

To: Fellow PAC Members

From: Nick Panzer

Subject: **7 March, 2019 PAC Meeting Agenda Item 5. b.**; Comments on Mr. Markman's February 28, 2019 Report on the February 15, 2019 Attorney Allocation Plan Meeting.

Date: 7 March 2019



Page 1, first paragraph claims that "all pumpers" may candidly express themselves. Who claims to speak exclusively for underlying residential rate payers? Multiple SGMA regulation sections require an accounting for such underlying "uses and users."

Page 2, second full paragraph: the third model run assumes imported water. Where a GSP relies upon import water, the Regulations do not permit such an assumption in the absence of a reliable source and proof of financial feasibility. I cannot find on the GA Website a technical report that identifies a financially feasible, reliable source of import water. Concerning leases from Meadowbrook and Mojave Pistachio to the Water District and Searles Minerals, what transfer price was used in the model run, and how was that price determined: Theoretical auction between Searles and the WD? Theoretical four-way negotiation?

Page 2, third full paragraph: this "new version" allocation plan refers to "project development fees." What would "project development" include? Just planning, or full build-out cost?

Page 3, first full paragraph, refers to "negotiating parties." Who are they? And who among them claims to exclusively represent 31,000 plus residential rate payers (as opposed to the three pumpers that sell water to those rate payers)?



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MEMORANDUM

VIA FACSIMILE

TO: David Janiec (david.janiec@chinalakealliance.org)
Steve Johnson (stevej@stetsonengineers.com)

FROM: James L. Markman *JLM*

DATE: February 28, 2019

SUBJECT: Report from February 15, 2019 Meeting on IWVGWA Allocation Plan

These notes are meant to roughly reflect the subject matter of the above-referenced meeting. Based on recent information, it again needs to be emphasized that these meetings are constructed so that all pumpers may candidly express their positions. No statements made constitute the adopted position of the GSA and, no party speaking is locked into any position.

The first statement made pertained to the necessity of discussing the practicality of suggestions made to be included in the water production allocation. This includes projected amounts of pumping allowed, rampdown, period of commencement of rampdown, projected costs of imported water and any other items to which a financial analysis may be applied. In fact, the meeting was oriented substantially to model runs, and other facts and figures. The sense is that we are under time constraints with management model runs to come which will aid in developing a first draft allocation plan which makes practical sense.

The initial general discussion was followed by a Stetson Engineering presentation (with power point) of three model runs. It was noted that the materials had been presented to TAC. The first model run (referred to as Test Run 1) was a run of 50 years, assuming an approximately 33,000 AF per year pumping level with supply frozen and 7,650 AF per year. This resulted in approximately 25,000 AF per year of mining or negative change in storage for a total 50 year loss of 1.5 million AF. It also was noted that at the end of the 50 years, the model showed no operative pumping occurring. The Basin elevation drawdowns ranged from 10 feet to 70 feet. In addition, TDS increased based on pumping water from lower elevations and from the

movement of water in the Basin in a southwest direction. The increase in TDS was shown to occur more in shallow layers than in deeper layers.

The second test run discussed limited pumping to the 7,650 AF per year (level with supplies). This presented a state of sustainability.

The third model run discussed was referred to as Management Run 1. This run assumed that imported water would arrive by 2030 in the amount of 15,000 AF per year. It also assumed recycled water in the amount of 352 AF per year would be available. It assumed that pumping would start at 31,000 AF per year, that rampdown would commence immediately at 8% per year and that leases would be made so that the District and Searles could offset their rampdowns from water leased to them by Meadowbrook and Mojave Pistachio. This scenario projected sustainable balance at approximately 2030 with a mined amount of approximately 200,000 AF to 250,000 AF.

Following the Stetson model runs presentation, one of the parties presented a new version of the potential allocation plan discussed in January. This plan presented a base water right representing a producer's average amount of pumping from 2004 to 2014 (excepting cliff producers). The base water right also was translated to being expressed as a percentage of total allocated base water rights. The plan next suggested that "operating allocations" be calculated representing any pumper's percentage share of safe yield. Safe yield included augmented yield (the addition of supplemental water) and deductions to deal with undesirable results. Free production allowances then would be calculated so that each producer could pump its share of the natural safe yield free of assessments. There was an assumed amount to so pump equaling 22% of the pumper's operating allocation. This converted prior presentations of assessable water production from all water pumped (referred to as a gross pump tax) to the amount of water production above the free production allowance (a net pump tax). The assessable production would cover administrative fees, project development fees and an excess fee to be used to avoid material harm from occurring in the Basin. The proposal considered cliff pumping parties who would not receive a base water right, would not participate in rampdown and whose right would not be transferrable. Cliff pumpers would pay administrative fees and project development fees and excess fees on production over the cliff pumping amount awarded to them. This proposal excluded Navy production of its Federal Reserved Right and proposed reverting unpumped Navy rights to others with Operating Allocations in the next year or, alternatively, to benefit the Basin. The proposal also proposed treatment for de minimus producers.

There followed presentations by two of the negotiating parties. One suggested that its water rights would be defended, that it would carefully consider any proposals, but would not

subsidize another party's production and that it agreed with a 10 year average to establish base water rights. The second party, a potential cliff pumper, suggested that it be provided a gross amount of water to produce over a 20 year period after which its pumping would fully terminate. This party still is in the process of refining its proposal.

There then was discussion of the negotiating parties providing input on the assumptions to be included in the second Management Model Run even if this meant a delay in the run. Some offered thoughts were beginning assumed total production at 31,000 AF per year, assuming a 5 to 10 year period before commencing rampdown and variable required annual rampdown percentages depending on the party ramping down. This topic remains open. The next meeting is to occur on March 8, 2019.

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To: Fellow PAC Members from Nick Panzer

Subject: **7 March, 2019 PAC Meeting Agenda Item 5. a.**; February Allocation Discussion



I delivered the following to the GA in my own name as an IWWWD residential customer during public comment prior to the GA's 10 AM closed door session on 2/21/19

On January 15, 2019, I addressed a question to Mr. Markman (see attached) via your PAC Chair, Mr. Janiec. Yesterday, I received a reply from Mr. Markman (see overleaf¹) via Mr. Janiec.

Mr. Markman's reply claims that "overlying use" is "constitutionally protected." This implies to me as a layman (I am not a lawyer) that our state constitution has a provision that specifically exempts "overlying use" from the "unreasonable use" limitations imposed by Article X, Section 2 of the constitution, or, alternatively, has a provision that declares all beneficial overlying use "reasonable" within the meaning of Article X, Section 2. If you would be so kind, please ask Mr. Markman to cite for the benefit of all the constitutional provisions that "protect overlying use" from the "unreasonable use" limitations imposed on all water rights by Article X, Section 2. I am not suggesting that such provisions do not exist, I am saying that I have not yet been able to find such provisions in the time available since receiving Mr. Markman's reply yesterday.

In making the above request, I am mindful of Professor Gray's comments (see my January 15, 2019 query of Mr. Markman attached) on the California Supreme Court's ruling in *City of Barstow v. Mojave Water Agency* (2000). Professor Gray writes

Although "water right priority has long been the central principle in California water law, the corollary of this rule is that an equitable physical solution must preserve water right priorities to the extent those priorities do not lead to unreasonable use." In crafting a "physical solution" to the problem of aggregate overdraft, the court concluded, a trial court "may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution *without first considering them in relation to the reasonable use doctrine* (emphasis added by Gray)."

I share Mr. Markman's goal of avoiding law suits that challenge the GSP's pumping allocation. Hence, I respectfully request that you append a) my January 15 query of Mr. Markman, b) his reply, and, c) this memorandum to your minutes for this GA meeting and to your website. My intent is to help my fellow rate payers and the general public better understand applicable water law as we work our way through the GSP process. In saying that, I acknowledge and appreciate Mr. Markman's caution that no pumper has an inviolable position when it comes to water rights.

¹ Mr. Markman's first sentence incorrectly claims that my idea "would completely deprioritize agriculture." In fact, my idea would completely deprioritize **all** irrigation (including residential irrigation), not just agriculture.

From Nick Panzer to Jim Markman via Dave Janiec, PAC Chair (1/15/19)

Question: Does this thumbnail sketch reasonably interpret and apply the law to IWV facts?

Article X, Section 2 of the California Constitution is the Cardinal Rule of California water law. It declares that all water rights and all water uses must be reasonable, and that unreasonable uses must be prevented. By making these reasonableness principles “**self-executing**,” the Constitution enshrines them as both a **policy mandate** and a **limitation on water rights**. Moreover, the California Supreme Court, in *Joslin v. Marin Water Agency*, holds that no one has a protectable interest in the unreasonable use of water. Hence, the deprivation of such is not a compensable taking or damaging. (See 2015, *The Reasonable Use Doctrine in California Water Law and Policy*, Chapter 4, Brian E. Gray. Mr. Gray is a Senior Fellow at the Public Policy Institute of California’s Water Policy Center and a Professor Emeritus at the University of California’s Hastings College of the Law in San Francisco.)

Section 10720.1.(b) of California’s Sustainable Groundwater Management Act (SGMA) specifically means to comply with California’s reasonableness principle as summarized above.

Reasonable use embraces at least four interrelated concepts (see Gray above).

Utilitarian: The law seeks to encourage relatively efficient, economical, and socially beneficial uses of water. Public water agencies such as Indian Wells Valley Water District, Inyokern Community Services District, and Searles Domestic Water Company, are **utilitarian** by design. We typically referred to such entities as “**public utilities**” for that reason. These entities are publically regulated to ensure that they **efficiently** and **economically** fulfill their primary mission, namely, public health and safety (HS hereafter). In this context, health and safety includes consumption, cooking cooling, sanitation, fire suppression, line flush, and line leakage.

After HS, the next most utilitarian use of water is the Navy Mission. IWV is ideally and uniquely suited to the Navy’s high tech/national defense mission due to the size and utility of its test ranges. Thus, the Navy Mission is far more efficient, economical, and socially beneficial in relation to all uses of water except for HS. That is why China Lake has survived several national military base closures and consolidations, known as Base Realignment and Closure (or BRAC).

Any allocation of water rights that risks public agency access to sufficient water for HS or the Navy mission is **unreasonable**? Two uses of water in the IWV basin fall within this unreasonable category as spelled out next.

Situational: Safe yield is about 7,600 afy. Pumping use in afy looks about like this:

Navy (this could change significantly in time of war)	2,000
HS at home and work for <i>current</i> population of 35,000	4,100
Irrigation at home, work, farm, and municipal	27,900
Searles Valley Minerals industrial process	<u>2,000</u>
	<u>36,000</u>

While all of these uses of water are beneficial, only the first two are **reasonable** in light of safe yield because a) their **utilitarian** value far exceeds that of the latter two uses, and b) they require a full allocation of safe yield to maintain population and still allow a cushion for population growth, Navy demand uncertainty, and climate uncertainty. Our **situation** is such that **irrigation** of any kind (home, business, and farm) and industrial process use of any kind is **unreasonable** in light of the basin's limited safe yield.

Dynamic: What is reasonable/unreasonable changes over time as the economy, technology, demographics, hydrologic conditions, environment, and societal needs evolve. As the scope of the Navy mission evolved and grew beginning in the 1940s, the population grew along with and in support of it. The dynamic of high-tech Navy growth and supporting population growth inverted societal needs over time, rendering other uses of water such as irrigation and industrial process **unreasonable** due to scarce safe yield.

Fragile: What originally may have been a reasonable use of water can become an unreasonable use of water as population grows, and new demands for water arise. Such is the case in IWV. Searles Valley Minerals water imports from IWV beginning in the 1920s were no doubt reasonable, same for small agricultural irrigation beginning about the same time. However, once the base and supporting population growth took off in the 1940s, chronic overdraft followed by the early 1950s. Industrial process use of water and irrigation use of water thus changed from being reasonable to **unreasonable** as China Lake and its supporting population became the most utilitarian use of water in the IWV.

SUMMARY AND CONCLUSION

Indian Wells Valley Groundwater Basin (IWVGB) must reduce pumping by 80% to comply with SGMA. The allocation of that reduction should turn on judicial principles espoused under the state constitution's "reasonableness" principle. Applying that principle to the IWVGB finds that essentially all groundwater uses other than HS and Navy Mission are unreasonable within the meaning of the California Constitution, and should be prevented without compensation.

Atty Markman on Reasonable Use

I appreciate Mr. Panzer's persistence in identifying ideas which would completely deprioritize agriculture in the Indian Wells Valley sustainability process. He advocates for his values assigned to various uses of water very effectively. But, in accordance with SGMA, we are constrained to apply the applicable state and federal water rights principles in attempting to bring a negotiated solution to water allocation in the Implementation Plan. And, as stated more than once, I do not believe there is controlling authority which would lead to the application of Mr. Panzer's values priorities in the use of water should litigation ensue. This position first was based on code sections listing municipal and industrial use as a statutory priority over agricultural use. This proposed application of the reasonable use doctrine established in the California Constitution is an effort to support the same position in a related but different way. The Joslin case is an anomaly to me because it is the one case which in a straightforward manner deprioritized a use in favor of protecting a municipal water supply. But that use was the deposition of rocks and gravel on property downstream of a City in a surface water system. The Court did not discuss the nature of the gravel use and really never discussed the applicable constitutional issues. Remember, the riparian use and the overlying use (virtually all of agricultural production in Indian Wells Valley) are constitutionally protected. Many fervent overlying agricultural interests take the position that they have an absolute priority to pump water from a groundwater basin onto their property located in that basin and all municipal pumping is entitled only to water surplus to safe yield. In other words, there are advocates of extreme positions favoring overlying agricultural production as well as municipal production. Also, please note that all parties recognize the Navy's federal reserved right as a priority over all other production. And, de minimis producers have long been left out of the application of adjudication management plans because of the cost of applying administrative provisions to them compared to the basin benefits derived.

I really have to circle back to the first point I made in the first presentation I offered which is that no pumper in the basin (other than perhaps the Navy) has a water right which has no weakness or is invulnerable. Our goal is to create an equitable implementation plan which will not force any group of producers or any one producer to bring suit challenging the pumping allocation made in the plan.

Nick Panzer comments on Mr. Markman's Allocation Plan Report dated February 4, 2019 from
January 11, 2019 Attorney Meeting
Date: 25 February 2019

Opening Paragraph: Which "attorneys" were present? Did one of those attorneys represent residential rate payers only, and no other interest such as the IWWVD?

Paragraph 1.

Does "converted" mean a straight, proportional conversion by pumper? If yes, how will you account for underlying "uses" as required by 350.4(g), 354.10(a), 354.26. (b) (3), 354.28.(b)(4), and 355.4.(b)(4)?

Concerning "projected to become available," is hard data regarding financial feasibility required? See 354.44.(b)(6) re source and reliability.

Regarding "purchased,"? what entity (banker) would buy the water rights? How would the buyer finance the rights purchase? Bonds? Fees? If by volumetric fees, would a fee payer own the rights in proportion to the fees it pays? How would you dynamically score estimated fees to account for changes in user demand (i.e., volumetric use)? How will you accurately determine demand in a high-unit-cost environment? The banker will need this number to determine the financial feasibility of the "deal."

Paragraph 2.

Regarding "any rampdown," what rampdown period is anticipated? Do Minimum Thresholds drive the rampdown period? If at or below Minimum Threshold, then no rampdown? It is important to note here that the TAC slot for "Customers of Public Water Agencies" is "stayed" (per GSP draft Chapter 1), leaving such customers without both legal and technical representation when it comes to Minimum Threshold issues. I would like to emphasize again that representatives of agencies do not represent agency customers, as conflict inheres here (example: IWWVD support of White Paper that calls for "proportional reductions," in disregard of minimum health and safety needs of its customers).

When you say "adjusted in accordance with projects which do or do not result in increased available water," does this imply that the Plan might include new sources of water before they are actually proven financially feasible or brought on line? See 354.44.(b)(6) re source and reliability.

Paragraph 3.

Re "Water pumped...would be subject to...fees, including...fees reflecting total costs of projects undertaken and implemented to increase total water supply," how would you dynamically score (v. statically score) anticipated fees given that fees will likely affect pumping behavior, thus affecting both the quantity of new water needed and the unit costs for it? I do not understand how you will escape the circularity inherent in these calculations.

Does "total water supply" imply that you are only talking about new water that would be injected or percolated into the aquifer? If not, does this imply that whoever gets the new water supply pays for it?

Does "fees reflecting the total costs of projects" include the present value of total debt service if bonds are used to finance the project? If so, how will you dynamically score "fees" to match "total costs of projects?"

Paragraph 4.

Does "transferability" imply pumper to pumper negotiations? If so, could multiple buyers be bidding against each other?

Paragraph 7.

Re "possible project cost fees" for de minimis pumpers, why would they be treated differently than other pumpers in Paragraph 3 for new water going into the aquifer?

Paragraph 9.

Re "to an extent necessary to meeting reasonable economic expectations," who gets to decide what is "reasonable"? I VOLUNTEER!

Re "pump without rampdown for a period of time," see Paragraph 2 above re Minimum Threshold issues and representation issues, both legal and technical.

NEXT TO LAST PARAGRAPH (unnumbered)

This paragraph correctly says that the economics of the above (see especially dynamic v. static scoring) "needs to be determined." It needs to be determined well in advance of June 28, 2019 because that is the due date for the first complete draft of the GSP, including executive summary.

LAST PARAGRAPH (unnumbered)

Re "initial conceptual discussion," it appears that a completed model run already reflects some of the above concepts, especially concerning water rights transfers. If so, there may be an issue here concerning a lack of legal and technical representation for certain water uses such as residential indoor rate payer "use" and domestic well owner indoor "use." See Paragraph 1 above regarding the need to account for underlying uses.

Re "This approach assumes that supplemental sources of water will become available, an assumption supported by the stated position of several parties who have given their input," may we, the public, please see the technical reports (science) that support a finding of "financially feasible" for each assumed supplemental source. See especially Reg. 354.44.(b)(6) re imported water.



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MEMORANDUM

VIA ELECTRONIC MAIL

TO: David Janiec (david.janiec@chinalakealliance.org)
Steve Johnson (stevej@stetsonengineers.com)

FROM: James L. Markman *JLM*

DATE: February 4, 2019

SUBJECT: Report from January 11, 2019 Attorneys' Meeting on IWVGWA Allocation Plan

These notes are meant to roughly recite the subject matter of the above referenced meeting, the latest meeting of the attorneys discussing pumping allocations. The meeting was almost entirely devoted to the presentation, consideration and discussion of an allocation plan with the following discussed features:

1. Each party would have a Base Production right calculated which is based on the average amount of production which occurred in a base period of ten years (or five years) ending with calendar year 2014. So, the base period would commence with calendar year 2005 or 2010. Steve Johnson has provided a spreadsheet calculating the average production based on the ten and five year periods. Excepted from this process would be the Navy and "cliff pumpers" discussed below. The Base Production rights would be converted to percentages of "operating water rights.". The total amount of operating water rights would be determined by amounts of total production which is available without causing negative impacts. This would include the Basin natural safe yield and other water which is projected to become available through the implementation of projects, including the availability of reclaimed water, water through rights purchased and wheeled through LADWP facilities, and, at least for an interim period, brackish water.
2. Any rampdown imposed would be intended to match production with all anticipated available water and would be adjusted in accordance with projects

which do or do not result in increased available water. Amendments would occur at DWR accepted intervals (every five years).

3. Water pumped by each producer with a Base Production right and percentage of available water would be subject to the payment of fees, including administrative fees needed to operate the management plan and fees reflecting the total costs of projects undertaken and implemented to increase the total water supply. The fees also could include the costs of remediation of shallow wells which might be subject to damage by continued production at higher levels.

It also is anticipated that projects costs and fees would be offset to the maximum possible amount by available grants and the Navy COSO royalty fund, if available. The approach has been referred to commonly in past adjudications as a "gross pump tax or assessment" approach.

4. The Management Plan also would include transferability of Base Production rights and percentages on a 1 to 1 basis (no offsets due to supposedly different consumptive uses). The ability to transfer would commence immediately upon the imposition of the Implementation Plan.
5. The Management Plan also would provide one year of carryover rights for any producer who pumped less than its available percentage in a given year.
6. As stated above, the Navy production would be a set amount, subject to being increased if circumstances require the increase.
7. The de minimus producers would be afforded a pooled or gross allocation of production rights and that production would be subject to administrative fees, and possible project cost fees. Any individual production exceeding 2 acre feet in a year would fall out of the pool. The disposition of such a producer remains to be discussed. It was suggested that an information effort concerning conservation methods and the management program would be made to inform de minimus producers.
8. There was a discussion of a potential right to overproduce (pump more than accorded in a calendar year) subject to an additional fee, generally referred to as a replenishment fee. This concept will be discussed further.

9. Certain pumpers commenced production at a later date so that the average production approach would not be appropriate in dealing with them. As an alternative, such pumpers would be accorded an opportunity to pump to an extent necessary to meeting reasonable economic expectations with that production entirely ceasing at a point in time, referred to as cliff pumpers. The operable concept would be that these pumpers could expect to pump without rampdown for a period of time, but not for the full rampdown period so that their total production would be equitably established as compared to other pumpers. These rights would not be transferable, but the cliff pumpers could enter the transferability process to acquire a percentage of production rights which might allow them to continue production after the initial cessation point is reached.

The suggested approach would be discussed with clients to determine whether this approach is feasible, particularly considering the costs per acre foot of water subject to the above-referenced assessments. It also needs to be determined what the cost of water delivered through projects would cost per acre foot to determine whether different categories of pumpers such as agriculture, public water suppliers and industry could absorb those costs. Also, the concept of different pumping right amounts based on distinct management areas was mentioned, but would have to be discussed and would have to be integrated into the basic framework.

It needs to be understood that this was an initial conceptual discussion and the persons participating remain open to the discussion of other conceptual suggestions. This approach assumes that supplemental sources of water will become available, an assumption supported by the stated position of several parties who have given their input. Follow up meetings were set for February 15 and March 8 at 10:00 am. at Keith Lemieux's office.

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To: IWW Groundwater Authority
From: Nick Panzer, IWWWD Residential Customer
Subject: **IMPORT WATER**
Date: 13 February 2019

QUESTION

Should our GSP assume that we will be able to import water?

ANSWER

No. However, further work on import feasibility should continue, but not at the risk of further water table lowering or rejection of our GSP by DWR.

ANALYSIS

Your RFP/RFQ to search for import water suggests that you lack a reliable source, a condition necessary for GSP "projects or management actions [that] rely on water from outside [your] jurisdiction" (Reg. 354.44.(b)(6)). Thus, including such a project in the GSP risks rejection of our GSP by DWR.

We must reduce pumping by 80% whether or not importing eventually proves feasible. To continue massive 5X overdraft pending a multi-year effort to pin down the feasibility of importing threatens further costly and irreversible damage to our water level, storage, and quality.

Even should imports eventually prove feasible, bringing them on line would likely take an additional ten plus years. Continued massive overdraft in the interim risks further significant and unreasonable undesirable results. Therefore, pumping ramp down should begin immediately and proceed at a rapid pace.

Import feasibility remains far from certain due to many high hurdles, such as:

1. Over 100 Bulletin 118 basins will want to import water, just like us. This guarantees an exorbitant price for whatever import water might come up for auction.
2. That high price for water, and the costly infrastructure to get it here and into the water table or directly distributed, must be financed by bonds. Who will issue/underwrite such bonds (the GA?). What investors will take a chance on such bonds, and at what interest rate? Exactly which end users will pay the exorbitant price needed to service such bonds? The search for import water will certainly prove costly and lengthy based on the RFPs in hand, especially if demand for import water proves unusually high as expected.

3. The large number of public agencies and private entities that must sign off on an import scheme will significantly add to the time and cost to implement such a scheme. Examples of such agencies and entities include, DWR, State Water Project Wholesalers and their Member Units, LADWP, Inyo County, Metropolitan Water District of Southern California, Caltrans, easement holders such as Edison and PG&E, U.S. Fish and Wildlife re protected species, Lahontan Regional Water Quality Control Board re impact of imported water on native groundwater, and California Department of Health services.

The so-called need to import water because we cannot imagine conserving our way out of overdraft says nothing about our actual **ability to import**. We can conserve our way to sustainability if we reasonably allocate our groundwater in accord with Title X, Section 2 of the California Constitution as spelled out in my memo to Mr. Markman dated January 15, 2019, and as posted on the GA website. While political expedience may argue for continued massive overdraft in the name potential future imports, such overdraft unwisely and unreasonably threatens the public welfare as set forth above.

Note: As of today (2/13/19), I have not been able to find Stetson's Imported Water Study, Technical Memorandum as per (1/14/19) POAM, line #87, due finished by 2/7/19.