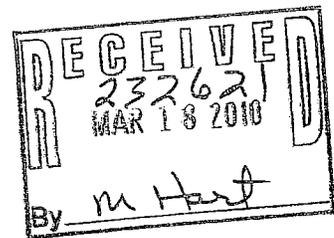


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March 18, 2010

VIA U.S. MAIL and ELECTRONIC MAIL

Mr. Benjamin H. Grumbles
Director
Arizona Department of Environmental Quality
1110 West Washington Street
Phoenix, Arizona 85007

Re: Roosevelt Irrigation District's Position Regarding a Request for an Interim Remedial Action by Potentially Responsible Parties

Dear Mr. Grumbles:

The Roosevelt Irrigation District (RID) has directed Gallagher & Kennedy to submit this letter to respond to comments from some Arizona businesses that have proposed alternatives to the RID Early Response Action (ERA). Based on the comments submitted by Salt River Project (SRP) in its letter to Ms. Julie Riemenschneider dated December 4, 2009, and similar comments submitted by other businesses to the Arizona Department of Environmental Quality (ADEQ), RID believes these businesses may request an Interim Remedial Action (IRA) or submit alternatives that would constitute an IRA pursuant to A.A.C. R18-16-501. RID believes that an IRA proposal would simply be another effort to delay ADEQ's approval of RID's ERA which is necessary to expeditiously address groundwater contamination that threatens public health, welfare and the environment and adversely impacts RID water supply wells in the West Van Buren Area (WVBA) Water Quality Assurance Revolving Fund (WQARF) Site.

Many of the Arizona businesses that may request an IRA from ADEQ have documented "releases" of hazardous substances at their facilities that have contaminated groundwater in the WVBA. Under federal law, these documented "releases" classify these businesses as "potentially responsible parties" (PRPs) that are liable for response costs incurred to protect public health, welfare, and the environment and to clean up and treat the groundwater contamination. These response costs include RID's costs relating to its ERA, which was submitted to ADEQ and supplemented to address ADEQ technical comments on October 5, 2009 and February 3, 2010, respectively.

RID believes that a PRP-proposed IRA will be consistent with the response action elements outlined in the SRP comments cited above. In its letter, SRP advocates:

- Restricting RID's end use of the groundwater extracted by its wells only to "maintain current agricultural and urban irrigation end uses..."
- Restricting the pumping of RID wells to only those wells in the eastern portion of the WVBA to intercept the [OU3] plume, supplemented by pumping from some RID wells at the downgradient extent of the WVBA plume. SRP otherwise suggests a remedial action plan that would require RID to shut off its wells located within the trichloroethylene (TCE) and tetrachloroethylene (PCE) plumes, and
- Restricting treatment of impacted groundwater to only some of the more highly contaminated RID wells as a means to "reduce" the transfer of hazardous volatile organic compounds (VOCs) to the air.

RID is unwilling to accept any such unlawful constraints on its wells, water supply system or water operations.

Furthermore, RID is writing this letter to remind ADEQ and all other interested parties what must be included in any potential IRA, and why ADEQ should not and legally can not approve or undertake any PRP-requested IRA under applicable Arizona law and the WQARF program rules and policies

I. Required Elements in Any PRP-Requested IRA

As with any proposed "remedial action"¹, any PRP-requested IRA must satisfy applicable statutory and regulatory WQARF program requirements. The following sections discuss these statutory and regulatory requirements and the inconsistencies and deficiencies of any PRP-requested IRA with these requirements.

A. A PRP-Requested IRA Must Achieve the Applicable Water Quality End Use Requirements Under Arizona Law and the WQARF Program Rules

Based on PRP comments to RID's ERA, any PRP-requested IRA will be inconsistent with applicable Arizona law and WQARF program rules governing the water quality end use of groundwater extracted from the WVBA. In the SRP comment letter, SRP asserts that RID should restrict its end use of this groundwater in pursuit of a "...more prudent risk management approach..." and infers that applying numeric

¹ Remedial action is broadly defined to include "those actions that are reasonable, necessary, cost-effective and technically feasible in the event of the release or threat of release of hazardous substances into the environment, such actions as may be necessary to investigate, monitor, assess and evaluate such release or threat of release, actions of remediation, removal or disposal of hazardous substances or taking such other actions as may be necessary to prevent, minimize or mitigate damage to the public health or welfare or to the environment which may otherwise result from a release or threat of release of a hazardous substance."

standards consistent with drinking water end use "...would eliminate any 'timely response' to the early response action." These assertions and inferences are irrelevant and incorrect and have no bearing on RID's legal right under state law to restore its impacted water supply for maximum beneficial end use², which approach is consistent with current practices at all existing Phoenix and Tucson area Superfund sites, where all remediated groundwater is treated to achieve drinking water maximum contaminant levels, regardless of current end use.³

In addition, the WQARF statute requires that an IRA "shall address, at a minimum, any well ... if the well would now or in the reasonably foreseeable future produce water that would not be fit for its current or reasonably foreseeable end uses without treatment due to the release of hazardous substances."⁴ WQARF rules define "reasonably foreseeable uses of water" as "those likely to occur within 100 years unless a longer time period is shown to be reasonable based on site-specific circumstances."⁵

During its remedial investigation of the WVBA and consistent with these and other applicable WQARF program requirements, ADEQ surveyed the "reasonably foreseeable end uses" of the groundwater in the WVBA.⁶ In the ADEQ survey, the WVBA water providers consistently identified the WVBA groundwater as a drinking water supply that is required by law to be protected and restored.⁷ Likewise, municipalities in the West Valley have expressed interest in the WVBA groundwater as a *current* drinking water source⁸, and RID has issued a policy statement requiring discharges of remediated groundwater to the RID system to meet applicable drinking water quality and aquifer water quality standards⁹. Accordingly, the contaminated groundwater extracted from the WVBA under any PRP-requested IRA is required by state law and RID policy to be treated to meet a current and reasonably foreseeable drinking-water quality end use. This also is mandated by statute:

"remedial actions shall, to the maximum extent practicable, provide for the control, management or cleanup of the hazardous substances in order to allow the maximum beneficial use of the waters of the state."¹⁰

² A.R.S. 49-282.06.A.2.

³ See North Indian Bend Wash Superfund Site, Operating Unit 1 – Motorola 52nd Street Superfund Site, Operating Unit 2 – Motorola 52nd Street Superfund Site, Tucson Airport Superfund Site, Phoenix Goodyear Airport Superfund Site, Payson WQARF Site.

⁴ A.R.S. 49-282.06.B.4.b.

⁵ A.A.C. R18-16-406.

⁶ *Id.*

⁷ A.A.C. R18-16-406.I.4. See also WVBA Land and Water Use Survey results from City of Phoenix, Salt River Project and RID.

⁸ Letter from John F. Fishbach, City Manager, Goodyear, to Herb Guenther, Director, Arizona Department of Water Resources (December 28, 2009)

⁹ See attached *Roosevelt Irrigation District Board of Directors Statement of Policy Regarding Superfund Sites*, Roosevelt Irrigation District (2010)

¹⁰ A.R.S. 49-282.06.A.2.

Based on these applicable legal and RID policy requirements, any IRA must include provisions requiring groundwater extracted from the WVBA to be treated to meet a drinking water quality end use.

B. A PRP-Requested IRA Must Provide an Explanation of the Water Rights and End Uses Associated with the Selected RID Wells

Pursuant to applicable WQARF rules, the PRPs must include in their written request to ADEQ for an IRA an “explanation of any water rights associated with the well and uses of the well, including any quality and quantity requirements associated with the end use of the water.”¹¹ Accordingly, PRPs will be required to acknowledge in their request for an IRA (what is supported by law and discussed in RID’s letter to ADEQ dated January 20, 2010), that RID possesses unencumbered water rights and that the current and reasonably foreseeable end uses of the groundwater extracted by the RID wells include a water supply for both irrigation and drinking water end uses.

RID believes that PRPs are required to include a drinking water end use for the reasons discussed in section I.A. above and because one of the well eligibility requirements for consideration of an IRA is that “[t]he well produces water or in the reasonably foreseeable future will produce water, *that is not fit for its current or reasonably foreseeable end-use without treatment due to the release of hazardous substances at or from a site on the registry.*”¹²

C. A PRP-Requested IRA Must Address the Impacted Water Supply of RID’s Wells

Pursuant to applicable WQARF rules, the PRPs must include in their written request to ADEQ for an IRA an “explanation of any water rights associated with the well and uses of the well, including any quality and quantity requirements associated with the end use of the water.”¹³ Accordingly, PRPs will be required to quantify the water supply that has been impacted for each RID well selected to be addressed by the IRA. Consistent with SRP’s comments to RID’s ERA, it appears that a PRP-requested IRA would address only certain RID wells in the eastern portion of the WVBA to intercept the OU3 plume and certain other RID wells at the downgradient extent of the WVBA plume. With respect to these selected RID wells, state law would require the PRP-requested IRA to include “specific measures to ... not reduce the supply of water available to the owner of the[se] well[s].”¹⁴ If the PRP-requested IRA would contemplate the shutdown of RID’s other impacted wells within the WVBA, as suggested in SRP’s comments, then state law would require the IRA to address the entire RID impacted water supply.¹⁵

¹¹ A.A.C. R18-16-503.A.2. (emphasis added).

¹² A.A.C. R18-16-502.A.2. (emphasis added).

¹³ A.A.C. R18-16-503.A.2. (emphasis added).

¹⁴ A.R.S. 49-282.06.B.4.b.

¹⁵ *Id.*

It is important to note that even if a PRP-requested IRA that addresses only a limited number of RID's impacted wells in the WVBA were approved, which is not legally possible,¹⁶ the IRA would not eliminate the need for ADEQ to approve RID's ERA. Despite an approved PRP-requested IRA, RID's ERA still would be necessary to address the current risks to public health, welfare and the environment, to prevent the contamination of RID's threatened wells within the WVBA, and to restore the impacted water supply from RID's impacted wells that are not addressed by the PRP-requested IRA.

D. A PRP-Requested IRA Must Provide a Description of the PRPs Interest in the Selected RID Wells and the Limitations on RID's Legal Rights to Use the Wells

Pursuant to applicable WQARF rules, the PRPs must include in their written request for an IRA, a "description of the [PRPs'] interest in the well and any limitations on the owner or operator's legal rights to use the well."¹⁷ However, the PRPs' only interest in RID's wells is the potential CERCLA liability facing the PRPs due to the releases of hazardous substances at PRP facilities, which have impacted or threaten to impact more than 30 of RID's wells in the WVBA.

It is important to RID that, in their request for an IRA, PRPs will be required to acknowledge (what is supported by law and discussed in RID's letter to ADEQ dated January 20, 2010), that RID has the legal right to use groundwater extracted by its wells in the WVBA for any beneficial use, and that RID's beneficial use of that groundwater has been unlawfully restricted by the documented releases of hazardous substances at PRP facilities that have impacted or threaten to impact RID's wells.

II. ADEQ Should Not and Legally Can Not Approve/Undertake a PRP-Requested IRA

According to applicable WQARF rules, only ADEQ or RID could undertake an IRA that addresses or involves RID's contaminated wells.¹⁸ Considering that RID already has proposed a more appropriate response action through its ERA, only ADEQ could undertake an IRA requested by PRPs or others. RID believes that any PRP-requested IRA would be inconsistent with applicable Arizona law and WQARF program rules.

A. A PRP-Requested IRA Will Not Adequately Address the Current Risk to Public Health, Welfare and the Environment

Based on comments received by ADEQ to date, it is clear that any PRP-requested IRA will not adequately mitigate current risks to public health, welfare and the

¹⁶ See discussion below.

¹⁷ A.A.C. R18-16-503.A.8.

¹⁸ A.A.C. R18-16-501.

environment from exposures to hazardous substances present in the groundwater and to hazardous substances that may volatilize into the air. The PRP-requested IRA will advocate treatment of only a limited number of RID's impacted wells, leaving many RID impacted wells and laterals as continuing sources of hazardous air pollutants. Any PRP-requested IRA also will not comply with the environmental policies of the Environmental Protection Agency (EPA) and ADEQ that prohibit the "relocation of contaminants from one media (groundwater) to another (air)."¹⁹ In order to mitigate the volatilization of hazardous substances into the air, as required by EPA and ADEQ, and to address the current risks to public health, welfare, and the environment, RID's ERA is the only feasible, effective and efficient path forward.

The RID ERA is simple and straightforward, effective and reasonable. Upon its implementation, the ERA, utilizing a substantial amount of existing RID infrastructure, will capture over 5,000 pounds of hazardous VOCs each year from the 10 most highly contaminated RID wells and minimize their release by controlling the contamination within the enclosed Salt Canal pipeline. The existing Salt Canal pipeline will be connected by a new pipeline extension to a treatment facility, where the VOCs will be removed by a granulated activated carbon (GAC) treatment system.

B. A PRP-Requested IRA is not an Appropriate Response Action for Contaminated RID Wells in the WVBA

According to WQARF policies, an IRA is "primarily intended to provide rapid solutions to water supply problems resulting from WQARF contamination where there is insufficient information about the site to determine whether an early response action would be appropriate."²⁰ ADEQ has been studying the WVBA WQARF Site for more than 20 years, and in October 2008, ADEQ published the Draft Remedial Investigation Report for the WVBA WQARF Site. The information gathered by ADEQ for the WVBA site is sufficient to identify PRPs, define the extent of contamination, quantify the impacts to the RID system, and determine that an early response action is appropriate. In fact, ADEQ's information was essential in designing RID's ERA, which has been submitted to ADEQ. Therefore, according to applicable WQARF policies and based on the large body of information amassed by ADEQ and PRPs, an ERA, not an IRA, is the appropriate action to expeditiously address the public health concerns and water supply problems resulting from the extensive VOC contamination at the WVBA WQARF Site.

C. A PRP-Requested IRA Would be Inconsistent with ADEQ's Criteria for IRA Approval

Pursuant to applicable WQARF rules, ADEQ "shall approve or deny requests for interim remedial action ... based on the following: ... 7. Any information that might reasonably suggest that the party requesting the interim remedial action is responsible for

¹⁹ Letter from Keith Takata to Michael Loch and Brian Israel (November 14, 2007); Letter from Amanda Stone to Keith Takata (November 14, 2007).

²⁰ 8 A.A.R. 1491, 17, effective March 4, 2002 (Supp. 02-1) (emphasis added).

the release of the hazardous substances contaminating the well. 8. Funding considerations of the Department.”²¹

The Arizona businesses that would be requesting ADEQ to approve/undertake an IRA have been identified in ADEQ and EPA documents as owners/operators of facilities where releases of hazardous substances have occurred that have contaminated or threaten to contaminate the groundwater that impacts or threatens to impact RID’s wells. Under CERCLA, such owners/operators are legally responsible for the response costs incurred to protect RID’s wells. 42 U.S.C. 9607(a). The WQARF statute emphasizes that ...

the director may choose not to take interim remedial action pursuant to subsection A of this section if the director has sufficient information to reasonably establish that the person requesting the remedial action may be responsible under this article for the release of hazardous substances contaminating the well.²²

For the past 20 years, ADEQ has been unable to develop and implement a remedy for the WVBA WQARF Site due to budgetary limitations and the lack of collective PRP cooperation. It certainly appears that the state’s current budget problems will deny ADEQ sufficient funding in the near future to assume a lead role in performing any proposed IRA, particularly due to ADEQ’s legal inability to recover contribution from the PRPs for “orphan shares.” If ADEQ cannot undertake the IRA due to funding concerns, then ADEQ must deny the PRP request since only ADEQ or RID can undertake an IRA to address RID’s wells.²³

D. A PRP-Requested IRA for the WVBA is Fatally Flawed

Pursuant to applicable WQARF rules, ADEQ’s approval of an IRA is conditioned “upon execution by the requesting party of ... [a]n agreement, as appropriate, to provide the Department access to the property at reasonable times.”²⁴ Any PRP request for an IRA in the WVBA to address groundwater impacts to RID’s wells will be unable to satisfy this necessary condition for approval because PRPs do not have the legal right to grant ADEQ access to properties that are not under PRP ownership or control. Consequently, ADEQ must deny any PRP-requested IRA for the WVBA.

Conclusion

RID believes that ADEQ must deny any PRP request for an IRA because an IRA is not the appropriate action for the WVBA WQARF Site and any PRP-requested IRA would be inconsistent and/or would fail to comply with applicable Arizona law and WQARF program rules and policies. On the other hand, RID’s ERA should be approved

²¹ A.A.C. R18-16-504.A.

²² A.R.S. 49-282.03.B. (emphasis added)

²³ A.A.C. R18-16-501.

²⁴ A.A.C. R18-16-504.C.

Mr. Benjamin H. Grumbles
March 18, 2010
Page 8 of 8

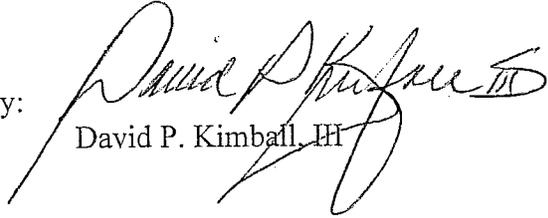
because it is the appropriate action for the WVBA WQARF Site, and the RID ERA is the only reasonable, cost-effective and expedient proposal to address current risks to public health, welfare and the environment, to protect RID's wells that have not yet been impacted, to provide a rapid solution to RID's water supply needs, and to provide, at the same time, a significant step toward remediating one of the largest contaminated groundwater plumes in the United States.

Please call if you have any questions.

Very truly yours,

GALLAGHER & KENNEDY, P.A.

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