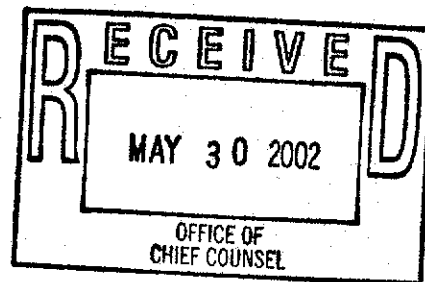


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10  
11 **BEFORE THE**  
12 **STATE WATER RESOURCES CONTROL BOARD**  
13 **STATE OF CALIFORNIA**

14 In re: Petition to Revise Declaration of  
15 Fully Appropriated Stream Systems  
16 Designation of American River,  
17 Sacramento County

18 **OBJECTION AND MOTION TO EXCLUDE**  
19 **EVIDENCE OUTSIDE NOTICED SCOPE**  
20 **OF HEARING**

21 Aerojet-General Corporation ("Aerojet") hereby objects to, and moves to exclude,  
22 the following evidence because it is clearly outside the scope of the above-titled proceeding and,  
23 therefore has no probative value to the State Water Resources Control Board ("SWRCB" or  
24 "Board"):

- 25 (1) Sacramento County Exhibit 1 (written testimony of Keith DeVore, Director,  
26 Department of Water Resources, County of Sacramento and Sacramento  
27 County Water Agency) ("SC Exh. 1"); and  
28 (2) Southern California Water Company ("SCWC") Exhibit 8 (expert witness  
testimony of Robert Hanford) ("SCWC Exh. 8").

SC Exh. 1 and SCWC Exh. 8 comprise the written testimony of witnesses, and Sacramento  
County and Southern California Water Company have noticed their intent to offer oral testimony  
of these same witnesses during the proceeding. Neither the exhibits nor any potential testimony,  
as framed by the written testimony, has any probative value for deciding the issues the Board has

1 defined for this proceeding. Accordingly, the exhibits and testimony should be excluded from  
2 evidence, so that the parties and SWRCB can focus on the factual testimony and evidence that has  
3 been offered relevant to the issues before the Board in this hearing. 23 Cal. Code Regs.,  
4 § 648.5.1; Gov't Code § 11513(c), (f).

5 **A. THE OBJECTIONABLE EVIDENCE IS CLEARLY OUTSIDE THE SCOPE**  
6 **OF THE PROCEEDING DEFINED AND NOTICED BY THE SWRCB**

- 7 1. **The Board has clearly defined the hearing scope to exclude evidence and**  
8 **argument regarding how any "new water" should be allocated among**  
9 **competing uses**

10 Aerojet pumps percolating groundwater, treats it and then discharges the water  
11 into Buffalo Creek, a tributary of the American River, pursuant to a Superfund cleanup program  
12 overseen by the Central Valley Regional Water Quality Control Board, the California Department  
13 of Toxic Substances Control and the United States Environmental Protection Agency. Southern  
14 California Water Company has lodged an application to appropriate this water and, in order to  
15 allow the application to be processed, has filed a petition to amend the State Water Resources  
16 Control Board's declaration that the American River is fully appropriated. The instant hearing  
17 concerns only the petition.

18 The SWRCB has defined the objective of this proceeding to be the determination  
19 of whether there is "new water" justifying a revision to the declaration that the American River is  
20 fully appropriated from its confluence with the Sacramento River upstream. SWRCB Notice of  
21 Pre-hearing Conference, Public Hearing and Petition to Revise Declaration of Fully Appropriated  
22 Stream Systems Regarding the American River. Sacramento County ("Hearing Notice") at 4  
23 ("KEY ISSUES"). With this objective in mind, the SWRCB provided written notice to all parties  
24 clearly delimiting the scope of this proceeding. The notice dated March 6, 2002, defined these  
25 five issues:

- 26 • Should the SWRCB revise the Declaration to allow the Division of Water  
27 Rights to accept and process water right applications to appropriate  
28 "treated groundwater discharged into the American River"?
- Has adequate information been provided to demonstrate that there is a

1 change in circumstances since the American River system was included in  
2 the FAS Declaration?

- 3 • How much, if any, of the water discharged by groundwater treatment  
4 operations is water that was not considered at the time the American River  
5 system was included in the FAS declaration?
- 6 • To what extent, if any, have flows in the American River been affected by  
7 groundwater treatment operations, including both pumping and  
8 discharging, since the American River system was included in the FAS  
9 Declaration?
- 10 • Has the petitioner provided sufficient hydrologic data, water usage data, or  
11 other relevant information to support a determination that there is  
12 unappropriated water in the American River system during the season  
13 applied for to justify revising the Declaration for the purpose of accepting  
14 and processing water right applications related to the discharges of treated  
15 groundwater into the American River?

16 During the April 25, 2002, pre-hearing conference, all parties had the opportunity  
17 to seek clarification from the SWRCB on the scope of issues to be decided, and the scope of  
18 evidence that would be admitted into evidence, during the proceeding. In response to comments  
19 by the parties at that conference, the hearing officer made clear that testimony related to the issue  
20 of the ultimate disposition of Aerojet's discharges into Buffalo Creek and the American River  
21 would be outside the scope of the hearing. Following the pre-hearing conference, the SWRCB on  
22 April 26, 2002, served written notice that the proceeding is limited to "whether there is new  
23 water, different from the water understood to be available when the orders that are the basis for  
24 listing the stream on the Declaration were issued." SWRCB Notice after Pre-hearing Conference  
25 (April 26, 2002). The notice stated that "[t]his proceeding does not reach the merits of . . .  
26 whether any 'new' water identified in this proceeding is required to go to senior water users, or  
27 for environmental purposes." *Id.* at 2 (emphasis added). The SWRCB admonished all parties  
28

1 that evidence offered on issues outside the noticed scope of the hearing “will not be allowed.” *Id.*  
2 (emphasis added).

3 **2. Sacramento County Exhibit 1 should be excluded because it is irrelevant to**  
4 **the issues to be determined in this hearing.**

5 Sacramento County Exhibit 1 consists almost entirely<sup>1</sup> of a legal argument  
6 asserting the County’s claim of a senior water right to Aerojet’s discharges of pumped water, and  
7 instruction to the SWRCB that it “must” find that the new water at issue here is subject to “the  
8 exclusive rights of Sacramento County.” SC Exh. 1 at 1 (last partial paragraph).<sup>2</sup> The remainder  
9 of the exhibit is an irrelevant argument advocating a particular allocation of the Aerojet  
10 discharges among competing uses.

11 The County’s Exhibit 1, with the possible exception of the sentence noted at  
12 footnote 1 above, should be excluded. It provides no relevant facts on which the SWRCB could  
13 base a determination as to the character of the Aerojet discharges. Instead, it reinjects an issue  
14 into the proceeding that the SWRCB expressly excluded.

15 Excluding the County’s Exhibit 1 will not deprive the SWRCB of any useful  
16 information. Indeed, exclusion of the exhibit will not deprive the SWRCB of *any* information,  
17 since the entire exhibit consists of legal argument. If the SWRCB allows these arguments into the  
18 proceeding under the guise of “testimony,” then the other parties and the SWRCB will have to  
19 respond, wasting time and other resources on issues unrelated to the question whether the Aerojet  
20 discharges constitute “new water.”

21 **3. SCWC Exhibit 8 should be excluded because it is an argument for allocating**  
22 **new water**

23 Southern California Water Company’s Exhibit 8 should be excluded from the  
24 proceeding for the same reason. The exhibit presents testimony concerning one party’s’ need for  
25

26 <sup>1</sup> The exhibit contains only one relevant statement: “The treated and discharged  
27 groundwater is, in fact, non-native water that was not considered by the SWRCB when it declared  
the American River to be fully appropriated.” SC Exh. 1 at 4 (last full paragraph).

28 <sup>2</sup> Inconsistently—but correctly—the County also notes that the SWRCB “has no jurisdiction”  
over rights in percolating groundwater. SC Exh. 1 at 1, 6.

1 water, and legal arguments asserting a claim to the Aerojet discharges. Both of these matters  
2 relate to the question of ultimate allocation of the water *if* the discharges are found to be "new  
3 water." In the context of this hearing, the testimony is at best irrelevant, and at worst, an effort to  
4 improperly influence the SWRCB's consideration of the facts relating to the question before it.  
5 Clearly, the testimony cannot assist the SWRCB in deciding whether there is "new water" in the  
6 American River.

7 **B. THE SWRCB SHOULD SUSTAIN THE OBJECTION AND ENFORCE ITS**  
8 **ADMONITION THAT THIS EXACT KIND OF EVIDENCE "WILL NOT BE**  
9 **ALLOWED"**

10 The SWRCB limited the scope of this proceeding to whether there is "new water"  
11 and admonished the parties that it would reject claims of senior water rights or other grounds for  
12 allocating "new water." The County's Exhibit 1 and Southern California Water Company's  
13 Exhibit 8 ignore the SWRCB's notices and admonition. They have no probative value in the  
14 present proceeding, and their admission will only waste resources and distract from consideration  
15 of the facts and testimony relevant to the SWRCB's determination.

16 Accordingly, Aerojet respectfully requests that the SWRCB enforce its clear  
17 delimitation of this proceeding's scope by excluding from evidence SC Exh. 1 and SCWC Exh. 8  
18 and excluding any oral testimony based on these exhibits.

19 Dated: May 30, 2002

20 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
21 A Professional Corporation

22 By



23 Eric N. Robinson  
24 Attorneys for Aerojet-General Corporation

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**PROOF OF SERVICE**

I, Do Gentry, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814-4416. On May 30, 2002, I served the within documents:

**OBJECTION AND MOTION TO EXCLUDE EVIDENCE OUTSIDE NOTICED SCOPE OF HEARING**

- by transmitting via facsimile from (916) 321-4555 the above listed document(s) without error to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmittal/confirmation sheet is attached.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.
- by causing personal delivery by messenger of the document(s) listed above to the person(s) at the address(es) set forth below.
- by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

*Please see attached Service List*

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 30, 2002, at Sacramento, California.

  
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Do Gentry

American River FAS Hearing Service List

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