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15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16
17 **COUNTY OF SAN BERNARDINO**

18 CENTER FOR BIOLOGICAL
19 DIVERSITY and SAN BERNARDINO
20 VALLEY AUDUBON SOCIETY,

21
22 Petitioners,

23
24 v.

25 CITY OF SAN BERNARDINO
26 MUNICIPAL WATER DEPARTMENT,
27 CITY OF SAN BERNARDINO; and
28 DOES 1 through 20, inclusive,

Respondents.

Case No.

**VERIFIED PETITION FOR WRIT OF
MANDATE**

[Pub. Res. Code § 21000, *et seq.*
(California Environmental Quality Act);
Code Civ. Proc. § 1094.5 (§ 1085)]

1 **INTRODUCTION**

2 1. This action challenges the decisions of the City of San Bernardino Water
3 Department (the “Department”) and the City of San Bernardino (the “City”) (collectively,
4 “Respondents”) approving the Clean Water Factory Project (the “Project”) and certifying an
5 Environmental Impact Report (“EIR”) for the Project. The Project would divert up to 22 million
6 gallons per day (“MGD”) from the Rapid Infiltration and Extraction Facility (the “RIX
7 Facility”) to spreading basins instead of allowing the treated water to flow into the Santa Ana
8 River.

9 2. Petitioners CENTER FOR BIOLOGICAL DIVERSITY and SAN
10 BERNARDINO VALLEY AUDUBON SOCIETY (“Petitioners”) demonstrated throughout the
11 administrative process that the Project will have significant impacts on imperiled species,
12 including the Santa Ana sucker, San Bernardino kangaroo rat, southwestern willow flycatcher,
13 and least Bell’s vireo, among other species. Unfortunately, the EIR does not disclose or
14 adequately evaluate these environmental impacts or identify effective measures to mitigate
15 them, rendering the document inadequate under the California Environmental Quality Act
16 (“CEQA”), Public Resources Code sections 21000, *et seq.*

17 3. Respondents’ approval of this Project exhibits a prejudicial abuse of discretion.
18 Respondents failed to analyze or disclose the significant impacts of the Project on the federally
19 threatened Santa Ana sucker arising from the proposed reductions in water discharges to the
20 Santa Ana River. Respondents claimed in the Draft EIR without any scientific basis that a 10
21 percent reduction of flows in the Santa Ana River would *not* adversely impact the Santa Ana
22 sucker, despite U.S. Geological Survey studies demonstrating that Santa Ana sucker are very
23 sensitive to river depth and water velocity. In commenting on the Draft EIR, the California
24 Department of Fish and Wildlife (“CDFW”) specifically requested that Respondents justify the
25 claim that 10 percent flow reductions would not adversely impacts the Santa Ana sucker. The
26 U.S. Fish and Wildlife Service (“USFWS”) went a step further and expressly disputed
27 Respondents’ claim. Nonetheless, in their responses to CDFW and USFWS’s comments,
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1 Respondents failed to offer any justification for their claim, and instead referred back to the
2 Draft EIR.

3 4. Respondents compounded their prejudicial abuse of discretion by refusing to set
4 forth a plan to adequately mitigate the impacts of the Project on the Santa Ana sucker. CEQA
5 mandates that if a project will result in significant impacts, the lead agency *must* adopt specific
6 and enforceable mitigation measures to mitigate these impacts when feasible. Instead of
7 complying with this mandate, Respondents maintained in MM BIO-7 that an unformulated
8 “Adaptive Management Plan” would adequately mitigate the serious impacts of the Project on
9 the Santa Ana sucker. During the comment process on the Draft EIR, Petitioners, CDFW, and
10 USFWS each separately alerted Respondents that the MM BIO-7 and its general description of
11 an “Adaptive Management Plan” did not amount to specific and enforceable mitigation
12 measures to address potential losses of individual Santa Ana sucker and their habitat. Once
13 again, Respondents disregarded the collective expertise of CDFW, USFWS, and Petitioners, and
14 made only minor changes to MM BIO-7 in the Final EIR. Ironically, in the Final EIR,
15 Respondents promise to “work with” and “consult with” USFWS in preparing an Adaptive
16 Management Plan, even while refusing to adequately respond to or consider USFWS’s
17 comments on MM BIO-7 during the administrative process.

18 5. Respondents similarly failed to analyze or disclose the impacts of the Project on
19 other special status species, including the San Bernardino kangaroo rat, southwestern willow
20 flycatcher, and least Bell’s vireo. Despite the fact that each of these are endangered species
21 under federal and/or state law, Respondents did not even bother to conduct protocol level
22 surveys for these species to establish an accurate and comprehensive “baseline” under CEQA.
23 Moreover, instead of acknowledging that reduced flows to the Santa Ana River would have far-
24 reaching disruptive impacts on these species’ riparian habitats, Respondents myopically focused
25 on pre-construction surveys and confused such surveys with adequate mitigation.

1 **THE PARTIES**

2 6. Petitioner CENTER FOR BIOLOGICAL DIVERSITY (the “Center”) is a non-
3 profit conservation organization dedicated to the protection of native species and their habitats
4 through science, policy, and environmental law. The Center has approximately 50,000 members
5 worldwide, including residents of San Bernardino and within the vicinity of the Project. The
6 Center has worked for many years to protect imperiled plants and wildlife, open space, air and
7 water quality, and the overall quality of life for people of San Bernardino where the Project is
8 proposed. Members of the Center objected to the approval and development of the Project and
9 will be directly and adversely affected by the Project.

10 7. Petitioner SAN BERNARDINO VALLEY AUDUBON SOCIETY (“Audubon”)
11 is a California non-profit public benefit corporation with approximately 2,000 members who are
12 residents and property owners within the Inland Empire of Southern California, including within
13 the San Bernardino County, and who will be directly affected by this action. The purpose of
14 Audubon is to educate the public about the environment, planning and infrastructure issues, and
15 to take action to protect the region’s natural heritage areas when necessary. Many Audubon
16 members receive personal, scientific, professional, and spiritual benefit from rare, sensitive,
17 threatened and endangered species that will be affected by the action that is the subject of this
18 litigation. Audubon members reside and own property in San Bernardino County and use
19 publicly accessible portions of the Project site, the Santa Ana River, and surrounding areas for
20 recreational, wildlife viewing, scientific, and educational purposes. Audubon members will be
21 directly affected by the actions in this litigation, and its components, as described herein.

22 8. Members of the Center and Audubon have environmental, educational,
23 recreational, scientific, and aesthetic interests in the Project area and its plants and wildlife.
24 These interests will be directly and adversely affected by the Project, which violates provisions
25 of law as set forth in this Petition and which would cause irreversible harm to the natural
26 environment and its recreational assets. The Center, Audubon, and their respective members
27 have a direct and beneficial interest in Respondents’ compliance with CEQA and California
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1 Code of Regulations, title 14, section 15000 *et seq.* (“CEQA Guidelines”). The maintenance
2 and prosecution of this action will confer a substantial benefit on the public by protecting the
3 public from the environmental and other harms alleged herein.

4 9. Respondent CITY OF SAN BERNARDINO (“City”) is a local governmental
5 agency and political subdivision of the State of California charged with the authority to regulate
6 and administer land use activities within its boundaries, subject at all times to the obligations
7 and limitations of all applicable state, federal, and other laws, including CEQA and the CEQA
8 Guidelines.

9 10. Respondent CITY OF SAN BERNARDINO MUNICIPAL WATER
10 DEPARTMENT (“Department”) is a local government agency and utility formed under the
11 Charter of the City. The Department is governed by the Board of Water Commissioners who
12 are appointed by the Mayor of the City. The Department is listed as the lead agency for the
13 purposes of Public Resources Code Section 21067, with principal responsibility for conducting
14 environmental review of the Project.

15 11. Petitioners do not know the true names and capacities, whether individual,
16 corporate, associate, or otherwise, of respondents DOES 1 through 20, inclusive, and therefore
17 sue said respondents under fictitious names. Petitioners will amend this Petition to show their
18 true names and capacities when the same have been ascertained. Each of the respondents is the
19 agent and/or employee of Respondents, and each performed acts on which this action is based
20 within the course and scope of such Respondents’ agency and/or employment.

21 **JURISDICTION AND VENUE**

22 12. This Court has jurisdiction to issue a Writ of Mandate to set aside Respondents’
23 decision to approve the Project under California Code of Civil Procedure section 1094.5
24 (alternatively section 1085) and Public Resources Code sections 21168.5 (alternatively 21168)
25 and 21168.9.

26 13. Venue for this action properly lies in the San Bernardino Superior Court because
27 Respondents and the proposed site of the Project are located in the County. Many of the
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1 significant environmental impacts of the Project that are the subject of this lawsuit would occur
2 in San Bernardino County, and the Project would impact the interests of San Bernardino County
3 residents.

4 14. Petitioners have complied with the requirements of Public Resources Code section
5 21167.5 by serving a written notice of Petitioners' intention to commence this action on
6 Respondents on April 5, 2017. A copy of the written notice and proof of service is attached
7 hereto as Exhibit A.

8 15. Petitioners have complied with the requirements of Public Resources Code section
9 21167.6 by concurrently notifying Respondents of Petitioners' request to prepare the record of
10 administrative proceedings relating to this action.

11 16. Petitioners have complied with the requirements of Public Resources Code section
12 21167.7 by sending a copy of this Petition to the California Attorney General on April 6, 2017.
13 A copy of the letter transmitting this Petition is attached hereto as Exhibit B.

14 17. Each Petitioner has performed any and all conditions precedent to filing this
15 instant action and has exhausted any and all administrative remedies to the extent required by
16 law, including, but not limited to, timely submitting extensive comments objecting to the
17 approval of the Project and presenting to Respondents the flaws in its environmental review on
18 June 8, 2016 and March 6, 2017. In addition, the Center submitted comments on the Notice of
19 Preparation on December 23, 2014.

20 18. Petitioners have no plain, speedy, or adequate remedy in the course of ordinary
21 law unless this Court grants the requested writ of mandate to require Respondents to set aside
22 certification of the EIR and approval of the Project. In the absence of such remedies,
23 Respondents' approval will remain in effect in violation of state law.

24 19. This petition is timely filed in accordance with Public Resources Code section
25 21167 and CEQA Guidelines section 15112.

1 **GENERAL ALLEGATIONS**

2 ***The Proposed Project***

3 20. By this action, Petitioners challenge the decision of Respondents to approve the
4 Project based upon a legally inadequate EIR.

5 21. In general, the Project would divert up to 22 million gallons per day (“MGD”) of
6 water from the RIX Facility to spreading basins instead of allowing the treated water to flow
7 into the Santa Ana River. Such activities have the potential to significantly reduce flow rates in
8 the Santa Ana River.

9 22. The EIR identifies five major components of the Project: (a) the RIX Facility
10 phased discharge reduction; (b) a water reclamation plant; (c) conveyance and storage systems;
11 (d) direct use sites, and (e) recharge basins.

12 23. Component (a) would reduce effluent from the RIX Facility by up to 17.9 MGD in
13 order to allow the gradual reduction of flow into the Santa Ana River. Component (b) would
14 upgrade the San Bernardino Water Reclamation Plant (“SBWRP”) and increase the rated
15 capacity from 22 MGD of secondary effluent to 33 MGD. Component (c) would establish a
16 system to convey treated water to recharge basins for surface spreading. Component (d) would
17 provide 5 MGD of tertiary water treated by SBWRP for direct use by local municipal facilities
18 and other recycled water users. Component (e) would allow treated water from the SBWRP to
19 be transported through conveyance pipelines to the East Twin Creek Spreading Grounds and
20 Waterman Basins.

21 ***The Santa Ana River***

22 24. The Project will have significant impacts on the Santa Ana River, its riparian
23 ecosystems, and the special status species that inhabit them. The Santa Ana River supports a
24 significant amount of biological diversity, including rare and endangered plants and wildlife.
25 The Draft EIR acknowledges that the Project area contains up to 39 special status plant species
26 and 35 special status wildlife species.

1 25. Although the Santa Ana River used to flow freely from its headwaters in the San
2 Bernardino Mountains until it met the Pacific Ocean, intensive development and water
3 diversions have significantly altered the hydrology and ecology of the river and associated
4 riparian habitats. Due to significant water diversions for human uses, the Santa Ana River now
5 is generally reliant upon recycled water discharges to maintain continuous flows, including
6 discharges from the RIX Facility. As such, the Department’s proposal to withhold water
7 discharges previously designated for the Santa Ana River may disrupt the river’s flows, water
8 quality, and ecosystems.

9 ***The Santa Ana Sucker***

10 26. The Santa Ana sucker (*Catostomus santaanae*) is a small, olive-gray freshwater
11 fish that is native to the rivers and streams of the Santa Ana and San Gabriel watersheds. Santa
12 Ana sucker feed on algae, small invertebrates and organic detritus from gravel, cobble, rock, and
13 other hard surfaces. Adult Santa Ana sucker may also feed on small insects.

14 27. Santa Ana sucker require constant stream flows both to keep stream temperatures
15 habitable and to flush the streambed and water column of sediments. In addition, Santa Ana
16 sucker need runs, riffles, and deep water created by submerged boulders where water is cool and
17 relatively still. Coarse substrates such as gravel or cobble give individual Santa Ana sucker
18 needed space for reproduction, development, and growth of its primary food source: algae.
19 Gravel beds in clear, flowing stream reaches are needed for spawning; shallow areas with sandy
20 substrates are needed to support larvae and fry; and juvenile and adult Santa Ana sucker need
21 deeper pools for food, shelter, and cover.

22 28. Although the usual lifespan of Santa Ana sucker is documented to be about three
23 years, most Santa Ana sucker in the Santa Ana River die before their second year.

24 29. The Santa Ana sucker has been listed as a federally threatened species since April
25 2000. Nonetheless, numbers of Santa Ana sucker have continued to steadily decline since then.
26 While the Santa Ana sucker was formerly widespread in its namesake – the Santa Ana River –
27 the fish now persists only in a 2.6 to 6.0 mile stretch of the river. As indicated above, flows in
28

1 this portion of the Santa Ana River are supported primarily by discharges from water treatment
2 plants, including the RIX Facility. Designated critical habitat for the Santa Ana sucker occurs in
3 the Project area as well as downstream of the Project area.

4 30. In the past few years, each time that the RIX Facility has temporarily shut down
5 for maintenance, water levels in the Santa Ana River dropped, often resulting in the death of
6 significant numbers of Santa Ana sucker. During such shutdown events, CDFW staff and
7 volunteers usually attempt to locate stranded or dying Santa Ana sucker, and “rescue” them by
8 temporarily placing them into buckets until water levels rise but Santa Ana sucker continue to
9 die during shutdown events. The Project will further decrease Santa Ana sucker’s chances of
10 survival and reproduction by permanently reducing discharges from the RIX Facility.

11 ***Arroyo Chub***

12 31. The arroyo chub (*Gila orcutti*) is a small species of fish that is of “high concern”
13 as classified by the state, and is endemic to Southern California. The arroyo chub is now
14 vulnerable to extinction in the next 100 years. The arroyo chub is present in the Santa Ana
15 River downstream of the Project. Like the Santa Ana sucker, arroyo chub are killed during the
16 RIX Facility’s shutdown events, despite efforts by CDFW staff and volunteers to rescue them
17 from stranding.

18 ***The San Bernardino Kangaroo Rat***

19 32. The San Bernardino kangaroo rat (*Dipodomys merriami parvus*) is well-adapted to
20 the arid environments of Southern California and can obtain all the water it needs to survive
21 from seeds. The San Bernardino kangaroo rat is named after the kangaroo because they hop
22 around on their hind feet rather than scurry around. These diminutive mammals inhabit alluvial
23 fans, active floodplains, washes, and upland areas with sand or gravel deposited by streams or
24 rivers.

25 33. Unfortunately, San Bernardino kangaroo rat numbers have significantly declined
26 due to stream channelization and alteration, mining, and urban sprawl. As a result, the San
27 Bernardino kangaroo rat is federally endangered and a California species of special concern.

1 Designated critical habitat for the San Bernardino kangaroo rat occurs upstream of the Project as
2 well as adjacent to the SBWRP. Suitable habitat for San Bernardino kangaroo rat also occurs
3 downstream of the Project along the Santa Ana River.

4 ***Southwestern Willow Flycatcher***

5 34. The southwestern willow flycatcher (*Empidonax traillii extimus*) is a state and
6 federally endangered songbird. The southwestern willow flycatcher inhabits the Santa Ana
7 River and adjacent riparian areas, and designated critical habitat for the southwestern willow
8 flycatcher occurs within the Project area.

9 ***Least Bell's Vireo***

10 35. The least Bell's vireo (*Vireo belli pusillus*) is a state and federally endangered
11 songbird. While least Bell's vireo is a shy and secretive species of bird, it will stand its ground
12 in its nest against intruders. The least Bell's vireo was one of California's most abundant birds
13 in the late 19th and early 20th centuries, but was reduced to only 300 pairs in 1986. Although
14 numbers have increased since 1986, the bird's recovery is still limited by continued habitat
15 destruction.

16 36. The least Bell's vireo inhabits the Santa Ana River and adjacent riparian areas.
17 Designated critical habitat for the bird lies downstream of the Project along the Santa Ana River

18 ***Rare Plant Communities***

19 37. Riversidean Sage Scrub, Southern Willow Scrub, and other rare plant communities
20 exist in the Project area. These plant communities – as well as riparian plant communities along
21 the Santa Ana River – will be impacted by the Project.

22 **The Draft EIR**

23 38. On or about November 5, 2014, the Department issued a Notice of Preparation for
24 the Project, in which it notified public agencies and interested individuals that, as a lead agency,
25 it would be preparing a Draft Environmental Impact Report/Environmental Impact Statement to
26 analyze the Project's potentially significant environmental impacts.

1 39. On or about April 22, 2016, Respondents completed the Draft EIR and circulated
2 the document for public comment.

3 40. On or about May 3, 2016, the Department held a public hearing on the Draft EIR.

4 41. Thirteen public agencies, including USFWS and CDFW, submitted comments on
5 the Draft EIR. Both USFWS and CDFW pointed out significant deficiencies in the Draft EIR
6 regarding its analysis of impacts on the Santa Ana sucker and other species, and requested that
7 the Department recirculate a revised and updated Draft EIR. The East Valley Water District
8 also identified numerous deficiencies with the Draft EIR, and concluded that the Draft EIR was
9 “distressingly inattentive to the impacts of the Project on the environment.”

10 42. Petitioners submitted detailed comments on the Draft EIR, and nearly 2,000
11 members of the Center individually submitted comments urging the Department to reconsider
12 the Project.

13 **Petitioners’ Comments on the Draft EIR**

14 43. In a letter to the Department on or about June 8, 2016, Petitioners commented that
15 the Draft EIR failed to comply with CEQA in the following respects:

- 16 a. The Draft EIR failed to adequately disclose and/or analyze the Project’s
17 significant impacts on the Santa Ana sucker, and failed to identify or consider
18 adequate measures to mitigate the Project’s significant impacts on the Santa Ana
19 sucker.
- 20 b. The Draft EIR failed to address the establishment of invasive red algae in Santa
21 Ana sucker habitat or consider adequate measures to mitigate future introduction
22 of red algae.
- 23 c. The Draft EIR did not adequately explain how an unformulated Adaptive
24 Management Plan would mitigate the Project’s significant environmental impacts.
- 25 d. The Draft EIR failed to accurately establish the baseline conditions by neglecting
26 to include adequate surveys for biological resources.
- 27
- 28

- 1 e. The Draft EIR failed to adequately disclose and/or analyze the Project’s
2 significant impacts on special status species including the San Bernardino
3 kangaroo rat, southwestern willow flycatcher, least Bell’s vireo, arroyo chub, and
4 southern steelhead, and failed to identify or consider adequate measures to
5 mitigate the Project’s significant impacts on the these species.
- 6 f. The Draft EIR failed to adequately disclose and/or analyze the Project’s
7 significant impacts on rare plant communities, including Riversidean Sage Scrub
8 and Southern Willow Scrub, and failed to identify or consider adequate measures
9 to mitigate the Project’s significant impacts on these communities.
- 10 g. The Draft EIR failed to adequately disclose, analyze or mitigate the Project’s
11 significant cumulative impacts on the Santa Ana sucker.

12 **Petitioners’ Comments on the Final EIR**

13 44. On or about February 24, 2017, the Department released its Final EIR, which
14 included text changes to the Draft EIR and Respondents’ responses to public comments on the
15 Draft EIR. The Final EIR identified Alternative 9 – the “Flow Mitigation Alternative” – as the
16 “environmentally superior alternative.” Alternative 9 purports to utilize groundwater pumped
17 from existing wells at the RIX Facility to maintain flows at the RIX Facility outfall at volumes
18 “necessary to keep impacts less than significant.”

19 45. Nonetheless, the Department’s failure to disclose or analyze the Project’s impacts,
20 as summarized above and explained in comments from Petitioners and other commenters,
21 persisted in the Final EIR.

22 46. In a letter on or about March 6, 2017, Petitioners further explained the ongoing
23 deficiencies of the Final EIR, commenting that the Final EIR failed to comply with CEQA in the
24 following respects:

- 25 a. The Final EIR did not adequately analyze the impacts on special status species, air
26 quality, and greenhouse gases (“GHGs”) of groundwater pumping associated with
27 Alternative 9.

1 EIR must analyze feasible mitigation measures and a reasonable range of alternatives to the
2 project.

3 50. CEQA also mandates that the lead agency adopt feasible and enforceable
4 mitigation measures that would reduce or avoid any of a project's significant environmental
5 impacts. If any of the project's significant impacts cannot be mitigated to a less than significant
6 level, then CEQA bars the lead agency from approving a project if a feasible alternative is
7 available that would meet the project's objectives while avoiding or reducing its significant
8 environmental impacts.

9 51. CEQA requires that substantial evidence in the administrative record support all of
10 the EIR and agency's findings and conclusions, and that the agency explain how the evidence in
11 the record supports the conclusions the agency has reached.

12 52. Respondents committed a prejudicial abuse of discretion and failed to proceed in a
13 manner required by law by relying on an EIR that fails to meet the requirements of CEQA for
14 disclosure, analysis, and/or mitigation of significant project impacts on special status species,
15 including the Santa Ana sucker, San Bernardino kangaroo rat, southwestern willow flycatcher,
16 least Bell's vireo, arroyo chub, southern steelhead, and other biological resources, as well as
17 surface and groundwater supplies, GHGs, and air quality, among other areas.

18 53. **Statement of Overriding Considerations.** When an agency approves a project
19 with significant environmental effects that will not be avoided or significantly lessened, the
20 agency must set forth in writing the specific reasons supporting its action based upon the final
21 EIR and the information in the record. (CEQA Guidelines, § 15093(b).) Respondents failed to
22 adopt a Statement of Overriding Considerations, and instead incorrectly concluded that the
23 Project would not result in significant environmental effects.

24 54. **Findings of Fact.** When an agency approves a project, it must adopt Findings of
25 Fact that identifies any the changes or alterations that are required to avoid or substantially
26 lessen the project's significant environmental effects. (CEQA Guidelines § 15091(a)(1).) The
27 Findings of Fact regarding the impacts, mitigation measures, and alternatives relied upon by
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1 Respondents' approval of the Project are not supported by substantial evidence in the record,
2 and the links between evidence and conclusions are not satisfactorily provided.

3 **55. Environmental Setting.** The EIR fails to comply with CEQA's requirements to
4 provide an adequate and accurate description of the environmental setting of the Project area.
5 (CEQA Guidelines § 15125.) The EIR's description of the environmental setting is inadequate
6 because, but not limited to, its failure to:

- 7 a. establish that protocol-level surveys were performed on all appropriate species,
8 including the Santa Ana sucker, San Bernardino kangaroo rat, southwestern
9 willow flycatcher, least Bell's vireo, and arroyo chub;
- 10 b. establish an accurate baseline for habitat suitability for all appropriate species,
11 including the southern steelhead;
- 12 c. establish an accurate baseline for the hydrology of the Santa Ana River; and,
- 13 d. establish an accurate baseline for current groundwater conditions, air quality, and
14 GHG emissions.

15 **56. Biological Resources.** The EIR fails to adequately disclose, analyze and/or
16 mitigate the Project's significant and cumulative impacts to biological resources, including
17 numerous animal and plant species affected by the Project. Those species include, but are not
18 limited to, the Santa Ana sucker, San Bernardino kangaroo rat, southwestern willow flycatcher,
19 least Bell's vireo, and arroyo chub. The EIR's biological resources analysis is inadequate
20 because, *inter alia*:

- 21 a. The EIR does not adequately analyze the impacts of the Project on rare plant
22 communities and wildlife species;
- 23 b. The EIR's mitigation measures – including the “Adaptive Management Plan,”
24 generally described in MM BIO-7 – are inadequate, deferred, and/or
25 unenforceable;

- c. The EIR fails to demonstrate that it is consistent with the Western Riverside Multiple Species Habitat Conservation Plan despite the Project's potential to impact areas covered by this plan;
- d. The EIR fails to incorporate current scientific studies and information into its analysis of the impacts on the Santa Ana Sucker, including studies prepared by the U.S. Geological Survey; and,
- e. The EIR does not adequately consider the cumulative impacts of the Project on plant and wildlife species, including reductions in water releases to the Santa Ana River from other facilities.

57. **Groundwater and water resources.** The EIR does not adequately disclose, analyze and/or mitigate the Project's significant impacts to groundwater and water resources because, *inter alia*:

- a. The EIR's mitigation measures are inadequate, deferred, and/or unenforceable;
- b. The EIR fails to analyze or disclose the impacts of groundwater pumping on groundwater sub-basins, the Santa Ana River, and associated riparian ecosystems;
- c. The EIR fails to adequately analyze the impacts of the Project on the Santa Ana River's water velocity, sedimentation levels, and flow rates; and,
- d. The EIR fails to analyze the cumulative impacts of the Project on groundwater and water resources.

58. **Water Quality.** The EIR does not adequately disclose, analyze and/or mitigate the Project's significant impacts to water quality because, *inter alia*:

- a. The EIR's mitigation measures are inadequate, deferred, and/or unenforceable; and,
- b. The EIR fails to adequately disclose the impacts of reduced stream flows in the Santa Ana River on water quality.

1 **59. Air Quality and GHGs.** The EIR fails to adequately disclose, analyze and/or
2 mitigate the Project’s significant and cumulative impacts to air quality and GHGs, particularly
3 arising from groundwater pumping activities. The EIR fails to adopt all feasible mitigation
4 measures and consider alternatives that would reduce impacts.

5 **60. Alternatives Analysis.** The EIR fails to provide a selection and discussion of
6 alternatives that foster informed decision-making and informed public participation. The
7 alternatives analysis in the EIR does not meet the requirement of a reasonable range of
8 alternatives that lessen the Project’s significant environmental impacts, and does not focus on
9 alternatives that either eliminate adverse impacts or reduce them to insignificance, even if they
10 would to some degree impede the Project’s objectives, as required by CEQA. The EIR’s
11 analysis of alternatives is inadequate because, *inter alia*:

- 12 a. The EIR fails to demonstrate that a project that avoids flow diversions from the
13 Santa Ana River is not feasible; and,
- 14 b. the EIR fails to include quantitative and/or meaningful comparisons of the
15 Project’s impacts and the proposed alternatives.

16 **61. Response to Comments.** The responses to comments in the EIR fail to meet
17 CEQA’s requirements in that they neither adequately dispose of all the issues raised, nor provide
18 specific rationale for rejecting suggested Project changes, mitigation measures, or alternatives.
19 CEQA requires that the lead agency evaluate and respond to all environmental comments on the
20 Draft EIR that it receives during the public review period. The responses must describe the
21 disposition of the issues raised and must specifically explain reasons for rejecting suggestions
22 and for proceeding without incorporating the suggestions. The EIR’s responses to comments
23 fail to satisfy the requirements of law.

24 **62.** Based upon each of the foregoing reasons, the EIR is legally defective under
25 CEQA. Respondents prejudicially abused their discretion in violation of CEQA in approving
26 the Project. As such, the Court should issue a writ of mandate directing Respondents to set
27 aside the certification of the EIR and associated approvals for the Project.

1 **SECOND CAUSE OF ACTION**

2 **Violation of CEQA – Failure to Recirculate or Supplement EIR**

3 **(Public Resources Code § 21000, *et seq.*)**

4 63. Petitioners hereby incorporate by reference each and every allegation set forth
5 above.

6 64. CEQA requires that if significant new information is added to an EIR after a draft
7 EIR is prepared, but before certification of the final EIR, an amended EIR must be recirculated
8 for public review and comment.

9 65. CEQA further provides that when a public agency makes a new discretionary
10 decision regarding a project for which an EIR has already been prepared, it must prepare a
11 subsequent or supplemental EIR if (a) substantial changes are proposed in the project that will
12 require major revisions of the EIR; (b) substantial changes occur with respect to the
13 circumstances under which the project is being undertaken that will require major revisions in
14 the EIR; or (c) new information, that was not known and could not have been known at the time
15 the EIR was certified as complete, becomes available.

16 66. In the Final EIR, Respondents identified Alternative 9 – the Flow Mitigation
17 Alternative – but this alternative was not identified in the Draft EIR. In certifying the Final EIR
18 and approving the Project, Respondents adopted Alternative 9.

19 67. Alternative 9 represents the addition of significant new information because this
20 alternative may have significant new environmental effects not previously evaluated in the Draft
21 EIR, and may have more severe environmental effects than evaluated in the Draft EIR.

22 68. Despite the changes incorporated in the approved Project, Respondents failed to
23 recirculate the EIR or any portion of the EIR as required CEQA. As a result of Respondents'
24 failure to recirculate the EIR, the public and other public agencies were deprived of any
25 meaningful opportunity to review and comment on the approved Project and its substantial
26 adverse environmental consequences.

1 DATED: April 6, 2017

CENTER FOR BIOLOGICAL DIVERSITY

2
3 By: 

4 _____
5 John Buse
6 Aruna Prabhala
7 John Rose

8 Attorneys for Petitioners
9 CENTER FOR BIOLOGICAL DIVERSITY,
10 and SAN BERNARDINO VALLEY AUDUBON
11 SOCIETY
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1 **VERIFICATION**

2 I am a Senior Scientist for the Center for Biological Diversity, which is a party to this
3 action. I am authorized to make this verification for and on its behalf, and I make this
4 verification for that reason. I have read the foregoing document and know its contents. The
5 matters stated in it are true of my own knowledge except as to those matters that are stated on
6 information and belief, and as to those matters I believe them to be true.
7

8 I declare under penalty of perjury under the laws of the State of California that the
9 foregoing is true and correct. Executed this 6th day of April, 2017, in Los Angeles, California.

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12 _____
13 Heene Anderson
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EXHIBIT A



Via FedEx

April 5, 2017

Board of Water Commissioners
City of San Bernardino Municipal Water Department
399 Chandler Place
San Bernardino, CA 92408

Re: Notice of Commencement of Legal Action Pursuant to the California Environmental Quality Act

Dear Board of Water Commissioners:

The Center for Biological Diversity and the San Bernardino Valley Audubon Society (“Petitioners”) intend to commence an action for writ of mandate to vacate and set aside the decision of the City of San Bernardino Municipal Water Department and City of San Bernardino (“Respondents”) approving the Clean Water Factory Project (the “Project”) and certifying an Environmental Impact Report for the Project. Petitioners submit this notice to pursuant to Public Resources Code section 21167.5.

The action will commence on April 6, 2017, and will be based upon on Respondents’ failure to comply with the California Environmental Quality Act (Public Resources Code § 21000 *et seq.*) in adopting the Environmental Impact Report and approving the Project.

Sincerely,

John Rose
Staff Attorney
Center for Biological Diversity



Via FedEx

April 5, 2017

Georgeann Hanna
City Clerk
City of San Bernardino
300 N. "D" Street, 2nd Floor
San Bernardino, CA 92418

Re: Notice of Commencement of Legal Action Pursuant to the California Environmental Quality Act

Dear Ms. Hanna:

The Center for Biological Diversity and the San Bernardino Valley Audubon Society ("Petitioners") intend to commence an action for writ of mandate to vacate and set aside the decision of the City of San Bernardino Municipal Water Department and City of San Bernardino ("Respondents") approving the Clean Water Factory Project (the "Project") and certifying an Environmental Impact Report for the Project. Petitioners submit this notice to pursuant to Public Resources Code section 21167.5.

The action will commence on April 6, 2017, and will be based upon on Respondents' failure to comply with the California Environmental Quality Act (Public Resources Code § 21000 *et seq.*) in adopting the Environmental Impact Report and approving the Project.

Sincerely,

John Rose
Staff Attorney
Center for Biological Diversity

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF ALAMEDA

3 I am employed in Oakland, California. I am over the age of 18 and not a party to the
4 foregoing action. My business address is Center for Biological Diversity, 1212 Broadway,
5 Suite 800, Oakland, California 94612. My email address is ckilmer@biologicaldiversity.org.

6 On April 5, 2017, I served a true and correct copy of the following document(s):

7 **NOTICE OF COMMENCEMENT OF LEGAL ACTION PURSUANT TO THE
8 CALIFORNIA ENVIRONMENTAL QUALITY ACT**

8 BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy
9 through Center for Biological Diversity's electronic mail system to the email address(s) shown
10 on the following service list.

11 BY FEDEX MAIL: By placing a true and correct copy thereof in sealed envelope(s).
12 Such envelope(s) were addressed as shown on the following service list. Such envelope(s)
13 were placed for collection and mailing following ordinary business practices with which I am
14 readily familiar.

15 STATE: I declare under penalty of perjury under the law of California that the
16 foregoing is true and correct.

17
18 Executed on April 5, 2017 at Oakland, California.

19
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22 _____
23 Colyn Kilmer
24

Service List

Georgeann Hanna
City Clerk
City of San Bernardino
300 N. "D" Street, 2nd Floor
San Bernardino, CA 92418

Board of Water Commissioners
City of San Bernardino Municipal Water Department
399 Chandler Place
San Bernardino, CA 92408

EXHIBIT B



Via USPS

April 6, 2017

Office of the Attorney General
Attn: Environmental/CEQA Filing
1300 "I" Street
P.O. Box 944255
Sacramento, CA 94244-2550

Re: Notice of Commencement of Legal Action Alleging Environmental Harm

Dear Office of Attorney General:

The enclosed Verified Petition for Writ of Mandate, *Center for Biological Diversity et al. v. City of San Bernardino Municipal Water Department et al.*, is submitted to your office pursuant to Code of Civil Procedure section 388 and Public Resources Code section 21167.7. This case is being pursued under the private attorney general provisions of the Code of Civil Procedure section 1021.5

The case is being brought by the Center for Biological Diversity and San Bernardino Valley Audubon Society and challenges the decision of the City of San Bernardino Municipal Water Department and City of San Bernardino ("Respondents") approving the Clean Water Factory Project (the "Project") and certifying an Environmental Impact Report for the Project. The Project will have significant impacts on imperiled species, including the Santa Ana sucker, San Bernardino kangaroo rat, southwestern willow flycatcher, and least Bell's vireo, among other species.

The Center for Biological Diversity and the San Bernardino Valley Audubon Society allege environmental harm that could affect the public generally and the natural resources of the state.

Thank you for your attention to this matter.

Sincerely,

John Rose
Staff Attorney
Center for Biological Diversity

Enclosure: Verified Petition for Writ of Mandate