



# California Regional Water Quality Control Board Lahontan Region



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## RESPONSE TO LETTER OF APRIL 13, 2007

Thank you for your letter of April 13, 2007 providing comments on a proposed settlement between the Lahontan Water Board and County Sanitation Districts of Los Angeles County, Districts No. 14 and 20 (Districts). Your letter has been shared with the Water Board and those on the interested parties list for the upcoming Water Board consideration of the settlement.

### General Response

Your letter raises many thought-provoking concepts that should be part of an integrated evaluation of the water supply and wastewater disposal issues in the Antelope Valley. These issues involve many challenges and opportunities. As described in your letter, there are many governmental entities in the Antelope Valley that have responsibility for water supply and wastewater treatment. The nature of the governmental structure that has been established to provide these services and the laws governing the scope of authority of these entities contribute to the challenges to integrate opportunities. Your letter implies that the Districts have a major role in meeting the water needs of the Antelope Valley and you are urging the Water Board to use this settlement as a means of "requiring" the Districts to take actions that could cost well in excess of what is needed to legally dispose of its wastewater. In your letter you acknowledge that it is unclear what party will bears the cost of treating wastewater to a higher level. However, your comments regarding the amount of the proposed liability appear to be intended to increase the amount in order to facilitate the recharge of groundwater.

As someone who has been involved in making public policy decisions as a Regional Board member, I am sure you appreciate that there are many unquantifiable factors that must be considered when evaluating a settlement. These factors include: strength or weakness of a case, other uses of the resources that would need to be devoted to prosecute a matter, potential for more rapid compliance or higher liability if matter was resolved through a court proceeding and the value of the difference in the context of the resources expended. Unfortunately, the discussion of most of these factors in a public setting could easily bias future enforcement actions; therefore, they are part of the

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confidential negotiations that lead to the development of the settlement and will likely be part of the Water Board deliberations, possibly in closed session, on whether to accept the settlement.

Finally, you appear to be arguing contrary positions on the timing for compliance. On one hand, you have strongly advocated that the Districts be required to stop discharges that are in violation of waste discharge requirements in a shorter time period than suggested in the proposed cease and desist orders. However, you also seem to be advocating for a re-evaluation of treatment methods and discharge alternatives that would necessitate revised facilities planning processes and environmental reviews, thereby lengthening the time before compliance is achieved.

### **Response to Specific Comments**

**1. Comment:** Settlement will send the wrong message to the Regulated Community.

**Response:** You base this comment on the difference between the calculated economic benefit and the proposed liability. While the prosecution team believes that it is not necessary to consider economic benefit in evaluating the acceptability of a settlement, it provided the economic calculation for context.

The proposed liability is sufficiently large so as to send a message that violations of this nature will not be tolerated; it is the largest administrative civil liability settlement in the history of the state. No public entity wants to place itself in a position where there is the possibility of such a large liability. Additionally, it is unclear why a larger liability would be viewed differently by a public entity.

Your argument may be more logical if this was a private company where either the owner or shareholders would benefit economically by delaying compliance. In this situation, the ratepayers are the ones who eventually will pay any liability. The Board members of a public entity do not derive an economic benefit from either their failure to provide direction in a timely manner to maintain compliance, or from decisions that postpone the completion of facilities to maintain compliance.

**2. Comment:** The proposed settlement will allow District 20 to discharge more nitrogen into the soil.

**Response:** You claim that the settlement, if approved, will allow an additional 500+ tons of nitrogen to be discharged into the soil between now and when compliance is achieved in 2010. While the statement is somewhat accurate, it is misleading and out of context. The District is constructing facilities because it is currently unable to comply with waste discharge requirements. The purpose of the cease and desist order is to establish a final compliance schedule and interim standards to minimize the violation until compliance is achieved. The future discharges of nitrogen are associated with over irrigation of crops not direct discharge of wastewater to soils as you imply. Therefore, allowing some discharge of nitrogen in excess of what would be required to comply with

waste discharge requirements is entirely consistent with the purpose of a cease and desist order.

The interim standard represents what can be achieved with existing facilities and optimizing irrigation practices. The interim standard proposed in the cease and desist order should not be compared with the standard in the existing cease and desist order in that they are based on different areas of application of wastewater.

The amount of additional nitrogen that will be added to the soil, and hence the plume, will not affect the requirements for cleanup. Nor will the additional nitrogen materially affect the time it will take to reach the final cleanup standard, no matter what standard the Water Board eventually chooses (background, drinking water objective, or somewhere in between). The District will remediate the plume pursuant to the Cleanup and Abatement Order, and any amendments thereto. That Order and the cleanup process are not affected by this settlement.

The District 20 will apply some nitrogen to crops at rates that exceed the agronomic needs of the crops between now and the final compliance date of 2010; however, the prosecution team believes that there is no reasonable alternative. In the prosecution team's presentation to the Water Board at the March 2007 meeting, we demonstrated that shortening the proposed compliance schedule is not achievable. In almost every action where a Water Board orders a discharger to bring a facility into compliance, there will be an amount of time in which the discharge continues before compliance is achieved. The penalty portion of the settlement includes a component for the additional nitrogen that will be discharged before the final compliance date.

In your oral statement to the Water Board at the March 2007 meeting you suggested micro-media treatment as a technology that could reduce the concentration of nitrogen in the effluent. This technology is relatively new. I understand that a few entities are evaluating this technology and have posed a number of questions relative to the timing to implement this technology (possibly 20 months out for Department of Health Services approval for reuse) and its ability to consistently meet waste discharge requirements. You did not indicate that this technology could be implemented more quickly by the Districts than the technology being implemented. In fact, your statement appears to be aimed at having the Water Board require a higher level of treatment than the level that is necessary to protect water quality so that this treated wastewater would be more acceptable for groundwater recharge.

**3. Comment:** District has refused to consider other disposal options.

**Response:** This statement is simply incorrect. The Districts selected its preferred disposal option (it is the Districts' responsibility to propose a disposal option) after consideration of many alternatives. Here again, it appears that you are trying to use this settlement as a means of putting the Water Board in a position of requiring the Districts to select a different disposal option, one that might facilitate groundwater recharge but be more costly to the ratepayers than the selected option.

Furthermore, you do not cite any real potential alternatives. Instead, your comment lists a number of entities and individuals who might be able to assist in developing a different wastewater disposal option. These entities and individuals had the opportunity to be part of the process when the Districts evaluated and selected their preferred option. Additionally, it is interesting that you are advocating on behalf of these other entities, yet none of them have independently requested to be involved in a new evaluation. Finally, any new evaluation of different disposal options would require the development of a revised facilities plan and associated environmental documents that would result in a further delay.

#### **4. Comment:** Significantly Flawed Process

**Response:** The prosecution team believes that the process has been entirely appropriate for the public to be aware of, understand and comment upon the proposed settlement and SEP. Indeed, we believe that there has been more opportunity for public notification, comment and participation than most other settlements and Water Board actions.

Negotiations designed to reach a settlement of litigation must occur in a non-public setting. We believe you are well aware of this requirement. The settlement is somewhat complex, but it is clearly understandable and the public has received plenty of notice and opportunity to comment and ask questions. Interestingly enough, it appears that you are the only person requesting more time for public review and you are the only person who has formally opposed the settlement to date.

In addition to the two Water Board meetings, the Prosecution Team held a public workshop. The entire process has been designed to give the public a significant amount of time and opportunity to learn, question and comment on the settlement proposal. Lack of significant public controversy could easily indicate that most members of the public agree with the prosecution team. Another explanation is that they are ambivalent. Given the number of entities or individuals that had any input to the Water Board during the many years when discussions of the violations were occurring on a regular basis, it is not unexpected that even fewer would care about a settlement of the violations. We believe that this is a good settlement, that it is in the public interest, and that the process provided ample opportunities for the public to participate.

#### **5. Comment:** Limitations in Regional Board Enforcement Capabilities Should Be Corrected

**Response:** As a former Water Board member, it should not come as a surprise that resources are limited and wise use of the resources available is the goal of the Water Board and its staff. When the prosecution team stated that it would be better to use the resources for other regulatory activities rather than for litigation with the Districts, it reflected a cost/benefit analysis of the value of the settlement compared to the cost, likely outcome, and benefit of protracted litigation.

No one doubts that strong and unrelenting enforcement is an essential component of the Water Board's regulatory program. Nor is the prosecution team recommending anything but vigorous enforcement. We believe that the settlement we've presented is in fact rigorous enforcement, and that litigation might result in only limited additional benefit to the Water Boards and no additional improvement in the quality of the waters of the state. As stated in response to the first comment, the penalty contained in the Settlement is the largest ACL settlement in the history of the state. It is unlikely that litigation would result in earlier compliance or a significantly larger penalty. Under these circumstances, resources (whether limited or not) would best be used for other purposes.

**6. Comment:** Consistency of Enforcement.

**Response:** You believe that the Districts are a "large" discharger, that they unfairly work the legal system by filing a petition to the State Water Board and then filing an action to challenge the Water Board's orders in court. All of these actions are consistent with the governing statute, and within the legal rights of all dischargers. Therefore, you are, in effect, asking the Water Board to punish a discharger for seeking to protect its rights. Abuse of the legal system (i.e. inappropriate use of petitions and appeals where little or no colorable argument exists) would in fact be problematic. However, you do not argue that there was a lack of good faith or substance to the Districts' challenges, nor does it appear that such an argument would be valid. One can disagree with the Districts' position, one can argue that the Districts will or will not succeed in such a challenge. But it would be improper to punish a discharger for availing itself of the right to seek redress from the State Water Board or from a court.

**7. Comment:** Is the amount of the administrative civil liability (ACL) reasonable in light of the facts?

**Response:** The prosecution team feels that the answer to this question is yes. You cite the low percent of the total potential liability as one basis for your position. However, the percent of total potential liability is not a factor that the Water Board has specifically used in the past. Instead, the imposed liability is based on other factors. In reality, as the maximum potential liability increases, the imposed liability, as a percent of total maximum liability, typically decreases.

Additionally, you cite the costs of replacement water, cleanup costs and damage to potential recharge sites as a basis for your position. However, since the Water Board is requiring the District to restore the beneficial uses of the affected groundwater, these citations are not applicable. The concept of replacement water does not enter into this equation under these circumstances.

**8. Comment:** Other Important Cost Concerns

**Response:** The ACL Order includes the cost of Water Board staff resources to prepare this matter for Water Board consideration. You state, "many of us believe that the ACL should be borne by District 2" yet you provide no legal basis for your suggestion nor information on who the "many of us" represents.

**9. Comment:** Proposed Supplemental Environmental Project (SEP)

**Response:** You imply that the SEP will provide only a small percent of the "money required to dispose of only a small fraction of the wastewater" because sufficient land exists along the pipeline route to dispose of only 10% of the wastewater. However, the SEP is not intended to dispose of all of the wastewater. The SEP is intended to assist in providing recycled water to uses that might otherwise rely on potable water. Therefore, for every gallon of recycled water put to use there will be a gallon of potable water available for a higher use. The comment confuses two separate concepts: the new treatment and disposal facilities are designed to allow the Districts to correctly dispose of its effluent in a manner that protects water quality. The SEP will promote conservation of potable water through appropriate use of recycled water.

**10. Comment:** Proposed Supplemental Environmental Project Eligibility

**Response:** You argue that the Districts have an obligation to implement the SEP as it is an environmentally safe manner of wastewater disposal. While not stated outright, your comment implies that the disposal method (applying nitrified/denitrified filtered effluent to crops) proposed by the Districts is not an environmental safe method. I do not agree. The Water Board has issued a permit to the District allowing this disposal method. It would be totally improper to compare the District's proposed method of wastewater disposal to that of the 1990s or even the early 2000's (land application of wastewater without a crop) that created the groundwater pollution in the Palmdale area.

**11. Comment:** Give Up Enforcement

**Response:** You are correct that this settlement, if approved, would cover the liability associated with future discharges of excess nitrogen including that which may be currently in the soils above the water table. This nitrogen, if it exists, does not represent an "unknown degradation or contamination," since it has not affected groundwater and may never affect groundwater. This settlement does not eliminate the Water Board's authority to require the Districts to both remediate the future effects, if any, of this hypothetical nitrogen, and to take actions to reduce the possibility of this nitrogen in the soil column from reaching groundwater.

**12. Comment:** Not Considering Accelerated Schedule

**Response:** The Districts are subject to additional liability if they do not adhere to the schedules proposed in the CDOs as part of the settlement package. As we discussed at the March 2007 meeting, the prosecution team does not believe that accelerating the schedule for completion is possible under these circumstances. In order to receive any

benefit from accelerating the schedule for District 14, it would be necessary to shave off at least one year from the schedule. This is not possible. For District 20, the Prosecution Team believes that the projects on the critical path are being implemented in the shortest possible time.

**13. Comment:** Other unanswered concerns important to the settlement.

**Response:** The issue of inadequacy of monitoring wells is appropriately covered in the waste discharge requirements for the District. This is not governed by the settlement. Similarly, the "massive new consumptive use of growing alfalfa" is a misstatement in that it is new use of wastewater not of potable water. Furthermore, even if this is an issue to you or others, it is not an issue that is appropriate to deal with in the context of settlement for violations of orders of the Water Board that cover appropriate means of disposing of wastewater.

**14. Comment:** Lack of Consideration of New Technology.

**Response:** The Water Board lacks the authority to specify manner of compliance. It is the District's responsibility to select a treatment method that will result in an effluent that complies with the waste discharge requirements that are established to protect the beneficial uses of the receiving waters for the proposed discharge. You provide no information that supports your position that an effluent quality of 2 mg/l of nitrogen is necessary to protect beneficial uses of waters that could be affected by the application of treated wastewater on crops at agronomic rates and the Prosecution Team disagrees with this position.

**15. Comment:** Anticipated Future Performance is Predicated on Past Behavior.

**Response:** The Lahontan Water Board cannot take actions beyond those established in the governing statutes. The California Water Code allows the Water Board to establish standards for discharge that protect water quality, monitor the progress and discharge of permittees to ensure that activities are carried out pursuant to requirements, and to bring enforcement actions when a discharger does not comply. Enforcement can be injunctive or punitive. The Prosecution Team believes that this settlement accomplishes all of these goals. If the Districts' performance does not meet the requirements in the future, there is nothing to preclude enforcement in the future.

**16. Comment:** No Measurable Change of Behavior.

**Response:** Based on our recent experiences, and the level of interaction, information exchange and new working relationships, the Prosecution Team believe that there has been such a change, even though it may not be "measurable."

**17. Comment:** Dereliction of Duty.

**Response:** Comment noted.



**18. Comment:** Inappropriate Behavior of Districts' Staff.

**Response:** The Prosecution Team respectfully disagrees. See earlier response on the right of a discharger to petition a Water Board action.

**19. Comment:** Engagement of Water Purveyors and Community in Water Quality Issues.

**Response:** Please see response to earlier comment regarding the public process. While only a limited number of representatives of water purveyors and community members have commented on the settlement and SEP, the majority of the comments have been favorable.

As a final note, based on the many conversations we have had on these issues, the responses to your comments will not likely change your position on the issues. My responses are not intended to reduce in importance the concepts that you have raised. They are intended to demonstrate that the Water Board's consideration of the settlement is not the appropriate forum to resolve these issues.



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