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DISTRICT LIABILITY FOR A SEWAGE SPILL FROM A PRIVATE LATERAL

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This paper addresses whether a sanitary district or a city will be held liable for a sewage spill occurring from a private lateral. This paper will first provide an overview of the operation and organization of a sanitary system before addressing theories of liability.

OPERATION AND ORGANIZATION

A sanitary district ("district") is organized under the Sanitary District Act of 1923.[1] A district is charged with wastewater collection and disposal. A district may consist of a publically owned treatment works (POTW) and collection system or it may be a satellite collection system. Cities are also authorized to own and operate sewer systems.[2]

Districts and cities are authorized to locate their sanitary sewer collection systems under the public streets.[3] Usually, neither a city nor a district will own the land underlying the street. Instead, the owner of the adjoining property owns the land under the street to the center of the right-of-way.[4] A district also does not own the public street right-of-way, though a district will sometimes obtain formal easements to locate infrastructure. Instead the county or city owns the right-of-way easement. Likewise, a district does not own the storm drain. Storm drains are owned and operated by a city or county.

District or city collection systems typically end upstream at the sewer main. Laterals that connect individual property to the sewer main are constructed and owned by the adjoining property owner. Lateral maintenance is generally the responsibility of the property owner; however, some districts or cities may offer lateral assistance programs which provide grants to private property owners to use toward cleaning their laterals.[5]

THEORIES OF LIABILITY

The Clean Water Act and National Pollutant Discharge Elimination System

The Clean Water Act "CWA" prohibits the discharge of a pollutant from a point source[6] into navigable waters of the United States without obtaining and complying with an NPDES permit.[7] The CWA requires the EPA to establish NPDES requirements for storm drain discharges.[8] The EPA delegated its permitting authority to California.[9] California gave

[1] (Health & Safety Code §§ 6400 et seq.)
[2] (See Gov. Code §§ 38900, 38901.)
[3] (Health & Safety Code § 6518 (districts).)
[4] (Civil Code § 831.)
[5] (See e.g. CMSDOC 7.03.040.)
[6] A point source is defined as "a discernable, confined and discrete conveyance." (33 U.S.C. §1362(14).)
[7] (33 USC 1342.)
[8] (33 USC 1342(p).)
[9] (33 USC 1342(b); Cal. Water Code § 13370.)

permitting authority to the State Water Resources Control Board.[10] Both state and regional water quality control boards are authorized to prohibit the discharge of waste from sewer collection systems.[11]

A sanitary sewer overflow ("SSO") is a discharge of a pollutant within the meaning of the CWA.[12] An SSO that reaches the storm drains, which discharge to navigable waters, violates the CWA unless done pursuant to an NPDES permit.[13]

The EPA may enforce such violations by bringing a civil action or issuing a compliance order. For a violation of a compliance order, the EPA may bring a civil or, in some situations criminal, action.[14] Criminal penalties are available for negligent violations, knowing violations, knowing endangerment to others, and for making false statements.[15] Criminal penalties, however, typically involve egregious conduct such as attempting to cover up violations, intentionally violating the law, altering data, or ignoring notices or warnings of CWA violations and are beyond the scope of this memo.

If a discharge complies with an NPDES permit, it does not violate the CWA. Further, it may also be a defense to an alleged violation of the CWA if the spill was sudden and unexpected. A sudden unexpected spill may escape liability if: the cause is identified, the facility was being properly operated, the spill was correctly reported, and the discharger took proper remedial measures.[16]

In the case of a spill occurring from a private lateral which is not caused by a blockage of the public sewer main or infrastructure, there is no public agency liability because the point source and causation involve the private lateral.

The California Health and Safety Code

Pursuant to the California Health and Safety Code, "[n]o person [including cities and sanitary districts[17]] shall discharge sewage or other waste, or the effluent of treated sewage or

[10] (Water Code § 13160.)
[11] (Water Code § 13280.)
[12] (*Northwest Environmental Advocates v. City of Portland*, 11 F.3d 900 (9th Cir. 1995).)
[13] The SWRCB took the position that an SSO violates the CWA in its recent WDR stating: 1) the CWA prohibits discharge to waters of the United States unless the SSO occurs pursuant to an NPDES permit; (2) any point source discharge of sewage effluent to waters of the United States must comply with secondary treatment standards; (3) "the unpermitted discharge of wastewater from a sanitary sewer system to waters of the [US] is illegal under the [CWA]." (SWRCB Order 2006-003.)
[14] (33 U.S.C. § 1319(b),(c).)
[15] (33 U.S.C. § 1319(c).)
[16] (40 CFR 122.41.)
[17] (Health & Safety Code § 5410(b)).

other waste, in any manner which will result in contamination, pollution or a nuisance."[18] Violation of this section is a misdemeanor.[19] Without regard to intent or negligence, any person who discharges sewage to waters of the state must report the discharge, except when authorized by law or a WDR. Failure to report is a misdemeanor. [20]The discharging party must also reimburse the government for the cost of abatement.[21]

The Health and Safety Code prohibits any party from discharging sewage. However, in the case of a private lateral spill that was not caused by the city or district, no liability would attach. If the backup occurs as a result of district lateral cleaning, the district or city would be liable for the discharge. However, if a backup of the public sewer main was caused by private lateral cleaning efforts, the public agency would not be liable for the spill unless the agency discovered the spill and took no effort to correct it. The public agency would be required to report the spill regardless of the cause.

Statewide General WDR for Wastewater Collection Agencies
State Water Resources Control Board Order No. 2006-0003

Waste Discharge Regulation Order 2006-0003 ("WDR") specifically addresses SSOs and applies to all cities, sanitary districts and other agencies operating sanitary sewer systems. The WDR prohibits any SSO that results in a discharge of untreated or partially treated wastewater and creates a nuisance or reaches waters of the United States.[22]

The WDR defines an SSO as: "[a]ny overflow, spill, release, discharge or diversion of untreated or partially treated wastewater from a sanitary sewer system" and "[w]astewater backups into buildings and on private property that are caused by blockages or flow conditions within the publically owned portion of a sanitary sewer system."[23] A sanitary sewer system, however, only includes "systems owned by public agencies that are comprised of more than one mile of pipes or sewer lines."[24] Private laterals, therefore, do not qualify.

A city or district must take all feasible steps to mitigate SSOs including blocking the storm drain and vacuuming wastewater.[25] Further, if sewage reaches the street, additional liability falls on cities as the *owner of the storm drain*, pursuant to their MS4 permit, to prevent sewage from reaching the drain. MS4 permits require storm drain owners to implement best management practices (BMPs) to minimize how much sewage reaches the storm drain.

[18] (Health & Safety Code § 5411.)
[19] (Health & Safety Code § 5461.)
[20] (Health & Safety Code § 5411.5.)
[21] (Health & Safety Code §5412.5.)
[22] (WDR, Orders § C (1),(2).)
[23] (WDR, Orders, A(1)(i)-(iii).)
[24] (WDR, Orders, A(2).)
[25] (WDR, Orders, D(4).)

Pursuant to an MS4 permit, cities and other storm drain owners are required to put up blocking mechanisms to prevent sewage from reaching the storm drain. Primary liability, however, remains with the property owner.

Any non-compliance with the WDR is a violation of the Water Code and grounds for an enforcement action.[26]

In the case of a spill from a private lateral caused by a blockage or inadequate maintenance of the lateral, a district will not be liable under the WDR. Under the WDR, the definition of SSO includes backups into buildings and on private property when caused by blockages within the *publically owned* portion of a sewer system.[27] Further, "sewer system" only includes "those systems *owned by public agencies*."[28] Therefore, if the cause of a backup is not within the publicly owned portion of the sewer system, a district is not liable.

If sewage reaches the street, some liability falls on the *owner of the storm drain*, which is typically the city or county, to prevent sewage from reaching the storm drain, pursuant to the BMPs of an MS4 permit. Primary liability for the spill, however, remains with the lateral owner.

The WDR also requires public agencies to take all feasible steps to mitigate SSOs including blocking the storm drain and vacuuming wastewater; however, as stated above, a spill from a private lateral that is not caused by conditions in the public main is not considered an SSO.[29]

However, if a district did not maintain its infrastructure and the lack of maintenance caused the system to fail, the District would have violated the WDR and, if the effluent reached navigable waters of the United States, the District would be in violation of the Clean Water Act. It makes no difference that the point of the discharge was on or from private property because the WDR's definition of SSO includes "[w]astewater backups into buildings and on private property that are caused by blockages or flow conditions within the publically owned portion of a sanitary sewer system."[30] Thus, there would be a violation of the WDR.

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[26] (WDR, Orders, D(1), K(1)(2).) When considering enforcement, the boards are directed to consider: enforcement policy factors, Water Code 13327 factors, and whether: (1) there was compliance with the WDR; (2) the entity can identify the cause of the discharge; (3) there were no feasible alternatives, such as diversion and storage; (4) the discharge was exceptional, unintentional, temporary, and caused by factors beyond the reasonable control of the district; (5) the discharge could have been prevented by exercise of reasonable control as described in the SSMP; (6) the system design capacity is appropriate to reasonably prevent SSOs; and (7) the entity took all reasonable steps to stop and mitigate impact of discharge.

[27] (WDR p.5.)

[28] (emphasis added) (WDR p.6.)

[29] (WDR, Orders, D(4).)

[30] (WDR p.5.)

Tort Claims Act

The California Tort Claims Act (TCA) defines, among other things, when a government entity will be held liable for negligent conduct or for injuries occurring because of a dangerous condition of property. In regard to dangerous property conditions, the TCA distinguishes between property that is owned by a public entity and that which is owned by someone or something else.

Public Property (Publically Owned Portions of the Sewer System)

When an injury is caused by a condition of public property, the entity owning the property will be liable for a dangerous condition of that public property. A sewer backup or SSO could be characterized as a dangerous condition of public property.

To establish liability for a dangerous condition of property, a plaintiff must prove: (1) public property was in a dangerous condition at the time of the injury, (2) the injury was proximately caused by the dangerous condition, (3) the injury was reasonably foreseeable, and (4) either (a) the dangerous condition was created by a public employee's negligent or wrongful act within the scope of his or her employment or (b) the public entity had actual or constructive notice of the dangerous condition a sufficient time before the injury occurred to correct the condition.

The Tort Claims Act defines "public property" and "property of a public agency" as "real or personal property" that is "owned or controlled by the public entity."[31] If a government entity does not have title to, or control over, property, there is no government tort liability for a dangerous condition of that property.[32] A private sewer lateral is typically owned, controlled, and maintained by a private property owner. Therefore, tort liability generally rests with the private property owner.

If, however, a spill occurs from a private lateral because of a backup or other malfunction involving the *public* sewer main or other *public* infrastructure, the public entity will be found liable under the TCA if the other factors mentioned above, such as actual or constructive notice of the condition, are also present. Because the WDR requires that a sewer entity inspect the sewer system with CCTV monitoring, a sewer agency may be held liable for blockages and dangerous conditions that are allowed to accumulate in the publically owned portions of the system, as discussed below.

[31] (Gov. Code § 830(c).)
[32] (See *Chatman v. Alameda County Flood Control and Water Conservation Dist.* (1986) 183 Cal.App.3d 424, 228 Cal.Rptr. 257.)

A blockage in a public agency's sewer main could be characterized as a dangerous condition of public property. To establish liability, a plaintiff must show: (a) the dangerous condition was created by a public employee's negligent or wrongful act within his or her employment or (b) the entity had actual or constructive notice of the dangerous condition a sufficient time before the injury occurred to correct it. It could be difficult for a plaintiff to demonstrate that a blockage was caused by a negligent or wrongful act on the part of the district or that the district had notice. However, if a district's CCTV monitoring revealed the backup and the district did nothing to clear the blockage, liability could be established.

A public agency could also be liable in tort for a backup caused by district cleaning efforts. The dangerous condition would be the blockage caused in the private lateral by the blasting and it would have been created by an act of a district employee (or agent) in the scope of the employee's duties. The issue is whether district blasting can be considered negligent or wrongful. It seems that if the district's blasting actually caused a blockage in a private lateral, the actions of the district could be considered wrongful or negligent and liability would attach, but that would depend on the proof at the time of trial.[33]

Private Property (Private Sewer Lateral)

A public entity is not liable for an injury caused by another's property, such as a privately owned lateral. Further, public entities also enjoy broad immunities against claims of negligence based on: enacting laws, denying or granting a permit (i.e. to construct the lateral), inspecting the *private* lateral via CCTV inspections or enforcing laws such as FOG ordinances.

Passing or Failing to Pass Law: Public entities and employees are not liable under the TCA for any injury caused by adopting a law, rule or regulation.[34] However, the enactment of regulatory measure may result in a "taking" requiring just compensation. Public entities and employees are also not liable for injury caused by failing to adopt a law, rule or regulation.[35]

Granting or Denying a Permit: Injuries that result from the granting, denying or other action taken on a license, permit, or similar official authorization are excluded from liability when the entity's or employee's decision is discretionary.[36] However, if the issuance of a license or permit to use *public* property makes that property dangerous, liability for the injuries would apply.[37] The grant or denial of a permit can constitute a taking.[38]

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[33] (See e.g. *Metcalf v. County of San Joaquin* 2008 DJDAR 2633.)
[34] (Gov. Code § 818.2, 821.)
[35] (Gov. Code § 818.2, 821.)
[36] (Gov. Code §§ 818.4, 821.2.) See e.g. *Cancun Homeowners Ass'n v. City of San Juan Capistrano* (1989) 215 Cal.App.3d 1352, 264 Cal.Rptr. 288 (city immune from liability for negligence in issuance of building and grading permits).
[37] *Hill v. People ex rel Dept. of Transportation* (1979) 91 Cal.App.3d 426, 154 Cal.Rptr. 142.

Health and Safety Inspections: Public entities and employees are not liable for failing to inspect, or for inadequate or negligent inspection of, physical property to determine whether the property complies with legal requirements or is a health or safety hazard.[39] This immunity is absolute and applies to ministerial and discretionary conduct.[40] However, the immunity does not apply to an inspection of the public agency's own property.[41] Therefore, a public entity is still liable for a dangerous condition of public property. Conversely, a public entity would not be liable if it negligently inspected a private lateral (via a CCTV inspection or other means) yet failed to detect a problem.

Enforcement or Failing to Enforce a Law: A public employee is not liable for injuries caused by his or her enforcement of a law[42] provided the employee was exercising "due care." (Gov. Code § 820.4.) This immunity, however, is redundant because tort liability generally concerns a failure to exercise due care. Public entities and employees have greater protection against liability for *failing* to enforce a law.[43] The immunity only applies to discretionary functions, however, and provides no defense against liability for failing to discharge a mandatory duty[44] or for injuries caused by a dangerous condition of public property.[45]

A district will generally not be held liable in tort for a sewage spill occurring as a result of a back-up or leak in a private lateral. Further, a district is not liable for passing a law regulating sewer laterals or issuing a permit to install a lateral. A district is also not liable for failing to inspect a lateral. If liability would attach, the likely scenario would be an allegation that a public entity negligently enforced a law. This would occur if a public employee ordered that action be taken to clean or upgrade a lateral that negligently caused a blockage or spill to occur. To establish liability, however, a plaintiff would have to show that the public agency failed to exercise due care.

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[38] *Freidman v. City of Los Angeles* (1975) 52 Cal.App.3d 317, 125 Cal.Rptr. 93 (liability for wrongful demolition of building).
[39] (Gov. Code §§ 818.6, 821.4.)
[40] (*Cochran v. Herzog Engraving Co*. (1984) 155 Cal.App.3d 405, 411, 205 Cal.Rptr. 1, 4.)
[41] (Gov. Code § 818.6.)
[42] To enforce a law within the meaning of Gov. Code § 818.2, 821 means to compel obedience to the law by actual force, such as involuntary detention, arrest or punishment. (*Clemente v. State* (1980) 101 Cal.App.3d at 374, 378, 161 Cal.Rptr. at 801.)
[43] (Gov. Code § 818.2.)
[44] (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 916, 136 Cal.Rptr. 251, 261.
[45] (*Quelvog v. City of Long Beach* (1970) 6 Cal.App.3d 584, 591, 87 Cal.Rptr. 127, 132.)

The California Takings Clause

The California Takings Clause prevents the government from taking private property without paying just compensation.[46] Any physical injury to property, proximately caused by a public improvement that failed to function as designed and intended, is compensable under the Takings Clause.[47]

Because the takings theory is constitutionally based, statutory defenses contained in the Tort Claims Act, discussed above, are inapplicable.[48] If, however, damage would have occurred despite a public project operating perfectly, such as when a storm exceeds a project's design capacity, there is no takings liability.[49]

The takings clause is applicable to damage caused by a sewer backup. (See *California State Automobile Association v. City of Palo Alto* (2006) 138 Cal.App.4th 474 ("*CSAA*").) In *CSAA*, a City sewer backed-up into a residence and caused damage. A video inspection found that the homeowners' lateral was in perfect condition but that there were tree roots in the City's "wye" joint connecting the lateral to the main. The Court found that because the blockage occurred in the main and caused sewage to back up into the home, the sewer failed to function as intended. The government was found liable for the damages.[50]

Liability imposed under the Takings Clause is the most likely scenario of public agency liability for a private sewer spill. A public agency will be held liable for a backup caused by a blockage in the public sewer main. This was the exact situation presented in *California State Automobile Association v. City of Palo Alto* (2006) 138 Cal.App.4th 474. If a blockage occurs in the sewer main and causes sewage to back up into the home, the public improvement failed to function as intended. At that point, the public entity is liable unless it can produce evidence that would show that some other force acting alone caused the backup.

A public agency will not be liable, however, for a backup of a private sewer lateral that is caused by a blockage or inadequate maintenance of the private lateral. Under this situation, the district did not cause the backup nor did the district's facilities fail to function as intended.

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[46] (Cal. Const. Art. I, § 19.)

[47] (*Belair*, *supra*, 47 Cal.3d at 562, 253 Cal.Rptr. at 699; *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 263-264, 42 Cal.Rptr. 89.)

[48] (See *Baldwin v. State* (1972) 6 Cal.3d 424, 99 Cal.Rptr. 145 ("design immunity" of Gov. Code § 830.6 inapplicable to takings claim); *Friedman v. City of Los Angeles* (1975) 52 Cal.App.3d 317, 321, 125 Cal.Rptr. 93, 95 (statutory immunity for negligence issuance of building permit inapplicable to takings claim).)

[49] (*Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 559, 253 Cal.Rptr. 693, 698.)

[50] (See also *Marin v. City of San Rafael* (1980) 111 Cal.App.3d 591, 168 Cal.Rptr. 750 (damage to private property resulting from bursting city storm drain constitutes actionable taking).)

CONCLUSION

Most laws recognize that a public agency should not be liable for a backup or spill occurring from a private lateral which is not caused by a condition in the public sewer system. Such spills are expressly beyond the definition of SSO in the WDR. Further, tort liability for a dangerous condition of property does not extend to a private lateral and liability under the takings clause requires that a public project fail to function as intended. The greatest chance of public agency liability for a spill or backup from a private lateral would be if a condition of the public system contributed to the spill (such as a blockage or government blasting efforts) or if a public employee acted negligently and such actions resulted in a sewer spill.

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