Mendocino on the upper Russian River) and Warm Springs Dam (forming Lake Sonoma on its Dry Creek tributary). AR30:07:65849, 65854. The Agency admits that “[f]lood management releases from both reservoirs are controlled by the United States Army Corps of Engineers (USACE).” AR66718. As the trial court explained:

Lake 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 into the flood control pool, the USACE determines releases. . . . [A]s to the relevance of USACE relative to the requirements under the Act, the court notes that the parties entered into a memorandum of understanding which addresses, in part, the effect of coho salmon and steelhead trout in the Russian River which would result from an increase in the amount of water diverted from the Russian River. [citations] This is precisely the sort of environmental concern that could affect the flow requirements potentially necessary to meet the increased demand during multiple dry years.

AA2:371.

Accordingly, the trial court ruled that USACE “shares a common source with the SCWA, and that it is a ‘relevant public agency’ as contemplated by the Act.” AA2:371. Moreover, noting the Plan’s contemplated use of emergency sources during shortfalls, the trial court found:

Considering the anticipated increase in water supply use, even that currently permitted under existing licenses, it is reasonable to assume that the USACE (as well as other agencies) may provide input that could affect the ultimate conclusions of the Plan. . . . [I]ts input as to the anticipated shortages and plan to address the same is certainly relevant.

AA2:373.

The Agency argues, however, that USACE “only *releases* water to ensure that the reservoirs maintain sufficient capacity to capture flood flows and thereby prevent flooding, and is not a water supplier.” AOB at 47. The purpose of the releases is beside the point. The waters that USACE releases from both Lake Mendocino and Lake Sonoma supply the Russian River flows that the Agency diverts at its Wohler pumps. Because USACE exercises substantial control over the Agency’s principal water supply, it is an agency with whom the Agency should have coordinated its Plan.

**b. FERC**

FERC likewise shares a common source with the Agency because it exercises authority over the Potter Valley Project (“PVP”). AR66718. The PVP diverts approximately 159,000 AFY from the Eel River into the Russian River, supplying most of the Russian River’s summer flow. AR66710. Because FERC regulates SCWA’s diversions of Eel River water under PG&E’s PVP license, it controls a major portion of the Agency’s water supplies. AR66710-66711, 66718.

The Plan assumes that the controversial PVP diversions will continue at their historic levels. AR66710. However, the PVP license is

expressly subject to amendment, as necessary to protect the Eel River's imperiled salmon, prior to relicensing in 2022. *California Sportfishing Protection Alliance v. FERC* (9th Cir.), Petitioners' Excerpts of Record Vol. 4 (January 28, 2004): Tab 20: Order Amending License, Articles 51-58. And, as the trial court noted, the Agency is involved in FERC proceedings that are reviewing the PVP's minimum Eel River flows. AA2:375, citing AR05:03:10327-10375. If FERC orders greater minimum "fish flows" in the Eel River, the Agency's Russian River water supplies decline. AR66710, *California Sportfishing Protection Alliance v. FERC* (9th Cir. Nos. 04-73498, et seq.) Petitioners' Excerpts of Record Vol. 1, Tab 9, page xxix. Yet the Agency failed to consult with FERC in preparing the Plan. AR66708.

Indeed, in tacit recognition of FERC's key role, the Agency utilized a FERC model for predicting flow into Lake Mendocino. AR24:10:50774. But because it did not coordinate the Plan's preparation with FERC, it did not discover this error until just before the Plan's adoption, from PG&E rather than from FERC. *Id.* Rather than correcting the draft plan, the Agency met with FERC and NOAA *after* the Plan's adoption to determine how to remedy this problem. AR24:10:50775. This was not an idle, technical error. The Agency's own staff admitted that "we know somewhat less water will probably flow into Lake Mendocino" than the erroneous model had projected. This Plan error might have been avoided had the Agency coordinated with FERC in preparing the Plan.



In sum, FERC shares a common source with the Agency, and by dint of its regulation of Russian River flows, was clearly a relevant agency for coordinating the Agency's Plan. The Agency's failure to coordinate the Plan with FERC therefore violated the UWMPA.

**c. NOAA**

NOAA, in cooperation with other agencies, likewise regulates releases from Lake Sonoma and Lake Mendocino into the Russian River. AR12:07:25626, 66718. The trial court therefore concluded that "this agency bears a role in controlling water releases from water sources shared by the SCWA." AA2:376.

In tacit recognition of this fact, the Agency belatedly met with NOAA, along with FERC, to determine how to amend its Plan to remedy its erroneous flow model for Lake Mendocino. AR02:12:04074, 24:10:50775. Thus, according to the Agency's own General Manager, its failure to coordinate with NOAA while preparing the Plan hindered its ability to correctly predict flows into Lake Mendocino. NOAA was thus a relevant agency under the terms of section 10620(d)(2).

**d. SWRCB**

SWRCB is a relevant public agency under the terms of section 10620 because it will determine whether or not the Agency will be allowed to divert the additional 26,000 AFY of supply on which it based the Plan. AR66710, 66713. Accordingly, the trial court ruled that "the SWRCB participates and to an extent controls a common water source and is

involved in the water management process. Clearly, the participation of this agency would be considered relevant to the purposes required to be addressed under the Act.” AA2:366-367.

The SWRCB’s key role in managing the Agency’s water supply is well documented. SWRCB has expressed its concern over the Agency’s increasing Russian River diversions, and asked for information about its long-term planning strategies. *See* AR02:11:03896-03897. Conversely, the Agency has repeatedly sought exemptions from the SWRCB’s Russian River minimum flow requirements. AR06:07:13562-13612, 06:08:13904-13914. Indeed, obtaining such exemptions is among the Plan’s contingency strategies to increase supplies during shortfalls. AR66753.

Proper coordination with relevant regulatory bodies such as the SWRCB, moreover, would help the Agency “make every effort” to ensure the reliability of its supplies. §10610.2(a)(4). The SWRCB’s insights into the reliability of the Plan’s water supply projections are obvious. But instead of eliciting those insights, the Plan relies on assumptions that could very well be contradicted by the SWRCB.

Thus, SWRCB was a public agency relevant to the Agency’s short- and long-term water planning. The Agency’s failure to coordinate the Plan with the SWRCB therefore violated the UWMPA.

**ii. The Agencies Are “In the Area.”**

The Agency makes much of the fact that neither SWRCB, FERC, NOAA nor USACE is a local agency. AOB at 42-43, 46-47. Therefore, it

argues these agencies are not “in the area” because they are not headquartered in the Sonoma County region. AOB at 46. This interpretation of the statute lacks merit. All of the facilities that the agencies manage – most notably the PVP, Lake Mendocino, Lake Sonoma and the Agency’s Wohler pumps – are “in the area.” Therefore, as the trial court ruled, to exclude any of these agencies “on the basis that it is not ‘in the area’ would constitute an abuse of discretion.” AA2:366. Their presence in the area is manifested by their management of area facilities. This common sense interpretation serves the statute’s intent to coordinate management of the Plan’s water supplies.

The Agency also contends that because the statute does not explicitly identify relevant state and federal agencies for coordination, it was therefore within the Agency’s discretion to exclude them from the planning process. AOB at 45-47. However, the UWMPA’s lack of specificity regarding potential inclusion of statewide or national agencies does not imply that they are neither “appropriate” nor “in the area” as the Agency contends. AOB at 46. Under the UWMPA’s plain language, the Agency had to confine its discretion to determining which agencies were “appropriate” and “in the area.”

**iii. It Was Practicable for the Agency to Coordinate with the Four Agencies.**

It was practicable for the Agency to coordinate with USACE, FERC, NOAA, and SWRCB. The Agency had ongoing communications with each

of the agencies, demonstrating that there is no reason that such communication could not have occurred with regard to the Plan. *See, e.g.*, AR05:02:10001-10074; 28:08:61493-61494, 30:07:65849-65862, 65975-65983. For example, as the trial court noted, the Russian River Biological Assessment was sent to these agencies for comment without difficulty. AA2:365-366.

The Agency argues that it need not have contacted these agencies because they could not predict their future actions regarding the Agency's water supplies. AOB at 47-48. But that is not what the Act requires. It directs the Agency to "coordinate" with these agencies. These agencies' feedback to the Agency would not be hindered by any required public hearings or complex procedures, as these same agencies have routinely offered comments on the Agency's proposals and operations in the past. *See, e.g.*, AR28:08:61493-61500. Thus, the Agency had no reason to assume that its coordination efforts would be futile here. Therefore it should have at least provided the Plan to the agencies for their comment.

Contrary to the Agency's claim, the trial court did not require the Agency "to ascertain from the SWRCB and three federal agencies the effect on the Agency's planned supplies of decisions by those agencies in future regulatory proceedings." AOB at 47. The coordination duty imposes no such onerous requirement. The Agency need only include the agencies in the Plan's preparation and review, not secure their agreement with the Plan's conclusions.

Therefore, it was practicable for the Agency to coordinate with each of these four agencies.

### **3. The Agency's Contrary Arguments Lack Merit.**

The Agency claims that “[t]o the extent the SWRCB and federal agencies referenced by the court had information relevant to preparation of the UWMP, it obtained that information and used it in preparation of the Plan.” AOB at 42-43. This statement is false. First, the Agency cites no evidence that it used information from those agencies when preparing the Plan. AOB at 43. Second, the Plan specifically enumerates the agencies with whom the Agency coordinated, and specifies what actions it took to coordinate with them. AR66708. That list does *not* include SWRCB, FERC, NOAA, or USACE. The Plan thus admits that the Agency did not coordinate the Plan with these agencies. *Id.* The Agency did not take even the first step of contacting any of these agencies for information during its planning process. *Id.*

The Agency again twists the trial court's ruling, claiming it required the Agency to “obtain concurrence on the Plan's forecasts” from SWRCB, FERC, NOAA and USACE. AOB at 43-44. Not so. The trial court merely ruled that the Agency must “coordinate” with those agencies, just as the statute explicitly requires. AA2:366-376. According to both the Plan and the Department of Water Resources, a variety of actions constitute “coordination” among agencies, including making contact with an agency for assistance and sending the Agency a copy of the draft Plan.

AR02:11:03810, 66708. Such modest effort is hardly daunting. Thus, by the Plan's own usage of this term, "coordination" does not require that an agency must concur with the Plan's forecasts. Nor would the Agency be required to hash out particular policies or go through lengthy rule processes to engage in "coordination." Neither petitioners nor the trial court ever suggested such an onerous duty.

Therefore, the trial court's ruling requiring the Agency to coordinate with FERC, USACE, NOAA and SWRCB was proper. It did not impose impractical procedural burdens on the Agency, nor intrude upon the Agency's management discretion granted under the UWMPA. The Agency's strawman argument fails.

**B. THE PLAN DID NOT ADEQUATELY ADDRESS THE CONSTRAINING EFFECT OF THREATENED AND ENDANGERED SPECIES ON THE RELIABILITY OF THE AGENCY'S WATER SUPPLIES.**

As discussed above, the UWMPA requires agencies to "[d]escribe the reliability of the water supply" and then, "[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 . . . ." §10631(c), emphasis added. Thus, the Act requires agencies to identify supplies that can be relied upon to meet future needs and also to describe the supplies that "*may not be available*," given potential constraints on those less-than-certain supplies.

Black's Law Dictionary defines "may" as "[t]o be a possibility."<sup>7</sup> Thus, the Act *requires* identification and analysis of any future water supply that has the *possibility* of not materializing or the *possibility* of not being available to the extent stated in the plan. For those supplies, UWMPA requires agencies to "describe plans to supplement or replace th[ose] source[s] with alternative supplies." §10631(c). Any plan that does not identify the less-than-certain supplies and alternatives thereto is legally deficient as a matter of law because it lacks information required by the Act. In short, if a water source *may* not be available in the future, the agency must describe that uncertainty and develop a back-up plan.

The Agency's appeal asks whether it violated UWMPA by ignoring the uncertainty in its future water supply plans caused by the presence of endangered salmonids in the Russian and Eel Rivers. The answer is yes. The Plan improperly assumed that all of its future water supplies would be available, i.e., that there existed *no* uncertainty in any of those supplies. AR66710. The endangered salmonids in the Eel and Russian rivers, however, pose a potentially substantial constraint on the Agency's future water supplies, one that affects their reliability.

For this reason, the trial court ruled that the Plan impermissibly ignored the substantial uncertainties in the Agency's future water supplies. The court correctly reasoned that (1) the presence of threatened salmonids in the Russian and Eel Rivers had the potential to block or significantly

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<sup>7</sup> Black's Law Dictionary 1068 (9<sup>th</sup> ed. 2009).

inhibit the Agency's plans for increased water diversions from the Russian River and (2) that the Agency was thus required by the UWMPA to identify the uncertain nature of its future water supply in the Plan and discuss alternative plans to replace those supplies in the event that the Agency's plans to increase diversions are not realized. The court explained:

[The Agency] clearly recognizes that its operations "may be modified" because of the existence of the listed species, and it acknowledges that the extent of those modification[s] is uncertain. This directly undercuts the Plan's assumption that "ESA constraints will not affect or impair the water supply available to the Agency for delivery," and throws substantial doubt on the reliability of the Agency's key water supplies in the future.

AA2:383-384. This uncertainty affects two separate components of the Plan's future water supply: (1) the Agency's ability to increase Russian River diversions from 75,000 AFY to 101,000 AFY, and (2) the continued availability of the Eel River water at current levels for use by the Agency.

**1. The Plan's Assumption That It Can Increase Pumping From 75,000 to 101,000 AFY Conflicts with the Flows Required for Endangered Salmonids in the Russian River.**

The Plan impermissibly assumed that the endangered fish species in the Russian River would not – could not possibly – affect the Agency's plans to increase diversions by 35 percent, from 75,000 to 101,000 AFY.<sup>8</sup>

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<sup>8</sup> The Plan states: "In its analysis of the availability of water for diversion from the Russian River by its transmission system, the Agency assumes that the listing of three salmonid species as threatened or endangered under the federal Endangered Species Act (ESA) *will not reduce the amount of water it can supply . . . using its Russian River diversion facilities.*" AR66710, emphasis added. Further, the Agency "assumes that it will construct and



As the trial court explained:

[T]he Plan relies heavily upon the assumed approval of a group of planned future projects, collectively called the Water Supply, Transmission, and Reliability Project (“Water Project”). AR66710, 66749-66750). This Water Project would substantially increase SCWA’s Russian River diversions, by up to one-third, from 75,000 ac-ft/yr to 101,000 ac-ft/yr. (AR66713, 66730). Respondents assume that they will construct and operate all of the facilities now planned for the Water Project. (AR66710, 66749-66751). At the same time, the Plan admits that “State and federal agencies, including the National Marine Fisheries Service (under the ESA) and the . . . SWRCB[] (which issues water rights permits) could impose requirements that would change the Water Project.” (AR66710). The Plan admits that the SCWA has only applied for such an increase, but does not yet possess the rights to the additional 26,000 ac-ft of Russian River flows. (AR66730). Even if the Water Project is completed within the anticipated time frame, approval of a permit for an increase in Russian River diversions is tenuous . . . . If Respondents’ application for the increased diversions [is] rejected, allowing diversions only at the current levels, the projected demand would outstrip the available supplies by 2016 in multiple dry year periods. (AR66767-66770). The UWMPA demands not only a full analysis of the uncertainties of the critical future supply, but equally important, a full discussion of SCWA’s “plans to replace that source with alternative sources.”

AA2:384-385. The trial court highlighted some of the most obvious, undisputed, and considerable obstacles standing between the Agency and its future increased water supply. The Court thus ruled as a matter of law that the Agency’s unconditional reliance on “paper water”<sup>9</sup> violated the Act’s

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operate” the Water Project facilities. *Id.*

<sup>9</sup> The courts have consistently condemned facile agency reliance on undocumented or uncertain improvements in future water supplies, commonly known as “paper water.” *See, e.g., Vineyard Area Citizens for*

express requirement for further analysis of any water supply that “may not be available” in the future. §10631(c).

The uncertainty of the Agency’s future water supply is demonstrated by the following factors (discussed more fully below):

- a. The Agency unambiguously admitted that its future supplies are uncertain;
- b. The Water Project on which the Agency relied had been declared unlawful in an earlier court proceeding and had yet to undergo the further environmental review required by the court;
- c. The BA is merely the *first* step in the ESA consultation process; moreover, the BA itself raised potential obstacles to the Plan;
- d. The Agency had not secured the rights from the SWRCB to increase diversions from the Russian River by 26,000 AFY; and
- e. The facilities needed to deliver the increased diversions had not been constructed.

Thus, the trial court correctly ruled as a matter of law that the 26,000 AFY of paper water is a water supply source that “may not be available” in the future (§10631(c)) and that therefore the Plan’s unequivocal assumption that the water would be available violated the Act.

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*Responsible Growth, supra*, 40 Cal.4th at 430; *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715, 722; and *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 914 n.7.

**a. The Agency Admitted That Its Supplies Are Uncertain, Contrary to the Plan’s Assumptions.**

In April 2006, before the Plan’s adoption late that year, the Agency *unambiguously admitted* that its water supply plans were uncertain. In its comments on the County’s General Plan 2020 DEIR, the Agency stated:

There is *uncertainty* in the Agency’s ability to provide water supply to its water contractors beyond its existing water right permit amount of 75,000 acre-feet per year (AFY).

AR01:02:00222, emphasis added. The Agency continued:

In planning for future water supply, [the County] *should not assume* that the Agency will be able to deliver current allocations allotted under [current contracts]. The EIR acknowledges that this allocation was premised in the buildout of certain Agency facilities [the Water Project] whose construction is *now precluded* as a result of [] litigation and requires State Water Resources Control Board approval of increases in the Agency’s water rights.

*Id.*, emphasis added.

These admissions are dispositive. How could the Agency claim that its future increase in supply was a *certainty* for purposes of its Plan, when, just 7 months before adoption of the Plan, *the Agency itself* warned other entities *not to rely on the completion of the Water Project* and the additional 26,000 AFY for long-term planning purposes? The Agency’s letter admits further that “changes in regulations to protect listed salmonids *could affect* the Agency’s ability to deliver the full allocation allotted under” the current contracts, and advises the County to “discuss any impacts related to water supply that would occur . . . if the Agency is *unable to deliver this water*

from the Russian River system in the future.” *Id.*, italics added.

The Agency thus conceded, expressly and unconditionally, that the planned 26,000 AFY increase in water supply “may not be available” in the future. §10631(c). Under the Act, this admitted lack of reliability should have been described and alternatives should have been analyzed in the Agency’s Plan. The Agency’s failure to so do is a clear violation of the UWMPA.

The Agency’s admission that “[t]here is *uncertainty* in the Agency’s ability to provide water supply to its water contractors beyond its existing water right permit amount of 75,000 acre-feet per year” demonstrates – without need of further analysis – that the Agency should have discussed the 26,000 AFY potential increase in supply as *uncertain* and studied alternatives thereto as required by the Act. The Agency can point to no intervening event between this admission and approval of its deficient Plan that could alter the Agency’s crystal clear contradiction. The Agency’s admission is *irrefutable evidence* that the Plan was premised on a false assumption – one that the Agency itself knew was incorrect. Thus, no further argument is necessary. Nonetheless, petitioners present below further analysis detailing the uncertain nature of the Agency’s future water supply.

In addition, the Plan itself admits that “[a]t the present time, it is uncertain what flow reductions NMFS may recommend in its Biological Opinion [and] the extent to which any flow reductions will have an impact

on the Agency’s water supply.” AR66712. Further, the Plan admits that “NMFS may require the Agency to modify its water supply facilities or operations” (AR66733) and that “[i]t is *uncertain* what modifications NMFS may ultimately require the Agency to implement in order to obtain . . . an increase in the Agency’s Russian River diversions.” *Id.*, emphasis added.

A complete and accurate description of these uncertainties is exactly what the UWMMPA requires. Instead, the Agency simply assumed that the Water Project will not be modified, plugged in 101,000 AFY into its future supply and demand charts, and ignored the Act’s call for a discussion of alternatives for any source of water that “may not be available” at levels predicted in the Plan. §10631(c). The Plan thus contradicts itself and fails to provide the information required by the Act.

And finally, the Agency admits in its BA that actions taken to protect listed species will *reduce* water supplies available to the Agency, creating an even darker, more ominous cloud of uncertainty over the Agency’s plan to increase water diversions in the future:

Because the lower flow rates necessary for suitable rearing habitat would make it *more difficult for SCWA to meet future 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, additional diversion facilities, and new raw water pipeline. SCWA is reviewing the types and feasibility of these facilities to meet water supply needs.

BA, Executive Summary, p. xl, emphasis added. Thus, the BA does not ensure that the Agency will be able to expand its water use in the future; it predicts the opposite. It states that the “lower flow rates” will make it “more difficult for SCWA to meet future supply demands.” *Id.* While the BA suggests that there may be ways to make up for the predicted shortfalls, such potential solutions – “measures” that are merely “*under consideration*” – do not eliminate the fundamental, concrete, and present conflict between the needs of the fish and the Agency’s plans for future increases in water diversions from the Russian River. *Id.*

In sum, the Agency’s admissions directly refute its assumption that “the listing of three salmonid species as threatened or endangered under the federal Endangered Species Act (ESA) will not reduce the amount of water it can supply.” AR66710. This false assumption fatally infects all of the Agency’s analysis of future supplies. Because the Agency failed to accurately describe the reliability of its water supplies or analyze alternatives that would compensate for future, potential shortfalls, it violated the Act.

**b. The Water Project on Which the Plan Relies Had Been Set Aside in an Earlier Court Proceeding and the Agency Had Yet to Complete the Further Environmental Review Required by the Court.**

The Plan admits that the Water Project EIR was successfully challenged in *Friends of the Eel River v. Sonoma County Water Agency*, (2003) 108 Cal.App.4th 859, 865 (“*Friends of the Eel River*”), that the

“Agency is in the process of preparing an EIR for a new water project,” and that the “water project must undergo environmental review in accordance with [CEQA] and obtain project approval before it can proceed.”

AR66730. Despite these significant obstacles, the Plan assumes that the Water Project will sail through environmental review, be approved by the Agency, and thereafter avoid further court review or delay. AR66710, 66749-66751. The Plan’s basic assumption thus ignores multiple, significant, potential roadblocks in the way of successful completion of the Water Project.

First, the Plan ignores the possibility that the required further CEQA review might change the Water Project or cause the Agency to deny it. CEQA review *precedes* project approval for a good reason. According to the Supreme Court, “[t]he lead agency is required to certify that . . . it reviewed and considered the information in the final EIR prior to approving the project.” *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1124. Without such consideration, an agency cannot approve a project; likewise, an agency cannot assume that a project will be approved prior to completion of the EIR:

The preparation and circulation of an EIR is *more than a set of technical hurdles* for agencies and developers to overcome. The EIR’s function is to ensure that government officials who decide to build or approve a project do so with *a full understanding of the environmental consequences* and, equally important, that the public is assured those consequences have been taken into account. [citation omitted] For the EIR to serve these goals it must present information in such a manner that the foreseeable impacts of pursuing the

project can actually be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation *before the decision to go forward is made*.

*Vineyard Area Citizens, supra*, 40 Cal.4th at 449, emphasis added.

Contrary to this fundamental CEQA precept, the Plan assumes that the updated environmental review for the Water Project will not produce new, critical information about the project's impacts and that Agency decisionmakers will approve the project. AR66710. This assumption makes a mockery of the CEQA process. Furthermore, it creates an impermissible shortcut around the UWMPA's requirements that agencies accurately "describe the reliability" of each water supply and analyze any source that "may not be available" to the extent projected in the Plan. §10631(c). Without completion of an adequate CEQA review, no agency should assume that a project will be approved – especially when, as here, the project was previously ruled illegal due to CEQA-related deficiencies.

Further, nothing in the Plan addresses the potential that the Agency's further CEQA review process will past muster in the courts. Rather, the Agency simply assumed that "it will construct and operate [the Water Project] facilities." AR66710. This assumption ignores the highly controversial nature of the project and the potential for many more years of litigation, allowing the Agency to pretend that the project will proceed without change or delay. Given the lengthy delays the project had already



experienced,<sup>10</sup> the Agency's overly optimistic projection that the Water Project would proceed on schedule is unrealistic and violates the Act. If allowed, such assumptions would permit agencies to avoid addressing tough questions about stop-gap supplies, the precise inquiries and analysis the UWMPA requires in its Plans.

In *Friends of the Santa Clara River, supra*, 123 Cal.App.4th at 12-15, the court confronted an UWMP that likewise ignored potential delays in remedying a potential supply shortfall due to groundwater contamination. The Court held that an UWMP must address any factors that render future water supplies uncertain, including “the amount of time needed for . . . implementation” of proposed new sources, lest there be a “temporal gap in the description of the reliability of the water source.” Such a “gap renders the UWMP legally inadequate,” the Court held. *Id.* at 14. The Court explained that “[t]his holding can be restated in the language of [UWMPA] section 10610.2, subdivision (d) as follows. Because of the failure to address the timing issues, the UWMP does not show that the defendants have made ‘every effort to ensure the appropriate level of reliability in [their] water service sufficient to meet the needs of [their] various categories of customers during normal, dry, and multiple dry water years.’” *Id.* at 14, fn. 14. So too in the case at bar, the Agency's failure to address

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<sup>10</sup> AR66730 (Water Project initiated “[i]n the early 1990s”); *see, also, Friends of the Eel River, supra*, 108 Cal.App.4th 859 (resolution of first case related to the Water Project in May of 2003; petition for writ of mandate had been filed in January 1999).

the factors that render the Plan’s future water supplies uncertain, including “the amount of time needed for . . . implementation” of proposed new sources such as the Water Project, “renders the UWMP legally inadequate.” *Id.* at 14.

In short, the Plan’s assumption skips over CEQA review, project approval, and court review, advancing the Water Project to a fictional “approved,” shovel-ready status. This Pollyanna approach does not comply with the UWMPA’s call for realistic discussions of the reliability of future water supplies and analysis of alternatives thereto.

**c. The BA Is the *First Step* in the ESA Consultation Process, and Is Not a Final Determination on the Feasibility of the Agency’s Plan to Increase Water Diversions from the Russian River.**

The Plan assumes that “with the implementation of mitigation measures [in the BA], *ESA* [Endangered Species Act] *constraints will not affect or impair the water supply available to the Agency* for delivery to its transmission system customers.” AR66733, emphasis added. Yet, the BA represents only the Agency’s *initial* step in the coordination process required by ESA. It is not a final agency action, nor does it contain NOAA’s determination on the feasibility of the Agency’s plans to increase future water diversions from the Russian River. As explained by the Ninth Circuit:

If a contemplated agency action may affect a listed species, then the agency must consult with the Secretary of the Interior, either formally or informally. 50 C.F.R. § 402.14(a); 16 U.S.C. § 1536(a)(4). The agency first prepares a

biological assessment, in which it evaluates the potential effects of an action on the listed species and its critical habitat. 50 C.F.R. § 402.12(a). If the agency discovers that its action may affect a listed species or its critical habitat, the agency must initiate formal consultation with NMFS. 50 C.F.R. § 402.14(a). In formal consultation, NMFS must prepare a biological opinion evaluating the effects of the action. NMFS determines whether the action will jeopardize a listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). If NMFS makes a jeopardy finding, then it may also suggest reasonable and prudent alternatives to the proposed action. *Id.*

*American Rivers v. National Marine Fisheries Service* (9<sup>th</sup> Cir. 1997) 126 F.3d 1118, 1122. Thus, it is NOAA in its Biological Opinion (“BiOp”) that “determines whether the action will jeopardize” the listed species; not the Agency and USACE in their threshold review in the BA. *Id.* Further, it is NOAA that suggests alternatives and mitigation measures. The Plan was written as though NOAA had completed its review and issued a BiOp, when in fact the Agency had just begun the consultation process by preparing a BA. Again, the Agency’s approach allowed it to ignore serious potential problems with its future water supply and impermissibly forgo analyses of “alternative sources to supplement or replace” the 26,000 AFY of water predicted to come from the Water Project.

**d. The Agency Had Not Even Secured the Rights from the SWRCB to Increase Diversions from the Russian River by 26,000 AFY.**

As correctly noted by the trial court, “[t]he Plan admits that the SCWA has only applied for [a permit to divert additional water], but does not yet possess the rights to the additional 26,000 AFY of Russian River

flows. (AR66730).” AA2:384. Approval by the SWRCB of a large-scale increase in water diversions along an already over-appropriated river is anything but a sure thing. AR02:11:03913. The fact that the Agency did not have the rights to its planned future increase further demonstrates that the Agency’s future water supplies were uncertain. Thus, the Agency was required, but failed, to accurately “describe the reliability of the water supply” and “describe plans to supplement or replace” that water if necessary. §10631(c). Its failure to do so violated the Act.

**e. The Water Project Facilities Were Not Constructed.**

Even if the Water Project had received all of its approvals and completed ESA consultation, potential construction delays and financing problems related to the massive Water Project still should have been discussed in the Plan. AR02:11:03856-03857. After all, the entire Plan is premised on the completion of the Water Project by the Agency. AR66768. If construction is delayed, the Plan’s water supply projections would not be accurate. The Plan should have addressed this potentiality and addressed interim alternatives.

**f. The Agency’s Arguments Are Unavailing.**

The Agency’s argument boils down to three main points. It claims: (1) the substantial evidence standard applies to this case and allows the Agency to ignore its own direct-hit, unambiguous admissions in the record, which would otherwise resolve the case without further analysis; (2) the

preparation of a BA for the Water Project allowed the Agency to assume that increased future water supplies will, without question, be available, despite the fact that (a) no BiOp had been prepared, (b) no environmental review of the project has been completed, and (c) the project has not been approved by the SWRCB, by the Agency, or by anyone else; and (3) *Friends of the Santa Clara River* is inapposite because it only addresses the need to identify as uncertain supplies with “identified, current constraint[s],” not planned supplies with identified, future constraints. The Agency’s arguments are without merit.

First, the Agency contends that the substantial evidence test is the only applicable standard and that the trial court erred by not deferring to the Agency’s conclusion that all of its future supplies will be available in the future. As discussed above, the standard of review here is two-fold. The UWMPA specifically requires this Court to determine whether the Agency has “not proceeded in a manner required by law” in addition to applying the substantial evidence test. §10651. In determining whether the agency failed to proceed in a manner required by law, this Court must review the Agency’s actions *de novo*, “scrupulously enforc[ing] all legislatively mandated” requirements. *Vineyard, supra*, 40 Cal.4th at 435 (enforcing the similar standard under Pub. Res. Code §21168.5).

The trial court determined that the future increase in water supply “may not be available” based in large part on the Agency’s *multiple admissions* that the completion of the Water Project was uncertain.

Because the Agency, by its own admission, did not accurately “discuss the reliability of [its] water supply” and failed to “describe plans to supplement or replace” the proposed, but uncertain additional water diversions, it failed to proceed in a manner required by law.

This Court need go no further than the Agency’s admission that “[t]here is *uncertainty* in the Agency’s ability to provide water supply . . . beyond its existing water right permit amount of 75,000 acre-feet per year” in concluding that, as a matter of law, the Agency should have, but failed to account for this uncertainty in its Plan. AR01:02:00222, emphasis added; *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1198 (agency’s “own findings” established “as a matter of law” that landfill would have adverse impacts on the environment, despite agency’s later contentions to the contrary).

Furthermore, even under the substantial evidence standard, no amount of substantial evidence trumps an Agency’s admission that precisely concedes the issue at hand.

Second, the Agency argues that the BA provides substantial evidence that the 26,000 AFY increase would be available. AOB 20-27. To the contrary, as noted above, the BA highlights, rather than dispatches, the real-world obstacles standing between the Agency and its desired increase in diversions. In any event, the BA merely represents a first step on a long road toward developing any additional water supplies – not an ultimate

approval of those supplies.<sup>11</sup> Thus, the BA demonstrates the *uncertainty* of the Agency’s future water supplies. Contrary to the Agency’s assertions, the BA, as an initial review of a highly complex undertaking requiring multiple further reviews and approvals, does not represent substantial evidence that the Water Project *will* proceed unfettered through review, approval, construction, and operation in the near future. Such an assumption is unreasonable and irresponsible, as the Agency itself admitted. AR01:02:00222.

Third, the Agency argues that *Friends of the Santa Clara River* “underscores the distinction between identified, current constraints on the reliability of an agency’s water supply (the subject of section 10631(c)), and possible contingencies that *may or may not* affect an agency’s plans for future water supplies.” AOB at 27, emphasis in the original. But the Agency’s argument is neither based on *Friends of the Santa Clara River* nor does it bear any relation to the actual requirement of the statute. First, the

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<sup>11</sup> BA, p. xxxvi (“A proposed monitoring program and an implementation plan for the new facilities *will be* developed jointly with NOAA Fisheries,” emphasis added), (“some activities for the proposed project would require environmental review under [CEQA] and National Environmental Policy Act (NEPA) as well as other agreements, permits or certifications from other state and federal agencies”), (some changes described in BA “will require regulatory approvals or congressional authorizations before they can be implemented); p. 1-3 (After submission of the BA, “NOAA Fisheries will evaluate the potential effects of the proposed project . . . [and] determine whether the activities of the proposed project are likely to jeopardize the continued existence of the populations under consultation”); p. 1-4 (BA “includes a description of the new facilities . . . that *are being considered* for implementation,” emphasis added).

*Friends of the Santa Clara River* Court did not single out water supplies with “identified, current constraints” (AOB at 27, 28); instead, this term was fabricated by the Agency and has no bearing on the holding in *Friends of the Santa Clara River*. To the contrary, that case reiterates the Act’s requirement that further analysis must be undertaken “when *any* water source may not be available at a consistent level of use.” *Id.*, 123 Cal.App.4th at 14, citing 10631(c), emphasis added. Further, the court clarified the grave importance of this requirement, stating: “The public and the various government entities that rely on the UWMP may be seriously misled by it and if the wrong set of circumstances occur, the consequences to those who relied on the UWMP, as well as those who share a water supply with them *could be severe.*” *Id.*, emphasis added.

Furthermore, in urging that *Friends of the Santa Clara River* does not apply, the Agency concedes that its future water supplies “*may*” be negatively affected by “possible contingencies” that would limit those supplies. AOB at 27. The statute, as discussed above, requires analysis of “*any* water supply that *may* not be available” at the levels projected in the Plan. §10631(c), emphasis added. Thus, even under the Agency’s phrasing, its future water supply was uncertain. Also, the Agency implies that the “subject of section 10631(c)” is “identified, current constraints on the reliability of agency’s water supply.” AOB at 27. The statute contains no such language; again, it requires analysis of “*any* water supply that *may* not be available.” The Agency’s attempt to rewrite the holding of *Friends*



*of the Santa Clara River* only draws attention to its failure to comply with the UWMPA's straightforward directive to more fully analyze *any* uncertain water supply.

**2. The Plan Improperly Ignored Potential ESA Constraints in Relying on the Continued Availability of Eel River Water at Current Levels.**

In addition to assuming that protection of Russian River species will not affect the quantity of its diversions, the Agency likewise assumed that the existing license “for the Potter Valley Project (PVP) *will not be modified*, or that any licence modifications (and terms of any new license) *will not reduce* the amount of water available for diversion by the Agency.” AR66710, emphasis added. As the trial court correctly determined, these assumptions ignore the possibility that the PVP licence may be changed in the future to protect endangered Eel River fish species. AA2:382-384.

A likely scenario, and one that should have been examined in the Plan, would involve FERC curtailing the amount of water diverted into the Russian River from the Eel River when FERC reconsiders the PVP license in the year 2022 (or even earlier if warranted by ongoing studies). *See* AR02:11:03852, 03968. A downward adjustment to the water supply derived from the PVP would adversely affect the Agency's total water supply because “*most* of the summer flow in the Russian River consists of water diverted from the Eel River.” *Friends of the Eel River, supra*, 108 Cal.App.4th at 866, emphasis in original. Rather than providing a thorough contingency plan, however, the Plan merely provides a vague assertion that

in such an event, “it is reasonable to assume that the Agency could take actions that would mitigate the impact of the reduction.” AR66711.

The Agency was well aware of this possibility, as it actively participated in the earlier FERC proceedings to modify the PVP license. AR02:12:04078; *Friends of the Eel River, supra*, 108 Cal.App.4th at 866-867 and 869-871 and fn. 7. During the FERC proceedings, the Agency admitted that FERC’s contemplated curtailments in the Eel River diversions would create “a dramatic increase in the risk that Lake Mendocino, and the Russian River . . . would be dewatered in a critically dry year by failure to maintain prudent water storage reserves. The economic and environmental consequences of such dewatering would be enormous.” Agency’s submission to FERC found in Administrative Record excerpted in Appellants’ Appendix filed on August 15, 2002 in *Friends of the Eel River, supra*, at 14:3486; *see also Friends of the Eel River, supra*, 108 Cal.App.4th at 867 (paraphrasing Agency submission). Nevertheless, the Plan erroneously failed to address the easily foreseeable possibility that such circumstances would arise. AR66711, 02:11:03913, 03967-03968.

The Agency argues that the Plan reasonably assumed that future PVP re-licensing proceedings will not reduce deliveries of water supplies from the Eel River. AOB at 28-32. Yet, the Agency acknowledges “the possibility that [the license] could be interpreted or modified prior to its expiration, or the terms of a new license changed, *in a way that would reduce the amount of water available to the Agency for diversion from the*

*Russian River.*” AOB at 30, emphasis added, citing AR66710-66712, 66732. Here again, the Agency fails to accord the Act’s statutory language a plain-language interpretation. If there is a “possibility” that the licence may be “modified . . . in a way that would reduce” the Agency’s future water supplies (*id.*), then that water source, in the words of the Act, “*may* not be available at a consistent level of use” in the future. §10631(c). The Agency’s argument thus affirms the Plan’s deficiencies by recognizing the uncertainties in the Agency’s future PVP water supplies.

This is not the first time that the Agency has sidestepped its statutory duty to disclose the vulnerability of its dependence on Eel River diversions. As discussed previously, in 2003 the Court of Appeal struck down the Agency’s EIR on the Water Project. *Friends of the Eel River, supra*, 108 Cal.App.4th at 869-870. There, the Court pointed out that “[t]he record tells a far different story from the one the Agency relates in its EIR. . . . [T]he Agency was well aware at the time the EIR was drafted that the proposals pending before FERC, if approved, would limit its ability to supply water to its customers . . . .” *Id.* at 869. Again, here, the Agency is aware that FERC might reduce the Agency’s PVP diversions when that project comes up for licensing renewal in 2022, or sooner. The Agency’s failure to address this scenario and analyze alternative supplies in the Plan violates the UWMPA.

**C. THE PLAN INADEQUATELY ADDRESSED THE THREATS  
POSED TO WATER SUPPLIES BY THE DISPOSAL OF  
TREATED SEWAGE WATER.**

The UWMPA recognizes that securing the quality of water supplies is key to ensuring their reliability. Thus, it acknowledges that “[p]ublic health issues have been raised over a number of contaminants that have been identified in certain local and imported water supplies” and that “[t]he quality of source supplies can have a significant impact on water management strategies and supply reliability.” §10610.2(a)(5), (9). Accordingly, plans must “include information, to the extent practicable, relating to the quality of existing sources of water available to the supplier . . . , and the manner in which water quality affects water management strategies and supply reliability.” §10634.

Addressing this requirement, the Plan concluded that “no impacts to water supplies due to water quality deficiencies are foreseen to occur in the next 25 years.” AR66754-66755. However, this conclusion was not supported by substantial evidence because the Agency was aware of, and had itself expressed concerns about, the City of Santa Rosa’s plans to dispose of treated sewage water in the Russian River above the Agency’s diversion facilities. AA2:291-293. Because the Agency wholly ignored this significant hazard to the quality of the Plan’s presumed water supply, the long-term availability of potable water may be severely threatened in areas whose surface or groundwater may be contaminated by treated sewage. Accordingly, the trial court properly ruled that the Plan violated

the UWMPA because it failed to acknowledge this threat to the water supply's reliability.

**1. The Agency Knew That Treated Wastewater Threatened the Reliability of Its Water Supply at the Time It Approved the Plan.**

In 2006, the City of Santa Rosa ("the City") was considering a plan to dispose of its sewage water by treating it and then disposing of it in the Russian River, a project known as the Discharge Compliance Project ("DCP"). AA2:291-293. The Agency submitted comments on the DCP's EIR in September 2006 that opposed the proposal because of the threat that contaminated water would pose to the Agency's collector wells in the area. AA2:291-293. In the Agency's comment letter, Randy Poole, the Agency's General Manager, wrote, "[t]he Agency is concerned that the City's Discharge Compliance Project could have detrimental impacts on the planned infrastructure necessary for the Agency's water supply project and may cause significant delays in the Agency's environmental review process." AA2:291. Thus, the DCP "could jeopardize the way the Agency's existing water supply facilities are operated." AA2:292. He expressed the Agency's concerns about "the presence of pathogens and inorganic and organic compounds that may be present in the wastewater" as well as newly discovered issues with "pharmaceuticals and personal care products that may remain in treated wastewater." AA2:292.

These issues, the Agency wrote, required the City's examination as to "what potential impacts to water supplies and the aquatic environment

could occur as a result of discharging the City's wastewater into the Russian River." AA2:292. The Agency was thus concerned that its water diversion infrastructure could be jeopardized and its Russian River water supply's quality compromised.

In sum, shortly before the Plan's approval, the Agency believed that the DCP could contaminate potable groundwater water where the Agency currently had collector wells and had also planned to expand its facilities. AA2:291. Thus, the Agency knew that treated wastewater threatened the reliability of its water supply at the time it approved the Plan.

**2. The UWMPA Required the Agency to Disclose and Analyze This Threat to Water Supply Reliability.**

The UMPA requires that a plan "shall include information, to the extent practicable, relating to the quality of existing sources of water available to the supplier over the same five-year increments as described in subdivision (a) of Section 10631, and the manner in which water quality affects water management strategies and supply reliability." §10634. The trial court properly determined that the Plan violated this section by failing to acknowledge the DCP's threat to the Agency's water supply quality and reliability. AA2:385-386.

A similar problem was presented in *Friends of the Santa Clara River, supra*. There, the Court set aside a water agency's plan because it did not address a contaminated water supply's known limitations and the consequent impact on its reliability. *Id.*, 123 Cal.App.4th at 10-13. The

court held that “[w]ithout a reliable analysis of the availability of water, the UWMP is fatally flawed.” *Id.* at 15. “When any water source may not be available at a consistent level of use, the UWMP must describe plans to replace that source with alternative sources.” *Id.* at 14, citing 10631(c). “The public and the various government entities that rely on the UWMP may be seriously misled by it and if the wrong set of circumstances occur, the consequences to those who relied on the UWMP, as well as those who share a water supply with them could be severe.” *Id.* at 15. Thus, the UWMPA requires the disclosure and analysis of water quality and its role in the reliability of an Agency’s water supplies. Here, the Plan was more egregiously flawed than the *Friends of the Santa Clara River* plan because this Plan did not even *disclose* the contamination problem, let alone analyze its impact on the supply’s reliability. As such, the Plan is invalid.

### **3. The Trial Court Applied the Proper Standard of Review.**

The Agency claims that the court used the incorrect standard of review in its decision on this issue. AOB at 38. Not so. As noted above, the trial court applied the proper standard under section 10651.

Nor did the trial court make an “independent factual finding” based on its interpretation of “isolated pieces of evidence,” as the Agency argues, when it ruled that the Agency was required to consider the treated wastewater that may adversely affect the Agency’s groundwater and river supplies in its Plan. AOB at 35-36. Rather, the court properly determined that the Agency did not proceed in the manner required by law because “the

potential impact of such [an] eventuality must be considered in connection with the Plan.” AA2:386. As such, the trial court’s ruling was proper.

**4. The Agency’s Contrary Arguments Lack Merit.**

The Agency’s arguments to excuse its improper water quality analysis misstate the UWMPA’s requirements, the evidence in the Administrative Record, and the trial court’s ruling. As discussed below, each of its contentions is untenable.

**i. Before the Agency Approved the Plan, It Was Aware of the DCP.**

As discussed above, the Agency was aware of the DCP before it approved the Plan. The Agency mistakenly contends that information regarding the DCP’s threat to its water supply quality was brought to the Agency’s attention only by petitioners during this litigation. AOB at 36-39. Therefore, it claims, the trial court should not have held it responsible for anticipating and responding to such information after the Plan’s approval. AOB at 37. However, the DCP issue actually came to light during the Plan’s development, raised by both the Agency itself and a public commentor. AA2:291-293, AR02:11:03862-03863.

During the Plan’s public comment period, Friends of the Eel River (“FOER”) supplied a draft of the Agency’s comment letter to the Agency and inquired about the conflict between the letter and the Plan’s conclusion. AR02:11:03862-03863, 03907-03909. Instead of addressing the conflict, the Agency and its consultant ignored FOER’s concerns. AR02:12:4071-



4074 (Agency's staff report does not discuss issue), 4091-4092 (referring the reader to the Agency's staff report for responses to water quality issues). Thus, during the Plan's preparation, it was reasonably foreseeable for the Agency to determine that the City's DCP proposal existed and was relevant to the Agency's water supply's reliability. Therefore, the threat to the Russian River's water supplies was not speculative, but was a subject of concern for the Agency months prior to the Plan's release. AA2:291-293.

The Agency ignores this fact, however, and portrays the trial court's decision as requiring the Plan to anticipate issues of which the Agency was unaware. AOB at 37. However, the Agency need not have attempted to make any predictions it had not already reached when months prior to the Plan's adoption, it objected to the threat posed by the DCP's treated wastewater to its water supplies. The Agency's objections on this point therefore ring hollow.

**ii. The Trial Court's Ruling Was Adequately Supported.**

Next, the Agency argues that the trial court's ruling ignored evidence supporting the Plan and focused only on contrary evidence. AOB at 38-39. The Agency claims that the trial court was "apparently persuaded" by a letter from petitioner O.W.L. Foundation submitted to the Agency during the Plan's public comment period regarding the dangers of treated sewage water. AOB at 38-39. Accordingly, it argues, the trial court concluded that the Agency's groundwater supplies "might be contaminated based on

claims that treated wastewater can contain residual chemicals together with the fact that Santa Rosa's Subregional Reclamation System produces treated wastewater that is recycled for use in irrigation." AOB at 39. However, the letter was obviously not the basis for the trial court's decision, as the court instead cites *the Agency's* letter to the City of Santa Rosa as support for its conclusion. AA2:385-386. That letter expresses the same concerns about Santa Rosa's DCP project and the residual chemicals that may affect the Agency's water supplies as the O.W.L. Foundation letter. AA2:292. The trial court thus properly cited the Agency's letter as evidence of the Agency's failure to include its information in the Plan. The Agency's challenge to the trial court's ruling on this point therefore fails.

**iii. The UWMPA Required the Agency to Disclose the DCP's Threat to Water Supply Reliability in the Plan.**

The Agency also claims that the UWMPA does not actually require that the Agency evaluate potential impacts to its water supply. AOB at 37. While the Agency admits that the Act requires it to "include information" about the effect of water quality on water management and supply reliability, it argues that it was not required to "evaluate 'potential impacts' to its water supplies." AOB at 36-37. Thus, the Agency reads the requirement that the Plan "include information regarding . . . the manner in which water quality affects water management strategies and supply reliability" as only relating to current problems with its supplies. AOB at 36-37. Accordingly, the Agency does not believe that the City's DCP

proposal qualified as information that should have been included in the Plan. AOB at 38-42.

The Agency's interpretation completely undercuts the purpose of the statute. The UWMPA provides that plans must evaluate an agency's water supply outlook over a prescribed set of five-year increments for twenty years into the future. §10634. It also directs that "[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, [a plan shall] describe plans to supplement or replace that source with alternative sources . . . ." §10631(c)(2), emphasis added. Accordingly, the UWMPA is not concerned with only present, certain, threats to water reliability, but also those that *may* cause a source to be unavailable on a consistent basis. The Act is clearly not only concerned about current problems with water quality, but requires that agencies evaluate and prepare for future water quality issues in their plans. The Agency's contrary contention is thus untenable.

The Agency next argues that it properly evaluated the threat that treated sewage water would have upon its supplies, and its experts reached the conclusion that it did not present a problem to water supply reliability. AOB at 37-41. These arguments fail. First, the Agency has not pointed to any evidence that supports the Plan's conclusion that no threat to the reliability of its water supplies was foreseeable. Second, the Agency's argument that the wastewater did not pose a threat to its water supplies, because the treatment processes and state regulation protect against

contamination, is illogical. AOB at 41. This contention is refuted by the Agency's clear position to the contrary as presented in its letter to Santa Rosa. AA2:291-293.

The Agency also points out that Santa Rosa's reclamation system treats wastewater to "recycled water standards" which can then be used for several beneficial uses. AOB at 39, §13511, 13550. The Agency fails to note, however, that recycled water is not suitable as a source of potable water. 17 Cal. Code of Regulations §7583(i). Thus, should the DCP project go forward, the letter raises the possible need for the Agency to construct and operate a surface water treatment plant because the water from the collector wells would require additional treatment. AA2:292. The state regulation and permits, then, do not protect the reliability of the supplies for potable uses.

The Agency also notes that statewide agencies regulate recycled water and water quality. AOB at 39. Again, this is beside the point. Just because the DCP project may be monitored by authorities and is subject to environmental regulation does not mean that the DCP could not jeopardize the Agency's Russian River potable water supplies. As the Agency correctly noted in its letter to Santa Rosa, the presence of treated wastewater in the water supply could "jeopardize the way the Agency's existing water supply facilities are operated." AA2:292. This threat should have been addressed in the Plan, but was not. AR66754-66755.

The Agency next argues that because the Plan hadn't concluded that

any of its supplies were threatened by water quality, it had no duty to analyze water quality impacts on supply reliability. AOB at 37-38. This contention ignores the fact that the Agency itself concluded that an important source of its drinking water might be contaminated by treated wastewater. Having itself admitted this threat to its water supply, the Agency could not lawfully ignore that problem in the Plan's analysis. The Agency was obligated to disclose the potential impacts on supply reliability and plan alternatives because its collector wells along the Russian River could prove to be an unreliable source due to the DCP proposal.

Next, the Agency contends that its comment letter to the City opposing the DCP was sufficient to ensure that the project's harmful effects would be avoided. AOB at 41. This argument lacks merit. At the time of the Plan's adoption, the DCP was a threat to the water supply's reliability, and therefore should have been disclosed and analyzed in the Plan. The EIR had not been completed at the time, so the Agency had no basis to assume that the project would eventually incorporate sufficient protections for the water supplies. The Agency had received no assurance that its concerns would be rectified.

The Agency's public objection to the DCP clearly demonstrates its awareness of the threat thereby posed to its water supply. Therefore the Agency should have addressed water quality concerns posed by such wastewater disposal projects in its Plan, rather than falsely claiming that "no impacts to water supplies due to water quality deficiencies are foreseen

to occur in the next 25 years.” AR66754-66755. The Agency’s failure to follow the UWMPA’s directives renders its Plan invalid.

**D. THE PLAN FAILS TO EXPLAIN HOW, WHEN, AND TO WHAT EXTENT THE AGENCY’S WATER CONSERVATION PROGRAM WILL REDUCE WATER DEMAND.**

The Plan is invalid because it fails to explain how, when, and to what extent the Agency’s water conservation programs will reduce water demand. The Agency’s demand projections are based upon the assumed water savings from the implementation of its water conservation measures. AR66764-66765. However, the Plan’s abbreviated description of its water conservation measures fails to describe its programs and the extent to which they have been implemented and are projected to reduce demand. AR66763-66766. Additionally, the Plan does not include any supporting data to demonstrate the projected water savings. AR66763-66766. Instead, the Plan notes that because the Agency is a participant in the California Urban Water Conservation Council (“CUWCC”), its reports to that entity which identify its water demand management measures satisfy its obligation to describe its water conservation plans. AR66764.

The UWMPA, however, requires more. Under the Act, plans must include an estimate of the water savings attributable to implementation of the conservation measures. §10631(f)(4). Additionally, the UWMPA requires that “[a] plan shall describe and evaluate . . . demand management activities.” §10615. In the interest of “encourag[ing] the active

involvement of diverse social, cultural, and economic elements of the population within the service area prior to and during the preparation of the plan[.]” the Plan was required to adequately disclose the assumptions and information underlying its projections. §§10642, 10615. The trial court agreed, ruling,

. . . the report submitted pursuant to Section 10631(j), and the Plan, does not include any supporting data to demonstrate the water savings from its participation in the [CUWCC]. The Plan does not provide the dates by which the claimed measures will be in effect. As such, the Plan is not supported by substantial evidence.

AA2:388.

No elements of the Plan explain this data. The Plan provides the CUWCC reports in an appendix, but they do not include information quantifying the programs’ water savings. AR66790-66816. Rather, the reports primarily summarize the programs’ costs and provide minimal information about the stage of the program’s implementation. AR66790-66816. The reports themselves, then, offer the reader no information about the actual water savings attributable to the conservation measures.

Similarly, the Plan’s discussion of the water management measures hides this information, merely concluding that an undisclosed amount of water will be conserved from a brief list of programs, without elaborating or evaluating them. AR66764-66766. Thus, the Plan subverts the underlying purpose of the water conservation element by hiding the data and information that are key to understanding and evaluating its water

conservation measures. As such, a reader has no insight into how accurate the Plan's assumptions regarding its water demands are, as the Agency's demand modeling incorporates the undisclosed water savings into those assumptions.

The UWMPA does not permit water agencies to insert conclusory claims of future demand reduction – here, purportedly based on conservation measures – into their calculations regarding supply and demand. The UWMPA expressly requires “quantif[ication]” of hard “data” in the latter projections. §10631, subd. (e)(1). If agencies were allowed to employ such fuzzy demand reduction devices, then the process of creating a plan for meeting future needs would be meaningless. Agencies could always increase their unfounded “estimate” of conservation-related reductions until future water deficits are erased, and supply conveniently exceeds demand. That is why the UWMPA directs courts to require *substantial evidence* of agency compliance with the Act. §10651.

In attempting to excuse this omission, the Agency argues that UWMPA section 10631(j) permits the Agency, as a member of the CUWCC, to merely provide the annual CUWCC reports in the Plan and therefore satisfy the UWMPA. AOB at 32-35. Section 10631(j) provides that CUWCC members “may submit the annual reports identifying water demand management measures currently being implemented, or scheduled for implementation, to satisfy the requirements of subdivisions (f) and (g).” *Id.* However, despite the Plan's technical compliance with section



10631(j), the Plan's discussion of its water conservation efforts remains inadequate because it does not quantify its expected water savings and thus hides its assumptions in the Plan. Moreover, section (j) only exempts CUWCC members from the requirements of section 10631's subsections (f) and (g), but not section 10615. As such, the Plan has wholly failed to "describe and evaluate . . . demand management activities" as required by the UWMPA.

Thus, the Agency's failure to explain the details of its water demand management programs renders its Plan invalid, as the Plan does not provide any evidence to support its demand projections that incorporate undisclosed amounts of water saved through conservation.

### **CONCLUSION**

Because the Agency's 2005 Plan has failed in five key respects to comply with the UWMPA as the trial court correctly ruled, its Judgment setting the Plan aside as invalid must be affirmed.

Dated: December 17, 2009

Respectfully submitted,

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Stephan C. Volker  
Attorney for Respondents  
SONOMA COUNTY WATER  
COALITION, et al.

**CERTIFICATE OF COMPLIANCE**

Respondent's Opposition Brief, pursuant to Rule 8.204 subdivisions (b)(4) and (c)(1), California Rules of Court, is in at least 13-point proportional type and contains 13,947 words.

Dated: December 17, 2009

Respectfully submitted,

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Attorney for Petitioners/Appellants  
SONOMA COUNTY WATER  
COALITION, et al.

## PROOF OF SERVICE

I am over the age of eighteen years. I am not a party to the within action or proceeding. My business address is 436 - 14<sup>th</sup> Street, Suite 1300, Oakland, California 94612. My business telephone number is (510) 496-0600, and fax number is (510) 496-1366. On December 17, 2009, I served the following document:

## RESPONDENTS' BRIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California, addressed as set forth below (CCP §§ 1012, 1013, and 1013(a)). In accordance with the ordinary course of business, the above-mentioned document(s) was deposited with the United States Postal Service addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed December 17, 2009, at Oakland, California.

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Teddy Ann Fuss