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NEW LEGISLATION ENCOURAGES WATER AGENCY INVOLVEMENT IN GROUNDWATER INVESTIGATIONS TO PROTECT DRINKING WATER SUPPLIES

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This article discusses water quality legislation enacted last year, Assembly Bill 378, that may significantly impact the investigation and cleanup of groundwater contamination in California. AB 378 allows public water systems and groundwater management agencies to take an active role in the investigation of groundwater pollution and the approval of water quality standards to be achieved by groundwater treatment systems.

This article also discusses pending legislation introduced earlier this year, AB 2071, which may provide public water systems with an additional remedy to respond to contamination of their drinking water supplies. AB 2071 would authorize a public water system that prevails in a civil action against the party responsible for contamination of surface water or groundwater supplies used by the public water system to recover certain costs associated with investigation and treatment of the contamination.

DESCRIPTION OF AB 378 PROVISIONS

AB 378 amended Water Code Section 13304, which authorizes a regional water quality control board (“regional board”) to order any person who has impermissibly discharged waste into waters of the State, or created a condition of pollution or nuisance, to clean up or abate the effects of the waste or take other necessary remedial action. Section 13304 also allows a regional board, by itself or with the cooperation of any other governmental agency, to clean up or abate the effects of an unauthorized discharge, and provides that any responsible party is liable to the regional board or other agency for the reasonable costs actually incurred in cleaning up the waste, supervising cleanup activities, or taking other remedial action.

AB 378 amended Section 13304 to authorize a regional board to contract with a “water agency” to perform, under regional board direction, investigations of existing or threatened groundwater pollution. Water Code § 13304(b)(4). The costs incurred by a contracting water agency are to be reimbursed by the regional board from the first available funds obtained from any cost recovery action for the site. Under AB 378, a regional board is authorized to contract with “a water agency that draws water from the affected aquifer, a metropolitan water district, or a local agency responsible for water supply or water quality in a groundwater basin.” *Id.*

AB 378 also added Water Code Section 13304.1, which specifies certain requirements to be followed by regional boards in establishing cleanup standards to be achieved by groundwater treatment systems that commence operation after January 1, 2002. If such a cleanup system requires a regional board discharge permit, the system must treat groundwater to standards approved by the regional board consistent with applicable Water Code provisions governing

water quality “and taking into account the beneficial uses of the receiving water and the location of the discharge and the method by which the discharge takes place.” Water Code § 13304.1(a).

In determining the water quality standards to be achieved by a cleanup system that draws groundwater from an aquifer that is used as a source of drinking water, a regional board must “consult with the affected groundwater management entity, if any, affected public water systems, and the State Department of Health Services” (“DHS”). Id. § 13304.1(b). Consultation is required “to ensure that the discharge, spreading, or injection of the treated groundwater will not adversely affect the beneficial uses of any groundwater basin or surface water body that is or may be used by a public water system for the provision of drinking water.” Id.

POTENTIAL IMPACTS OF AB 378

By authorizing water agencies to contract with a regional board to perform groundwater investigations, and providing that such agencies are to be reimbursed first from any cost recovery funds obtained from responsible parties, AB 378 may encourage water agencies to take the initiative in responding to groundwater contamination that they perceive to threaten drinking water supplies. AB 378 allows a water agency to supplement a regional board’s limited staff resources by assigning water agency employees to assist in a site investigation under contract to the regional board. A water agency could also contract with a regional board to assume lead responsibility for a groundwater investigation. As a result, AB 378 may lead to in more expeditious, and in certain cases more expensive, cleanups.

Besides committing staff, a contracting water agency might need to incur costs for a groundwater investigation subject to potential, but not guaranteed, reimbursement from the regional board, depending on the availability of financially viable responsible parties. Nevertheless, because AB 378 establishes first priority for cost reimbursement to a contracting water agency, an agency that perceives its water supply to be at risk may be willing to take the lead in a groundwater investigation.

Under AB 378, a regional board may contract with a public water system, a metropolitan water district, or a local public agency responsible for water supply or quality in a groundwater basin. Thus, in addition to water providers, an agency formed to develop and implement a groundwater management plan may take the initiative to investigate groundwater contamination within its jurisdiction. See Water Code § 10753 (authorization for groundwater management plans). Such an agency might address the need to perform site investigations to address contamination as part of its planning process or in implementing its groundwater management plan.

A water agency may be especially motivated to perform a groundwater investigation if it perceives that the responsible parties are not taking prompt and effective action to clean up impacted groundwater. If a water agency assumes lead responsibility for an investigation, the responsible parties ultimately may have both less control over the investigation and increased liability for agency response costs. Responsible parties who would prefer that potentially impacted water agencies continue to defer to regional board oversight of site investigations should make every effort to investigate and clean up groundwater contamination in an expeditious manner.

AB 378 authorizes water agencies to contract with a regional board to perform groundwater investigations only, not subsequent cleanup activities. However, as a practical matter, if a water

agency performs an investigation under contract to a regional board, the water agency would likely continue in its lead role to evaluate remedial alternatives and perform the cleanup. As noted above, a provision of Water Code Section 13304 that was not affected by AB 378 provides that responsible parties are liable for reasonable response costs incurred by agencies in cleaning up contamination. Thus, the responsible parties will be liable for the costs incurred by a water agency in connection with cleanup activities even in absence of contract between the regional board and the water agency for such work.

The provision of AB 378 requiring cleanup systems that begin operating after January 1, 2002, to treat the groundwater to standards approved by a regional board consistent with the applicable Water Code requirements, is a restatement of pre-existing law and does not impose new obligations on cleanup system operators. Regional board waste discharge requirements must implement relevant water quality control plans and take into consideration, among other factors, the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, and conditions in the receiving waters. Water Code § 13263. Similarly, regional boards prescribe reclamation requirements for the use of recycled water as necessary to protect public health, safety, and welfare. Water Code § 13523. These and other Water Code provisions, and implementing policies for water quality control, apply independently of AB 378 to the approval of water quality standards to be achieved by cleanup systems.

AB 378 also does not impose new requirements with respect to approval of the cleanup standards to be achieved in the environment (*i.e.*, the maximum residual pollutant concentrations in the groundwater remaining at a site). Regional boards set such cleanup standards in accordance with applicable Water Code requirements and State Water Resources Control Board Resolution No. 92-49, as amended, entitled “Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304.” Consistent with Water Code Section 13000, Resolution No. 92-49 requires dischargers:

“to clean up and abate the effects of discharges in a manner that promotes attainment of either background water quality, or the best water quality which is reasonable if background levels of water quality cannot be restored, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.”

In accordance with Resolution No. 92-49, the regional boards establish cleanup levels based on a balancing of all competing interests, including an evaluation of impacts on beneficial uses and considerations of technological and economic feasibility.

AB 378 requires that the regional boards consult with affected public water systems and groundwater water management entities and with DHS in determining the water quality standards to be achieved by groundwater cleanup systems. This consultation requirement will likely increase the level of participation and scrutiny by affected water agencies and DHS in regional board decisions establishing groundwater treatment standards. Moreover, given that the purpose of such consultation is to ensure that the disposal of treated groundwater will not “adversely affect” the beneficial uses of drinking water sources, AB 378 appears to establish a new criterion to be applied in treatment system permitting decisions.

As discussed above, regional boards establish both waste discharge requirements and site cleanup levels based on consideration of a wide-range of factors. Consistent with the need to

balance the various interests involved, Water Code Section 13241 recognizes that “it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses.” In comparison to prohibiting disposal of treated groundwater from “unreasonably affecting” beneficial uses, ensuring such disposal does not “adversely affect” beneficial uses appears to be a more stringent standard. Thus, consultation may result in the imposition of more stringent cleanup standards, even though AB 378 does not establish new requirements for approving such standards.

Water quality objectives to protect drinking water generally correspond to applicable drinking water maximum contaminant levels (“MCLs”) established under the California and federal Safe Drinking Water Acts (“SDWAs”). See Health & Safety Code § 116365; 42 U.S.C. § 300g-1. Since water that meets MCL requirements complies with the standards set under the SDWAs, and may be served as drinking water, dischargers may argue that groundwater treated to MCL standards will not “adversely affect” beneficial uses. In contrast, affected water agencies may argue that applying MCLs as groundwater treatment standards would allow contamination of drinking water supplies up to the MCLs and, as a result, would “adversely affect” beneficial uses. Instead, the regional boards may be urged to impose more stringent treatment standards to provide a margin of safety below MCLs.

Consultation might also result in increased attention to possible alternatives for the disposal of treated groundwater, other than surface water discharges or reinjection. Water agencies might suggest that alternatives be pursued to avoid or minimize the potential for spreading contamination to new locations or the reintroduction into the environment of residual pollutants from a treatment system.

With respect to alternatives, treatment system operators might consider delivering treated groundwater to a water agency or disposing of it at a publicly owned treatment works (“POTW”). AB 378 would not apply if treated groundwater were delivered to a water agency or discharged to a POTW because a regional board permit typically would not be required for these alternatives. Of course, the treatment system would need to comply with any requirements imposed by the water agency or POTW. The applicable water quality standards imposed by a water agency would likely depend on the intended use of the treated groundwater -- whether it might be used for drinking water or restricted to other purposes, such as landscape irrigation or spreading for groundwater recharge. A POTW would be concerned primarily with preventing the disposal of treated groundwater from interfering with the POTW’s operations.

AB 2071 MAY CREATE A CAUSE OF ACTION FOR WATER SYSTEMS TO RECOVER COSTS

Pending legislation introduced in the Assembly early this year, AB 2071, may provide public water systems with an additional remedy to respond to contamination of their drinking water supplies. AB 2071 would add Section 116747 to the Health and Safety Code to permit a public water system that prevails in a civil action seeking damages against any party responsible for contaminating surface water or groundwater supplies used by the water system to recover certain costs associated with the investigation and treatment of the contamination. LEXIS 2001 Bill Text CA AB 2071 (as amended May 2, 2002). AB 2071 would also specify the time within which a public water system would be required to file a civil action seeking such costs.

As enacted by AB 2071, Health and Safety Code 116747(a) would provide that the costs recoverable by a public water system include: (1) the reasonable costs of investigating the nature

and extent of the contamination, and of investigating appropriate measures to prevent the contamination from entering the public water distribution system; (2) the reasonable costs of designing, constructing, installing, operating, and maintaining any facilities necessary to prevent the contamination from entering the public water distribution system, including administration and overhead costs; (3) interest on the costs described in (1) and (2), above, accrued from the date of expenditure; and (4) reasonable attorney's fees and court costs.

Health and Safety Code 116747(b) would provide that, "[n]otwithstanding any other provision of law, a public water system shall have three years from the date it incurs costs described [in subsections (a)(1) and (2)] within which to file a civil action to recover those costs," interest, and reasonable attorney's fees and court costs.

Finally, Health and Safety Code 116747(c) would provide that any damages awarded pursuant to subsection (a) are in addition to, and not a restriction upon, the awarding of other damages available under any cause of action available to a public water system.

The central purpose and intent of AB 2071 is not entirely clear. Proposed Health and Safety Code 116747(a) suggests that the legislation is intended primarily to designate the costs that may be recovered by a public water system that prevails in an action for damages under existing remedies. On the other hand, by establishing a three-year statute of limitation for filing an action to recover such costs, and providing that any damages awarded under the statute are in addition to damages awarded on any other available cause of action, proposed Sections 11647(b) and (c) suggest that AB 2071 is intended to create an entirely new cause of action.

The establishment of a new cause of action for public water systems to recover costs associated with the investigation or treatment of contaminated drinking water appears to be unnecessary. Existing law provides public water systems with a variety of remedies against parties responsible for contaminating surface water and groundwater supplies. Existing remedies include, but are not limited to, common law claims for negligence, nuisance, and trespass; an action under Water Code Section 13304 for recovery of investigation and cleanup costs; and, depending on the circumstances, possibly claims for violation of the Safe Drinking Water and Toxic Enforcement Act (Proposition 65) discharge prohibition, a cost recovery action under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and a claim under the Resource Conservation and Recovery Act ("RCRA") to abate "an imminent and substantial endangerment to health or the environment." See Health & Safety Code § 25249.5; 42 U.S.C. §§ 9607(a), 6972(a)(1)(B).

If AB 2071 would create a new cause of action, it fails to define the key elements of the claim, including what acts or omissions would give rise to liability. In particular, AB 2071 would allow the recovery of costs to investigate and prevent the entry into the public water distribution system of "any contaminant," a term which is not defined, regardless of the nature or source of the contaminant and regardless of whether the concentration of the contaminant exceeds an applicable MCL. As noted above, water that meets MCL requirements may be served as drinking water. Therefore, it may be argued that public water systems should not be allowed to recover costs incurred in connection with the mere presence of any amount of any contaminant, particularly where a water system is not required to treat its water supply to comply with federal or State law.

AB 2071 does not require a public water system to consult with the regulatory agencies which may be exercising jurisdiction over a groundwater investigation and cleanup, such as the U.S. Environmental Protection Agency, the Department of Toxic Substances Control, or a regional board, before the water system incurs costs to investigate the contamination or treat its water supply. As a result, potentially responsible parties may be subject to liability for duplicative or unnecessary costs. This situation might occur, for example, if a regulatory agency were to order responsible parties to implement a particular remedial measure to address any threat to a public water system's supply, such as groundwater extraction to prevent further migration of a contaminant plume or the provision of an alternative water supply. Despite any such measures ordered by a regulatory agency, under AB 2071, an affected water system could nevertheless proceed to investigate and treat the contamination and recover its costs against the responsible parties.

A related concern is that AB 2071 does not specify any standards or criteria to be met by a public water system's investigation or selected remedy, before the costs incurred by the water system are eligible for reimbursement. In contrast, to be recoverable under CERCLA, a public water system's response costs would have to be consistent with the National Contingency Plan (40 C.F.R. Part 300), *see* 42 U.S.C. § 907(a)(4)(B), and for costs to be recoverable under Water Code Section 13304, a water system would need to perform its response activities in cooperation with, or under the direction of, a regional board. Water Code §§ 13304(b)(2), (b)(4).

The monetary relief available to a public water system under AB 2071 clearly would be broader than under the existing remedies mentioned above. While the costs actually incurred to investigate or treat contamination may be a generally accepted measure of damages, the AB 2071 provision authorizing recovery of costs to design, construct, install, operate, and maintain any facilities necessary to prevent any contaminant from entering the water distribution system could apply to a broad range of improvement projects routinely implemented by public water systems.

Under AB 2071 a public water system would also be entitled to recover interest on investigation, treatment, and other costs accrued from the date of expenditure, administration and overhead costs, and reasonable attorney's fees and court costs. Although attorney's fees may be recoverable under certain existing remedies where a plaintiff is found to have brought suit in the public interest, such as under Proposition 65 and RCRA, an award of attorney's fees in those cases is within the discretion of the court, rather than expressly mandated by statute as would be the case under AB 2071. Moreover, while it might be assumed that a public water system's attorney's fees typically would be paid by large private corporate defendants, a one-sided attorney's fee provision, as proposed by AB 2071, would also adversely impact small businesses and farmers alleged to be responsible for causing or contributing to the presence of any contaminant in a public water supply.

Finally, it is not clear how the AB 2071 three-year statute of limitations, running from the date a public water system incurs a claimed expense, would relate to the statutes of limitations applicable to other causes of action under which a public water system might seek damages. For example, an action on common law claims alleging trespass upon or injury to real property generally must be brought within three years of when the plaintiff first knew, or should have known, of the presence of the alleged contamination and its cause. Code of Civil Procedure § 338(b). However, under AB 2071, a public water system would not lose the right to bring an

action for damages even if it waited ten years or longer after learning of a contamination, provided that it filed suit within three years of incurring claimed costs. In such a case, and with a statute of limitations unrelated to the acts or omissions which caused the alleged injury, it might be difficult to locate the responsible parties or to produce witnesses, documents, or other proof relevant to determining causation and liability.

AB 2071 was introduced in February, 2002, and has passed the Assembly Environmental Safety and Toxic Materials and Judiciary Committees. As of this writing, in mid-May, the bill is pending before the full Assembly. Therefore, it is still too early to predict whether AB 2071 will be enacted by the Legislature and signed by the Governor.

CONCLUSION

AB 378 authorizes water agencies to take an active role in the investigation and cleanup of groundwater pollution, including the determination of applicable treatment standards. The practical effect of the legislation will depend on whether water agencies pursue the various mechanisms established by AB 378. Pending AB 2071 may establish an additional remedy for public water systems to respond to contamination of their water supplies by authorizing civil actions against the responsible parties to recover the costs incurred by such water systems to investigate and treat the contamination.