Association of California Water Agencies
Leadership Advocacy Information Since 1910

SENT VIA FAX WITH ORIGINAL TO FOLLOW BY MAIL

December 31, 2002

Mr. Paul Murphey
Associate Engineering Geologist
State Water Resources Control Board
P. O. Box 100
Sacramento, California 95812-0100

Re: Proposed Order Determining Legal Classification Of Groundwater Pumped By North Gualala Water Company

Dear Mr. Murphey:

This comment letter is being submitted by the Association of California Water Agencies (ACWA) in response to the proposed order of the State Water Resources Control Board (SWRCB) concerning the legal classification of groundwater pumped by the North Gualala Water Company. ACWA is a statewide, non-profit incorporated association organized and existing since 1910. The members of ACWA include more than 440 public agencies that manage water resources, develop water supplies, and deliver over 90% of the water used for urban and agricultural purposes in California.

ACWA has been involved in the SWRCB's actions regarding legal classifications of groundwater for several years. Beginning in 1999, with the classification of Pauma/Pala groundwater basins in San Diego County, ACWA submitted letters commenting on Board's proposed decision and ACWA's representatives appeared at the SWRCB's meetings on the issue. In 2001, ACWA submitted extensive oral and written comments during the SWRCB's process to review the legal classification of groundwater.

The broad concerns we expressed in those earlier board efforts are again raised by this proposed order. First, the order appears to upset long-standing precedent, established through court decisions and board orders, establishing that the overwhelming majority of groundwater in the state is percolating groundwater and not subterranean stream flows. This legal and policy structure is supported by a consensus among hydrologists. As stated in the Department of Water Resources latest publication in its Bulletin 118 series on groundwater, "all hydrologists agree that almost none of California's groundwater resources flow in subterranean streams."

Our second point is that for nearly 100 years Californians have relied upon the presumption created by the legal and policy precedent that the wells they operate pump percolating groundwater. They have invested literally billions of dollars on that

presumption and those investments now support entire regional economies. These water supplies and the economies that rely upon them would be put at risk if water right permits with junior priorities and unknown limitations are now to be required. Therefore, any departure from established precedent and policy would have far-reaching impacts and must be carefully considered.

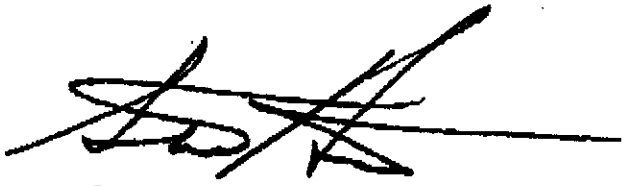
Third, because of the long-standing reliance upon this legal, policy and hydrologic presumption, not only does the burden of proof rest with the party seeking to establish that groundwater is a subterranean stream, we believe the facts must be compelling to establish the fact of subterranean stream flow. To require anything less would put the board and the state on a path toward setting new precedent that would weaken people's faith in the policies governing groundwater use in California and ultimately undermine the value of this important resource.

Given the gravity of these issues, we believe it is incumbent upon the board to weigh carefully all cases that come before it seeking to classify groundwater as percolating or subterranean flow. As the letter from our Legal Affairs Committee details, we do not believe the factual case has been made in North Gualala. In fact, we believe the administrative record was not adequately considered in the development of the proposed order. Although the hydrologic facts are in dispute, we believe, the proposed order distorts, mischaracterizes, and marginalizes the evidence supporting North Gualala Water Company's contention that the water being pumped is percolating groundwater. We further believe the proposed order is inconsistent with earlier court decisions and is inconsistent with the ultimate conclusions of the board in its groundwater classification review in 2001.

Accordingly, ACWA respectfully requests that the board not adopt the proposed order as written. Instead the Board should direct staff to rewrite the proposed order to make it consistent with the facts in the administrative record for this proceeding and consistent with the policy conclusions derived by the Board in its 2001 groundwater classification review.

ACWA, of course, stands ready to assist the Board in any way as it considers this order.

Respectfully submitted,



STEPHEN K. HALL
Executive Director

SKH/wh

Association of California Water Agencies
Leadership Advocacy Information *Since 1910*

SENT VIA FAX WITH ORIGINAL TO FOLLOW BY MAIL

December 31, 2002

Mr. Paul Murphey
Associate Engineering Geologist
State Water Resources Control Board
P. O. Box 100
Sacramento, California 95812-0100

Re: Proposed Order Determining Legal Classification Of
Groundwater Pumped By North Gualala Water Company

Dear Mr. Murphey:

The Legal Affairs Committee of the Association of California Water Agencies ("ACWA") submits these comments in response to the State Board's draft order concerning the legal classification of groundwater pumped by the North Gualala Water Company. ACWA is a state-wide, non-profit incorporated association organized and existing since 1910. The members of ACWA include more than 440 public agencies that manage water resources, develop water supplies, and deliver over 90% of the water used for urban and agricultural purposes in California.

As we have argued extensively to the State Board in recent years, the ACWA Legal Affairs Committee believes that the State Board should continue to use the standards enunciated in *City of Los Angeles v. Pomeroy*[1] to determine whether underground water is a "subterranean stream flowing through known and definite channels," as required for State Board permitting jurisdiction under Water Code §1200. These standards have served the State Board and its predecessors well since the Water Commission Act was adopted in 1914. More importantly, they have furnished a consistent body of law on which ACWA members and the public have relied. Creating new rules subjecting vast new quantities of underground water to State Board permitting jurisdiction would cause substantial and unwarranted disruptions to California's water users and would be contrary to the intent of the Legislature. ACWA was therefore pleased with the State Board's decision in the *Pauma/Pala* case[2], which was consistent with the *Pomeroy* standards.

The draft order in the North Gualala matter raises a number of questions that ACWA believes must be addressed before the State Board adopts any final order.

---

[1] 124 Cal. 598 (1899).
[2] D-1645 (2002).

First, the draft order completely ignores the critical legal rule, stated in *Pomeroy* and other California Supreme Court decisions, that the presumption is that groundwater is percolating groundwater, and that the burden of proof is on the party (here DFG) asserting that the groundwater instead is groundwater flowing in a subterranean stream.[3] Any final SWRCB order in this matter should discuss the differences in the evidence on the critical factual issues concerning flow boundaries and flow directions, and whether or not the party with the burden of proof submitted sufficient evidence to overcome this presumption.

Second, the draft order contains (in the two full paragraphs on page 11) a discussion of the historical context of *Pomeroy*. This discussion appears to be based on the Sax Report,[4] pages 19 and following. However, it is not clear what the purpose of the discussion is in the draft order. That purpose should be clearly stated. Professor Sax used the historical context of Pomeroy to bolster his argument that the *Pomeroy* test should be abandoned. If the State Board likewise intends to abandon the *Pomeroy* test, despite its apparent decision to the contrary in *Pauma/Pala*, then that intent should be clearly stated.

Third, the draft order cites *City of Los Angeles v. Hunter*[5] for the proposition that the groundwater in the San Fernando Valley is part of the subterranean flow of the Los Angeles River.[6] This misstates the holding of *Hunter*. As Professor Sax stated in his report: "The Court [held] it was immaterial whether the waters in question were considered percolating or not. Since '[t]hese waters percolate ... in the sense that they form a vast mass of water confined in a basin filled with detritus, always slowly moving downward to the outlet [which is the Los Angeles River],' then insofar as Los Angeles has paramount rights to the use of all the waters of the River, 'none of these so-called percolating waters may be withdrawn to the invasion and injury of such right.' It was held unnecessary, as in *Katz* and *McClintock*, to classify the water either as percolating or as a subterranean stream."[7]

Moreover, later decisions of the California Supreme Court made it clear that the *Hunter* holding was not based on the characterization of San Fernando Valley groundwater as a subterranean stream.[8]

---

[3] 124 Cal. at 528, 633-634; Arroyo Ditch & Water Co. v. Baldwin, 155 Cal. 280, 284 (1909).

[4] J. Sax, *Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws* (January 19, 2002).

[5] 156 Cal. 603 (1909)

[6] See Draft Order at 10, 12-13, 15.

[7] Sax Report at 24 (citations omitted).

[8] See *City of Los Angeles v. City of Glendale*, 23 Cal.2d 68, 73 (1943) ("Because the flow of the river is dependent on the supply of water in the San Fernando Valley, it has also been held that the pueblo right includes a prior right to all of the waters in the basin." (citing *Hunter*)); *City of Los Angeles v. City of San Fernando*, 14 Cal.3d 199, 248-51 (1975).

By citing *Hunter* as it does in its draft order, the State Board raises the question whether it intends to assert jurisdiction over all underground waters contained in alluvial valleys like the San Fernando Valley. This, of course, was the question raised in *Pauma/Pala*, and ACWA had understood from that decision that the State Board had decided not to make any such broad assertion of jurisdiction. ACWA requests that the State Board clarify its intentions.

Fourth, although the draft order purports to follow *Pomeroy*, it then proceeds to set forth a proposed new rule for groundwater classification cases, which may be summarized as follows:

> A subterranean stream may be found to exist even if its channel boundary allows a significant flow of groundwater into the channel from the surrounding bedrock formation, and even if such flow is across, rather than along, the channel, as long as the channel contains the water and does not permit significant groundwater flow back out of the channel.

To see that this is a new rule, one need look only to the State Board's decision in *Garrapata Creek*.[9] In that case, as in this one, the water company contended that the stream was a gaining stream, with the gains in streamflows being supplied from the fractured bedrock surrounding the alluvium. However, in that case the State Board did not apply the proposed rule set forth above, but instead weighed the evidence and determined that the evidence did not support the water company's contention. The State Board concluded that the relative impermeability test was met because there were not any significant flows of groundwater across the boundary between the bedrock and the alluvium. Instead, "the alluvium was recharged principally through the shallow percolation of rainfall through the zone of weathered bedrock, colluvium and soil, and through infiltration from surface flow in Garrapata Creek," and not from openings in the bedrock constituting the canyon walls and bottom.[10]

In addition to not being supported by prior court or State Board decisions, the new rule that is proposed in the North Gualala draft order also is faulty because the stated hydrologic basis for the new rule is incorrect. The draft order states in several places that the difference in permeability between the fractured bedrock and the channel alluvium prevents water flow out of the channel. Groundwater flow directions, however, actually are determined solely by water level differences, and not by permeability differences. The reason groundwater is flowing into the so-called "channel" discussed in the draft order is that groundwater levels outside the channel are higher than inside the channel. Groundwater does not flow out of that "channel" because groundwater, like surface water, does not flow up gradient.

---

[9] D-1639 (1999).

[10] D-1639 at 9; see Sax Report at 47-51.

The draft order cites no precedent for its proposed new rule, except D-1639 (*Garrapata Creek*), and, as stated above, D-1639 does not support the new rule. We have found no case that uses this rule as a basis for its decision. The draft order does give an argument for the rule: the postulated subterranean stream is a subterranean stream because it is "behaving like a surface stream."[11] However, this purported basis is not supported by *Pomeroy* or by D-1639, despite the statement in the draft order that it answers "the practical question" presented by D-1639. Because there is no supporting legal authority or precedent, the draft order should explain why "behaving like a surface stream" is a proper subject of inquiry under Water Code §1200.

Further, the draft order fails to discuss any arguments against the new rule. For ACWA, the most compelling arguments against the new rule are:

- It is based on incorrect science.
- It would represent a significant change from the principles the State Board has used in the past (as summarized in the Sax Report), on which the water community and the public have based their decisions to make very substantial investments in their water supply facilities, and on which they have based their expectations of being able to continue to rely on the supplies that are provided by these facilities.
- It could set a precedent that would result in reclassification of significant amounts of water from percolating groundwater to subterranean streams.

We are puzzled by the discussion of groundwater flow direction on page 18 of the draft order. The order emphasizes that North Gualala has shown the direction of groundwater flow *only within the channel alluvium*. But that is exactly where the direction of flow is important – within the postulated channel. The draft order sets up a "straw man" by comparing the groundwater flow direction to that of the surface stream,[12] and then correctly concludes that this is not the question. Instead of discussing the "straw man" argument, the State Board should focus on the correct question: whether the groundwater within the "channel" flows in the same direction as the channel. If we understand the draft order correctly, the evidence in this case shows that it does not. That should preclude a finding of a subterranean stream.

If it is the State Board's position that prior decisions support the new rule, then it should cite those decisions and explain how they apply. On the other hand, if the State Board acknowledges that the new rule goes beyond prior decisions, then the State Board should set forth the reasons why such a change is appropriate, given the concerns stated above.

As we said in our comments to the proposed *Pauma/Pala* decision and in our comments to the Sax Report, we believe that before any groundwater may be classified as

---

[11] Draft Order at 19.
[12] Draft order at 18-19.

a subterranean stream, the channel boundary actually must be a groundwater flow boundary which directs and channels the groundwater so that it actually flows in the direction of the channel not across it. The State Board should not adopt new rules regarding its regulation of groundwater. If there is to be any change in these rules, then the change should come through the legislative process, where all parties' interests can be considered and addressed to ensure that any new state regulation of groundwater is fair and implemented in an orderly manner.

We also want to point out an apparent editorial error. The draft order states that the permeability of the alluvial aquifer beneath Elk Prairie is "2.5 to 3 times" that of the surrounding bedrock.[13] If that were true, it would certainly rule out a known and definite channel. We suspect what was intended was "2.5 to 3 orders of magnitude," equivalent to 300 to 1000 times greater permeability.

In conclusion, the ACWA Legal Affairs Committee believes that the draft order should not be adopted in its present form, because it contains several serious errors. At the very least, if the SWRCB decides to adopt the draft order in its present form, then the SWRCB should add language (as it did in the Pauma/Pala decision) stating that, in accordance with Government Code section 11425.60, subdivision (a), the order may not be relied on as a precedent.

Thank you for considering our comments.

Respectfully submitted,

Robert B. Maddow

Robert B. Maddow
Chair, ACWA Legal Affairs Committee

RRM/wh

[13] Draft Order at 16.