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**ENDORSED
FILED
ALAMEDA COUNTY**
APR 18 2008
CLERK OF THE SUPERIOR COURT
~~M Hayes~~
Deputy

5 Attorneys for Petitioners:
6 BUTTE ENVIRONMENTAL COUNCIL
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE
7 CALIFORNIA WATER IMPACT NETWORK

Rc 094 46708

9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 IN AND FOR THE COUNTY OF ALAMEDA

11 BUTTE ENVIRONMENTAL COUNCIL;)
CALIFORNIA SPORTFISHING PROTECTION)
12 ALLIANCE; AND CALIFORNIA WATER)
IMPACT NETWORK,)

Case No. (To be Assigned)
**VERIFIED PETITION FOR WRIT OF
MANDATE**

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14 vs.)

(Code Civ. Proc., § 1084 et seq.; Pub.
Resources Code, §§ 21168, 21168.5)

15 CALIFORNIA DEPARTMENT OF WATER)
RESOURCES; CALIFORNIA NATURAL)
16 RESOURCES AGENCY; GOVERNOR ARNOLD)
SCHWARZENEGGER; AND DOES 1-50,)

**[CALIFORNIA ENVIRONMENTAL
QUALITY ACT]**

17 Respondents,)

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ALAMEDA COUNTY WATER DISTRICT;)
AMARAL RANCH; ANTELOPE VALLEY)
EAST KERN WATER AGENCY; AVENAL)
STATE PRISON; BANTA CARBONA)
IRRIGATION DISTRICT; BELLA VISTA)
WATER DISTRICT; BROADVIEW WATER)
DISTRICT; BROWNS VALLEY IRRIGATION)
DISTRICT; BUTTE WATER DISTRICT;)
BYRON BETHANY IRRIGATION DISTRICT;)
CARTER MUTUAL WATER COMPANY;)
CASTAIC LAKE WATER AGENCY; CASTAIC)
LAKE WATER AUTHORITY; CENTRAL)
COAST WATER AUTHORITY; CITY OF)
AVENAL; CITY OF COALINGA; CITY OF)
HURON; CITY OF SACRAMENTO; CITY OF)
YUBA CITY; CONAWAY PRESERVATION)
GROUP; CONTRA COSTA WATER DISTRICT;)
DEL PUERTO WATER DISTRICT; DESERT)
WATER AGENCY; DUDLEY RIDGE WATER)

1 DISTRICT; DUNNIGAN WATER DISTRICT;)
EAGLE FIELD WATER DISTRICT; EAST BAY)
2 MUNICIPAL UTILITY DISTRICT; GARDEN)
HIGHWAY MUTUAL WATER COMPANY;)
3 GLENN-COLUSA IRRIGATION DISTRICT;)
GOOSE CLUB FARMS; JAMES IRRIGATION)
4 DISTRICT; KERN COUNTY WATER AGENCY;)
LAGUNA WATER DISTRICT; LEWIS RANCH;)
5 MAXWELL IRRIGATION DISTRICT; MERCED)
IRRIGATION DISTRICT; MERCY SPRINGS)
6 WATER DISTRICT; MERIDIAN FARMS)
WATER COMPANY; METROPOLITAN)
7 WATER DISTRICT OF SOUTHERN)
CALIFORNIA; MOJAVE WATER AGENCY;)
8 NAPA COUNTY FLOOD CONTROL AND)
WATER CONSERVATION DISTRICT;)
9 NATOMAS CENTRAL MUTUAL WATER)
COMPANY; OAK FLAT WATER DISTRICT;)
10 ORLAND UNIT WATER USER'S)
ASSOCIATION; ORO LOMA WATER)
11 DISTRICT; PACHECO WATER DISTRICT;)
PALMDALE WATER DISTRICT; PANOCHÉ)
12 WATER DISTRICT; PARROTT INVESTMENT)
COMPANY; PATTERSON IRRIGATION)
13 DISTRICT; PELGER MUTUAL WATER)
COMPANY; PINNACLE LAND VENTURES,)
14 LLC (BROOMIESIDE FARMS); PLACER)
COUNTY WATER AGENCY; PLEASANT)
15 GROVE-VERONA MUTUAL WATER)
COMPANY; PLUMAS MUTUAL WATER)
16 COMPANY; PRINCETON-CODORA-GLENN)
IRRIGATION DISTRICT; PROVIDENT)
17 IRRIGATION DISTRICT; RECLAMATION)
DISTRICT 1606; RECLAMATION DISTRICT)
18 1004; RECLAMATION DISTRICT 108;)
RICHVALE IRRIGATION DISTRICT; RIVER)
19 GARDEN FARMS; SACRAMENTO RIVER)
RANCH; SACRAMENTO SUBURBAN WATER)
20 DISTRICT; SAN LUIS & DELTA MENDOTA)
WATER AUTHORITY; SAN BENITO COUNTY)
21 WATER DISTRICT; SAN BERNARDINO)
VALLEY MUNICIPAL WATER DISTRICT;)
22 SAN DIEGO COUNTY WATER AUTHORITY;)
SANTA CLARA VALLEY WATER DISTRICT;)
23 SOUTH SUTTER WATER DISTRICT; SUTTER)
MUTUAL WATER COMPANY; SUTTER)
24 EXTENSION WATER DISTRICT; SYCAMORE)
MUTUAL WATER COMPANY; TEHAMA)
25 COLUSA CANAL AUTHORITY;)
TRANQUILITY IRRIGATION DISTRICT;)
26 TULARE LAKE BASIN WATER STORAGE)
DISTRICT; UPPER SWANSTON RANCH;)
27 WALNUT VALLEY WATER DISTRICT; WEST)
28)

1 SIDE IRRIGATION DISTRICT; WEST)
2 STANISLAUS IRRIGATION DISTRICT;)
3 WESTERN CANAL WATER DISTRICT;)
4 WESTLANDS WATER DISTRICT; YUBA)
5 COUNTY WATER AGENCY; AND DOES 51-)
6 100,)
7)
8 Real Parties In Interest.)
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1 Petitioners BUTTE ENVIRONMENTAL COUNCIL, CALIFORNIA SPORTFISHING
2 PROTECTION ALLIANCE, and CALIFORNIA WATER IMPACT NETWORK (hereinafter,
3 “Petitioners”) allege as follows:

4 1. Petitioners hereby challenge Respondents CALIFORNIA DEPARTMENT OF WATER
5 RESOURCES, CALIFORNIA NATURAL RESOURCES AGENCY, and GOVERNOR ARNOLD
6 SCHWARZENEGGER (“Respondents”)’s approval of the 2009 Drought Water Bank (hereinafter,
7 “DWB” or “Project”) on grounds that said approval violates the California Environmental Quality
8 Act, at Public Resources Code § 21000 et seq., and the CEQA Guidelines, at 14 California Code of
9 Regulations § 15000 et seq. (collectively, “CEQA”), and other laws.

10 2. The Drought Water Bank is a “one-year transfer program to obtain water from willing sellers
11 upstream of the [Sacramento and San Joaquin rivers] Delta for sale to water users experiencing
12 shortages due to extreme drought conditions and regulatory pumping curtailments.” (See Exhibit 1
13 [Notice of Exemption].)¹

14 3. In approving the DWB and making the associated findings, Respondents improperly relied
15 on the “emergency” exemption provisions of CEQA, and, based thereon, did not otherwise engage
16 in the environmental impact analysis required under CEQA or otherwise comply with CEQA.

17 4. Unless an exemption applies, CEQA requires that government agencies engage in advance
18 planning to avoid unnecessary environmental harm before they approve any project that affects the
19 environment. This advance planning includes preparation of an Environmental Impact Report, which
20 is “the heart of CEQA” and the “environmental ‘alarm bell’ whose purpose it is to alert the public
21 and its responsible officials to environmental changes before they have reached ecological points of
22 no return.” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47
23 Cal.3d 376, 392 (*Laurel Heights I*)).

24 5. The Legislature has included a number of exemptions from CEQA where such advance
25 planning would interfere with the achievement of other legislative goals. The two statutory
26 exemptions at issue in this case apply in conditions of “emergency.” But the Legislature has strictly

27
28 ¹ All exhibits referred to herein are attached hereto and incorporated by reference herein.

1 limited the conditions that constitute an “emergency” that would justify ignoring CEQA’s advance
2 planning requirements. As alleged in more detail below, the 2009 Drought Water Bank does not meet
3 these statutory requirements, which must be “interpreted in such manner as to afford the fullest
4 possible protection to the environment within the reasonable scope of the statutory language.” (*Laurel*
5 *Heights I, supra*, 47 Cal.3d at 390.) Therefore, Respondents abused their discretion in exempting the
6 Project from environmental review.

7 PARTIES

8 6. Petitioner BUTTE ENVIRONMENTAL COUNCIL (“BEC”) is, and at all times relevant to
9 this proceeding was, a non-profit public benefit corporation founded in 1975, devoted to
10 environmental education, information referral services, and advocacy. BEC has dedicated over 33
11 years to protecting the exceptional quality of life in the 1,670 square miles of Butte County, and is
12 the region’s leading environmental organization. The cities of Chico, Oroville, Gridley, Biggs, and
13 Paradise bring Butte County’s population to over 204,000. The community-based, non-profit
14 organization is managed by a board of directors, two staff members, interns and volunteers, and
15 currently has more than 850 members.

16 7. Petitioner CALIFORNIA SPORTFISHING PROTECTION ALLIANCE (“CSPA”) is, and
17 at all times relevant to this proceeding was, a non-profit public benefit corporation founded in 1983
18 to conserve, restore, and enhance the state’s water quality, wildlife, and fishery resources and their
19 aquatic ecosystems and associated riparian habitats. To further these goals, CSPA actively seeks
20 federal and state agency implementation of environmental regulations and statutes and routinely
21 participates in administrative, legislative, and judicial proceedings.

22 8. Petitioner CALIFORNIA WATER IMPACT NETWORK (“C-WIN”) is, and at all times
23 relevant to this proceeding was, a non-profit public benefit corporation located in Santa Barbara,
24 California, that advocates for the equitable and environmentally sensitive use of California’s water,
25 including instream uses, through research, planning, public education, and litigation.

26 9. The actions complained of herein will have detrimental impacts on Petitioners and others.
27 Petitioners have demonstrated their interest in the DWB Project by, *inter alia*, participating in
28 numerous public agency meetings and decision-making processes concerning the environmental

1 impacts related to the DWB Project and other state water projects. Petitioners participated in DWR's
2 process leading up to the Project approval and opposed the DWB Project. The interests of Petitioners
3 and their members have been, are being, and unless the relief requested herein is granted, will
4 continue to be adversely affected and injured by Respondents' failure to comply with applicable law
5 for the DWB Project.

6 10. Respondent CALIFORNIA DEPARTMENT OF WATER RESOURCES (hereinafter,
7 "DWR") is, and at all times relevant to this proceeding was, an agency of the State of California
8 located in Sacramento, California. DWR is the lead agency under CEQA for the DWB Project.

9 11. Respondent CALIFORNIA NATURAL RESOURCES AGENCY (hereinafter, "Resources")
10 is, and at all times relevant to this proceeding was, an agency of the State of California located in
11 Sacramento, California. Resources oversees DWR's policies, activities, and budget.

12 12. Respondent GOVERNOR ARNOLD SCHWARZENEGGER (hereinafter, "the Governor")
13 is governor of the State of California.

14 13. Respondents DOES 1 through 50, inclusive, are sued under fictitious names. Petitioners are
15 ignorant of the true names and capacities, whether individual, corporate, governmental, or otherwise,
16 of the Respondents named in this Petition as DOES 1 through 50, inclusive, and therefore sue these
17 Respondents by these fictitious names. Petitioners will amend this Petition to allege their true names
18 and capacities when ascertained. Petitioners are informed and believe, and based thereon allege, that
19 each of these fictitiously named Respondents are responsible in some manner for the acts or
20 omissions alleged herein.

21 14. Without conceding that any of the following entities are recipients of the DWB approval
22 under Public Resources Code section 21167.6.5 or necessary or indispensable parties under Code of
23 Civil Procedure section 389, Petitioners name the following entities as Real Parties in Interest
24 because they are listed as potential sellers of water in the 2009 Drought Water Bank Final Addendum
25 (defined hereinafter):

- 26 (1) Amaral Ranch
- 27 (2) Browns Valley Irrigation District
- 28 (3) Butte Water District

- 1 (4) Carter Mutual Water Company
- 2 (5) City of Sacramento
- 3 (6) Conaway Preservation Group
- 4 (7) Garden Highway Mutual Water Company
- 5 (8) Glenn-Colusa Irrigation District
- 6 (9) Goose Club Farms
- 7 (10) Lewis Ranch
- 8 (11) Maxwell Irrigation District
- 9 (12) Merced Irrigation District
- 10 (13) Meridian Farms Water Company
- 11 (14) Natomas Central Mutual Water Company
- 12 (15) Orland Unit Water User's Association
- 13 (16) Parrott Investment Company
- 14 (17) Pelger Mutual Water Company
- 15 (18) Pinnacle Land Ventures, LLC (Broomieside Farms)
- 16 (19) Placer County Water Agency
- 17 (20) Pleasant Grove-Verona Mutual Water Company
- 18 (21) Plumas Mutual Water Company
- 19 (22) Princeton-Codora-Glenn Irrigation District
- 20 (23) Provident Irrigation District
- 21 (24) Reclamation District 108
- 22 (25) Reclamation District 1004
- 23 (26) Richvale Irrigation District
- 24 (27) River Garden Farms
- 25 (28) Sacramento River Ranch
- 26 (29) Sacramento Suburban Water District
- 27 (30) South Sutter Water District
- 28 (31) Sutter Mutual Water Company

- 1 (32) Sutter Extension Water District
- 2 (33) Sycamore Mutual Water Company
- 3 (34) Upper Swanston Ranch
- 4 (35) Western Canal Water District
- 5 (36) Yuba County Water Agency

6 15. Without conceding that any of the following entities are recipients of the DWB approval
7 under Public Resources Code section 21167.6.5 or necessary or indispensable parties under Code of
8 Civil Procedure section 389, Petitioners name the following entities as Real Parties in Interest
9 because they are listed as potential buyers of water in the 2009 Drought Water Bank Final
10 Addendum:

- 11 (1) Alameda County Water District
- 12 (2) Antelope Valley East Kern Water Agency
- 13 (3) Avenal State Prison
- 14 (4) Banta Carbona Irrigation District
- 15 (5) Bella Vista Water District
- 16 (6) Broadview Water District
- 17 (7) Byron Bethany Irrigation District
- 18 (8) Castaic Lake Water Agency
- 19 (9) Central Coast Water Authority
- 20 (10) City of Huron
- 21 (11) City of Avenal
- 22 (12) City of Coalinga
- 23 (13) City of Yuba City
- 24 (14) Contra Costa Water District
- 25 (15) Del Puerto Water District
- 26 (16) Desert Water Agency
- 27 (17) Dudley Ridge Water District
- 28 (18) Dunnigan Water District

- 1 (19) Eagle Field Water District
- 2 (20) James Irrigation District
- 3 (21) Kern County Water Agency
- 4 (22) Laguna Water District
- 5 (23) Mercy Springs Water District
- 6 (24) Metropolitan Water District of Southern California
- 7 (25) Mojave Water Agency
- 8 (26) Napa County Flood Control and Water Conservation District
- 9 (27) Oak Flat Water District
- 10 (28) Oro Loma Water District
- 11 (29) Pacheco Water District
- 12 (30) Palmdale Water District
- 13 (31) Panoche Water District
- 14 (32) Patterson Irrigation District
- 15 (33) Reclamation District 1606
- 16 (34) San Diego County Water Authority
- 17 (35) San Bernardino Valley Municipal Water District
- 18 (36) San Benito County Water District
- 19 (37) San Luis & Delta Mendota Water Authority
- 20 (38) Santa Clara Valley Water District
- 21 (39) Tehama Colusa Canal Authority
- 22 (40) Tranquility Irrigation District
- 23 (41) Tulare Lake Basin Water Storage District
- 24 (42) West Stanislaus Irrigation District
- 25 (43) West Side Irrigation District
- 26 (44) Westlands Water District

27 16. Without conceding that any of the following entities are recipients of the DWB approval
 28 under Public Resources Code section 21167.6.5 or necessary or indispensable parties under Code of

1 Civil Procedure section 389, Petitioners name the following entities as Real Parties in Interest
2 because Petitioners are informed and believe that they claim an interest in the DWB program as
3 potential buyers of water:

- 4 (1) East Bay Municipal Utility District
- 5 (2) Walnut Valley Water District
- 6 (3) Castaic Lake Water Authority

7 17. Real Parties in Interest DOES 51 through 100, inclusive, are sued under fictitious names.
8 Petitioners are ignorant of the true names and capacities, whether individual, corporate,
9 governmental, or otherwise, of the Real Parties in Interest named in this Petition as DOES 51 through
10 100, inclusive, and therefore sue these Real Parties in Interest by these fictitious names. Petitioners
11 will amend this Petition to allege their true names and capacities when ascertained. Petitioners are
12 informed and believe, and based thereon allege, that the rights and interests of each of these
13 fictitiously named Real Parties in Interest would be affected by the granting of the relief Petitioners
14 seek in this proceeding.

15 FACTUAL BACKGROUND

16 18. The State Water Project ("SWP") is a system of reservoirs, canals, and pumps appended to
17 the Feather, Sacramento, San Joaquin and other rivers and Delta and operated by DWR to provide
18 water to water supply agencies throughout the state.

19 19. The Central Valley Project ("CVP") is a similar system of reservoirs, canals, and pumps
20 appended to the Sacramento and San Joaquin Rivers and Delta and operated by the federal Bureau
21 of Reclamation ("Reclamation"), also to provide water to water supply agencies throughout the state.

22 20. DWR's and Reclamation's coordinated operation of these projects is often referred to as the
23 "Coordinated Operations."

24 21. The California Environmental Water Account ("EWA") is a program to increase protection
25 for fish resources of the San Francisco Bay-Delta estuary and is operated by DWR and Reclamation
26 in conjunction with their "Coordinated Operations," using the same physical facilities and sources
27 of water as the SWP and CVP .

28 22. In or around January 2004, DWR and the Bureau of Reclamation approved the EWA for the

1 period 2004 through 2007 based on DWR's certification and Reclamation's approval of a Final
2 Environmental Impact Statement / Environmental Impact Report ("EIS/EIR") for the EWA ("2004
3 EWA EIR"), which evaluated the effects of the EWA from 2004 to 2007.

4 23. In or around March 2008, DWR and Reclamation issued a Final Supplemental EIS/EIR to the
5 EWA Final EIS/EIR ("2008 Supplemental EWA EIR"). The 2008 Supplemental EWA EIR
6 evaluated the effects of extending the EWA from 2008 through 2011. DWR has not certified and
7 Reclamation has not approved the 2008 Supplemental EWA EIR, and neither agency has approved
8 the extension of the EWA from 2008 through 2011.

9 24. In or around 2004, the U.S. Fish & Wildlife Service ("USFWS") issued a biological opinion
10 on the effects of the Coordinated Operations on Delta smelt, a species of fish listed as threatened
11 under the federal Endangered Species Act ("ESA"), and its designated critical habitat ("2004 Delta
12 smelt BO"). In response to a lawsuit challenging this opinion, USFWS reinstated consultation under
13 Section 7 of the ESA and issued a redrafted opinion in 2005 ("2005 Delta smelt BO").

14 25. On or about May 25, 2007, the United States District Court for the Eastern District of
15 California (Judge Oliver W. Wanger presiding) issued an order in *Natural Resources Defense*
16 *Council, et al. v. Kempthorne*, 1:05-cv-1207 OWW GSA (E.D. Cal. 2007), finding that the 2005
17 Delta smelt BO violated the requirements of the ESA, and ordered the preparation of a new biological
18 opinion. On or about December 14, 2007, Judge Wanger also issued an interim order curtailing
19 operations at CVP and SWP export facilities to protect Delta smelt until a new biological opinion was
20 completed. This order is one of the sources of the "judicially mandated operational curtailments"
21 referenced in DWR's Draft and Final Addendums (defined hereinafter) for the DWB.

22 26. In or around December 2008, the USFWS issued an updated biological opinion for the
23 Coordinated Operations and Delta smelt ("2008 Delta smelt BO").

24 27. In or around 2004, the National Marine Fisheries Service ("NMFS") issued a biological
25 opinion on the effects of the Coordinated Operations on the Sacramento River winter-run Chinook
26 salmon, the threatened Central Valley spring-run Chinook salmon, and the threatened Central Valley
27 steelhead, three species of fish listed as endangered or threatened under the ESA ("2004 salmonid
28 BO").

1 28. On or about April 16, 2008, the United States District Court for the Eastern District of
2 California (Judge Oliver W. Wanger presiding) issued a Memorandum Decision and Order on the
3 Cross-Motions for Summary Judgment filed in *PCFFA et al. v. Gutierrez et al.*,
4 1:06-cv-245-OWW-GSA (E.D. Cal. 2008), finding that the 2004 salmonid BO violated the
5 requirements of the ESA and ordering that a new biological opinion be issued. An evidentiary
6 hearing followed, resulting in a Remedies Ruling on or about July 18, 2008, which concluded that
7 the court needed further evidence to consider Plaintiffs' proposed restrictions on CVP/SWP
8 operations. On or about October 21, 2008, Judge Wanger issued a ruling concluding that "the three
9 [listed salmonid] species are unquestionably in jeopardy Project [Coordinated] operations through
10 March 2009 will appreciably increase jeopardy to the three species."

11 29. On or about January 15, 2009, NMFS issued an updated draft biological opinion (dated
12 December 11, 2008) for the Coordinated Operations and listed salmonids ("2008 salmonid BO").

13 30. On or about December 17, 2008, DWR released a document entitled "Addendum to the
14 Environmental Water Account Environmental Impact Statement/Environmental Impact Report"
15 ("Draft Addendum") for a 30-day public comment period. This Draft Addendum described a project
16 entitled the "2009 Drought Water Bank" that purported to consist of "three minor changes" to the
17 EWA.

18 31. The Draft Addendum describes the EWA as follows:

19 The EWA is an existing and ongoing CalFED program that seeks to increase
20 protection to the fish resources of the Bay-Delta estuary beyond the protections
21 afforded by a regulatory baseline identified in the 2000 ROD for the CalFED program
22 through operational curtailments of State Water Project (SWP) and Central Valley
23 Project (CVP; collectively Project) operations beyond that baseline at no net cost to
24 the Project deliveries and supply.

25 32. The three proposed changes to the EWA discussed in the Draft Addendum are: "1. Change
26 in giant garter snake mitigation in response to the Draft USFWS Biological Opinion 2. Change in
27 the areas from which water may be purchased and 3. Change in the areas to which water may be
28 delivered."

33. The Draft Addendum also noted a new purpose for the DWB, stating:

The 2009 Drought Water Bank (DWB) thus will be the mechanism for acquiring and
transferring water to replace Project supplies lost and that will be lost due to the

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judicially mandated operational curtailments, aggravated by the conditions of drought.

34. On or about January 16, 2009, Petitioners BUTTE ENVIRONMENTAL COUNCIL and CALIFORNIA SPORTFISHING PROTECTION ALLIANCE submitted written comments to DWR objecting to the DWB Project and specifying the significant environmental effects of the Project due to the new areas described in the DWB Draft Addendum from which water may be purchased for delivery to affected water agencies that are not described in the 2004 EWA EIR or 2008 Supplemental EWA EIR, including new sources of groundwater that are vulnerable to overdraft.

35. Also on or about January 16, 2009, counsel for Petitioner BUTTE ENVIRONMENTAL COUNCIL submitted a comment letter to DWR on BEC’s behalf objecting to DWR’s approval of the Drought Water Bank on grounds that neither the Draft Addendum that DWR circulated for public comment on December 17, 2008 nor the 2008 Supplemental EWA EIR comply with the requirements of CEQA.

36. On or about February 27, 2009, the Governor of California issued a Proclamation declaring a State of Emergency due to Water Shortage, finding: “[T]he drought conditions and water delivery limitations identified in my prior Executive Order and Emergency Proclamation still exist, and have become worse in this third year of drought, creating emergency conditions not just in the Central Valley, but throughout the State of California, as the adverse environmental, economic, and social impacts of the drought cause widespread harm to people, businesses, property, communities, wildlife and recreation.” (See Exhibit 1.)

37. On or about March 4, 2009, DWR issued a final “Addendum to the Environmental Water Account Environmental Impact Statement/Environmental Impact Report Re: 2009 Drought Water Bank Transfers” (“Final Addendum”). The Final Addendum made only minor changes to the Draft Addendum and repeated the nature and purpose of the DWB as stated in the Draft Addendum.

38. The Final Addendum states that it “has been prepared as part of the Environmental Impact Statement/Environmental Impact Report (EIS/EIR) (2004) and Supplement (2008) for the Environmental Water Account (EWA)” and that the “three proposed changes” do not involve “new significant environmental effects, a substantial increase in the severity of previously identified significant effects, or substantial changes in the circumstances under which the project will be

1 implemented.”

2 39. On or about March 9, 2009, DWR, with concurrence from the California Secretary for Natural
3 Resources, filed a Notice of Exemption (“NOE”) pursuant to CEQA, at Public Resources Code
4 sections 21108(b) and 21167(d), for its approval of the DWB. The NOE claims the Project is exempt
5 from CEQA pursuant to the “emergency” exemptions codified at Public Resources Code section
6 21080, subdivision (b), paragraphs (3) and (4), and section 21172, and CEQA Guidelines section
7 15269, subdivisions (a), (b), and (c) and states: “The Project is subject to the Governor’s Proclamatin
8 [sic] of a State of Emergency of February 27, 2009 (attached), among whose purposes is to protect
9 the safety of persons and property from the natural disaster created [sic] by the critical drought
10 considitons [sic] currently existing in the State. Section 17 of said Proclamation directs that CEQA
11 exemptions under these sections as well as CCR title 14, section 15269(c) shall apply. The Secretary
12 for the Natural Resources Agency has determined that the 2009 Drought Water Bank falls within this
13 exemption (see attached).” (A true and correct copy of this NOE is attached hereto as Exhibit 1.)

14 **JURISDICTION AND VENUE**

15 40. This Petition is brought pursuant to Code of Civil Procedure section 1084 et seq., and Public
16 Resources Code sections 21168 and 21168.5. This Court has jurisdiction over these claims.

17 41. Venue is proper in this Court pursuant to Code of Civil Procedure section 401, subsection (1),
18 which provides that whenever an action against a state agency may be commenced in the County of
19 Sacramento, the same may be commenced and tried in any city or city and county of this state in
20 which the Attorney General has an office. This action may be commenced in the Superior Court for
21 the County of Sacramento because Respondents DWR, Resources, and the Governor are state
22 agencies with their principal offices in the County of Sacramento, and because Government Code
23 section 955 provides that actions against state agencies may be removed by the Attorney General to
24 Sacramento County. Thus, since an action against Respondents may be commenced in the County
25 of Sacramento, it may also be commenced in any county in which the Attorney General has an office.
26 Since the Attorney General has a general office in Alameda County in the City of Oakland, venue
27 for this case is proper in Alameda County.

28 42. Venue is also proper in this Court pursuant to Code of Civil Procedure section 393, subsection

1 (a), which provides that the county in which the cause, or some part of the cause, arose, is the proper
2 county for trial of an action to recover a penalty or forfeiture imposed by statute. Several Delta
3 pumps necessary to implement the DWB Project, thereby giving rise to the harm described herein,
4 are located in Alameda County.

5 **STANDING**

6 43. Petitioners have a direct and beneficial interest in Respondents' full and complete compliance
7 with CEQA and other legal requirements applicable to the DWB Project. This beneficial interest
8 arises, *inter alia*, in that Petitioner BUTTE ENVIRONMENTAL COUNCIL is made up of over 850
9 citizens, residents, landowners, businesses, and taxpayers of Butte County, whose rivers, streams,
10 lakes, reservoirs and groundwater will be affected by the DWB Project. The State Water Project's
11 watershed encompasses the mountains and waterways around the Feather River that lead into Lake
12 Oroville in Butte County. Indeed, Lake Oroville – the second largest reservoir in California – is the
13 SWP's official start and a part of a complex that includes three power plants, a forebay, and an
14 afterbay. Petitioner CALIFORNIA SPORTFISHING PROTECTION ALLIANCE has approximately
15 2,000 members who live, recreate, and work in and around waters of the State of California, including
16 waterways throughout the Sierra Nevada, Central Valley, and the Sacramento-San Joaquin River
17 Delta Estuary, and represents prominent fishing organizations and individual members across the
18 state committed to conserving the state's fishery resources and habitat. And Petitioner
19 CALIFORNIA WATER IMPACT NETWORK's goal is to ensure that publicly-owned water projects
20 in California are operated in the public interest, including reasonable urban and agricultural uses as
21 well as environmental values, in order to achieve a sustainable water future. As a result, Petitioners
22 will be adversely affected if Respondents fail to comply with the above-referenced legal requirements
23 via such impacts as damage to Petitioners' members', supporters', and benefactors' land and
24 environmental resources including fish and associated wildlife in rivers, streams, lakes, and reservoirs
25 in California, and in that Petitioners' members, supporters, and benefactors are residents and
26 taxpayers of the State of California. Petitioners also have standing in that the purposes of this
27 proceeding and action include the enforcement of public duties for which the public interest will
28 suffer if such duties are not performed, including, *inter alia*, the duties to protect the environment,

1 and in that Petitioners have a lengthy, demonstrated history of interest and involvement in protecting
2 the environmental resources of the State of California.

3 44. Respondents have a mandatory duty to comply with CEQA and other legal requirements
4 applicable to the DWB Project. Petitioners have the right to enforce these mandatory duties.
5 Petitioners have no other plain, speedy, and adequate remedy at law, and will suffer irreparable injury
6 unless they receive the relief requested in this Petition.

7 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

8 45. To the extent that any administrative process existed for Petitioners to raise issues included
9 in this Petition and to object to DWR's or Resources' approval of this Project, Petitioners did so.
10 Petitioners have thus exhausted all available administrative remedies with respect to these matters.

11 **NOTICE OF COMMENCEMENT OF CEQA PROCEEDING**

12 46. On April 10, 2009, Petitioners served Respondents DWR and Resources, and on April 13,
13 2009, Petitioners served Respondent Governor with notice of Petitioners' intention to commence this
14 action. A copy of these notices, together with proofs of service, is attached hereto as Exhibit 2 and
15 incorporated herein by this reference. By servicing these notices, Petitioners complied with Public
16 Resources Code section 21167.5.

17 **PRIVATE ATTORNEY GENERAL**

18 47. This proceeding involves enforcement of important rights affecting the public interest.
19 Issuance of the relief requested in this Petition will confer a substantial benefit on the public,
20 including citizens, residents, businesses, and taxpayers of the State of California, and will result in
21 the enforcement of important public rights by requiring Respondents to comply with CEQA and other
22 legal requirements applicable to the proposed DWB Project, by voiding the Project approval, and by
23 prohibiting Respondents and Real Parties from taking further actions with respect to the DWB Project
24 until they have complied with those legal requirements.

25 48. Petitioners bring this action as private attorney general pursuant to Code of Civil Procedure
26 section 1021.5. The necessity and financial burden of enforcement of these public rights entitle
27 Petitioners to an award of reasonable attorneys' fees pursuant to that section.

28 //

FIRST CAUSE OF ACTION
(Mandamus Against Respondents DWR, Resources, and
the Governor for Violations of CEQA)

1
2
3 49. Petitioners hereby reallege and incorporate by reference into this First Cause of Action all of
4 the preceding and succeeding paragraphs of this Petition as though fully set forth herein.

5 50. Petitioners allege this First Cause of Action against DWR and Resources. Without conceding
6 that the Governor approved the DWB, which Petitioners contest, in the event that any party contends
7 that the Governor approved the DWB, Petitioners also allege this First Cause of Action against the
8 Governor.

9 51. Respondents are subject to CEQA because they are state agencies, and state agencies must
10 comply with CEQA prior to approving a public project. CEQA applies to the DWB Project as a
11 public project. In approving the DWB Project, Respondents had discretionary authority over the
12 Project. Consequently, prior to approving the DWB Project, Respondents were required to comply
13 with CEQA.

14 52. CEQA imposes a three-tiered structure of environmental review of public projects. If a
15 project does not fall within a statutory exemption, then CEQA requires preparation of either an
16 Environmental Impact Report or a Negative Declaration (depending on the potential significance of
17 environmental impacts). If a project falls within a statutory exemption, the preparation of an
18 Environmental Impact Report or a Negative Declaration is not required.

19 53. Respondents determined that the DWB Project was statutorily exempt from further CEQA
20 review, relying on the "emergency" exemptions provided in Public Resources Code section 21080,
21 subdivision (b), paragraphs (3) and (4), and section 21172, and CEQA Guidelines section 15269,
22 subdivisions (a), (b), and (c). This determination was erroneous because those exemptions are
23 inapplicable to the DWB Project for the reasons noted below. Respondents therefore prejudicially
24 abused their discretion by failing to proceed in the manner required by law and by failing to support
25 their conclusions with substantial evidence in the record.

26 54. An agency's use of an emergency exemption must meet "close judicial scrutiny of each
27 element of the Legislature's detailed definition of 'emergency.'" (*Western Mun. Water Dist. v.*
28 *Superior Court* (1986) 187 Cal.App.3d 1104, 1113; quoted also in *Calbeach Advocates v. City of*

1 *Solano Beach* (2002) 103 Cal.App.4th 529, 536.)

2 **Count 1**
3 **(The DWB Project Is Not Exempt from CEQA Under Section 21080(b)(4).)**

4 55. CEQA section 21080(b)(4) exempts from CEQA review “[s]pecific actions necessary to
5 prevent or mitigate an emergency.” The related CEQA Guidelines section 15269(c) provides:
6 “Specific actions necessary to prevent or mitigate an emergency” are emergency projects and
7 “exempt from the requirements of CEQA.” Guidelines section 15269(c) excludes from the
8 exemption “long-term projects undertaken for the purpose of preventing or mitigating a situation that
9 has a low probability of occurrence in the short-term.”

10 56. Under CEQA, an “emergency” is defined as: “a sudden, unexpected occurrence, involving
11 a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage
12 to, life, health, property, or essential public services. ‘Emergency’ includes such occurrences as fire,
13 flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident,
14 or sabotage.” (Pub. Resources Code, § 21060.3; 14 Cal. Code Regs., § 15360.)

15 57. Respondents’ use of section 21080(b)(4) to avoid CEQA review of the DWB Project is a
16 prejudicial abuse of discretion because this Project does not meet the statutory requirements for
17 invoking this exemption.

18 58. Neither the “judicially mandated operational curtailments” or “drought” constitute a “sudden,
19 unexpected occurrence” because the events leading to the current water conditions in California have
20 been gradual. Indeed, the Governor’s Proclamation recognizes that “the drought conditions ... have
21 become worse in this third year of drought, creating emergency conditions” (Exhibit 1, p. 1
22 [emphasis added].) Further, a drought is not similar to the examples of natural disasters listed in
23 CEQA’s definition of “emergency,” i.e., “fire, flood, earthquake, or other soil or geologic
24 movements,” which are all sudden, one-time events. Neither the Governor’s Proclamation nor the
25 Final Addendum refers to any sudden change in the severity of the drought over the last three years.
26 On the contrary, a DWR publication entitled “Recent California Drought” explains that “unlike
27 earthquakes, fires, or floods, drought onset is slow, allowing time for water suppliers to implement
28 preparedness and response actions to mitigate reductions in normal supplies.”

1 59. Neither the “judicially mandated operational curtailments” or “drought” involve “a clear and
2 imminent danger, demanding immediate action.” The water conditions in California – both at the
3 time of the Governor’s Proclamation and at the time Respondents signed the Notice of Exemption
4 – do not present a “clear and imminent danger” demanding “immediate” action absent environmental
5 review. (See *Western Mun. Water Dist. v. Superior Court, supra*, 187 Cal.App.3d at 1111 [project
6 to drill and release groundwater under city to reduce the risk of liquefaction during an earthquake did
7 not satisfy the imminence requirement of section 21060.3: “The theory behind [emergency]
8 exemptions is that if a project arises for which the lead agency simply cannot complete the requisite
9 paperwork within the time constraints of CEQA, then pursuing the project without complying with
10 the EIR requirement is justifiable. For example, if a dam is ready to burst or a fire is raging out of
11 control and human life is threatened as a result of delaying a project decision, application of the
12 emergency exemption would be proper.”].) While the 2009 water year may be a “dry” or “low
13 water” year compared with historical averages, that classification does not rise to the level of an
14 “emergency” for purposes of avoiding environmental review under CEQA. In *Western Mun. Water
15 Dist. v. Superior Court, supra*, the court explains the standard for “imminence” as follows:

16 Although [the agency] urges that “CEQA, including its environmental impact report
17 requirements, shall not apply to specific actions necessary to prevent or mitigate
18 earthquakes or other soil or geological movements,” this interpretation is unsupported
19 by the text of the exemption. Such a construction completely ignores the limiting
20 ideas of “sudden,” “unexpected,” “clear,” “imminent” and “demanding immediate
21 action” expressly included by the Legislature and would be in derogation of the canon
22 that a construction should give meaning to each word of the statute. [Citation.]
23 Moreover, in the name of “emergency” it would create a hole in CEQA of fathomless
24 depth and spectacular breadth. Indeed, it is difficult to imagine a large-scale public
25 works project, such as an extensive deforestation project or a new freeway, which
26 could not qualify for emergency exemption from an EIR on the grounds that it might
27 ultimately mitigate the harms attendant on a major natural disaster. The result could
28 hardly be intended by the careful drafting of the Legislature, and is unmistakably
opposed to the policy of construing CEQA to afford the maximum possible protection
of the environment. [Citation.]

24 (187 Cal.App.3d at 1111-1112.) Likewise here, if Respondents were to apply emergency exemptions
25 to all water projects in “dry” years in California, the agencies would conduct environmental review
26 on only a fraction of their projects. Such a sweeping interpretation of CEQA would be contrary to
27 the purpose of CEQA and would subvert the rationale for CEQA’s “emergency” exemptions.

28 60. Therefore, Respondents prejudicially abused their discretion in finding the Project exempt

1 under CEQA section 21080(b)(4) by failing to proceed in the manner required by law and by failing
2 to support the decision with substantial evidence.

3 **Count 2**
4 **(The DWB Project Is Not Exempt from CEQA Under Sections 21080(b)(3) or 21172.)**

5 61. CEQA section 21080(b)(3) exempts from CEQA review “[p]rojects undertaken, carried out,
6 or approved by a public agency to maintain, repair, restore, demolish, or replace property or facilities
7 damaged or destroyed as a result of a disaster in a disaster-stricken area in which a state of emergency
8 has been proclaimed by the Governor pursuant to Chapter 7 (commencing with Section 8550) of
9 Division 1 of Title 2 of the Government Code.” (See also Pub. Resources Code, § 21172; 14 Cal.
Code Regs., § 15269(a).)

10 62. Respondents’ use of section 21080(b)(3) to avoid CEQA review of the DWB Project is a
11 prejudicial abuse of discretion because this Project does not meet the statutory requirements for
12 invoking this exemption.

13 63. The DWB Project does not “maintain, repair, restore, demolish, or replace” property or
14 facilities affected by the proclaimed drought. As stated above, DWR defines the DWB Project as
15 “the mechanism for acquiring and transferring water to replace [SWP and CVP] supplies lost and that
16 will be lost due to the judicially mandated operational curtailments, aggravated by the conditions of
17 drought.” (Final Addendum, p. 3 [emphasis added].)

18 64. To the extent the DWB Project purports to “replace” water supplies “lost” as a result of
19 “judicially mandated operational curtailments,” such water supplies:

- 20 (1) are not “damaged or destroyed” because they are merely transferred to other uses;
21 (2) are not lost “as a result of a disaster” because “judicially mandated operational
22 curtailments” are not a “disaster” as proclaimed by the Governor; and
23 (3) are not “property” because Real Parties who are potential buyers of DWB water
24 transfers have no property rights in water delivered by the DWR or Bureau of Reclamation.

25 65. To the extent the DWB Project purports to “replace” water supplies “lost” as a result of
26 “drought,” such water supplies:

- 27 (1) are not “damaged or destroyed” because they are merely transferred to other uses;
28

