

From: Jay Austin
Sent: Thursday, October 18, 2007 11:30 AM
To: Cupps, Katharine (ECY)
Cc: Scott Redman; Langdon Marsh; Adam Schempp
Subject: ELI liability memo

Kathy,

Attached please find ELI's memo on liability and indemnification concepts for reclaimed water. This took a bit longer, but also covers a bit more ground, than we originally expected.

Because the subject matter is not as complex as the impairment issue, we've taken a slightly different approach. First, this document is styled as a legal memorandum addressed to you, rather than the more comprehensive report format we used for Adam's work. Second, due to your timeline, we've gone ahead and formatted this as a final version, rather than a "draft" with a period of review. That doesn't mean we can't still receive comments and incorporate them into a later iteration of the memo, but I wanted to get something as polished as possible into your hands while you're still assembling your report. If it turns out there's time for another version before you need to submit, we'll be happy to turn that around; if not, please feel free to cite, quote, paste, or attach this material as you see fit.

I hope this assists your deliberations and report. As before, we've enjoyed working with you on this project, and look forward to doing so in the future.

Best regards,

-- Jay

Jay E. Austin
Senior Attorney
Environmental Law Institute
www.eli.org
austin@eli.org
503-775-5705 (Pacific Time Zone)

Director, Endangered Environmental Laws Program
www.endangeredlaws.org



MEMORANDUM

TO: Katharine Cupps, Washington Department of Ecology
FROM: Jay Austin and Adam Schempp, ELI
RE: Comparative Survey of Liability and Indemnification Concepts for Reclaimed Water
DATE: October 17, 2007

I. Introduction

The “Removing Barriers” Sub-Task Force of the Reclaimed Water Use Rule Advisory Committee is charged with considering “unresolved legal issues specific to reclaimed water use.”¹ One group of issues identified by Advisory Committee members was the liability and indemnification rules for production, distribution, and use of reclaimed water. ELI agreed to provide comparative research on these issues as part of its collaboration with the Advisory Committee, the Department of Ecology, and the Puget Sound Action Team/Partnership. This memorandum highlights relevant liability and indemnification concepts in key states.²

On the one hand, the baseline legal regime for reclaimed water is not radically different than for water treatment and supply generally. Parties engaged in the production, distribution, and use of reclaimed water (1) must meet applicable regulatory standards; (2) may – and in some cases must – contract with one another to assign responsibility for meeting those standards down the water supply chain; (3) may be subject to tort liability for violating certain duties of care to each other or to third parties; and (4) may seek contractually to limit or be indemnified from such liability. In practice, since the development of water reclamation projects has tended to precede development of specialized legal rules for reclaimed water, these standard tools provide the basis on which many existing projects have been initiated and are currently operating.

On the other hand, the emergence of separate legislation and regulations for reclaimed water – coupled with public perceptions and a more restricted array of end uses – suggests that a slightly modified legal climate may help accommodate any special characteristics of, or potential concerns about, water reuse. This memorandum focuses primarily on state laws and regulations that make specific reference to reclaimed water. It assumes working knowledge of, and does not attempt to analyze in depth, the broader regime of regulatory, contract, and tort law under which wastewater treatment plants and water providers must operate in any event.

¹ Washington Senate Bill 6117, Section 5(d).

² As with ELI’s other work product on reclaimed water, the research here is intended to inform the ongoing discussion in Washington State. It does not purport to offer binding legal analysis or advocate a specific outcome.

II. Regulatory Liability

The vast majority of states have some form of regulation governing water reclamation and reuse. A 2002 U.S. EPA inventory of state laws and regulations found that forty-one states have enacted either regulations or guidelines pertaining to reuse, with varying degrees of detail and allowable uses.³ At that time, Washington already was noteworthy for being the only state in the nation to have made some provision for each of the reuse categories being tracked by EPA, including urban, agricultural, recreational, environmental, industrial, groundwater recharge, and indirect potable reuse.⁴

These state laws and regulations can be broadly grouped into three types: water-quality standards that govern the level of treatment, contaminant limits, and/or monitoring requirements for different classes of reclaimed water; design and construction standards for reclaimed water facilities and distribution networks; and standards or best practices for handling and application of reclaimed water. Some states, including Washington, use a combination of all three types, as applied respectively to wastewater treatment facilities, reclaimed water providers, and end users. Other states rely more heavily on a single type, presumably leaving any gaps to be filled by more general water-quality regulations, contracts, or the tort system.

Reclaimed water regulations of course vary in content and stringency from state to state, but their implementation reveals some common themes. For present purposes, the most relevant questions are: (1) who is responsible for ensuring compliance with regulatory standards along the water supply chain; and (2) how compliance (or non-compliance) with regulatory standards may affect potential common-law liability.

A. Compliance With Regulatory Standards

1. In Washington

The Washington State Legislature has delegated authority over reclaimed water to the Departments of Ecology and Health, and directed those agencies to adopt rules addressing “all aspects of reclaimed water use.”⁵ Pending development of new rules, the two Departments have jointly produced standards that govern most reclaimed water applications.⁶ These standards set out water-quality requirements for specific classes and uses of reclaimed water;⁷ engineering, operation, design, and reliability requirements;⁸ and use-area requirements.⁹ Their terms are tailored to specific projects and incorporated into a reclaimed water permit that is jointly issued by the Departments to the producer of reclaimed water.

³ U.S. EPA, *Guidelines for Water Reuse*, EPA Pub. No. 625R04108 (September 2004), Chapter 4. The nine states listed as having no regulations or guidelines were Connecticut, Kentucky, Louisiana, Maine, Minnesota, Mississippi, New Hampshire, Rhode Island, and Virginia.

⁴ *Id.* at 152, Table 4-1.

⁵ Wash. Rev. Code § 90.46.015(1).

⁶ Washington State Departments of Ecology and Health, *Water Reclamation and Reuse Standards*, Pub. #97-23 (September 1997).

⁷ *Id.*, Articles 1-7 and Table 1.

⁸ *Id.*, Articles 8-11.

⁹ *Id.*, Article 12.

The current standards document places primary responsibility for compliance on the permit holder: “The permittee shall maintain control over, and be responsible for, all facilities and activities inherent to the production of reclaimed water to ensure that the reclamation plant operates as approved by the Washington Departments of Health and Ecology.”¹⁰ If the use area is under the permittee’s direct control, the permittee also must “ensure that the entire reuse system operates as approved.”¹¹ Where the distribution system or use area is not under the permittee’s direct control, responsibility shifts to “the person(s) who distributes reclaimed water, owns, or otherwise maintains control over the use area,” and there must be “a binding agreement among the parties involved ... to ensure that construction, operation, maintenance, and monitoring meet all requirements.”¹²

This arrangement can be readily illustrated with an existing water reclamation project. The LOTT Wastewater Alliance and its partner jurisdictions (Thurston County and the cities of Lacey, Olympia, and Tumwater) have entered into a “General Interlocal Agreement” governing the distribution and use of reclaimed water.¹³ Under that agreement, the LOTT Alliance owns, operates, and holds the state permits for Class A water reclamation facilities, and is responsible for ensuring regulatory compliance for production of reclaimed water and its distribution to designated delivery points.¹⁴ From there, the individual LOTT partners assume responsibility for distribution of the water, whether for their own use or further distribution to other end users.¹⁵

Any such resale to end users requires two additional steps: adoption by the LOTT partner jurisdiction of a reclaimed water ordinance, including enforcement authority; and a binding end-user agreement that is “materially identical ... as to permit and regulatory compliance,” and that sets forth “terms and conditions including legal rights and responsibilities; regulatory compliance provisions required by the Washington State Departments of Health or Ecology; provisions enabling enforcement action as necessary to ensure regulatory compliance; and other necessary or appropriate terms and conditions.”¹⁶

These terms and conditions are incorporated into the end-user agreement, by reference to applicable federal, state, and local laws and the Washington Water Reclamation and Reuse Standards, by enumeration of specific end-use requirements in the agreement, or both.¹⁷ Through this trail of legal documentation, regulatory standards and the responsibility for complying with them follow reclaimed water through the supply chain, from the state level down to local use.

¹⁰ *Id.*, Article 9, Section 6(a).

¹¹ *Id.*, Section 6(b).

¹² *Id.*, Sections 6(c)-(d).

¹³ General Interlocal Agreement Between the LOTT Wastewater Alliance, Thurston County and the Cities of Lacey, Olympia and Tumwater for Distribution and Use of Reclaimed Water (January 16, 2004).

¹⁴ *Id.*, Sections 1.5, 1.8, 1.13, 3.1, 4.5(a).

¹⁵ *Id.*, Sections 2.3, 3.7, 4.5(b).

¹⁶ *Id.*, Section 5.

¹⁷ *E.g.*, City of Olympia, [Model] Class “A” Reclaimed Water Service Agreement, Section 8 and Attachment.

2. In Other States

Other Western states have similarly carved up regulatory responsibility among reclaimed water producers, distributors, and users, as illustrated below.

Texas. Texas spells out the division of responsibility directly in its state regulations, requiring reclaimed water *producers* to:

(A) transfer reclaimed water of at least the minimum quality required ... at the point of delivery to the user for the specified use; (B) sample and analyze the reclaimed water and report such analyses ...; and (C) notify the executive director [of the Texas Commission on Environmental Quality] in writing within five days of obtaining knowledge of reclaimed water use not authorized by the executive director's reclaimed water use approval.¹⁸

Reclaimed water *providers* must assure that construction of reclaimed water distribution lines or systems is in accordance with standards, and also are required to notify the Commission of any unauthorized use of reclaimed water.¹⁹ Upon discovering misuse, the provider will not be found in violation of the regulations “if transfer of such water is shut off promptly upon knowledge of misuse regardless of contract provisions.”²⁰ Finally, the reclaimed water *users* are required to use the water in accordance with regulations, and to maintain and provide records of their use.²¹

Oregon (current). Like the Washington standards, Oregon regulations hold sewage treatment system owners “solely responsible and liable to the Department [of Environmental Quality] for meeting the requirements of these rules and the sewage treatment system owner's permit for any and all water that passes through the owner's treatment plant.”²² Release of reclaimed water for use on property not under the treatment plant owner's control “shall be allowed only if there is a legally enforceable contract between the treatment plant owner and the user.”²³ The regulations require that these contracts include, among other things:

- a statement specifying the parties responsible for compliance with the rules and the sewage treatment system permit;
- a provision allowing the sewage treatment system owner to cease providing reclaimed water if the Department or the owner determine that the regulatory requirements are not being met; and

¹⁸ Tex. Admin. Code § 210.6(1).

¹⁹ *Id.*, § 210.6(2)(A) & (C).

²⁰ *Id.*, § 210.6(2)(D).

²¹ *Id.*, § 210.6(3).

²² Or. Admin. Rules, § 340-055-015(9).

²³ *Id.*

- a condition that requires the user of reclaimed water to report to the sewage treatment plant owner any and all violations of the terms of the rules or the contract.²⁴

This contracting process must be repeated for any additional links down the supply chain, all the way to the end user.²⁵

Oregon (proposed). However, Oregon is in the process of revising its reclaimed water regulations, including a potentially significant change to the responsibility structure. Under the proposed revisions, any person “having control over the treatment or distribution or both” of reclaimed water would be required to “take all reasonable steps” to ensure that the water gets used in accordance with the standards and requirements.²⁶ The regulation also would explicitly require reclaimed water users to comply with the standards and requirements.²⁷

By replacing the current express contract requirement with “reasonable steps,” the draft language appears to grant treatment plants and distributors more flexibility to determine how to enforce state standards down the supply chain, whether through ordinances, local permits, best practices, or other tools. This change was endorsed both by reclaimed water distributors and by the Oregon Attorney General’s office, who feel the present system of contracts is burdensome to administer, especially for smaller municipal utilities.²⁸ But by introducing the general language of “reasonableness,” the new regulation could, in the event of a mishap, expose treatment plants and distributors to litigation to determine precisely what that term means in practice and in law.

Colorado. Colorado has perhaps the most detailed regulation of the Western states studied, supplanting these contract-based systems with enforceable plans that, like permits, can be directly enforced by the state’s Water Quality Control Division.²⁹ Under this regulation, a reclaimed water producer must prepare a “reuse system management plan” that includes:

... a description of the proposed reclaimed water treatment and transmission systems; a description of the treater’s program to inform and educate users on the requirements of this regulation; a description of the treater’s plan to oversee the use of reclaimed water by users to ensure, to the maximum extent practicable, that

²⁴ *Id.*, § 340-055-015(9)(e)-(g).

²⁵ See *id.*, § 340-055-015(10):

In cases where reclaimed water is transferred from one user to another, each succession of ownership of the reclaimed water shall be governed by a legally enforceable contract on file with the owner of the sewage treatment system and which notifies the succeeding reclaimed water user of the requirements of this Division and the permit for the sewage treatment system. The contract shall also require the succeeding user to so contract with any additional succeeding reclaimed water users.

²⁶ Oregon Dept. of Env. Quality, Draft Regulations on Recycled Water Use, § 340-055-12(1) (June 2007).

²⁷ *Id.*, § 340-055-12(2).

²⁸ Conversation with Judy Johndohl, Oregon Dept. of Env. Quality (May 14, 2007).

²⁹ Colo. Dept of Pub. Health and Env., Water Quality Control Commission, “Reclaimed Water Control Regulation,” 5 Colo. Code Reg. 1002-84 (2005). The detailed Colorado scheme for reclaimed water regulation was patterned on the Commission’s biosolids regulation. *Id.*, § 84.21(A)-(B).

users attain and maintain compliance with this regulation; and evidence of the treater’s legal ability (regulation, ordinance, contract, or other acceptable mechanism) to terminate service to a user if the user fails to comply with this regulation.³⁰

Colorado’s regulatory structure assumes that the producer “is in a better position to oversee the operations of the applicator and can generally resolve violations without Division intervention as part of their routine program activities.”³¹

The reclaimed water producer must also develop and submit, in cooperation with each of its users, a “User Plan to Comply” that includes express rules and conditions for end use.³² These are spelled out directly in the regulation, and include general conditions and design standards, as well as additional rules and a requirement of “best management practices” for certain uses such as landscape irrigation and fire protection.³³ The user or its legal representative must also certify that it agrees to comply with the requirements of the regulation, and to grant the reclaimed water producer and the Water Quality Control Division “reasonable access” to the use site to determine compliance.³⁴

Based on the proposed reuse system management plan and user plans, the Division issues or denies a separate “Notice of Authorization” (NOA) to the producer and the users. These NOAs require implementation of the plans and best management practices, and include terms for modification, revocation, or termination; required monitoring to be performed by the user; reporting and record-keeping requirements; and a statement of applicable civil and criminal penalties.³⁵ They are enforced by requiring both producers and users to report any violations to the Division within specified time periods.³⁶ Each of the parties is “solely responsible for its compliance with the terms and conditions imposed upon it”; however, a producer who is aware of and fails to report a user violation may be subject to enforcement action for failure to report, and vice versa.³⁷

Each of these three legal schemes – Texas’ general regulation, Oregon’s combination of regulations and contracts, and Colorado’s detailed plans – serve the same goal as Washington’s current system of standards, permits, and user agreements: setting a fair, practicable division of labor and responsibility between reclaimed water producers, distributors, and users. The main differences are in the balance between the degree of detail specified in the regulations, and the amount of flexibility left to the parties to make individualized arrangements for compliance. By proposing to forego specific contractual agreements in favor of an open-ended “reasonable steps” requirement, Oregon’s draft regulation could, if enacted, go the farthest in the direction of flexibility, at the potential expense of decreased regulatory certainty and increased litigation.

³⁰ *Id.*, § 84.6(A)(4).

³¹ *Id.*, § 84.21(G).

³² *Id.*, § 84.6(A)(6).

³³ *Id.*, § 84.9(A)-(C).

³⁴ *Id.*, § 84.9(D).

³⁵ *Id.*, § 84.6(4)-(12).

³⁶ *Id.*, § 84.10(C)(1) (reporting period of up to sixty days for most violations, but within 24 hours for “more serious violations” that threaten public health or the environment).

³⁷ *Id.*, § 84.12.

B. Regulatory Compliance as Safe Harbor

With regulatory requirements being spelled out in great detail through standards, permits, contracts, and other instruments, the question arises whether compliance with these requirements would be sufficient to shield reclaimed water producers, providers, and users from other forms of legal liability – or, conversely, whether a violation of regulatory requirements could also be cited as evidence of a breach of common-law duties of care. As in other areas of environmental law, a statutory “safe harbor” provision might clarify the relationship between reclaimed water statutes and regulations and the larger body of tort law.

In practice, there appear to be few express legislative pronouncements on this topic, in Washington or elsewhere, and almost no case law specific to reclaimed water. This points to the conclusion – elaborated in the next section – that reclaimed water operations likely are subject to the same forms of common-law liability as any other types of wastewater treatment, distribution, or application.³⁸ A few limited examples to the contrary are discussed below.

1. In Washington

Washington’s statute on reclaimed water use expressly states that it is *not* intended to supplant other provisions of state law:

The authority and duties created in this section are *in addition to* any authority and duties already provided in law with regard to sewage and wastewater collection, treatment, and disposal for the protection of health and safety of the state’s waters. Nothing in this section limits the powers of the state or any political subdivision to exercise such authority.³⁹

While this section arguably focuses on the state and local governments’ “authority” to administer a reclaimed water program alongside other forms of wastewater regulation, the inclusion of the term “duties” suggests the regulated community’s legal obligations are also being kept intact. Further, the language “provided in law” is quite general, and could easily be read to extend to common-law liability as well as statutory and regulatory requirements.

Conversely, the Washington State Legislature did expressly create a safe harbor for reclamation on one specific occasion, when it amended the reclaimed water statute in 1997 to authorize five demonstration projects around the state. That amendment provided that:

No irrigation district, its directors, officers, employees, or agents operating and maintaining irrigation works for any purpose authorized by law, including the production of food for human consumption and other agricultural and domestic

³⁸ However, the law of governmental immunity also may shield wastewater or reclaimed water treatment plants, distributors, or users from common-law liability, where these actors are municipalities or other government entities. Examination of this complex legal doctrine is beyond the scope of this memorandum.

³⁹ Wash. Rev. Code § 90.46.030(5) (industrial and commercial reuse) (emphasis added). Similar language appears in § 90.46.040(5) (land application).

purposes, is liable for damages to persons or property arising from the implementation of the demonstration projects in this section.⁴⁰

This provision appears to grant near-total immunity from damages suits to the irrigation districts and personnel involved in distributing irrigation water generated by the demonstration projects. Its language is fairly clear, and its existence could be cited to argue that the Legislature knows how to create immunity or safe harbors when it chooses – and that it has not yet done so for other instances of water reclamation.

2. In Other States

Florida. Florida has a statutory safe harbor for spray irrigation with wastewater. Its state code provides that:

Any person who in good faith accepts from any owner or operator of a permitted wastewater treatment or disposal plant any wastewater permitted and intended to be used for disposal through spray irrigation is not liable for any civil damages as a result of the acceptance and disposal of such wastewater through approved spray irrigation practices.⁴¹

This provision is found in the code chapter dealing with wastewater generally, but by its terms would appear to apply to reclaimed water use for irrigation. The immunity it provides is limited, however, and does not extend to acts of “negligence, gross negligence, or reckless, wanton, or intentional misconduct,” nor to “improper management and use of the wastewater” after it is delivered.⁴² Significantly, Florida’s statute is a safe harbor only for wastewater users, and does not exempt treatment plant owners or operators for damages caused by irrigation.⁴³ Nor does it prevent a government entity “from taking such action within its jurisdiction as may be necessary to protect the public health, safety, or welfare or the environment.”⁴⁴

The fact that the Washington and Florida safe-harbor provisions relate only to irrigation suggests they were drafted to alleviate fears of liability to the ultimate consumer of the crops. In these limited instances, the legislature is making a policy judgment that the benefits of reclaimed water use outweigh the potential risk that water produced or used under the regulatory standards, properly followed, might somehow lead to public health or environmental problems.

III. Common-Law Liability

Absent an express safe harbor, water reclamation presumably is subject to the same kind of common-law liability that attaches to water treatment and supply generally. To the extent that most everyday performance issues – whether of water quantity, water quality, or end use – can

⁴⁰ *Id.*, § 90.46.110(6). The demonstration projects were located in Ephrata, Lincoln County, Royal City, Sequim, and Yelm.

⁴¹ Fla. Stat. § 403.135(1).

⁴² *Id.*, § 403.135(2)(a)-(b).

⁴³ *Id.*, § 403.135(2)(c).

⁴⁴ *Id.*, § 403.135(3).

be anticipated in enforceable distribution agreements, this should not result in much additional legal exposure; the parties can set clear expectations, assign responsibility among themselves, and fall back on litigation only as a last resort. But no agreement can cover all situations between the parties, or the extraordinary situation of harm to persons that are not party to the agreement.

There are several common-law theories under which third-party liability could arise. As applied to reclaimed water, these remain largely theoretical, in the sense that there has been little significant case law in that specific context. Nevertheless, it may be prudent to anticipate them, especially as reclaimed water use increases in Washington. Many of the legal theories relevant to reclaimed water production, distribution and use have been catalogued in an article by California attorney Carolyn Richardson.⁴⁵ While her discussion leans on California law and precedent, it also states general principles of tort law that likely exist, or might arise, in Washington as well.

A. Negligence Theory

Richardson begins with the basic idea that violation of a statute or administrative rule designed to protect against a particular risk could result in liability for injuries to members of the protected class. In her view (and under California law),

[i]f any of the quality criteria or management regulations are violated in the treatment, delivery, or application of reclaimed wastewater, negligence would be presumed. Violation of the treatment standards would raise a presumption of negligence against the wastewater treatment facility. Violation of management standards in the application of the wastewater would raise a presumption only against the irrigator, unless the treatment facility has violated a specific duty to inspect the irrigation operation or was negligent in entrusting the wastewater to this operation.⁴⁶

In essence, the same division of responsibility that applies when reclaimed water operators must answer to regulators, or to one another, applies when they answer to third parties for negligence: the reclaimed water producers are responsible for violations of water-quality standards, and the reclaimed water users are responsible for violations of management and application standards.

In practice, though, the division is unlikely to be this neat. Many of the regulations and distribution agreements described above do in fact create specific duties that require the parties to inspect and to report on each other, and failure to do so could expose them to liability for one another's violations. Further, injured tort plaintiffs generally have every incentive to sue all the parties along the supply chain, and to link the parties' actions wherever possible, in an attempt to maximize their possibility of success and full recovery of damages. On the positive side, Richardson also reports that "[t]he safety record of reclamation projects is excellent. Based on this record, casualty underwriters consider the risk of third party claims to be low; irrigators have not reported difficulty in expanding their insurance coverage to include these risks."⁴⁷

⁴⁵ Carolyn S. Richardson, "Legal Aspects of Irrigation with Reclaimed Water in California," in IRRIGATION WITH RECLAIMED MUNICIPAL WATER: A GUIDANCE MANUAL (G. Stuart Pettygrove & Takashi Asano eds., 1984).

⁴⁶ *Id.* at 11-11.

⁴⁷ *Id.* at 11-26, n.32.

B. Product Liability and Warranty Theories

In addition to negligence, Richardson also notes a number of legal theories based on reclaimed water's status as a commercial product. Under *product liability* theory, manufacturers and distributors of a "defective" product may be held strictly liable for resulting damages, either to persons or their property. Richardson speculates that this theory could be applied to reclaimed water that injures human health or crops: "A manufacturing defect in treated wastewater might be found if it failed to meet the regulatory water-quality standards; a design defect might be found if water that met all applicable water-quality standards nonetheless caused damage."⁴⁸ She notes that application of this theory may depend on water reclamation being deemed by courts to be more like the manufacture of a good, rather than provision of a service.⁴⁹

Treating reclaimed water as a commercial good also could give rise to tort claims for *breach of warranty*. The existence of state reclaimed water standards, along with any other assurances of safety made in the course of marketing and distributing reclaimed water, could be interpreted by courts as an *express* warranty of quality, which could be enforced by anyone who is damaged by its breach.⁵⁰ There also may be *implied* warranties, such as the warranty of fitness for a particular purpose – for example, irrigation – that generally can be enforced only by parties to the relevant agreement. In Richardson's opinion, this implied warranty of fitness "would arise in every wastewater supply contract because of the necessarily detailed knowledge of the buyer's use and because of the active role in advising the buyer which is imposed by law upon the treatment facility."⁵¹

C. Contractual Limitation and Indemnification

As already seen above, the parties to an agreement may contract among themselves to assign responsibility in various ways. They may also attempt to limit their liability to each other or to third parties, and/or to indemnify one another from third-party claims. Such limitation and indemnification clauses likely would be interpreted under general rules of tort and contract law, and subject to any public-policy exceptions that have emerged from the legislature or the courts.

1. In Washington

The LOTT Wastewater Alliance provides a good example of *contractual limitation*. In its General Interlocal Agreement, the Alliance's partner jurisdictions have agreed that "[t]he Parties expressly do not intend to create any right, obligation or liability, or promise any performance, to any third party"; and that "the Parties have not created any right for any third party to enforce this General Agreement."⁵² While this language purports to be comprehensive as to the effect of the Agreement, it likely cannot wholly extinguish third-party claims arising from tort theories that are external to the agreement – such as a negligence claim based on regulatory violations.

⁴⁸ *Id.* at 11-11 to 11-12.

⁴⁹ *Id.* at 11-12.

⁵⁰ *Id.* at 11-12 to 11-13.

⁵¹ *Id.*

⁵² General Interlocal Agreement, *supra* note 13, Section 12.2.

Thus, the ultimate enforceability of such limitation clauses will depend not only on the details of Washington tort law, but also on the nature of the claims.

The LOTT Alliance agreement also includes an express *indemnification* clause:

To the maximum extent permitted by law, each Party shall protect, defend, indemnify and hold harmless each other Party and their officials and employees from and against all claims, demands, suits, actions, costs, damages, liability or loss of any kind whatsoever arising from the acts or omissions of the indemnifying Party and its officials, employees, agents and contractors.... In the case of joint negligence, any damages allowed shall be levied in proportion to the percentage of negligence attributed to each Party. This indemnification shall survive the termination of this General Agreement.

Under this language, each Alliance partner agrees to be responsible for the actions of its own personnel, and to indemnify the other partners from any claims arising from those actions. This indemnification appears to apply both laterally, among the four county and city governments who are distributing reclaimed water; and vertically, between any of the four governments and the Alliance itself, in its role as the reclaimed water producer.

Similarly, the LOTT end-user agreement specifies that:

To the extent permitted by law, the End User shall hold harmless, indemnify, and defend the City, whether acting as a separate municipal entity or as a member of the LOTT Alliance, from any claims, suits, actions, losses, penalties, judgments, awards for damages of any kind arising out of, or in connection with, the use of Class A Reclaimed Water provided under this Service Agreement, except to the extent arising out of the negligence or other fault of the City.⁵³

This provision attempts to ensure that end users will be responsible for claims arising from their own actions, and indemnify the water distribution utilities from these claims.

Here again, the degree to which such indemnification clauses will be enforceable depends both on Washington tort law and the factual circumstances of specific claims. In each agreement, the phrase “to the extent permitted by law” is key, acknowledging that the parties do not have the absolute ability to exempt themselves from every form of liability, especially third-party liability, that might arise.

2. In Other States

California. Richardson lists a number of specific ways in which liability can be limited contractually under California law, at least as between the parties to an agreement. As in current Washington and Oregon practice, she notes that the reclaimed water supply contract itself “can minimize the treatment facility’s exposure to negligence claims.... by clarifying the division of management responsibilities between the parties in the contract and by preserving evidence that

⁵³ [Model] Reclaimed Water Service Agreement, *supra* note 17, Section 6.

the user was fully instructed in all regulatory requirements.”⁵⁴ She lists possible common-law defenses, including “misuse” and “assumption of risk,” which might defeat an end-user’s claim as long as the proper uses and potential risks were clearly spelled out in the contract.⁵⁵ And she cautions that while express disclaimers of warranty may work in some cases, the very technical, regulatory nature of water reclamation means that “disclaimers in these contracts are particularly susceptible to judicial disapproval.”⁵⁶

Richardson’s analysis of California tort law confirms that such contractual devices are much less effective against third-party claims, leaving indemnification as the final option for reclaimed water providers who hope to avoid liability. Under California law, indemnification clauses not only are enforceable, “[t]hey may even provide for indemnification against damages resulting from negligent violations of law, such as failure to meet the regulatory water-quality standards, but such an agreement must be explicit, because any doubt will be resolved against the supplier.”⁵⁷ Even so, she also points out the inherent weakness of any indemnification clause, in any context – it can only be effective if the indemnifying party has sufficient resources to pay a final judgment. Clause or no clause, if “the water user is unable to pay, the water supplier will be responsible for the full amount of the claim.”⁵⁸

IV. Conclusion

As outlined above, reclaimed water facilities must operate under a body of regulatory, contract, and tort law that conceptually is quite similar to the law that governs water treatment and supply generally. Reclaimed water poses particular challenges and is subject to somewhat more restrictive regulations, and the potential for violation of these regulations or other mishaps could translate into an additional risk of legal liability. However, this situation need not be cause for alarm. As with any worthwhile enterprise – and as Washington practice already demonstrates – these risks can be anticipated, managed, and minimized with careful planning and legal advice.

If Washington practitioners conclude that more is needed on this front, there are at least two possible leverage points. First, the Departments of Ecology and Health can consider whether the pending reclaimed water rule should codify the existing structure for responsibility, or move it in a different direction – toward Colorado’s detailed regulation and plans, if greater control is desired; or toward Oregon’s proposed language of “reasonable steps,” if greater flexibility is the goal. Second, the Washington State Legislature could consider whether the baseline system of common-law liability remains adequate, or whether the statutes should be amended to further encourage and immunize reclaimed water operations – a step that should not be taken lightly, and not without considering the potential for unintended consequences for the general public and the tort system as a whole. Ultimately, the most certain guarantee against liability, and the one most under reclaimed water producers’ control, will be the quality of the water itself.

⁵⁴ Richardson, *supra* note 45, at 11-15.

⁵⁵ *Id.* at 11-16. Richardson points out, however, that “[a] prudent irrigator would probably object to an assumption clause completely exculpating the facility from any responsibility for not meeting the agreed non-statutory quality standards.” *Id.* at 11-31, n.64.

⁵⁶ *Id.* at 11-17.

⁵⁷ *Id.* at 11-18.

⁵⁸ *Id.* at 11-19.