Recommended Commission Agenda

At the August 25th meeting, the Commission continued the review and straw voting for Chapter 11, the Water Resources Element. For tonight's meeting staff recommends that the Commission:

1. Review the outstanding policy decisions for Chapter 11, Water Resources.
3. Allow time for public comments.
4. Continue review and deliberation of Chapter 11, Water Resources and begin review of Chapter 12, Energy Element, if time allows.
5. Continue the hearing to September 15th or other suitable date.

Outstanding Issues for Chapter 11 Water Resources Element

WR-P2 and NEW POLICY Re: Un-Permitted Development.

In discussing changes to WR-P2, Commissioner Faust expressed the desire to have a policy that stated it was unlawful to have un-permitted diversions serving un-permitted development, and the Commission directed staff to return with such a policy.

Staff drafted a policy as requested, but is concerned that it may run counter to water rights law which provides certain entitlements for riparian and overlying lands. **Staff recommends** that this issue be addressed through **WR-IMx2. (new)**, as shown in Attachment 1. **Staff does not recommend** the inclusion of WR-P2x1 as originally proposed for the August 25th meeting.

WR-P11 Small and Micro Hydroelectric

The Commission discussed changes to WR-P11 regarding the small hydroelectric policy. Discussion focused on the need for clear definitions, and responding to Fish and Games' comments. Staff is suggesting edits to respond to these issues, but is not recommending developing a set of "standard mitigations" as suggested by Fish and Game at this time.

The original policy language of WR-P11 is as follows:

**WR-P11 Small and Micro Hydroelectric.** Encourage small and micro hydroelectric development when impacts to surface water flows and habitat are in conformance with state and federal standards.

The definition of "small hydroelectric system" in the Framework Plan glossary is as follows:

**Small Hydroelectric System:** Small scale electrical generating systems using run of the river type diversions and existing impoundments with a maximum generating capacity of five (5) megawatts.
This definition has been revised in the proposed General Plan Update glossary to delete the 5 megawatt reference:

**Small Hydroelectric System**: Small scale electrical generating systems using run of the river type diversions and existing impoundments.

Based on the Commission’s discussion staff recommends the following revision of WR-P11:

**WR-P11 Small and Micro Hydroelectric.** Encourage small and micro hydroelectric development when impacts to surface water flows, aquatic species, and habitat have been adequately mitigated and are in conformance with state and federal permits and standards.

Also, add definition for “micro hydroelectric” to the glossary:

**Micro Hydroelectric System**: Very small scale electrical generating systems using run of the river type diversions with up to 100 kilowatts of electrical generating capacity.

**WR-Px4 Well Permit Applications**

The Commission discussed changes to WR-Px4 regarding the purpose of the policy.

The original policy language of WR-Px4 is as follows:

**WR-Px4. Well Permit Applications.** Require that information regarding the historic uses of the project site and contiguous surrounding lands and a map showing known contaminated sites within 500 feet of the property located near the project based on data available from the SWRCB Geotracker or successor website shall be included as part of well permit applications. Additionally, a map that identifies known contaminated sites located near the project based on data available from the SWRCB website.

Based on the Commission’s discussion staff recommends the following revision of WR-Px4:

**WR-Px4. Well Permit Applications.** Information regarding the historic uses of the project site and contiguous lands and a map showing known contaminated sites within 500 feet of the property based on data available from the SWRCB Geotracker or successor website shall be included as part of well permit applications, as well as evidence of compliance with State water rights law.

**NEW WR-Px6. Greywater Re-use**

During the Commission discussion on WR-P14 Commissioner Kreb expressed the desire to have a policy that supports the re-use of water and alternative sewage disposal systems and the Commission directed staff to return with such a policy. It was recognized that this should be a separate policy.

Based on the Commission’s discussion staff recommends the following policy:

**WR-Px6. Greywater and Alternative Disposal Systems.** Support programs and ordinance revisions that modify the permit process for greywater and other alternative disposal systems to make such systems more accessible to individual households.
NEW Goal - WR-GX.

During the Commission discussion on WR-P16, Commissioner Masten expressed the desire to have a goal statement that eliminates failed septic systems in the County along surface waters and the Commission directed staff to return with such a goal statement.

Based on the Commission's discussion staff recommends the following goal:

WR-GX, Wastewater Management. Individual wastewater systems that do not contaminate surface and ground water.


WR-P25. Compliance with Water Code Export Law. Water export projects will not be approved or supported unless the specific requirements of California Water Code Section 10505 protecting development rights and Section 11460 protecting beneficial uses of the watersheds are met and substantiated through a scientifically based public process.

During the Commission’s discussion on WR-P25 (shown above), the question was raised whether or not the cited sections only apply to (federal) Central Valley Water Project diversions. Staff was asked to return with a review of the cited sections.

Attachment 2 is a summary of California water rights law that discusses Water Code Sections 10505 (the County of Origin Law) and Sections 11460-11465, (the "Watershed of Origin Protection Act" or, "Area of Origin Act") cited in WR-P25. As the summary discusses, these laws were primarily directed at State appropriation of water, in particular for the State Water Project. The summary notes that the 'county of origin' provisions do not apply to water rights that are not based on assignment or release of a State filing. However, as the summary concludes, these statues also apply to the federal government, and specifically the federal Central Valley Project.

Staff believes that while these sections may have some limitations in their application, they are the correct and appropriate sections to cite for purposes of WR-P25.

The Department of Fish and Game (DFG) commented on this policy stating that they support the County becoming a protestant of new water applications or change petitions under Water Code Sections 1330 and 1703.1, respectively. These sections authorize the filing of protests. This suggestion could be added to the end of policy WR-P25.

Based on the Commission's discussion staff recommends the following policy revision:

WR-P25. Compliance with Water Code Export Law. Water export projects will not be approved or supported unless the specific requirements of California Water Code Section 10505 protecting development rights and Section 11460 et seq., protecting beneficial uses of the watersheds are met and substantiated through a scientifically based public process. The County should consider protesting new water applications or change petitions which may adversely affect water resources in Humboldt County under Water Code Sections 1330 and 1703.1, respectively.

WR-P40. Fish Passage Designs

The Commission in its discussion of WR-P40, noted DFG and Healthy Humboldt comments, and
requested staff draft a standard or implementation measure as suggested. The current proposed wording for WR-P40 is:

**WR-P40. Fish Passage Designs.** Work with federal and state agencies and local watershed restoration groups to retrofit existing drainage and flood control structures and design new structures to facilitate fish and other wildlife passage in partnership with federal and state agencies.

The Dept. of Fish and Game commented: “Per Fish and Game Code 5901, it is unlawful to prevent or impede fish passing in a stream. Thus, DFG is supportive of all passage barriers being removed or retrofitted to provide for passage.” Healthy Humboldt commented: “It may be appropriate to incorporate an associated standard or implementation measure that addresses the identification, prioritization and retrofit of drainage/flood control structures that pose a barrier to fish passage.”

In response, the Commission could add the following implementation measure:

**WR-IMx3. Fish Barrier Removal.** Identify, prioritize, and retrofit drainage and flood control structures that pose a barrier to fish passage.

Attachment 1: Previous Recommended Policy Revisions from the 8-11-11 Staff report
Attachment 2: California Water Law Summary
Attachment 3: Public Comments
ATTACHMENT 1
Previous Recommended Policy Revisions from the 8-11-11 Staff report

(NOTE: no new language recommendations, this was originally provided in the August 11, 2011 Commission packet and supplied here for convenience only)

WR-IMx1. Update Water Quality Regulations. Amend the Grading, Excavation, Erosion, and Sedimentation Control Regulations and Division 1, Planning Zoning Regulations Chapter 6 - General Provisions and Exceptions Section 314-61.1 Streamside Management Area Ordinance to reflect the new erosion, sediment control, vegetation, restoration, and stormwater drainage policies and standards contained in the Water Resources Element, and the Biological Resources Chapter of the Conservation and Open Space Elements and evaluate as part of the five-year Housing Element Update to determine if additional measures are needed to protect water quality.

WR-IMx2. (new) Prepare an ordinance to provide increased enforcement capabilities for un-permitted development within critical watershed areas if the development impacts water resources. Work with the State Departments of Water Resources and Fish and Game to address illegal water diversions and over-subscribed water right allocations.

WR-P2x1. Water Withdrawals Serving Un-permitted Development. It shall be unlawful to draw water to serve un-permitted development. Compliance measures for un-permitted development not served by municipal water supplies shall include mitigations for surface or groundwater resource impacts.

WR-IMx. Graywater Re-use Standards. Update and amend the existing County Code to implement the revisions to the State California Plumbing Code, Title 24, Part 5, Chapter 16A regarding Graywater Standards, as reflected in SB1258.
Attachment 2:
California Water Law Summary
A SUMMARY OF THE CALIFORNIA LAW OF SURFACE WATER AND GROUNDWATER RIGHTS

Set forth below is a brief discussion of the California law of surface water and groundwater rights, including provisions for transfer of different types of water rights and entitlements. These are general provisions. Please consult an attorney regarding specific water right issues. The State Water Resources Control Board’s (“State Board”) website (http://www.waterrights.ca.gov/WRINFO/) includes publications that provide additional information on California water rights.

1. Reasonable and Beneficial Use Doctrine

Article 10, section 2 of the California Constitution (enacted in 1928) prohibits the waste of water, and requires reasonable use, method of use and method of diversion for all surface and groundwater rights. The doctrine of reasonable and beneficial use is the basic principle defining California water rights: that no one can have a perpetual interest in the unreasonable use of water, and that holders of water rights must use water reasonably and beneficially. (See also Water Code section 275: “The department [of water resources] and [state water resources control] board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.”)

2. Riparian Rights

Riparian water rights are rights that an owner of land contiguous to a natural stream possesses to divert the naturally-available supply directly to use, without artificial storage, for reasonable, beneficial purposes on that riparian land. Riparian land is the smallest parcel of such contiguous land, in a single chain of title from the original private owner, that is within the watershed of the stream. The right arises by virtue of ownership of the riparian land, and is not gained by use nor lost by nonuse. Generally, the riparian right is superior to the other types of surface water rights, but the riparian right does not apply to water that is stored for later use. The riparian right may be junior to an appropriative water right that was perfected before a patent on
the riparian land was issued by the United States. The riparian rights of owners of land that are riparian to the same source are “correlative,” in that, if there is insufficient water under the riparian right for all riparians, each is entitled to a fair share of the available supply based upon the amount of their land and their reasonable water supply needs.

Where interests in the riparian parcel are conveyed or the riparian parcel is subdivided, the riparian right as to any subparcel that is no longer contiguous to the source of water may be severed, absent the intent to retain the riparian nature of the severed parcel.

3. Appropriative Rights

Appropriative rights to surface water are rights to use unappropriated water, that is, water that is surplus to the needs of riparian owners and prior appropriators and prescriptors. Appropriative rights are based not on land ownership, but on actual diversion and use of water. They are rights of priority, in that, if the available surface water supply is insufficient to meet the needs of all appropriators, the one with the earliest priority date is entitled to satisfy his or her needs fully before those with later priority are entitled to any water. An appropriative right may be established to use water for any reasonable, beneficial purpose on any land no matter where located, and to store water from one season for use in a later season, or from one year for use in subsequent years. Just as appropriative rights are gained by use, conversely, once acquired, they may be lost wholly or in part by five years’ nonuse during a time when the water was physically available for use.

Prior to 1914, appropriative rights could be acquired simply by posting or filing a notice, and then diverting and using the water for reasonable, beneficial purposes (referred to as “pre-1914 water rights”). Since 1914, California statutory law has required that an application be filed and a permit obtained from a State agency, now the State Water Resources Control Board. The State Board has the discretion to decide whether unappropriated water exists, and whether the proposed use under the application is reasonable, beneficial and in the public interest. If the State Board finds affirmatively on these issues, it can issue a permit, and then, after the diversion and use facilities have been constructed and the water appropriated has been fully put to beneficial use within the time allowed, the State Board can issue a license confirming that the water right has been perfected by use for the amount used.

Under Water Code sections 5100 through 5108, the holder of an appropriative water right is required to file periodic statements with the State Board of diversion and use of water under the water right. Under section 5108, these statements are for informational purposes only, and neither the failure to file a statement nor any error in information filed will have any legal consequence. From time to time, the State Board has proposed amendments to these provisions that would require filing the statements of diversion and use as a condition to retaining the water.
right.

4. Prescriptive Rights to Surface Water

Prescriptive water rights are created by five years' open and notorious use of water under a claim of right that is adverse to one or more existing prior rights: riparian, appropriative or prescriptive. (But see, People v. Shirokow (1980) 26 Cal.3d 301, which held that prescriptive rights could not be obtained against the State's interest in allocating water in the public interest.) The use must be reasonable and beneficial. As in the case of appropriative rights, a prescriptive water right can be established for use on any land, and water can be diverted directly to use or stored for later use. Prescriptive rights, however, cannot be acquired against public agencies or public utilities. Prescriptive rights, like appropriative rights, can be lost by five years' nonuse.

5. The Public Trust Doctrine

In National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, the California Supreme Court held that the State, in accordance with Article 10, section 2 of the State Constitution, as trustee of the "public trust," retains supervisory control over all the State's waters to protect navigation, fishing, recreation, ecology and aesthetics. No person has a vested right to appropriate water in a manner harmful to the interest protected by the public trust. "Once the State has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the State is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. The State accordingly has the power to reconsider allocation decisions. . . . No vested rights bar such reconsideration."

6. The County of Origin Law (State Filings)

In the 1920's and 1930's, the State legislature adopted legislation authorizing massive applications by the State for future water development projects. In order to attempt to allay the fears of areas from which water projects might transfer water, the legislature passed certain "area of origin" laws. Specifically, in 1931 the legislature passed the County of Origin Law (Water Code section 1055), and in 1933 the legislature adopted the Watershed Protection Law (Water Code sections 11460 – 11463), which is discussed in the next section of this document.

The State, acting through the Department of Water Resources ("DWR," and previously the Department of Finance), is authorized to appropriate water (and has done so) for future water projects (known as "State filings"). (See Water Code sections 10500 - 10507.) The State Board is authorized to release from priority or assign these State filings to other agencies or entities when the release or assignment is for the purpose of development not in conflict with the State water plan. (Water Code section 10504.) Under the County of Origin Law, the State Board is
expressly prohibited from assigning or releasing the priority when, in its judgment, the effect could be to deprive the county in which the water originates of water necessary for its development. (Water Code section 10505.)

The legislative intent and effect of section 10505 was to provide protection for the future interest of the counties of origin by placing restrictions on the authority of the State to transfer or dispose of the priorities vested in the State by filing applications to appropriate unappropriated water. (25 Ops.Cal. Atty.Gen. 8, 15 (1955).) Section 10505 applies only to applications filed by the State. The county of origin provisions do not apply to water rights that are not based on assignment or release of a State filing.


The “Watershed of Origin Protection Act” (Water Code sections 11460 – 11465, sometimes referred to as the “area of origin law”) operates to protect the priority of water rights within the watershed against State export rights in two major ways: (a) by giving protected areas a preferential right to contract for State-developed water, and (b) by allowing later upstream developments within the watershed to obtain priority as against the State’s projects. Water Code section 11460 states: “In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.”

The area of origin law does not entitle protected areas to State-developed water free of charge, nor does it allow the protected areas to gain any priority against entities other than the State who may export water out of the watershed. Area of origin rights are not transferable to an area outside the area of origin. The area of origin law does not create any hierarchy of preference between areas included within the same watershed. The Central Valley Basin contains two watersheds: one comprising the Sacramento River and its tributaries down to and through the Delta, and another comprising the San Joaquin River and its tributaries. (29 Ops.Cal. Atty.Gen. 136 (1957).)

The United States must comply with the area of origin law when it seeks a priority established under a state filing (Water Code section 10500). (See 25 Ops.Cal. Atty.Gen. 8, 28 - 29 and Water Code section 10505.5: “Every application heretofore or hereafter made and filed pursuant to section 10500 . . . shall provide that the application, permit or license shall not authorize the use of any water outside the county of origin which is necessary for the development of the county.” Under Water Code section 11128, the area of origin law applies to
the operation of the federal Central Valley Project. (See also, California v. United States (1978) 438 U.S. 645.)

8. The Delta Protection Act

Article 4.5 of Division 6 of the Water Code (commencing with section 12200) sets forth the Delta Protection Act, which provides a first priority to provision of salinity control and maintenance of an adequate water supply in the Sacramento-San Joaquin Delta ("Delta") Delta for reasonable and beneficial uses of water, and relegates to lesser priority all exports of water from the Delta to other areas for any purpose.

9. Groundwater Rights

Groundwater rights attach to percolating groundwater, which includes all groundwater that does not comprise a subsurface stream or the underflow of a surface stream. An underground stream is a stream or river flowing in a definite channel in an underground watercourse. The underflow of a surface stream is the water in the soil, sand and gravel comprising the bed of a stream in its natural state and essential to its existence. Water in a stream’s underflow or an underground stream is treated like surface water for legal purposes, including State Board permitting. It usually is in contact with the surface flow, and flows in the same direction. Courts have classified water rights in percolating groundwater as overlying, appropriative or prescriptive. No water right permit is required to pump percolating groundwater.

Overlying groundwater rights are analogous to riparian rights to surface water. Each owner of land that overlies a common groundwater supply has a right to reasonable, beneficial use of the water of that supply on or in connection with the overlying land. The use of each overlying landowner is “correlative” with the rights of all other owners of land overlying the same groundwater supply. In the event of insufficiency of the supply for the requirements of the overlying landowners, the water may be apportioned among them all by a court decree. There is no priority in time among overlying pumpers.

Similar to riparian rights, the transfer of title to an overlying groundwater right, separate from the land, can result in a permanent severance of the right from the land. Once the overlying water right has been severed, the parcel ceases to be an overlying parcel and it loses its overlying groundwater right. One acknowledged way to transfer the right to exercise an overlying right, without causing a severance of the right, is the transfer of the overlying right to a mutual water company, which acts as an agent or trustee of the owners of the overlying right. At least one case has suggested that the right to exercise an overlying right could also be transferred to a public agency or an agent or trustee without resulting in a severance of the right. (See Orange County Water District v. City of Colton (1964) 226 Cal.App. 642.)
Water users that do not use groundwater on their overlying land are not barred from using groundwater. Such water users include public agencies and owners of non-overlying land. They may extract groundwater, but their rights are analogous to appropriative rights to surface water. Unless there has been an adjudication of the groundwater basin rights, their use is limited to surplus water, which is defined as water in excess of the safe annual yield that is not needed for reasonable, beneficial use by the overlying owners. If the basin is in overdraft, use may be restricted to the overlying owners. As between groundwater appropriators, the one first in time is the first in right, and a prior appropriator is entitled to all the water he or she needs, up to the amount he or she has taken in the past, before a subsequent appropriator may take any groundwater.

Prescriptive groundwater rights are not acquired by taking surplus or excess water. An appropriative taking of groundwater that is not surplus is wrongful, and may ripen into a prescriptive right when the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under a claim of right. (See, generally, City of Barstow v. Mojave Water Agency (2000) 23 Cal.4th 1224.) Prescriptive groundwater rights are most often obtained when someone pumps groundwater during an obvious overdraft condition.

10. Groundwater Adjudication

Groundwater rights generally are not quantified unless the groundwater basin is adjudicated. The authority to adjudicate a groundwater basin exists in State courts, and in limited circumstances, with the State Board. In an adjudication, junior groundwater right holders generally try to prove that they have obtained higher priority pumping rights by pumping for at least five years during an overdraft of which the senior groundwater right holders had notice. If the junior right holders prove such a case, then, under the doctrine of “self-help,” the senior right holders retain their priority to only as much water as they actually pumped during the relevant period. In such a situation: (1) an overlying landowner’s “correlative” right to a reasonable share of a basin’s safe yield effectively may be replaced with a right based on its past water usage; and (2) a public agency with only a junior appropriative right may be able to obtain a higher priority. The California Supreme Court has held that Civil Code section 1007 prevents prescription against public agencies’ groundwater rights or such rights that a public utility has dedicated to public use. (See Los Angeles v. San Fernando (1975) 14 Cal.3d 199; City of Barstow v. Mojave Water Agency (2000) 23 Cal.4th 1224; Hi-Desert County Water Dist. v. Blue Skies Country Club, Inc. (1994) 23 Cal.App.4th 1723.)

11. Conjunctive Use of Surface Water and Groundwater

defines "conjunctive use" as "the operation of a groundwater basin in combination with a surface water storage and conveyance system. Water is stored in the groundwater basin for use by intentionally recharging the basin during years of above-average water supply." Conjunctive use can involve direct recharge or "in lieu" recharge. "In lieu" recharge occurs when someone uses surface water in lieu of pumping groundwater. The storage aspects of the conjunctive operation of a groundwater basin may contemplate both storage of surface water in available basin storage space and increasing pumping from the basin to create additional storage space.

The conjunctive use of surface water and groundwater is favored under California law and policy. (See Los Angeles v. Glendale (1943) 23 Cal.2d 68, and Los Angeles v. San Fernando, referred to in the previous section.) Water Code section 1242 states that storing water underground, including necessary diversion and spreading operations, is a beneficial use of water if the water stored is later put to beneficial use. Under Water Code section 1005.1, the reduction in the extraction of groundwater by the owner of a right to extract, as result of the use of an alternative supply of water, is deemed to be equivalent to establishing and maintaining a right to extract the groundwater. In other words, a person who reduces his groundwater extraction due to the development of a surface water supply does not diminish, as a result, his groundwater rights.

12. Groundwater Management

Although California does not have centralized groundwater regulation, the Legislature has adopted special legislation for the formation of groundwater management districts in various parts of the State, and authorized other local agencies to exercise groundwater management authority. (See, e.g., Water Code sections 10750 through 10755.)

13. Water Transfers

a. General

The State Board’s website (http://www.waterrights.ca.gov/watertransfer/) includes publications that provide additional information on water transfers.

Several sections of the Water Code contain declarations of state policy favoring voluntary water transfers. For example, Water Code section 109 contains a declaration of state policy favoring voluntary water transfers, and directs DWR, the State Board and all other state agencies to encourage voluntary transfers. Water Code section 475 contains legislative findings and declarations favoring voluntary water transfers, states that the coordinated assistance of state agencies is required for voluntary transfers, and directs DWR to establish an ongoing program to facilitate voluntary water transfers.

Several statutory provisions declare that the act of transferring water will not, by itself,
result in a forfeiture of the underlying water right. For example, Water Code section 1244 states that a water transfer, in itself, will not constitute evidence of waste or unreasonable use, and will not affect any determination of forfeiture of an appropriative right. Water Code section 1745.07 states that no transfer of water pursuant to any provision of law will cause a forfeiture, diminution or impairment of any water right, and that a transfer approved under any provision of law is deemed to be a beneficial use of water by the transferor. (See also, Water Code sections 1010, 1011, 1011.5, 1014 - 1017, 1440, 1731 and 1737.)

The transferability of water depends on the source of the water right being transferred. The following provisions of the Water Code provide authority to carry out water transfers: Water Code sections 1011 ("Transfer of Conserved Water"), 1020 through 1031 ("Water Leases"), 1435 through 1442 ("Temporary Urgency Change"), 1700 through 1705 ("Permanent Changes"), 1707 ("Transfers for Instream Uses"), 1706 ("Transfer of Pre-1914 Rights"), 1725 through 1732 ("Temporary Transfers"), 1735 through 1737 ("Long-Term Transfers"), 1740 ("Transfer of Decreed Rights") and 1745 through 1745.11 ("Transfers by Water Suppliers"). In addition, the enabling legislation for a number of different types of water districts includes authorization to transfer surplus water. See, for example, Water Code sections 22228 ("Irrigation Districts") and 35425 ("California Water Districts").

b. Transfers Under a Riparian Water Right

It is well-settled under California law that a riparian water right is not transferable for use on nonriparian land. (See, e.g., People v. Shirokow (1980) 26 Cal 3rd 301, 307.) A riparian owner may, however, enter into a contract under which he or she agrees not to exercise the riparian right for his or her property, so as to increase the downstream water supply. Such an agreement could not prevent a downstream riparian owner from exercising his riparian right. DWR has entered into "water transfer" agreements with riparian landowners in the Delta under which the riparian owner agreed for compensation not to exercise his or her riparian right. Water that was left in the river was pumped from the Delta as part of DWR's Water Bank operations. Under Water Code section 1707, however, riparian rights are among the water rights that may be included within a change petition to the State Board for the purpose of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in or on the water. An adjudicated riparian right can be transferred under Water Code section 1740.

c. Transfers Under an Appropriative Water Right

An appropriative water right can be sold or transferred off the land by changing the place of use under the right. Under Water Code section 1706, the point of diversion, place of use or purpose of use of a pre-1914 appropriate right can be changed if others are not injured by that change. The transfer or other change involving the exercise of a post-1914 appropriate right
requires the approval of the State Board under Water Code sections 1020, 1435, 1700, 1707 (for instream uses), 1725 or 1735, and State Board findings that the proposed transfer would not injure legal users or unreasonably affect fish, wildlife or other instream beneficial uses. Under Water Code section 1729, a water transfer under section 1725 for not longer than one year is exempt from the provisions of the California Environmental Quality Act.

d. Transfers of Groundwater

There are no general statutory procedures for the transfer of groundwater. Under Water Code section 1220, groundwater may not be pumped for export from the combined Sacramento and Delta-Central Sierra Basins (as defined in DWR Bulletin 160-74), unless the pumping is in compliance with a groundwater management plan that was adopted by ordinance of the county board of supervisors and approved by the voters of the county that overlies the affected groundwater basin. No such plans currently exist. Therefore, groundwater may not be pumped for export from the Delta at the present time. DWR contends that the transfer of groundwater for Delta outflow rather than export purposes would not violate Water Code section 1220.

A number of counties within the Sacramento Valley have adopted ordinances that regulate the direct export of groundwater. One such ordinance has been upheld as a valid exercise of the police power that was not preempted by general state legislation. (See Baldwin v. County of Tehama (1994) 31 Cal.App.4th 166.)

In groundwater basins that have been adjudicated by a court, the court's judgment often establishes unique conditions concerning the transfer of groundwater rights in the basin.

e. Transfers of Water Under a Contractual Entitlement

Under California law, the right to water under a contract or as result of owning land within a water district is not transferable in whole or in part without the consent of the water right holder and the water supplier. (E.g., see Water Code sections 382-383 and 1745.04.) Under section 3405(a) of the federal Central Valley Project Improvement Act (Title 34 of Public Law 102-575), the Secretary of the Interior is authorized to approve an application of an individual water user to transfer his or her federal CVP water entitlement without the consent of the water district that holds the CVP contract under which the water is supplied. However, transfers involving more than twenty percent of the CVP water subject to a long-term contract within a contracting district or agency is also subject to review by the district or agency under the provisions specified in Section 3405(a)(1) of the CVP Improvement Act.

f. Transfers by Public Agencies

In addition to the provisions discussed above that deal with the ability to transfer water under different types of water rights, there are numerous statutory provisions that deal with the
authority of public agencies to transfer water. Before a public agency undertakes a water transfer, it must determine that it has authority in its enabling legislation, or elsewhere, to transfer water for use outside its boundaries. Water Code sections 382 and 1745 - 1745.11 provide alternative sources of authority for a public agency to transfer surplus water for use outside of its boundaries. Under Water Code section 1745.10, surface water that is transferred under these provisions may not be replaced with groundwater unless such groundwater use is consistent with a groundwater management plan adopted pursuant to State law for the affected area, or the substitution of groundwater was approved by the transferring agency after it determined that the transfer would not create or contribute to conditions of long-term overdraft in the affected groundwater basin. The transfer would also have to be carried out in compliance with applicable procedural requirements, such as under Water Code sections 1706 or 1725.

**g. Determining What Water Is Transferable - The “No Injury” Rule**

An important element of any water transfer is determining what quantity, if any, of the water is “transferable,” as a result of the application of provisions of the Water Code that are intended to protect other legal users of water and fish and wildlife from the possible adverse effects of a water transfer. The “no injury” rule originates in the common law, and also is reflected in Water Code provisions intended to protect legal users of water from injury from a water transfer. (See, e.g., Water Code sections 1702, 1706 and 1725.) Under the no injury rule, a water transfer would not be authorized to the extent that it reduced the availability of water for downstream users, regardless of the water priority of those users. Under the no injury rule, only “new water” is transferable, i.e., water that is added to the downstream water supply as a result of the transfer. The rationale for the “no injury” rule is as follows: “... California water law protects senior water users (those with the oldest water rights) from junior diverters while protecting junior water right holders from the expansion of senior water rights. Junior water right holders would be harmed if seniors could increase the amount of water they divert under their senior priority. Likewise, juniors could be hurt if seniors could change their point of diversion, place of use or purpose of use in a manner that reduces the quantity or quality of water relied upon by juniors for their diversion. The ‘no injury’ rule protects junior right holders against this kind of harm from senior right holders.” (See *A Guide to Water Transfers*, July 1999, pages 3-7 and 3-8, published by the State Board.) Under section 3405(a)(1)(M) of the CVP Improvement Act, however, one CVP contractor can transfer unused entitlement under its CVP water supply contract to another CVP contractor for use within the watersheds of origin.

**h. Transfers of Conserved Water**

Under Water Code section 1011, the right to the use of water that has been reduced as a result of water conservation efforts may be transferred pursuant to any provision of law relating to the transfer of water. For purposes of this section, “water conservation” means the use of less
water to accomplish the same purpose of use allowed under the existing appropriative water right. In order to obtain the benefits of this section, the water right holder must file periodic reports with the State Board that describe the extent and amount of the reduction in water use due to the water conservation efforts.

On December 28, 1999, the State Board issued Order WR 99-012, which involved a proposed transfer of conserved water under Water Codes sections 1725 and 1011 involving licensed water rights of Natomas Central Mutual Water Company. The State Board determined that Natomas could transfer the right to use of the amount of water that Natomas would have consumptively used but for Natomas’ water conservation efforts, but that a reduction in diversions that did not reduce consumptive use could not be transferred under Water Code section 1725. For example, the State Board said that conservation efforts that reduced diversions from the stream and return flows to the stream by equal amounts would not result in consumptive use savings that could be transferred.

State Board Order WR 99-012 describes the purpose of Water Code section 1011 as follows: “Section 1011 preserves an appropriative water right when less water is used under the right due to water conservation efforts. Essentially, section 1011 requires water to be treated as though it were used, when in actuality the water is conserved. Any reduction or cessation in the use due to conservation efforts is ‘deemed equivalent to a reasonable beneficial use....’ Thus, the right to use the amount of water conserved is not subject to forfeiture for nonuse. The right thereby protected from forfeiture may be used later if needed. The right to use the water conserved may also be transferred pursuant to other provisions of law authorizing transfers.”

The State Board order also points out that, since 1980, the State Board has required licensees to document their conservation efforts in the Report of Licensee form that must be filed with the State Board every three years under 23 California Code of Regulations, sections 847 and 848, and that the failure to fill out the section of the form regarding water conservation would deprive the licensee of the benefits of section 1011. The State Board order also states: “It also merits note that Natomas’ failure to report conservation efforts in a timely manner called into question the credibility of its claim to have conserved water. Late reporting raises the question whether the nonuse of water was in fact due to conservation efforts, or if the water user is attempting to characterize nonuse that occurred for some other reason as water conservation in order to obtain the protections of section 1011. Conversely, reporting water conservation in a timely manner, while insufficient in itself to prove water conservation, would tend to support a claim that the nonuse of water was the result of water conservation efforts. For this reason, it is in every water user’s best interest to report water conservation efforts in a timely manner.”

i. Use of Conveyance Facilities for a Water Transfer

As a practical matter, State Water Project and federal Central Valley Project facilities are often needed to convey transfer water to the place of use of the transferee, such as for through-
Delta transfers. Water Code sections 1810-1814 authorize joint use of unused capacity in water conveyance facilities, requiring the state, regional and local public agencies that own water conveyance facilities to make available up to seventy percent of their unused capacity for a bona fide water transfer upon payment of fair compensation, and so long as: (1) no legal user of water would be injured; (2) there would be no unreasonable effect on fish, wildlife or other instream beneficial uses; and (3) there would be no unreasonable effect on the overall economy or the environment of the county from which the water is being transferred. Use of CVP facilities to convey non-CVP water would require a Warren Act contract with the United States (43 U.S. Code sections 523-525 and 2212), which would include provisions to compensate for use of federal facilities and to ensure that the transfer does not interfere with the operation of federal facilities.

j. Third-Party Impacts from a Water Transfer

There has been confusion from time to time regarding the terms used to refer to potential impacts to others resulting from a proposed water transfer. There generally are three types of potential impacts: (1) injury to legal users of water; (2) unreasonable effects on fish, wildlife or other instream beneficial uses; and (3) unreasonable effects on the overall economy of the area from which the water would be transferred.

The requirement to avoid impacts to "legal users" (discussed above) is set forth in various provisions of existing law. For example, see Water Code section 386 (as to State Board approval of certain water transfers), section 1706 (as to a transfer under a pre-1914 water right), section 1707 (as to a transfer for instream uses), section 1727 (as to a temporary transfer under a water right permit), section 1736 (as to a long-term transfer under a water right permit) and section 1810 (as to determinations of DWR concerning use of surplus conveyance capacity).

The requirement to avoid unreasonable effects on fish, wildlife or other instream beneficial uses is also set forth in various provisions of existing law. For example, see Water Code section 386, section 1707, section 1727, section 1736 and section 1810.

The requirement to avoid unreasonable effects on the overall economy of the area from which the water would be transferred (what is commonly referred to as "third-party economic impacts") is provided for in more limited situations. Water Code section 386 has such a provision, but it is in a chapter on State Board approval of water transfers that is rarely used. Water Code Sections 1725 through 1732 are in the chapter that is generally relied on for State Board approval of a temporary water transfer (i.e., for a term of less than one year), and section 1727 requires the State Board to consider only impacts to legal users and instream uses (i.e., the State Board is not authorized to consider third-party economic impacts). The same section 1727 requirements are also contained in section 1736 for approval of a long-term water transfer.

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Water Code Section 1810(d) requires DWR, however, to consider all three types of impacts (i.e., to legal users, to instream uses and to the economy of the area from which the water would be transferred) in determining whether to allow use of its surplus water system conveyance capacity for a water transfer.

Generally, transfer water is developed through four methods: (1) surplus water released from storage facilities; (2) substituting groundwater for transferred surface water; (3) fallowing agricultural land to make water available for transfer; and (4) undertaking conservation activities that develop surplus water (e.g., under Water Code section 1011). Transfers from storage and transfers resulting from conservation activities have little or no likelihood to cause third-party economic impacts because these types of transfers do not affect crop production or groundwater pumping. Therefore, it would not seem necessary or appropriate to require an analysis of potential third-party impacts from these two types of transfers.

There are other provisions of existing law that have the effect of limiting the extent to which water transfers that involve land fallowing or groundwater substitution would cause third-party economic impacts. For example, Water Code section 1745.05 (which authorizes water suppliers to transfer surplus water) puts a limit on the amount of land that may be fallowed in connection with a water transfer. Subdivision (b) of this section states: "The amount of water made available by land fallowing may not exceed 20 percent of the water that would have been applied or stored by the water supplier in the absence of any contract entered into pursuant to this article in any given hydrological year, unless the agency approves, following reasonable notice and a public hearing, a larger percentage."

Water Code section 1732 states that a petition for State Board approval of a temporary water transfer that involves the increased use of groundwater to replace transferred surface water must be in compliance with Water Code sections 1745.10 and 1745.11. Sections 1745.10 and 1745.11 generally require a water supplier that increases the use of groundwater to replace transferred surface water to determine that the groundwater use: (1) would be consistent with a groundwater management plan adopted pursuant to State law for the affected area; or (2) would not create or contribute to conditions of long-term overdraft in the affected groundwater basin.

Section 3405 of the federal Central Valley Project Improvement Act (Title 34 of Public Law 102-575) includes provisions that would limit the amount of federal water that a water district could transfer. For example, subsection (a)(1) states in part: "Transfers involving more than 20 percent of the Central Valley Project water subject to long-term contract within any contracting district or agency shall also be subject to review and approval by such district or agency under the conditions specified in this subsection ... [including a determination by the Secretary of Interior that the transfer would have no significant long-term adverse impact on groundwater conditions]."

**k. Environmental Review of Water Transfers**

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In general, water transfers are subject to compliance with the requirements of the California Environmental Quality Act and the National Environmental Policy Act, to the extent applicable. Water Code section 1729 provides an exemption from compliance with CEQA for temporary water transfers under Water Code sections 1725 through 1732.

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**END OF DISCLAIMER**
Attachment 3:
Public Comments
August 26, 2011

Matthew Marshall, Executive Director  
Redwood Coast Energy Authority  
517 5th Street  
Eureka, CA 95501

Re: Comprehensive Action Plan for Energy (CAPE)/County Energy Element

Dear Matthew,

As I described to you when we met in mid-August, the Humboldt Association of Realtors® (HAR) has been reviewing the County's Energy Element. Several of the Element’s goals, policies, etc. make reference to the Comprehensive Action Plan for Energy (CAPE) written by the Redwood Coast Energy Authority (RCEA). For example, the first Energy Element goal states:

E-G1. Countywide Strategic Energy Planning. An effective energy strategy...that is actively implemented countywide through...the Redwood Coast Energy Authority's Comprehensive Energy Action Plan.

CAPE is designated, by County planning staff, as the operating implementation document. However, we are concerned with what you conveyed in your August 12 email to me. You wrote that the current CAPE is “going to be further refined...” and “we do plan to refine...it into more of an actual action plan.”

The County’s Energy Element has been posted and made available for some time. This gives the public time to review and comment at the upcoming Planning Commission meetings on the Element. However, the CAPE document has changed into something significantly modified since its publication in 2005. Your email states it will change again. This makes for a moving target.

The Energy Element is important to the Association in that it has the potential to impact housing costs. CAPE is an important part of the Element. It is difficult for HAR, and the public, to comment on CAPE’s impact if it continues to change. Before the Planning Commission starts on the Energy
Element, we urge RCEA to complete revisions to CAPE allowing the public ample time to review a completed document.

Thank you,

Bob Higgons
Government Relations Coordinator

cc: Redwood Coast Energy Authority Board of Directors
    Humboldt County Planning Commission
    Kirk Girard, Director, County Community Services Department
    Tom Hofweber, Supervising Planner, County Community Services Dept
    Martha Spencer, Supervising Planner, County Community Services Dept
-----Original Message-----

From: Hofweber, Tom
Sent: Tuesday, August 09, 2011 2:56 PM
To: 'bhiggons@sbcglobal.net'
Cc: Spencer, Martha; Girard, Kirk
Subject: RE: Energy Element - CAPE?

Bob,
I talked to Matthew Marshall at Redwood Coast Energy Authority regarding the CAPE. He said that the CAPE hasn't been finalized, pending adoption of the County's energy element. He said he would compile the current draft and send it to me in a week.

To get an idea of what the CAPE contains, you can review the Energy Element document that RCEA prepared in 2005:
It was the basis for our Chapter 12 Energy Element of our draft General Plan. RCEA's 2005 document contains detail that was omitted from our GPU element, and that detail will form the basis of the CAPE.

While you may perceive a chicken or the egg issue, RCEA has been waiting for the County to adopt the general plan, at which point they will proceed to adjust their document to be consistent with the County's adopted energy element, and finalize it. They will do this before their Board at public meetings and will receive input from our Board of Supervisors. Like many items of the general plan, the CAPE is essentially an implementation program that is work to be done once our general plan is adopted.

Tom Hofweber, Supervising Planner
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