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May 14, 2008

VIA U.S. MAIL & E-FILING

Hon. Jack Komar
Santa Clara County Superior Court
Department D-17
161 N. First Street
San Jose, CA 95113

**Re: *Antelope Valley Groundwater Litigation*
*Case No.: 1-05-CV-049053***

Dear. Judge Komar:

This letter pertains to the further status conference in this matter set on May 22, at 9:00 a.m. in LASC, Department 1, and more specifically, my potential representation of a class we have loosely referred to as the "small pumper" class.

I write to address what I believe is a potential hurdle to the representation of this class, with the hope that it might be resolved at hearing next week. Last week I discussed this issue with Jeffrey Dunn, who I asked to discuss the matter with his colleagues in anticipation of this letter. If the water purveyors, or other interested parties wish to comment, it is my hope that they will do so now so that this matter can be fully addressed next week.

The proposed pumping class would consist of at least 7,500 members, according to Mr. Dunn. I have heard higher estimates, but even using 7,500, this is a rather sizeable group of people (and entities) with collectively and individually large stakes in this litigation. As the Court has recognized, these people as a group have interests that are at odds with the interests of other groups of stakeholders in this litigation.

I am informed that the primary vehicle for the conduct of this adjudication will be a rather sizeable report soon to be issued by a group of engineers and water experts, many or all of whom will ultimately testify in this case on behalf of their clients. I also understand that much or all of the information in this report has been assembled by a Technical

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Committee comprised of a number of these experts. While there are apparently some landowner interests on this Committee, this group appears to be largely dominated by the water companies, and a few large landowners (including the Federal Government). These larger stakeholders obviously have the financial means to undertake such costly and complex analysis, and by virtue of that, are in control of this process.

I have serious reservations about representing this group of pumpers relying solely on the expert analysis of this group experts retained by large stakeholders with differing interests. My concern is born in large part from my years of experience in complex groundwater litigation. While the underlying data in such cases is generally fixed, the actual expert analysis is general subject to substantial subjective components that can vary significantly based on assumptions. It is no secret that experts have, from time to time, been known to angle their subjective decisions in a direction favoring the parties they represent.

I believe the interests of the small pumpers would be best served with an independent expert, and that the appearance of fairness in this adjudication would be enhanced through the appointment of such an expert under Evidence Code section 730, which provides in relevant part:

When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required. The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court.

(See also Witkin, Cal. Evidence 4th, Opinion Evidence § 81.)

I propose that the Court appoint an expert to represent the interests of this group. Such an expert would not be commissioned to re-invent the wheel, but would instead undertake a satisfactory analysis of the work done to date. I have contacted Stetson Engineers, a reputable and qualified firm in this field, and they are willing to serve in this role. While the numbers are very rough, they estimate generally a cost of \$100,000-150,000 for the initial workup (year 1), and then considerably smaller costs if the case were to continue for successive years. If necessary, Stetson could assemble a more detailed proposal, but for the time being, I would suggest an order that simply caps the total costs on an annual basis.

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Under section 731, the Court may apportion the costs for such an expert to those parties it deems proper. In this case, I suggest that the costs of such an expert should be born by the public water supplier entities, as this is a matter of general public benefit.

While my office is will to venture legal time and standard costs on a contingency basis, I will not assume the burden of paying for this expert. In the event the water companies are inclined to object to this proposal, I offer a back of envelope estimate of the costs of proceeding in the alternative, i.e. having to individually name and serve these parties. Using 7,500 as the number of small pumpers, and conservative cost of \$100 to identify and serve each pumper, a court order requiring the service off all these parties would cost at least \$750,000, and quite likely much more. So I suggest that it is more economical to proceed with a class action and an expert than in the alternative.

Finally, I have interviewed Mr. Richard Wood, the proposed class representative for this class (see letter to the Court, April 22, 2008, Docket #1286). I believe Mr. Wood will serve as a more than capable representative for the vast majority if not all of members of this class (reserving of course the possibility that some small number of members of this yet-to-be-defined class may have interests not fully in line with his). He understands the obligations of that role, and is willing to serve as representative. So, if we can resolve the concerns raised above, I believe the proposed class makes sense and can proceed.

If any of the attorneys for the interested parties would like to discuss this matter with me, please feel free to call me.

Very truly yours,

A handwritten signature in black ink, appearing to read 'MDM', with a long horizontal flourish extending to the right.

Michael D. McLachlan