



## Association of California Water Agencies

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Copy via fax to (916) 341-5400

Paul Murphey, Associate Engineering Geologist  
Division of Water Rights  
State Water Resources Control Board  
P.O. Box 2000  
Sacramento, CA 95812-2000

Re: North Gualala Water Company Matter – Revised Order  
Determining the Classification of Groundwater

Dear Mr. Murphey:

These comments on the revised draft order regarding the classification of groundwater pumped by the North Gualala Water Company are offered on behalf of the Association of California Water Agencies (ACWA). ACWA is a statewide association made up of more than 440 public agencies, which supply over 90 percent of the water used for urban and agricultural purposes in California.

ACWA has participated in several recent SWRCB proceedings regarding classification of groundwater, including the Pauma and Pala Basins matter, the review and analysis by Professor Joseph Sax, and the proceedings regarding the North Gualala Water Company. In the instant matter, please refer to our letter of December 31, 2002.

The revised draft order clearly demonstrates that the SWRCB has listened to at least some of the comments offered by ACWA concerning the widely held perception that the SWRCB appears to be attempting to expand its jurisdiction with regard to regulation of groundwater in California. We appreciate the language found in Footnote 1 on page 3 of the revised draft which attempts to allay our concerns and those of others who have made comments in this proceeding about the Board's intention, and which indicates that the SWRCB will take a case-by-case approach to groundwater classification issues.

Unfortunately, despite the draft order's attempt to include some reassuring language in Footnote 1 and some new language regarding the important issues of flow boundary and flow direction, ACWA's substantive questions about the draft order have not been addressed. As we read the revised draft order, it stands for the proposition that once water reaches a postulated subterranean stream channel, it is groundwater flowing in a subterranean stream, regardless of where the water came from, which direction it is flowing, or where it goes. Based on ACWA's admittedly limited knowledge of the facts

in the record of this proceeding, we believe that the revised draft order has to be read to say that even if the water in question comes from fractured bedrock and moves in a direction perpendicular to the streamflow direction, it nevertheless falls within the SWRCB's water-right jurisdiction. The revised draft order still does not state the legal basis for this conclusion, despite our request that it do so, and we do not believe the conclusion finds support in the leading case of *City of Los Angeles v. Pomeroy* (1899) 124 Cal. 597. Therefore, ACWA continues to believe that the adoption of the revised draft order would result in an unwarranted broadening of the SWRCB's jurisdiction over groundwater.

The revised draft order raises new concerns as well. New Footnote 1 contains two references to the San Fernando Valley which ACWA believes to be sorely misplaced. As we and other commenters indicated in comments on an earlier draft order in this proceeding, we believe that the SWRCB has misread the holding in *City of Los Angeles v. Hunter* (1909) 156 Cal. 603, and we urge that both references to the San Fernando Valley be stricken from Footnote 1. *Hunter* in fact held that the City of Los Angeles had pueblo rights to underground water in the San Fernando Valley, *whether or not that water was part of a subterranean stream*.

ACWA is also very concerned about Footnote 5 on page 12 of the revised draft order, which misstates the century-old presumption found in *Pomeroy*. The presumption is that groundwater is percolating, and not that it is "not part of a subterranean stream flowing in a known and defined channel." Footnote 5's attempt to restate the presumption undermines its strength and significance.

The second significant problem in Footnote 5 is the manner in which it addresses the issue of the burden of proof which must be carried by those seeking to overcome the *Pomeroy* presumption. The revised draft order is devoid of any consideration or weighing of the evidence produced during the hearing, save for the conclusory assertion that the evidence presented in the hearing met the burden. There is no indication of which evidence or witness was relied upon for this critical determination. If a presumption as significant as the *Pomeroy* presumption can be so cavalierly dismissed, the revised draft order raises doubt about the continuing significance of any presumption in proceedings before the Board.

ACWA understands that the revised draft order is driven by what the Board has determined the facts to be, and that groundwater cases will almost always be strongly fact-driven. As a result, we believe that it is critical for the SWRCB to provide clear guidance regarding the presumption, the burden of proof, and the manner in which evidence relating to the presumption is considered and weighed by the Board. These fundamental elements of groundwater law are critical to maintaining stability and certainty in the many parts of the State in which investment-backed decisions made over more than 100 years are at the heart of huge segments of California's urban and agricultural economies.

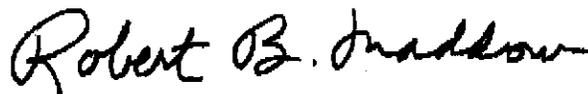
ACWA also remains concerned about the bifurcation of the SWRCB staff into a hearing team and a permitting team for water rights hearings. ACWA has consistently expressed concerns about the *Pomeroy* presumption and the burden of proof in groundwater classification proceedings. The bifurcation of SWRCB staff means that a portion of the Board's staff is allowed to appear before their staff colleagues assigned to the hearing team and before the hearing officer. Even with the limits discussed on page 4 of the revised draft order--i.e., no legal argument, no closing brief, and presumably no cross-examination by the permitting team--having SWRCB staff members present evidence that goes to the heart of groundwater classification raises a question about whether any such proceeding will ever have the appearance of complete fairness.

ACWA appreciates the limitations described on page 4 and the imposition of an "ethical wall" between the two staff teams, but must again express its serious misgivings about the bifurcated staff approach. These misgivings are reinforced by the revised draft order's failure to provide any indication of how the evidence produced by staff was balanced against that produced by the parties in reaching the conclusion that the *Pomeroy* presumption had been overcome.

Finally, ACWA reiterates its request that, even if the SWRCB ignores our comments and adopts the revised draft order in its present form, the SWRCB at least should add language stating that, in accordance with Government Code section 11425.60, subdivision (a), the order may not be relied on as a precedent.

ACWA appreciates the opportunity to provide these comments and will continue to urge the Board to take steps to avoid actual or perceived attempts to expand its jurisdiction over and regulation of groundwater.

Respectfully submitted,



Robert B. Maddow, Chairman  
ACWA Legal Affairs Committee

cc: Arthur G. Baggett Jr., Chairman, SWRCB  
SWRCB Board Members Gary Carlton, Richard Katz, and Peter S. Silva  
Celeste Cantu, Executive Director, SWRCB  
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