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June 11, 2003

BY MESSENGER

Division of Water Rights
State Water Resources Control Board
Cal/EPA Headquarters
1001 I Street, 2nd Floor
Sacramento, CA 95814

DIV OF WATER RIGHTS
SACRAMENTO

2003 JUN 11 PM 1:12

STATE WATER RESOURCES
CONTROL BOARD

Attention: Edward C. Anton, Chief

Re: Draft Order Denying Petition to Revise the Declaration of Fully
Appropriated Streams to Allow Processing of Applications to Appropriate
Treated Groundwater Discharged into the Lower American River

Dear Mr. Anton:

The County of Sacramento and the Sacramento County Water Agency (hereinafter "County") intend to provide comments at the July 1, 2003 workshop on the above-referenced matter. In this context, the County would like the State Water Resources Control Board ("SWRCB") to consider the following:

1. In general, the County has no inherent problem with the extensive discussion within the Draft Order of the statutory provisions associated with surface water. For the most part, however, the County believes that discussion to be irrelevant.
2. As addressed in the County's Closing Statement, we believe that the water in question is groundwater and should be treated accordingly.
3. In this regard, the County believes that the discussion within Section 6.0 of the Draft Order is more or less correct. To the extent that the County disagrees with that discussion, it focuses on its treatment of Aerojet and the fact that the discussion ignores the unique facts presented in this situation, including the vested rights of water purveyors who rely on the relevant groundwater basin for their water supply. This, of course, includes the vested rights of the County.
4. In the County's view, groundwater rights do not vest merely by virtue of an entity pumping, treating and discharging water as part of a groundwater remediation

project. Something more must be involved as, for example, would exist if there were agreements with those who were adversely affected by the contamination to use this water to replace what had been taken.

5. The SWRCB cannot ignore the clear rights of water purveyors within the affected groundwater basin. Among other things, the water is being pumped, treated, and discharged pursuant to orders by the Environmental Protection Agency ("EPA") and the Regional Water Quality Control Board ("RWQCB). The RWQCB is, of course, merely an arm of the SWRCB with review authority over all of the RWQCB's actions, including the Aerojet actions at issue here.

6. The statement that "[a]ny issues concerning alleged injury to groundwater rights occurring prior to this water finding itself in a natural channel, and in connection with where this water originated and how, are outside the scope of this proceeding" will force otherwise unneeded litigation in which the SWRCB's and RWQCB's orders, in the context of the exercise of its water quality authority, come directly into play. See Draft Order at p. 15 of 29. Since the Draft Order proceeds to grant this groundwater to others, including the Central Valley Project ("CVP") and State Water Project ("SWP") or others with "higher priorities," it would constitute an unconstitutional taking of property rights.

7. In the context of the foregoing discussions, *all* of the water at issue here is groundwater and, as a consequence, all of the water is "new" water. It is inappropriate to treat any of this water as part of the flow of the American River.

8. Having determined that "new" water exists in the American River, in measurable quantities, the SWRCB should allow it to be again "appropriated" by those injured by the Aerojet contamination and pump, treat and discharge program. Precluding this water from being recovered by those entities twice victimizes them and deprives the County of needed water supplies which they have historically relied upon and to which they have rights.

9. No justification whatsoever exists to support the notion that this "new" water cannot be diverted because it is needed to meet instream uses. The undisputed fact is that the new water has *not* been relied upon for these purposes and cannot be impressed now for these purposes. Moreover, since all of the water discharged is metered, it can be re-diverted without adversely affecting the natural flow of the American River.

10. There is absolutely no justification for imposing Term 91 on any aspect of the diversion and use of the so-called "new" water. As groundwater, imposition of Term 91 clearly would be unjustified. Diverting only "new" water, by definition, means that CVP or SWP stored water is not being diverted nor is natural flow that otherwise would exist to meet Delta outflow requirements. Moreover, application of Term 91 to "in basin uses" stands the whole interpretation and application of Term 91 on its head. One

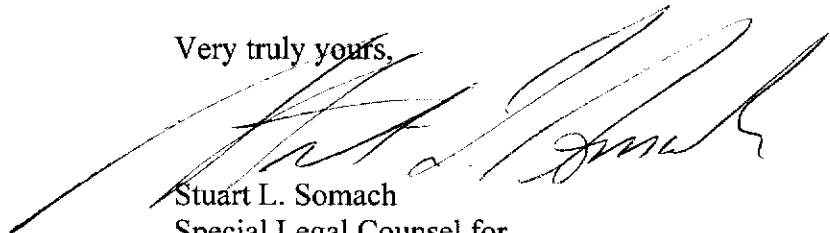
must look at the purpose and intent of Term 91 and not apply it blindly at the behest of the United States Bureau of Reclamation ("USBR") and the Department of Water Resources ("DWR"). The CVP and SWP should not be granted the benefit of this windfall at the expense of water users within Sacramento County.

11. There is no justification for the Draft Order's bald statement that "even if the treated groundwater at issue in the proceeding¹ was not tributary to the river during the relevant time period . . . if it had been discharged to the river at any time, it would have been dedicated to satisfying unmet demands with a higher priority than any permit SCWC might acquire." Draft Order at p. 22 of 29. "Unmet demand" is not entitled to "new water" taken from those who hold vested, lawful rights to it.

12. The County incorporates fully by reference herein the discussion within its Closing Statement.

Please do not hesitate to contact me if you have any questions or need additional information.

Very truly yours,



Stuart L. Somach
Special Legal Counsel for
County of Sacramento and
Sacramento County Water Agency

SLS:sb

Atch.

cc: See Attached Certificate of Service
Keith DeVore
John F. Whisenhunt

¹ We note the obvious admission of the undeniable: that the water in question is "treated groundwater." As treated groundwater, it should not be dealt with as surface water.

1 CERTIFICATE OF SERVICE

2 I am employed in the County of Sacramento; my business address is 813 Sixth Street,
3 Third Floor, Sacramento, California; I am over the age of 18 years and not a party to the
4 foregoing action.

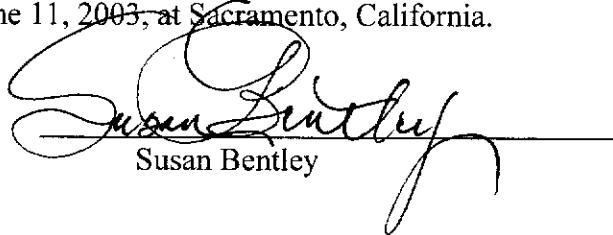
5 On June 11, 2003, I served the following document(s):

6 LETTER TO EDWARD C. ANTON ON BEHALF OF COUNTY OF SACRAMENTO AND
7 SACRAMENTO COUNTY WATER AGENCY REGARDING
8 DRAFT ORDER DENYING PETITION TO REVISE THE DECLARATION OF FULLY
9 APPROPRIATED STREAMS TO ALLOW PROCESSING OF APPLICATIONS TO
10 APPROPRIATE TREATED GROUNDWATER DISCHARGED INTO THE LOWER
11 AMERICAN RIVER

12 X (by mail) on all parties in said action listed below, in accordance with Code of Civil Procedure
13 §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a designated area for
14 outgoing mail, addressed as set forth below. At Somach, Simmons & Dunn, mail placed in that
15 designated area is given the correct amount of postage and is deposited that same day, in the ordinary
16 course of business, in a United States mailbox in the City of Sacramento, California.

17 SEE ATTACHED SERVICE LIST

18 I declare under penalty of perjury that the foregoing is true and correct under the laws of
19 the State of California. Executed on June 11, 2003, at Sacramento, California.

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Susan Bentley

SERVICE LIST

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