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JAMES M. BOYD, JR., Of Counsel

February 14, 2003

Mr. Arthur G. Baggett, Jr., Chairman
State Water Resources Control Board
P. O. Box 100
Sacramento, California 95812-0100

Re: February 3, 2003 Draft Order Regarding Legal Classification Of
Groundwater Pumped By North Gualala Water Company

Dear Mr. Baggett:

This letter, submitted on behalf of the North Gualala Water Company ("North Gualala"), comments on the February 3, 2003 draft order regarding the legal classification of the groundwater pumped by North Gualala in the Elk Prairie (the "New Draft Order").

By making some edits to section 4.2 and completely re-writing sections 4.3, 4.3.1 and 4.3.2, the New Draft Order addresses many, but not all, of the technical comments in the December 24, 2002 letter from Joseph Scalmanini, which commented on the November 27, 2002 draft order in this matter (the "Old Draft Order"). However, the New Draft Order still contains several selective, out-of-context discussions of excerpts from the hearing testimony, without adequately analyzing most of the evidence that was submitted on the relevant issues. For example, the text regarding groundwater flow directions, which appeared on pages 17-18 of the Old Draft Order, has been moved to a new footnote 6, and has been edited to clarify that it is just a description of the testimony of DFG's witness. However, the new footnote still completely ignores the detailed rebuttal testimony of Mr. Scalmanini, which demonstrates that the opinions of DFG's witness on groundwater flow directions are not supported by the available data and are contrary to basic principles of groundwater hydrology. (See R.T., pp. 233-247.)

Moreover, the New Draft Order does not address most of the comments in my December 30, 2002 letter, or the comments in the letters submitted by several representatives of other California water users. As a result, the New Draft Order still contains incorrect descriptions of several important background facts and still does not correctly apply the elements for determining the existence of a subterranean stream that were stated by the California Supreme Court in *City of Los Angeles v. Pomeroy* (1899) 124 Cal. 597. Contrary to *Pomeroy* and Water Code section 1200, the New Draft Order still does not require that a subterranean stream have: (a) a "contracted and bounded channel"; or (b) flow through the purported channel.

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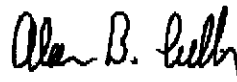
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In my December 30, 2002 letter, I noted that the major criticism by many members of the California water community of the first draft decision that was circulated several years ago in the Pala/Pauma matter was that it would have set a precedent that would have significantly expanded the SWRCB's water-right jurisdiction to include almost all groundwater that occurs in alluvial materials located in valleys with bedrock boundaries in California. I also noted that the Old Draft Order, like the first draft order in the Pala/Pauma matter, once again attempted the same type of proposed expansion of the SWRCB's water-right jurisdiction.

The New Draft Order attempts to dispel this concern with its new footnote 1. However, the reality is that the New Draft Order's legal test still would create a precedent under which any groundwater located in alluvial materials surrounded by bedrock or other "relatively impermeable" formations, and flowing in any direction, would be subject to the SWRCB's water-right jurisdiction. Under the New Draft Order's approach, the four elements of the so-called Garrapata test always would be satisfied in valleys containing such materials and boundaries. Because almost all usable groundwater in California is in aquifers in such valleys, the precedent created by the New Draft Order would subject almost all California groundwater to the SWRCB's water-right jurisdiction.

As other commenters and I have noted in prior letters, such a precedent would create tremendous upheaval to many California groundwater users, by requiring these water users to have water-right permits that they may not be able to obtain, and by drastically re-ordering the water-right priorities of the users who can obtain permits. In the Pala/Pauma matter, the SWRCB ultimately correctly decided not to adopt its first draft decision, and instead to rule that the groundwater in the Pauma Basin was percolating groundwater. To avoid a precedential decision that would have devastating effects on both North Gualala and other groundwater users throughout California, and to recognize that groundwater under the Elk Prairie does not actually flow through any contracted and bounded channel, the SWRCB should do the same thing here and rule that the groundwater under the Elk Prairie is percolating groundwater.

Very truly yours,



ALAN B. LILLY

ABL:tmo

cc: Peter S. Silva
Richard Katz
Gary Carlton
Paul Murphey
Attached Service List

PROOF OF SERVICE BY MAIL

I, Terry M. Olson, declare:

I am over the age of eighteen and not a party to this action and work in Sacramento County at 1011 Twenty-Second Street, Sacramento, California 95816. On February 14, 2003, following ordinary business practices, I placed for collection and mailing with the United States Postal Service, Sacramento, California 95816, Letter from Alan B. Lilly to Arthur G. Baggett, Jr., Chairman, State Water Resources Control Board dated February 14, 2003 Regarding February 3, 2003 Draft Order Regarding Legal Classification Of Groundwater Pumped By North Gualala Water Company in a sealed envelope, with postage fully prepaid, addressed to:

Jerome P. Lucey
66 Manderly Road
San Rafael, CA 94901

Erin Mahaney, Staff Counsel
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812

Harilee Branch, Staff Counsel
Department of Fish and Game, Office of the
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I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 14, 2003


Terry M. Olson