PWAG
Public Water Agencies Group

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VIA E-MAIL – wildfirecommission@opr.ca.gov

Commission on Catastrophic Wildfire
Cost and Recovery

Subject: Comments on Inverse Condemnation Liability and Related Insurance Issues

Dear Sir/Madam:

We are legal counsel to the Public Water Agencies Group (the "Group"), an association of 15 public agency water suppliers situated in Los Angeles County.[1] Pursuant to the Commission's request, the Group submits its comments to the Commission concerning wildfire liability and insurance issues.

1. Wildfire Liability Regime

The Group is greatly concerned with the broadening potential for liability to public agency water suppliers based on inverse condemnation. As asked in the Commission's Question 1(a), inverse condemnation liability certainly limits the equitable distribution of wildfire costs. Inverse condemnation, which imposes liability without regard to fault, jeopardizes the ability of drinking water suppliers throughout California to continue to serve their customers. The Group contends inverse condemnation liability imposed on water suppliers is unreasonable, unfair and inequitable.

Liability under an inverse condemnation theory for wildfire damage is imposed on a strict liability basis. That theory places the cost of wildfire property damage on a utility if its equipment

[1] The Group consists of Crescenta Valley Water District, Kinneloa Irrigation District, La Habra Heights County Water District, La Puente Valley County Water District, Main San Gabriel Watermaster, Palmdale Water District, Pico Water District, Quartz Hill Water District, Rowland Water District, San Gabriel County Water District, San Gabriel Valley Municipal Water District, South Montebello Irrigation District, Three Valleys Municipal Water District, Valley County Water District and Walnut Valley Water District.

caused the fire—regardless of fault and without consideration of the contributing role of other factors.[2] Thus, to successfully pursue an inverse condemnation case, the plaintiff need not allege or prove that the water supplier behaved unreasonably or negligently. Instead, a water supplier may be held strictly liable for potentially significant damages (i.e., tens, if not hundreds of millions of dollars) if the plaintiff proves the water supplier was a substantial cause of such damage—even if it was only one of several concurrent causes. Consequently, the strict liability framework under inverse condemnation raises concerns for the Group's members, who are all public agencies that seek to provide safe, reliable drinking water to their customers at affordable prices.

The Group is particularly concerned by the recent proliferation of litigation that seeks recovery under inverse condemnation where a water supplier had no role in starting the wildfire, but merely could not furnish sufficient water to extinguish the wildfire. As explained below, the application of the strict liability standard in those circumstances is inequitable given (i) the lack of fault on the part of the water supplier in starting the fire, (ii) the fact that water systems are not designed or constructed to fight wildfires (and it would essentially be impossible and economically infeasible to design and construct such systems), and (iii) the rationale underlying inverse condemnation of spreading the costs of the wildfire is incompatible with the purposes for which water distribution systems are constructed.

The expansion of inverse condemnation liability is exemplified by the judgment entered against Yorba Linda Water District ("YLWD") in the aftermath of the 2008 Freeway Complex Fire. In that case, the superior court expressly determined that YLWD did not cause or 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 under an inverse condemnation theory based on strict liability 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 inverse condemnation claims against the City of Ventura and Casitas Municipal Water District in connection with the devastating Thomas Fire. In those lawsuits, neither the City of Ventura nor Casitas Municipal Water District is alleged to have been responsible for starting the Thomas Fire. Instead, the inverse condemnation claims in those cases are premised on an alleged lack of water pressure from those water suppliers that purportedly prevented

[2] *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.").

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 are currently pending.

In such inverse condemnation cases, water suppliers can be held liable for substantial damages arising out of a wildfire they had no part in starting, regardless of whether the court finds them at fault. If plaintiffs are successful, there may be liability simply where a water supplier's public improvement does not prevent the spread of a wildfire, even though it is not designed or constructed to do so. If this lack of water pressure or supply is found to be a substantial cause of the plaintiff's damages, even if it was only one of several concurrent causes, the water supplier may be unfairly held responsible in this situation for hundreds of millions—or even billions—of dollars of wildfire damage. Because water systems are not designed or constructed to fight catastrophic wildfires, and the water suppliers have no control of—or responsibility for—the starting of such wildfires, it is unfair and inequitable to shift the risk exposure arising out of wildfires to water suppliers.

The premise that water suppliers are a substantial cause of wildfire damages under inverse condemnation, solely because they are unable to provide sufficient water pressure to extinguish wildfires, is flawed. California's water suppliers go to great lengths to operate drinking water systems that supply safe and reliable supplies and that can assist first responders in suppressing and extinguishing urban fires. However, the reality is that drinking water supply infrastructure is simply not deliberately designed or constructed to fight wildfires. To the limited extent water suppliers do assist fire protection efforts, water distribution systems are designed to combat urban or building fires, not fast-moving wildfires that spread across vast areas. It is not feasible to design, construct, and maintain drinking water systems that would be able to combat most wildfires. For example, at its height, the 2018 Camp Fire was burning the equivalent of a football field every second. There is not a drinking water system in the world that has sufficient facilities to combat a wildfire of this magnitude. Even attempting to design and build one is, for all intents and purposes, impossible from a technical/engineering standpoint, and not economically feasible. To hold drinking water suppliers responsible for the destruction caused by wildfires under these circumstances would be unreasonable.

Simply put, it is both inequitable and illogical to hold water suppliers strictly responsible under the doctrine of inverse condemnation for damages caused by wildfires they did not start, but simply could not furnish sufficient water to extinguish. The combination of the existing strict liability framework of inverse condemnation and these unabashed attempts to push the boundaries of the inverse condemnation doctrine will make it that much more difficult to close the infrastructure investment gap in California and raise the billions of dollars of capital needed to maintain and upgrade the State's water

systems, particularly at a time where significant focus is being placed on the affordability of water and assisting disadvantaged communities with the operation of their water systems, and low-income residents with the payment of their water bills. These types of lawsuits siphon away funds that could be used, and are seriously needed, to help the many communities and individuals in need of such financial assistance.

As have other water utilities, the Group recommends implementing a bright line rule that water suppliers whose public improvements do not start a fire, but whose improvements do not deliver sufficient water supply or pressure to prevent the spread of a fire that has already started, should not be subject to strict liability in inverse condemnation. In other words, legislation should be approved which makes clear that a water supplier is not a "substantial cause" of wildfire damages under an inverse condemnation theory simply for not having adequate water supply or pressure to fight a wildfire.

This recommendation would address the inequities water suppliers face under current inverse condemnation liability, while not unduly hampering the rights of homeowners and other wildfire victims in other circumstances. For example, it would not limit the ability of plaintiffs to pursue any entity, including water suppliers, who are responsible for starting a wildfire that later causes damages. Nor does it seek to circumvent liability in instances of negligent actions—plaintiffs may still separately bring such negligence and other traditional tort claims. We believe this change to the wildfire liability regime is critical, given that inverse condemnation claims arising out of destructive wildfires present a very real threat to the continuing viability of some water suppliers.

The Group strongly urges the Commission to recommend this bright line rule to bar the application of strict liability to inverse condemnation claims for water suppliers who had no part in starting a wildfire, as part of its report to the Governor and Legislature.

2. <u>Insurance and Financing Mechanisms</u>

Although the Group is certainly not expert in insurance matters, it has spoken to insurance professionals on these issues. To a large degree, the insurance issues are connected with the inverse condemnation issues discussed above. The proposed revision of strict liability of water suppliers with respect to "failure to protect claims" would increase the supply of insurance products in that market. If that is combined with a holistic legislative/executive remedy (see the next paragraph), insurance supply and affordability would be enhanced.

Among the various options being discussed, the Group believes a holistic approach is needed, which emphasizes a variety of steps, including augmented building codes that require conservative

setbacks, fire reducing building materials and using fire-prevention technologies in new home construction; more conservative land use planning; encouraging numerous insurers to enter and stay in the market to spread the risk; and establishing a state wildfire insurance fund. If such a fund is created, the Group believes that water suppliers should not be obligated to contribute to such a fund, or to the extent that they are obligated to contribute, the contribution of water suppliers should be at a significantly lower level than electricity providers to reflect responsibilities regarding wildfires.

The challenges associated with safe and reliable electricity transmission and distribution has historically been the primary driver of wildfire-related risk in California. This fact naturally arises out of the very nature of providing electrical service. By contrast, there is no unique or natural connection between the provision of water service and the risk of starting wildfires. Moreover, electricity providers are in a better position to mitigate the safety risks associated with how wildfires start.

Therefore, the contribution of water suppliers to any state wildfire fund should be minimal, if any. We simply urge the Commission to be mindful of the relative responsibilities of water suppliers with respect to wildfires when evaluating proposals for wildfire funds that are intended to substitute for wildfire liability insurance.

Thank you for your consideration of these comments and we hope the Commission appreciates the significant concerns of the water industry, which faces significant liability under the very unfair inverse condemnation theory of liability, as it is now being applied.

Very truly yours,

James D. Ciampa

cc: Public Water Agencies Group (via e-mail)

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