



CALIFORNIA WATER SERVICE

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UTILITY WORKERS UNION OF AMERICA, AFL-CIO

California Water Utility Council: Locals 160, 160C, 160D, 205, 283 & 484

April 22, 2019

The Honorable Gavin Newsom
Governor, State of California
Governor's Office, State Capitol
Sacramento, CA 95814

Commission on Catastrophic Wildfire Cost & Recovery
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95184

Dear Governor Newsom and Commissioners:

California Water Service (Cal Water) and the California Water Utility Council (CWUC) thank you for everything you are doing to address the challenges posed by wildfires in the State. We appreciate the opportunity to provide input on several of the topics the Commission on Catastrophic Wildfire Cost & Recovery outlined in its recently released Request for Comment.

Cal Water is the second-largest public drinking water supplier in the State, and the largest regulated by the California Public Utilities Commission. In total, we provide safe, reliable drinking water service to about 2 million Californians, from Chico in the north to the Palos Verdes Peninsula in the south.

The CWUC represents the approximately 665 operations, construction, maintenance, and clerical employees through six Utility Workers Union of America, AFL-CIO (UWUA) locals at Cal Water. The CWUC's members are responsible for ensuring the safe, reliable delivery of drinking water to hundreds of thousands of California households and businesses.

While many of the conversations around wildfire liability have understandably focused on energy providers, it is important to also recognize the far-reaching consequences of failing to implement commonsense reforms to California's unsustainable strict liability standard. The same dire situation currently faced by California's energy providers could befall the State's hundreds of public drinking water suppliers.

Cal Water and the CWUC both previously submitted letters to the Commission highlighting the potential for public drinking water suppliers in the State to be exposed to significant liability for wildfires, even when they play no part in starting those same wildfires. Exposure to this level of liability jeopardizes their ability to provide safe, reliable, and affordable drinking water service to customers, not to mention the jobs of thousands of utility workers across California.

The current lack of a fault-based wildfire liability standard is an expanding risk to public drinking water suppliers, the boundaries of which are increasingly being pushed beyond what might be considered reasonable, fair, and equitable. Here, we highlight recent developments in the area of wildfire liability; explain why strict liability, as opposed to a fault-based standard, is inappropriate when applied to a drinking water supplier who has no part in starting a wildfire; and recommend the implementation of a bright line rule to address the issue.

Lack of a Fault-Based Wildfire Liability Standard Unfairly Burdens Water Suppliers & Their Customers

When evaluating claims for damages caused by wildfires, California courts apply a strict liability standard. This framework places the cost of wildfire property damage on a public agency — be it a city, county, drinking water supplier, or energy utility — if its equipment caused the fire, regardless of fault and without consideration of the contributing role of other factors.¹ This means that in such a claim, the plaintiff need not allege nor prove that the public agency behaved unreasonably or negligently, or even that the damages were foreseeable.²

We are alarmed by the proliferation of efforts in recent years seeking to apply strict liability to public drinking water suppliers in the aftermath of wildfires, not when their water systems ignite them, but rather when they are simply unable to help prevent their spread. The application of the strict liability standard in these instances could result in the State's water suppliers becoming responsible for hundreds of millions – or even billions – of dollars of wildfire damage, threatening their very existence:

Inverse condemnation is an evolving exposure that may intensify in frequency, gravity, and consequence. The impact on public water systems is notably adverse because their water delivery systems align well with the liability standards imposed by this legal theory. With overwhelming financial ramifications, inverse condemnation represents an existential threat to public water systems. The situation will exacerbate should the standard of strict liability, as opposed to reasonableness, be imposed for failure of fire suppression systems during wildfires.³

This unprecedented expansion of the strict liability standard for wildfire damage is most infamously exemplified by the judgment entered against Yorba Linda Water District (YLWD) in the aftermath of the 2008 Freeway Complex Fire, which is summarized in our previous letters.⁴ In that case, the superior court expressly determined that YLWD did not cause nor start the Freeway Complex Fire (instead, the fire was caused by a broken down car); nonetheless, even though YLWD did not act negligently, was not responsible for starting the fire, and was, in fact, one of the fire's many victims, it had to pay out a nearly \$70 million judgment relating to claims under the strict liability framework because the fire triggered a water supply interruption, which allowed the fire to continue to spread, and was therefore deemed a substantial cause of the plaintiffs' damages.

More recently, multiple plaintiffs have filed similar claims against the City of Ventura and Casitas Municipal Water District in connection with the devastating Thomas Fire.⁵ In each of those lawsuits, neither the City of Ventura nor Casitas Municipal Water District is alleged to have been responsible for

¹ *Marshall v. Dept. of Water and Power*, 219 Cal.App.3d 1124, 1138 (1990) [citing *Souza v. Silver Development Co.*, 164 Cal.App.3d 165, 170 (1985)] (“A public entity may be liable in an inverse condemnation action for any physical injury to real property proximately caused by a public improvement as deliberately designed and constructed, whether or not that injury was foreseeable, and in the absence of fault by the public entity.”).

² *Albers v. Los Angeles Cty.*, 62 Cal.2d 250, 263 (1965).

³ Paul Fuller, “Inverse Condemnation and Public Water Systems: A Legal Nexus of Complexity, Exposure, and Uncertainty,” *Public Law Journal*, Volume 41, Numbers 3 & 4, 2019.

⁴ *Itani v. Yorba Linda Water Dist.*, Case No. 30-2009-00124906 (Sup. Ct. Orange County, July 13, 2012).

⁵ See, e.g., *Wilkinson v. Southern California Edison Co.*, Case No. 19GDCV00322 (filed in Sup. Ct. Los Angeles County on March 12, 2019) (alleging inverse condemnation claims against the City of Ventura); *Ojai Village Pharmacy v. Southern California Edison Co.*, Case No. 56-2018-00511478-CU-EI-VTA (filed in Sup. Ct. Ventura County on May 7, 2018) (alleging inverse condemnation claims against the City of Ventura and Casitas Municipal Water District).

starting the Thomas Fire. Instead, the claims in those cases are premised on an alleged lack of sufficient water pressure from those water suppliers preventing firefighters from extinguishing the Thomas Fire before it damaged the plaintiffs' property. This is not an inconsequential allegation—the Thomas Fire was one of the largest and most destructive wildfires in California history. These lawsuits and others arising out of the Thomas Fire are currently pending.

Governor Newsom's Strike Force recently explained that the absence of a fault-based standard for wildfire liability poses a significant danger to the State's energy utilities:

Another challenge to a durable solution is that liability for wildfires . . . is governed by California's inverse condemnation law, which holds a utility strictly liable for wildfire damages if the utility's equipment ignites a wildfire, even if the utility's design and maintenance of infrastructure were not unreasonable or negligent . . . This regime – strict liability for wildfire damage coupled with uncertain ability to recover those damages in rates – increases the risk of bankrupt utilities, which in turn drives up costs for consumers, threatens fair recoveries for fire victims, undermines the state's ability to mitigate and adapt to climate change, and creates uncertainty for utility employees and contractors. Under the status quo, all parties lose – wildfire victims, energy consumers, and Californians committed to addressing climate change . . . Bottom line – utilities in or on the verge of bankruptcy are not good for Californians, for economic growth or for the state's future.⁶

Certainly, these dangers are no less significant or severe for the State's drinking water suppliers.

Lack of a Fault-Based Wildfire Liability Standard Jeopardizes Important Water Policy Objectives

From making water conservation a California way of life⁷ to establishing a human right to safe, clean, and affordable water,⁸ California has adopted a number of significant and important policy objectives related to the provision of drinking water service. In much the same way that California's energy objectives cannot be achieved without electric utilities on a sound financial footing, the State's water objectives cannot be achieved if its public drinking water suppliers face potential financial insolvency from unrestrained wildfire liabilities.

Water conservation has long been regarded as a critical component of any effective strategy to ensure the long-term reliability of California's water supplies, especially with additional pressures placed on those supplies by climate change. More recently, water conservation has been heralded as a means to assist California achieve its greenhouse gas reduction goals, given the amount of energy it takes to get water from the source to the tap. Robust water conservation programs require the investment of financial resources. If the State's public drinking water suppliers are faced with the prospect of hundreds of millions – if not billions – of dollars of wildfire liabilities, most will not be able to make critically important investments in programs that are needed to help California respond and adapt to climate change and meet the water supply needs of its businesses and growing population.

⁶ "Wildfires and Climate Change: California's Energy Future," A Report from Governor Newsom's Strike Force, p. 27, April 12, 2019.

⁷ See, e.g., "Making Water Conservation a California Way of Life: Primer of 2018 Legislation on Water Conservation and Drought Planning Senate Bill 606 (Hertzberg) and Assembly Bill 1668 (Friedman)," Prepared by the California Department of Water Resources and State Water Resources Control Board, November 2018.

⁸ California Water Code §106.3.

Similarly, drinking water suppliers facing the possibility of unrestrained wildfire liabilities may find it increasingly difficult to make needed improvements to the State's drinking water infrastructure. The Governor's Strike Force has explained that the absence of a fault-based wildfire liability standard will negatively impact the ability of energy utilities to provide customers with safe and affordable electricity:

At the same time, the current system for allocating costs associated with catastrophic wildfires . . . is untenable both for utility customers and for our economy. Multi-billion dollar wildfire liabilities over the last several years have crippled the financial health of our privately and publicly owned electric utilities . . . Utilities rely on credit to finance ongoing infrastructure investments, including fire mitigation. As utilities' credit ratings deteriorate, their borrowing costs increase and those costs for capital necessary to make essential safety improvements are passed directly to customers. These downgrades, and the prospect of additional utility bankruptcy filings, directly impact Californians' access to safe, reliable, and affordable electricity.⁹

For the same reasons, the lack of a fault-based standard for wildfire liability could directly impact Californians' access to safe, reliable, and affordable drinking water. Unfortunately, the water infrastructure needs in California are significant. For example, data released by the State Water Resources Control Board shows that more than 1.5 million Californians have drinking water that violates public health standards.¹⁰ And, the Environmental Protection Agency estimates that more than \$50 billion needs to be invested in California's drinking water systems over the next 20 years to ensure their continued safety and reliability.¹¹ These critically important investments will simply not be possible if the State's water suppliers face untold liabilities for damage caused by wildfires they played no part in starting.

Lack of a Fault-Based Wildfire Liability Standard Threatens Thousands of California Jobs

Thousands of hard-working men and women are employed by California's drinking water suppliers. They are highly trained, qualified, competent, and state-certified water service professionals. Many have dedicated their entire careers to ensuring that California's communities and business have the drinking water resources they need to grow and thrive.

When wildfires do strike, these men and women are among the many critical responders. They are on the ground during the emergency to operate and maintain the drinking water system to assist first responders battling the fire. After the emergency subsides, they are on the ground repairing and rebuilding the drinking water systems to help get families back to their homes and businesses reopened. For example, in the aftermath of the Camp Fire, water service professionals from across California descended on the Town of Paradise to provide assistance to the Paradise Irrigation District and help the community start rebuilding.

⁹ "Wildfires and Climate Change: California's Energy Future," A Report from Governor Newsom's Strike Force, p. 2 - 3, April 12, 2019.

¹⁰ State Water Resources Control Board, Division of Drinking Water, "Annual Compliance Report: 2015."

¹¹ U.S. Environmental Protection Agency, "Drinking Water Infrastructure Needs Survey and Assessment: Sixth Report to Congress," March 2018.

Yet, without commonsense reforms to California's unsustainable strict liability standard, the jobs of the men and women who are responsible for getting safe, reliable drinking water from the source to the tap will be in jeopardy. Very few, if any, of the State's public drinking water suppliers would be able to shoulder the burden of hundreds of millions – or even billions – of dollars of wildfire liability without laying off significant portions of their workforce.

A Clear Fault-Based Wildfire Liability Standard Should Be Established


We recommend the establishment of a fault-based standard for wildfire liability under which drinking water suppliers whose public improvements do not start a fire are not subject to strict liability for damages arising from that same fire. Stated differently, there should be a clear bright-line rule that public drinking water suppliers are not the substantial cause of damages simply because they are unable to prevent the spread of a fire that has already started.

This type of fault-based standard would address the inequities outlined above pertaining to water suppliers, but at the same time is narrow enough to avoid unduly hampering the rights of homeowners and other wildfire victims in other circumstances. This commonsense refinement is critical, given that the current strict liability standard for wildfire liability can easily present an existential threat to California's drinking water suppliers.

Sincerely,



Martin Kropelnicki
President & CEO
California Water Service



Richard Wilson
President
California Water Utility Council

Cc: The Honorable Toni Atkins, Senate President Pro Tempore
The Honorable Anthony Rendon, Speaker of the Assembly
The Honorable Ben Hueso, Chair, Senate Energy Utilities & Communications Committee
The Honorable Chris Holden, Chair, Assembly Utilities & Energy Committee
The Honorable Henry Stern, Chair, Senate Natural Resources & Water Committee
The Honorable Eduardo Garcia, Chair, Assembly Water, Parks, & Wildlife Committee