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August 22, 2001

Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board
1001 "T" Street, 14th Floor
P. O. Box 2000
Sacramento, CA 95812-2000

Dear Mr. Schueller:

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

The City of San Diego is grateful for the opportunity to provide comments to the State Water Resources Control Board (State Board) and its consultant, Professor Joseph Sax, in response to the State Board's recent Notice of Public Meeting to gather information regarding the legal classification of groundwater. The State Board is to be commended for continuing to cooperatively work with public agencies and stakeholders in evaluating its permitting authority over subsurface waters.

It is clear from the six questions posed by the State Board to Professor Sax, that it is mindful of both the gravity and breadth of the issues at hand. The scope of the State Board's permitting authority and the current legal test for determining whether or not subsurface waters fall within the State Board's jurisdiction have been developed over the course of the past century. We urge Professor Sax, in evaluating each of the State Board's questions, to respect existing legal precedent when providing recommendations for distinguishing subsurface waters connected with a watercourse from percolating groundwater outside the jurisdiction of the State Board.

We are mindful of the need for the State Board to clarify, to the extent possible, the standards to be applied to specific groundwater formations in differentiating between subsurface waters subject to its jurisdiction and percolating groundwater. Certainly, the evolution of modern science and engineering has provided those charged with differentiating between subsurface streams and percolating groundwater with useful, previously unavailable tools and information that undoubtedly aids them in making appropriate determinations. However, we recommend that these tools be used to supplement and build upon the current legal test, rather than recast or reshape established rules and determinations.

State Board decisions have, for the last several decades, made the differentiation between subsurface water subject to its jurisdiction and percolating groundwater in a consistent manner upon which groundwater users have come to rely. Indeed, users of groundwater in California have, for decades, relied upon the legal precedents established by the State Board and the California Courts when investing in the development and management of groundwater resources. Based upon this reliance, it is of paramount importance that these proceedings aim toward the further development, rather than the substantive alteration or abandonment, of the existing legal test and established precedent. Specifically, we believe it would be inappropriate to change the established legal test for determining which subsurface waters are subject to the State Board's permitting authority. Accordingly, we respectfully request that Professor Sax, in preparing his evaluation and providing his recommendations, decline to answer Question No. 5 affirmatively, as posed to him by the State Board in this regard.

We appreciate the opportunity to provide input on these issues of statewide importance, and hope that Professor Sax will consider our comments in developing his evaluation. We look forward to continuing to participate in this process.

Respectfully submitted,

CASEY GWINN, City Attorney

By

Deborah L. Berger
Deputy City Attorney

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