

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Order Instituting Rulemaking on the)
Commission's Own Motion to Consider a)
Comprehensive Policy Framework for)
Recycled Water.)
_____)

Rulemaking 10-11-014
(Filed November 19, 2010)

**RESPONSE OF CALIFORNIA WATER ASSOCIATION
TO PREHEARING CONFERENCE STATEMENTS**

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In accordance with Rule 6.2 of the Rules of Practice and Procedure of the California Public Utilities Commission (the "Commission"), and the procedural schedule set forth in the Order Instituting Rulemaking issued on November 23, 2010 (the "OIR"), in the above-captioned proceeding (the "Rulemaking"), California Water Association ("CWA") hereby submits the following Response to the Prehearing Conference Statements addressing the issues and questions identified in Section 3 of the OIR (the "Preliminary Scoping Memo") filed on January 18, 2011.

I. Introduction

CWA supports the Prehearing Conference Statements filed by the Class A investor-owned water companies ("IOWC") and appreciates having found common ground with other parties on certain of the issues raised by the Preliminary Scoping

Memo. In this Response, CWA¹ addresses two arguments presented by the Division of Ratepayer Advocates (“DRA”) and one presented by the Sanitation Districts of Los Angeles County (the “Sanitation Districts”) in their Prehearing Conference Statements, with which CWA disagrees.

II. DISCUSSION

A. Setting Mandatory or Voluntary Goals For Recycled Water Production and/or Delivery Is Inappropriate.

Among the parties filing Prehearing Conference Statements, DRA is alone in urging the Commission to mandate goals for recycled water production and delivery, citing it as a way to foster an “open dialogue” between the parties and to “incent IOUs to act.”² Although DRA concedes that certain types of goals (e.g. potable reuse) may be neither feasible nor prudent, depending upon the circumstances of the particular utility, DRA suggests that goals mandated by the Commission would account for such variances. DRA fails to make clear how any type of mandatory “goal-setting process” might be expected to produce reasonable predictions for recycled water production and delivery when the viability and development of recycled water projects are so affected by factors outside of the control of the individual water utility. The availability of recycled water supply, the objectives and requirements of public agency partner(s), availability of

¹ CWA members Alco Water Service (U-206-W), Apple Valley Ranchos Water Company (U-346-W), California American Water Company (U-210-W), California Water Service Company (U-60-W), Del Oro Water Company, Inc. (U-61-W), East Pasadena Water Company (U331-W), Golden State Water Company (U133-W), Park Water Company (U-314-W), San Jose Water Company (U-168-W), San Gabriel Valley Water Company (U-337-W), Suburban Water Systems (U-339-W), and Valencia Water Company (U-342-W) join with CWA in submitting this Prehearing Conference Statement.

² DRA PHC Statement, pp. 2-3; Victor Valley Wastewater Reclamation Authority suggested that enumerating goals might assist utilities in garnering public acceptance/enthusiasm for recycled water, but did not call for the uniform adoption of mandatory goals.

funding sources, customer acceptance and demand for recycled water, and project cost are all dynamic, changing conditions that constrain current and future recycled water project development and plans to offer recycled water service. Like CWA, most other parties submitting Prehearing Conference Statements in this proceeding strongly discouraged the setting of goals, whether mandatory or voluntary, to promote recycled water use. In this context, the setting of goals is, at best, an exercise in wishful thinking and, at worst, a wasteful detour into contentious claims and counterclaims to be litigated at length before the Commission.

B. Recycled Water Is a Key Element to Achieving California's 20 Percent By 2020 Water Conservation Goals Mandated by SBX7 7.

In response to the Ruling's solicitation of comment regarding coordination of the Commission's recycled water policy with the State's water use efficiency goals, DRA retreads ground covered in the development of existing state law and policy on the subject by its recommendation that recycled water development not count towards meeting the State's 20x2020 water conservation goals. CWA objects to this position and is compelled, by the lack of factual background provided in DRA's response, to provide the Commission with the relevant context for this discussion.

In 2008, as part of a comprehensive plan to improve the Sacramento-San Joaquin Delta, Governor Schwarzenegger announced the goal of achieving a 20 percent reduction in per capital water use statewide by the year 2020. This pronouncement set in motion a lengthy and comprehensive stakeholder dialogue on the

policy of water conservation by the 20x2020 Agency Team on Water Conservation,³ and resulted in the publication of two key documents for the consistent implementation of SBX7 7, the Water Conservation Act of 2009. These two key documents, the 20x2020 Water Conservation Plan (February 2010) and Methodologies for Calculating Baseline and Compliance Urban Per Capita Water Use (October 2010), accurately reflect state law with respect to recycled water by expressly considering recycling as a means to reduce use of potable supplies and counting recycled water development as a means to achieve the 20 percent reduction goal. Indeed, at the outset of the stakeholder meetings, the State Water Resources Control Board members adopted the position (and never waived from it) that recycled water production was a proper and appropriate means of compliance with the 20x2020 mandate.

Not only is this approach codified in state law,⁴ but it appropriately recognizes and accounts for the significant investment in recycled water projects by water agencies that had been actively pursuing water conservation for years before the setting of the 20x2020 goal.⁵ The 20x2020 Water Conservation Plan also acknowledges that while it is “important to use all water sources efficiently, it is essential for California to expand the use of recycled water.”⁶ Consistent with state law and policy, the Commission

³ The 20x2020 Agency Team membership consisted of state and federal agencies including the Department of Water Resources, State Water Resources Control Board, California Energy Commission, Department of Public Health, California Public Utilities Commission (CPUC), Air Resources Board, California Bay-Delta Authority, and the US Bureau of Reclamation.

⁴ Wat. Code, §§ 10608.12(g) (excluding recycled water from the definition of “gross water use”) and 10608.12(m) (defining “recycled water” as “recycled water, as defined in subdivision (n) of Section 13050, that is used to offset potable demand, including recycled water supplied for direct use and indirect potable use”)

⁵ Wat. Code, § 10608.4(h).

⁶ 20x2020 Water Conservation Plan, p. 45.

should promote the use of recycled water by recognizing it as a means to reduce potable supply and meet the State's 20x2020 goals.

C. The Sanitation Districts' Proposal To Deprive Water Utilities of Rights and Remedies Under the Service Duplication Act Is Contrary to Law and Bad Public Policy.

By enacting the Service Duplication Act (Pub. Util. Code sections 1501-1507), the Legislature expressly recognized the "substantial obligation undertaken by a privately owned public utility" to provide water service to its customers in its service area. Pub. Util. Code, § 1501. The Legislature declared it in the public interest to compensate private utilities for the loss of value of its facilities suffered as a result of the extension of facilities by political subdivisions⁷ into an investor-owned water utility's service area. *Id.* Compensation for such taking is to be mutually agreed upon by the political subdivision and the utility, or fixed by the courts pursuant to the law of eminent domain. Pub. Util. Code, § 1504; Civ. Proc. Code, § 1036; *see, e.g., San Gabriel Valley Water Company v. City of Montebello* (1978) 84 Cal. App. 3d 757.

The Sanitation Districts recommend that the Commission deny a water utility the remedies set forth under the Service Duplication Act (the "Act") if it "refuses to participate in or otherwise obstruct a local water recycling project," even under circumstances involving the construction of facilities by a political subdivision in violation of the Act. This recommendation is misguided, unwise and illegal. First, on its face, the Sanitation Districts' recommendation would purport to deprive an investor-owned water utility of its rights under the Act even where the utility exercised good business judgment

⁷ Defined by Pub. Util. Code Section 1502 to include "a county, city and county, city, municipal water district, county water district, irrigation district, public utility district, California water district, or any other public corporation."

to reject an imprudent project. Second, the Act creates a cause of action for inverse condemnation in a court of competent jurisdiction. The Commission clearly has no jurisdiction to adjudicate such disputes. As a result, the Sanitation Districts effectively are urging the Commission to act without authority to contravene existing statutory law. Third, the Sanitation Districts offer no evidence, even anecdotal, to suggest that “obstructionist” water utilities are impeding efforts to develop recycled water projects, which is the implication of their proposal. CWA and its members strongly object to such implication and direct the attention of all parties to the investor-owned water utilities’ multi-faceted efforts to work collaboratively with customers and public agency partners to make use of recycled water as an important source of supplemental water supply. CWA’s members have well-documented these efforts in this proceeding and in their respective urban water management plans (“UWMPs”).

Lastly, and most important, the essential public policy advanced by the Service Duplication Act and its remedies rooted in takings law – the protection of private property rights – may not and need not be sacrificed in order to promote the use of recycled water. The Legislature recognized that failure to protect the investor-owned water utilities against the loss of value of their facilities due to service duplication would have the deleterious effect of deterring IOWCs from providing or extending water supply “essential to the health and safety of the citizens.” Pub. Util. Code, § 1501. In 1994, the Legislature revisited this important principle in the specific context of recycled water by providing that nothing in the Water Recycling Act of 1991 (Pub. Util. Code sections 13575-13583) alters the rights and remedies available under the Service Duplication Act. Pub. Util. Code, § 13582. The Commission should unequivocally recognize the

same by firmly rejecting any suggestion that it should even attempt to undermine the water utilities' rights under the Act.

III. Conclusion

CWA encourages the Commission to adopt a comprehensive policy framework in this proceeding that encourages all parties to work together to maximize every reasonable opportunity to promote and expand recycled water use in California. A Commission framework that would impose penalties for failure to meet goals that cannot possibly account for the variables in project and service development or that would seek to nullify statutory protections for water utility investments would be misdirected and self-defeating.

Respectfully submitted,

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