

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – DIVISION OF FINANCIAL ASSISTANCE
JULY 15, 2008**

ITEM 8

SUBJECT

CONSIDERATION OF A RESOLUTION TO AMEND THE WATER RECYCLING FUNDING PROGRAM GUIDELINES TO CLARIFY ELIGIBLE COSTS AND MODIFY THE WAIVER OF LITIGATION RIGHTS LANGUAGE

DISCUSSION

The purpose of this agenda item is to adopt amendments to the Water Recycling Funding Program (WRFP) Guidelines (Guidelines). The Division of Financial Assistance (Division) of the State Water Resources Control Board (State Water Board) administers the WRFP. This program provides state funds for loans and grants to agencies for planning and construction of water recycling projects. Bonds approved by voters in 1984, 1988, 1996, 2000, and 2002 as well as the State Revolving Fund Loan Program fund the WRFP. The Guidelines, which govern the WRFP, were last revised on October 21, 2004. Amendments to the Guidelines are proposed to clarify the original intent of the Guidelines regarding eligible costs and to conform language in the Guidelines to a previous decision of the State Water Board regarding waiver of litigation rights.

Eligible Costs

Loans and grants for construction of water recycling projects can be used for wastewater treatment, recycled water pump stations, recycled water storage, and recycled water distribution pipelines. There are restrictions on facilities that can be funded based on provisions in the bond laws, State, and Federal restrictions on the use of general obligation bond funds, and policies established by the State Water Board set forth in the Guidelines. During the course of administration of the WRFP, the Division has determined that the Guidelines are unclear regarding the types and locations of facilities that are eligible for funding, the ownership of funded facilities, and the expected types of rights-of-way for funded facilities. It is necessary to amend the Guidelines to clarify these items to maintain consistency in interpretation and conformance to bond laws and other laws and regulations governing the use of bond funds. The proposed amendments are not intended to establish new policy but rather to clarify the original intent of the Guidelines and conform to current understandings of restrictions on bond law funds.

The proposed changes are in Section III.I, which addresses eligibility criteria, and are shown in Exhibit A. The amendments can be summarized as addressing four issues:

1. Types of facilities: The intent of the WRFP has been to facilitate the treatment of wastewater to acceptable quality for reuse and the distribution of recycled water from treatment facilities to the use sites. Meters, valves and backflow prevention devices at the property line to convert from potable to recycled water service are eligible for funding. The WRFP has not funded facilities on use sites that would distribute the recycled water within the site or would be used for the actual application of recycled water, such as irrigation facilities. It also has not funded on-site retrofit costs, that is, plumbing costs on a use site to convert from potable to recycled water, such as, separating potable lines serving drinking fountains from recycled water lines serving sprinkler irrigation.

Funding on-site costs would place an administrative burden on the WRF to address legal and technical issues for each use site regarding private ownership, adequacy of rights-of-way, long-term maintenance, and rehabilitation costs unrelated to recycled water conversion. These are issues more easily handled by agencies at the local level, and many water purveyors have established programs to assist users in financing and constructing on-site retrofits. The amendments clarify both the extent of facilities that can be funded as well as the types of facilities, that is, treatment, pump stations, storage units, and distribution pipelines, and meters at the property lines of the use sites.

2. Locations of facilities: Treatment and storage facilities can be located anywhere between the source of the wastewater and the use sites, depending on topography, available land, and cost-effectiveness. It is becoming more common for tertiary treatment facilities to be located separately from the secondary treatment plant. Storage has to be located at suitable elevations in relation to the distribution system. At times, it is best to locate treatment and storage facilities adjacent to or on a use site. The amendments clarify that locating loan or grant-funded facilities on a use site is considered acceptable as long as they serve the function of the overall recycled water system.
3. Ownership of facilities: The 1984, 1988, 1996, and 2000 bond laws restrict funding to public agencies. To maintain the public interest in the facilities, the Division has required that state-funded facilities remain in public ownership and that the State Water Board authorize transfers of ownership. This concept is explicitly stated in the amendments to the Guidelines. The 2002 Bond Law (Proposition 50) funds can be provided to privately owned water utilities and ownership must remain with the funded utilities unless transferred to a public agency.
4. Rights-of-way: To protect the public interest in state-funded facilities to construct, operate, and maintain them, the amendments clarify that facilities must be located on land with adequate rights-of-way for the useful life of the project.

Waiver of Litigation Rights

The Guidelines currently state that acceptance of grant funds constitute a waiver of litigation rights to challenge any State Water Board or Regional Water Quality Control Board (Regional Water Board) regulation or order. On February 1, 2006, the State Water Board considered similar language that was included in the 2005-06 Consolidated Grants Program Guidelines. By [Resolution No. 2006-0011](#) it adopted modified language that does not restrict litigation rights but prevents the use of grant funds to pay costs associated with any litigation against the State Water Board or any Regional Water Board. The Resolution contains the intent to apply the modified language to other grant programs administered by the Division. The proposed amendment would reflect the February 2006 decision.

Guidelines Amendment Process

Water Code §79505.6 requires that state agencies conduct two public meetings, one in Northern and one in Southern California to consider public comments prior to finalizing guidelines. The proposed amendments were posted on the State Water Board website and announced through mailing lists prior to the workshop and comments were due on May 17, 2008. A public workshop was held in San Diego on May 15, 2008. This State Water Board meeting satisfies the Northern California site requirement.

POLICY ISSUE

Should the State Water Board adopt the amendments shown in Exhibit A to the current WRFPP Guidelines to clarify the description of eligibility criteria and conform the litigation rights language to State Water Board [Resolution No. 2006-0011](#)?

FISCAL IMPACT

The proposed amendments will not have a fiscal impact.

REGIONAL BOARD IMPACT

None

STAFF RECOMMENDATION

The State Water Board should adopt the amendments shown in Exhibit A to the current WRFPP Guidelines to clarify the description of eligibility criteria and to conform the litigation rights language to State Water Board [Resolution No. 2006-0011](#).

DRAFT

STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2008-

AMEND THE WATER RECYCLING FUNDING PROGRAM GUIDELINES TO CLARIFY ELIGIBLE COSTS AND MODIFY THE WAIVER OF LITIGATION RIGHTS LANGUAGE

WHEREAS:

1. The State Water Resources Control Board (State Water Board) is authorized to administer bond funds approved by the voters in 1984, 1988, 1996, 2000, and 2002 and State Revolving Fund Loan Program funds for the purpose of loans and grants to public agencies and privately-owned water utilities for the planning and construction of water recycling facilities.
2. The State Water Board adopted revised Water Recycling Funding Program Guidelines (Guidelines) on October 21, 2004, for the administration of these funds.
3. During the course of administration of the Water Recycling Funding Program, it has been determined that it is necessary to clarify eligibility criteria in the Guidelines to maintain consistency in interpretation and conformance to bond laws and laws and regulations governing the use of bond funds.
4. On February 1, 2006, the State Water Board passed [Resolution No. 2006-0011](#) adopting modified language related to waiver of litigation rights for use in grant programs.
5. The Division of Financial Assistance proposes amending the Guidelines as shown in Exhibit A.

THEREFORE BE IT RESOLVED THAT:

The State Water Board approves the amendments shown in Exhibit A to the current Guidelines to clarify the description of eligibility criteria and modify waiver of litigation rights language.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Board held on July 15, 2008.

Jeanine Townsend
Clerk to the Board

EXHIBIT A

PROPOSED AMENDMENTS TO THE WATER RECYCLING FUNDING PROGRAM GUIDELINES

1. Amend Section I.E.4. Waiver of Litigation Rights as follows:

4. Waiver of Litigation Rights Related Litigation:

~~Grant agreements funded by the SWRCB will specify that acceptance of grant funds constitutes a waiver of litigation rights (including pending actions) to challenge any SWRCB or Regional Water Quality Control Board (RWQCB) regulation or order, which is reasonably related to the purpose of the grant.~~

Grant agreements funded by the SWRCB will specify that under no circumstance may a Grantee use funds from any disbursement under the grant agreement to pay costs associated with any litigation the Grantee pursues against SWRCB or any Regional Water Quality Control Board (RWQCB), regardless of the outcome of any such litigation, and notwithstanding any conflicting language in the grant agreement, the Grantee agrees to complete the Project funded by the grant agreement or to repay the grant funds plus interest.

2. Amend Section III.I.1. Eligible Costs as follows:

1. Eligible Costs

The following items are eligible for funding:

- a. Construction cost of recycled water recycling treatment, storage, pump stations, and distribution pipeline systems, provided that:—~~SRF funded facilities must remain in public ownership.~~
 - Facilities are located as appropriate to serve best the function of the funded recycled water system, including on a use site.
 - Facilities remain in public ownership. For privately owned water utilities receiving grant funds from Proposition 50, funded facilities must remain in the ownership of the utility contracted to receive the state funds. Transfer of ownership to an entity other than the recipient of the state funds must be to a public agency as authorized by the State Water Board.
 - Facilities are located on land with adequate rights-of-way for the useful life of the project.
- b. Recycled water distribution pipeline systems, from the source of supply to the reuse sites. Eligibility of a pipeline system on the user's property is limited to:
 - Recycled water service line up to and including the water meter if the meter is located in the proximity of the property line.
 - Recycled water service line to the main storage facilities serving the user on the reuse site or, to the initial division of the recycled water flow on the use site to multiple use areas.
- c. Recycled water distribution pipeline with a terminal point serving a user that is committed by mandatory use ordinance or by user contract to take recycled water. If only a portion of a pipeline serves users secured by a firm commitment, then eligibility extends to the most downstream user secured by a commitment.

- d. The capacity of a project used within ten years of completion of construction. Pump station wet wells and pipelines may have an eligible capacity of up to 20 years when documented by a market assessment showing the 20-year service area, and corresponding uses, and flows.
- e. Reasonable costs to provide an emergency backup water supply for the recycled water system.

Eligible capacities are measured in terms of annual recycled water deliveries determined by recycled water market assurances. At least 50 percent of the eligible project capacity must serve users that will exist by the time of completion of construction. ("Existing user" is defined in Appendix H.)

Eligible sizes of facilities components are based on reasonable design criteria to serve these annual deliveries. Eligible costs for partially eligible capacity will be determined on an incremental cost rather than pro rata cost basis.

Applicants constructing pipelines or treatment facility capacity, in excess of that which can be utilized within five years of completion of construction, must demonstrate that adequate recycled water supply and demand will be available to support that future capacity.

3. Amend Section III.I.2. Ineligible Costs as follows:

2. Ineligible Costs

The following costs are not eligible for construction funding:

- Costs of planning for a project;
- Costs of applying for funding;
- Costs of on-site retrofit facilities, that is, facilities to convert to recycled water use;
- Costs of on-site irrigation facilities;
- Costs of land, easements, and rights of way;
- Costs for operation and maintenance of project facilities;
- Legal and court costs resulting from violation of state and federal laws or as a result of the CEQA process, excluding the cost of capital facilities required to be built as a condition or result of a legal or court settlement;
- Indirect costs of construction performed by the funding recipient's work force.¹

¹ A more detailed discussion of force account cost eligibility may be found in Appendix C "Guidelines on Force Account Eligible Costs."