12/4/07 Bd. Mtg.
Water Recycling Policy
Deadline: 10/26/07 Noon

San Diego County Water Authority

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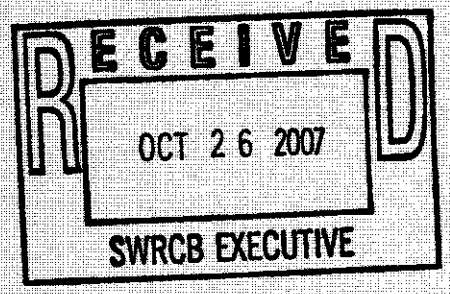
October 25, 2007



Ms. Tam M. Doduc, Chair and Members
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Attention: Jeanine Townsend, Acting Clerk to the Board

Dear Chair Doduc and Members of the Board:

The San Diego County Water Authority[1] would like to thank the State Water Resources Control Board for taking action to develop a recycled water policy that will remove impediments to using recycled water, encourage consistent approaches among Regional Boards, and protect the water quality in local groundwater basins for the purpose of maximizing beneficial uses. Also, thank you for the opportunity to provide comments on this important policy.

Recycled water is a critical resource needed to meet California's demand for water. It is a key element of developing a diversified water supply portfolio in the Water Authority's service area. Currently, the Water Authority's member agencies recycle approximately 13,000 acre-ft per year of water. That number is anticipated to increase to over 40,000 acre-ft per year by 2015. The State Board should take the critical need for this water resource into consideration by developing criteria that do not pose a significant impediment to the use of recycled water. When used for irrigation, recycled water should be considered the same as other supplies. The final policy should reflect this principal.

The Water Authority's remaining comments address three key topic areas associated with anti-degradation of water supplies. These include management of total dissolved solids and nitrate, protecting groundwater supplies through compliance with California Department of Public Health (CDPH) criteria for groundwater recharge projects, and liability associated with emerging contaminants. The proposed approaches will be used as the basis for demonstrating compliance with the Statement

[1] The Water Authority's mission is to provide a safe, reliable water supply to its 24 member public agencies in San Diego County. Recycled water is an important component of the Water Authority's diversified water supply portfolio. The Water Authority actively supports, through economic incentives and other programs, continued development and use of recycled water, along with water conservation and other programs as identified in its updated Urban Water Management Plan.

of Policy with Respect to Maintaining High Quality Waters in California, as set forth in Resolution 68-16 to ensure that the best practicable treatment is provided to prevent pollution and the highest quality of water will be maintained consistent with the maximum benefit to the people of the state.

Management of Total Dissolved Solids (TDS) and Nitrate

The single greatest impediment to development of local water supplies in San Diego County is the high concentration of total dissolved solids in the local groundwater basins and recycled water supplies. The Water Authority supports the use of a salt balance and integrated planning approach to meeting basin plans as a long-term goal of the policy. This is consistent with the most recent update of the California Water Plan, which promotes Integrated Regional Water Management Planning to optimize the beneficial uses of local resources.

As was presented at the October 2, 2007, hearing on this topic, the State Board is proposing a two-step process to control and manage TDS and nitrate levels. The process, as described during the hearing, is intended to establish short-term prescriptive requirements for irrigation with recycled water while Regional Boards prepare and adopt long-term plans for salt management under Section 13242 of the Water Code.

This two-step approach is not clearly stated in the proposed policy. The policy currently states that all recycled water irrigation projects shall comply with the proposed prescriptive requirements of proposed section 7. No exceptions have been provided. The policy should clearly state that once a Regional Board has adopted a salt management plan for a groundwater basin, the plan shall supersede the prescriptive requirements identified in the policy. Also, the policy should plainly state that when developing long-term salt management plans, Regional Boards are required to work with local water agencies and other stakeholders to find reasonable and cost effective approaches to managing salts.

In the San Diego region, updating of basin plans and development of salt management plans is complicated by multiple groundwater basins. While there are similarities between the groundwater basins, each basin must be addressed independently. Where there is a significant local benefit, users of some basins may advance more quickly to using integrated approaches to salt management. To encourage prompt implementation and optimize beneficial uses of local resources, the policy should allow Regional Boards the flexibility to waive prescriptive requirements where stakeholders are implementing effective salt management approaches. The Water Authority is concerned about the ability of the San Diego area recycled water suppliers to meet some of the proposed prescriptive requirements in section 7 in a cost effective manner. A process should be included whereby these suppliers are able to obtain waivers upon demonstrating alternative means of obtaining the same management objectives as would be obtained from compliance with the requirements while the long term management plan is being developed.

1. Nutrient Management Plan

The proposed policy includes a requirement to develop and implement a nutrient management plan for irrigation projects, where "nutrient management" is the act of managing the amount, source, placement, form and timing of plant nutrients, and soil amendments. At the October 2, 2007, State Board hearing, it was stated that a nutrient plan would be required from each user of recycled water. This could create a significant disincentive to using recycled water. The Draft Certified Regulatory Program Environmental Analysis for the policy states that this approach would be economically and technologically feasible and would provide as much protection of water quality as any other method. However, the analysis fails to provide any documentation on costs of implementation and anticipated water quality results that would support this conclusion. Development of nutrient management plans will place a significant workload on Regional Boards, recycled water suppliers and users that will pose an impediment to use of recycled water. In some groundwater basins, nutrient management by recycled water users may not be necessary, particularly where nitrate concentrations in the groundwater are very low and the potential impact of nitrate in the recycled water is insignificant.

The Water Authority does agree that user should use best management practices to control nutrient and efforts should be made to educate recycled water users on the impacts to groundwater basins and surface water runoff that are caused by the over-application of nutrients. As an alternative to nutrient management plans, the Water Authority recommends that existing training programs for recycled water site supervisors emphasize or develop a component on how to manage nutrients.

2. Effluent TDS Standard

The proposed policy states that the TDS concentration in recycled water may not exceed the monthly average TDS concentration in source water plus 300 mg/L. The Draft Certified Regulatory Program Environmental Analysis states that the 300 mg/L increment was selected as being a value that the majority of recycled water producers can meet, but it provides no documentation substantiating this claim. Many recycled water users will have difficulty meeting this standard. While the Water Authority agrees that TDS control is important, the State Board should do further analysis to establish a reasonable standard. The WateReuse Association is compiling data regarding TDS that can assist the State Water Board in establishing appropriate and attainable requirements. The Water Authority encourages the State Board to adopt the WateReuse recommendations on this issue.

3. NPDES Compliance

The policy states that the waste discharge requirements shall include a provision mandating compliance with NPDES requirements, but it fails to state how a recycled water user would comply with those requirements. The California Constitution provides that the water resources of the State be put to beneficial use to the fullest extent possible. Compliance with NPDES requirements should be implemented in a manner that protects surface water supplies, while at the same time allowing the beneficial use of recycled water for irrigation. Recycled water beneficially used for irrigation should be characterized in the same manner as irrigation water from other supply sources.

In order to optimize the use of staff resources at the Regional Boards, and allow for use of best management practices to prevent runoff, the Water Authority recommends that the policy state that compliance with NPDES requirements may be achieved through MS4 regulation of illicit non storm-water discharges through regulation under existing permits.

Department of Public Health Criteria for Groundwater Recharge

The Water Authority supports the State Board's approach of using the CDPH maximum contaminant levels (MCLs) and other CDPH recommendations for groundwater recharge projects to provide adequate protection of groundwater quality for the beneficial use of municipal water supplies. The Water Authority agrees that the Regional Board should establish effluent limitations at a concentration equivalent to the MCL where an MCL has been adopted. The Water Authority does not support establishing effluent limits at concentrations below the MCL.

The State Board is also proposing criteria to prevent impacts to groundwater from emerging contaminants in groundwater recharge projects where no MCL has been adopted. While the State Board recognizes the role and expertise of the CDPH in setting health related standards for recycled water, the Board is proposing to delegate this standard setting responsibility to individual Regional Boards for emerging contaminants. To maintain statewide consistency, provide adequate scientific review, and ensure protection of public health, this responsibility should rest with the CDPH in cooperation with the Office of Environmental Health Hazard Assessment.

The proposed policy recognizes the CDPH's role in review of groundwater recharge projects that use direct injection and spreading basins. The CDPH and Regional Boards follow an extensive scientific and public review process for approval of these groundwater recharge projects. (See Water Code §§ 13540, 13520 et. seq., and 22 CCR §60302). This includes a requirement for a public hearing, the submittal and review of detailed engineering and preconstruction reports, evaluation of the groundwater hydrogeologic conditions, and review of the proposed treatment processes. For groundwater injection projects there is also a requirement to consider

the requirements in Resolution 68-16, and both current and potential future public health consequences of the controlled recharge projects.

The policy should state that for any groundwater recharge project, where there is finding by CDPH that the project meets the requirements of Water Code §13540, Water Code §13520 et. seq., and 22 CCR §60302, the project will be deemed to be implementing the best practicable treatment or control of discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest quality of water consistent with the maximum benefit to the people of the State will be maintained.

Liability

The proposed liability approach in the policy fails to consider the complex legal and public policy issues associated with public agency liability. The proposed approach inappropriately places a disproportionate share of the risk associated with emerging contaminants on local recycled water suppliers and users and fails to consider the significant public benefit to developing local recycled water supplies.

The proposal leaves open the question of what "liability" means and then states that recycled water suppliers shall be "liable" for any past or continuing discharge that has caused, is causing, or is threatening to cause groundwater to violate any new or more stringent drinking water standards. There is ample reasoning set forth in two important court cases that demonstrate the rationale to support a position that there should be no "liability" to accrue in the future when the water supplier meets the standards at the time of use of the recycled water.

The Supreme Court ruling in Hartwell v. Superior Court (2002) 27 Cal.4th 256 created a safe harbor for water utilities regulated by the Public Utilities Commission ("PUC") against personal injury suits relating to "contaminated drinking water". After remand to the Superior Court, and a trial, the Court of Appeals in Re Groundwater Cases (2007) 154 Cal. app. 4th 659, stated that Government Code §815.6 provides an avenue for immunity for a public agency relating to the service of water. While the context in the case was the service of water for public consumption, the logic applies equally here given the strict rules and regulations regarding the quality, treatment, distribution and usage of recycled water. Government Code §815.6 provides:

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

Citing to various cases interpreting this statute, the Court of Appeals noted that they establish a three-pronged test for determining whether liability may be imposed on a public entity: (1) the enactment in question must impose a mandatory, not discretionary, duty; (2) the enactment must be intended to protect against the kind of risk of injury suffered by the party asserting the statute as the basis of liability; and (3) the breach of duty must be a proximate cause of the plaintiff's injury. The Court concluded that:

> Because we conclude that none of the statutes identified by plaintiffs in their brief to this court can be construed as creating a mandatory duty, we hold that plaintiffs have failed to state a claim against the Public Entity Defendants under Government Code §815.6. Accordingly, the Public Entity Defendants' sovereign immunity barred the trial court from hearing plaintiffs' claims against the Public Entity Defendants, and their motions to dismiss were properly granted.

So stating the Court found that as long as the Public Entity Defendants followed the rules and regulations set down by the CDPH relating to drinking water, they could not be held liable for contaminants not yet determined to be a health issue should some harm become apparent in the future. That is, there can be no future liability for delivery of drinking water now with a substance for which an MCL does not exist.

Due to the existing legal framework to address liability, there is no need to address it in this policy. Therefore, the Water Authority recommends that the liability provision be removed from the policy. The financial means test should also be removed from the policy on the same grounds.

Thank you for the opportunity to provide comments today on these key areas. If you have any questions regarding this letter, please contact Toby Roy at (858) 522-6743.

Sincerely,

Maureen A. Stapleton
General Manager