Public Nuisance/Common Law Litigation: Do California Cities Have a Property Interest in Stormwater?

Arkansas Environmental, Energy, and Water Law Blog

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The issue of who owns "surface water" of California has arisen twice in the past few months.

Whether the State of California owned diverted water was recently addressed in the context of a criminal charge by a California appellate court in a September 27th decision. See previous blog here.

A federal district court in an August 22nd decision addressed whether three California cities had a property interest in stormwater moving through their municipal stormwater systems.

The California cities of San Jose, Oakland, and Berkeley (collectively "Cities") sought damages from the Monsanto Company and other companies alleging that between the 1930s and the late 1970s, Monsanto manufactured and sold products containing environmental contaminants including polychlorinated biphenyls ("PCBs"). See *City of San Jose v. Monsanto Company, Nos. 15-cv-3178, 15-cv-5152, and 16-cv-0071 (Aug. 22, 2016).*

The Cities' lawsuit filed in the United States District Court (Northern District of California) alleged that the PCBs contaminated the San Francisco Bay ("Bay") because of runoff channeled through the municipal stormwater systems forcing them to expend funds to comply with state/federal regulatory water pollution requirements.

The Cities argued that their municipal stormwater systems collect stormwater and discharge it in the Bay. The PCBs were alleged to leach into stormwater and rainwater. The PCB contaminated stormwater and rainwater is then allegedly channeled into the Bay through the municipal stormwater systems.

Cities discharging stormwater must obtain discharge permits. The presence of the PCBs is alleged to trigger a requirement to limit the PCBs discharged. This necessitates expenditures of funds to meet current and future limits related to the PCBs.

The Cities Complaint in regards to the PCBs identifies two causes of action:

- Public Nuisance by manufacturing, distributing, marketing, and promoting PCBs that have harmed the Bay
- Equitable indemnity for the damage caused to the Cities

Monsanto and the other defendants filed Motions to Dismiss addressing both causes of action.

A key issue in the Court's resolution of the public nuisance issue was whether the Cities had a property interest in the stormwater. In describing the type of public nuisance action claimed by the Cities the Court noted in part:

. . .Second, “any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance,” may bring a civil action for abatement of the nuisance as well as damages. Id. A public entity may bring the latter type of action if it “can show it has property interest injuriously affected by the nuisance.”. . .

One of the arguments raised by Monsanto in response to the nuisance claim was that the cities “may not assert the public nuisance claim because none of their property has been affected.” The Court noted that the Cities’ claim was predicated on their belief that the property interest was not in the Bay itself, but in stormwater that has been polluted by Monsanto’s (“PCB products”) because the Cities are responsible for collecting stormwater and managing its discharge into the Bay.

The Court rejected the Cities’ argument that Orange County Water District v. Arnold Engineering Co., 196 Cal. App. 4th 1110 (2011) held that the Orange County Water District had a proprietary interest in its groundwater for purposes of a nuisance claim. Instead, the Court responded favorably to Monsanto’s reference to a California statute that it argued placed stormwater under the ownership of the State (citing Cal. Water Code § 1201).

The Court noted:

Under Cal. Water Code § 1201, “[a]ll water flowing in any natural channel,” unless appropriated or used, is “public water of the State.” Of course, stormwater drainage systems are not natural channels under § 1201. However, Cal. Water Code § 10574 clarifies that “[u]se of rainwater collected from rooftops does not require a water right permit pursuant to Section 1201.” By exempting rainwater from the permitting requirement of § 1201, § 10574 implies that rainwater otherwise falls within § 1201, meaning that rainwater is public water belonging to the state. The Cities do not take ownership of stormwater merely because it flows through municipal pipes on its way to the Bay. . . .

Therefore, the Court held that the Cities failed to establish a property interest the nuisance injuriously affected.

The equitable indemnity argument was also dismissed. It was deemed premature unless and until the State of California obtains a judgment or settlement in regards to the Bay PCB issue.

A copy of the Opinion can be downloaded here.