

1 ALLEN MATKINS LECK GAMBLE & MALLORY LLP  
JAN S. DRISCOLL (SBN 065967)  
2 501 West Broadway, Ninth Floor  
San Diego, California 92101-3577  
3 Phone: (619) 233-1155  
Fax: (619) 233-1158

4 *Attorneys for*  
5 *California-American Water Company*

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8

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

9

STATE OF CALIFORNIA

10

11 In re:

12 Petition to Revise Declaration of Fully  
Appropriated Stream System Description of  
13 American River, Sacramento County

CLOSING STATEMENT OF  
CALIFORNIA-AMERICAN WATER  
COMPANY

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I.

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**INTRODUCTION**

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Cal-Am believes that this Board should not revise its Declaration that the American River System in Sacramento County is Fully Appropriated from the Confluence of the Sacramento River Upstream.

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California-American Water Company ("Cal-Am") is a water utility regulated by the California Public Utilities Commission that provides drinking water to approximately 55,460 customers in the Sacramento area. Cal-Am's main source of supply for a major portion of its system is the Central Sacramento County Groundwater sub-basin. Cal-Am, like every other holder of groundwater rights in the Central Sacramento Groundwater sub-basin, has been significantly harmed by the contamination of the groundwater caused by Aerojet. The magnitude of the current and projected pumping by Aerojet is of grave concern to Cal-Am.

1 Southern California Water Company (SCWC) has petitioned the State Water  
2 Resources Control Board (SWRCB) to revise the Declaration of Fully Appropriated  
3 Streams to allow the Division of Water Rights to accept and process water rights  
4 applications to appropriate treated groundwater indirectly discharged to the American  
5 River. The SWRCB should consider the factual context in which SCWC brings this  
6 petition. For decades, activities conducted by Aerojet and others have contaminated the  
7 groundwater basin in the vicinity of the Aerojet property and beyond. The groundwater  
8 basin in the vicinity of the contamination has been relied upon by various municipal and  
9 private water companies to supply domestic water to thousands of users in the area. The  
10 contamination and its continued migration within the groundwater basin has caused the  
11 loss of many domestic supply groundwater wells.

12 Aerojet has been ordered to remediate the contamination. The current plan calls for  
13 withdrawal and treatment of vast quantities of contaminated groundwater from the basin.  
14 In addition to having contaminated the groundwater basin, Aerojet now further threatens  
15 the stability of the groundwater basin due to the huge volume of water it will pump from it.  
16 Aerojet is now extracting groundwater that would otherwise be appropriated for domestic  
17 use, treating, and discharging it indirectly to the American River, to the detriment of legal  
18 users of water.

19 Cal-Am respectfully contends that the fundamental determining fact in this  
20 proceeding is that the water being pumped by Aerojet is groundwater, not surface water.  
21 Groundwater does not lose its identity as groundwater when released into a surface stream.  
22 It should not be treated as though it were surface water.

## 23 II.

### 24 DISCUSSION

#### 25 1. There Has Been A Change in Circumstances Since the American River 26 System was Included in the FAS Declaration.

27 There is no doubt that there has been a significant change in circumstances with  
28 regards to water supply in the area of the Aerojet site. Since 1953, Aerojet has operated on

1 the site which has been declared a "Superfund Site". The history of the site is well  
2 documented in the EPA Record of Decision (Exhibit C to SCWC's Petition, hereinafter  
3 "ROD") and for brevity's sake Cal-Am will not repeat it here. Suffice it to say that  
4 Aerojet's manufacturing and disposal activities significantly contaminated the groundwater  
5 basin. In 1979, volatile organic compounds ("VOCs") were found in private wells off of  
6 the Aerojet property.

7       The extent of contamination in Western Groundwater Operable Unit (OU-3) alone  
8 is 14 square miles. (ROD § 2.5.2.1.) The primary contaminants comprise TCE,  
9 perchlorate, and NDMA. Other contaminants include breakdown products and  
10 contaminants of TCE, Freon, chloroform, nitrate and nitrite. The Aerojet site was placed  
11 on the National Priorities List on August 8, 1983. (ROD §2.2.2.) Aerojet is now being  
12 required to control the contamination plume and remediate groundwater contamination.  
13 (ROD §2.2.3.) The remediation plan entails the extraction of more than 25,000 acre feet  
14 per year of water from the groundwater basin underlying OU-3. (Public Hearing  
15 Testimony, June 13, 2002; p.298 1n.5-10.) In the ROD, the EPA estimated that the  
16 extraction of contaminated groundwater in an amount less than 19,000 acre feet per year  
17 would result in a drop in the water table of 30-35 feet. (ROD, Response to Comment No.  
18 331.) Increasing the extraction rate to more than 25,000 acre feet per year would  
19 undoubtedly cause an even greater drop in the water table.

20       Over 40 public and domestic water supply wells are located within OU-3. (ROD  
21 §2.5.7.) Groundwater contamination resulting from perchlorate and NDMA plumes  
22 migrating from the Aerojet Superfund site and the adjacent IRCTS, for which Aerojet is  
23 also partly responsible, has resulted in the loss of at least fourteen (14) public water supply  
24 wells in Sacramento County. (See Testimony of Keith Devore, Sacramento County  
25 Exhibit No. 1.) Thirteen (13) additional wells are at risk of removal from service in the  
26 near future. The Aerojet and IRCTS plumes have not only caused the closure of many  
27 existing water supply wells, but also they have precluded the construction of new water  
28 supply wells in groundwater outside the plumes. (Ibid.)

1 Cal-Am has had two wells impacted by contamination caused by the Mather Air  
2 Force Base Plume. One well was completely lost and a second required installation of  
3 well-head treatment. Although Cal-Am has not yet had to close a well due to the Aerojet  
4 Superfund Site and the adjacent IRCTS contamination, a substantial portion of the Central  
5 Sacramento County Groundwater sub-basin (from which Cal-Am appropriates water for its  
6 public drinking water purposes) has been contaminated by Aerojet and others. This  
7 contamination threatens Cal-Am's water supply because it poses an immediate threat to  
8 several of Cal-Am's wells. Cal-Am has built a new storage tank, pump station and  
9 transmission lines to enable it to store water from other wells in the event that one or both  
10 of the threatened wells is lost. Cal-Am is a party to the Water Forum Agreement, the  
11 parties to which seek to avoid basin-wide pumping in excess of sustainable yield. Cal-Am  
12 is concerned that Aerojet's current and proposed pumping could adversely affect the  
13 groundwater basin. (Written Testimony of Robert S. Roscoe offered by Cal-Am as a  
14 Policy Statement.)

15 As a supplier of drinking water for the public, Cal-Am will be directly affected by  
16 the groundwater extraction by Aerojet currently authorized by RWQCB Order 98-113  
17 (NPDES No. CA0083861) and by any increases in groundwater pumping by Aerojet.  
18 Cal-Am has participated in the Regional Board proceedings concerning Aerojet and will  
19 continue to do so. Cal-Am has repeatedly voiced its objection to the failure of Aerojet to  
20 actually provide a viable long-term water replacement contingency plan or a realistic short-  
21 term water replacement contingency plan. (Ibid.)

22 So there is a change in circumstances: the groundwater basin has been  
23 contaminated by Aerojet and others, and is now not fit for human consumption. Aerojet is  
24 now pumping huge amounts from the contaminated groundwater basin and is currently  
25 discharging that groundwater into Buffalo Creek. This is not the type of "change in  
26 circumstances" that warrants a revision to the FAS Declaration. The fundamental fact is  
27 that there is no new surface water available for appropriation in the American River.  
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1           2.     There Is No "Newly Developed Water."

2           SCWC suggests that the Aerojet discharge is "newly developed water." (See  
3 SCWC Petition for Limited Revision of the Declaration of Full Appropriation of the Lower  
4 American River, p.2 In. 13.) This is not correct. SCWC never addresses the fundamental  
5 fact that the water being pumped and treated by Aerojet is groundwater. Groundwater  
6 does not lose its identity as groundwater merely by being discharged into a stream.  
7 Surface water stored in an underground aquifer is not available for appropriation by  
8 overlying landowners or appropriators in a groundwater basin. (*City of Los Angeles v. City*  
9 *of Glendale* (1943) 23 Cal.2d 68, 76-78.) Similarly, water extracted from a groundwater  
10 basin and placed into a surface water course is not available for appropriation from the  
11 surface water course. (See generally Water Code §7075; *Stevens v. Oakdale Irr. Dist.*  
12 (1939) 13 Cal.2d 343, 350-353.)

13           The only authority cited by SCWC is WR Order 2000-12, which in fact does not  
14 support SCWC's position. There is nothing in WR Order 200-12 that supports treating  
15 groundwater discharged into a surface water as "new" surface water.

16           If Aerojet were to attempt to develop its discharge as a water supply, it must  
17 necessarily have the right to the water. Newly developed water, added to a stream from an  
18 underground source, may be reclaimed by the "owner thereof." Aerojet, in the instant  
19 situation, has absolutely no right in the water which it is pumping from the ground. The  
20 overlying landowners and historic appropriators have the right to use the water from the  
21 groundwater basin and the right to recapture that water remains with those parties. (*Id*)  
22 Even if the SWRCB were to consider this water "developed water," the right to use  
23 developed water only exists so long as the use of the developed water does not infringe  
24 "the prior rights of others." (Hutchins, *The California Law of Water Rights*, at 383.) Given  
25 the overwhelming evidence of the injury caused by the contamination, coupled with the  
26 additional harm should this treated groundwater be available for others to appropriate, no  
27 parties, other than those with existing rights to this groundwater, may use this water. The  
28

1 only parties entitled to use this groundwater are those with existing rights in the  
2 groundwater basin whose rights have been adversely affected by the contamination.<sup>1</sup>

3 Not only does Aerojet not have any legal right to the water it is pumping and  
4 treating, but the method of discharge may constitute a waste or unreasonable use of water.  
5 The California Legislature has recently declared that the "loss or diminishment of drinking  
6 water supplies from groundwater basins because of contamination or pollution constitutes  
7 a waste of water." (Assembly Bill No. 378, §1(d).) Under this policy Aerojet's  
8 contamination of the groundwater basin constitutes a waste. This is clearly so because  
9 "[d]rinking water pumped from groundwater basins . . . represents a vitally important  
10 component of the state's water supplies." (Assembly Bill No. 378, 51(b).) Aerojet's current  
11 activity, discharge of the groundwater indirectly to the American River without making it  
12 available to the legal users of the groundwater basin affected by its operation may, in itself,  
13 be a waste or unreasonable use of water prohibited by Article XIV, section 3, of the  
14 California Constitution. (See *Niles Sand and Gravel Co., Inc. v. Alameda County Water*  
15 *Dist.* (1974) 37 Ca1.App.3d 924, 934.)

16 3. No Water is Available for Appropriation.

17 Order WR 89-25 found that no unappropriated water was available from the  
18 American River. SCWC now asks that the SWRCB revise the FAS Declaration in order to  
19 process an application for the appropriation of treated groundwater discharged into the  
20 American River. Granting this petition necessitates a finding by the SWRCB that  
21 unappropriated water is available in the American River.

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25 <sup>1</sup> Several parties to this proceeding, including the Department of Water Resources and  
26 the United States Bureau of Reclamation, assert that this water is abandoned water and  
27 is subject to the restrictions imposed by Term 91. As discussed more thoroughly  
28 above, this water is not abandoned water, as the parties with the rights to the water have  
no intent to abandon the water. Moreover, parties appropriating water from the  
American River have no right to divert the groundwater discharged into Buffalo Creek  
or the American River. (See *Crane v. Stevinson* (1936) 5 Cal.2d 387, 399-400; *Stevens*  
*v. Oakdale Irr. Dist.* (1939) 13 Cal.2d 343, 348-349.)

1 The only water available for appropriation is surface water and water flowing in  
2 subterranean streams with known and definite channels. (Water Code § 1200.) Only  
3 unappropriated water is available for appropriation. (Water Code §1201.) Unappropriated  
4 water consists of: (1) water which has never been appropriated; (2) pre-1914  
5 appropriations that is not being put to beneficial use; (3) water appropriated pursuant to the  
6 Water Commission Act or the Water Code that is no longer put to beneficial use; and (4)  
7 water previously appropriated or used which flows back into a water course. (Water Code  
8 § 1202(a)(d).) It is undisputed that the percolating groundwater pumped, treated and  
9 discharged by Aerojet was not appropriated pursuant to a pre-1914 right nor was it  
10 appropriated pursuant to the Water Commission Act or the Water Code. To classify this  
11 treated groundwater as "unappropriated," therefore, it must be water that has never been  
12 appropriated, or water that was previously appropriated and turned back into a water  
13 course. (See Water Code § 1202(a),(3).)

14 The evidence before this Board clearly demonstrates the history and factual  
15 background of the contamination of the groundwater basin and ensuing loss of drinking  
16 water supplies. No party or participant has disputed that the groundwater that is the  
17 subject of SCWC's petition has historically been appropriated by various water purveyors  
18 and overlying landowners. It is undisputed that this water has never been "appropriated"  
19 by Aerojet and was not, in fact, being pumped by Aerojet until the remediation activities  
20 began. Moreover, the water purveyors who are the historical appropriators of this  
21 groundwater have not abandoned their right to the groundwater.<sup>2</sup>

22 There are essentially two types of rights in groundwater: overlying rights (similar to  
23 riparian rights in surface waters) and appropriative rights.<sup>3</sup> Overlying rights are exercised

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25 <sup>2</sup> Abandonment of appropriated water requires the intent to abandon and the  
26 relinquishment of dominion and control. (Slater, California Water Law and Policy,  
27 2002, §2.32.) There is no evidence that any of the water purveyors that have  
28 appropriated groundwater from the basin had the requisite intent to abandon their right  
to the groundwater.

<sup>3</sup> California also recognizes prescriptive rights in groundwater. This occurs where an  
appropriator takes water that is not surplus. This wrongful taking may ripen into a  
prescriptive right where the use is actual, open and notorious, hostile and adverse to the

1 when a landowner pumps groundwater for use on overlying lands. Water purveyors, such  
2 as Cal-Am and SCWC, that operate public drinking water systems do not exercise the  
3 overlying rights of their customers. Such water purveyors are appropriators. (Littleworth  
4 and Garner, California Water (1995) p.51.) As an operator of the treatment facilities and  
5 discharger of treated groundwater, Aerojet is not an overlying user, but at best a would-be  
6 appropriator, because the groundwater it pumps is not used on Aerojet lands. An  
7 appropriator may only appropriate surplus water in the basin. (*City of Barstow v. Mojave*  
8 *Water Agency* (2000) 23 Cal.4th 1224, 1241; Littleworth and Garner, California Water  
9 (1995) p.51.) As between appropriators, "first in time is first in right, and a prior  
10 appropriator is entitled to all the water he needs, up to the amount he has taken in the past,  
11 before a subsequent appropriator may take any action." (*City of Barstow, supra at 1241*)

12         The only water available for appropriation is surplus water. Those with  
13 longstanding and recognized appropriative rights to the groundwater basin have been  
14 concerned for some time that the groundwater basin is being pumped in excess of  
15 sustainable yield. The Water Forum Agreement was executed by numerous groundwater  
16 rights stakeholders to recommend management of the basin to prevent aggregate basin  
17 wide pumping in excess of sustainable yield. (See Written Testimony of Keith DeVore,  
18 p. 3 and Written Testimony of Robert S. Roscoe submitted by Cal-Am as a Policy  
19 Statement, p. 2.) Aerojet's pumping will exacerbate the problem. Aerojet's pumping is in  
20 derogation of the rights of existing overlying landowners and groundwater appropriators  
21 prior in time to Aerojet. Aerojet is not appropriating groundwater, but instead pumping  
22 groundwater that others already have a legal right to use.

23         This again reinforces the need to go beyond simply asking whether water is  
24 available for appropriation. The SWRCB must consider the conditions and activities that  
25 resulted in Aerojet's pumping and discharging of this groundwater, and the impact that

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27 original owner and continuous and uninterrupted for five years, and under a claim of  
28 right. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241, citing  
*California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 Cal.App.2d  
715, 725-726.



1 Aerojet's activities are having on the lawful appropriators of the water and the groundwater  
2 basin generally. In doing so, the SWRCB would undoubtedly conclude that there is no  
3 water available for appropriation from the American River and that Aerojet's activities do  
4 not change that conclusion.

5 4. The Treated Groundwater Should be Supplied Solely to Those Whose  
6 Groundwater Supplies Have Been Diminished.

7 The EPA requirement that Aerojet pump and treat this groundwater was not  
8 intended to give Aerojet the right to the water itself. The ROD expressly states that the  
9 right to use the groundwater would be determined by California law. (ROD Response to  
10 Comment No. 197.) California law recognizes both an overlying landowner's right to  
11 groundwater for use on overlying land and an appropriator's right to groundwater. Aerojet,  
12 in the context of this petition and the proposed use of the water, is neither a proper  
13 overlying user nor an appropriator. Aerojet clearly has no right to this groundwater and  
14 the clean-up orders were not intended to confer any interest in the groundwater to Aerojet.

15 The regulatory record demonstrates that the treated groundwater that Aerojet is  
16 currently discharging into Buffalo Creek is earmarked as a replacement supply for the  
17 water purveyors injured by the contamination. (See ROD Response to Comment No. 2  
18 ("The treated groundwater is to supply a growing water demand in the community."); ROD  
19 Response to Comment No. 32 ("Groundwater, once remediated, remains available for local  
20 use. The groundwater discharged to the American River, Folsom South Canal or Lake  
21 Natoma will be available to the local community."); ROD Response to Comment No. 396  
22 ("... within the first two years of the remedy implementation a provision has been made to  
23 provide ... water through direct discharge to the drinking water system ,of surface water  
24 discharge of treated groundwater."); see also ROD Response to Comments No. 47, 50,  
25 414, 415, 418.) The ROD Response to Comment No. 421 states that the long term plan for  
26 an alternative water supply would be the reuse of treated groundwater, either through  
27 direct discharge to the drinking water system or through surface water discharge and reuse.  
28

1 It is clear that the EPA and RWQCB intended that Aerojet treat this water for the  
2 use of those who already had rights to it and whose rights were injured by the  
3 contamination. It is also clear that this water is not intended to be used by third parties,  
4 whether it be for appropriation by third parties or earmarked for environmental or water  
5 quality purposes.

6 **III.**

7 **CONCLUSION**

8 There is no dispute that water being pumped by Aerojet is groundwater. Pumping  
9 groundwater and then discharging it into surface water does not magically transform  
10 groundwater into surface water. It would be manifestly unfair to those with longstanding  
11 groundwater appropriative and overlying rights to allow the groundwater discharged by  
12 Aerojet to be treated as unappropriated under the rules pertaining to surface water. There  
13 is no question but that those who have been harmed by the groundwater contamination  
14 should benefit from the treated groundwater.

15 The appropriate forum for a just resolution of this remedy is the Regional Water  
16 Quality Control Board, which should order Aerojet to provide appropriate facilities to  
17 allow the injured groundwater rights holders to divert, store and use the treated  
18 groundwater. This Board could facilitate such a remedy by denying the petition to revise  
19 the FAS Declaration, and making findings (1) that the treated groundwater discharged by  
20 Aerojet is not unappropriated surface water but is groundwater; (2) the treated groundwater  
21 is subject to the rights of diversion and use by entities and individuals with overlying or  
22 appropriative rights within the groundwater basin from which it was pumped; (3) the  
23 treated groundwater discharged by Aerojet shall not be diverted as surface water or as  
24 "abandoned water", and (4) the treated water discharged by Aerojet shall not be subject to  
25 Term 91 requirements or any other terms or conditions that limit surface water diversions.

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1 California-American Water Company respectfully requests that this Board deny the  
2 Petition to Revise Declaration of Fully Appropriated Stream System Description of  
3 American River, Sacramento County.

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Dated: August 2, 2002

ALLEN MATKINS LECK GAMBLE &  
MALLORY LLP

By: Jan S. Driscoll  
JAN S. DRISCOLL  
California - American Water Company

1 ALLEN MATKINS LECK GAMBLE & MALLORY LLP  
JAN S. DRISCOLL (SBN 065967)  
2 501 West Broadway, Ninth Floor  
San Diego, California 92101-3577  
3 Phone: (619) 233-1155  
Fax: (619) 233-1158

4 *Attorneys for*  
5 *California-American Water Company*

6  
7  
8 BEFORE THE STATE WATER RESOURCES CONTROL BOARD  
9 STATE OF CALIFORNIA

10  
11 In re: PROOF OF SERVICE  
12 Petition to Revise Declaration of Fully  
Appropriated Stream System Description of  
13 American River, Sacramento County  
14

15 I am employed in the County of San Diego, State of California. I am over the age  
of 18 and not a party to the within action. My business address is 501 West Broadway,  
16 Ninth Floor, San Diego, California 92101-3577.

17 On August 2, 2002, I served on interested parties in said action the within:

18 CLOSING STATEMENT OF CALIFORNIA-AMERICAN WATER COMPANY

19 X (by **electronic submission**) on the following parties, at their email addresses as  
provided, in said action listed below:

20 State Water Resources Control Board  
21 Division of Water Rights  
1001 I Street, 14th Floor  
22 Sacramento, CA 95814  
**WrHearing@waterrights.swrcb.ca.gov**

23 Michael T. Fife, Esq.  
24 Hatch & Parent  
P. O. Drawer 720  
25 Santa Barbara, CA 93102-0720  
**mfife@hatchparent.com**  
26 *Representing Southern California Water Company*

1 Ronald M. Stork  
915 – 20<sup>th</sup> Street  
2 Sacramento, CA 95814  
[rstork@friendsoftheriver.org](mailto:rstork@friendsoftheriver.org)  
3 *Representing Friends of the River*

4 Stuart L. Somach  
Somach, Simmons & Dunn  
5 400 Capitol Mall, Ste. 1900  
Sacramento, CA 95814-4407  
6 [ssomach@lawssd.com](mailto:ssomach@lawssd.com)  
7 *Representing County of Sacramento and  
Sacramento County Water Agency*

8 **AND**

9 X (by facsimile transmission) to the person at the address and phone number set  
forth below:

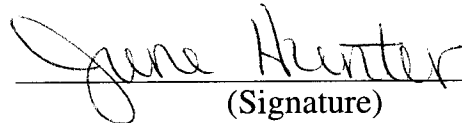
10 X (by mail) on all parties in said action listed below, in accordance with Code of Civil  
11 Procedure § 1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a  
designated area for outgoing mail, address as set forth below. At Allen Matkins Leck  
12 Gamble & Mallory LLP, mail placed in that designated area is given the correct amount of  
postage and is deposited that same day, in the ordinary course of business, in a United  
13 States mailbox in the City of San Diego, California.

14 SEE ATTACHED SERVICE LIST

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

16 Executed on August 2, 2002, at San Diego, California.

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18 June Hunter  
\_\_\_\_\_  
19 (Type or print name)

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22 (Signature)

SERVICE LIST

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State Water Resources Control Board  
Division of Water Rights  
Attn: Jean McCue  
1001 I Street, 14<sup>th</sup> Floor  
Sacramento, CA 95814  
**WrHearing@waterrights.swrcb.ca.gov**  
FAX: 916-341-5400

*Representing Southern California Water Company*

Michael Fife  
Hatch & Parent  
21 East Carrillo Street  
Santa Barbara, CA 93101  
[mfife@hatchparent.com](mailto:mfife@hatchparent.com)

*Representing Friends of the River*

Ronald M. Stork  
915 – 20<sup>th</sup> Street  
Sacramento, CA 95814  
[rstork@friendsoftheriver.org](mailto:rstork@friendsoftheriver.org)

*Representing County of Sacramento and Sacramento County Water Agency*

Stuart L. Somach  
Somach, Simmons & Dunn  
400 Capitol Mall, Ste. 1900  
Sacramento, CA 95814-4407  
[ssomach@lawssd.com](mailto:ssomach@lawssd.com)

*Representing Aerojet-General Corporation*

Janet K. Goldsmith  
Kronick, Moskovitz, Tiedemann & Girard  
400 Capitol Mall, 27<sup>th</sup> Floor  
Sacramento, CA 95814-4417  
FAX: 916-321-4555

*Representing City of Sacramento*

Martha H. Lennihan  
Lennihan Law  
2311 Capitol Avenue  
Sacramento, CA 95816  
FAX: 916-321-4422

*Representing Department of Fish & Game*

Jennifer Decker  
Department of Fish and Game  
1416 Ninth Street, 12<sup>th</sup> Floor  
Sacramento, CA 95814  
FAX: 916-654-3805

*Representing CVRWQCB*

M. Catherine George, Staff Counsel  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812  
FAX: 916-341-5199

*Representing U.S. Bureau of Reclamation*

James E. Turner  
Office of the Regional Solicitor  
PSW Region  
2800 Cottage Way, E-1712  
Sacramento, CA 95825  
FAX: 916-978-5694