

S243247

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

City of Oroville, *Petitioner*

JAN 25 2018

v.

Jorge Navarrete Clerk

Superior Court of Butte County, Respondent

Deputy

California Joint Powers Risk Management Authority et al., *Real Parties in Interest*

After an Unpublished Decision of the Court of Appeal
Third District Court of Appeal Case No. C077181
Arising from Butte County Superior Court Case No. 152036
The Honorable Sandra L. McLean, Judge

**APPLICATION OF CALIFORNIA ASSOCIATION OF SANITATION
AGENCIES FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF
AND
PROPOSED AMICI CURIAE BRIEF BY CALIFORNIA ASSOCIATION OF
SANITATION AGENCIES IN SUPPORT OF PETITIONER CITY OF
OROVILLE AND REAL PARTY IN INTEREST CALIFORNIA JOINT POWERS
RISK MANAGEMENT AUTHORITY**

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**APPLICATION FOR PERMISSION TO FILE
AMICUS CURIAE BRIEF**

Pursuant to Rule 8.520(f) of the California Rules of Court, California Association of Sanitation Agencies (“CASA”) respectfully applies for permission from the Chief Justice to file the Amicus Curiae Brief, contained herein, in support of Petitioner City of Oroville and Real Party In Interest California Joint Powers Risk Management Authority.

CASA is a nonprofit mutual benefit corporation organized and existing under the laws of the State of California. CASA is comprised of more than 100 local public agencies throughout the state, including cities, sanitation districts, sanitary districts, community services districts, sewer districts, county water districts, joint powers authorities, California water districts, and municipal utility districts. CASA’s member agencies provide wastewater collection, treatment, water recycling, renewable energy and biosolids management services to millions of California residents, businesses, industries and institutions.

CASA’s interest in this case arises from the fact that a majority of CASA members operate sewer collection systems similar to the system that is the subject of this appeal. This case presents a number of important questions regarding the application of the takings clause (Cal. Const., art. I, § 19) to sewer system overflows. CASA and its membership have a strong interest in ensuring that the clause is interpreted in a manner that imposes liability on its members and their ratepayers only where it is just and reasonable. This proposed amicus brief explains the existing federal and state regulatory framework that governs sewer system operations and the importance of privately installed and maintained backflow valves in the proper operation of such systems. In light of those existing protections and the availability of other remedies, it urges rejection of the inverse

condemnation standard applied by the Court of Appeal in this case and by other lower courts.

Amicus's counsel have examined the briefs on file in this case, are familiar with the issues involved and the scope of their presentation, and do not seek to duplicate that briefing. Proposed *Amici* confirm, pursuant to California Rule of Court, rule 8.520(f)(4), that no party or counsel for a party in the pending appeal authored the proposed *amicus* brief in whole or in part and that no one, other than proposed amicus, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this proposed *amicus* brief.

For these reasons, CASA respectfully requests that the Chief Justice grant permission to file its proposed Amicus Curiae Brief.

DATED: January 18, 2018 MEYERS, NAVE, RIBACK, SILVER &
WILSON

By: 

John Bakker
Attorneys for California Association of
Sanitation Agencies

AMICUS CURIAE BRIEF

I. INTRODUCTION

Amicus Curiae California Association of Sanitation Agencies (“CASA”) supports the arguments advanced by Petitioner City of Oroville and Real Party in Interest California Joint Powers Risk Management Authority. Amicus urges this Court to hold that, in the sewer backup context, inverse condemnation liability is only available where property damage is caused by the public entity’s deliberate design, construction, or plan of maintenance, rejecting the standard announced in *California State Auto Association Inter-Insurance Bureau v. City of Palo Alto* (2006) 138 Cal.App.4th 474 (“CSAA”) and followed in this case, which amounts to strict liability for sewer blockages in a public sewer.

II. SUMMARY OF ARGUMENT

In this case, the Court of Appeal found the City of Oroville liable for damage to private property from a sewer system overflow resulting from a blockage in the city’s sewer main, despite the fact that the private property owner failed to install a device – one it was legally required to install – that would have prevented the damage. The court felt constrained by the holding in *CSAA* finding inverse condemnation liability for a sewer overflow “unless other forces alone produced the injury.” (*Id.* at p. 509.) The Court should reject any such indications in *CSAA* and the result in this case.

State and federal law impose substantial liability and responsibility on the operators of sewer systems. The penalties include civil penalties of up to \$52,414 per day and administrative penalties of up to \$226,338 for overflows from sewage collection systems. Public agencies also face the prospect of private enforcement by citizen groups.

In order to prevent such overflows to the extent feasible, state regulators have imposed mandatory, detailed operation, maintenance, and

repair requirements on sewer system operators. The regulatory scheme requires operators to develop and implement management practices that reduce the number and frequency of such overflows. The regulatory scheme explicitly and implicitly acknowledges that it is not possible for system operators to prevent all backups, focusing as it does on feasible management practices rather than mandatorily punishing violations.

The takings clause should not be interpreted, as *CSAA* did, to add another layer of strict liability on sewer system operators and their ratepayers. *CSAA*, as interpreted by the Court of Appeal, allows private property owners to avoid their responsibility to install a backflow valve that would limit the harm to their property and human health, and potentially avoid an overflow entirely. The prophylactics central to the federal and state regulatory schemes create more-than-adequate motivation for sewer system operators to eliminate overflows to the extent feasible. Dangerous condition of public property, nuisance, and more narrow inverse condemnation liability are sufficient to protect property owners that are nonetheless harmed by sewer system overflows where overflow protection devices are not required or do not protect the property adequately.

III. ARGUMENT

A. Sewer System Overflows are Strictly Regulated Under Federal and State Law.

Section 301(a) of the Clean Water Act prohibits the “discharge of any pollutant by any person” except in compliance with a National Pollutant Discharge Elimination System permit. (33 U.S.C. § 1311, subd. (a).) The term “discharge of a pollutant” is defined as the “addition of any pollutant to navigable waters from any point source.” (33 U.S.C. § 1362, subd. (12).)

A person who violates Section 301 is subject to various civil and criminal penalties and other enforcement tools available to regulators.

These include:

- Civil penalties of \$52,414 per day for each violation.¹ (33 U.S.C. § 1319, subd. (d); 40 C.F.R. § 19.4 [adjusting penalties for inflation]);
- Criminal penalties of up to a \$25,000 fine and 1 year in prison for negligent violations (33 U.S.C. § 1319, subd. (c)(1)) and of up to \$50,000 fine and 3 years in prison for knowing violations. (33 U.S.C. § 1319, subd. (c)(2).)
- Administrative penalties of up to \$226,338. (33 U.S.C. § 1319, subd. (g); 40 C.F.R. § 19.4 [adjusting penalties for inflation].)

Enforcement actions that involve sewer system overflows treated as unpermitted discharges are common.²

Section 301 is also enforceable by private attorneys general through so-called “citizens’ suits.” Section 505 of the Clean Water Act authorizes any person having an interest that may be adversely affected to commence a civil action against any person alleged to have violated Section 301. (33 U.S.C. § 1365, subs. (a)(1), (f).) In such cases, the court may apply civil penalties in accordance with 33 U.S.C. § 1319. (*Id.*, § 1365, subd. (a).) The court can award attorneys’ fees and costs to the prevailing party. (*Id.*, § 1365, subd. (d).) Citizens’ suits are common in California, and they often

¹ “In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.” (33 U.S.C. § 1319, subd. (d).)

² See for example the Environmental Protection Agency’s list of Civil Cases and Settlements found at: <https://cfpub.epa.gov/enforcement/cases/>.

focus on sewer system overflows.³ Reports of all overflows are available on state regulator websites (see p. 15, fn. 7 and accompanying text, *infra*), which minimizes the effort required for potential plaintiffs to identify targets.

Similarly, illegal dischargers are subject to various criminal and civil penalties for discharges to the waters of the United States under state law as well. Water Code section 13385 authorizes:

- Civil penalties of \$25,000 per day for each violation plus \$25 per gallon “not cleaned up” that exceeds 1000 gallons. (Water Code, § 13385, subd. (b)(1).)
- Criminal penalties of up to a \$25,000 fine per day and 1 year in county jail for negligent violations (*Id.* § 13387, subd. (b)) and of up to \$50,000 fine per day and 3 years in prison for knowing violations. (*Id.*, § 13387, subd. (c).)
- Administrative penalties, imposed by the State Water Resources Control Board or the Regional Water Quality Control Board, of up to \$10,000 per day plus \$10 per gallon “not cleaned up” that exceeds 1000 gallons. (*Id.*, § 13385, subd. (c).)

In 2006, the State Water Resources Control Board determined that sewer system overflows (“SSOs”) were a significant problem in the state and adopted specific statewide regulations to address them. The State Board’s Sanitary Sewer Systems Waste Discharge Requirements are designed to ensure that sewer system operators properly design, maintain, and operate their systems. (State Water Resources Control Board, Order No. 2006-0003-DWQ, Statewide General Waste Discharge Requirements

³ For example, California River Watch, a citizens group that enforces the Clean Water Act among other environmental statutes, lists examples of the cases it has pursued on its website, and many examples include sewer system overflows:
<http://www.ncriverwatch.org/legal/resolved/index.php>.

for Sanitary Sewer Systems [“the Sanitary Sewer Systems WDR”], p. 1.⁴) It requires each sewer system operator in the state that operates a system of greater than one mile to have an “operation, maintenance and management plan” designed to “reduce the number and frequency of” sewer system overflows. (*Ibid.*)

The Sanitary Sewer Systems WDR defines SSOs to include overflows whether or not they reach waters of the United States and backups onto private property “caused by blockages of flow conditions within the publicly owned portion of a sanitary sewer system.” (*Id.*, p. 5.) It requires system operators to “take all feasible steps to eliminate SSOs” and “contain and eliminate them” (*ibid.*), “allocate adequate resources for the operation, maintenance, and repair” of the system (*id.*, p. 9), “provide adequate capacity to convey base flows and peak flows” (*ibid.*), and adopt a “sewer system management plan” (“SSMP”) following a public hearing. (*Ibid.*) The Sanitary Sewer Systems WDR also prohibits SSOs that result in discharges to the waters of the United States and those that create a nuisance (*id.*, p. 7), consistent with Section 301(a) of the Clean Water Act and Water Code section 13263.

An SSMP must provide a plan and schedule to properly manage, operate, and maintain all parts of a sanitary sewer system. (*Id.*, p. 10.) A system operator’s SSMP must (a) demonstrate the system operator’s “legal authority,” such as a statute, ordinance, or administrative regulation, to (i) prevent illicit discharges, (ii) “[r]equire that sewers and connections be properly designed and constructed,” (iii) “[l]imit the discharge of fats, oils, and grease and other debris that may cause blockages,” and (iv) enforce

⁴ The Sanitary Sewer Systems WDR is available from the State Board’s website at:
https://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2006/wqo/wqo2006_0003.pdf.

violations (*id.*, pp. 10–11); (b) describe the system operator’s preventative maintenance program (*id.*, p. 11); (c) “[d]evelop a rehabilitation and replacement plan to identify and prioritize system deficiencies and implement short-term and long-term rehabilitation actions to address each deficiency” (*id.*, p. 11); (d) “[p]rovide training on a regular basis . . . in sewer system operations and maintenance” (*ibid.*); (e) include design and construction standards for new facilities and rehabilitation and repair (*id.*, p. 12); (f) include a detailed “overflow emergency response plan” (*ibid.*); (g) “prepare and implement” a fats, oils, and grease “source control program to reduce the amount of these substances discharged to the sanitary sewer system” (*id.*, p. 13); (h) “prepare and implement a capital improvement plan . . . that will provide hydraulic capacity of key sanitary sewer elements for dry weather peak flow conditions” and appropriate design for storm events⁵ (*ibid.*); (i) comply with various reporting requirements in the event of an overflow (*id.*, p. 18); (j) “[m]onitor the implementation and measure the effectiveness of each element” of the plan (*id.*, p. 14); (k) “conduct periodic audits . . . evaluating the effectiveness of the” plan and the system operator’s “compliance with the” requirements of the Sanitary Sewer Systems WDR (*id.*, pp. 14–15); and (l) “communicate on a regular basis with the public on the development, implementation, and performance” of its plan. (*Id.*, p. 15.)

If an agency fails to comply with the Sanitary Sewer Systems WDR, it is subject to penalties. (*Id.*, p. 19.) A person who violates a waste discharge requirement is subject to the same penalties as is a discharger. (Water Code, §§ 13385, subd. (a)(2), 13387, subd. (a)(2).)

⁵ Inflow and infiltration of stormwater and groundwater into the sewer system increases during storms, and it needs to be accounted for in designing sewage collection systems.

B. Sewer System Operators Cannot Completely Eliminate Overflows—a Situation Acknowledged by Regulators.

Sewer system overflows occur for a number of reasons, many of which are difficult to control. In the Sanitary Sewer Systems WDR, the State Water Resources Control Board noted several major causes of SSOs:

Grease blockages, root blockages, sewer line flood damage, manhole structure failures, vandalism, pump station mechanical failures, power outages, excessive storm or ground water inflow/infiltration, debris blockages, sanitary sewer system age and construction material failures, lack of proper operation and maintenance, insufficient capacity and contractor- caused damages.

(Sanitary Sewer Systems WDR, p. 1.)

Blockage-related SSOs are particularly difficult to prevent. Anyone can pour grease down the drain, or flush rags down the toilet, or dump debris down a manhole. All of these circumstances, which are beyond the direct control of the system operator, can result in blockages that result in sewer overflows. The diligent operational practices of CASA's members—aimed at discovering potential blockages and taking steps to eliminate them—can minimize but not prevent such overflows.

In adopting the Sanitary Sewer Systems WDR, the State Water Resources Control Board acknowledged that it is impossible to eliminate overflows. The WDR notes “many factors . . . affect the likelihood” of SSOs, many of which are outside of an operator's control. (*Ibid.*) Therefore, the State Board chose a “[p]roactive approach that requires” operators implement plans to “*reduce* the number and frequency” of SSOs. (*Ibid.*, emphasis added.) The Board noted that “*many* overflows are preventable” (*ibid.*, emphasis added), implicitly acknowledging that many are not. Similarly, the fundamental requirement is that an operator must take “all *feasible* steps to eliminate SSOs.” (*Id.*, p. 7, emphasis added.) The WDR also directs those considering enforcement related to an SSO to

consider whether “the discharge was exceptional, unintentional, temporary, or caused by factors *beyond the reasonable control*” of the system operator. (*Id.*, p. 8, emphasis added.)

C. The Requirement to Install Backflow Valves is a Critical Part of Protecting the Public Health.

State law requires those constructing new structures to install backflow valves that would prevent wastewater from entering their property and structures in the event of a blockage. (See Health & Saf. Code, § 18938, subd. (b); Cal.Code.Reg., tit. 24, part 5, § 710.1.⁶) Since at least 1982, the Uniform Plumbing Code required the installation of a backwater valve where “fixtures have flood level rims located below the elevation of the next upstream manhole cover” serving the property. (See Oroville Opening Brief, pp. 11-12.)

Backflow valves are a critical part of the sewer system operator’s system to protect the public health, since blockages can and do occur in sewer systems (see Part III.B *supra*). Backflow devices cannot necessarily reduce all sewage backups into structures and property, but they are no less an integral part of a sewer system than circuit breakers and gas shutoff valves are to electrical and natural gas utility systems. The presence of a backflow valve can avoid situations in which an overflow would discharge into a private building because the sanitary fixtures in the building are at lower elevation than adequate upstream system capacity upstream to contain the wastewater or other potential system outlets. A properly installed and maintained backflow valve can prevent many of the most unsavory type of sewer backups, those into a private building, and do so without placing an unreasonable burden on private property owners. The

⁶ The 2016 California Plumbing Code is available from the California Building Standards Commission website:
<http://www.bsc.ca.gov/codes.aspx>

requirement to install a backflow valve, as required by the Uniform Plumbing Code and numerous local ordinances statewide, is therefore critical element of sewer collection systems in order to minimize the risks to human health that the Sanitary Sewer Systems WDR addresses.

D. CSAA’s Strict Liability Inverse Condemnation Standard Should Be Rejected, Particularly Given the Thorough Legal and Regulatory Framework That Governs Sewer Systems.

CASA agrees with the perspective offered in the opening briefs of the City of Oroville and the California Joint Powers Risk Management Authority (“CJPRMA”) that *California State Auto Association Inter-Insurance Bureau v. City of Palo Alto* (2006) 138 Cal.App.4th 474 (“CSAA”), by which the Court of Appeal felt constrained, should be rejected. (See Oroville Opening Brief, Part V.A, pp. 19–34; CJPRMA Opening Brief, Part VIII, p. 28–35.) CSAA’s effective elimination of the “deliberateness” requirement creates inverse condemnation liability in situations, like this case, where the damage was actually caused by others.

The inappropriateness of the CSAA standard is obvious when viewed in light of legal and regulatory framework governing sewer systems discussed in Part III.A *supra*. Even without strict liability for overflows, sewer system operators have significant environmental, legal, regulatory, and financial incentives to minimize overflows and to properly maintain their systems, which imposes substantial burdens on their ratepayers. The prospect of an overflow leading to an action by the State Water Resources Control Board or the Environmental Protection Agency seeking civil or administrative penalties is a real one. Similarly, even small discharges, which are reported in the State Board’s public SSO database,⁷ can lead to

⁷ See https://www.waterboards.ca.gov/water_issues/programs/ssso/#online.

citizen suits. Responding to any such actions would be costly and often result in the system operator paying both sides' attorneys' fees. (See, e.g., 33 U.S.C. § 1365, subd. (d).) Sewage overflows also reflect poorly on an operator's public reputation, which is the protection of public health and the environment. Suffice it to say, CASA member agencies are vigilant in maintaining best management practices to avoid overflows, but overflows nonetheless occur despite this vigilance as a result of circumstances beyond operators' reasonable control.

Many of the legal and regulatory incentives, of course, are aimed at preventing overflows that reach surface waters. Nonetheless, the Sanitary Sewer System WDR requires sewer system operators to "take all feasible steps to eliminate" "backups into buildings and onto private property that are caused by blockages or flow conditions within the publicly owned portion of a sanitary sewer system." (Sanitary Sewer Systems WDR, D.3, *id.*, p. 7, A.1.(iii) [defining SSO].) The operational and maintenance practices required by the WDR tend to minimize all SSOs, but backflow valves remain a necessary element of the sewer system for minimizing the potential impact on individual members of the public from the occasional backups that occur despite system operators best efforts.

If *CSAA* is taken at face value, as it was in this case, private property owners will be allowed to inappropriately shift liability to the public, in the form of sewer ratepayers. Responsibility for compliance with the requirement to install a backflow valve is often—as it was in this case—left to the property owner, which is particularly appropriate when the city or county responsible for building regulation is not the sewer system operator. It is appropriate for government to shift the burden to prevent or at least mitigate damage in such circumstances to the property owner, particularly given the relatively small cost of installing and maintaining a backflow

valve. Section 19 of Article I of the California Constitution should not be interpreted to defeat that sensible approach.

Finally, the rejection of *CSAA* will not leave those impacted by overflows without a remedy. As is detailed in the Part VI of the CJPRMA Opening Brief (pp. 17–18), property owners harmed by a sewer overflow have available remedies for dangerous condition of public property and nuisance. A property owner who could show that the overflow was caused by the sewer system “as deliberately designed and constructed” would be entitled to takings damages, including by demonstrating that the operator deliberately adopted plan of maintenance that led to the overflow. (See *Bauer v. County of Ventura* (1955) 45 Cal.2d 276, 284–285; *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596 [inverse liability arising from City’s water system maintenance practices].)

IV. CONCLUSION

Sewer system operators are already subject to significant liability for the failure and have every incentive to avoid preventable sewer system overflows. Federal and state law both harshly penalize the discharge of wastewater to surface waters, and state regulations require agencies to have detailed operations and maintenance plans designed to minimize sewer system overflows.

Nonetheless, overflows can still occur because many are caused by circumstances beyond the reasonable control of even the highest performing system operators. Accordingly, state law requires new construction to install backflow valves to prevent sewage overflows into structures that are below the elevation of the next upstream manhole cover.

The strict liability standard imposed by *CSAA*, and followed in this case, should be rejected. A sewer system operator should not be faced with inverse-condemnation claims in circumstances where the damages were not proximately caused by the system operator’s deliberate design,

construction, or plan of maintenance. The prospect of attorneys' fees made available in inverse condemnation cases makes these cases expensive to litigate, and that incentive is not necessary in light of the substantial legal and regulatory framework that already governs sewer system operations.

DATED: January 18, 2018 MEYERS, NAVE, RIBACK, SILVER & WILSON

By:



John Bakker
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CERTIFICATE OF WORD COUNT

I hereby certify that, as counted by my MS Word word-processing system, this brief contains 3,195 words exclusive of the tables, signature block and this certification.

Executed this 18th day of January, 2018 at Oakland, California.

A handwritten signature in black ink, appearing to read 'John D. Bakker', written over a horizontal line.

John D. Bakker

2912076.2

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

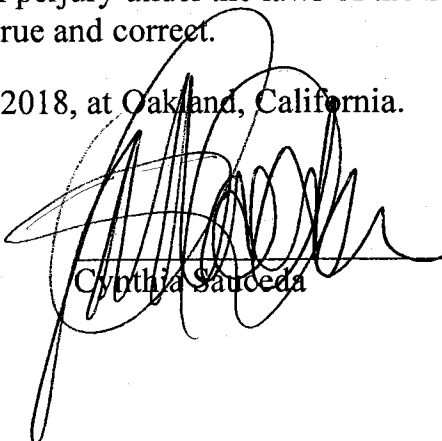
On January 18, 2018, I served true copies of the following document(s) described as **APPLICATION OF CALIFORNIA ASSOCIATION OF SANITATION AGENCIES FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF AND PROPOSED AMICI CURIAE BRIEF BY CALIFORNIA ASSOCIATION OF SANITATION AGENCIES IN SUPPORT OF PETITIONER CITY OF OROVILLE AND REAL PARTY IN INTEREST CALIFORNIA JOINT POWERS RISK MANAGEMENT AUTHORITY** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 18, 2018, at Oakland, California.



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