Statement by the Association of California Water Agencies

State Water Resources Control Board
Public Meetings to Discuss the Legal Classification of Groundwater

August 20 and 23,2001

Introduction and Summary of Comments

The Association of California Water Agencies ("ACWA") appreciates this opportunity to present comments to the State Water Resources Control Board (the "State Board") and Professor Joseph Sax in response to the State Board's recent Notice of Public Meeting relating to the legal classification ofgroundwater. ACWA represents over 450 public water agencies and numerous private water companies in California. Together, ACWA's members serve over 90% of the water delivered in the state for domestic, agricultural, and industrial uses. Many, if not most, of our members rely totally or heavily on groundwater resources.

In our comments today, ACWA wishes to commend the State Board for its handling of a very difficult issue - the legal classification of subterranean water' as either percolating groundwater or underflow — in a cooperative and thoughtful manner. This course of action on the part of the State Board appears likely to achieve the three goals that ACWA believes should guide the State Board's deliberations: (i) providing certainty as to the classification of subterranean water; (ii) providing protection to the investment-backed expectations of groundwater users throughout California; and (iii) clearly distinguishing between the State Board's jurisdiction over surface waters and its lack of jurisdiction over percolating groundwater.

The Draft Pauma/Paula Decision

ACWA believes that it is important for all parties to these proceedings to recall the situation in late 1999 and early 2000. On November 23, 1999, the State Board issued its draft decision relating to the "Determination of the Legal Classification ofGroundwater in the Pauma and Pala Basins of the San Luis Rey River" (the "Draft Pauma/Pala Decision"). That decision was widely seen in the water community as anunprecedented and unwarranted extension of the *City of Los Angeles v. Pomeroy,* 124 Cal. 597 (1899) decision that distinguished a

' These comments generically refer to water found under the surface of the Earth as "subterranean water" in order to avoid the need to classify such water as either underflow or percolating groundwater.

subterranean stream from percolating groundwater by the presence of impermeable "bed and banks." In oral comments given at the workshop on February 2, 2000 (attached hereto as Exhibit A), ACWA argued that the Pomeroy decision, correctly interpreted, did not support the extension of State Board jurisdiction to basins such as Pauma and Pala, even though those basins are ultimately bounded by bedrock. As noted in its oral comments and in the written comments that ACWA submitted to the State Board on January 3, 2000 (attached hereto as Exhibit B), the Draft Pauma/Pala Decision created the possibility that the Pauma/Pala Decision would transform all subterranean water in alluvial formations - in other words, most groundwater in California - into water under the jurisdiction of the State Board and so would create tremendous uncertainty and confusion regarding the management, use, and regulation of subterranean water. 2

The State Board's Search for a Workable Classification of Groundwater

Rather than create that uncertainty and confusion, however, the State Board acted responsibly and in the best interests of all Califomians. The State Board deferred any final decision on the Pauma/Pala basins and, instead, convened a workshop to hear further thoughts on the best manner to address the complicated issues associated with the classification of groundwater. ACWA participated in that workshop, which was held on April 24 and 25, 2000. ACWA's comments (attached hereto as Exhibit C), stressed the need for the State Board to keep in mind the complexity associated with classifying subterranean water as either underflow or percolating groundwater. ACWA also suggested that the State Board focus on three goals: (i) providing a standard that allows different observers to reach the same conclusion as to whether a specific formation is underflow or percolating groundwater (the goal of certainty); (ii) providing a standard that honors and respects the very great investment-backed expectations of water users in California that have been made in reliance of over 100 years of groundwater law (the goal of protecting existing rights); and (iii) the need for the State Board clearly to distinguish between its jurisdiction over surface water and its lack of jurisdiction over percolating groundwater (the goal of clearly delineating the State Board's jurisdiction). With those goals in mind, ACWA suggested that the Board's jurisdiction be limited to underflow of surface streams and that the bed and banks test should be supplemented with the use of additional information obtainable with modern techniques.

2 On January 24, 2000, the State Board's Hearing Team offered amendments to the Draft Pauma/Pala Decision that attempted to address the use of the term "relatively" in the Draft Pauma/Pala Decision. In ACWA's view, those amendments - which were offered to avoid the implication that the Draft Pauma/Pala Decision would change existing law and so expand the jurisdiction of the State Board - simply highlighted the difficulties associated with the legal classification of groundwater. As noted above, ACWA believes that the State Board has chosen the better course of action by working with the water community to develop a widely supported standard for the classification of groundwater rather than simply adopting a draft decision that was generally thought to articulate a new - and much more expansive standard - for what constitutes a subterranean stream.

Current Status

Since April 2000, the State Board has retamed the services of Professor Sax as an expert consultant and has convened two panels of individuals with extensive experience in dealing with groundwater in California. ACWA understands that Professor Sax, after consulting with the two panels of experts and receiving input at the two scheduled workshops, will be developing a recommendation to the State Board. ACWA believes that this is a very good way to pursue the classification issue, and commends the State Board and Professor Sax for their efforts.

ACWA's Recommendation

ACWA continues to believe that subterranean water should be considered groundwater unless there is clear and convincing evidence demonstrating that it is underflow of a surface stream. Subterranean water should be considered groundwater-and so not subject to the State Board's jurisdiction-if it could be determined that any of the following conditions (or other similar conditions) exist: (i) there is an unsaturated zone between the surface watercourse and the aquifer from which water is being extracted; (ii) there are significant differences in the age and/or chemistry of the subterranean water and nearby surface water; (iii) the levels of subterranean water do not fluctuate in direct response (e.g., on a diurnal cycle) to flows in the surface watercourse; (iv) the hydraulic gradient of subterranean water is not approximately parallel to and in the same direction as the surface flow in the watercourse; (v) the subterranean water is being extracted from a confined aquifer; or(vi) the subterranean water is being recharged from a source other than the surface watercourse in question. Collectively, these standards would ensure that the vast majority of subterranean water in California would continue to be considered percolating groundwater and so allow ACWA's membership to maintain the groundwater management regimes and practices that have been developed over the past century.

ACWA believes that the foregoing set of conditions — which is designed to place under the State Board's jurisdiction only water that is shown to be closely connected with a surface watercourse - is likely to prove workable in practice and to serve the public interest. Such a standard, by focusing on characteristics that distinguish percolating groundwater from underflow, satisfies the goal of certainty by providing hydrogeologists with standard measures that can easily be adapted from one watershed to another. Further, because the standard reflects the general manner in which Califomians have interpreted the *Pomeroy* "bed and banks" test during the last century, it satisfies the goal of protecting existing rights and avoiding the confusion that would have been created had the State Board adopted the Draft Pauma/Pala Decision. Finally, the proposed standard provides clear ways to distinguish between underflow and percolating groundwater and so satisfies the goal of ensuring that water users, regulators and the State Board all can identify the applicable legal regime when questions regarding subterranean water arise.

ACWA understands that one of the arguments being made for the expansion of State Board jurisdiction is that it would provide an opportunity for environmental review in those situations where the pumping of groundwater

by a private party influences the flow of a surface stream so as to affect riparian habitat. ACWA recognizes the potential for such influence, but believes that the opportunity for environmental review or other remedies already exist in nearly all such situations. Subjecting vast new quantities of water to State Board jurisdiction in response to the problem discussed in this paragraph is not an appropriate solution, because of the catastrophic effect it would have on California's established system of water rights.

For these reasons, ACWA wishes to support the course of action that the State Board has taken over the past eighteen months and respectfully urges that Professor Sax take our comments into account in developing his recommendation. ACWA would be pleased to provide further comments once Professor Sax's recommendation is made available for review.

ACWA believes that the State Board has taken a situation that could have created tremendous confusion (with the inevitable lengthy and expensive litigation) and managed that situation so as to be on track to developing an interpretation of the *Pomeroy* standard that is based on modem science, is consistent with California law, and maintains the distinction between underflow and percolating groundwater. ACWA looks forward to continuing to work with the State Board, its staff, and Professor Sax as he completes his report to the State Board and as the State Board deliberates on that report.

Respectfully submitted,

ASSOCIATION OF CALIFORNIA WATER AGEI

STEPHEN K. HALL

Executive Director

cc: ACWA Groundwater Committee
ACWA Leeal Affairs Committee

The *Pomeroy* case concerned the area near the outlet of the San Fernando Valley, an area very close to where I live. I would encourage each of you to reread the *Pomeroy* decision between now and your board meeting.

The draft decision focuses on the part of *Pomeroy* that lists the elements of a subterranean stream. I would like to focus today instead on the converse, the elements that show the absence of a subterranean stream. I would like to read to you a sentence from jury instruction no. 20, which was approved by the supreme court as correctly reflecting the law.

"Gentlemen of the jury ... If you find from the evidence that the lands sought to be condemned are situated at the lower portion of, and form a part of, the San Fernando basin or watershed, near or at its outlet, and that said basin is about twenty-four miles long and about twelve miles wide at the widest point, and that said outlet is from two thousand feet to three miles wide, and **bounded and defined** on the southern side by the rock of the Cahuenga range, and on its northern side by a similar rock of the Verdugo hills, and that the earth of which the basin is generally composed, including said outlet and the land sought to be condemned, is an **alluvial or other deposit** made up of loam, sand, gravel, and bowlders, mixed together, and interspersed with broken or irregular strata or masses of clay or cemented sand and gravel, and lying in place as originally deposited by the forces of nature,

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and that as the same lies in place the natural voids or interstices of such earth generally throughout the basin, including the defendants' lands and said outlet, are equal to from one-fifth to one-third of the bulk of the entire mass, and that such entire deposit lies upon a grade or slope towards and through the outlet of such basin, and that all the water falling in the watershed of such basin, which is not lost in storm, run off, or by evaporation, or in supporting plant life, or held immovable in the ground, sinks into the earth composing such basin, and thence by force of gravity moves down through such voids or natural interstices of the earth throughout the greater portion of the entire mass to the outlet of the basin, through which it passes, without forming anywhere in the mass any definite course or channel in which it can be ascertained with reasonable accuracy that such water is moving in greater quantities or with greater velocity than in other places, so as to be concentrated in a stream either above or below ground, then such waters so moving through such outlet, or through or in defendants' land in the natural voids or interstices of the earth, **do not constitute a subterranean flowing stream or water course** ...."

So, you have "bounded and defined" by rock, you have "alluvium," and you have "moving through [the] outlet" D and you still have percolating groundwater. And the concept that groundwater can moving in a definite direction along the gradient toward the outlet of a basin, and still be percolating, was reaffirmed in later cases, such as *Los*

Angeles u. Hunter 1(1909) 156 Cal. 603, 608] and *Eckel v. Springfield Tunnel & Development Co.* [(1927) 87 Cal.App. 617, 622].

The defendants in the *Pomeroy* case complained that under the definition of subterranean stream given to the jury, the entire San Fernando Valley would be considered a subterranean stream. But the supreme court said no, that's not what was intended, and pointed to jury instruction no. 20, which I read you, to support its statement.

Now let's look at the draft decision and see how to apply *Pomeroy* to the facts of this case. I think I can illustrate my point by focusing on two paragraphs in the decision which discuss the testimony of Tom Stetson. They appear at pages 23 and 24 of the draft decision.

"Mr. Stetson distinguished between groundwater flowing in the recent river channel deposits and groundwater flowing in the older alluvium. He testified that the flow of groundwater in the river channel deposits was only bounded by the bedrock on the left bank. On the bottom, a lakebed clay deposit separates the younger river channel deposits from the older alluvium, and on the right side the river channel deposits are in hydraulic continuity with the older alluvium. ...

"From Mr. Stetson's testimony, it is clear that there is hydraulic continuity between the river channel deposits and the older alluvium (T, II, 486:1-9), that both the river channel deposits and the older alluvium

are water bearing units (T, II, 452:20-453:1, 486:4-6; Company Exhibit 1-B, p. 5), that the alluvium within the Pauma Basin is underlain on the bottom and both sides by the bedrock unit (T, II, 472:6-21), and that he considered the bedrock to be impermeable (T, II, 461:24-462:6; Company Exhibit I-B, pp. 2, 5). Accordingly, his testimony shows that a subsurface channel does exist which is bounded by the bedrock."

Based on the summary of Mr. Stetson's testimony, I disagree with the conclusion. Under *Pomeroy,* Mr. Stetson's testimony shows that the water is percolating groundwater. If the river channel deposits, in addition to a bed and one bank, had had another bank, then there would have been an underground stream flowing in a defined channel. But to say that when we don't find a bank, we should just keep moving outward until we do, destroys the distinction that *Pomeroy* so carefully made. Under that philosophy, the entire San Fernando Valley **would** be an underground stream. And of course, the California Supreme Court looked again at the San Fernando Valley when it was adjudicated in 1975, and analyzed it vising groundwater principles, not surface water principles.

Where does the decision go wrong? It goes wrong in not recognizing the difference between the river channel deposits and the older alluvium. It goes wrong in talking about "net groundwater flow" being in the same direction as the channel, when in fact at the margins of the valley the movement of the groundwater is perpendicular to the

channel. When the movement of groundwater is perpendicular to a channel, the water is not flowing in the channel D simple as that.

This decision has given rise to a rare degree of agreement among ACWA members. Every one I have talked to who has read this decision thinks it is wrong, the only exception being the attorney for the applicant. As a further example I have brought with me a diagram from *California Groundwater Management*, which was published in 1997 and is generally considered to represent the thinking of the water community. This diagram is one of a series designed to illustrate subterranean streams, underflow and percolating groundwater. It shows a situation very similar to the Pauma Basin as an illustration of D percolating groundwater.

So this draft decision does represent a change in the rules. I believe, as do many others, that the reasoning of this decision could be extended to cover virtually every alluvial aquifer in the state. This would work injury to those who have relied on the rules that have existed since The Water Commission Act was originally passed. This includes many people throughout the state, not only water producers but groundwater managers. So I urge you to consider this decision carefully, with regard to the effect that it will have on those people. If the law is to be changed, it needs to be changed in a different way than this.

Exhibit B

January 3,2000

Mr. James M. Stubchaer, Chairman
State Water Resources Control Board
P.O. Box 100
Sacramento CA 95817-0100

Re: Proposed Water Rights Decision Determining the Legal Classification of Groundwater in the Pauma and Pala Basins

Dear Chairman Stubchaer and Members of the Board:

This comment letter is submitted by the Association of California Water Agencies ("ACWA") in response to the State Water Resources Control Board's ("SWRCB") Proposed Water Rights Decision Determining the Legal Classification of Groundwater in the Pauma and Pala Basins of Southern California ("Proposed Decision"). 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 by Califomians.

As you are well aware, the SWRCB's final Decision in this proceeding is a matter of intense concern throughout the State. ACWA has several concerns with the Proposed Decision, and requests that the SWRCB carefully consider and modify its Proposed Decision in light of these comments. ACWA's particular focus has been on the manner in which the Proposed Decision applied the law to the facts that were before the SWRCB, and based upon our knowledge of the case, we believe that the Proposed Decision should not be adopted in its present form. We urge the SWRCB to consider ACWA's recommendations that clear, contemporary and science-based criteria be used to determine when groundwater becomes subject to SWRCB jurisdiction, and that future proceedings be conducted in a manner which eliminates the possibility that any questions might be raised about fairness and objectivity.

ACWA's concerns with the Proposed Decision can be grouped into three broad categories: substantive, procedural, and policy. ACWA's substantive concerns lie primarily with the legal and technical standards employed by the

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SWRCB to determine when groundwater is a "subterranean stream flowing in a known and defined channel," and thus subject to SWRCB jurisdiction. ACWA maintains that the SWRCB has misapplied the standards enunciated in City of Los Angeles v. Pomeroy. (1899) 124 Cal. 598 [57 P. 585], and, in addition, that the 100-year old Pomeroy standard is in need of revision in light of contemporary technological and scientific advances. Moreover, ACWA takes issue with the section of the Draft Decision that states that the SWRCB can reorder the priorities of water rights applicants pursuant to its "public interest" authority. ACWA does not believe that the SWRCB's authority is as broad as the Draft Decision suggests.

Procedurally, ACWA is concerned with the manner in which the SWRCB conducted the groundwater classification proceeding. ACWA believes that there are fundamental procedural flaws with a process that would allow the SWRCB to accept applications to appropriate water, and then would allow a portion of SWRCB staff to appear as a party advocating support of the staffs initial determination that, in accepting the application, the groundwater is \within the SWRCB's jurisdiction. At a minimum, such a process permits an inference to be drawn that the Draft Decision stems from a decision that had already been made at the time the SWRCB's staff accepted the applications. The possibility that such a conclusion might be reached by any observer tends to undermine the credibility of the SWRCB's decisions and the respect to which they should be entitled.

As a policy matter, ACWA believes that the Proposed Decision would set a precedent which tends to strongly favor centralized jurisdiction over groundwater, a position that ACWA believes would run counter to recent legislative and judicial direction that groundwater resources should be managed and regulated at the local level.

1. The SWRCB misapplied the Pomeroy standard and, in any case, the Pomeroy standard should be replaced with a more contemporary and scientific-based standard

Our initial concern with the Proposed Decision is the SWRCB's conclusion that the Pala and Pauma Basins are "channels" with "relatively impermeable beds and banks" (emphasis added). The definition of "channel" used in the Proposed Decision is based on an assumption, without benefit of any cited authority, that an aquifer may be a subterranean stream flowing in a "channel" if it is underlain by bedrock (regardless of depth) and bounded by bedrock (regardless of width). ACWA believes that this conclusion is not only illogical and unsupported in this case, but is also unfounded in the law and contrary to generally accepted technical and legal principles regarding water courses and the channels that confine them.

At the core ofACWA's concern with the Proposed Decision is the SWRCB's insertion of the adjective "relatively" before the term "impermeable bed and banks." The qualifying word "relatively" is proposed to be added to the Pomeroy standard without reference to any legal

authority, which is one ofACWA's principle criticisms of the Proposed Decision. ACWA believes that adding that word constitutes expansion of the standard set forth in Pomeroy.' Once the SWRCB accepts that "impermeable" really means "relatively impermeable," we believe that a clear and bounded standard ceases to exist. We also believe that without a clear and bounded standard, it can be inferred that groundwater is a subterranean stream°anywhere that groundwater exists. Two respected groundwater experts testified that under the standard enunciated in the Proposed Decision "essentially ... all valley basins, alluvial valley basins in California, would ... be considered ... subterranean streams." (Reporter's Transcript , p. 555, 1. 3-14; see also p. 566, 1. 13-16.) It seems axiomatic that essentially every groundwater basin has a relatively impermeable bed and banks. In short, ACWA believes that in this respect, the Proposed Decision has misapplied and extended well beyond Pomeroy.

We believe there is a serious question as to whether there is substantial scientific evidence to support the Proposed Decision's conclusion that the Pala and Pauma Basins are impermeable channels. For example, the Proposed Decision goes to great length in an attempt to discredit what appears to ACWA to be substantial scientific evidence that there are no discemable impermeable beds and banks in the Pauma basin. We believe that this aspect of the Proposed Decision flies in the face of the SWRCB's own recognition that, "absent evidence to the contrary, groundwater is presumed to be percolating groundwater, not a subterranean stream," and that the "burden of proof is on the person asserting that the groundwater is a subterranean stream flowing through a known and definite channel."2 (Proposed Decision, p. 7). Indeed, the Proposed Decision appears to ignore these principles.

'The Proposed Decision acknowledges that the Pomeroy court "stated that the bed and banks of a subterranean stream must be impermeable." but then extends beyond the court's holding and concludes that since "all geologic materials are permeable to some degree," the test for bed and banks must be "relatively impermeable compared to the alluyium filling the channel." (Proposed Decision, p. 8, emphasis added).

20ther jurisdictions also utilize a rebuttable presumption that underground water is • percolating. In Arizona, for example, the presumption can only be overcome by clear and convincing evidence, a similar standard to that announced in Pomeroy. *(See, e.g.,* Maricopa County Municipal Water Conservation Dist. No. One v. Southwest Cotton Company (1931) 39 Ariz. 65 [4 P.2d 369]). Adhering to this presumption, the Arizona Supreme Court has twice refused to arrive at the conclusion that the SWRCB reaches in the Proposed Decision. *(See* Bristor v. Cheatham (1953) 75 Ariz. 227 [255 P.2d 173] (opinion on rehearing); In re General Adjudication of All Rights to Use Water in the Gila River System and Source (1993) 175 Ariz. 382 [857 P.2d 1236]).

ACWA recognizes that the Pomeroy standard is an older and relatively non-scientific method of classifying groundwater. We agree that it is outdated and that it probably should be replaced by more contemporary, science-based criteria. Pomeroy may still work relatively well for cases with similar facts involving outlets of groundwater basins, but it is less useful in prescribing a standard for classification of groundwater existing and moving within a basin, such as in the case of the Pauma and Pala Basins. In the Proposed Decision, however, the SWRCB is being asked to expand beyond the Pomeroy standard (i.e., to misapply current law, in our opinion) without the guidance oflegislatively or judicially adopted replacement criteria. Given the difficulty with existing Pomeroy standards for defining "channels" and "impermeable beds and banks," ACWA does not believe that it is appropriate for the SWRCB to apply the even more subjective "relatively impermeable" standard found in the Proposed Decision.

Although it can be difficult, ACWA believes that the SWRCB can work within the current legal standard by applying criteria that comprehensively and objectively analyze the occurrence of groundwater in the Pauma and Pala Basins byconsidering and analyzing such factors as the geologic composition of the aquifer system and groundwater levels to define groundwater flow directions. Other relevant factors include the stream-aquifer connection, well yields, and aquifer transmissivity (a contemporary measure of permeability.that was not yet developed at the time of Pomeroy) to completely assess whether truly impermeable bed and banks are present. Groundwater quality analyses can also be used to further verify the geologic and hydraulic presence of'channelized" conditions. We believe that the SWRCB has used similar criteria in some instances in the past to determine issues involving percolating groundwater and underflow, yet the Proposed Decision appears to attempt to discredit or dismiss such criteria. By blurring the difference between subterranean streams and percolating groundwater without reference to available scientific criteria, we believe the Proposed Decision will tend to erode confidence in the SWRCB's decisions.

In the long run, ACWA believes that new criteria for classification of groundwater within a basin probably should be developed—perhaps through a Water Code amendment or as a result of litigation. ACWA stands ready to provide input to any effort to develop such criteria. Until then, ACWA believes that the preferred course of action for the SWRCB is to properly apply the Pomeroy standard through use of more modern criteria which rely upon the available scientific evidence rather than utilizing the more subjective approach contained in the Proposed Decision.

2. *The SWRCB cannot simply reorder priorities*

The Proposed Decision states that "[wjhen it is in the public interest, the SWRCB has the authority to adjust the priorities of water rights." (Proposed Decision, p. 37, *citing* United States v. SWRCB (1986) 182 Cal.App.3d 82, 132 [227 Cal.Rptr. 161, 189]; Water Code § 1253). The SWRCB's loosely-defined "public interest" authority does not give the SWRCB free rein to

design the particular result it desires in any given case. In United States v. SWRCB. the court was evaluating the SWRCB's authority to adjust priorities in the "public interest" when the SWRCB considers applications for competing beneficial uses of water. ACWA suggests that the language of the Proposed Decision appears to extend beyond the Court of Appeal's decision in that case. We are concerned whenever there is an attempt to re-order water right priorities. ACWA respectfully suggests that the SWRCB should proceed cautiously in using this particular authority to reach (a) a result that some observers have perceived to bean attempt to justify a position taken by staff when it accepted the applications, and (b) a result that has what we perceive to be the potential to lead to a significant expansion in the frequency with which SWRCB jurisdiction is asserted over groundwater extractions from basins throughout the State.

We believe that neither the record or the Proposed Decision contains substantial evidence that would suggest that the uses to be made by the Pala and Pauma Basin water right applicants are any more or less "beneficial" than the uses that have historically been made in those Basins. ACWA believes that there is an insufficient record before the SWRCB to determine whether it has the authority to adjust priorities in this instance, and counsels the SWRCB to proceed cautiously in utilizing this loosely-defined authority to reach the results set forth in the Proposed Decision . Representatives of a number of ACWA member agencies have expressed grave concern over what they perceive as the Proposed Decision's apparently cavalier view of the priority system.

3. The groundwater classification proceeding used by the SWRCB is fundamentally flawed

A number of observers have suggested that the groundwater classification proceeding for the Pala and Pauma Basins appeared to be procedurally flawed, whether or not the SWRCB believes that Administrative Procedures Act applies. Allowing SWRCB staff to participate in the proceeding as an advocacy party to determine whether the SWRCB had jurisdiction to accept applications that had already been accepted has caused some observers to infer that the Proposed Decision is *apost hoc* rationalization for the earlier staff decisions regarding acceptance of the applications. The procedural problem becomes even more acute when the SWRCB's jurisdiction is essentially the issue.

ACWA recommends that the SWRCB develop clear and objective procedures for handling similar issues in the future. We would be pleased to participate in an orderly process to assist in the development of appropriate procedures. In no case, however, should the SWRCB staff participate in the proceeding as an advocate for assertion of SWRCB jurisdiction.

4. The Proposed Decision runs counter to legislative and Judicial direction to manage groundwater at a local level

ACWA believes the Proposed Decision would provide a decisional and technical basis for the SWRCB to expand its jurisdiction to nearly all groundwater resources in the state, including resources that have generally been understood to be percolating groundwater. This would tend to centralize within the SWRCB authority and jurisdiction over groundwater resources that are not now understood to be within the jurisdiction of the SWRCB. ACWA and many of its member agencies perceive this Proposed Decision as an attempted end-run to centralize decision-making in the SWRCB in spite of clear legislative and judicial policies in California. Both the Legislature and California courts have clearly and consistently resisted centralized groundwater planning and management, and have instead provided a consistent framework for local management and jurisdiction over groundwater resources. For example:

- In the past decade alone, the Legislature has specifically provided local groundwater authority to general act agencies' special act agencies" and county boards of supervisors'
- Local counties for more than 60 years have regulated and thus exerted police powers over groundwater resources. *(See* In re Maas (1933) 219 Cal. 422; Baldwin v. Tehama County (1994) 31 Cal.App.4'h 166.) At least twelve counties now have ordinances that regulate groundwater use.6
- Sixteen basins, primarily in Southern California, have been adjudicated on a local basis to determine the rights to groundwater resources'

3 *See* Groundwater Management Act, Water Code section 10750 *etseq.;* Water Code sections 1745.10, 2100(b). Additionally, nearly fifty general act agencies have specific legislative authority to manage groundwater.

" *See e.g.,* Honey Lake Valley Groundwater Management District (Water Code App. 2793), Long Valley Groundwater Management District (App. 7662), Sierra Valley Groundwater Management District (App. 7662), Mono County Tri-Valley Groundwater Management District (App. 4833), Willow Creek Valley Groundwater Management District (App. 9171), Monterey County Water Resources Agency (App. 5064), Pajaro Valley Water Management Agency (App. 5695), and Fox Canyon Groundwater Management Agency (App. 2750).

" See Water Code section 1220.

' Butte, Colusa, Imperial, lnyo, Kern, Nevada, San Benito, Sacramento, San Diego, San Joaquin, Tehama, and Yolo Counties have adopted groundwater ordinances. It appears that Glenn County will soon adopt such an ordinance.

" Adjudicated basins include: Central, West Coast, Upper Los Angeles River Area, Raymond,

(continued...)

These legislative and judicial authorities show a strong and nearly unanimous trend toward local authority and management over groundwater resources in California. Tremendous local resources have been devoted to management of groundwater throughout the state under the assumption that it was percolating groundwater.8 Even the Attorney General, in the leading case on the authority of a county, submitted an amicus curiae brief at the SWRCB's direction supporting local county jurisdiction and regulation of groundwater. *(See* Baldwin v. Tehama County (1994) 31 Cal.App.4'h 166). The SWRCB decision in the present case should continue to advance this position, and should recognize the clear and consistent state policy direction that advocates local groundwater management, rather than centralized regulation by the SWRCB. Any decision that could result in calling into question rights that water users have long thought they were properly using in reliance on a long-standing rule of law needs to be considered with the utmost scrutiny.

J. *Conclusion*

As California enters an age of dwindling supplies and increasing demands, it is imperative that water resources be managed in an orderly and optimal manner. California has always managed its groundwater resources at the local level, and much of the State's infrastructure relies on local control of groundwater resources. Given the complexity and diversity of California's groundwater basins, local control has long been considered the most efficient means of groundwater basin management. ACWA is concerned that the Proposed Decision, if adopted, will be a major step towards centralized groundwater management in California, in direct conflict with judicial precedent and legislative direction. In order to ensure that local investments and property rights in groundwater are fully protected, ACWA suggests that the SWRCB should significantly modify the Proposed Decision on the Pauma and Pala Basins. ACWA was not a party to the proceeding, but based upon our review

(...continued)
Main San Gabriel, Puente, Cummings, Tehachapi, Mojave, Warren Valley, Chino, Cucamonga, San Bemardino, Santa Margarita, Santa Paula, Scott River.

8California is not alone in encouraging local management ofgroundwater resources. In In re General Adjudication of All Rights to Use Water in the Gila River System and Source (1993) 175 Ariz. 382; 857 P.2d 1236, the Arizona Supreme Court noted:

> More than six decades have passed since Southwest Cotton was decided. The Arizona legislature has erected statutory frameworks for regulating surface and groundwater based on Southwest Cotton. Arizona's agricultural, industrial, mining and urban interests have accommodated themselves to those frameworks. Southwest Cotton has been part of the constant backdrop for vast investments, the founding and growth of towns and cities, and the lives of our people.

(Id., 175 Ariz. at 289, 857 P.2d at 1243.)

of the record we believe that the SWRCB should find that the Pauma and Pala Basins are not subterranean streams.

ACWA also suggests that the SWRCB should utilize the available scientific evidence when attempting to make groundwater classification decisions. In any groundwater classification decisions, ACWA requests that language be included pursuant to Government Code section 11425.60 (a provision of the Administrative Procedures Act made applicable to SWRCB proceedings by 23 California Code of Regulations section 648) which expressly asserts that the decision shall not be used as precedent for future board decisions or orders on the subject of subterranean stream classifications.

ACWA and its member agencies appreciate the opportunity to submit comments to the SWRCB on this important matter. One or more representatives of ACWA will be present at the February 2, 2000 SWRCB Workshop regarding this matter.

Respectfully submitted,

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Robert B. Maddow, Chairman
ACWA Legal Affairs Committee

RBM:b

cc: SWRCB Mailing List
Stephen K. Hall, ACWA Executive Director

Statement by the Association of California Water Agencies for the State Water Resources Control Board Workshop Regarding Subterranean Streams Flowing Through Known and Definite Channels April 24-25,2000

The Association of California Water Agencies (ACWA) appreciates the opportunity to submit this statement for the workshop regarding subterranean streams flowing through known and definite channels. ACWA includes 450 public water agencies in California. Our members serve over 90% of the water delivered in the state for domestic, agricultural, and industrial uses. Most of our members rely totally or heavily on groundwater sources.

ACWA and its members appreciate the opportunity to participate in this important workshop. As you are aware, several of us appeared before you back in February when the Board was prepared to adopt a decision regarding the legal classification of groundwater in the Pala and Pauma basins of the San Luis Rey River. At that time we expressed concern to the Board about the precedent this decision could set and the statewide impact it could have. We were very encouraged when we learned of the Board's decision to postpone ruling on the Pauma/Pala case and to conduct this information-gathering workshop. To us, this signaled the Board's recognition of the potential impact this decision could have and a willingness to address the issue cooperatively.

ACWA's interests in this matter are two-fold. First, ACWA is committed to the idea of local management of groundwater resources. ACWA sponsored the Groundwater Management Act (AB 3030) and ACWA members have invested a tremendous amount of effort into formulating groundwater management plans. Second, many ACWA members obtain some or all of their water supply from groundwater. In reliance on the traditional tests for distinguishing percolating groundwater from subterranean stream flow, these agencies have constructed the infrastructure that serves water to much of California. They need to have their rights and interests protected in order to continue to provide a dependable, economic water supply.

ACWA's interest in the groundwater classification issue was heightened by the draft decision in the Pauma/Pala case. It appeared to us that the reasoning of the draft decision sought to alter the existing legal standards in such a way as to introduce tremendous uncertainty into groundwater rights and groundwater management. This is the reason that we rendered such a strong objection to the draft decision — not because we had a particular interest in the San Luis Rey River, but because it appeared that the Board was about to change the legal test to be applied in future cases, with potential impacts throughout California. We were concerned that the decision would result in needless new water right applications for existing wells, requiring attorneys and engineers for SWRCB proceedings or litigation, requiring new rounds of environmental review, and introducing tremendous financial uncertainty. As we said to you in February, any change in the legal standard should be approached cautiously and only after full consideration of the interests involved.

We are very pleased that, by scheduling this workshop and framing the issues as you have, the Board appears to be doing exactly that. We commend the Board's effort and wish to offer any help that we can in this important process.

Since we last appeared before you, we have dissected this issue thoroughly. The legal, technical, and practical questions that have arisen over and over in our discussions are exactly what is at the core of this debate. Is a 100-year-old legal decision still appropriate today? Has that decision been applied appropriately, not just in the recent Pauma/Pala determination, but elsewhere? Is there better science available today for making these crucial determinations? And if so, is the modem knowledge any more reliable or unambiguous than the tools historically used? Depending on the point of view of the person responding, the answers to these questions can vary widely.

We have determined that a number of approaches could be used to ensure a fairer, more reliable application of the legal standard. Below we set forth some of the results of our discussions, along with our suggestions about processes that could be used. But regardless of the actual process used, we feel that the ultimate outcome of that process MUST achieve the following goals:

Certainty: First and foremost, the Pauma/Pala decision has reinforced our need for certainty when classifying groundwater as percolating or as underflow. While the "bed and banks" principle has been somewhat effective in the past, the current controversy has exposed a large weakness in this test. The development of additional criteria, although still possessing some degree of subjectivity, could provide more reliability and certainty when classifying groundwater.

Protection of Existing **Rights:** Despite our concern with the traditional bed and banks test, it is the foundation on which 100 years wcgth of groundwater rights are built. It is imperative that the existing rights of groundwater pumpers be protected while we attempt to improve any future groundwater classification decisions.

Maintaining the Board's Authority Over Surface Water: We are deeply concerned about what appears to be a well intended but potentially disastrous expansion of the Board's authority. We appreciate the authority the Board has over surface water rights and the underflow of surface streams, as well as the difficulty in sometimes discerning between percolating groundwater and underflow. Providing a clearer distinction between the two not only results in greater certainty, but more clearly delineates where the Board's authority ends and where local groundwater management begins.

In the remainder of this letter, we give you our best answers to the questions you posed. As is often the case, we have found it easier to agree on the problem than on the solution. There was virtual unanimity among our members that the draft decision in the Pauma Basin was wrong. There is less unanimity over the legal test to be used in the future, and the process for establishing the test. Ultimately, we concluded there was no one perfect test. We want to share with you some of our thought processes so that you can understand the points of discussion among us and why we believe there is a need for the Board to convene a group of professionals

to come up with a workable solution.

ACWA's Legal Affairs Committee and Groundwater Committee have held extensive discussions on this issue. Together, these committees represent an enormous amount of legal and technical experience and expertise concerning groundwater and the classification of underground water. The distillation of our conclusions into this letter was done primarily by Bob Maddow, the chair of the Legal Affairs Committee; Steve Bachman, the chair of the Groundwater Committee; Tom Bunn, an attorney on the Groundwater Committee; and myself. Each of them spoke to you at your February 2 workshop.

1. What legal test should the SWRCB apply in determining whether subsurface waters should be classified as part of a subterranean stream or percolating groundwater?

There are several criteria that we believe should be used in evaluating which test is appropriate. They are:

1) The test should be workable and repeatable, so that when applied by different professionals, the results are likely to be the same;
2) The test should not create major changes in what has historically been considered surface water and percolating groundwater, so that there is reasonable certainty in present water rights;
3) The test should reflect the reality of surface water and groundwater conditions as much as possible.

In our discussions on the subject over the past two months, it is clear that there is not an individual test that simultaneously meets all three criteria - each test discussed only met a portion of the criteria. We believe that there is a range of possible tests, with two end members.

At one end of the spectrum is the argument to retain the existing test set forth in Water Code section 1200 and the Pomeroy case, and to refine that test in order to give more uniform and predictable results, consistent with long-standing practices throughout the state. This approach would be the least disruptive in terms of existing water rights, but would not be as consistent with what we now know about the hydrology of surface water and groundwater.

At the other end of the spectrum is the argument to entirely revise the test using modern techniques of hydrogeologic analysis. The revised test would not use the existence of a subterranean stream flowing through a known and definite channel as the primary determining factor. Rather, a number of factors would be used to determine the degree of connection between the surface and underground supplies.

There are arguments in favor of both approaches. Retaining the existing test would recognize that the distinction is primarily legal, not technical, and would preserve the rights of those who had relied on the existing test over the years. Revising the test, however, would allow the use of more modern techniques to determine the relationship of the surface and underground supplies.

Instead of choosing one or the other of these approaches, we believe that we must blend the two approaches to derive the most satisfactory test. Therefore, we recommend that the existing "bed and banks" test be retained, but that the test be supplemented with the use of additional information obtainable with modern techniques.

There is an important principle which is at the heart of our concern here. We believe that the Board's jurisdiction should be limited to the underflow of surface streams, and we recommend that the Board should expressly so state in order to relieve some of the uncertainty now surrounding groundwater classification issues. We believe that the term "subterranean stream" was always intended to be synonymous with "underflow," except perhaps for such anomalies as lava tubes. (For example, the Board's instructions for the application to appropriate water say, "Underflow, for this purpose, is defined to mean subterranean streams flowing through known and definite channels; that is, having identifiable beds and banks.") Only recently have underflow and subterranean stream been treated as two distinct concepts. Underflow was included in the Board's appropriation permit system under Water Code section 1200 "because extraction, especially from underflow, generally directly affects surface water flows. This definition is intended to avoid jurisdictional overlap between the Board and groundwater management authorities." (Governor's Commission to Review California Water Rights Law, *Final Report* (1978) at page 174.)

Any modifications to the existing legal tests should be developed in such a way as not to subject vast new quantities of underground water to the permitting system. The California Legislature and the courts have clearly provided a consistent framework for local management and jurisdiction over groundwater resources, and have resisted centralized groundwater planning and management. In taking any actions related to groundwater classification, the Board needs to be mindful of that overall context for the current workshop and for any future proceedings related to groundwater classification. The presumption that underground water is percolating groundwater must be retained. In addition, those existing pumpers who would be affected by any modified test should be protected, perhaps by a grandfather clause or by other appropriate transitional provisions.

2. What information should the SWRCB consider when determining whether subsurface waters are part of a subterranean stream or are percolating groundwater?

We believe that the existing "bed and banks" criteria should be retained, but that additional information should be considered as well. Among this information are the following factors that we put forth at the State Board workshop on the Pauma and Pala basins. It should be noted that no one of these factors should be determinative, but should be used in combination with "bed and banks".

A. Hydraulic connection of stream to the underflow of the stream - There should be a good correlation between the state of the stream and the water levels in wells completed in the underflow. Rises and falls in water levels in shallow aquifers along a stream that are part of the flow of the stream can be correlated directly to changes in the stream stage, even down to diurnal (daily) changes. In contrast, other aquifers deeper beneath the

stream or at a greater distance from the stream may indicate only long-term correlation with stream stage (i.e., seasonal changes related to recharge events), and these would be considered percolating groundwater.

B. Age of water - Underflow, because it is well connected to surface flow, will likely contain young water. If aquifers contain old water, the connection between aquifer water and stream flow is probably remote, and the water should be considered percolating. There are several methods of determining the age of groundwater.

C. Water chemistry - Although underflow would not necessarily have the exact water chemistry as surface flow, any differences should be readily explained. If groundwater contains a different chemical suite than surface water, or if groundwater has a different point of origin than surface water, then it is unlikely to be underflow. Difference in the origin of the water can be determined using such standard methods as oxygen isotopes.

D. Hydraulic gradient - The hydrologic gradient of any water considered to be underflow should be approximately parallel to and in the same direction as surface flow of the stream.

We recognize that there is virtually always a degree of connection between groundwater and surface water. Therefore, the decision whether underground water is subject to the SWRCB's jurisdiction is also one of degree. This is the crux of the problem - where do you draw the line that determines underflow in one case and percolating groundwater in another? Of course, with the present "beds and banks" test, the SWRCB and its staff face the same problem of degree. Our suggestion of bringing these other factors to bear will assist in drawing this line.

3. Should the SWRCB propose rules or guidance for the classification of which subsurface waters are subject to the water right permitting and licensing system administered by the SWRCB? If so, should the SWRCB propose or establish those rules or guidance through administrative rulemaking, as a proposal for legislation, in a precedent decision, or through other means?

We do not believe the Board should attempt to define a legal test based solely on the input from this workshop. Based on our own work over the last two months, it is evident that the "line-drawing" question should be subjected to further scrutiny. In order to satisfy our stated criteria of the test yielding similar results when applied by different professionals, there needs to be guidance on how these factors will be combined with the "bed and banks" doctrine. They must be applied in a way that will provide needed certainty and adequate protection of the holders of both surface and groundwater rights.

According to the workshop notice issued by the Board, it appears that a rule-making process to develop groundwater classification criteria is being considered. Some ACWA members favor a formal rule-making process, in order to have the subject considered under the rigors of the Administrative Procedures Act. This would allow for a cooperative effort by Board staff and water experts to develop potentially new criteria for making future groundwater determinations.

However, there is substantial doubt whether the Board has or should have the authority to modify by regulation the existing legal tests developed by the courts and the Legislature. For this reason, we believe that legislation may ultimately be the best approach.

We suggest that the SWRCB convene a small panel of groundwater professionals, with representatives from the Board, the SWRCB staff, and the water community. This panel could provide the guidance on how to combine "bed and banks" with the factors given above (and possibly others), and where to set the boundaries between surface and groundwater. They could use their knowledge of different areas in the state to predict the results of using the factors set forth above. We are hopeful that the panel could reach consensus on the factors to be used in applying the legal test, and the weight to be given to each factor. If a means to apply modern analytical techniques to the existing legal test can be developed in a manner satisfactory to all parties, we believe that legislation implementing that consensus could be passed with relatively little difficulty.

We have prepared legislation that can be used as a placeholder while the panel is formulating the legal test. It can be amended into an existing bill and thus preserve the opportunity to be enacted this session. If there are issues that need more time to be worked out, the legislation can be postponed until the next session.

Procedural Points

In addition to the substantive points made herein, we have the following points on process that we believe will guide the Board staff and assist interested parties. First, there should be an initial determination of classification, so that the acceptance of an application does not turn into a *de facto* finding that the water is underflow. Second, we believe that it is not appropriate for the SWRCB staff to serve as an advocate for either party in any proceeding in which a question is raised about groundwater classification.

Conclusion

California has always provided for management of its groundwater resources at the local level, without significant State agency intervention or regulation. Much of the State's infrastructure has been installed and operated in reliance on local control of groundwater resources. Given the complexity and diversity of California's groundwater basins, local control has long been considered the most efficient means of groundwater basin management. ACWA is concerned that if the activities of the SWRCB are perceived as a major step towards centralized groundwater management in California, many California entities and individuals would find such action to be in direct conflict with judicial precedent and legislative direction. More measured steps, consistent with existing law and with due regard for modern scientific and technical advancements, and which protect current and anticipated investments and property rights in groundwater, appear to be in order at this time.

We believe that the best method of ensuring that the multiple criteria for a legal test of repeatable results, certainty of water rights, and using factors reflecting the reality of surface water and

groundwater conditions is by retaining the existing test set forth in Water Code section 1200 and the Pomeroy case, modified by hydrogeologic factors that will give more uniform and predictable results. We believe a technical panel should be convened to formulate those additional factors in a manner consistent with the principles outlined in this letter. We offer the Board any assistance we are able to provide, both individually and collectively.