



State Water Resources Control Board



Winston H. Hickox
Secretary for
Environmental
Protection

Division of Water Rights
1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5351
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site Address: <http://www.waterrights.ca.gov>

Gray Davis
Governor

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>.

NOTICE OF PUBLIC HEARING

**The State Water Resources Control Board will hold a Hearing
to Determine Whether to Impose Administrative Civil Liability
Against
Omnium Estates (Complaint No. 262.5 – 31)**

McNab Creek, Mendocino County

**Commencing at 10 a.m. on Wednesday, May 14, 2003
at**

**Joe Serna, Jr./Cal-EPA Building
1001 I Street, Second Floor Sierra Hearing Room
Sacramento, CA**

SUBJECT OF HEARING

The purpose of this hearing is for the State Water Resources Control Board (SWRCB) to receive evidence relevant to determining whether it should affirm Administrative Civil Liability Complaint No. 262.5-31 issued by the Chief of the Division of Water Rights (Division) to Omnium Estates (Omnium).

BACKGROUND

Water Code section 1052, subdivision (b), provides that the State Water Resources Control Board (SWRCB) may administratively impose civil liability in an amount not to exceed \$500 for each day that a trespass occurs.

Water Code section 1055, subdivision (a), authorizes the Executive Director of the SWRCB to issue a complaint to any person on whom administrative civil liability may be imposed under section 1052. On May 17, 1999, the Executive Director of the SWRCB delegated this authority to the Division Chief.

On November 15, 2002, the Division Chief issued an Administrative Civil Liability complaint against Omnium Estates (Complaint No. 262.5 – 31). The complaint alleges that Omnium Estates violated Water Code section 1052, subdivision (a), which states: "The diversion or use of water subject to this division other than as authorized in this division is a trespass." The complaint proposed imposition of Administrative Civil Liabilities (ACL) of \$3,000 on Omnium Estates. The complaint includes in substance the following allegations:

1. During a July 18, 2001 compliance inspection of License 4777¹, Division staff observed that Omnium's property was planted in a mature vineyard and that an offstream pit-type reservoir had been constructed on the property and was storing water. Division staff did not enter the Omnium property to complete the inspection because Omnium had not used water from the Russian River under License 4777 for over five consecutive years due to the lack of a water conveyance facility between the source and the authorized place of use². There is no record of a current permit or license authorizing the storage of water in the observed reservoir.
2. Division staff concluded from a July 11, 1993 aerial photograph showing the Omnium property that the reservoir had been constructed prior to July 1993. The Division estimated the capacity of the reservoir to be about 16 acre-feet.
3. By certified letter, dated October 5, 2001, to Omnium and the other parties to License 4777 the Division transmitted findings relative to the July 2001 inspection and specifically requested that within 30 days of receipt of the letter that Omnium either identify a basis of right authorizing the storage of water at its reservoir or explain why the water held in the reservoir was not subject to the permitting authority of the SWRCB. The Division received no response within 30 days on behalf of Omnium.
4. On December 26, 2001, Mr. Steven Grover, a representative of Omnium, contacted Division staff and confirmed that Omnium pumps water from McNab Creek and stores it in the reservoir, and uses the stored water to frost protect and irrigate approximately 76 acres of vineyard. Division staff mailed Mr. Grover the forms needed to file an application to appropriate water by permit at that time.
5. Mr. Grover faxed an unsigned draft letter to the Division on February 1, 2002 stating that he intended to file an application to appropriate water. The Division never received an application from Omnium. By letter dated February 28, 2002, the Division again warned that storing water without a permit, license, or other basis of right is unauthorized and a trespass against the State. The letter also notified Omnium that it must diligently pursue a permit to authorize the storage of water in its reservoir.
6. On April 22, 2002, Mr. Grover notified the Division by letter that Omnium intended to pursue an application for storage and would contact Division staff in this regard. As of November 1, 2002, Omnium had not provided any evidence supporting a basis of right for diversion of water to storage in its reservoir, or filed an application to appropriate water by diversion to storage.

¹ At the time of the inspection, the Division of Water Rights record of ownership for License 4777 (Application 14997) showed the current holders of the license as John E. Fetzer (Fetzer), Omnium, and Flight Rail Corporation (Flight Rail). These parties were assigned ownership of the license on November 5, 1999. License 4777 authorizes the direct diversion and use of water from the Russian River from about May 1 to about November 30 for irrigation. The maximum rate of diversion under the license is 1 cubic foot per second, and the place of use covers 150 acres of land, of which approximately 10 acres is located on Omnium property.

² On November 27, 2002, following issuance of the complaint, the Chief Deputy Director of the SWRCB signed an Order Issuing Separate Licenses and Revoking Original License 4777. Omnium's interest in License 4777 was revoked and License 4777 was replaced and superceded with License 4777A, issued to Flight Rail, and License 4777B, issued to Fetzer.

By letter dated November 22, 2002, Mr. Steven Grover, on behalf of Omnium, submitted a request for a hearing and denied that Omnium Estates has been diverting water from McNab Creek to the reservoir and stated his desire to pursue a water right permit to store water.

KEY ISSUE

Should the SWRCB order liability in response to Administrative Civil Liability Complaint No. 262.5-31 against Omnium Estates?

- Has Omnium diverted water from McNab Creek?
- Does Omnium have any basis of right to divert water to storage from McNab Creek?
- Is the proposed administrative civil liability amount appropriate?

ABOUT THIS HEARING

In this hearing, the Division of Water Rights will be represented by an enforcement team who will be a party in the hearing. The enforcement team members will be Ken Emanuel, Staff Environmental Scientist, John O'Hagan, Senior Engineer, and Samantha Olson, Staff Counsel. The enforcement team is separated by an ethical wall from the hearing team, and is prohibited from having *ex parte* communications with members of the hearing team regarding substantive issues and controversial procedural issues within the scope of this proceeding.

The hearing team will consist of the hearing officer and the hearing staff (see page 4). The hearing staff will assist the hearing officer and the other members of the SWRCB in the hearing.

HEARING PARTICIPATION

IF YOU WANT TO TAKE PART IN THIS HEARING you should carefully read the enclosure entitled "Information Concerning Appearance at Water Right Hearings." As stated in that enclosure, parties intending to present evidence at the hearing must submit a **Notice of Intent to Appear**, which must be received by the SWRCB no later than **noon** on Thursday, **April 10, 2003**.

To facilitate exchange of testimony, exhibits and witness qualifications, on or about **April 15, 2003**, the SWRCB will mail out a list of those parties who have indicated that they intend to participate in the hearing.

Copies of witnesses' proposed testimony, exhibits, list of exhibits, and qualifications must be served upon and received by the SWRCB and each of the parties who have indicated their intent to appear no later than **noon** on Wednesday, **April 30, 2003**.

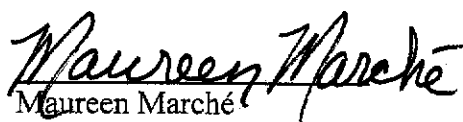
PARKING AND ACCESSIBILITY

The enclosed map shows the location of the Joe Serna, Jr./California Environmental Protection Agency (Cal-EPA) Building in Sacramento. Public parking is available in metered spaces on area streets, and in the public garages shown on the enclosed map.

The Cal-EPA Building second-floor hearing room is accessible to persons with disabilities. Individuals who require special accommodations are requested to contact Adrian Perez at (916) 341-5880 at least five working days prior to the meeting date. TTY users may contact the California Relay service at 1-800-735-2929 or voice line at 1-800-735-2922.

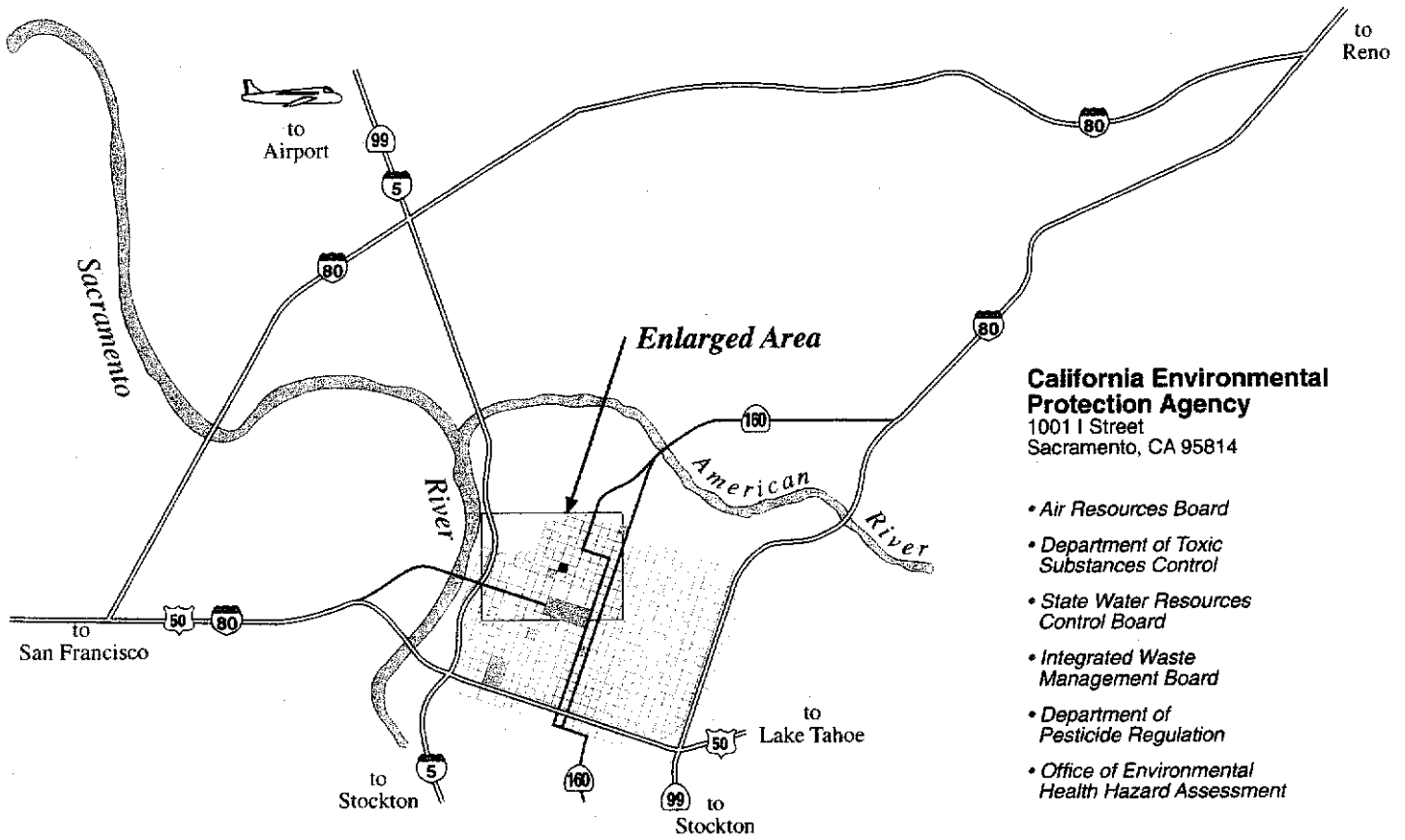
IF YOU HAVE ANY QUESTIONS

SWRCB Member Peter S. Silva will preside as hearing officer over this proceeding. SWRCB staff hearing team members will be Barbara Leidigh, Staff Counsel IV, and Jean McCue, Staff Engineer. *Ex parte* communications with members of the Board or SWRCB hearing team staff regarding substantive or controversial procedural matters involved in the hearing are prohibited during the pendency of this proceeding. (Gov. Code, §§ 11430.10-11430.80.) Communications regarding routine non-controversial procedural matters (See Gov. Code, § 11430.20, subd. (b).) should be directed to Barbara Leidigh, at (916) 341-5190.

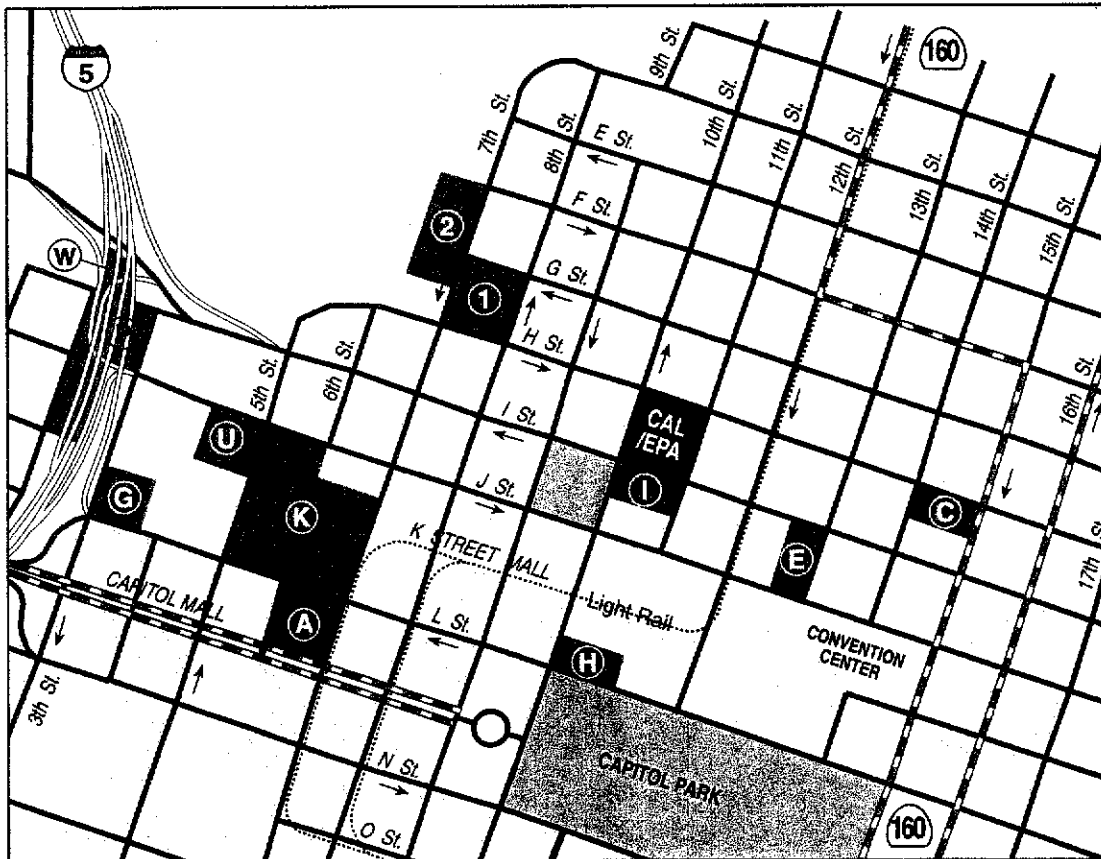

Maureen Marché
Clerk to the Board

Enclosures

Date: March 21, 2003



Parking Lot Locations



- Lot 1 (7th & G St.)**
\$0.75 ea. 1/2 hr.
- Lot 2 (7th & G St.)**
\$0.75 ea. 1/2 hr.
- Lot A (7th & Capitol)**
\$0.75 ea. 1/2 hr. for first 2 hrs.
\$1.50 ea. additional 1/2 hr.
\$8.00 maximum charge
- Lot C (14th & H St.)**
\$5.00 flat rate
- Lot G (3rd & L)**
\$0.75 ea. 1/2 hr. for first 2 hrs.
\$1.25 ea. additional 1/2 hr.
\$13.00 daily maximum charge
- Lot H (10th & L)**
\$1.25 each 1/2 hr.
\$15.00 daily maximum charge
- Lot I (10th & I, 11th & I)**
\$1.00 each 1/2 hr.
\$12.00 daily maximum charge
- Lot K (6th & J/L, 7th & K)**
\$0.75 ea. 1/2 hr. for first 2 hrs.
\$1.25 ea. additional 1/2 hr.
\$13.00 daily maximum charge
- Lot P (2nd & I)**
\$0.75 ea. 1/2 hr. for first 3 hrs.
\$1.00 each additional 1/2 hr.
\$12.00 daily maximum charge
- Lot U (5th & J)**
\$0.50 ea. 1/2 hr. for first 2 hrs.
\$1.00 ea. additional 1/2 hr.
\$12.00 maximum charge
- Lot W (2nd & I St.)**
\$5.00 flat rate

Enclosure 1

INFORMATION CONCERNING APPEARANCE AT WATER RIGHT HEARINGS

The following procedural requirements will apply and will be strictly enforced for purposes of the above-mentioned hearing.

1. **HEARING PROCEDURES GENERALLY:** The hearing will be conducted in accordance with the procedures for hearings set forth at California Code of Regulations, title 23, sections 648-649.6 and 760, as they currently exist or may be amended. A copy of the current regulations, and the underlying statutes, governing adjudicative proceedings before the State Water Resources Control Board (SWRCB) is available upon request or may be viewed at the SWRCB's web site:
http://www.swrcb.ca.gov/water_laws/.

Each party has the right to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even if that matter was not covered in the direct examination, impeach any witness, rebut adverse evidence, and subpoena, call and examine an adverse party or witness as if under cross examination. The hearing officer may extend these rights to a non-party participant or may limit the participation of a non-party participant.

Any requests for exceptions to the procedural requirements specified in this notice shall be filed in writing. To provide time for other participants to respond, the hearing officer will rule on procedural requests filed in writing no sooner than fifteen days after receiving the request, unless an earlier ruling is necessary to avoid disrupting the hearing.

2. **PARTIES:** The parties are the Division of Water Rights and Omnium Estates. Only parties and other participants who are authorized by the hearing officer will be allowed to present evidence. A person or entity who appears and presents only a policy statement will not be allowed to participate in other parts of the hearing. The rules for policy statements are discussed below.
3. **NOTICE OF INTENT TO APPEAR:** Participants in this hearing must file a Notice of Intent to Appear and two copies thereof which must be received by the SWRCB no later than **noon on Thursday, April 10, 2003**. Failure to submit a Notice of Intent to Appear and exhibits in a timely manner may be interpreted by the SWRCB as intent not to appear.

The Notice of Intent to Appear must state the name and address of the participant; and if the participant is a party or desires to be recognized as a party, the name of each witness who will testify on the participant's behalf; a brief description of the proposed testimony; and an estimate of the time, not to exceed 20 minutes, that the witness will take to present a brief oral summary of the witness's testimony. The witness's testimony must be submitted in writing as described in section 4 below. Participants should indicate how they intend to participate in the hearing by marking the appropriate box on the Notice of Intent to Appear. Participants who do not intend to present a case in chief but who may wish to cross-examine witnesses or present rebuttal should so indicate on the Notice of Intent to Appear. Participants who decide not to present a case in chief after having

submitted a Notice of Intent to Appear should notify the SWRCB and the other participants as soon as possible.

In order to expedite the exchange of information and lower the cost of participating in the hearing, the SWRCB encourages participants to submit written policy statements, written opening statements, written testimony, exhibits, and Exhibit Identification Indexes to the SWRCB in electronic form. In addition, participants may exchange the foregoing documents in electronic form. Hearing participants are not required to either submit these documents in electronic form or accept electronic service; however, those who choose to submit these documents electronically must comply with the requirements described in section 5, below. If you are willing to accept electronic media service in lieu of receiving hard copies of items, please check the appropriate box on the Notice of Intent to Appear.

Following receipt of the Notices of Intent to Appear, the SWRCB will mail to each participant who has submitted a notice a service list of participants. The service list will indicate which participants agreed to accept electronic service. No later than Wednesday, **April 30, 2003**, each participant shall serve a copy of its Notice of Intent to Appear on each of the participants identified on the service list and shall also serve on the SWRCB and the participants on the service list a statement of service that indicates the manner of service. If there is any change in the hearing schedule, only those persons or entities who have filed a Notice of Intent to Appear will be informed of the change.

4. **WRITTEN TESTIMONY AND OTHER EXHIBITS:** Exhibits include written testimony, statements of qualifications of expert witnesses, and other documents to be used as evidence. Each participant proposing to present testimony on factual or other evidentiary matters at the hearing shall submit such testimony in writing.¹ Written testimony shall be designated as an exhibit, and must be submitted with the other exhibits. Oral testimony that goes beyond the scope of the written testimony may be excluded. A participant who proposes to offer expert testimony must submit an exhibit containing a statement of the expert witness's qualifications.

Each participant shall submit to the SWRCB either: (1) six paper copies of each of its exhibits or (2) two paper copies and one electronic copy of each of its exhibits. Each participant shall also serve a copy of each exhibit on every participant on the service list. Participants may serve those parties who agree to electronic service with an electronic copy of exhibits. Participants must serve paper copies of exhibits on those participants who do not agree to electronic service.

With its exhibits, each participant must submit to the SWRCB and serve on the other participants a completed Exhibit Identification Index. If possible, each participant should submit to the SWRCB and serve on the other participants an electronic copy, as well as a paper copy of the Exhibit Identification Index. Please see Section 5 for details regarding electronic submissions.

¹ The hearing officer may make an exception to this rule if the witness is adverse to the participant presenting the testimony and is willing to testify only in response to a subpoena or alternative arrangement. In such a case, the hearing officer may allow presentation of the oral direct testimony without requiring written testimony.

A statement of service with manner of service indicated shall be filed with each participant's exhibits. The exhibits and indexes for this hearing, and a statement of service, must be **received** by the SWRCB by **noon on Wednesday, April 30, 2003**, and served on the other participants on or before that date.

The following requirements apply to exhibits:

- a. Exhibits based on technical studies or models shall be accompanied by sufficient information to clearly identify and explain the logic, assumptions, development, and operation of the studies or models.
 - b. The hearing officer has discretion to receive in evidence by reference relevant, otherwise admissible, public records of the SWRCB and documents or other evidence that have been prepared and published by a public agency, provided that the original or a copy was in the possession of the SWRCB before the notice of the hearing is issued. (Cal. Code Regs., tit. 23, § 648.3.) A participant offering an exhibit by reference shall advise the other participants and the SWRCB of the titles of the documents, the particular portions, including page and paragraph numbers, on which the participant relies, the nature of the contents, the purpose for which the exhibit will be used when offered in evidence, and the specific file folder or other exact location in the SWRCB's files where the document may be found.
 - c. A participant seeking to enter in evidence as an exhibit a voluminous document or database may so advise the other participants prior to the filing date for exhibits, and may ask them to respond if they wish to have a copy of the exhibit. If a participant waives the opportunity to obtain a copy of the exhibit, the participant sponsoring the exhibit will not be required to provide a copy to the waiving participant.
 - d. Exhibits that rely on unpublished technical documents will be excluded unless the unpublished technical documents are admitted as exhibits.
5. **ELECTRONIC SUBMISSIONS:** Participants are encouraged to submit the following documents to the SWRCB in electronic form: written opening statements, written policy statements, written testimony, exhibits, and Exhibit Identification Indexes. In addition, the foregoing documents may be served electronically on those participants who have agreed to accept electronic service. Paper copies of all other documents must be submitted to the SWRCB and served on the other parties, unless the hearing officer specifies otherwise.

Any documents submitted or served electronically must be in Adobe™ Portable Document Format (PDF), except for Exhibit Identification Indexes, which must be in a version supported by Microsoft Excel 97 (preferred) or Word 97. Electronic submittals to the SWRCB of documents less than 5 megabytes in size may be sent via electronic mail to: **WrHearing@waterrights.swrcb.ca.gov** with subject of "**Omnium**". Electronic submittals to the SWRCB of documents greater than 5 megabytes in size should be sent

by mail, in PDF format, on ZIP™, JAZ™, or compact disk (CD™) media. Electronic service on participants shall be in the same format as submittals to the SWRCB, but should be submitted to the other participants by mail on CD.

Participants who agree to electronic service may request that specific documents be provided to them in paper copy. Requests should be made to the participant who submitted the document, not to the SWRCB. Participants who receive such a request shall provide a paper copy of the requested document within five days of the date the request is received. The SWRCB will post a list of all exhibits submitted for the hearing on its website at <http://www.waterrights.ca.gov/hearings>.

6. **ORDER OF PROCEEDING:** The SWRCB member serving as hearing officer will follow the Order of Proceedings specified in California Code of Regulations, title 23, section 648.5. Participants should take note of the following additional information regarding the major hearing events.
 - a. **Policy Statements:** Pursuant to California Code of Regulations, title 23, section 648.1, subdivision (c), the SWRCB will provide an opportunity for presentation of nonevidentiary policy statements or comments by interested persons who are not participating in the hearing. Policy statements will be heard at the start of the hearing, immediately after the hearing officer identifies the parties and other participants. Policy statements are subject to the following provisions in addition to the regulation:
 - i. Policy statements are not subject to the prehearing requirements noted above for testimony or exhibits, except that persons wishing to make policy statements are requested to file a Notice of Intent to Appear, indicating clearly an intent to make only a policy statement.
 - ii. The SWRCB requests that policy statements be provided in writing before they are presented. Please see Section 5, above, for details regarding electronic submittal of policy statements. Oral summaries of the policy statements will be limited to five minutes or such other time as established by the hearing officer.
 - b. **Presentation of Cases in Chief:** Each participant may present a case in chief addressing the key issues identified in the hearing notice. The case in chief will consist of any opening statement provided by the participant, oral testimony, introduction of exhibits, and cross examination of the participant's witnesses. The hearing officer may allow redirect examination and recross examination. The hearing officer will decide whether to accept the participant's exhibits in evidence upon a motion of the participant after the case in chief has been completed.
 - i. **Opening Statements:** At the beginning of a case in chief, the participant or the participant's attorney may make an opening statement briefly and concisely stating the objectives of the case in chief, the major points that the proposed evidence is intended to establish, and the relationship between the major points and the key issues. Oral opening statements will be limited to 20 minutes per participant. A participant may submit a written opening statement. Please see

section 5, above, for details regarding electronic submittal of written opening statements. Any policy-oriented statements by a participant should be included in the participant's opening statement.

- ii. **Oral Testimony:** All witnesses presenting testimony shall appear at the hearing. Before testifying, witnesses shall swear or affirm that the written and oral testimony they will present is true and correct. Written testimony shall not be read into the record. Written testimony affirmed by the witness is direct testimony. Witnesses will be allowed up to 20 minutes to summarize or emphasize their written testimony on direct examination.² Each participant will be allowed up to two hours total to present all of its direct testimony.³
 - iii. **Cross Examination:** Cross examination of a witness will be permitted on the party's written submittals, the witness' oral testimony, and other relevant matters. If a participant presents multiple witnesses, the hearing officer will decide whether the participant's witnesses will be cross examined as a panel. Cross examiners initially will be limited to one hour per witness or panel of witnesses. The hearing officer has discretion to allow additional time for cross examination if there is good cause demonstrated in an offer of proof. Any redirect examination and recross examination permitted by the hearing officer will be limited to the scope of the cross examination and the redirect examination, respectively. Witnesses may be cross examined on relevant subjects that are not covered in the direct testimony. (Gov. Code, § 11513, subd. (b).) Ordinarily, only a participant or the participant's representative will be permitted to examine a witness, but the hearing officer may allow a participant to designate a person technically qualified in the subject being considered to examine a witness. SWRCB members and the SWRCB's counsel may ask questions at any time, and the SWRCB members and staff may cross examine any witness.
- c. **Rebuttal:** After all participants have presented their cases in chief and their witnesses have been cross-examined, the hearing officer will allow participants to present rebuttal evidence. Rebuttal evidence is new evidence used to rebut evidence presented in another participant's case in chief. Rebuttal testimony and exhibits need not be submitted prior to the hearing. Rebuttal evidence is limited to evidence that is responsive to evidence presented in a case in chief, and it does not include evidence that should have been presented during the presenter's case in chief. It also does not include repetitive evidence. Cross-examination of rebuttal evidence will be limited to the scope of the rebuttal evidence.

Closing Statements and Legal Arguments: At the close of the hearing or at other times if appropriate, the hearing officer may allow oral arguments or set a schedule for filing briefs or closing statements. If the hearing officer authorizes the participants to file briefs, **six** copies of each brief shall be submitted to the SWRCB, and one copy shall be served on each of the other participants on the service list. A

² The hearing officer may allow additional time for the oral direct testimony of the witness if the witness is adverse to the participant presenting the testimony and the hearing officer is satisfied that the participant could not produce written direct testimony for the witness.

³ The hearing officer may, for good cause, approve a party's request to use more than two hours total to present direct testimony during the party's case in chief.

participant shall not attach a document of an evidentiary nature to a brief unless the document is at the time in the evidentiary hearing record or is the subject of an offer of the document in evidence. Every participant filing a brief shall file a statement of service with the brief, indicating the manner of service.

- d. **Large Format Exhibits:** Participants submitting large format exhibits such as maps, charts, and other graphics shall provide the original for the hearing record in a form that can be folded to 8 ½ x 11 inches. Alternatively, participants may supply, for the hearing record, a reduced copy of a large format original if it is readable.
7. **AUDIO-VISUAL EQUIPMENT:** Participants who require Audio-Visual Equipment for their presentations should contact the Division one week prior to the first day of hearing to make arrangements with staff.
8. **EX PARTE CONTACTS:** During the pendency of this proceeding, commencing no later than the issuance of the Notice of Hearing, there will be no *ex parte* communications between SWRCB members or SWRCB hearing staff and any of the participants regarding substantive issues within the scope of the proceeding. (Gov. Code, §§ 11430.10-11430.80.) Communications regarding noncontroversial procedural matters are permissible, but ordinarily should be directed to SWRCB staff, not SWRCB members. (Gov. Code, § 11430.20, subd. (b).)
9. **RULES OF EVIDENCE:** Evidence will be admitted in accordance with Government Code section 11513. Hearsay evidence may be used to supplement or explain other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.
10. **SUBMITTALS TO THE SWRCB:** Notices of Intent to Appear, written testimony and other exhibits submitted to the SWRCB should be addressed as follows:

Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000
Attn: Jean McCue
Phone: (916) 341-5351
Fax: (916) 341-5400
Email: WrHearing@waterrights.swrcb.ca.gov
With Subject of "Omnium"

Scheduled for May 14, 2003

Exhibit Identification Index

Participant _____

Exhibit No.	Description	Status as Evidence		
		Introduced	Accepted	By Official Notice