STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

DECISION 1645

In the Matter of Applications 30038, 30083, 30160, 30165,
30175, 30178, 30260, 30355, and 30374:
Determination of the Legal Classification of Groundwater
in the Pauma and Pala Basins of the San Luis Rey River

**WASTE MANAGEMENT, INC.; PEPPERCORN MUTUAL WATER CO.;
RANCHO PAUMA MUTUAL WATER CO.; THREE PARTY WATER CO.;
JAMES C. ROBERTS, INC.; SIERRA LAND GROUP, INC.;
JOHN AND MARTHA HANKEY; FLUOR FAMILY TRUST;
J. THOMAS AND KATHLEEN McCARTHY**
Applicants,

YUIMA MUNICIPAL WATER DISTRICT,
Protestant,

PAUMA VALLEY WATER COMPANY,
Interested Party

SOURCE: San Luis Rey River Subterranean Stream

COUNTY: San Diego

DECISION DETERMINING THE LEGAL CLASSIFICATION OF GROUNDWATER IN THE PAUMA AND PALA BASINS OF THE SAN LUIS REY RIVER

BY THE BOARD:

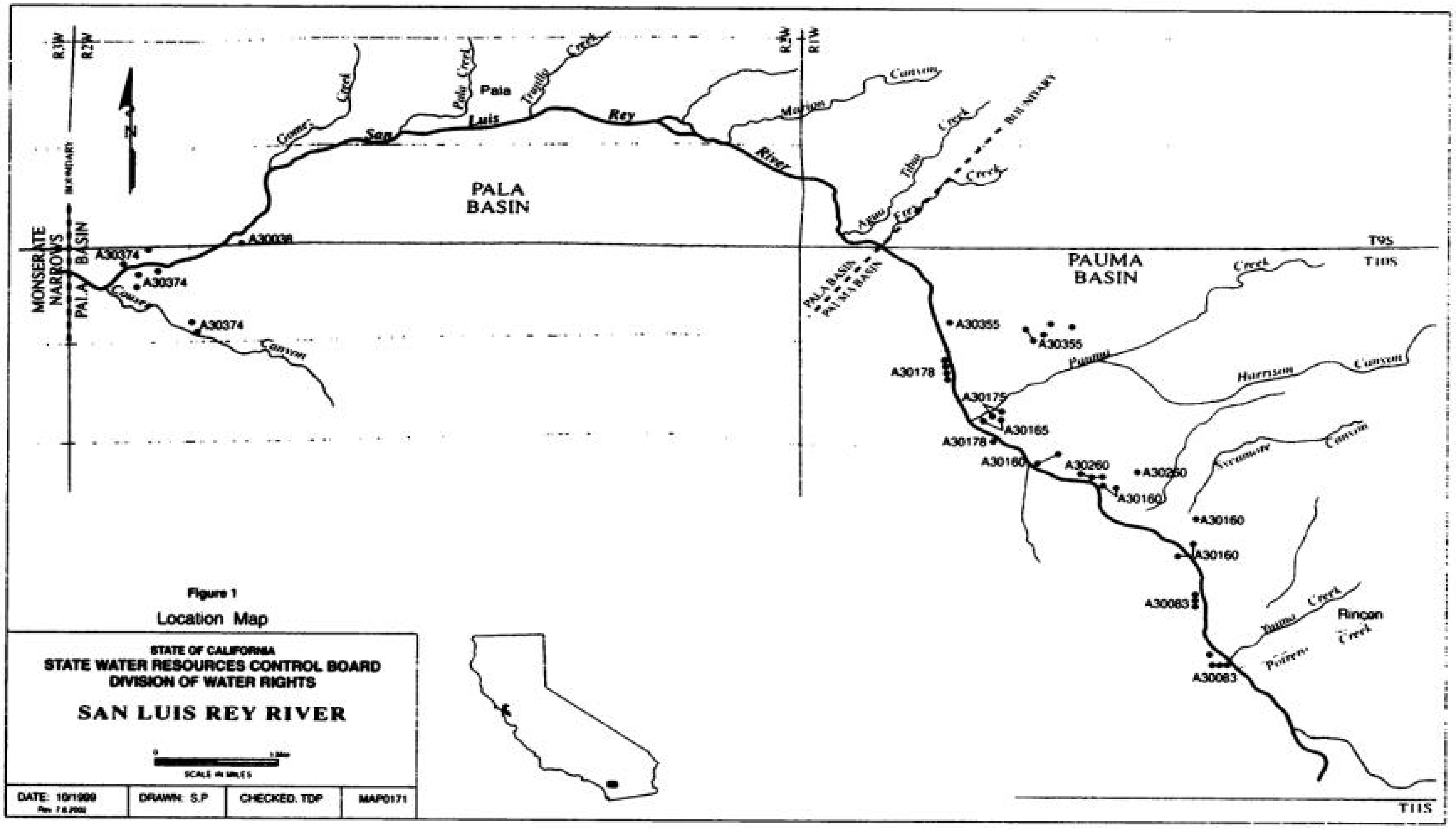
1.0 INTRODUCTION

Applications to appropriate unappropriated water from the Pauma and Pala Basins have been filed with the State Water Resources Control Board (SWRCB) by Waste Management, Inc. (Application 30038); Peppercorn Mutual Water Company (Application 30083); Rancho Pauma Mutual Water Company (Application 30160); Three Party Water

Company (Application 30165); James C. Roberts, Inc. (Application 30175); Sierra Land Group, Inc. (Application 30178); John and Martha Hankey (Application 30260); Fluor Family Trust (Application 30355); and Thomas and Kathleen McCarthy (Application 30374). With the exception of Application 30038 of Waste Management, Inc., all of the applicants' projects are existing extractions of water from wells in the Pauma Basin and the Pala Basin. Waste Management Inc.'s application is a proposed extraction of groundwater from the Pala Basin. Five of the applicants participated in the hearing: Peppercorn Mutual Water Company; Rancho Pauma Mutual Water Company; Three Party Water Company; James C. Roberts, Inc.; and Sierra Land Group, Inc. (collectively referred to as Applicants).

Waste Management filed its application to preserve its priority of right in case the SWRCB should make a determination that its proposed diversion is from a subterranean stream flowing through known and definite channels. In 1992, staff of the Division of Water Rights of the SWRCB (Division) wrote a memorandum that concluded that the groundwater in the alluvial aquifer in the Pala Basin is a subterranean stream flowing through known and definite channels. (Applicants' Exhibit 1, p. 3.)

The Division's Memorandum also contained a statement that the aquifer in the Pala Basin is continuous with the aquifers in the Pauma Basin and the Bonsall Basin. *(Id.)* The Pauma Basin is located upstream of the Pala Basin and the Bonsall Basin is located downstream of the Pala Basin. (See Location Map, Figure 1.) Groundwater in the alluvial aquifer in the Bonsall Basin downstream of the Monserate Narrows was previously determined to be a subterranean stream flowing through known and definite channels (Decision 432 (D-432) (1938) of the Division of Water Resources of the State Department of Public Works (predecessor to the SWRCB), reaffirmed in Order of the State Water Rights Board dated June 26, 1962).


R3W
R2W
R2W
R1W
N
Pala
Gomez Creek
Pala Creek
Trujillo Creek
San Luis Rey River
Marion Canyon
Agua Tibia Creek
Frey Creek
BOUNDARY
PALA BASIN
PAUMA BASIN
MONSERATE NARROWS
PALA BASIN
PALA BASIN
PAUMA BASIN
T9S
T10S
T11S
A30038
A30374
A30374
A30374
Couser Canyon
A30355
A30355
A30178
A30175
A30165
A30178
A30160
A30260
A30250
A30160
A30160
A30160
A30083
A30083
Pauma Creek
Harrison Canyon
Sycamore Canyon
Pauma Creek
Rincon
Potrero Creek
Figure 1
Location Map
STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS
SAN LUIS REY RIVER
SCALE IN MILES
DATE: 10/1999
DRAWN: S.P
CHECKED. TDP
MAP0171

In 1992, the Applicants filed applications to cover their historic water use in anticipation of the possibility that the groundwater in the Pauma Basin be determined to be flowing in a known and definite channel. (T, I, 41:1-8.) In 1993, Yuima Municipal Water District (Yuima) filed protests to the applications in which it contends that the groundwater extracted by the Applicants in the
Pauma Basin is percolating groundwater that is not subject to the permitting authority of the SWRCB.

The SWRCB bifurcated the proceedings on the applications to determine whether the SWRCB has permitting authority over extractions of groundwater from the Pauma and Pala Basins prior to making any determination regarding the merits of the pending applications. Accordingly, on October 15 and 16, 1997, the SWRCB held a hearing to receive evidence on the legal classification of the groundwater in the Pauma and Pala Basins of the San Luis Rey River.

2.0 HEARING ISSUES

On May 13, 1997, the SWRCB issued a Notice of Hearing. The Notice of Hearing contained two issues:

> "1. Is the groundwater in the Pauma Basin of the San Luis Rey River located in a subterranean stream flowing through known and definite channels?
>
> "2. Is the groundwater in the Pala Basin of the San Luis Rey River located in a subterranean stream flowing through known and definite channels?"

3.0 PARTIES TO THE HEARING

In addition to the Applicants listed in paragraph 1.0 above, Yuima, the Pauma Valley Water Company (Company), and the Division participated as parties at the hearing. Yuima has standing as a party because it is a protestant to the pending applications in the Pauma Basin. Both the Division and the Company were recognized as interested parties at the hearing by the

SWRCB Hearing Officer in accordance with California Code of Regulations, Title 23, section 761(a).[1] Section 761(a) states:

> "(a) Parties Recognized at Hearing. In addition to applicants, petitioners, and protestants of record, the board in its discretion, and upon such terms as it may impose to avoid prejudice to the parties, may recognize as interested parties other persons appearing at a hearing. Upon being so recognized, interested parties may participate in the proceedings. The board may request testimony and evidence from the appropriate California Regional Water Quality Control Board."

Since the Division and the Company are not applicants, petitioners, or protestants of record, it is appropriate that they be recognized as interested parties at the hearing.

4.0 APPLICABLE LAW

The California Water Code defines the water that is subject to appropriation and is thus subject to the SWRCB's permitting authority. Water Code section 1200 states:

> "Whenever the terms stream, lake or other body of water occurs in relation to applications to appropriate water or permits or licenses issued pursuant to such applications, such term refers only to surface water, and to *subterranean streams flowing through known and definite channels*." (Emphasis added.)

Groundwater which is not part of a subterranean stream is classified as "percolating groundwater." The distinction between subterranean streams and percolating groundwater was set forth by the California Supreme Court in 1899 in *Los Angeles v. Pomeroy* (1899) 124 Cal. 597 [57 P. 585]. In *Los Angeles v. Pomeroy*, the court stated that subterranean streams are governed by the same rules that apply to surface streams. (*Id*. at 632 [57 P. at 598].) Percolating groundwater is not subject to the Water Code sections that apply to applications, permits, or licenses to appropriate water from streams, lakes, or bodies of water. Thus, the SWRCB has permitting authority over subterranean streams but does not have permitting authority over percolating groundwater.

[1] Section 761(a) was in effect at the time of the hearing. This section was repealed March 26, 1998. Section 648.1 now applies to parties and other interested persons at a hearing.

Absent evidence to the contrary, groundwater is presumed to be percolating groundwater, not a subterranean stream. (*Id*. at 628 [57 P. at 596].) The burden of proof is on the person asserting that groundwater is a subterranean stream flowing through a known and definite channel. (*Id*.) This presumption does not bar the SWRCB from applying the water right permit and license system where the SWRCB, the applicant or another interested party can establish facts showing the existence of a subterranean stream. Rather, the presumption requires that the preponderance of the evidence presented in a contested hearing show that groundwater is flowing in a subterranean stream. In cases where no evidence shows the existence of a subterranean stream or the evidence is equally balanced, the burden of proof is not met. Most groundwater in California is percolating groundwater. In that sense, subterranean streams are the exception, and percolating groundwater is the rule, justifying placing the burden of proof in contested proceedings on those who seek to establish that groundwater is flowing in a subterranean stream in known and definite channels.

Proof of the existence of a subterranean stream is shown by evidence that the water flows through a known and defined channel. (*Id*. at 633-634 [57 P. at 598].) In *Los Angeles v*. *Pomeroy*, the court stated:

> " 'Defined' means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge; and the word 'known' refers to knowledge of the course of the stream by reasonable inference." (*Id*. at 633 [57 P. at 598].)

A channel or watercourse, whether surface or underground, must have a bed and banks which confine the flow of water. (*Id*. at 626 [57 P. at 595].) In *Los Angeles v*. *Pomeroy* the court stated that the bed and banks of a subterranean stream must be "comparatively" impermeable.[2] (*Id*. at 632 [57 P. at 597].) All geologic materials, including those recognized as confining the

[2] The term used in *Los Angeles* v. *Pomeroy* is "impervious," a synonym for "impermeable." The latter term is used more commonly in scientific literature and the SWRCB will follow this convention.

subterranean stream in *Pomeroy*, are permeable to some degree.[3] Thus, the bed and banks of a subterranean stream need not be absolutely impermeable. Rather, the confining materials must be as impermeable as the materials found to confine subterranean streams in the judicial and administrative precedents establishing and applying the test of what constitutes subterranean streams flowing through known and definite channels. This is a subjective test, as no SWRCB decisions or orders or appellate court opinions have quantified the difference in permeability between the alluvium and the surrounding or confining materials that is needed to establish a subterranean stream.

In summary, for groundwater to be classified as a subterranean stream flowing through a known and definite channel, the following physical conditions must exist:

1. A subsurface channel must be present;
2. The channel must have relatively impermeable bed and banks;
3. The course of the channel must be known or capable of being determined by reasonable inference; and
4. Groundwater must be flowing in the channel.

(SWRCB Decision 1639 (1999) at 4.)

5.0 COMPLIANCE WITH THE ADMINISTRATIVE PROCEDURE ACT

In its closing brief, the Company alleges that the SWRCB violated Chapter 4.5 of the Administrative Procedure Act ([APA]; Gov. Code, §§ 11400-11470.50) by not separating functions properly, by having a member of the SWRCB's hearing team show bias, by

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[3] The material found to be "comparatively impervious," in *Pomeroy,* and referred to in another passage of the case simply as "impervious," (124 Cal. at 631 [57 P. at 597]) was bedrock. (124 Cal. at 632 [57 P. at 597.] Like any natural material, bedrock is relatively, not absolutely impermeable. The court recognized that the ability to confine flow rather than absolute impermeability was required. (124 Cal. at 623 [57 P. at 594]: jury instruction 15.) Similarly, in *City of Los Angeles* v. *Hunter* (1909) 105 P. 755, 756, the court found bedrock to be the bed and banks of the subterranean stream. Thus, although in one passage in *Pomeroy* the court says "impervious," and at another passage it says "comparatively impervious," it is clear that the court meant "relatively impermeable" when it found that jury instruction 15 was proper and that bedrock formed the bed and banks of the subterranean stream.

During the hearing, at least one witness testified that "nothing in nature is truly impervious," (T, II, 318:24-25) and the witnesses recognized that "relative impermeability," not absolute impermeability, of the bed and banks is one of the physical characteristics for defining a subterranean stream. (T, I, 156:4-11; T, II, 313:9-14; 347:8-14.) It is also clear from the testimony that the witnesses in the SWRCB's hearing understood that the court meant relatively impermeable was the proper test.

requiring the Company to request permission to participate in the hearing as an interested party, and by suppressing evidence. (Company's Closing Brief, 14:9-18:7.)

Chapter 4.5 of the APA applies only to adjudicative proceedings commenced on or after July 1, 1997. (Gov. Code, § 11400.10, subd. (c).) The adjudicative proceeding leading to this decision commenced with issuance of the hearing notice on May 13, 1997. Even so, the procedural safeguards followed in these proceedings meet or exceed what would have been required by Chapter 4.5 of the APA if it did apply.

5.1 Separation Of Functions

The Company alleges that the SWRCB failed to separate functions in this proceeding and thus violated sections 11425.10(a)(4) and 11425.30 of the Government Code.

To maintain the impartiality of the proceeding, the SWRCB established a separate hearing team to advise the Hearing Officer and the Board, which did not include the staff who testified on behalf of the Division or assisted in the preparation of that testimony. By separating functions at the staff level, the SWRCB provided an additional procedural safeguard beyond that required by Chapter 4.5 of the APA.

Section 11425.10, subdivision (a)(4) of the Government Code states:

> "(a) The governing procedure by which an agency conducts an adjudicative proceeding is subject to all of the following requirements: . . .
> .
>
> "(4) The adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in Section 11425.30."

Section 11425.30 states:

> "(a) A person may not serve as *presiding officer* in an adjudicative proceeding in any of the following circumstances:
>
> "(1) The person has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage.

> "(2) The person is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage.
>
> "(b) Notwithstanding subdivision (a):
>
> "(1) A person may serve as presiding officer at successive stages of an adjudicative proceeding.
>
> "(2) A person who has participated only as a decisionmaker or as an advisor to a decisionmaker in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding or its preadjudicative stage may serve as presiding officer in the proceeding.
>
> "(c) The provisions of this section governing separation of functions as to the presiding officer also govern separation of functions as to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated." (Emphasis added.)

As the above quoted sections indicate, the requirements of Chapter 4.5 of the APA for separation of functions apply only to the decision-maker or presiding officer, not to staff advisors.

Similarly, the SWRCB went beyond the requirements of Chapter 4.5 of the APA with respect to ex parte communications. The APA rule against ex parte communications does not apply to communications by SWRCB staff in water right permitting or other nonprosecutorial proceedings before the SWRCB. (Gov. Code, § 11430.30, subd. (c)(2).) Nevertheless, the SWRCB applied to the staff team that presented evidence at the hearing the same restrictions on ex parte communications as applied to other parties in the proceeding.

During the hearing, the Company expressed concern regarding separation of functions because the hearing team engineer, Ms. Melanie Collins, and the Division's geologist, Ms. Julie Laudon made a site visit to the Pauma Basin on March 16, 1995 to collect information relevant to the issue of groundwater classification. (T, I, 225:3-6.) During the site visit, Ms. Collins and Ms. Laudon discussed the issue of groundwater

classification. (T, I, 228:3-6.) The Company contends that discussion violated the provisions of the APA regarding ex parte communications and separation of functions.

The APA limitations on ex parte communications apply only after an adjudicative proceeding has been initiated through issuance of any agency pleading or similar notice. (Gov. Code, § 11430.10, subds. (a), (c).) At the time of the site visit, there was no adjudicative proceeding pending to which the provisions of the APA would have applied. According to the APA, an "adjudicative proceeding" is "an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision." (Gov. Code, § 11405.20.) In 1995, applications to appropriate unappropriated water had been filed but no hearing on all or part of them was scheduled. All of the applications are for "minor" amounts of water as defined in Water Code section 1348 (not in excess of 3 cubic feet per second by direct diversion or storage in excess of 200 acre-feet per year). "Minor protested applications" are subject to Water Code sections 1345-1348 which do not require an evidentiary hearing to resolve protests. The APA provisions, if applicable, would not have applied until the SWRCB issued its Notice of Hearing on May 13, 1997.

At the hearing, counsel for the Company asked "when did the wall go up" between the Division and the SWRCB hearing team to prohibit ex parte communications and "are there memos that show when the wall went up on this proceeding?" (T, I, 229:21-23.) The wall went up on May 13, 1997, when the Notice of Hearing was issued. On May 13, 1997, counsel for the SWRCB's hearing team hand-delivered a memo to staff members, including supervisors and managers, describing the ex parte communication rules in effect for the hearing. This memo was read into the record of the hearing. (T, I, 234:9-235:1.) Separation of functions occurred prior to issuance of the hearing notice, but the date is not known. (T, I, 236:11-237:25.)

Ms. Collins had not violated any statutory requirement or agency directive against ex parte communications nor is there any evidence that she or other Board staff acted improperly in any manner. Nevertheless, in an effort to avoid an unnecessary dispute and distraction, the Hearing Officer exercised his discretion to excuse Ms. Collins from the

hearing team. She did not participate in the rest of the hearing or in the hearing team's review of the hearing record, and took no part in drafting or reviewing the decision proposed for adoption by the Board. The Company argues that because the SWRCB Hearing Officer excused the hearing team engineer from participating in the hearing, it "tends to prove the failure to follow the Administrative [Adjudication] Bill of Rights [Gov. Code, § 11425.10, which recites the APA requirements for separation of functions and restrictions on ex parte communications] in this regard." (Company's Closing Brief, 14:26-15:4.) To the contrary, the Hearing Officer's action underscores the SWRCB's commitment to maintain the impartiality of the hearing procedure. Although Ms. Collins' selection to the hearing team did not violate the APA, her removal from the hearing team would have been an appropriate remedy for the Company's concern if such a violation had occurred. Ms. Collins took no part in the hearing team's review of the record or in the preparation of the hearing team's recommendations to the Board on this decision.

In summary, the adjudicative function was separated from the investigative and advocacy functions in these proceedings. Excusing Ms. Collins from participation in the hearing was done in order to avoid an unnecessary dispute and distraction. It was not required to comply with the APA or with procedural due process. Neither Ms. Collins nor the other staff members on the SWRCB hearing team are decision makers; only the members of the SWRCB have the authority to make a decision in this matter. (Wat. Code, § 183.)

5.2 Bias

The Company contends that the attorney member of the SWRCB hearing team is biased because she "admonished Water Company's counsel with respect to a purported distinction between the terms 'underflow' and 'subterranean stream.'" (Company's Closing Brief, 15:14-16.) The Company alleges that "Ms. Katz's effort to persuade the parties as well as the hearing team that the terms mean two different things indicates or tends to show bias within the hearing team." (Company's Closing Brief, 15:22-24.) According to the transcript of the hearing, the statement by Ms. Katz which is at issue is:

> "I'd just like to clarify for the record that underflow does not equal subterranean stream. And so just with that clarification, if you mean underflow say underflow. And if you mean subterranean stream flowing through known and definite channels say subterranean stream. That's for everybody here not just Mr. Kidman." (T, I, 110:20-111:1.)

Government Code section 11425.40 governs bias in an administrative proceeding. Section 11425.40 states:

> "(a) The *presiding officer* is subject to disqualification for bias, prejudice, or interest in the proceeding.
>
> (b) It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the presiding officer:
>
> (1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group.
>
> (2) Has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on a legal, factual, or policy issue presented in the proceeding.
>
> (3) Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding.
>
> (c) The provisions of this section governing disqualification of the presiding officer also govern disqualification of the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.
>
> (d) An agency that conducts an adjudicative proceeding may provide by regulation for peremptory challenge of the presiding officer." (Emphasis added.)

Section 11425.40 applies to the presiding officer and other decision makers. Ms. Katz is not a presiding officer or decision maker. Even if the provisions of section 11425.40 applied to Ms. Katz, subdivision (b), paragraph (2) makes clear that her statement, without any additional evidence to show bias, would be appropriate because she is asking

for clarification of terminology used by witnesses and counsel.[4] There is no evidence to show bias in this proceeding.

5.3 Interested Party Status

The Company contends that requiring it to request interested party status to participate in the hearing "violates due process as well as offends the spirit of fairness required in adjudicative proceedings pursuant to the Administrative Procedures [sic] Act." (Company's Closing Brief, 16:7-11.) The Company provides no support for its contention.

The APA defines "party" to a proceeding to include "the agency that is taking action, the person to which the agency action is directed, and any other person named as a party or allowed to appear or intervene in the proceeding." (Gov. Code, § 11405.60.) In a proceeding to decide whether to process a water right application or issue a water right permit, the person to which agency action is directed is the applicant. The only part of that definition that fits the Company is "any other person . . . allowed to appear or intervene in the proceeding." The Company was allowed to appear in the hearing by the SWRCB Hearing Officer in accordance with SWRCB regulations.

The APA provides that the "governing procedure by which an agency conducts an adjudicative proceeding is determined by the statutes and regulations applicable to that proceeding." (Gov. Code, § 11415.10.) The hearing was conducted in accordance with the provisions of the Water Code and Title 23 of the California Code of Regulations as well as the Notice of Hearing. Former section 761(a) of Title 23 of the California Code

[4] Some of the witnesses appeared to use the term underflow as a synonym for subterranean stream, and the SWRCB has sometimes used the term underflow as a shorthand reference for groundwater in a subterranean stream in known and definite channels. But the term underflow is described in Los Angeles v. Pomeroy as having characteristics that are not entirely the same as the characteristics of a subterranean stream in known and definite channels. (124 Cal. at 624 [57 P. at 594].) A recent SWRCB decision characterized underflow as a subset of subterranean stream flowing in known and definite channels. (Decision 1639 (1999) at 7.) In these circumstances, asking the participants to be clear about whether they are referring to underflow or subterranean streams in known and definite channels served to help avoid confusion.

of Regulations governed parties recognized at a hearing.[5] As stated in section 3.0 of this decision, the Company was recognized as an interested party at the hearing by the SWRCB Hearing Officer in accordance with section 761(a).

Finally, the APA's Administrative Adjudication Bill of Rights only requires the agency to give the person to whom the agency action is directed notice and an opportunity to be heard. (Gov. Code, § 11425.10(a)(1).) The SWRCB provided notice to more persons that it was legally obligated to ensure fairness to anyone who may have an interest in the subject of the hearing and to provide them an opportunity to be heard. Requiring that persons so notified request to be recognized as an interested party to the hearing is not a violation of due process nor is it a violation of the spirit of fairness required by the APA.

5.4 Suppression of Evidence

The Company alleges that the SWRCB suppressed a draft memorandum to files regarding Applications 30083, 30160, 30165, 30175, 30178, 30260, San Luis Rey River, San Diego County dated October 18, 1994, written by Ms. Collins (referred to in the Company's closing brief as "Collins Memo #3"). The Company argues that the failure to make the draft available to the parties during the hearing is contrary to the spirit of the APA as well as SWRCB regulations.

The parties, the SWRCB hearing team (with the exception of Ms. Collins), and the SWRCB Hearing Officer first became aware of the existence of Collins Memo #3 when Yuima passed out a set of exhibits to all counsel at the end of the first day of hearing which it intended to offer into evidence during rebuttal. Exhibits 41 and 42 of that set of exhibits are Contact Reports prepared by Ms. Collins dated October 14, 1994, and October 19, 1994, respectively. They are also part of Staff Exhibit 1. In those Contact Reports, Ms. Collins stated that she prepared a draft memorandum which was being routed for review in which she concluded that groundwater near the San Luis Rey River channel in the Pauma Basin is percolating groundwater. At the end of the second day of

[5] Section 761(a) was in effect at the time of the hearing. This section was repealed March 26, 1998. Section 648.1 now applies to parties and other interested persons at a hearing.

hearing, Exhibits 41 and 42 were accepted into evidence subject to the hearsay rules applicable to the proceeding. (T, II, 561:12-562:17.)

In a letter dated October 21, 1997, the Company requested a copy of Collins Memo #3. At the request of the SWRCB Hearing Officer, the Chief of the Division of Water Rights conducted a thorough search to attempt to locate the draft memo. The original could not be located, but a copy of the draft memorandum was located on October 28, 1997.

The draft memorandum was not included in the files of the SWRCB because it was a preliminary draft that was never finalized. Draft documents are not included in the SWRCB's files. Further, preliminary drafts such as Collins Memo #3 would not normally be retained in the ordinary course of business. Draft memoranda such as Collins Memo #3 are exempt from the Public Records Act pursuant to Government Code section 6254, subdivision (a). Nevertheless, the SWRCB Hearing Officer waived the exemption and provided a copy of the draft to all of the parties on November 3, 1997.

There is no basis for the Company's claim that the SWRCB suppressed the draft memorandum, or that failure to make it available earlier was reversible error. The draft was prepared long before the SWRCB decided to hold a hearing on the applications, and is not the type of document that would ordinarily be retained. Indeed, the SWRCB apparently was not aware that a copy of the draft memorandum was still available until after the Company requested a copy.

The Company claims, without explanation, that the SWRCB's failure to produce the draft memorandum sooner violates the "spirit" of the Administrative Adjudication Bill of Rights. Nothing in the Administrative Adjudication Bill of Rights appears to have any relevance to issues concerning disclosure of evidence. (See Gov. Code, § 11425.10 et seq.) Similarly, the Company relies on an SWRCB regulation, former section 648.3 of

Title 23 of the California Code of Regulations,[6] that governs the order of proceedings in an adjudicative proceeding, and does not address disclosure of evidence. Finally, the Company relies on authority that, in a criminal case, the prosecution must disclose material evidence favorable to the accused. (*People v. Filson* (1994) 22 Cal.App.4th 1841 [28 Cal.Rptr.2d 335].) The Company cites no authority for the proposition that disclosure is required in a nonprosecutorial administrative proceeding.

Moreover, the Company had information indicating that the draft memorandum was available, and could have obtained a copy of the draft before the hearing if it had made a timely request. The contact reports indicating that the draft memo had been prepared were available to the parties, but the Company did not request a copy until after the hearing. The SWRCB responded promptly to the request. Finally, there is no basis for concluding that the outcome would have been different if the Company had obtained the draft memorandum before the hearing. The author of the draft did not testify at the hearing, and the memorandum would not have provided a basis for impeachment of any witness who did testify. As discussed in Section 6.0, below, the draft memorandum had no probative value. Nor did the draft memorandum disclose any physical evidence or other material information not otherwise available to the parties. That the SWRCB did not provide copies of the draft memorandum to the parties until requested to do so does not provide a basis for concluding that the SWRCB violated any requirement of the APA or SWRCB regulations or that the SWRCB otherwise failed to provide a fair hearing procedure.

6.0 REQUESTS FOR OFFICIAL NOTICE OF DOCUMENTS

The Applicants and the Division requested that the SWRCB take official notice of specified documents pursuant to California Code of Regulations, Title 23, section 761(e)[7]. In its closing brief, the Company requested that Collins Memo #3 be officially

[6] Former section 648.3 was in effect at the time of the hearing. This section was repealed March 26, 1998, and replaced by the current section 648.3 Section 648.5 now addresses the issues addressed by former section 648.3.

[7] Section 761(e) was in effect at the time of the hearing. This section was repealed March 26, 1998. Section 648.2 now applies to official notice.

noticed. Yuima filed objections to the requests by the Applicants and the Division for official notice.

Former section 761(e) and current section 648.2 of Title 23, California Code of Regulations, provide that the SWRCB may take official notice of such facts as may be judicially noticed by the courts of this State. Evidence Code sections 451 and 452 govern matters which must be and may be judicially noticed. Evidence Code section 451 states:

> "Judicial notice *shall* be taken of the following:
>
> (a) The decisional, constitutional, and public statutory law of this state and of the United States and the provision of any charter described in Section 3, 4, or 5 of Article XI of the California Constitution.
>
> (b) Any matter made a subject of judicial notice by Section 11343.6, 11344.6, or 18576 of the Government Code or by Section 1507 of Title 44 of the United States Code.
>
> (c) Rules of professional conduct for members of the bar adopted pursuant to Section 6076 of the Business and Professions Code and rules of practice and procedure for the courts of this state adopted by the Judicial Council.
>
> (d) Rules of pleading, practice, or procedure prescribed by the United States Supreme Court, such as the rules of the United States Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy.
>
> (e) The true signification of all English words and phrases and of all legal expressions.
>
> (f) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute." (Emphasis added.)

Evidence Code section 452 states:

> "Judicial notice *may* be taken of the following matters to the extent that they are not embraced within Section 451:

(a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Emphasis added.)

Matters that are officially noticed are a form of evidence and may be used or relied on or rebutted under the rules of evidence that apply to administrative proceedings. (California Administrative Hearing Practice, Second Ed., § 7.83.) Evidence supplied under the doctrine of official notice is not conclusive and it should be weighed and considered together with all other evidence in the record. (*Mack v. State Bd. of Educ.* (1964) 224 Cal.App.2d 370, 373 [36 Cal.Rptr. 677].)

On November 26, 1997, the Applicants submitted a Request for Official Notice of the following documents:

1. "Water Sales Agreement" executed by Rancho Estates Mutual Water Company on March 18, 1994, and Yuima Municipal Water District on February 18, 1994;

2. "Emergency Well Agreement" executed by Rincon Oaks Water Service and Yuima Municipal Water District on May 28, 1991;

3. "Emergency Well Site Lease and Pipeline Easement" executed by Schoepe Enterprises on October 18, 1993, and Yuima Municipal Water District on October 15, 1993;

4. "Emergency Well Site Lease and Pipeline Easement" executed by Schoepe Enterprises on April 12, 1991, and Yuima Municipal Water District on April 15, 1991;

5. "Amendment No. 1 to Emergency Well Site Lease and Pipeline Easement" executed on October 29, 1991, by Schoepe Enterprises and Yuima Municipal Water District;

6. "Amendment No. 2 to Emergency Well Site Lease and Pipeline Easement" executed by Schoepe Enterprises on August 21, 1992, and Yuima Municipal Water District on June 22, 1992;

7. Certified copy of Resolution No. 95-11: Resolution of the Board of Directors of the San Diego County Water Authority Amending Section 15.2 and 15.3 of the Administrative Code Modifying Water Rates Effective July 1, 1995, and Finding Such Action Exempt from the California Environmental Quality Act; and

8. Certified copy of the minutes of the regular meeting of the Board of Directors of the Metropolitan Water District of Southern California of March 12, 1996, whereby the Board of Directors adopted the water rates effective January 1, 1997.

Documents 1 through 6 are contained in Exhibit 1 attached to the Applicants' Request for Official Notice. Document 7 is contained in Exhibit 2 and document 8 is contained in Exhibit 3 attached to the Applicants' Request for Official Notice. Official notice of documents 1 through 6 is requested to show bias of Yuima. Official notice of documents 7 and 8 is requested to show bias of Yuima because it has an alleged financial interest in using groundwater instead of imported water. (Applicants' Request for Official Notice, p. 3.)

In its closing brief, the Division requested that the SWRCB take official notice of the facts summarized in Exhibit A (attached to its closing brief). Exhibit A is a list of water right applications, permits, licenses, statements of water diversion and use, and small domestic use registrations for which groundwater (either subterranean streams flowing through known and definite channels or "underflow") is listed as the source of the water diverted according to the Water Rights Information Management System database maintained by the Division. The Division does not claim that Exhibit A is a complete listing of diversions from subterranean streams nor does it claim that each source of groundwater listed meets the legal requirements for classification as a subterranean stream. The Division requests that the SWRCB take official notice that SWRCB records show many sources of groundwater in California have been recognized or treated as constituting subterranean streams (or "underflow") subject to Water Code sections 1200-1202. (Division's Closing Brief, p. 17.)

At the hearing, all of the parties agreed to provide the Applicants and the Division an opportunity to request a continuation of the hearing which would be limited to additional cross-examination and/or rebuttal regarding Yuima's exhibits introduced on rebuttal. (T, II, 592:25-593:6.) Neither the Applicants nor the Division requested a continuation of the hearing.

The parties also agreed that legal briefs must be filed within 30 days of the close of the evidentiary record. (T, II, 593:7-9.) New evidence cannot be submitted after the close of the evidentiary record. Attempting to introduce new evidence after the close of the

evidentiary record by requesting that the SWRCB take official notice of the documents is inappropriate where the parties had stipulated to allowing the Applicants and the Division to request a continuation of the hearing. The documents could have been offered into evidence at the continued hearing.

Yuima offered its Exhibit 40 into evidence at the hearing and, on a hearsay objection raised by the Division, asserted that the SWRCB could take official notice of it regardless of the hearsay objection raised by the Division. (T, II, 560:18-561:9.) Exhibit 40 is Department of Water Resources Bulletin 118. Exhibit 40 contains a footnote which states that "all hydrologists agree that almost none of California's groundwater resources flow in subterranean streams." (T, II, 555:24; 556:3-5.) It was that statement that gave rise to the hearsay objection. (T, II, 560:21-561:3.) The Hearing Officer admitted Exhibit 40 into evidence subject to the weight to be given to the evidence so there is no need to address whether it should be officially noticed by the SWRCB. (T, II, 561:10-12.)[8]

Yuima introduced its Exhibit 40 during rebuttal. The Division could have requested a continuation of the hearing to rebut Exhibit 40 and the testimony of Yuima's witness regarding how much of California's groundwater resources flow in subterranean streams with the Division's proposed Exhibit A. It is inappropriate to circumvent the agreement of the parties by taking official notice of Exhibit A. Further, Exhibit A is not subject to mandatory official notice pursuant to Evidence Code section 451. Accordingly, the SWRCB denies the request of the Division to take official notice of Exhibit A.

[8] The footnote contained in Yuima Exhibit 40 is not persuasive as to the issues presented in this hearing. It has very little, if any, bearing on whether a particular body of water is a subterranean stream. Subterranean streams clearly exist as a matter of law. In *Los Angeles* v. *Pomeroy, supra*, the California Supreme Court set forth the distinction between subterranean streams and percolating groundwater. Water Code section 1200 includes subterranean streams in defining which waters are subject to the SWRCB's permitting authority, an assignment of authority that would have been pointless if none of California's water resources flows in subterranean streams. The generalization in the footnote may be valid, even if it may have been exaggerated for emphasis, if one compares the total volume of water found as percolating groundwater to the volume of water in subterranean streams. It is also true, however, that there are a number of decisions where the SWRCB and the courts have determined that a subterranean stream exists in a particular case. There have been many instances in which the parties involved have recognized that water was being diverted from a subterranean stream and no formal decision on the legal classification of groundwater was necessary. (See, e.g., SWRCB Decisions 1639, 1633, 1632, 1624, 1589, 432, and 119; SWRCB Orders WR 95-10, 90-19, and 88-14.)

The Applicants knew that Yuima would be appearing at the hearing. The Applicants received Yuima's proposed testimony and exhibits prior to the hearing. The Applicants could have offered documents 1 through 8 to show bias and financial interest of Yuima as part of its case in chief or on rebuttal. There is no information to show that these documents could not have been introduced at the hearing. It is inappropriate to take official notice of documents which could have been introduced at the hearing over the objection of the party against whom they are offered. Further, none of the documents which are the subject of the official notice requests are documents which must be officially noticed in accordance with Evidence Code section 451. Accordingly, the SWRCB denies the request of the Applicants to take official notice of documents 1 through 8.

Official notice of Collins Memo #3 is not required by Evidence Code section 451. Further, the document is a preliminary draft that was never finalized and never filed in the official files of the SWRCB. The draft memo was never approved by supervisory personnel who have technical qualifications not possessed by Ms. Collins. At the time of the hearing Ms. Collins was not a registered civil engineer, certified engineering geologist, or registered geologist; and at the time she prepared her draft memo, she did not appear to possess comparable training and expertise to determine the legal classification of groundwater. In a memorandum dated August 31, 1995, Ms. Collins admitted that the legal classification of groundwater in the Pauma Basin is outside of her area of expertise. (Staff Exhibit 1.) Consequently, Collins Memo #3 has no probative value in these proceedings. Therefore, the SWRCB denies the request of the Company to take official notice of Collins Memo #3.

7.0 DISCUSSION OF HEARING ISSUES

There is general agreement among the witnesses testifying at the hearing regarding the physical conditions that must exist for groundwater to be classified as a subterranean stream flowing through a known and definite channel (see Section 4.0, *supra*). The

Applicants' witness testified that groundwater has to be flowing within defined boundaries to be a subterranean stream. (T, I, 61:9-15.) The Division's witness testified that a subterranean stream is a groundwater aquifer that is bounded by a known and defined channel that has bed and banks that are relatively impermeable compared to the aquifer material which fills the channel, and that groundwater must flow through the basin. (T, I, 156:4-11.) Yuima's witness testified that water needed to flow in a course with a definable subsurface structure that is relatively impermeable to confine such a subsurface stream. (T, II, 313:9-14, 346:16-24.) He also testified, however, that other factors should be considered. (T, II, 314:8-12; Yuima Exhibit 5, p. 2.) The Company's witness testified that a subterranean stream must flow in a course that is defined and has a bed and banks. (T, II, 448:1-8.)

Although there is general agreement among the witnesses regarding the physical conditions that must exist for groundwater to be classified as a subterranean stream flowing through a known and definite channel, the witnesses do not agree that the four physical conditions identified in Section 4.0 above exist in the Pauma Basin.

7.1 Physical Setting

The San Luis Rey River watershed is in northern San Diego County. The San Luis Rey River flows through five valleys: Warner, Pauma, Pala, Bonsall, and Mission. The valleys are separated by narrow, steep-walled canyons. The valleys are underlain by alluvial fill of varying thickness in which groundwater is present. The groundwater basins share the same names as the valleys: Warner, Pauma, Pala, Bonsall, and Mission. The SWRCB previously determined that the groundwater in the Bonsall and Mission Basins is flowing in a subterranean stream with known and definite channels. The Pauma Basin extends from the confluence of the San Luis Rey River and Paradise Creek to the Agua Tibia Narrows near the confluence of the San Luis Rey River and Frey Creek. The Pala Basin extends from the Agua Tibia Narrows to Monserate Narrows.

The San Luis Rey River flows in a northwesterly direction through the Pauma Valley. At Pala, the San Luis Rey River curves to the southwest and flows to the Pacific Ocean at Oceanside. The Pauma Valley is approximately 7.5 miles long and varies in width from approximately one mile to 2.25 miles. The Pala Valley is approximately 5 miles long and varies in width from approximately 1,000 feet to 1.5 miles. (Applicants' Exhibit 2, p. 3; Division Exhibit 8, p. 5.)

The Pauma Basin is bounded by a pre-Tertiary basement complex of metamorphic and igneous rocks. The alluvial fill in the Pauma Basin is comprised maximum thickness of river channel deposits and younger alluvium (0-130 feet thick), alluvial fan deposits (of 370 feet), and older alluvium (maximum thickness of 160 feet). (Applicants' Exhibit 2, pp.12-13.)

The Pala Basin is bounded by the same basement complex as the Pauma Basin. The alluvial fill is not as thick as the Pauma Basin and is comprised of river channel deposits and younger alluvium, and alluvial fan deposits. There is no older alluvium in the Pala Basin. (*Id*., p. 16.)

7.2 Pala Basin

The Division's witness testified that groundwater in the alluvium of the Pala Basin is flowing in a subterranean stream. The geologic formation described as the basement complex forms the bed and banks of the subterranean stream channel. (T, I, 159:12-17; Division Exhibit 2, p. 3.) The basement complex is relatively impermeable compared to the unconsolidated deposits. (T, I, 161:13-15; Division Exhibit 2, p. 5.) Groundwater is flowing in the subterranean channel. The gradient generally parallels the net flow direction of the San Luis Rey River. The groundwater is flowing in the "downstream direction" of the San Luis Rey River. (T, I, 162:24-163:25; Division Exhibit 2, pp. 5-6.) No evidence was introduced to show that the groundwater in the Pala Basin is percolating groundwater.

The evidence is uncontroverted and it clearly establishes that a subsurface channel is present, the channel has relatively impermeable bed and banks, the course of the channel is known or is capable of being determined by reasonable inference, and groundwater is flowing in the channel. Therefore, the SWRCB finds that the groundwater in the Pala Basin of the San Luis Rey River is a subterranean stream flowing through known and definite channels. For the purpose of this decision, the upstream boundary of the Pala Basin is defined as the confluence of Frey Creek and the San Luis Rey River.

7.3 Pauma Basin

Witnesses for the Applicants and the Division testified that groundwater in the Pauma Basin is water flowing in a subterranean stream channel bounded by nearly impermeable igneous and metamorphic bedrock.

Witnesses for Yuima and the Company testified that the groundwater in the Pauma Basin is percolating groundwater. They contend that the subsurface conditions necessary to classify the groundwater in the Pauma Basin as a subterranean stream, i.e., groundwater flowing in a known and defined channel with relatively impermeable bed and banks, are not present in the Pauma Basin.

The parties for both sides of the groundwater classification issue offered credible evidence. The SWRCB finds that the weight of the evidence offered by the parties is equally persuasive. Because the party claiming that groundwater is flowing in a subterranean stream has the burden of proof, we must conclude that the water in the basin does not constitute an underground stream in known and definite channels in a case where, as here, the weight of the evidence is equally balanced. The applications filed by the Applicants' to extract groundwater in the Pauma Basin should be canceled because the SWRCB has not found that it has permitting authority here.

8.0 CONCLUSION

Based upon the facts in this case, the SWRCB finds and concludes the following:

1. The groundwater in the Pauma Basin of the San Luis Rey River is percolating groundwater that is not subject to the permitting authority of the SWRCB.

2. The groundwater in the Pala Basin of the San Luis Rey River is a subterranean stream flowing through known and definite channels.

3. The SWRCB provided a fair hearing, consistent with the requirements of Chapter 4.5 of the APA.

4. The requests for official notice of documents by the Applicants, the Division, and the Company are denied.

5. This decision relies on the site-specific facts present in the instant case. It is therefore not a precedent decision and may not be expressly relied on as a precedent in accordance with Government Code section 11425.60, subdivision (a).

ORDER

IT IS HEREBY ORDERED that the Chief of the Division of Water Rights expedite processing of Applications 30038 and 30374.

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IT IS FURTHER ORDERED that the Chief of the Division of Water Rights cancel Applications 30083, 30160, 30165, 30175, 30178, 30260, and 30355.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a decision duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 17, 2002.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz
Gary M. Carlton

NO: None

ABSENT: None

ABSTAIN:

Maureen Marché
Clerk to the Board