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City Council for the City of Rohnert Park

IN THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA

O.W.L. FOUNDATION, a non-profit
organization, KATHLEEN HAYNIE, an
individual, JOAN McLAIN, an individual, and
CRAIG ROTH, an individual,

Petitioners and Plaintiffs,

v.

CITY OF ROHNERT PARK, CITY COUNCIL
FOR THE CITY OF ROHNERT PARK, and
DOES 1 through 25, inclusive,

Respondents and Defendants.

UNIVERSITY DISTRICT LLC and VAST
OAK PROPERTIES L.P.,

Intervenors and Real Parties in
Interest.

Case No. 236309

**RESPONDENTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO PETITIONER'S
VERIFIED FIRST AMENDED
PETITION FOR WRIT OF
MANDAMUS AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

DEPT: 18

DATE: April 4, 2006

TIME: 8:30 a.m.

JUDGE: Hon. Knoel Owen

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1 INTRODUCTION

By this Petition, Petitioners O.W.L. Foundation, Kathleen Haynie, Joan McLain and Craig Roth (hereinafter collectively referred to as "OWL" or "Petitioners"), ask this court to issue a peremptory writ of mandate commanding the City of Rohnert Park City Council ("City") to vacate and rescind its Resolution No. 2005-24. This Resolution formally adopted a Water Supply Assessment dated January 14, 2005 ("WSA"). The WSA was adopted pursuant to Senate Bill 610 (SB 610) and the City's own Water Policy Resolution No. 2004-95 ("Water Policy Resolution"). The WSA is a comprehensive document which was prepared to assist the City in making decisions related to land use and water supply from the present until 2025. To prepare the WSA, the City hired highly experienced engineers who specialize in groundwater resource evaluation and are experts in assessing the quantity and quality of groundwater resources, particularly with regard to geology, hydrology, water quality, and natural and artificial recharge.

The WSA was triggered by six planning applications that varied in size and location. Those six applications included: University District Specific Plan Area Development; Northeast Specific Plan Area Development; Southeast Specific Plan Area Development; Northwest Specific Plan Area Development; Wilfred Dowdell Specific Plan Area Development; and Stadium Lands Development. Although several of these developments did not require a water supply assessment under SB 610, they were included in the WSA because of requirements contained in the City's Water Policy Resolution.

The WSA describes the relationship between projected demands on the City's water supply and the availability of that supply under normal, single-dry and multiple-dry years for those development projects contemplated in the City's General Plan. The WSA contains a detailed and exhaustive analysis of the City's three sources of water supply (Sonoma County Water Agency allocation, recycled water, and local groundwater) as well as a detailed analysis of water demands that will occur as the City reaches build out under its General Plan. Because the City uses groundwater as one of its water supplies, the WSA also considers the demands of other pumpers in the groundwater basin.

After analyzing the City's water supplies and projected water demands associated with

1 implementation of its General Plan, the WSA's sufficiency analysis concludes that the
2 groundwater supply is sufficient to meet City water demands and those of other pumpers in the
3 basin. As the WSA confirmed, the City intends to pursue a conjunctive use strategy with its
4 three supply sources. During normal and above normal water years, the City would meet
5 demands using its Sonoma County Water Agency allocation and recycled water first, thereby
6 minimizing its demands on groundwater. This would allow the groundwater basin to recharge
7 during these periods. In dry and multiple-dry years, the City will continue to use recycled water
8 to the maximum extent possible, implement demand curtailment measures consistent with its
9 Water Shortage Emergency Plan, and also utilize groundwater resources.¹

10 While SB 610 does not require a formal hearing to be held on the proposed WSA, the
11 City conducted three public meetings, one of which was a formal public hearing, and received
12 written and oral comments which comprise an Administrative Record of over 47 volumes and
13 approximately 12,000 pages. The WSA itself comprises over 215 pages. Based upon this
14 information and following pain-staking review of all relevant evidence, the City adopted the
15 WSA and concluded that the City's projected water supplies were sufficient to satisfy the
16 demands of the proposed projects in the City's General Plan.

17 OWL challenges the City's action based upon its desire that this Court re-examine *all* the
18 evidence and arrive at a different conclusion than the City. OWL bases the majority of its
19 arguments on a relatively generalized computer model prepared by PES, an environmental
20 consulting firm, hired by the City in conjunction with preparation of its 2000 General Plan
21 Update. OWL's steadfast reliance on the PES model is somewhat surprising given that OWL's
22 predecessor, the South County Resource Preservation Committee, leveled heavy criticisms on
23 this exact same model in a lawsuit challenging the City's adoption of its 2000 General Plan.

24 As the following will demonstrate, rather than rely on the PES model which was based on
25 old data and estimates as opposed to actual measurements, the City hired expert consultants to
26 perform a revised and updated analysis that was more reliable and current than the PES model.

27
28 ¹ A more detailed discussion and summary can be found in the WSA executive summary. (AR
33:8915-28.)

Neither SB 610 nor caselaw support OWL's contention that this Court must re-evaluate the scientific data presented to the City and reach a different conclusion. The City appropriately exercised its legislative authority in adopting the WSA by engaging in a thorough and well-reasoned analysis wherein it considered all relevant factors and demonstrated a rational connection between the evidence submitted and its ultimate conclusion that the City's water supplies were sufficient to meet water demands. The record is replete with evidence that shows a reasonable basis for the City's findings which were neither arbitrary nor capricious and as a consequence the City's legislative determination cannot be disturbed.

HC Standard

II BACKGROUND

By the late 1990s, Rohnert Park found itself facing a need to expand and develop outside its current boundaries. The City's physical borders had remained the same for decades, and land within its jurisdiction was essentially built out. (AR 2:529, 541; 75:24494.) State laws required the City to accommodate its fair share of regional housing needs, including the needs of very-low, low and moderate income households. (Gov. Code, § 65580 *et seq.*) The City could not achieve this goal without providing for more development. Accordingly, the City commenced a General Plan update to expand its boundaries.

The City commenced preparation of an Environmental Impact Report ("EIR") for its 2000 General Plan update ("General Plan") pursuant to the California Environmental Quality Act. The EIR studied both surface and groundwater resources the City contemplated using. The City retained PES, an environmental consulting firm that undertook a simplified groundwater study, deemed sufficient to evaluate interim use of groundwater pending receipt of substantially more surface water from the then-anticipated transmission project of the Sonoma County Water Agency. (AR 3:725.) PES used a basic groundwater model to estimate recharge from precipitation in the Rohnert Park area. (AR 3:730-35; 33:8972-73.) The data reached back decades to the most recent basin-wide study that had been published by the California Department of Water Resources ("DWR") in 1982. (AR 3:727.) The study evaluated the amount of recharge occurring from direct precipitation within a defined area and the amount of water pumped from that defined area. (AR 33:8972-73.) The study concluded that recharge

1 within the model area averaged 1.6 million gallons per day ("mgd"), and estimated that, without
2 receipt of additional surface water to allow reduced groundwater pumping, pumping would
3 exceed recharge by approximately 0.3 mgd in 2004 and 0.7 mgd in 2009. (AR 3:753.)

4 The City incorporated the PES study in the EIR which concluded that temporary
5 groundwater pumping, pending receipt of additional surface supplies, could potentially lead to
6 significant adverse impacts. (AR 3:753.) The EIR accordingly relied upon General Plan policies
7 that would require the City to monitor water levels at its boundaries, and ensure that no
8 substantial lowering resulted from the City's pumping. (AR 2:552-53; 3:752.) The Rohnert Park
9 City Council certified the EIR, and adopted the General Plan. (AR 75:24477-79.) The General
10 Plan proposed expansion outside current City boundaries in Specific Plan areas large enough to
11 encourage the types of projects that themselves are big enough to support the provision of
12 affordable housing. (AR 75:24493-509.)

13 The City was then buffeted by a string of lawsuits. The South County Resource
14 Preservation Committee ("Committee"), a group claiming to represent the interests of residents
15 of the unincorporated Penngrove area south of Rohnert Park and OWL's predecessor,²
16 challenged the City's General Plan EIR. (AR 26:7250.) The Committee leveled heavy criticisms
17 at the PES study. These included criticisms of the City's reliance on the "old" DWR data, and
18 use of a computer model to generate estimates rather than taking measurements of the actual
19 amount of water in the basin. (Respondents' Request for Judicial Notice ("RJN"), Exs. A, B.)

20 The City and the Committee entered into settlement negotiations, which resulted in a
21 stipulated judgment.³ (AR 26:7263-7273.) The judgment required the City to interpret its

22
23 ² "The O.W.L. Foundation grew out of the South County Resource Protection Committee
(SCRPC). This group successfully sued the City of Rohnert Park by demonstrating in court that
24 the City had insufficient supplies of water for further expansion." OWL's website at
<http://www.owlfoundation.net/OWL.htm>. (See Respondents' Additional Authorities, Ex B.)

25 ³ During this period, another lawsuit had been pursued by a group who challenged the decision
26 of the Sonoma County Water Agency to approve its transmission project. That lawsuit resulted
27 in a decision overturning the Water Agency's transmission project. (*Friends of the Eel River v.*
28 *Sonoma County Water Agency* (2003) 108 Cal.App.4th 859.) The Water Agency accordingly
rescinded approval of its project to bring more surface water to its contractors, including Rohnert
Park. The Water Supply Assessment relied on the Water Agency's current entitlement to 75,000
AFY, and did not rely on the increase to 101,000 AFY the Agency's transmission project would
have provided. (AR 33:8941; 34:9277 (Agency's current 75,000 AFY not affected by past and
pending proceedings).)

General Plan policies to require a closer study of water supply as projects were processed, and to prohibit approval of a project outside the City's current boundaries if the project's net water use would contribute to the City exceeding an average annual pumping rate that equated to 2.3 mgd.⁴ (AR 26:7267-7268.)

By 2004, the City had commenced preparation of the WSA that is the subject of this litigation. The City then faced a very different situation than it had in 2000 when it adopted its General Plan. The circumstances surrounding the study of water supplies was complex. The City's General Plan policies promising a more exacting, detailed study of groundwater supplies when processing projects outside its current boundaries had been upheld and expanded in the stipulated judgment. (AR 26:7263-7273.) Similar water supply study requirements had been imposed by State Law, in SB 610 (Water Code, §§ 10910 *et seq.*) In addition, on April 27, 2004, the City adopted Water Policy Resolution No. 2004-95, which required the City to undertake analysis consistent with SB 610 for all development outside its 1999 City limits and regardless of the size of the development proposal. (AR 33:8932; OWL RJN, Ex. 1.) The groundwater studies were more important than before, since the elimination of the Water Agency's transmission project had made the City's reliance on groundwater for a portion of its future supply not just temporary but long term.

The PES analysis upon which the City had previously relied had been harshly criticized by OWL's predecessors. The City was also mindful of the criticism of its prior reliance on computer modeling estimates rather than measurements of actual water levels, its use of data dating back more than 20 years rather than a more current time period, and its reliance on the 1982 DWR study. (See, Section IV. C., *infra.*) Accordingly, rather than simply asking PES to

⁴ In the process of negotiating settlement of the case, the City also agreed that it would seek to eliminate the water supply and traffic impacts associated with another development outside City limits by asking LAFCO to remove the property from the City's sphere of influence. The owners of that property then sued the City. They attacked the stipulated judgment as being beyond the City's police power. This lawsuit eventually resulted in an appellate decision, which is not yet final, but which favors the City and leaves the stipulated judgment and the General Plan interpretations in place. South County Resource Preservation Committee and John King were real parties in interest in this suit and joined in City's arguments against the petitioners. (*108 Holdings, Ltd. v. City of Rohnert Park* (South County Resource Preservation Committee) (Jan. 31, 2006) CA1/1 No. A108629.)

1 update its prior study, the City retained Winzler & Kelly ("W&K") and Luhdorff & Scalmanini,
2 Consulting Engineers (hereinafter collectively referred to as "WSA Consultants") to prepare the
3 WSA. (AR 1:6.) Luhdorff & Scalmanini ("LSCE") is an internationally recognized engineering
4 firm specializing in groundwater resource evaluation, and its associates are experts in assessing
5 the quantity and quality of groundwater resources, particularly with regard to evaluation of
6 geology, hydrology, water quality, and natural and artificial recharge. (AR 1:6, 65-73.)

7 **A. The City's Water Supply Assessment**

8 The WSA was prepared to assist the City in satisfying the requirements of SB 610 and
9 the City's Water Policy Resolution. (AR 33:8915; OWL RJN, Ex. 1.) It describes the
10 relationship between projected demands on the City's water supply and the availability of that
11 supply under normal, single-dry and multiple-dry years. The WSA proposes a strategy for
12 utilizing the City's Sonoma County Water Agency allocation, current and future recycled water
13 supplies and its local groundwater supply to meet the water supply demands associated with
14 implementation of the City's General Plan. (AR 33:8929.) The WSA fully complied with the
15 requirements of SB 610 as its analysis contained all of the following:

- 16 • Provided information on the City's water supplies consistent with Water Code sections
17 10620 *et seq.* (the Urban Water Management Act) and 10910(d). (AR 33:9143, 8931-
18 32.)
- 19 • Provided information on current water demands and projected water demands based on
20 the City's General Plan and specific project proposals currently under review by the City
21 consistent with Water Code section 10910(c). (AR 33:9146, 8931-32.)
- 22 • Compared water supplies and water demands for normal, single-dry, and multiple-dry
23 years consistent with Water Code section 10910(c)(4). (AR 33:9146, 8931-32.)
- 24 • Provided a description of the groundwater basin from which the proposed projects will be
25 supplied consistent with Water Code section 10910(f)(2). (AR 33:9144, 8931-32.)
- 26 • Evaluated the information contained in the most current bulletin of the DWR to
27 determine whether the department had identified the basin as overdrafted, or had
28 projected that the basin will become overdrafted, and characterizes the condition of the

groundwater basin consistent with Water Code section 10910(f)(2). (AR 33:9145, 8931-8932.)

- Provided a detailed description and analysis of the amount and location of groundwater pumped by the public water system for more than the past five years (in fact the analysis covers the period from 1977-2003) consistent with Water Code section 10910(f)(3). (AR 33:9145, 8931-8932.)
- Provided a detailed description and analysis of the amount and location of groundwater that was projected to be pumped by the City, including the proposed projects, from the basin. This analysis also included a description of the amount projected to be pumped by others, including other entities in addition to the City (e.g., City of Cotati and Sonoma State University), private and commercial pumpage, and agriculture for the study area (i.e., the nationally recognized hydrologic unit) that encompasses and is also a significantly larger area than the public water system service area. This analysis was based on information that was reasonably available, including, but not limited to, historic use records consistent with Water Code section 10910(f)(4). (AR 33:9146, 8931-8932.)
- Provided the data to make the sufficiency findings required by Water Code section 10910(c)(4). (AR 33:9146, 8931-32.)

B. Procedural Background

The City released the draft WSA for public review on October 11, 2004. The draft WSA was made available to all members of the public who requested it, and was also posted on the City's website. (AR 32:8852.) The City Council received a comprehensive presentation regarding the draft WSA at its October 26, 2004, meeting and allowed public comment on the draft. (AR 1:260-273.) It then set a formal public hearing on the WSA for November 23, 2004. At the November 23, 2004, public hearing, representatives of Petitioners (including their counsel) had the opportunity to supplement their extensive written comments and air any other concerns to the City Council directly. After closing the public hearing, the Council did not take action immediately, but continued the matter to January 25, 2005 in order to consider and respond to some of the questions and comments raised by the public and other agencies.

1 (AR 32:8883.) LSCE prepared a technical memorandum responding to all comments raised,
2 which was incorporated into a final WSA. (AR 33:8908-9124.) The technical memorandum and
3 final WSA delved into such intricate details as the generality of the information from a 1951
4 report regarding the groundwater divide, and how more specific, detailed information revealed
5 that the divide had not changed. (AR 33:8966, 8974.) It provided much more detail and
6 explanation regarding recharge areas than had prior studies, and confirmed that its conclusions
7 were consistent with DWR findings. (AR 33:8969-8970.) It also responded to claims that
8 "overdraft" had been "proven" by lowering groundwater levels in certain isolated wells by noting
9 that Penngrove wells for which DWR data was available were evaluated, and all showed
10 groundwater levels generally stable. (AR 33:8962.)

11 The final WSA was distributed widely before the January 25th Council meeting.⁵ (AR
12 34:9298.) At the meeting, the Council allowed additional comments by the public, including
13 Petitioners, to assure that all issues were addressed. (AR 34:9256.) Although additional issues
14 were raised, the work that had been done by the WSA Consultants was so thorough that all
15 comments were addressed by staff that evening. (AR 34:9294-313.) For example, one letter
16 arrived at the last minute from a neighboring Bay Area Regional Water Quality Control Board
17 expressing concern with increased pumping of groundwater. (AR 34:9307.) Staff was able to
18 immediately explain that the factual events that underlay that letter were different than the letter's
19 author had assumed. (AR 34:9301-04.) Similarly, staff was able to explain that while the Canon
20 Manor West EIR prepared by Sonoma County had concluded that increased pumping of
21 groundwater by that project could result in significant impacts, this conclusion was based on
22 speculation that Rohnert Park would not contain its pumping as it had done in recent years. (AR
23 34:9305.) On January 25, 2005, following months of public review dating back to October 2004,
24 the City approved Resolution No. 2005-24 which formally adopted its Water Supply Assessment

25
26 ⁵ The final WSA was posted on the City's website, distributed to Sonoma County Public Works,
27 L.A.F.C.O., the Water Agency, Sonoma State University, Penngrove Water Company, Cities of
28 Santa Rosa, Cotati, Sebastopol, Petaluma, Sonoma, League of Woman Voters, Rohnert Park City
Staff, Specific Plan proponents, the library. Additionally, notices of availability were sent to
representatives of Penngrove Area Plan Advisory Committee, OWL, and the Circuit Rider
Productions. (AR 34:9298.)

1 in accordance with Senate Bill 610. (Petition, paras. 32-36.)

2 On February 24, 2005, OWL filed a Verified Petition for Writ of Mandamus and
3 Complaint for Declaratory and Injunctive Relief against the City of Rohnert Park, City Council
4 for the City of Rohnert Park and Docs 1 through 25 (collectively "City"). On or about July 22,
5 2005, Petitioners filed their Verified First Amended Petition for Writ of Mandamus and
6 Complaint for Declaratory and Injunctive Relief ("Petition") against the City. The third cause of
7 action for production of documents in accordance with the Public Records Act was dismissed
8 with prejudice pursuant to stipulation of the parties. (Stipulation and Order re Resolution of (1)
9 Plaintiffs' Motion to Augment Administrative Record and (2) Respondents' Demurrer to Third
10 Cause of Action of the Verified First Amended Petition for Writ of Mandamus and Complaint
11 for Declaratory and Injunctive Relief ("Stipulation re Augmentation"), filed October 27, 2006, p.
12 3.)

13 III STANDARD OF REVIEW

14 Traditional mandate under section 1085 of the Code of Civil Procedure ("Section 1085"),
15 not administrative mandamus under section 1094.5 of the Code of Civil Procedure ("Section
16 1094.5"), is the proper remedy to review the City of Rohnert Park's approval of the challenged
17 WSA.⁶ In these cases, the legislative action will be upheld unless the action is found to be
18 arbitrary, capricious, or lacking in evidentiary support. (*Shapell Indus., Inc. v. Governing Bd.*
19 (1991) 1 Cal.App.4th 218, 231-233; *California Hotel & Motel Assn. v. Indus. Welfare Com.*
20 (1979) 25 Cal.3d 200, 212; *Strumsky v. San Diego County Employees Ret. Ass'n* (1974) 11
21 Cal.3d 28, 34.)

22 ⁶ The mere fact that the City held a public hearing on the WSA does not make 1094.5 applicable.
23 (*Shapell Indus., Inc. v. Governing Bd.*, *supra*, 1 Cal.App.4th at 231.) "As a prerequisite for
24 review by administrative mandamus [under Section 1094.5], the administrative decision must be
25 one made in a proceeding in which a hearing is required by law." (*Dominey v. Dep't of Pers.*
26 *Admin.*, *supra*, 205 Cal.App.3d at 735; *Keeler v. Superior Court*, *supra*, 46 Cal.2d at 599.) The
27 City in this instance is not under any mandate to hold a hearing. SB 610 does not require that a
28 hearing be held prior to or in approval of a WSA. (Water Code, §§ 10910-10912.) In the
absence of such a hearing requirement, traditional mandate under Section 1085 is the appropriate
vehicle for review. (*Royal Convalescent Hosp. v. State Bd. of Control* (1979) 99 Cal.App.3d
788, 792 (administrative mandamus inappropriate when no legal requirement for hearing,
regardless of whether one was held).) Moreover, the Stipulation re Augmentation and Case
Management Conference Statement to which OWL refers are likewise not relevant. (OWL Br. at
16:12-14.) They only refer to record matters. They do not purport to make 1094.5 applicable as
the appropriate standard of review.

1 The court may not substitute its own judgment for that made by the agency in its quasi-
2 legislative administrative function. (*Western States Petroleum Ass'n v. Superior Court* (1995) 9
3 Cal.4th 559, 576.) Reversal in these cases can only be on a finding of abuse of discretion.
4 (*McGhan Med. Corp. v. Superior Court* (1992) 11 Cal.App.4th 804, 808.) The court will make
5 this decision based on the whole record to evaluate whether the agency adequately followed any
6 procedures required by law and whether there is any evidence to support the decision. (*City of*
7 *Santa Cruz v. Local Agency Formation Commission* (1978) 76 Cal.App.3d 381.)

8 A court must ensure that an agency has adequately considered all relevant
9 factors, and has demonstrated a rational connection between those factors,
10 the choice made, and the purposes of the enabling statute.

11 (*Shapell Indus., Inc. v. Governing Body, supra*, 1 Cal.App.4th at 232.)

12 Therefore, a court's authority in a Section 1085 action is not to weigh the evidence or
13 pass upon its wisdom; but to confine its judicial review to the record before the agency whose
14 decision is being challenged. (*Western States Petroleum Ass'n v. Superior Court* (1995) 9
15 Cal.4th 559, 576; *Shapell Indus., Inc. v. Governing Bd., supra*, 1 Cal.App.4th at 233.)

16 Since any decision made in the exercise of an agency's legislative authority would
17 involve the use of discretion, the steps to be undertaken, the method selected, and the decision
18 reached in the course thereof, in the absence of fraudulent or arbitrary action, would not be
19 interfered with by the courts. (*San Bernardino Fire & Police Protective League v. City of San*
20 *Bernardino* (1962) 199 Cal.App.2d 401, 411.) In essence, the question is whether substantial
21 evidence supports the agency's decision. The inquiry is whether the record shows a reasonable
22 basis for the action of the legislative body, and if the reasonableness of the decision is fairly
23 debatable, the legislative determination will not be disturbed. (*Mike Moore's 24-Hour Towing v.*
24 *City of San Diego* (1996) 45 Cal. App. 4th 1294, 1305-1306.)

25 The precise formulation of the standard may be less important than what courts actually
26 do in exercising deferential but not perfunctory review:

27 "What matters is that . . . judges generally understand that they may
28 not properly substitute their judgment for administrative judgment
except on questions of law on which they are the experts, but that
something like reasonableness, rational basis, substantial evidence, or

1 clearly erroneous guides what they do on other questions, and that in
2 most cases other factors have a much stronger influence than the
3 words of the formula that is supposed to apply. Whatever the
4 formulas, good judges customarily tread lightly when they are
impressed with the care, conscientiousness, and balance of the
administrators..."

5 (*Cal. Hotel & Motel Ass'n v. Indus. Welfare Comm'n*, *supra*, 25 Cal. 3d at 212, fn. 30.) As the
6 over 12,000 pages of administrative record and the following will demonstrate, the City
7 exercised both care and conscientiousness in adopting its WSA. OWL disagrees but fails to
8 properly address the correct standard of review. It either asks this Court to decide in the first
9 instance which conflicting evidence is correct, or it offers new opinions not previously presented
10 to the City and asks the Court to adopt these. For example, it asks this Court to reach scientific
11 conclusions about the impact of geology on water supply and how rainfall data "should" be
12 interpreted. (OWL Br. at 24:17, 27:24-28:16.) It asks this Court to believe that the WSA study
13 is "fictional" and the PES Study is "accurate." (OWL Br. at 22:10, 27:8.) OWL even includes a
14 heading declaring that the record contains contrary evidence. (OWL Br. at 21:16.) There is no
15 indication of arbitrary or capricious decision-making. Rather, there is ample evidence to support
16 the WSA findings.

17 Because OWL only contradicts the WSA study, and does not even attempt to establish
18 that the study was adopted based on arbitrary or capricious decision making or does not comprise
19 evidence, it fails to present a justiciable claim. The Court need delve no further into OWL's
20 claims, and should deny the petition outright. In any event, as shown below, OWL's arguments
21 do not and cannot make the City's decision to adopt the WSA into anything other than a rational
22 decision based on all the evidence in the record.

23 IV ARGUMENT

24 A. The History And Purposes Of SB 610 Are Not As OWL Proposes.

25 The law enacted as SB 610 began, as do so many legislative actions, as a power struggle.
26 Years ago, Contra Costa County was engaged in a fierce and litigious battle with the East Bay
27 Municipal Utility District over whether the County, as a police power entity with land use
28

1 powers, or EBMUD, as water provider, had the power to determine whether the 11,000-unit
2 Dougherty Valley project should be approved. (Morrison and Doporto, Where Does The Final
3 Approval Authority Lie For New Development In California? The Long And Winding Road To
4 SB 221 and SB 610, *California Land Use Law & Policy Reporter*, pp. 61-67 (Nov. 2001); see,
5 Respondents' Additional Authorities, Ex. A.) The dispute found its way to the Legislature,
6 where it resulted in SB 901 (1995). (*Ibid.*) SB 901 effected a compromise by keeping land use
7 planning authority with cities and counties, but requiring them to obtain and consider
8 information from water suppliers before approving General Plans or Specific Plans. (*Id.* at p. 63.)
9 Experience proved, however, that SB 901 was not as effective at achieving its goal of marrying
10 land use and water planning. (*Id.* at p. 64.) As stated by the Legislature, "... the water supply
11 and land use planning linkage, established by [SB 901], has not been implemented in a manner
12 that ensured the appropriate level of communication between water agencies and planning
13 agencies." (Stats. 2001, c 643, § (a)(9).)

14 SB 610 amended state law, effective January 1, 2002, to strengthen the process by which
15 local agencies determine the adequacy and sufficiency of current and future water supplies to
16 meet current and future demands. (AR 33:8915.) SB 610 is a procedural statute. It requires that
17 for projects of 500 units or more, a water provider assess whether water supplies will be
18 sufficient (Water Code, § 10910), adopt new plans for obtaining additional water if supplies are
19 not sufficient (Water Code, § 10911), and provide that information to the agency making land
20 use decisions. (Water Code, §§ 10910(g), 10911(a).) The statute thus serves the purpose of
21 coordinating land use and water planning.

22 Water Code section 10910(f)(2) requires in part "[a] description of any groundwater
23 basin or basins from which the proposed project will be supplied."⁷ SB 610 then requires the
24 City to use such information as is "reasonably available" (Water Code, § 10910 (f)(4)) to assess
25 whether the groundwater the City pumped "from the basin," would be sufficient to meet the
26 projected water demand associated with the proposed project. (Water Code, § 10910(f)(5).) The

27
28 ⁷ Contrary to OWL's statements (OWL Br. at 22-25), the WSA describes the Santa Rosa Valley
Groundwater Basin, the three subbasins within this basin, and provides a figure depicting the
DWR designated basin and subbasin boundaries. (AR 33:8951-52, 8994.)

1 Legislature also decreed exactly what type of information must be included in a description of a
2 project's proposed water supply. (Water Code, § 10910-19011.) It further dictated that this
3 description be the one included in the EIR for the project. (Water Code, § 10911(c); Pub. Res.
4 Code, § 21151.9.) The law now expressly provides that the description of water supplies may
5 include existing entitlements or contracts, for which facilities have not yet been built. (Water
6 Code, § 10910(d)(2): an identification of existing entitlements shall be demonstrated by
7 providing information related to proof of the entitlement, a capital outlay program for financing
8 the delivery of the water supply, a list of the permits that will be required to construct the
9 necessary infrastructure, and a list of the regulatory approvals that are required to convey the
10 water.)

11 SB 610 further endorses the concept of uncertain water supplies, by mandating that if a
12 water agency determines supplies will not be sufficient, "the public water system shall provide to
13 the city or county its plans for acquiring additional water supplies, setting forth the measures that
14 are being undertaken to acquire and develop those water supplies." (Water Code, § 10911(a).)
15 These future supply plans "may include" estimates of future costs, approvals anticipated to be
16 required to acquire and develop the future supplies, and estimates of timeframes within which
17 the agency expects to acquire the water. (Water Code, § 10911(a).) In this manner, the
18 Legislature assured that the Water Supply Assessment laws would not be used to stop
19 development, but only to assure that land use planning and water supply planning were
20 coordinated.⁸

21 **B. The City's Findings That The Santa Rosa Plain Subbasin Is Not In Overdraft**
22 **Is Supported By Law And Evidence.**

23 OWL argues that the City used an inadvisable definition of overdraft, and that it did not
24 offer a "significant amount of evidence" to refute the supposed findings by DWR and PES of an
25 overdraft condition in the Santa Rosa Plain ("SRP") Subbasin. (OWL Br. at 20-21.) OWL also
26 argues that the City must "prove that the SRP Subbasin is *not* in overdraft . . ." (OWL Br. at

27 ⁸ Petitioners do not directly dispute any of this, but they posit a very different legislative history.
28 As shown above, these statements represent nothing but Petitioners' conjecture; the law and
legislative history is to the contrary.

19:14-15.) OWL misstates the standard which must be established to uphold the City's adoption of its WSA. The City need not refute OWL's assertion that the basin is in overdraft, or "prove" anything; the only requirement is that there be evidence in support of the City's conclusions. (*City of Santa Cruz v. Local Agency Formation Commission of Santa Cruz County, supra*, 76 Cal.App.3d at 393.) So long as that is the case, the reasonableness of the City's determination will not be disturbed. (*Mike Moore's 24-Hour Towing v. City of San Diego, supra*, 45 Cal. App.4th at 1305-1306.)

1. **The City's Definition Of Overdraft Is Supported By Law And The Record.**

The WSA analysis shows there is no overdraft and none is expected within the 20-year planning horizon of the WSA. OWL attacks this conclusion in part by pointing to a truncated version of DWR's discussion of overdraft, and asking this Court to reach its own determination whether the basin is overdrafted. The argument is irrelevant, contrary to the standard of review, and would lead to absurdities.

a. **SB 610 Supports The City's Analysis Regarding Overdraft.**

OWL only sets up a straw man to knock him down. The *only* mention of "overdraft" in the Water Supply Assessment laws appears in Water Code section 10910(f)(2), which requires:

...for basins that have not been adjudicated, information as to whether [DWR] has identified the basin or basins as overdrafted or has projected that the basin will become overdrafted if present management conditions continue, in the most current bulletin of the department that characterizes the condition of the groundwater basin, and a detailed description by the public water system, or the city or county if either is required to comply with this part pursuant to subdivision (b), of the efforts being undertaken in the basin or basins to eliminate the long-term overdraft condition.

Since the basin has not been adjudicated, the only requirement of SB 610 that involves a determination of overdraft relates to basins declared by DWR to be in overdraft. OWL cleverly attempts to create new obligations by adding separators and numbers to this statutory language to imply that obligations exist with respect to overdrafts that have not been declared by DWR.⁹

⁹ (OWL Br. at 7:16-17 (referencing two non-existent requirements that a water agency determine

1 To the contrary, the only requirement appears in a single sentence, which pertains only to
2 basins declared in overdraft by DWR. As even OWL concedes, the only DWR determination for
3 the SRP Subbasin is that it was in a state of balance, not overdraft. (OWL Br. at 21:17-18.) The
4 City accordingly had no other statutory obligations with respect to any determination of
5 "overdraft." Thus, while the City rationally considered whether the basin was overdrafted in
6 determining whether supplies are sufficient, it was not required to do so in any particular matter
7 or using any particular definition.

8 OWL's argument is a red herring in another sense as well. Even if all OWL's arguments
9 in this regard were accepted, OWL would establish, at most, that there is evidence in the form of
10 DWR practices that contradicts the evidence upon which the City relied in determining
11 sufficiency of water supplies. Such evidence is not relevant under the applicable standard of
12 review. Certainly, there is no language in SB 610 that would permit, let alone require, a court to
13 determine in the first instance how to assess a basin, or how to define "overdraft" for purposes of
14 determining whether water supplies would be sufficient. Instead, the only question presented is
15 whether the record shows a reasonable basis for the City's determinations. If the City's
16 determination is fairly debatable, its decision cannot be overturned. (*Mike Moore's 24-Hour*
17 *Towing*; *supra*, 45 Cal.App.4th at 1305-06.)

18 **b. The City's Definition Of Overdraft Is Supported By Both**
19 **DWR And Caselaw.**

20 Even within the scope of the definitional technicalities OWL emphasizes, OWL's
21 arguments fail. The term "overdraft," like its companion, "safe yield," is subject to numerous
22 meanings and applications. DWR acknowledges this uncertainty. DWR's Bulletin 118 notes
23 "[g]roundwater overdraft is defined as the condition of a groundwater basin or subbasin in which
24 the amount of water withdrawn by pumping exceeds the amount of water that recharges the basin
25 over a period of years during which the water supply conditions approximate average conditions.
26 Overdraft can be characterized by groundwater levels that decline over a period of years and

27 "(i) whether the basin is overdrafted or is projected to be overdrafted and (ii) any management
28 efforts being taken to eliminate the long-term overdraft condition); 18:7-10, 19:21-24.)

1 never fully recover, even in wet years.”¹⁰ (AR 79:25525.) DWR then goes on to explain,
2 however, that the ultimate determination whether overdraft exists rests within the discretion of
3 the local agency:

4 Despite its common usage, the term overdraft has been the subject
5 of debate for many years. Groundwater management is a local
6 responsibility, therefore, the decision whether a basin is in a
condition of overdraft is the responsibility of the local groundwater
or water management agency.

7
8 (AR 79:25526.)

9 DWR similarly recognizes that whether a basin is in “critical overdraft” is a
10 determination within the discretion of a local agency: “Definition of the time frame [within
11 which adverse results would occur, establishing a critical overdraft] is the responsibility of the
12 local water managers, as is the definition of significant adverse impacts, which would be related
13 to the local agency’s management objectives.” (AR 79:25527.) Indeed, DWR has tasked itself
14 with the job of working with local agencies to more accurately define overdraft. (AR 78:25437.)

15 Not only were the City’s definitions consistent with DWR practice but they were
16 consistent with California Supreme Court authority as well. The Court provided definitions of
17 “overdraft” and “safe yield” in its seminal *San Fernando* decision, which modified the definition
18 first established in the *Pasadena* case to which OWL refers. (*City of Los Angeles v. City of San*
19 *Fernando* (1975) 14 Cal.3d 199, citing *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d
20 908.) The *San Fernando* court explained that a basin is in a state of surplus, i.e., exceeds
21 circumstances that could be considered indicative of overdraft, “when the amount of water being
22 extracted from it is less than the maximum that could be withdrawn *without adverse effects on*
23 *the basin’s long-term supply.*” (*City of Los Angeles v. San Fernando, supra*, 14 Cal.3d at 277
24 (emphasis added).) Similarly, the court defined safe yield as “the maximum quantity of water
25 which can be withdrawn annually from a ground water supply under a given set of conditions
26 *without causing an undesirable result.*” (*Id.* at 278 (emphasis added).) DWR concurs that

27 ¹⁰ As OWL notes, basin levels declined for several years in the Rohnert Park area before
28 stabilizing and reaching new equilibrium, and then starting to rise. (OWL Br. at 21:17-18; AR
33:8980.)

1 "[s]afe yield is defined as the amount of groundwater that can be continuously withdrawn from a
2 basin *without adverse impact*." (AR 79:25528 (emphasis added).)¹¹ "The phrase 'undesirable
3 result' is understood to refer to a gradual lowering of the ground water levels *resulting eventually*
4 *in depletion of the supply*." (*City of Los Angeles v. San Fernando, supra*, 14 Cal.3d at 278
5 (emphasis added); AR 33:8950, 9130; see also 79:25525, 25529.)

6 The WSA employed concepts of overdraft that incorporated the notion of causing
7 undesirable results. (AR 33:8949-8950.) It noted the generally accepted definition of safe yield
8 first announced by the California Water Rights Board¹² in the "Report of Referee" the Board
9 prepared in 1962 for the *San Fernando* case: "the maximum average annual pumping draft
10 which can be continually withdrawn for useful purposes under a given set of conditions without
11 causing an undesired result." (AR 33:8950.) The WSA went on to explain that an "undesired
12 result" is most commonly interpreted to mean "a progressive lowering of the groundwater levels
13 resulting eventually in depletion of the supply. Undesired results would also include long-term
14 depletion of groundwater storage, inducement of seawater intrusion or other degraded water
15 quality, or land subsidence." (AR 33:8950; see also 33:9130.) The WSA then defined overdraft:

16 Overdraft is a condition caused by pumping in excess of safe yield that produces an
17 undesirable result such as:

- 18 • Chronic lowering of groundwater levels (toward depletion of supply),
- 19 • Chronic depletion of groundwater storage,
- 20 • Inducement of seawater intrusion of other degraded water quality, and/or
- 21 • Land subsidence

22 (AR 33:8950.)

23 As noted, the WSA concluded that, with the range of water supplies available to the City
24 to support planned growth, the City's groundwater pumping would not cause water levels to

25
26 ¹¹ The judicial definition of overdraft comports with DWR's definition of the term "critical
27 overdraft": "A basin is subject to critical conditions of overdraft when continuation of present
28 water management practices would probably result in significant adverse overdraft-related
environmental, social, or economic impacts." (AR 79:25527.)

¹² The State Water Rights Board is the predecessor of the current State Water Resources Control
Board, and was the entity appointed as Referee in the *San Fernando* case. (*City of Los Angeles*
v. San Fernando, supra, 14 Cal.3d at 216.)

1 decline, let alone lead to any of these undesirable results. (AR 33:8979.) The study also
 2 revealed that after experiencing the declines of prior years, the basin had stabilized, and that
 3 levels had started to rise again, indicating that undesirable results were not likely to occur in the
 4 future. (AR 33:8979.) Accordingly, the evidence upon which the City relied showed no
 5 overdraft as the California Supreme Court, the State Water Rights Board, DWR and industry
 6 practice defined that term. This is more than substantial evidence to support the City's
 7 conclusions.¹³

8 Finally, OWL's argument, when followed to its logical conclusion, leads to absurdities.
 9 OWL apparently believes that agencies must stand by waiting for a basin to recover to
 10 historically high levels before they are permitted to approve any substantial development project.
 11 In other words, OWL claims that the Legislature intended to require local agencies to allow
 12 basins, which are not facing undesirable results and which are not in danger of running dry, to
 13 refill for no reason other than to be able to say the basin has refilled. In so doing, OWL urges a
 14 use of water that has never been endorsed, and which may well constitute a constitutional waste
 15 of water.¹⁴

16
 17 ¹³ Petitioners' argument is disingenuous as well. Had the basin been in overdraft for decades as
 18 petitioners claim, then landowners in the Penngrove area south of Rohnert Park, who were
 19 instrumental in forming the South County Resource Protection Committee and were the genesis
 20 of OWL Foundation, would have lost their water rights through prescription. (E.g., *City of*
 21 *Pasadena v. City of Alhambra, supra*, 33 Cal.2d at 929.)

22 ¹⁴ Since the 1928 amendment to the California Constitution requiring that water to be put to
 23 reasonable, beneficial uses and prohibiting a waste of water in excess of those uses (Cal. Const.,
 24 Art X, § 2), the courts have recognized that "public interest requires that there be the greatest
 25 number of beneficial uses which the supply can yield" (*City of Pasadena v. City of*
 26 *Alhambra, supra*, 33 Cal. 2d at 925.) As far back as 1935, the courts recognized that "what may
 27 be a reasonable beneficial use, where water is present in excess of all needs, would not be a
 28 reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at
 one time, may because of changed conditions become a waste of water at a later time." *Tulare*
Dist. v. Lindsay-Strathmore Dist., (1935) 3 Cal.2d 489, 567 (holding that winter season irrigation
 to exterminate pests in an area of water need "cannot be held to be a reasonable beneficial use");
 see also *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 369, fn. 8 (use of water overflowing
 land to deposit silt and wash out salt deposits held to be a waste of water in light of
 municipality's need to store water to serve its citizens.) Thus, even practices that used to be
 considered common can now be deemed a waste of water in the constitutional sense. (E.g.,
 Water Code, § 13550(a) (use of potable water for nonpotable uses such as golf course irrigation,
 where recycled water is available, is a waste of water in the constitutional sense).) At the very
 least, the use of water to fill a basin for either no reason, or only to achieve the goals of a few
 individuals, should raise serious questions about whether the proposed use should now be
 considered a waste. (Compare, *City of Los Angeles v. City of San Fernando, supra*, 14 Cal.3d at
 279 if a rising level of extractions were halted at the point of the safe yield based on the 29-year

2. **Petitioners' Overdraft Contentions Are Based On Speculation.**

OWL's argument that the WSA's findings are contrary to conclusions drawn by DWR is both contrary to evidence in the administrative record and completely false. The WSA conclusions on groundwater level trends are entirely consistent with conclusions made by: (1) the 1975 DWR report - Evaluation of Ground Water Resources in Sonoma County¹⁵ (AR 70:22829 - 3012), (2) the 1979 DWR report - Meeting Water Demands in the City of Rohnert Park¹⁶ (AR 9:2458-10:2581), and (3) the 1982 DWR report - Evaluation of Groundwater Resources in Sonoma County¹⁷ (AR 10:2582-2718). By OWL's own admission, in 1982 the DWR "concluded that the Subbasin was 'in balance' with respect to the levels of recharge and production." (OWL Br. at 20:20-21.) Indeed, the administrative record confirms that no where in any of the studies does DWR conclude the subbasin was in an overdraft condition. (AR 70:22829 - 3012; 9:2458-10:2581; 10:2582-2718.)

Precisely because OWL could not identify a determination of overdraft by DWR, it instead makes its own unsubstantiated conclusion that "recharge must have decreased due to urbanization of open space, and groundwater production must have increased given the water needs of a larger population." (OWL Br. at 20:22-24.) This statement is not only speculation,

average, leaving no room for higher than average percolation during years of higher-than-average precipitation, there would be waste.)

¹⁵ The 1975 DWR study never mentions the term "overdraft." Rather, it states that "well records dating back to 1949 show that there have been few significant changes in water levels over the years." (AR 70:22846.) The study further provides, "there is essentially no change in water levels over the 26-year period, suggesting that the aquifer system which the well taps is being adequately recharged to meet its demand." (AR 70:22908.)

¹⁶ The 1979 DWR study, which is specific to the Rohnert Park area, does not contain any finding of overdraft either. While the report does discuss "the gradual lowering of water levels beneath the City of Rohnert Park over time," it only concludes, "[i]f future studies indicate that the basin is in a state of overdraft, a recharge program should be implemented." (AR 9:2473, 9:2484.) This is far from a determination of overdraft.

¹⁷ The 1982 DWR study demonstrates the lack of a determination by DWR of an overdraft condition. This report provides, "The Santa Rosa Plain ground water basin as a whole is about in balance, with increased ground water levels in the northeast contrasting with decreased ground water levels in the south." (AR 10:2596.) A finding of decreased groundwater levels in one area does not constitute overdraft, and no where in the report is there a conclusion of overdraft. To the contrary, the report provides, "aquifers beneath most natural recharge areas appear to be nearly full." (AR 10:2597.) The report further explains, "[t]he recovery capabilities of parts of the groundwater reservoir suggest that if more of the area's water demand were met by extracting ground water from areas of rapid recharge, more storage space would be available to accept surface runoff that is now rejected by the groundwater reservoir. (*Ibid.*)

1 but is false and finds no support in the administrative record before the City. The record contains
2 no evidence that the WSA is inconsistent with DWR's conclusions. Rather, the record makes
3 clear that "groundwater conditions in the study area are in balance with an average annual net
4 positive change in storage." (AR 33:9135; see also AR 2:290; 33:8974.) Even if OWL's
5 unsubstantiated opinion was accepted, OWL would establish only that there is some evidence to
6 that which the City relied on in adopting its WSA. Again, the issue in this action is whether the
7 City's adoption of the WSA is supported by substantial evidence. Any contrary evidence is not
8 relevant to the determination of abuse of discretion. (*City of Santa Cruz v. Local Agency*
9 *Formation Commission of Santa Cruz County, supra*, 76 Cal.App.3d at 393 ("It is of no
10 consequence that [an agency], believing other evidence and drawing different inferences might
11 have come to other conclusions.")) The choice between conflicting expert analysis is for the
12 City to determine, not the courts. (*Western Oil & Gas Ass'n v. Air Resources Bd.*, (1984) 37
13 Cal.3 502, 515.)

14 OWL also introduces a new term, "the 'step down' effect", to support its opinion that the
15 SRP Subbasin is in overdraft and to describe the condition where "water levels drop in dry years,
16 and then level off in wet years."¹⁸ (OWL Br. at 28:15-18.) OWL offers only its speculation that,
17 contrary to the measurements the WSA documented, well levels are actually declining in dry
18 years and remaining stable in wet years. OWL concludes from this speculation that overdraft
19 must exist if an increase in rainfall does not result in an equal increase in water levels. (OWL
20 Br. at 27:26-28 - 28:1-2.) This is in direct conflict with the WSA's findings. (See AR 33:8979-
21 8980, 8974 (water levels experienced a decline between 1970-1989 and then increase during the
22 1990s).) In this context, OWL apparently asks this Court to reach a scientific judgment
23 regarding how rainfall measurements should be interpreted.¹⁹ Again, the standard of review does
24

25 ¹⁸ This term has no historical use in groundwater hydrology and cannot legitimately be applied to
26 groundwater levels in the Rohnert Park area. OWL also refers to the term "historic overdraft" to
27 describe groundwater conditions in the Rohnert Park area. (OWL Br. at 28:18-21). Although
28 this term is mentioned in DWR Bulletin 118, it is not defined and has no legal meaning unless
there was a finding of overdraft during the period of historical water level declines. (*City of*
Pasadena v. City of Alhambra, supra, 33 Cal.2d at 929.) No such finding of overdraft exists in
this case.

¹⁹ OWL also attempts to demonstrate that the basin is in overdraft by concluding that overdraft
must exist if an increase in rainfall does not result in an equal increase in water levels. (OWL

1 not permit this inquiry. The City relied on extensive studies, planning documents, tables, graphs,
2 staff report and expert opinion which all provide more than sufficient evidentiary support for the
3 City to determine the basin was not in overdraft. (See AR 33:8975 ("this recharge estimate is
4 consistent with the estimate of recharge based on the Todd water budget for a longer period
5 (1986-2001) that was only slight[ly] wetter than normal".) As stated in *Western Oil & Gas*
6 *Association*, a "staff report, ...-- which itself is evidence -- and the expert testimony together
7 provide a sufficient evidentiary basis for the [decision]." (*Western Oil & Gas Ass'n v. Air*
8 *Resources Bd.*, *supra*, 37 Cal.3d at 516.)

9 OWL further argues that the SRP Subbasin's shifting groundwater divide is an indication
10 of overdraft. As support, OWL loosely claims that the boundary or divide between SRP Subbasin
11 and the Petaluma Valley Groundwater Basin is significant in defining the direction and
12 destination of groundwater flows. OWL also argues that recent evidence indicates that the City's
13 groundwater pumping has affected the water levels in the Petaluma Valley Groundwater Basin.
14 As such, OWL argues the alleged drafting of water is a sign of an overdrafted groundwater basin.
15 (OWL Br. at 30:1-3.) OWL's argument fails because both the administrative record and the
16 WSA provide ample evidence to the contrary.

17 The location of the divide is discussed in Section 3.5.5 of the WSA. (AR 33:8966-8968.)
18 As the City was informed at its public hearing, any potential shift in the divide would not change
19 the findings present in the WSA. (AR 33:286.) The technical memorandum provided to the
20 Council explained that the overall direction of the groundwater flow toward the SRP Subbasin
21 has not changed in any significant fashion, and the exact location of the divide is not essential to
22 conclusions about recovering groundwater levels and the amount of future pumpage that can be
23 sustained without causing long-term groundwater level declines. (*Ibid.*) The record
24 demonstrates that further analysis was performed on the alleged shifting of the divide, and found
25 that there probably had not been a significant shift in the divide between 1951 and 2002.²⁰ (AR
26

27 Br. at 27:26 - 28.) OWL mistakenly focuses on rainfall as the relevant factor for determining
28 overdraft. As the WSA fully explains, most of the water level changes that have been observed
in the Rohnert Park area are associated with pumpage rather than climatic conditions and do not
show evidence of a OWL's supposed "step down" effect. (See AR 2:288; 33: 8958, 9016.)

²⁰ The WSA explains that the groundwater inflow estimated by Todd (2004) is partially based on

33:8950-51, 8961, 8966, 8974-75; see also AR 2:286.) The information spanning over fifty years confirms that the divide has not shifted, and even if it had, that would not change the findings reached in the WSA. OWL has pointed to nothing in the record which counters this weight of evidence.

C. There Is No Statutory Mandate That The City Use A Computer Model Or Rely On Old Data From PES.

As noted, the City was hit with heavy criticism of the PES study in the earlier general plan litigation by OWL's predecessor, the South County Resource Preservation Committee. OWL's predecessor criticized the City for using a water study that "simply reviewed old ('historic') data."²¹ It complained about the City's reliance on "this 22 year old study" that had been prepared by DWR,²² found fault in the City's use of a computer model, emphasizing that the City had relied on "estimates",²³ and argued that the EIR should instead have "provide[d] information on the volume of water and size of the aquifer before any decision may be reached about its allocation"²⁴

In a rather strange twist of fate, OWL now contends the PES study took the correct approach, and it was wrong for the City to take a different approach. None of its arguments has merit, since the PES study would, at most, comprise only evidence that is contrary to the City's conclusions, which would be irrelevant under the standard of review. (*Western Oil & Gas Ass'n*

the assumption that the groundwater divide has moved to the south since 1951. Reevaluation of the 1951 groundwater level data and more recent shallow groundwater level data show there is no indication that a significant change in the location of the groundwater divide has occurred. (AR 33:8950-51, 8961, 8966, 8974-75; see also AR 2:286.) The lack of movement of the divide in the shallow zone is supported by water level hydrographs for shallow wells near the divide, which indicate that shallow groundwater levels have generally been stable for at least the last fifteen years. (WSA Figure 3-14, AR 33:9007.) The shape of the groundwater contours and directions of groundwater flow in the shallow zone are generally similar for 1951 and the Spring of 2004. (WSA Figure 3-22, AR 33:9015.) The record contains a more detailed discussion on how the consultants reached the above stated conclusion. (AR 2:286-88.)

²¹ (Petitioners' Opening Brief in Support of Petition for Writ of Mandamus, filed October 18, 2001 in *South County Resource Preservation Committee and John King v. City of Rohnert Park*, Sonoma County Superior Court No. 224976, at 19:27. (Respondents' RJN, Ex. A.)

²² (Petitioners' Reply Brief in Support of Petition for Writ of Mandamus, dated February 21, 2002, in *South County Resource Preservation Committee and John King v. City of Rohnert Park*, Sonoma County Superior Court No. 224976, at 12:15.) (Respondents' RJN, Ex. B.)

²³ (*Id.* at 11:23.)

²⁴ (Committee's Opening Brief at 19:20-21; see also 19: 28-end of page, complaining about "the EIR's inadequacy regarding volume of the aquifer.") (Respondents' RJN, Ex. A.)

1 *v. Air Resources Bd., supra*, 37 Cal.3d at 515, 516; *City of Santa Cruz v. Local Agency*
2 *Formation Commission of Santa Cruz County, supra*, 76 Cal.App.3d at 393; *Pitts v. Perluss*
3 (1962) 58 Cal.2d 824, 834-35.)

4 Moreover, even though the standard of review does not require the City to negate the PES
5 study, the City did rely upon reason and evidence in deciding not to rely upon that study. SB
6 610 contains no requirement that any groundwater model be used to determine sufficiency, let
7 alone a specific groundwater model used by a prior consultant. (Water Code, §§ 10910 *et seq.*)
8 There is simply no requirement that the city accept OWL's preferred consultant or methodology,
9 and OWL's arguments to the contrary ignore the standard of review. (*Western Oil & Gas Ass'n*
10 *v. Air Resources Bd., supra*, 37 Cal.3d at 515, 516; *City of Santa Cruz v. Local Agency*
11 *Formation Commission of Santa Cruz County, supra*, 76 Cal.App.3d at 393; *Pitts v. Perluss,*
12 *supra*, 58 Cal.2d at 834-35.)

13 Mindful of the criticisms of PES' reliance on estimates rather than measurements, and old
14 data in the prior general plan litigation, the City had LSCE perform a revised and updated
15 analysis that was more robust, more reliable and more current than the PES study. Rather than
16 relying on model results, the WSA evaluated actual water level data. (AR 2:289-91; 33:8972-74,
17 9132.) It also explained why the PES study should not be used. The WSA Consultants also
18 explained that the PES model is not as "sophisticated" as OWL would like the Court to believe.
19 (*Ibid.*) It uses the MODFLOW code that is available as public domain software from the USGS,
20 but does not take advantage of all the features available in the MODFLOW code.²⁵ (AR
21 32:8839; 33:8972.) The WSA explains that the PES model was "based on a simplified
22 conceptualization of the aquifer system." (AR 2:290-91; 33:8922, 8972.) The PES study, as a
23 more generalized study, also did not account for details such as infiltration from streamflow and
24 irrigation return flows (AR 33:8973), or distinct vertical layers within the basin, with different
25 responses from different aquifer zones to pumping stresses. (AR 33:8973.) Its simulation as a
26 single, unconfined layer ignored the complexity of groundwater flow, which includes both

27
28 ²⁵ In direct contrast to the PES model, USGS and the Sonoma County Water Agency are
currently developing a proper multi-layer MODFLOW model of the Santa Rosa Plain. (AR
32:8841; 33:8975.)

1 unconfined and semi-confirmed aquifers. (AR 33:8973.) The PES model could not distinguish
2 between responses of the different zones to pumping stresses. (AR 33:8973.)

3 Most important, the PES model could not project the rising water levels that actually
4 occurred in later years.²⁶

5 Groundwater levels were stable to slightly increasing during the
6 1990s, however, and this condition cannot be reproduced by the
7 PES model because the amount of recharge used in the model is
8 significantly less than the volume of pumpage. during 1990-1997,
9 for example, the recharge rate estimated by PES averaged about
1.7 mgd, and the City pumpage alone averaged 4.5 mgd. Because
simulated water levels will decline during any year that outflows
exceed inflows, the PES model simulates declining groundwater
levels during the 1990s.²⁷

10 (AR 33:8974.)

11 LSCE also explained that the PES study did not account for "a majority of the recharge
12 and the potential recharge areas" from percolating rainwater and streamflow outside the study
13 area. (AR 2:290-91; 32:8840; 33:8973, 9133.) The PES study area covered only the very
14 southern portion of the SRP Subbasin, accounting for less than one-third of the subbasin, and is
15 smaller than any other study area including the WSA. (AR 33:8972-73.) Furthermore, the PES
16 study area excluded "the hills east of the City" and included "a no-flow boundary that prevents
17 groundwater inflow to the model from this area." (*Ibid.*; see also AR 32:8839-41, 33:9133.)
18 Thus, the PES study does not account for a majority of the recharge and the potential recharge
19

20 ²⁶ OWL asserts that "other experts and agencies have embraced the PES conclusions." (OWL Br.
at 25:16-26.) These documents, at most, comprise evidence contrary to that which City relied
21 upon. As such, they are irrelevant under the standard of review. OWL's claims also misstate the
22 contents of the record. What the record shows is that the PES study has been criticized by
23 others. (AR 33:9133.) OWL relies on a memorandum by Stetson Engineers that contains a
24 review of a proposed negative declaration for the County's nearby Canon Manor West project, in
25 which the County had proposed to rely on the PES study. (OWL Br. at 25:17-19.) OWL also
26 cites a one-page review of the Stetson memorandum written by Jon Tracy, a Project Review
Health Specialist with the Sonoma County Permit and Resource Management Department.
(OWL Br. at 25:17-19.) However, the County never endorsed the Canon Manor negative
27 declaration. It instead decided that an EIR was required to re-evaluate water supply issues,
among others. (AR 80:25795.) The County retained Todd Engineers to perform that new study.
(AR 80:25844, 25997.) LCSE, in turn, reviewed the Todd study water budget and recharge
28 estimates in their analysis. (AR 33:8974-75.)

²⁷ The inability of the PES model to predict the rise in groundwater levels indicated to the City
that, at best, the calibration of the PES model was flawed. OWL's touting of the calibration of
the PES model as evidence of its reliability (OWL Br. at 27:2-9), is therefore not supported by
the record. Again, in making this argument OWL asks this court to judge in the first instance
which expert has the "better" argument, in contravention of the standard of review.

1 areas from percolating rainwater and streamflow outside the study area.²⁸ (AR 32:8840; see also
2 AR 2:290-91; 33:8969-72.) As a result, the WSA concludes that the estimated recharge rate in
3 the PES model did not reflect actual recharge potential.²⁹ (AR 33:8973; see also AR 33:8969-72,
4 8975-80.)

5 OWL disputes the WSA analysis, but it offers only disagreement. It does not and cannot
6 establish that the WSA somehow fails to constitute evidence in support of the City's
7 determinations. Moreover, in many instances, OWL's argument misrepresents the record.

8 Principally, OWL argues "the 2000 EIR states specifically that PES recognized both
9 unconfined and semi-confined zones (AR 3:726)." (OWL Br. at 26:23-24.) To the contrary, the
10 General Plan EIR provided that "[t]he model consists of one layer" and "[t]he groundwater
11 model was simulated as an unconfined aquifer."³⁰ (AR 3:754.) OWL also argues that "PES ran
12 its computer model in exactly the manner as DWR ran its primarily unconfined model of the
13 SRP Subbasin in 1982." (OWL Br. at 26:24-26.) The whole description in the record, however,
14 indicates that DWR recognized the existence of confined aquifers (AR 10:2594; 29:8064), but
15 had to limit its 1982 model to a single layer because it lacked data for the entire SRP Subbasin to
16 develop and calibrate a multi-layer model.³¹ (*Ibid.*) In fact, DWR acknowledged the lack of
17 information and recommended that a future study should:

18
19 ²⁸ In fact, OWL cannot refute this conclusion. It points to language in the EIR regarding stream
20 channels and stream terrace deposits. (OWL Br. at 26:9-12.) However, this cite is irrelevant and
21 misleading; it cannot refute the WSA's finding that the PES model fails to take into account
22 sources of recharge other than rainwater when neither the page nor the section cited discuss the
23 PES model. (See AR 3:725-26.)

24 ²⁹ To the extent OWL implies that the City relied on the Todd Report, this is incorrect. The City,
25 through its consultants, used different methodologies from Todd and made its own findings
26 based on accurate analyses of actual, real recharge patterns. (AR 32:8842, 33:9133.)

27 ³⁰ In an attempt to distract the Court, OWL refers to the one sentence in which the term "semi-
28 confined" is used within the Revised DEIR, "Groundwater within the principal water-bearing
deposits is generally present under unconfined conditions, except locally in the vicinity of clay or
silt horizons where conditions may be semi-confined." (AR 3:726.) This statement, which was
written by Dyett and Bhatia and not PES, is actually a misstatement. (AR 33:8973.) In fact, the
PES model discussion makes no mention of any semi-confined zones. (AR 27:7367; 29:8091.)

³¹ Unlike the limitations facing DWR reports, there is ample data within the PES study area
showing groundwater levels in the upper unconfined zone and deeper semi-confined zones. (See
Figures 3-21 to 3-23, AR 33:9014-16; App. C, AR 33:9049-124.) The existence of large
hydraulic head differences in the Rohnert Park area makes it essential that the large variation in
aquifer properties and groundwater flow conditions in different zones be accounted for in a
model. (AR 33:8973.)

1 "analyze local confinement and/or vertical flow of ground water,
2 which may exist in parts of the basin....There are not yet enough
3 data to adequately calibrate and verify a model taking such effects
4 into account. More data are needed on pumping rates and
5 groundwater level measurements to distinguish between the
6 piezometric surface of the confined zone and the ground water
7 table of the unconfined zone in areas of suspected confinement."

8 (AR 10:2595.) DWR also explained in its 2003 Update of Bulletin 118 that the difference
9 between unconfined and semi-confined conditions is important, since "[m]ixing of wells
10 constructed in confined and unconfined portions of the basin and measurement of different well
11 sets over time can result in significant errors." (AR 2:392.) Accordingly, the record indicates
12 that the issue was far from being a "red herring" as OWL suggests. (OWL Br. at 26:23-26.)

13 **D. OWL Asks The Court To Negate The City's Recharge Estimates Based**
14 **Purely On Speculation.**

15 OWL boldly asserts that the City failed to adequately quantify the loss of potential
16 recharge caused by the City's proposed development in the Specific Plan Areas ("SPAs"), and
17 therefore cannot adequately estimate the future recharge of the SRP Subbasin. (OWL Br. at
18 29:2-15.) OWL's bare bone allegations are contrary to the evidence presented in the WSA and
19 must be rejected

20 The WSA evaluated the potential effect of the proposed development on groundwater
21 recharge. As the WSA makes clear, the majority of the SPAs overlie areas mapped as having a
22 low recharge potential. (AR 33:8971.) The acreage of recharge areas within the five SPAs
23 contain a total of 928 acres. (AR 33:8971, 9034.) 845 of those acres are in low recharge
24 potential areas. (AR 33:9034.) The remaining 83 acres are in high and moderate recharge
25 potential and out of those 83 acres, 42 are designated for open space zones. (AR 33:8971, 9034.)
26 Most of the areas with high recharge potential correspond to the Five Creek, Crane Creek, and
27 Copeland Creek corridors. (AR 33:8972.) Almost all of the areas with high recharge potential
28 have been designated as open space or buffer zone. Only 8 acres (mostly along Five Creek) are
not included in the open space/buffer zone area. (*Ibid.*) This represents less than one percent of
the total acreage of soils with high recharge potential in the study area which will be slated for
development. Moreover, the designation of areas with higher recharge potential as open space or

1 buffer zone is one of the protective measures that have been incorporated into the City's General
2 Plan, its EIR and its Mitigation Monitoring Program which mandates that all future development
3 in the SPAs adhere to these measures. (AR 33:8972.)

4 Accordingly, the WSA concludes that, "[t]he affect of development in the SPAs on
5 recharge in the study area is anticipated to be small." (AR 33:8972.) The WSA clearly analyzed
6 the effect future development will pose on recharge to the basin. As such, OWL's argument
7 must be rejected

8 OWL asks this Court to rule that the PES model "accurately" predicted recharge rates for
9 the years 1970 through 1999. (OWL Br. at 27:7-9.) Again, OWL's claim cannot be considered
10 under the appropriate standard of review. In fact, significant evidence in the record supports the
11 opposite conclusion. The record shows the PES model was unable to reproduce the increasing
12 groundwater levels that were measured in the 1990s. (AR 33:8974.) As a result, the City
13 concluded that the PES's recharge estimate was not reliable. The WSA in contrast, determined
14 recharge by measuring actual water levels, reviewing data from actual pumping levels, and
15 determining that recharge must have exceeded pumping for the groundwater levels to have risen.
16 (AR 33:9134, see also 33:8974.)

17 OWL then asks this Court to rule in the first instance on whether the subbasin was not
18 actually stabilizing as the WSA declares, but rather "shifting". (OWL Br. at 28:3-14.) OWL
19 posits that stable groundwater levels during the 1990s were the result of the City shifting its
20 pumpage to new wells near the fringes of the City and that this shift in pumpage resulted in
21 private wells going dry in the Canon Manor area. (*Ibid.*) Again, OWL posits an argument that
22 cannot be considered under the appropriate standard of review. The "proper" conclusion to draw
23 from well level data is an issue within the City's discretion, and its determination will not be
24 overturned so long there is a reasonable basis for that determination in the record. (*Mike*
25 *Moore's 24-Hour Towing, supra*, 45 Cal.App.4th at 1305-06.) The analysis by the WSA
26 Consultants indicated that all available well construction and water level data in the study area
27 and vicinity were examined for the WSA, and "none of the data demonstrated dry well
28 conditions," where the water level drops below the bottom of the well casing. (AR 2:291.)

1 Hydrographs for shallow wells located in the southern Rohnert Park area and south toward the
2 unincorporated area of Penngrove showed stable water levels since at least 1989.³² (*Ibid.*)

3 **E. The City's Conclusions Regarding Present And Future Water Demand Are**
4 **Supported In The Record.**

5 The water demand facing the City when it prepared the WSA was complex. Over the
6 previous years, the City had experienced increasing water demands. (AR 75:24669; 33:8982.) It
7 recognized the critical need to make more efficient use of its supplies, making the same amount
8 of water serve more uses. It was also following a more recent statewide trend, which OWL finds
9 incredible, by which water demands are stabilizing or decreasing, despite substantial increases in
10 population. As summarized by DWR in its most recent State Water Plan:

11
12 Californians have made great progress on urban water use efficiency over
13 the past few decades. As has been demonstrated in various regions of the
14 state, an increase in population does not necessarily result in a
15 proportionate increase in urban water use. For example, the Los Angeles
16 Department of Water and Power reports in their Urban Water
17 Management Plan Update 2002-2003 that "water conservation continues
18 to play an important part in keeping the city's water use equivalent to
19 levels seen 20 years ago." While some other regions of the State cannot
20 claim such progress, this report indicates that indeed something is working
21 well in the field of water use efficiency.

22 (DWR, *California Water Plan 2005 Update, Bulletin 160-05*, Vol. 2, Chapter 22 at p. 22-
23 1 (December 2005)³³; accord AR 32:8763 (referring to study by Pacific Institute).) Rohnert
24 Park, for its part, began its wise water use campaign after adoption of its 2000 General Plan, and
25 in part as a response to the stipulated judgment. It obtained funding for, and installed, individual
26 water meters, forcing each water user to pay according to use. (AR 32:8763.) It also
27 implemented computerized measures to allow more precise withdrawals of Sonoma County
28 Water Agency surface water, allowing the City to reach its maximum allocation, and thus

25 ³² Only one shallow well northwest of Rohnert Park shows evidence of significant water level
26 declines. Several factors may contribute to such declines: (1) local private well interference
27 where multiple wells operate in one area; (2) well maintenance issues; and (3) change in demand
28 with a change in land use that requires additional water supply, but where the well construction
restricts the yield. (AR 2:291.)

³³ Available at <http://www.waterplan.water.ca.gov/cwpu2005/index.cfm#vol2>. (See, City's
Secondary Authorities, Ex. C.)

1 reducing dependence on groundwater. (AR 32:8762; 26:7268.) The results enabled the City to
2 use less groundwater than it had historically, "to take ground water pumping back to levels
3 commensurate with 1977 for the City of Rohnert Park." (AR 34:9300.)

4 The City based the water demand calculations of the WSA on recent water use data, and
5 a projection of 10% reduction in future demands based on trends in the recent data. (AR
6 32:8763.) The City's consultants explained that these recent demand figures were much more
7 indicative than historical water use data, which did not provide a good measure of user demand
8 because it was an aggregate number and was not separated by customer class (AR 33:8982), and
9 it did not reflect the change in water consumption patterns that occurred when the City starting
10 billing customers based on consumption. (AR 32:8763.)

11 The Council was also presented with evidence supporting the projection regarding future
12 demands. The projected 10% reduction appeared reasonable in light of documentation that
13 California Urban Water users could reduce overall use by 34% with available water conservation
14 technology. (*Ibid.*) The City had adopted a Water Policy Resolution outlining its commitment
15 to conservation measures. (*Ibid.*) The City was a signatory to the California Urban Water
16 Conservation Council's Memorandum of Understanding regarding imposition of conservation
17 measures, and the City was actively implementing those conservation measures. (AR 32:8764;
18 See Water Code, §10631 which provides that submission of annual reports are deemed to satisfy
19 SB 610 requirement to discuss future and current water demand management measures.)³⁴ In
20 addition, during times of drought, City's own ordinance imposed mandatory reductions. (AR
21 32:8764.) The WSA contains a discussion of this Water Shortage Emergency Ordinance and
22 how it would be employed in periods of drought. (AR 33:8983-84.)

23 The City's consultants also pointed out, in response to OWL's comments, that the amount
24 of development would be limited by the City's Growth Management Ordinance, not by the
25

26 ³⁴ Water Code section 10631(i) states in full, "Urban water suppliers that are members of the
27 California Urban Water Conservation Council and submit annual reports to that council in
28 accordance with the "Memorandum of Understanding Regarding Urban Water Conservation in
California," dated September 1991, 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)." (Water Code, § 10631(i).)

1 amount of development that had been requested by developer which were reflected in Notices of
2 Preparation of EIRs on those development projects. (AR 32:8763.) And, the City had recently
3 adopted its Water Policy Resolution, which required that particular measures proposed by future
4 projects outside the City's existing boundary to further offset water use be approved by the City
5 Engineer before they would be credited as feasibly reducing the project's net consumptive water
6 use. (OWL's RJN, Ex. 1, p. 2.).

7 OWL attacks the water demand calculations, but it does so based on nothing but a plea
8 that the court disbelieve the City's conclusions. Again, the standard of review does not permit
9 such an argument, and OWL's plea that the court disregard the WSA does not make the WSA
10 disappear, or erase its status as evidence. (*Western Oil & Gas Ass'n v. Air Resources Bd.*, *supra*,
11 37 Cal.3d at 515.)

12 Thus, OWL posits its own calculations about what it would consider a reasonable water
13 demand without consideration of the evidence the City relied upon in adopting the WSA. (OWL
14 Br. at 30:14-24.) It asks this Court to determine in the first instance whether the 856 AFY
15 surplus projected for 2025 (AR 33:8986) should be considered meritorious, or "extraordinarily
16 thin." (OWL Br. at 30:27.) It asks the Court to determine in the first instance whether City
17 residents will, in fact, reduce water demand as projected by the City and as provided for in
18 Municipal ordinances. (OWL Br. at 31:14-23.) It engages in speculation that the City's
19 ordinances regarding reductions in water demand will be violated, resulting in increased demand
20 during times of drought. (OWL Br. at 32:1-9.) And it contends that the Court should substitute
21 its judgment for that of the City in determining whether the City will approve the amount of
22 development limited by its own Growth Management Ordinance, or instead approve any and all
23 development requested by a developer. (OWL Br. at 32:10-17.)³⁵

24 Finally, OWL claims that the City's past statements to Sonoma County Water Agency
25 somehow undermine the City's current calculations in the WSA. (OWL Br. at 32:18-27.) Again,
26 OWL ignores evidence in the record. The City's letter to SCWA on March 4, 2004, outlined a

27
28 ³⁵ The WSA anticipates an increase of 4,038 new units over the current unit count, not the 3,667
that OWL claims. (AR 33:8982.)

1 total water use of 6,926 AFY and indicated that up to 450 AFY could be served by recycled
2 water. (AR 32:8762.) This puts the total demand on SCWA potable water at 6,476 AFY as
3 represented in the WSA (6926 total demand minus the 450 recycled water demand). (AR
4 32:8762.)

5 In short, OWL repeatedly asks this Court to decide in the first instance what conclusions
6 the City "should" have drawn, and it does so based largely on nothing but its opinion. Under the
7 standard of review, these arguments are meritless and should not be considered.

8 **F. SB 610 Does Not Mandate A Regional Study Of The Entire Subbasin Or**
9 **Adoption Of A Groundwater Management Plan.**

10 OWL claims that the "study area" analyzed in the WSA is substantially smaller than the
11 subbasin mapped by DWR. As a consequence, OWL argues that the adequacy of the
12 groundwater analysis cannot be determined as a matter of law under SB 610. (OWL Br. at 20:9-
13 17.) Once again OWL totally ignores the appropriate standard of review for the court and
14 misinterprets the evidence presented in the WSA.

15 Water Code section 10910(f)(2) requires in part "A description of any groundwater basin
16 or basins from which the proposed project will be supplied." Contrary to OWL's statements, the
17 WSA describes the Santa Rosa Valley Groundwater Basin, the three subbasins within this basin,
18 and provides a figure depicting these formations. (AR 33:8951-52, 8994.)

19 SB 610 then required the City to use such information as was "reasonably available," to
20 assess whether the groundwater the City pumped "from the basin," would be sufficient. (Water
21 Code § 10910(f)(5).) The WSA reviewed data from the subbasin, and selected the upper Laguna
22 de Santa Rosa watershed as the study area. (AR 33:8951.) It did so based upon the hydrologic
23 analysis that had just been completed by Todd Engineers for the Canon Manor EIR the County
24 had prepared, and based on independent review and analysis of subsurface geologic conditions
25 and available groundwater data. (AR 32:8838-39; 33:8951.) Indeed, the study area was the
26 same as the County had used in the Todd Engineers study. (AR 32:8838-39.) In determining the
27 study area, the WSA Consultants reviewed and relied upon data from the CalWater Committee,
28 produced as part of the Natural Resources Conservation Service nationwide program to develop
a nationally uniform hydrologic unit system. (AR 33:8951.) It reviewed and analyzed extensive

1 data from several sources. (AR 33:8951, 8961.) In light of the determination that a portion of
2 recharge to the area came from rainfall originating outside the basin, it included those areas
3 within the watershed that would drain to the area where the City's pumps were located.³⁶

4 OWL contends, however, that this effort was not strenuous enough. They apparently ask
5 this Court to rule that by enacting SB 610, the Legislature instead intended to impose a
6 substantive limitation on project approvals and to require that a 500+-unit project to assess and
7 resolve the region's, and perhaps even the State's, water problems before being allowed to
8 proceed. Thus, OWL claims that the City should have updated the regional, subbasin study
9 DWR had published in 1982 instead of studying the area where information was reasonably
10 available. (OWL Br. at § VI.B.) They conversely and illogically criticize the WSA for studying
11 too large an area, by including the hills east of the City where so much recharge originates.
12 (OWL Br. at 23:20-22.) They imply that no Water Supply Assessment can lawfully be adopted
13 until the jurisdiction has adopted a Groundwater Management Plan. (OWL Br. at 34.) They
14 contend that no single development project should be approved, even when the undesired results
15 that characterize overdraft are not present, apparently only because OWL prefers a halt on
16 development. (OWL Br. at 19:25-27.)³⁷ OWL apparently contends a City should not approve
17 development even when supplies are sufficient, if, in OWL's view, the groundwater surplus of
18 hundreds of acre feet is "extraordinarily thin." (OWL Br. at 30:27.) OWL goes so far as to cite
19 "think tank" pieces proposing ways to solve the State's water problems. (OWL Br. at 34:22-23,
20 citing "Petitioners' Additional Authorities.")

21 The record is replete with evidence of how unreasonable such a study would have been.
22 There is extensive evidence that a computer modeling study of the entire subbasin would take
23

24 ³⁶ Petitioners note that the PES study relied on recharge from streams within its study area.
25 (OWL Br. at 26:1-16.) Petitioners cannot, however, provide any record citation for their
26 proposition that the PES model included recharge originating outside the PES study area. And,
27 even if they could, the citations would comprise nothing more than contrary, and therefore
28 irrelevant, evidence.

³⁷ Petitioners quote a discussion from the *Pasadena* case, where the court indicates that remedies
should be available in groundwater adjudication proceedings "when overdraft commences."
(*City of Pasadena v. City of Alhambra*, *supra*, 33 Cal.2d at 929.) As explained in Section IV.
B(2) above, the Court's definition of overdraft, as the *San Fernando* case modified it, includes
the presence of undesirable results. No such results are found in the SRP Subbasin.

four to five years, at a cost of millions, and was feasible in only light of the participation of the United States Geologic Service (USGS), the regional Sonoma County Water Agency, and multiple local jurisdictions. (AR 33:8975, 8979; 34:9303; AR 33:8836 and 8842 (characterizing the regional study as a more refined analysis of what PES did, a "comprehensive, detailed and clearly written."); 33:8893.) Moreover, even this regional study would likely not appease OWL. As Councilmember Flores wryly put it, "I guarantee you that even when that study is completed in four years, there will be challenges to the scientific integrity of that plan." (AR 34:9316.)

Indeed, as the petitioners in the prior General Plan litigation kept emphasizing, DWR itself had not had the wherewithal to update its basin wide study since 1982. (OWL Br. at 8:15-17 ("As stated by DWR, basic information for many groundwater basins is lacking the essential data that is necessary"); see also AR 32:8836 ("that information remains to be updated").) And this has occurred despite the fact that DWR tasked itself with working with local agencies to develop a water budget for each basin. (AR 78:25437 (2003 Update to State Water Plan).) The record also contains evidence that even the federal government had not found it feasible to do so. (AR 2:287 (noting that more data were available for Spring 1951 than any other period because that was when the USGS monitored water levels in a large number of wells).)

OWL's plea for a groundwater management plan is even more inventive. (OWL Br. at 34:1-35:17.) No law requires adoption of a groundwater management plan in any circumstance, and OWL does not contend otherwise. Also, the Council had before it evidence that adopting a groundwater management plan would take two years, and require consent of landowners, such as OWL's predecessors. (AR 33:8894-96.) There was also evidence that the City and OWL's predecessor considered the Sonoma County Water Agency the appropriate entity to prepare a groundwater management plan, not the City. In prior general plan litigation, Petitioners' predecessors and City stipulated to judgment directing the City to request the Agency to prepare a groundwater management plan. (AR 26:7268; see also Evid. Code, § 664 (city presumed to have fulfilled that duty).)³⁸

³⁸ In one of their many misrepresentations, petitioners claim the City has "rejected" a Grand Jury recommendation to adopt a groundwater management plan. (OWL Br. at 2:12.) What the record shows is that the City is funding a large study of the entire subbasin in part to obtain information

1 Certainly this evidence is more than sufficient to support the City's determination that the
2 study it conducted was based upon "information reasonably available" (Water Code,
3 § 10910(f)(4)), and that a more strenuous study could not feasibly be undertaken within the
4 statutorily-mandated 120 day period. (Water Code, § 10910(g).) This same evidence also
5 proves that the study comprised the type of study, that the Legislature had in mind, given its
6 insistence upon use of information reasonably available and its imposition of a 120-day deadline.

7 The remainder of OWL's claims in this regard only repeat OWL's mantra that the Court
8 should make scientific determinations in the first instance. Thus, OWL claims it knows more
9 about basin boundaries (OWL Br. at 23:16-22), geologic barriers (OWL Br. at 24:17-26), and
10 recharge potential (OWL Br. at 24:27-25:5,³⁹ 26:2-9), than do the WSA Consultants, and asks
11 this Court to rule that the City should have believed OWL over its own consultants. These
12 arguments do not present justiciable claims.

13 **G. The City Went Above And Beyond The Statutory Requirements For**
14 **Adopting The WSA By Conducting Fair Hearings With Extensive Public**
15 **Participation**

16 OWL argues that the City Council failed to conduct an adequate public hearing to review
17 the final WSA and therefore compromised their due process rights. However, OWL ignores the
18 fact that the City went above and beyond the statutory requirements for adopting a water supply
19 assessment by holding several public meetings on the issue. (Water Code, § 10910(g)(1).) OWL
20 further overlooks the fundamental point that adoption of the WSA was a legislative act;
21 therefore, OWL was not entitled to procedural due process protection. (*Horn v. County of*
22 *Ventura* (1979) 24 Cal.3d 605, 612-613.) Finally, even if Owl was entitled to such protection,
23 OWL received more than adequate due process.

24 **1. No Hearing Was Required For Adoption Of The WSA Under SB 610**
25 **Or By The Due Process Clause Of The Constitution**

26 First, it is important to note that there are no formal hearing requirements for adoption of
27 a water supply assessment under SB 610. It provides in relevant part, "The governing body of

28 for a groundwater management plan. (AR 33:8975.)

³⁹ On page 25, OWL also contends that the county concluded the basin was overdrafted. (OWL
Br. at 25:24.) Petitioners misrepresent the record. (See fn. 26 above.)

1 each public water system, or the city or county...shall approve the assessment prepared pursuant
2 to this section at a regular or special meeting." (Water Code, § 10910(g)(1).) Thus, the only
3 procedural requirement established by SB 610 is that the assessment be adopted at a regular or
4 special meeting of the City Council.⁴⁰ The City Council not only complied with this prerequisite
5 but it went well beyond its statutorily imposed obligations and held two public meetings, one of
6 which was a formal public hearing, after which the final WSA was adopted at a regular meeting
7 on January 25, 2005. (AR 1:1-5; 32:8744; 34:9235.)

8 Second, where, as here, the Council makes a legislative decision, procedural due process
9 is not required. As explained in the *Horn v. County of Ventura* case cited by OWL to support
10 their argument, "It is equally well settled, however, that only those governmental decisions
11 which are *adjudicative* in nature are subject to procedural due process principles. *Legislative*
12 *action* is not burdened by such requirements" (*supra*, 24 Cal.3d at 612; citing *Mullane v. Central*
13 *Hanover Tr. Co.* (1950) 339 U.S. 306, 313; *Franchise Tax Board v. Superior Court* (1950) 36
14 Cal.2d 538, 549. e.g., *Beck v. City Council of Beverly Hills* (1973) 30 Cal.App.3d 112, 115;
15 *California Grape etc. League v. Industrial Welfare Com.* (1969) 268 Cal.App.2d 692, 708-709.)
16 The enactment of the subject WSA was a legislative function. (*Bi-Metallic Co. v. Colorado*
17 (1915) 239 U.S. 441, 445.) The mere fact that the City held public hearings on the WSA does
18 not change the legislative character of the decision.⁴¹ (*Shapell Indus., Inc. v. Governing Bd.*,
19

20 ⁴⁰ Because no law required a hearing or an opportunity to present evidence, the administrative
21 mandate procedures of Code of Civil Procedure section 1094.5 do not apply. (E.g., *Lightweight*
22 *Processing Co. v. County of Ventura*, (1982) 133 Cal. App.3d 1042, 1049 (law must require
23 agency to take evidence, not merely allow it to take evidence, in order for administrative
24 mandate to be available); Code Civ. Proc. § 1094.5(a) (section applies only when "inquiring into
25 the validity of any final administrative order or decision made as the result of a proceeding in
26 which by law a hearing is required to be given, evidence is required to be taken . . .").)
27 Accordingly, to the extent Petitioners seek to invoke the "fair trial" language of 1094.5(b), they
28 are mistaken. The point is irrelevant, however, as the procedure the City provided was more
than fair under any reasonable standard.

⁴¹ Under the Ralph M. Brown Act, every agenda item for a regular City Council meeting must
allow members of the public to speak on any item of interest, so long as the item is within the
subject matter jurisdiction of the legislative body. (Gov. Code, § 54954.3(a).) The public must
be allowed to speak on a specific item of business before or during the legislative body's
consideration of it. (*Id.*) However, the requirements for public comment under the Brown Act
are different than the requirements necessary for a public hearing. For example, notification
requirements under a public hearing are often more stringent. (See, e.g., Gov. Code, §§ 65090-
65091.)

1 *supra*, 1 Cal.App.4th at 231.)

2 Adoption of the WSA was unquestionably a legislative decision. Legislative acts involve
3 "the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the
4 actual application of such a rule to a specific set of existing facts." (*Dominey v. Dep't of Pers.*
5 *Admin.*, *supra*, 205 Cal.App.3d at 736-737, quoting *Strumskey v. San Diego County Employees*
6 *Ret. Ass'n* (1974) 11 Cal.3d 28, 35 fn.2; see also *Shapell Indus., Inc. v. Governing Bd.*, *supra*, 1
7 Cal.App.4th at 231.) As the court in *Dominey* more specifically explained, "legislative facts are
8 facts which help the tribunal determine the content of law and of policy and help the tribunal to
9 exercise its judgment or discretion in determining what course of action to take while
10 adjudicative facts are facts concerning the immediate parties -- who did what, where, when, how,
11 and with what motive or intent." (*Dominey v. Dep't of Pers. Admin.*, *supra*, 205 Cal.App.3d at
12 737 (internal quotations omitted).)

13 In the instant case, the WSA was adopted in accordance with SB 610 to provide an
14 analysis of the water supply available to a number of specific plans included in the City's general
15 plan. The City commissioned the preparation of the WSA pursuant to legislative authority. (AR
16 33:8915 (ES.1 Purpose and ES.3 Projects Under Consideration).) The WSA was not an attempt
17 to approve or discuss the merits of individual projects. While the City held public hearings and
18 made certain findings in approving the WSA, this does not convert the legislative character of
19 the WSA's adoption into an adjudicative act. (*Shapell Indus., Inc. v. Governing Bd.*, *supra*, 1
20 Cal.App.4th at 231.) Rather, the WSA provides information on the City's water supplies and
21 water demands, and provides the data to make sufficiency findings and is meant to help the City
22 determine water sufficiency for buildout. It is a tool to help the City exercise its judgment or
23 discretion in determining what course of action to take as to the projects currently under
24 consideration. (*Dominey v. Dep't of Pers. Admin.*, *supra*, 205 Cal.App.3d at 737.) Accordingly,
25 adoption of the WSA is a legislative act and does not require the City to take OWL's procedural
26 due process into account.

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2. **Even If Procedural Due Process Applies, Petitioners Received Adequate Notice And Opportunity To Be Heard**

Moreover, even if it is assumed for the sake of argument, that procedural due process requirements apply to the adoption of a water supply assessment, OWL's argument still fails.⁴² Procedural due process generally means notice and opportunity to be heard. (*North Georgia Finishing, Inc. v. Di-Chem, Inc.* (1975) 419 U.S. 601, 605-606.) OWL does not and cannot demonstrate that Petitioners were deprived of notice or an opportunity to be heard before the Council made its decision about the WSA.⁴³

The Rohnert Park City Council did not commit a single procedural error. Nor are any facts alleged in the Petition that would suggest any disregard for procedural due process. Rather, OWL has excluded a number of the relevant facts about the procedure used to adopt the WSA. The City released the draft WSA for public review on October 11, 2004. The draft WSA was made available to all members of the public who requested it, and was also posted on the City's website. (AR 32:8852.) The City Council received a comprehensive presentation regarding the draft WSA at its October 26, 2004, meeting and allowed public comment on the draft. (AR 1:260.) It then set a formal public hearing on the WSA for November 23, 2004. This gave Petitioners and other members of the public more than adequate time to review and comment on the draft WSA, a fact exemplified by the over 2,000 pages of documents submitted by petitioners on November 19, 2004.

⁴² In limited circumstances, land use decisions that substantially affect the property rights of owners of adjacent parcels may constitute deprivations of property rights giving rise to due process concerns. (*Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 548-549.) Petitioners do not attempt to establish that the adoption of the WSA could have or did substantially affect their property rights.

⁴³ The case cited by Petitioners in support of their deprivation of due process argument does nothing to further their position. In *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 555, the court addressed the issues related to biased decision makers who collectively as a City Council, appealed a decision of the planning commission to the Council. (*Id.* at 552.) As the court explained, "The Council ignored the very laws and regulations meant to ensure fair process concerning property development conflicts." (*Id.* at 560.) The Thousand Oaks City Council not only sat as a biased body listening to the appeal that it had instigated, it failed to adopt findings for the adopted resolution until after appellants filed their petition for writ of mandate. (*Id.* at 561.) Recognizing these, among other procedural failures, the court found that "[w]hile a single procedural error might have caused appellants no prejudice, the cumulative effect of Council's actions resulted in a violation of appellants' substantive and procedural due process rights." (*Ibid.*)

1 At the November 23, 2004, public hearing, representatives of Petitioners (including their
2 counsel) had the opportunity to supplement their extensive written comments and air any other
3 concerns to the City Council directly. Before opening the public hearing, the Council and the
4 public received a presentation from one of the consultants who prepared the WSA, responding to
5 many of the public comments made at the October 26 meeting, as well as in written submittals.
6 (AR 32:8819.) In this presentation, Ms. Kretsinger of LSCE addressed, point-by-point, the
7 comments in the November 19 submittal by OWL. (AR 32:8835.) Following this presentation,
8 representatives from OWL – including their counsel – had the opportunity to and did respond to
9 issues discussed by Ms. Kretsinger in response to their comments. (AR 32:8841-69.) Every
10 person who wished to speak was given an opportunity to do so. (AR 32:8882.)

11 Finally, at the close of the public hearing, the City Manager recommended that the
12 Council not take action immediately, but continue the matter to a subsequent meeting in order to
13 consider and respond to some of the questions and comments raised by the public and other
14 agencies. (AR 32:8883.) The Council adopted the recommendation and continued the matter to
15 January 25, 2005.⁴⁴ At the January 25 Council meeting, the City Attorney clarified that,
16 although the public hearing had been closed at the prior meeting, the Council, “of its own
17 volition wish[ed] to hear public comment,” which would be taken at the beginning of the agenda
18 item. (AR 34:9257.) Representatives of Petitioners, including their counsel, were then provided
19 a further opportunity to address the Council on the WSA. Following an extensive discussion by
20 the Council regarding the WSA – including the public input they had received – the Council
21 adopted the Water Supply Assessment. (AR 34:9324.)

22 The City thereby went far beyond the requirements of law in the process it employed to
23 adopt the WSA.⁴⁵ Petitioners and other members of the public had, and availed themselves of,
24

25 ⁴⁴ Petitioners argue that the final version of the assessment was released after the close of the
26 November 23, 2004 hearing on the WSA. (OWL Br. at 33.) However, they also concede that,
27 “Petitioners were allowed to comment on the final WSA at the City Council’s January 25, 2005
28 meeting...” (*Id.* at fn. 11.) The January 25, 2005 meeting took place before the final WSA was
adopted by the City Council. (AR 34:9203-8, 9235-36.) Thus, by their own admission,
Petitioners were given an opportunity to be heard by the City Council before the Council took
any action on the final WSA. Because Petitioners appeared and were heard before decisions
were made, they cannot claim that their due process rights were violated.

⁴⁵ Petitioners maintain that the City Council should not have closed the public hearing on

multiple opportunities to present their views and supporting evidence to the City Council. The Council was not required to conduct *any* public hearing at all in connection with the WSA, because no such hearing is required by SB 610 and due process notice and hearing requirements do not come into play where the Council acts in a legislative capacity. Thus, the City was not required to conduct a hearing Petitioners deemed "fair", much less to carry out more than one public hearing. The process the City followed was more than fair, and Petitioners' arguments to the contrary are unsupported in the record.

V CONCLUSION

The City adopted its Water Supply Assessment following review of extensive studies, planning documents, tables, graphs and expert opinion in the form of both written documents and oral testimony. It is not the role of this Court to re-weigh that evidence nor pass upon the City's wisdom in reaching its legislative decision. Rather, the Court's role is to assure that there was a reasonable basis for the City's decision. As the foregoing demonstrates, the City's determination that a sufficient water supply exists for the demand of proposed projects under the City's General Plan was based on ample evidence in the record. Since the City's action cannot be deemed arbitrary or capricious in light of this record, the City respectfully requests that this Court deny OWL's Petition for Writ of Mandate.

DATED: *March 1, 2006*

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November 23, but rather should have held a further public hearing at one or more subsequent Council meetings. In support, they contend that after the close of the November 23 public hearing, the City's consultant "produced a 'Technical Memorandum' that provided entirely new information [that, in turn, led to a 'Final WSA' that was vastly different from the draft WSA that was the subject of the public hearing." (OWL Br. at 33.) But petitioners have the chronology mixed up: The technical memorandum is dated November 17, 2004. It was presented to the Council at its November 23 meeting and was extensively discussed by its author, by members of the public (including petitioner's counsel), and by City staff and Council members. (AR 32:8820-43.)