AXLEY BRYNELSON, LLP

WILLIAM S. COLE
(608) 283-6766
wcole@axley.com

TO: Brian Helminger, District Director
FROM: William S. Cole, District Legal Counsel
DATE: March 10, 2020

RE: District Liability Regarding Pollution Prevention

You requested an opinion explaining the District's general liability exposure for purposes of determining the appropriate level of insurance.

SUMMARY

The District is generally covered by governmental immunity to the same extent as any other local governmental entity, as well as a damage limitation of $50,000 per claimant. However, such protection is subject to various exceptions as explained below. Additionally, plaintiffs attorneys are continually characterizing their claims in such a way to attempt to avoid such protection. Due to the below factors, I cannot assure the District a claim would not be presented which would not only circumvent statutory immunity but also the damage caps. Therefore, I recommend the District consult with its insurance professionals as to the appropriate coverage levels.

DISCUSSION

The Heart of the Valley is deemed a governmental entity and subject to the protections and limitations set forth in section 893.80 of the Wisconsin Statutes. Specifically, section 893.80(4), Stats., provides the District with immunity for legislative, judicial, quasi-legislative and quasi-judicial functions[1]. Additionally, section 893.80(3), Stats., limits the amount a person can recover from the District for damages, injuries or death founded in tort to $50,000.

There are several limitations to the above concepts. They generally do not apply to any of the following:

1. Claims brought under federal law;
2. Contractual claims;
3. Fines and governmental enforcement actions;
4. Equitable relief such as to abate a nuisance; and
5. Even with respect to tort claims, a series of cases have carved out exceptions to the immunity

[1] A quasi-legislative act involves the exercise of discretion or judgment in determining the policy to be carried out or the rule to be followed. A quasi-judicial act involves the exercise of discretion and judgment in the application of a rule to specific facts. Acts that are "legislative, quasi-legislative, judicial or quasi-judicial functions," are, by definition, nonministerial acts. As applied, the terms "quasi-judicial or quasi-legislative" and "discretionary" are synonymous and the two tests result in the same finding. *Lifer v. Raymond*, 80 Wis. 2d 503, 511–12, 259 N.W.2d 537, 541–42 (1977).

and damage limitations of section 893.80.

With respect to #3, as you are aware, various state and federal agencies regularly bring actions against sewerage districts for violations of state and federal pollution laws, including the Clean Water Act. The cases resulted in results varying from consent decrees to multi-million dollar fines. The attached memo summarizes some of those cases. Additionally, a listing of the recent enforcement actions taken by the EPA, together with the forfeitures assessed can be found at the following website: https://cfpub.epa.gov/enforcement/cases/index.cfm?templatePage=12&ID=3&sortby=&stat=Clean%20Water%20Act

With respect to #4, the Wisconsin Supreme Court has ruled that while a sewerage district is subject to the immunity and damage limitations of section 893.80, it is still responsible for the cost of abating nuisance conditions it knowingly causes. In the case of Bostco, LLC, *et. al.* v. Milwaukee Metro. Sewerage Dist., 2013 WI 78, the Boston Store claimed MMSD's deep tunnel project lowered ground water levels, exposing its building foundation to deterioration and resulting in structural damage. The Supreme Court found MMSD's project created a nuisance and it was liable for the cost to abate the nuisance.

With respect to #5, the Courts have, over the years, determined various situations are not subject to section 893.80. The principle exception most likely applicable to the District is one for ministerial duties[2]. In summary, if the District were aware of a situation in which it was imperative to fix, and the District failed to do so, it would be liable for negligence notwithstanding the immunity under section 893.80. For example in the case of Milwaukee Metro. Sewerage Dist. v. City of Milwaukee, 2005 WI 8, 277 Wis. 2d 635, 691 N.W.2d 658 (2005), MMSD claimed a City water line leaked and caused an MMSD sewer line to collapse. The court's decision makes clear that if MMSD could prove the City had knowledge of the leak it could be found negligent and liable for the damage caused to MMSD.

Additionally, several cases have been brought alleging a sewerage district's actions or inaction constituted a taking of the plaintiff's property and, therefore, amount to a condemnation of the plaintiff's land. To date, these type of cases have not generally been successful. However, if successful they would circumvent the limitations under section 893.80. It is certainly conceivable a district could contaminate private property to such an extent the owner is deprived of all viable use of the property and that it would constitute a taking, for which the district would be required to pay the fair market value of the property taken.

It is also worth pointing out the evolving case of polyfluoroalkyl substances, or PFAS. Depending on the specific circumstances, it is certainly possible a claim could be brought against the District regarding the presence of such substances.

WSC

[2] A ministerial act, in contrast to an immune discretionary act, involves a duty that "is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." *Willow Creek Ranch, L.L.C. v. Town of Shelby*, 2000 WI 56, ¶ 27, 235 Wis. 2d 409, 611 N.W.2d 693.

TO: WSC
FROM: MXJ
DATE: February 7, 2020
RE: Heart of the Valley Metropolitan Sewerage District
Verdicts & Settlements Involving Water Contamination in Sewerage Districts

1. *United States of America, et al. v. City of Bangor*
31 N.Eng. J.V.R.A. 2:7, 2015 WL 6123359 (D.Me.)

United States District Court, D. Maine

MXJ Notes: City responsible for a wastewater collection system and treatment plant accused of discharging pollutants.

Result: CONSENT DECREE

Summary of Facts/Contentions:
In this action, the U.S. Department of Justice (DOJ) accused a city in Maine of illegal wastewater discharges. The matter was resolved with a consent decree.
The defendant, City of Bangor, Maine is responsible for the operation and maintenance of a Publicly-Owned Treatment Works (POTW) that includes a wastewater collection system and treatment plant. Those facilities discharge into the Penobscot River and Kenduskeag Stream. The defendant also owns and operates a small municipal separate storm sewer system (MS4), which is comprised of a system of conveyances designed to collect, convey, and discharge storm water to receiving waters. The defendant, POTW, also serves small portions of two adjacent municipalities. The defendant was accused of discharging pollutants from its wastewater collection system and MS4 in violation of its state pollutant discharge permits, and thereby, also violating the Clean Water Act.
The United States (on behalf of the U.S. Environmental Protection Agency) and the State of Maine filed suit in the U.S. District Court for the District of Maine. The City of Bangor was accused of violating the federal Clean Water Act. The plaintiffs sought injunctive relief and civil penalties.
The matter was resolved with a consent decree, in which he defendant agreed to complete projects stipulated in an earlier 1991 consent decree, as well as Information Requests issued by the EPA in May 2010 and April 2012. Finally, the defendant will implement a group of stipulated projects, plans, and reports.

2. *United States of America vs. Puerto Rico Aqueduct and Sewer Authority, et al.*
30 Nat. J.V.R.A. 10:C10, 2015 WL 7258213 (D.Puerto Rico)

United States District Court, D. Puerto Rico

MXJ Notes: Sewer system/authority accused of releasing untreated sewage and other pollutants into waterways and failing to meet operations and maintenance obligations an numerous facilities.

Result: CONSENT DECREE

Summary of Facts/Contentions:
In this action, the U.S. Department of Justice (DOJ) accused the Commonwealth of Puerto Rico and its water and sewer authority of violating federal clean water laws. The suit was resolved with a consent decree.
The Puerto Nuevo sewer system serves the municipalities of San Juan, Trujillo Alto, and portions of Bayamon, Guaynabo, and Carolina on the island of Puerto Rico, and is managed by the Puerto Rico Aqueduct and Sewer Authority (PRASA). According to the U.S Environmental Protection Agency (EPA), PRASA released untreated sewage and other pollutants into waterways in the San Juan area, including the San Juan Bay, Condado Lagoon, Martn Pena Canal, and the Atlantic Ocean, as well as failing to report discharges in the Puerto Nuevo collection system, and by failed to meet effluent limitations and operations and maintenance obligations at numerous facilities island-wide.
The United States filed suit in the U.S. District Court for the District of Puerto Rico against PRASA and the Commonwealth of Puerto Rico. The defendants were accused of violating PRASA's National Pollutant Discharge Elimination System (NPDES) permits and the Clean Water Act.
The accusations were resolved with a settlement, in which defendants agreed to make major upgrades, improve inspections, and cleaning of existing facilities within the Puerto Nuevo system and continue improvements to its systems island-wide. PRASA will spend approximately $1,500,000,000 to make necessary improvements, invest $120,000,000 to construct sanitary sewers that will serve communities surrounding the Martn Pena Canal and undertake a comprehensive operation and maintenance program in the Puerto Nuevo sanitary sewer system.

3. *California Sportfishing Protection Alliance v. West Sonoma County Disposal Service Inc.* 25 Trials Digest 16th 9, 2013 WL 3149219 (N.D.Cal.)

Northern District Federal Court/San Francisco

MXJ Notes: Water recycling facilities accused of discharging polluted storm water.

Settlement Amount: $150,000

$150,000 to the Rose Foundation for Communities and the Environment for mitigation to fund projects to benefit water quality in the Russian River watershed, the Petaluma River watershed or Suisun Bay.

Defendants agreed to implement structural best management practices to improve the storm water pollution prevention measures at the facilities including installing water decontaminator catch basin inserts, storm water conveyances systems and water decontamination test filter systems.

Summary of Facts/Contentions:
Defendants Redwood Empire Disposal Inc., West Sonoma County Disposal Service Inc. and Novato Disposal Service Inc. reportedly operated waste recycling facilities in Santa Rosa and

Petaluma, Calif. Plaintiffs California Sportfishing Protection Alliance (CSPA) and Petaluma River Council (PRC) claimed defendants collected and processed aluminum cans, aluminum foil, paint cans, spray cans, steel cans, various plastic and paper materials, glass bottles and jars, electronic waste and used oil. Plaintiffs claimed these activities were performed outside on surfaces exposed to storm water and water flows. Plaintiffs claimed defendant's facilities lacked sufficient controls such as grading, berming, roofing, containment, or drainage structures to prevent rainfall and storm water flows from coming into contact with contaminates. Plaintiffs further alleged defendants' facilities lacked adequate storm water treatment technology to treat contaminated storm water.

Plaintiff alleged defendants discharged polluted storm water and non-storm water pollutants from their waste recycling facilities, contributing the decline in water quality of receiving waters within the North Coast and the San Francisco Bay regions. Plaintiffs alleged violations of the Federal Water Pollution Control Act, 33 U.S.C.A. § 1251 to 1387.

4. *California Department of Toxic Substances Control vs. City of Chico, California*
18 Trials Digest 11th 10, 2008 WL 1886100 (E.D.Cal.)

Eastern District Federal Court/Sacramento

MXJ Notes: Plaintiff sought to recover its costs associated with responding to the contamination of drinking water. Defendants include a city that operated a sanitary and storm sewer system.

Settlement Amount: $11,920,000

Plaintiff: $5,100,000 from defendant Sunset View Cemetery Association; $3,200,000 from defendants Sunset View Cemetery Association and Pedens; $50,000 from Peden; $100,000 from third-party defendant Metcalf & Eddy Inc.; $50,000 from third-party defendant Chico Unified School District; $2,200,000 from defendant City of Chico; $220,000 from defendants Noret and Weiss. Defendant California Water Service Company agreed to spend up to $1,000,000 on the design and construction of remedial measures. According to plaintiff's counsel, defendant California Water Service Company agreed to perform other work and estimated the total cost of all work to be performed at $3,000,000. Defendant Noret: $45,000 from defendants Shilling. Defendant Genevieve Conley Revocable Trust was dismissed by stipulation.

Claimed Damages: $5,000,000

Summary of Facts/Contentions:
Plaintiff California Department of Toxic Substances Control sought to recover cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") from defendants City of Chico, California, Noret Inc., Goldie Olson, Peden Enterprises, John Peden, Lorena Peden, Sunset View Cemetery Association Inc., Norville R. Weiss, Janet L. Weiss, and California Water Service Company. Defendant City of Chico operated a sanitary and storm sewer system throughout the central downtown business district of Chico. Noret Inc., Norville R. Weiss, and Janet L. Weiss operated Esplanade Dry

Cleaners in Chico. Goldie Olson, John Peden, Lorena Peden, and Peden Enterprises operated Flair Cleaners in Chico. Sunset View Cemetery Association Inc. owned the property that housed Flair cleaners. California Water Service Company operated public water supply wells.

Plaintiff alleged defendants released hazardous substances, including perchloroethylene ("PCE") from their locations during their ownerships of the properties. Plaintiff claimed the drinking water of Chico was contaminated by a plume of hazardous substances.

Contamination was first detected in 1984, and, in 1986, plaintiff began to investigate the nature and extent of contamination. Plaintiff sought to recover its costs associated with responding to the contamination from defendants.

Defendants Peden cross-claimed against Chico Unified School District, claiming the school drilled a well that acted as a conduit to spread the contamination to deeper groundwater, spreading the problem.

Defendants Noret and Weiss filed a third-party complaint against the Genevieve Conley Revocable Trust, Anna L. Shilling, and Robert B. Shilling, claiming they operated Sunshine Cleaners and contributed to the contamination.

Defendant Sunset View Cemetery Association filed a third-party complaint against Metcalf & Eddy, claiming the firm was hired to test the lateral sewer line because plaintiff was concerned that leaks from the line and the adjoining main sewer line contributed to groundwater contamination. Defendant Sunset View claimed Metcalf & Eddy performed a high pressure/power-flushing of the sewer line, even though it knew or should have known the lines contained PCE. Defendant Sunset View claimed the flushing caused additional contamination.

5. *Reep v. City of Milwaukee*
2013 WL 10739597 (Wis. Cir.)

Circuit Court of Wisconsin, First Judicial District, Milwaukee County

MXJ Notes: Homeowners file suit against a sewerage district for raw sewage in basement; sharing simply for the fact it was a verdict against a Wisconsin sewerage district.

Trial Type: Jury

Verdict: Plaintiffs, $1,491,000
$590,000.00 to plaintiffs for cost of repair/restoration
$501,000.00 to plaintiffs for loss of contents
$400,000.00 to plaintiffs for loss of home value

Summary of Facts/Contentions:
Tom Reep and other homeowners of the Lincoln Creek and Lincoln Park neighborhoods claimed as much as three feet of raw sewage entered their basements.

Reep and numerous other homeowners filed a lawsuit against the City of Milwaukee, Milwaukee Metropolitan Sewerage District (MMSD), Veolia Water North America - Central L.L.C., and Veolia Water Milwaukee L.L.C. The plaintiffs alleged the defendants negligently maintained and operated their sewer systems. They also contended MMSD and Veolia closed access to a deep tunnel. The plaintiffs sought compensation from the defendants jointly and severally.

The City of Milwaukee denied negligence and contended the other defendants were causally negligent

MMSD and Veolia claimed they were immune from liability.