

Draft PFAS Agreement With Groundwater Producers

Board of Directors

February 19, 2020

Groundwater Producers Expected to Execute the Agreement with OCWD

- City of Anaheim
- East Orange County Water District
- City of Fullerton
- City of Garden Grove
- Irvine Ranch Water District
- City of Orange
- City of Santa Ana
- Serrano Water District
- City of Tustin
- Yorba Linda Water District
- Golden State Water Company (potentially in future)

Processing of PFAS Agreement

- Draft Agreement distributed to Producers on January 31st
- Requested comments by February 5th
- Incorporated comments, 2nd Draft Agreement distributed on February 11th
- Discussed with Producers and attorneys on February 12th
- Requested remaining comments by February 18th
- Current Draft Agreement transmitted today to Board and Producers
- Meeting with attorneys scheduled for February 25th
- Bring back to Board on March 4th for consideration

Response to Major Producer Comments on Draft PFAS Agreement

- Comment 1. Should there be two separate agreements for the OCWD led procurement effort and the Producer led effort.
 - Response: OCWD has clarified which parts of the Agreement do not apply if a Producer chooses to construct treatment itself
- Comment 2. Development of the lowest reasonable and efficient groundwater Treatment System(s) (“LREGTS”) as a basis for Producer reimbursement is not fair to Producers and does not adequately account for unique circumstances.
 - Response: Currently LREGTS determinations are in OCWD’s sole discretion. However, OCWD could consider modification clarifying determination of LREGTS will: (a) be reasonable and made in good faith; (b) will be made on a site specific basis after considering special circumstances identified by the Producer.
- Comment 3. What are the Parties obligations if treatment doesn’t work?
 - If OCWD builds?
 - If Producer builds?
 - Response: Currently OCWD limits financial assistance for repairs to the first year because of warranty coverage for treatment it builds. OCWD could consider expanding such funding.

Response to Major Producer Comments on Draft PFAS Agreement

- Comment 4. Indemnifications and Releases are too broad and unfairly favor OCWD beyond the risks created by the Agreement
 - Response: OCWD will narrow the release and add limited mutual indemnification provisions that do not require Producers to indemnify OCWD for risks the Producer did not cause.
- Comment 5. The agreement is too narrow in defining what treatment costs are eligible for reimbursement
 - Response: OCWD is developing clarifying language per comments received.
- Comment 6. What are OCWD's rights to reimbursement if Producer stops using the treatment or fails to maintain it properly
 - Response: OCWD is developing clarifying language per comments received.

Response to Major Producer Comments on Draft PFAS Agreement

- Comment 7. Some Producers want the ability to sue separately to recover their costs without obtaining OCWD's approval.
 - Response: If Producers want to sue separately, then OCWD must have ability to ensure Producer litigation is not harmful to OCWD's interests.
- Comment 8. What happens in joint litigation if the Parties disagree on key decisions?
 - Response: There appears to be consensus for a compromise approach wherein there would be an Executive Committee of six members (3 Producer appointed, 3 OCWD appointed), and the OCWD Board would break the tie should the parties in the litigation be unable to reach resolution.

Recommendation

Informational

Summary of Agreement

- Producer to provide any land or right of way.
- OCWD will fund the lowest reasonable and efficient treatment system design and construction cost to remove PFAS compounds down to existing and anticipated new Response Levels and anticipated future Maximum Contaminant Levels.
- OCWD will work closely with the Producer but will have ultimate control of the project design and construction.
- At the time of executing the agreement, OCWD would pay Producer for any appropriate design type cost incurred.

Summary of Agreement

- Producers will own and operate the treatment systems for 30 years.
- OCWD will provide a 50 percent subsidy for operation and maintenance expenses up to \$75/acre-foot.
- Producer will obtain and comply with necessary operating permits.
- Producer can decide to take the lead in designing and constructing treatment systems – OCWD would reimburse the Producers cost under this arrangement subject to the limitations described in the agreement.

Summary of Agreement

- Producer will support and be a co-litigant for any legal action initiated by OCWD.
 - Producer can initiate litigation on its own to recover its cost
- All settlement money collected by OCWD would be proportionally shared per the agreement.
- OCWD or Producer could be lead agency for CEQA. OCWD will pay for any costs.
- OCWD will administer construction contracts.

Summary of Agreement

- Establishes a Steering Committee
 - Representatives from OCWD and one representative from each participating Producer
 - Meets quarterly or more often as necessary
 - Interfaces with legal counsel
- Establishes an Executive Committee
 - Two representatives from OCWD, three representatives from participating Producers (appointed annually) and OCWD legal counsel
 - Meets quarterly or more often as necessary
 - Decides litigation strategy and settlement decisions

Background

- The District established a PFAS policy to construct PFAS treatment systems for impacted Groundwater Producers who want to participate in the program on November 22, 2019
- PFAS policy was amended on January 22, 2020
- Staff and legal counsel are working quickly to prepare and execute agreements with Groundwater Producers to implement the program