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<http://www.epa.qld.gov.au/waterrecyclingagreement>

Recycled paper saves energy and resources.

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1. Introduction

1.1. Purpose of this manual

The Environmental Protection Agency (EPA) has developed this *Manual for recycled water agreements in Queensland* (the 'Manual') in response to requests for information and guidance on how to develop a contract for the supply and use of recycled water. The purpose of this document is to provide information and guidance on the various issues that need to be considered when stakeholders are considering entering into an agreement to supply and/or use recycled water as part of a recycled water scheme. This Manual is not a legal document. It seeks to assist suppliers and individual commercial customers of recycled water who are negotiating agreements for the supply and use of recycled water in Queensland. The success of a recycled water scheme may partly depend on how these negotiations are carried out. The Manual discusses key issues involved in planning and operating water recycling projects and provides a number of suggested options to address these issues in a recycled water agreement.

The *Queensland Water Recycling Strategy* (QWRS 2001) identified the need of suppliers and customers of recycled water for a model agreement to provide guidance for negotiating a contract. A *Model recycled water agreement* (see Appendix) has been prepared that identifies the common issues relating to water recycling that should be addressed through an agreement or contract for the supply and use of recycled water. The *Model recycled water agreement* provides a starting point from which stakeholders can edit and customise the document to suit the specific characteristics of their recycled water scheme or project. The *Model recycled water agreement* is designed for an individual commercial customer of recycled water (e.g. agricultural irrigation or irrigation of a golf course) and is particularly relevant where the source of the recycled water is from a sewage treatment plant (STP). This Manual provides explanatory information to support the *Model recycled water agreement*. It is recommended that legal advice be obtained before preparing and entering into an agreement, as this document does not purport to give legal advice.

This Manual adopts a 'partnership approach' to developing a *Model recycled water agreement*. It should be noted that these documents and the suggested partnership approach are advisory only and should not be construed as an EPA regulatory requirement for licensing or other purposes.

The EPA will develop a *Model terms of use for recycled water in a dual reticulation system*, to provide a standardised starting point for situations where individual agreements are not practical. Schemes comprising a large number of residential customers supplied with high quality recycled water for non-potable uses would be such an example. It will deal specifically with issues associated with

preparing a 'Terms of use' document and explain its role in the overall management of a dual reticulation scheme.

1.2. Background to water recycling in Queensland

In 2004, around 13 percent of wastewater from STPs in Queensland was recycled primarily for irrigation of golf courses, sugar cane or pasture. Approximately half of the 125 local governments in Queensland operate water recycling schemes, involving 40 percent of the sewerage systems. Most of these water recycling schemes have been possible due to the close proximity between the source of recycled water (mostly STPs) and customers of recycled water (for example golf course or agriculture). Currently, there is insufficient data to determine the volume and rate of water recycling from other sources such as industrial wastewater and stormwater.

In the short-term, the main growth sector for recycled water from an STP is likely to be agricultural uses. Industrial use of recycled water either as internal recycling of wastewater streams generated on-site, or water recycling in industrial sourced from an STP in industrial processes is also increasing. Examples of large industrial water recycling projects include the reverse osmosis treatment plant at Luggage Point Wastewater Treatment Plant in Brisbane, which supplies process water to the BP Oil Refinery, and use of recycled water from Gladstone City Council STPs as process water for aluminium smelting and power generation. Dual reticulation of recycled water for non-potable residential use is also projected to increase.

Most existing water recycling schemes in Queensland are based on beneficial use of part of the effluent stream, with a residual discharge to waterways. The Eli Creek-Pulgul scheme in Hervey Bay (sugar cane and other agricultural irrigation) and an industrial recycling scheme in Gladstone achieve close to full water recycling from the source STPs. Currently, the Western Corridor pipeline project in Brisbane is being investigated and is based on a 100 percent reuse model. It proposes to supply recycled water from STPs in western Brisbane and Ipswich to industrial customers.

1.3. Queensland Water Recycling Guidelines

Queensland Water Recycling Guidelines (EPA 2005)

The *Manual for recycled water agreements in Queensland* and the *Model recycled water agreement* should be read in conjunction with the *Queensland Water Recycling Guidelines*. The *Queensland Water Recycling Guidelines* provide guidance on water recycling that is appropriate to Queensland conditions. It includes a road map to additional resources that can support water recycling. For additional information and resources to support the development of a recycled water Agreement, refer to the reference list at the end of this document.

2. Agreements for the supply and use of recycled water

2.1. What is a recycled water agreement?

A recycled water agreement is a formal agreement that regulates the relationship between a supplier of recycled water and a customer (person or organisation) of recycled water. Other parties, such as an individual or company that owns part of the delivery infrastructure or land where the use of recycled water occurs, may also be signatories to the recycled water agreement. In Queensland, a recycled water agreement is sometimes referred to as a ‘third party agreement’, to indicate that it involves a party (or customer) who is not bound by the existing development approval for the activity that produces the recycled water. The recycled water agreement is the product of negotiations between the supplier of recycled water and the customers. It sets out the terms under which the project will operate. Under the recycled water agreement, the parties agree to a set of obligations and responsibilities under which the water recycling scheme will operate.

The recycled water agreement establishes:

- the rights and obligations of the parties and supports these with legal sanctions;
- who should perform certain tasks and when and who bears the costs;
- who bears the risks associated with supply and use of the product;
- who should insure or be indemnified against claims in relation to these risks; and
- the commercial terms under which recycled water is supplied.

2.2. Why have written agreements?

Recycled water agreements will potentially minimise disputes between signatories to the agreement and, together with appropriate management plans, assist in preventing and minimising risks associated with recycled water schemes. In addition, most customers will want to secure their rights to recycled water supply through a contract to establish some certainty of supply.

Under EPA licences (referred to as Development Approvals) for STPs and other wastewater facilities that are associated with water recycling schemes, written agreements are a requirement. In these cases, licence conditions require the plant operator to enter into a ‘third party agreement’ (recycled water agreement) with each person not subject to the licence to whom the operator supplies water for recycling. Typical licence conditions require that the recycled water agreement include details of how the customer of recycled water will meet their ‘general environmental duty’ under the *Environmental*

Protection Act 1994. Some licences specify issues to be addressed in agreements such as the requirement for customers to prepare an irrigation management plan or a recycled water management plan (refer to *Queensland Water Recycling Guidelines*) if the recycled water is to be used for irrigation purposes. The STP operator is required to keep a register of all recycled water schemes supplied by the STP and, if requested, to report on the status of the schemes to the EPA.

2.3. Terms of the agreement

The terms of an individual recycled water agreement will depend on the characteristics of the water recycling scheme to which it will relate, for example the scale of the recycled water scheme, the quality of the recycled water, the environmental and health risks, and the respective resources of the parties. Key issues that recycled water agreements should cover include:

- price, quantity and quality of recycled water;
- security of the recycled water supply;
- ownership and responsibilities for operating and maintaining infrastructure;
- measures to identify, allocate and manage risks and ensure safe use of recycled water;
- liabilities and insurance for potential damages caused by supply and use;
- monitoring and reporting arrangements;
- resolution of disputes; and
- duration of the agreement including options to renew.

2.4. A partnership approach

It is suggested that a partnership approach to developing water recycling agreements as part of water recycling schemes based on the following principles is pursued:

- sharing of risks, responsibilities and information by the parties;
- striking a balance between the interests of suppliers and customers;
- minimising ‘regulation’ of customers by suppliers and vice versa; and
- complying with legislative and common law requirements.

By working together suppliers and customers will achieve more equitable and practical legal arrangements for the water recycling scheme. It is likely to be mutually beneficial to:

- start negotiating the recycled water agreement early in the scheme development;

- take a joint approach to solving problems;
- share relevant information about each other's operations and activities;
- share risks and responsibilities; and
- have a good understanding of the range of issues that can arise in planning and operating a recycled water scheme.

By taking a partnership approach to recycled water agreements and scheme management, the supplier is likely to benefit from easier recruitment of customers, longer-term supply arrangements and greater certainty of wastewater management arrangements.

2.5. The process for water recycling projects

In addition to the recycled water agreement, there are several important processes involved in water recycling schemes that require detailed consideration to ensure the safe and sustainable use of recycled water and community acceptance of water recycling. It is possible to put too much emphasis on the legal agreement between the supplier and the customer. Although the recycled water agreement is a central element, it is only one of several important processes in a water recycling project that the supplier and customer need to engage in to ensure safe and sustainable use of recycled water and community acceptance. These processes are described in detail in the *Queensland Water Recycling Guidelines*.

2.5.1. Community engagement

Community education and consultation has been an important factor for councils and water authorities in gaining local support for large water recycling schemes in Australia. Concerns of the local community can be incorporated into the design and operating procedures for the water recycling scheme, including the preparation of management plans and environmental monitoring programs. For example, a landholder who could be affected by spray drift or runoff from irrigation of recycled water on an adjoining site could be consulted on the preventative measures and monitoring included in the customer's recycled water management plan.

Engagement of the community should be ongoing. During the operational phase, this may include providing reports on environmental monitoring and performance of the scheme, the results of audits of recycled water use, or other economic aspects of the scheme to the community on a regular basis.

2.5.2. Customer support

Interaction between the supplier and customer should not be limited to negotiations toward and undertakings in the recycled water agreement but should be an ongoing part of the partnership approach. Suppliers of recycled water could provide ongoing support to customers by:

- having a dedicated contact person or team of employees to provide ongoing technical support and to disseminate information about the scheme in newsletters or bulletins;
- providing an ongoing training program in the safe use of recycled water for employees at their customer's sites who are involved in handling or management of recycled water; and
- establishing a forum of recycled water customers where operational and management issues can be raised and addressed in an informal setting. This can be effective in larger schemes with multiple customers who share the recycled water supply.

Various types of customer committees have been set up for irrigation schemes in Queensland and other states. Some of these committees are limited to the supplier and representatives of scheme participants. Others are broader and include stakeholders such as environmental or technical experts and representatives of the local community. Roles that customer committees have played in water recycling schemes in Australia include:

- negotiating block recycled water prices for groups of customers;
- determining rules to share available recycled water between scheme participants;
- considering proposals for new customers to join the scheme;
- discussing and resolving ongoing operational issues;
- presenting scheme recycled water use and environmental data;
- disseminating information on best practice measures and risks in recycled water use;
- providing occupational health and safety training; and
- advising on the allocation of capital works expenditure when there are multiple funding sources.

3. Parties to the agreement

Usually the supplier and the customer of recycled water are the two parties who are signatories to a recycled water agreement. However, in certain situations, it may be necessary to include other parties to the recycled water agreement, such as a guarantor. The following paragraphs provide greater detail on the parties to the recycled water agreement.

3.1. Supplier of recycled water

Chapter 2 of the *Queensland Water Recycling Guidelines* provides information on the requirement to be registered and the obligations of service providers under the *Water Act 2000*.

Recycled water suppliers in Queensland include local councils, Aboriginal Councils, Island Councils and government owned corporations for example, Wide Bay Water, SEQ Water Corporation and Sunwater. Currently, local councils are the main group of recycled water suppliers in Queensland. Water boards, drainage boards and other 'water authorities' under the *Water Act 2000* and government owned institutions such as correctional and educational centres also operate STPs and could potentially become suppliers of recycled water in the future.

Other potential suppliers of recycled water include privately operated STPs (for example at tourist resorts or mining towns), agricultural or industrial enterprises that generate wastewater (for example, sugar mills and meat works) and a body corporate for a community titles scheme. In this instance, the body corporate would own and operate a wastewater treatment facility and provide recycled water to the owners or occupiers of residential and commercial lots within the water recycling scheme. Currently, there are only a few community titles water recycling schemes in Queensland. Sunrise at 1770 Community Titles Scheme 32536 is one example.

Community titles schemes are being considered for a number of coastal residential developments. In situations like these, the 'terms of use' of the recycled water may be included in the Community Management Statement for the scheme. The powers of a body corporate do not extend to entering into agreements for the supply of recycled water with customers outside the community titles scheme.

The entity that owns and/or operates the wastewater facility and/or delivery infrastructure should enter into the agreement as the supplier. This is consistent with the regulatory obligations of service providers under the *Water Act 2000*, which apply to the infrastructure owner, rather than the operator (see Chapter 2 of the *Queensland Water Recycling Guidelines*).

Care should be taken to identify and enter into a recycled water agreement with the correct legal entity. For example, the relationship between a parent and subsidiary company (a separate legal entity) may not always be clear as to which one actually owns and operates the infrastructure and which one holds the planning and/or environmental approvals (for example, Development Approval) to treat and produce the recycled water.

3.2. Recycled water customer

The customer may be the owner of the land where the recycled water is to be used or a person entitled to occupy the land such as a lessee. Customers can be individuals, companies or unincorporated associations (such as a sporting or community group).

Care should be taken when entering a recycled water agreement, to ensure that the correct customer name is specified on the agreement. It may need to be considered whether the customer (operator of the business) is an individual, company, family trust (for example, a family farm) or unincorporated association.

In Queensland, recycled water is commonly used at council owned sites or facilities separate to the treatment plant, for example to irrigate municipal parks and gardens. In this situation, the supplier and customer are separate business units within the same council but are still part of the same legal entity and hence cannot enter into a legally binding contract with each other. However, the council may wish the two business units to have an agreement governing the supply and use of recycled water that reflects the provisions and issues covered in the *Model recycled water agreement* and this Manual. In this case, an appropriate agreement may be an internal document such as a service level agreement or memorandum of understanding. These forms of agreement are essentially statements of intent that have administrative, rather than legal force. This approach is only likely to be good practice if the administration of the business units is fairly separate or if the business units are going to become separate entities.

3.2.1. Identifying the customer's site

It is important legally to accurately identify the site where the recycled water is to be used. For example, the use of recycled water for irrigation may only apply to a small portion of a land holding, or a customer may lease a small plot from another landowner to undertake the recycling.

A title search of the land making up the customer's business or farm holding should be undertaken to confirm ownership, easements and other potential impacts on the

land. The title details should be recorded in the recycled water agreement. A site plan that shows the relevant parts of the land where recycled water is to be used, including storage areas, delivery infrastructure for recycled water and potential areas for expansion, should be attached to the agreement (annexure A of the *Model recycled water agreement*). Generally the 'site' identified in the recycled water agreement will be the subject of the customer's recycled water use management plan (see section 11).

3.3. Guarantors

A supplier of recycled water may demand security for the performance of the customer's obligations under the recycled water agreement. For example, if the customer is a company, the supplier may require the company directors to personally guarantee the performance of the agreement by the company, or may require an affiliated company with greater financial resources to provide this guarantee. Alternatively, a supplier could require another form of security such as a bank guarantee or cash deposit. The need for a guarantor or financial security can be more pressing in schemes where the supplier has made a significant investment in infrastructure to provide recycled water to the customer and could suffer significant loss if the customer suddenly withdraws from the scheme.

The *Model recycled water agreement* (clause 21 (Guarantee)) provides that the guarantor guarantees the payment of monies owed by the customer, including any legal and enforcement fees incurred by the supplier in attempting to recover these monies.

3.4. Landowner

In some cases, the customer may not own the land where the recycled water is to be used. Instead, they may occupy the land under a lease, licence or other right to occupy. In this case, the supplier and customer should, at the very least, ensure that the landowner is made aware of the proposal to use recycled water and confirm the consent of the landowner to the terms of the agreement (see clause 23 (Owner's Consent) in the *Model recycled water agreement*). Clause 23 includes an acknowledgement by the landowner that there are potential risks involved in the use of recycled water at the site. The nature of these risks will vary with each recycling situation, so none are specified in the *Model recycled water agreement*. Risks that may be of concern to an owner include salinisation of the soil or an increase in nutrient levels in ground and surface waters that may result from long-term irrigation with recycled water. Damage to assets associated with the land is another potential risk.

A provision to the recycled water agreement could also be included in which the landowner acknowledges that they are satisfied, on the basis of the information provided to them and their own investigations, that the risks involved in using the recycled water are reasonable. In some cases, the landowner may agree to release (that is, indemnify) the supplier from any claims for damages or losses arising from the use of recycled water at the site. Indemnity clauses are discussed further in section 12. Alternatively, the landowner could give written consent in a separate document or may have consented under the lease terms or other terms of the customer's occupation of the land.

The best approach is for the supplier and customer to involve the landowner from an early stage in planning and implementing the scheme and in particular ensure that the landowner is aware of, and involved in, any risk assessment or management initiatives such as development of the recycled water management plan.

Clause 24.1 (No right in land or allocation) of the *Model recycled water agreement* also makes it clear that the right to a supply of recycled water is personal to the customer and not to the landowner, if they are separate parties.

3.5. The supplier as landowner

There may be occasions where the supplier of recycled water not only supplies recycled water to a customer but also leases land where the recycled water is to be used by the customer. For example, a council may lease fields to a sporting club and supply recycled water to that club for irrigation purposes. Councils looking to secure options for wastewater disposal may lease land adjoining the STP to a farm or other enterprise that uses the recycled water from the STP.

In situations such as these, the lease may include terms regarding the supply and use of recycled water on the site. Alternatively, the agreement to supply recycled water may be separate to the lease document. If there are separate documents, it may be prudent to include mutual default provisions under which a breach of the recycled water agreement is a breach of the lease and vice versa.

3.6. Correctly identifying the parties

Suppliers and customers should ensure that the correct entities enter into the recycled water agreement and that the parties correctly execute the agreement. If relevant, additional parties such as the landowner and guarantors should be identified and sign the agreement.

It is important to get this right because different legislation governs how different entities can conduct business activities, including entering into contracts.

The business dealings of local governments are governed by the *Local Government Act 1993*, while those of water service providers are guided by the *Water Act 2000*. For example, provisions of the *Local Government Act 1993* dealing with the disposal of goods may require councils to sell recycled water through an auction or tender process, so that councils initiating a water recycling scheme have to advertise for tenders in a transparent fashion before entering into a contract with a customer to supply them with recycled water from an STP.

Private individuals are not governed by specific legislation but are required to comply with laws relating to the environment, planning, the use of water and fair trading. Corporations are subject to the *Corporations Act 2001* (Cwlth) and the *Trade Practices Act 1974* (Cwlth) in their dealings with other parties (see section 9.1).

Where relevant, ACN and ABN numbers should be included within the recycled water agreement.



4. Non-exclusivity

Most agreements provide that the customer's right to receive recycled water is not exclusive. That is, subject to being able to meet their obligations to existing contracted customers, suppliers are free to enter into recycled water agreements with other customers (Clause 24.2 (No exclusivity) of the *Model agreement*). Suppliers should ensure they are able to meet their obligations to existing customers before entering into agreements with new customers.

However, alternative arrangements may include an agreement that:

- one customer is to take the entire output from a recycled water facility; and

- the supplier may only supply to new customers after consulting with existing customers or other relevant scheme stakeholders, to ensure that the entitlements of existing customers will not be adversely affected by the entry of the new customer or this will not have a detrimental environmental or financial impact. Various consultative and advisory committees that include existing customers have been established for agricultural irrigation schemes in Australia where the reliability of supply and/or standards of service (such as instantaneous flow rates) are important concerns.

