



April 22, 2019

Commission on Catastrophic Wildfire Cost & Recovery
1400 Tenth Street
Sacramento, California 95184

Submitted Via Email: wildfirecommission@opr.ca.gov

Re: Public Drinking Water Suppliers, Wildfire Liability, & Inverse Condemnation

Dear Commissioners:

The organizations and public water suppliers listed above sincerely appreciate the Commission on Catastrophic Wildfire Cost & Recovery (Commission) issuing a request for public comment on a range of topics, including the fairness of the current wildfire liability regime in California. As part of your important work, we respectfully encourage the Legislature and Governor to address the negative impact the existing wildfire liability regime has on California's public drinking water suppliers, their ratepayers, and dependability of the state's drinking water systems.

The same legal regime that has threatened the financial standing of California's major electric and gas providers threatens the very existence of the state's public drinking water suppliers and their ability to provide safe, dependable drinking water to customers.

The dangers posed by the current application of the inverse condemnation doctrine are highlighted by the judgment against the Yorba Linda Water District ("YLWD") after the 2008 Freeway Complex Fire.¹ In

¹ *Itani v. Yorba Linda Water District*.

this case the Superior Court determine that, “neither the Plaintiffs nor the YLWD (or any YLWD public improvement) caused the Freeway Complex Fire.” Despite this, Yorba Linda Water District had to pay out nearly \$70 million because a portion of its water system was damaged by the fire, which interrupted the flow of water to the fire hydrants in one neighborhood. The Superior Court did not find that Yorba Linda Water District did anything wrong or was negligent: “The interruption of water service . . . was an accident that was not desired or intended by anyone. The service interruption was not caused by a decision of YLWD’s Board of Directors.” Yorba Linda Water District had “full liability” even though it was also a victim of the fire and because the fire damaged the water system.

And now this same logic is being used as the foundation of suits against other public drinking water providers, including the City of Ventura in relation to the 2017 Thomas Fire.² In this instance, the City of Ventura is being sued because portions of its water system are dependent upon electricity. When Southern California Edison was unable to provide the needed electricity during the fire, the City of Ventura was unable to pump water to some fire hydrants, which then could not be used in the firefighting efforts. As was the case with Yorba Linda Water District, the City of Ventura is not being accused of starting the fire, but because it was one of the fire’s many victims.

The threat posed by this legal doctrine to California’s public drinking water suppliers is significant:

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

These risks will be magnified if the Legislature addresses these challenges for electric and gas utilities, but not the hundreds of public drinking water suppliers in California, for they could become the new reinsurers of last resort for communities ravaged by wildfires. In this instance, public water suppliers – and their ratepayers – may be left with the financial responsibility for fires caused by someone else, and even when we are the victim of those very same fires.

To address the inequities of the current wildfire liability regime, the Commission should propose, and the Legislature should adopt, a clear and unambiguous standard that public drinking water systems are not subject to strict liability when their facilities are unable to provide sufficient amounts of water or water pressure to prevent the spread of a fire, so long as the fire was not started by the public drinking water system. We should not wait for one or more public water suppliers to declare bankruptcy before addressing this significant issue.

Cc: The Honorable Gavin Newsom, Governor
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

² *Wilkinson v. Southern California Edison, Edison International, & City of Ventura.*

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.