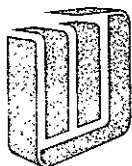


FILED by order
of the Board of Directors of
The Metropolitan Water District
of Southern California
at its meeting held MAY 12 1992

9-14

**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Executive Secretary

April 22, 1992

To: Board of Directors (Engineering and Operations Committee--Info.)
(Legal and Claims Committee--Info.)
(Water Problems Committee--Info.)

From: General Counsel

Subject: Liability Considerations for San Gabriel Basin Conjunctive
Use Program

Report

In connection with the Board's \$2.8 million appropriation earlier this month for additional San Gabriel Basin conjunctive use studies, members of the Engineering and Operations Committee requested information on: (1) what liability Metropolitan might assume by adopting the proposed conjunctive use program, (2) plans for limiting that liability, and (3) the extent to which Metropolitan is now committed to that program.

Metropolitan has not yet committed itself to implementation of the proposed program, and will not, without express Board approval. Indeed, the proposal has not been fully defined and the feasibility investigation has not been completed. The General Counsel's office is, however, identifying and evaluating potential liability exposure associated with implementation of a proposal and the steps needed to limit any liability exposure to reasonable levels.

Metropolitan has participated in limited basin conjunctive use operations for the past 17 years. The proposed program would expand present operations which store imported water in the basin for subsequent transfer to member agencies to offset overpumping. The new proposal would place additional amounts of water in the basin and would extract contaminated groundwater for treatment and transportation to areas outside the basin through Metropolitan's middle feeder.

The new proposal involves two significant additional legal factors: (1) The need for court approval to extract and export groundwater from the basin pursuant to the Los Angeles Superior Court basin adjudication judgment in Upper San Gabriel Valley MWD v. Alhambra et al.; and (2) The need to clean up basin contamination pursuant to the United States Environmental

Protection Agency (EPA) classification of the basin as seriously contaminated, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly referred to as the Superfund Act.

Last year, the Los Angeles County Superior Court expressly linked those two factors, by subordinating basin management under the judgment to EPA's basin cleanup plan. Accordingly, court approval of Metropolitan's proposed groundwater extraction and export will require compliance with the CERCLA remedial action plan which EPA is currently developing. EPA is, in fact, considering Metropolitan's proposed conjunctive use approach as part of that plan. EPA expects to release its proposed plan for public review and comment later this year.

Liability Considerations

A. Water Supply Operational Liability

Metropolitan's existing basin groundwater storage operations already incorporate several features limiting liability. The three major bases for potential liability previously considered are: (1) Construction and operation of physical facilities for delivering water for direct sale to, and use by, member agencies in the area; (2) Delivering water to those agencies for direct replenishment purposes; and (3) Delivering water to the basin for Metropolitan storage and subsequent sale to member agencies for replenishment.

Metropolitan's potential liability from the first and second situations is limited in the same manner as its potential liability from water deliveries to its other member agencies, that is, by complying with applicable statutory and common law requirements and by indemnification provisions for liability occurring after Metropolitan delivers water to its member agencies.

The third situation is handled through judicially approved storage contracts with the Watermaster that administers the basin adjudication judgment. Those contracts are considered particularly protective because they represent exercise of judicial authority under article X, section 2 of the California Constitution. California's Supreme Court has clearly designated that article as providing police power regulatory authority to protect groundwater supply and storage capabilities. (Niles Sand & Gravel Co. v. Alameda County Water

Dist. (1974) 37 Cal.App.3d 924, 935-937); City of Los Angeles v. City of San Fernando (1975) 14 Cal.3d 199, 287, 292.)

The new conjunctive use proposal would utilize the same methods for limiting liability exposure. In particular, it would rely on state court approval of a storage/extraction agreement with the basin Watermaster. Metropolitan is currently meeting with the Watermaster to draft an acceptable agreement in cooperation with Metropolitan's member agencies in the basin. The proposal must also incorporate features which will limit any potential liability exposure under CERCLA.

B. CERCLA Liability

CERCLA provides authority and allocates responsibility for cleanup of soil, surface water, and groundwater contamination caused by releases of certain hazardous substances into the environment. It also established a fund to finance cleanup of contaminated areas. EPA administers CERCLA through a comprehensive set of regulations identified as the National Contingency Plan.

EPA is responsible for recovering cleanup costs from the parties responsible (commonly referred to as PRP's) for releasing hazardous substances, on a joint and several, strict liability basis. It has authority to allow or require PRP's to participate in the cleanup. It also has authority to perform the cleanup itself, or to contract with the state and its political subdivisions such as Metropolitan and its member agencies to assist in the cleanup. In addition, CERCLA allows federal and state agencies to obtain damages from PRP's for permanent impairment of natural resources such as groundwater basins.

EPA has so far notified 275 entities that it considers them PRP's liable for basin cleanup costs. There are clear indications that EPA does not consider water supply management operations such as groundwater pumping and replenishment for municipal water supplies subject to liability under CERCLA. However, a possibility exists that PRP's may seek judicial determination that those operations (past, present, and future) are subject to CERCLA liability, if they affect the spread of contaminants previously released by others into the basin.

Our analysis indicates that neither the pumping of groundwater nor the spreading of nontoxic water for groundwater replenishment constitutes a release of hazardous substances

covered by CERCLA. Our research also indicates that the courts have not extended CERCLA liability to those types of water supply management operations.

Additional CERCLA liability considerations will arise if Metropolitan's proposal requires acquisition of land in the basin for extraction, treatment, or conduit facilities. CERCLA responsibility attaches to purchasers of previously contaminated lands except under specified conditions. It appears at this time that Metropolitan could meet those conditions and thus avoid CERCLA exposure, by qualifying as an innocent purchaser through its eminent domain authority.

It is also possible that EPA's cleanup plan will itself result in some additional liability exposure. Consequently, any Metropolitan participation in EPA's cleanup plan may require an indemnification arrangement with EPA and other agencies, such as the California EPA and the Main San Gabriel Basin Water Quality Authority, participating in the basin cleanup.

Our research is continuing and will include California hazardous waste statutes and regulations, as well as procedures for, and implications of, related agreements with state and local agencies. We will continue to assist the General Manager's staff so that it can structure a conjunctive use proposal in a manner that will limit any liability exposure to reasonable levels.

Board Committee Assignments

This letter is referred for information to:

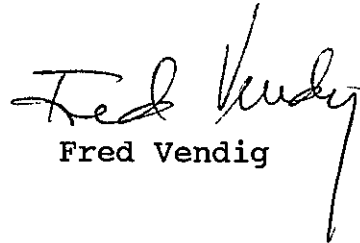
The Legal and Claims Committee because of its responsibility regarding litigation and claims brought by or against Metropolitan, pursuant to Administrative Code section 2461, subdivision (a);

The Engineering and Operations Committee because of its authority regarding facilities for the production, exchange, sale, storage, and treatment of water, pursuant to Administrative Code section 2431, subdivision (c); and

The Water Problems Committee because of its authority regarding policies dealing with the sale and delivery of water for various uses, and underground storage of water and use thereof, pursuant to Administrative Code section 2481, subdivisions (d) and (i).

Recommendation

For information only.


Fred Vendig

VEG:gld
SGB11ab