Court of Appeal No. H031540

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

COUNTY OF SANTA CLARA et al.,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

Respondent.

ATLANTIC RICHFIELD COMPANY, et al.,

Real Parties in Interest.

Santa Clara County Superior Court No. CV 788657
Hon. Jack Komar, Judge Presiding

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF CALIFORNIA WATER AGENCIES IN SUPPORT OF PETITIONERS COUNTY OF SANTA CLARA, ET AL.

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DESCRIPTION AND INTEREST OF AMICUS CURIAE

Amicus Curiae Association of California Water Agencies (ACWA) is a voluntary, statewide, nonprofit association comprising 488 public water agencies and founded in 1910. Together, these public agencies deliver more than 90 percent of the water used in California by cities, businesses, and citizens. In addition to public agency members, ACWA also includes mutual water companies and other private, nonprofit water-related agencies. Pollution from a variety of human activities has affected many ACWA members, requiring them to abandon public water supplies and/or incur expensive costs of treating water to make it clean, safe and healthy before delivering it for public consumption. ACWA actively participates in legislative and regulatory advocacy relating to water rights and water quality on behalf of its members.

ACWA has an interest in this litigation because contamination places a growing burden on its members. Many of ACWA's members have brought, or may be forced to bring, litigation to recover the enormous costs of dealing with contamination. These costs include replacing contaminated water supplies, and/or treating contaminated water so that it is suitable for delivery to the drinking public. In these lawsuits, ACWA's members seek to

assure that those responsible for pollution – and not the citizens who pay water rates – bear this immensely expensive burden.

Polluted drinking water is a public nuisance, and those who participate in polluting drinking water unquestionably participate in creating a nuisance. Public water suppliers have a usufructuary property interest in the water they deliver to the public. Accordingly, lawsuits by public agency plaintiffs seeking to restore their drinking water commonly assert claims that sound in nuisance.

The trial court's ruling adversely affects ACWA's public agency members. Public water agencies injured by pollution commonly seek both to abate the nuisance and to recover damages caused by the nuisance. In pursuing these remedies, public water agencies face a critical need for assistance from highly-qualified, well-funded outside legal counsel to assist them in litigation to recoup the extraordinary costs of dealing with contamination of public water supplies. These cases –which frequently pit small communities against literally the largest corporations in the world – are extremely complex and expensive to litigate. Without the help of outside contingency counsel, many if not most ACWA members would lack the resources to pursue such actions.

These cases address issues of pressing public interest. Brought to protect both the public health and the public fisc, they are highly complex cases both legally and technically. They are also extremely expensive to litigate. The legal resources of many, if not most, public agencies are already stretched beyond their limits. Accordingly, public agencies have turned with increasing frequency to outside litigation counsel retained on a contingency fee basis. In recent years, such litigation has led to significant recoveries in litigation to remedy contamination from a wide range of chemicals, including MTBE, PCE, DBCP, perchlorate and others.

Litigation of this sort generally asserts (among other legal theories) that contamination of drinking water supplies constitutes a public nuisance, entitling the agency both to abatement and damages. The trial court's ruling, which potentially could bar public entities from retaining outside legal counsel on a contingency fee basis wherever the complaint asserts a public nuisance claim, would effectively stymie this kind of litigation, and with it any hope of abating the serious and expensive public health threats posed by pollution. It would jeopardize the ability of public water agencies to remedy large-scale, serious and ongoing public health and environmental hazards. And it would give the companies responsible for the problems – many of

which have virtually unlimited war chests to pay for lawyers and experts – a free pass for their misconduct.

SUMMARY OF ARGUMENT

First, widespread pollution degrades drinking water, one of California's most precious resources. This pollution comes from a plethora of human activities, and includes chemicals from agriculture like DBCP (1,2-dibromochloropropane), TCP (1,2,3-trichloropropane) and others; gasoline-related compounds like MTBE (methyl tertiary butyl ether); perchlorate (rocket fuel); solvents like PCE (perchloroethylene) from dry-cleaning and TCE (trichloroethylene) from commercial and industrial degreasing; and many others. Since 1984, more than 8,000 California public drinking water wells have been shut down, many of them because of the presence of these and other compounds. Such pollution imposes enormous and unavoidable burdens on public agencies responsible for delivering clean and safe water to the public. And litigation to recover the costs of dealing with contaminated drinking water is itself extremely complex, expensive and burdensome on agencies already overburdened with the real work of delivering water to the drinking public. In contrast to the limited resources of public agency plaintiffs in these cases, defendants frequently rank among

the biggest companies in the world, with virtually unlimited litigation war chests.

Second, polluted drinking water is a nuisance.

Third, actions by public water agencies for abatement and damages arising from polluted drinking water raise none of the concerns about outside contingency fee counsel that underlay the Supreme Court's decision in *People ex rel Clancy v. Superior Court* (1985) 39 Cal.3d 740, for at least three reasons: (1) because water agencies hold a usufructuary interest in the affected water they suffer special injury from the nuisance created by polluters; thus their role as plaintiff in such suits is primarily that of a tort victim, rather than a sovereign seeking to vindicate the rights of its residents or exercising governmental powers; (2) in stark contrast to the defendant in *Clancy*, a polluter whose conduct fouls drinking water engages in no constitutionally-protected activity; and (3) plaintiffs' counsel in these cases have no need to address policy choices or value judgments regarding the regulation of pollution; rather, they simply argue, as in most cases in the private sector, that their clients have suffered injury from defendants' tortious misconduct. Moreover, the trial court's ruling would undermine public policy by on the one hand jeopardizing the ability of public water agencies to remedy large-scale, serious and ongoing public health and

environmental hazards, and on the other hand giving the companies responsible for the problems a free pass.

ARGUMENT

I. WIDESPREAD POLLUTION DEGRADES CALIFORNIA'S PRECIOUS DRINKING WATER SUPPLIES AND IMPOSES ENORMOUS COSTS

"Whiskey is for drinking," Mark Twain reputedly said,[1] "but water is for fighting over." Indeed, "[n]o other resource is as vital to California's cities, agriculture, industry, and environment as this liquid gold."[2] Fights over California's water have shaped the state's history for more than a century. In recent years fights involving the "oil of the 21st century"[3] increasingly have focused on water quality. In particular, communities have resorted to the courts to assure that those responsible for pollution, and not the drinking public, pay to preserve and restore the quality of the State's drinking water supplies.[4]

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[1] *County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13, 18. Mark Twain widely gets credit for this statement, but attribution has not been confirmed. *See* www.twainquotes.com (directory of Mark Twain's maxims, quotations and various opinions).

[2] *County of Imperial, supra*, 152 Cal.App.4th at 18.

[3] *Id.*

[4] *See, e.g.*, C. Rechtschaffen & D. Antolini (eds), Creative Common Law Strategies for Protecting the Environment (ELI 2007) ("Creative Common Law

Groundwater in California is an important but limited and highly threatened resource. California is the "single largest user of groundwater in the nation [and] about 43 percent of all Californians obtain drinking water from groundwater."[5] Many small towns in California rely entirely on groundwater. In dry years, California can rely on groundwater for up to two thirds of the State's total water consumption.[6]

California law requires public agencies to assess and verify their ability to meet projected demand.[7] Increasing scarcity already puts growing pressure on water suppliers as demand for this crucial resource continues to grow; the State expects 30 percent population growth by 2020.[8]

Pollution makes the problem even worse. Contamination from a wide range of human activities poses an enormous threat to drinking water. Anthropogenic compounds already contaminate vast portions of California's groundwater resource, including large numbers of public drinking water

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Strategies") (describing, *inter alia,* recent litigation by California public agency plaintiffs over DBCP, MTBE and PCE contamination).

[5] California Department of Water Resources (CDWR), Bulletin 118 [Draft] (2003).

[6] NRDC, California's Contaminated Groundwater: Is The State Minding The Store? (2001).

[7] *See, e.g.,* Cal. Water Code §§10610 et seq.; id. §§10910 et seq.; Gov. Code §§66493 et seq.; *Friends of the Santa Clara River v. Castaic Lake Water Agency* (2004) 123 Cal.App.4th 1 (invalidating Urban Water Management Plan for not adequately addressing both the time needed to implement available treatment technology and reliability of groundwater supply before installation of treatment).

[8] CDWR, *supra.*

supplies. For example:

- DBCP, an agricultural soil fumigant banned in California since 1977 because of its toxicity and potential to contaminate groundwater, "is known to have contaminated groundwater in an area encompassing 7,000 square miles of the San Joaquin Valley,"[9] and has been detected in public-supply wells in every county in the Valley.[10] The California State Water Resources Control Board (SWRCB) reports that as of 2002 nearly 400 active or standby public drinking water wells contained DBCP at levels that exceed the State's Maximum Contaminant Level (MCL).[11] Nearly 3,000 wells contain DBCP at lower levels.[12]

- The United States Geologic Survey has reported that "At least

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[9] Board on Agriculture, Pesticides and Groundwater Quality: Issues and Problems in Four States 15 (Nat'l Academies Press 1986).

[10] M. Planert & J.S. Williams, Groundwater Atlas of the United States, Segment 1 California Nevada (USGS 1995) http://ca.water.usgs.gov/groundwater/gwatlas/valley/quality.html.

[11] SWRCB, [DRAFT] Groundwater Information Sheet Dibromochloropropane (DBCP) (Rev. Oct. 2002), reproduced at http://www.swrcb.ca.gov/gama/docs/dbcp_oct2002_rev3.pdf. The DHS reports that these wells are located in nearly 150 public drinking water sources. CA DHS, Drinking Water: Overview of Monitoring Results and an Indication of Dominant Contaminants (update Jun. 2006) ("DHS Monitoring Overview"), available online at www.dhs.ca.gov/ps/ddwem/chemicals/monitoring/default.htm.

[12] J. Troiano et al., "Summary of Well Water Sampling in California to Detect Pesticide Residues Resulting from Nonpoint-Source Applications" 30 J. Environmental Quality 448, Table 4 (2001), available at http://jeq.scijournals.org/cgi/content/full/30/2/448/TBL4?ck=nck.

50 other pesticides [besides DBCP], including 1,2--dichloropropane and ethylene dibromide, had been detected in ground water in the Central Valley by 1984."[13] These include the herbicides simazine (detected in nearly 700 wells), diuron (in nearly 400 wells), atrazine (more than 250 wells), bromacil (more than 200 wells), and others.[14]

- As of 2006, 85 water systems in 16 counties had reported confirmed detections of 1,2,3-trichloropropane (a chemical associated with certain agricultural chemicals) in 303 sources.[15]

- The gasoline component MTBE (methyl tertiary butyl ether), widely used in the 1990s but banned in California since the end of 2003 because of its potential to contaminate groundwater, also has been detected widely. DHS reports that nearly 90 sources in 32 counties have reported MTBE, including 60 at

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[13]DHS Monitoring Overview, *supra.*.

[14] D. Bartkowiak et al., "Sampling for pesticide residues in California well water, 1999 update of the Well Inventory Database" (SWRCB 1999).

[15] CA DHS, 1,2,3-Trichloropropane in Drinking Water: Overview (updated Aug. 2006), www.cdph.ca.gov/certlic/drinkingwater/Pages/123TCP.aspx. California has not yet established a Maximum Contaminant Level for TCP, but the State requires public water suppliers to notify agencies and the public at levels that exceed 5 parts per trillion. *Id.* All of the reported detections exceeded this level. *Id.*

levels that exceed the State's maximum contaminant level.[16]

- Perchlorate – a toxic chemical associated with rocket fuel and explosives – has been detected in more than 350 public water sources since 1997.[17]

- Public water suppliers have reported levels of perchlorethylene (PCE), a solvent associated with dry-cleaning, at levels exceeding the MCL in at least 262 drinking water sources.[18]

- Trichloroethylene (TCE), another solvent associated with various commercial, industrial and military de-greasing operations, has exceeded the MCL in 243 public water sources.[19]

- The State Water Resources Control Board (WRCB) reports that "Since 1984, over 8,000 public water wells have been shut down," many due to the detection of chemicals such as MTBE,

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[16] CA DHS, MTBE: Regulations and Drinking Water Monitoring Results (updated Nov. 2006), ww2.cdph.ca.gov/certlic/drinkingwater/Pages/MTBE.aspx.
[17] CA DHS, Drinking Water: Overview of Monitoring Results 1995-2004, and an Indication of Dominant Contaminants (updated Jul. 2005) ("DHS Overview), www.dhs.ca.gov/ps/ddwem/chemicals/monitoring/results97-04/default.htm#INDIVIDUAL%20CONTAMINANTS%20IN%20CONTAMINANT%20TYPES.
[18] DHS Overview, *supra.*
[19] *Id.*

solvents, and perchlorate.[20]

- Recent studies by State scientists found toxic solvents and agricultural chemicals in virtually all wells tested in the Los Angeles region.[21]

The good news is that the technology exists to remove these chemicals before the public receives drinking water that would otherwise contain them. The bad news is that such treatment costs a very great deal. Public water suppliers must meet federal and state minimum drinking water standards, known as Maximum Contaminant Levels.[22] However, the costs of complying with MCLs underestimates the costs of providing clean water to communities as suppliers strive to provide uncontaminated water – not the maximum permitted degraded water of the MCLs.[23] Either way,

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[20] State Water Resources Control Board, GAMA: Groundwater Ambient Monitoring & Assessment Program homepage, www.waterboards.ca.gov/gama/.

[21] "Survey reveals contaminants in most wells" (L.A. Daily News, Mar. 28, 2007) (reporting findings of volatile organic compounds in 33 out of 35 wells tested, and pesticides in 31 out of 35).

[22] *See, e.g.*, Federal Safe Drinking Water Act, 42 U.S.C. §§ 300f et seq.; California Safe Drinking Water Act, Cal. Health & Safety Code §§ 116270 et seq.; Cal.Code Regs. Tit. 22, §§ 64400 et seq.

[23] A Maximum Contaminant Level ("MCL") established by DHS pursuant to the California Safe Drinking Water Act (Health & Safety Code §§ 116275 et seq.) represents the statewide standard of *minimum* potability for drinking water provided by public water suppliers. State law expressly defines an MCL as "the *maximum permissible* level of a contaminant in water." Cal. Health & Safety Code § 116275 (emphasis added). Moreover, both CADHS and its sister agency, the State Water Resources Control Board ("SWRCB") broadly prohibit

contamination imposes huge and unavoidable costs on communities ill-prepared to pay them.

Abandoning and replacing polluted water supplies is expensive, even assuming that option exists. And the costs of treating contaminated water are even higher. Communities must design and install treatment facilities, and then operate and maintain them – frequently for decades. Multiple contaminants can make the costs disproportionately large because they can require entirely different treatment methodologies, and the mixes may make

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degradation of water quality, even where existing water quality exceeds the minimum quality necessary to satisfy the MCL.b *See, e.g.,* California Dep't Health Services, *Guidance for Direct Domestic Use of Extremely Impaired Sources (Policy Memo 97-005)*, Nov. 1997 ("MCLs should not be used to condone contamination up to those levels"); California SWRCB, *Statement of Policy with Respect to Maintaining High Quality Waters in* California, Res. No. 68-16, Oct. 1968 ("existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State"); California SWRCB, *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304*, Res. No. 92-49 (1992) (authorizing Regional Water Boards "to require complete cleanup of all waste discharged and restoration of affected water to background conditions (i.e., the water quality that existed before the discharge)".) In short, the MCL does not constitute a license for polluters to foul the waters of the State up to the permissible limit of the MCL. *See, e.g., In re MTBE Litigation*, 458 F.Supp.2d 149 (S.D.N.Y. 2006) (there is no "persuasive reason why the MCL should establish the scope of the protected interest or define, as a matter of law, what is and what is not an injury. ...[T]he 'MCL is a regulatory standard that governs [water providers'] conduct in supplying water to the public but not the Defendants' conduct in manufacturing and selling a defective product'"). *Accord, e.g., Hartwell Corp. v. Superior Court,* 27 Cal.4th 256 (2002) (dismissing claims against water suppliers involving below-MCL contamination, but not against polluters).

the combination even more expensive than each would cost alone.[24] For example:

- DBCP-related treatment costs run about $1 million per well in capital costs plus annual O&M of about $100,000.[25]

- Estimates of the costs of treating a single public well contaminated with MTBE can range up to nearly $6 million in capital (design and construction) costs, plus between approximately $2 million and $5.7 million in annual operating and maintenance (O&M) costs, depending on influent MTBE concentrations.[26] The tiny South Tahoe Public Utility District received about $60 million earmarked for compensatory damages in its MTBE litigation,

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[24] *See, e.g.,* "Cold War Legacy Burdens Water Utilities," American Water Works Assn (Jun. 7, 2005) (City of Redlands had to shut down two wells receiving granular activated carbon treatment for TCE and DBCP because of newly-discovered presence of perchlorate "because GAC doesn't effectively remove perchlorate"), available on line at http://www.awwa.org/Communications/mainstream/2005/0607/Feature02Story01perchlorate.cfm.

[25] G.P. Hanna, Jr. et al., "Strategy for Mitigation of DBCP of a Groundwater Basin" in Proceedings of the 50th Industrial Waste Conference 87 (Purdue Univ. 1995). DHS' estimates are similar: Capital costs for GAC treatment to remove DBCP range from roughly $500,000 (for a small well) to more than $2 million, while annual costs range from about $80,000 to more than $120,000. *See* CA DHS, "MCL Evaluation for [DBCP]" 7, 12 (Nov. 1999).

[26] D. Creek et al., "Treating MTBE-Impacted Drinking Water Using Granular Activated Carbon" 32 (California MTBE Research Partnership 2001).

which settled in 2002.[27] The City of Santa Monica obtained in its lawsuit a treatment facility to remove MTBE from four large City wells; the trial court placed the value of this facility at approximately $200 million.[28]

- Treatment costs for perchlorate are even higher. Industry estimates place the annual costs to public water suppliers of removing perchlorate from drinking water at from $50 million to $100 million per year, or $1 billion to $2 billion dollars over a 20 year period.[29]

Finally, the costs of litigating to make a community whole from pollution are themselves enormous. Lawsuits to recoup replacement and/or treatment costs are complex, lengthy, and expensive.[30] They strain the already-

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[27] *See* "Gasoline with MTBE Defective," CA Jury Verdicts Weekly (Aug. 26, 2002)

[28] "City reaches landmark settlement," Santa Monica Daily Press at 1 (Nov. 22, 2003) (describing settlement with Exxon, Chevron and Shell). The City also received approximately $120 million in cash. *Id.*

[29] Alliance of Automobile Manufacturers, et al. "Development of Maximum Contaminant Level for Perchlorate" 3 (Aug. 9, 2004), available on line at http://www.californiaspaceauthority.org/images/worddocs/perchlorate-coal-letter.doc. One Southern California water district – which provides water for about 70,000 people, expects to need to spend as much as $30 million to treat perchlorate. *See* "New drinking water rule could bring $30 million tab," Press Enterprise (Aug. 2, 2007).

[30] *See, e.g.*, V. Sher, "Taming the Tiger in the Tank: The South Tahoe Public Utility District and Its Methyl Tertiary Butyl Ether Litigation" in Creative Common Law Strategies, *supra* at 209 et seq. ("Over the course of nearly three

overextended resources of public water utilities, districts, and municipalities in terms of competence, legal resources, and financial abilities.

To make matters worse, defendants in such cases frequently include literally the biggest corporations in the world, with virtually unlimited legal and technical resources. For example, South Tahoe's and Santa Monica's successful MTBE lawsuits targeted major gasoline refiners, including Exxon, Shell, Chevron, Conoco Philips, and other enormous companies.[31] Similarly, the City of Modesto's PCE litigation sought recoveries from chemical giants Dow, PPG, Vulcan, and others.[32]

II. POLLUTED DRINKING WATER IS A NUISANCE

Civil Code § 3479 defines a "nuisance" as "[a]nything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property...." Section 3480, in turn, defines a "public nuisance" as "[a nuisance] which affects at the same time an entire community or

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years of pretrial proceedings, the parties took about 300 percipient witness depositions and about 150 expert depositions. .... The number of depositions alone underestimates their magnitude. .... Motions were similarly voluminous").

[31] *See* Jury Verdicts Weekly, *supra* (listing defendants and settlements).

[32] M. Axline & D. Miller, "Cleaning up the Dry Cleaning Mess: How One City Made Perchloroethylene Manufacturers Pay to Get Their Product Out of Public Drinking Water" in Creative Common Law Strategies, *supra* (Chap. 9).

neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

"It is beyond cavil that the public has a right to ... water that is free from environmental contamination."[33] It is well established that polluted water is a public nuisance for which public water suppliers can hold the appropriate parties responsible in court. As the U.S. Court of Appeals for the Ninth Circuit explained,

> Under [California] laws, polluted water is a public nuisance, ... and any person who creates or helps create and maintain a nuisance is liable for its abatement and damages.[34]

Significantly, *all* parties responsible for creating or maintaining polluted drinking water can be liable, including manufacturers whose

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[33] *In re MTBE Litigation*, 175 F.Supp.2d 593, 629 (S.D.N.Y. 2001) ("*In re MTBE Litigation I*"). This is clearly the rule both in California and elsewhere, *see, e.g., State v. Schenectady Chemicals, Inc.*, 117 Misc.2d 960, 459 N.Y.S.2d 971, 978 (1983) ("The common law rule has long been that water, like air, is an element in which no person can have an absolute property, yet, it is also, like air, free for the use of all, and the law has been diligent and rigorous to maintain it in its natural purity") (quotation marks and citation omitted).

[34] *State of California v. Campbell* (9th Cir. 1998) 138 F.3d 772, 782 (applying California law). *Accord, e.g., In re MTBE Litigation,* 457 F.Supp.2d 455, 465-66 (S.D.N.Y. 2006) ("*In re MTBE Litigation II*") (applying California law to MTBE contamination); *City of Modesto v. Superior Court,* 119 Cal. App. 4th 28 (2004) (dry cleaning solvents); *Selma Pressure Treating Co. v. Osmose Wood Preserving Co.* (1991) 221 Cal.App.3d 11601, 1609 (wood treatment chemicals); *KFC Western, Inc. v. Meghrig* (1994) 23 Cal.App.4th 1167 (release of petroleum products from underground tanks); *Wilshire Westwood Associates v. ARCO* (1993) 20 Cal.App.4th 732 (leaking underground petroleum tanks); *Capogeannis v. Superior Court* (1993) 12 Cal.App.4th 668 (leakage of petroleum from underground tanks installed by plaintiffs predecessor in interest).

products contaminate the environment. This can result from a failure to warn of a chemical's potential for polluting groundwater,[35] or other conduct that contributes to the creation of the nuisance.[36] For example, courts in recent years have affirmed the viability of nuisance damages claims for the costs of dealing with polluted drinking water supplies by public agencies against the manufacturers of dry-cleaning compounds and equipment,[37] and refiners of gasoline who chose to use MTBE.[38] The overlay of manufacturer conduct that has contributed directly to so much of the pollution virtually assures that major corporations with enormous litigation resources will oppose lawsuits by public water agencies to protect the public.

III. PUBLIC NUISANCE CLAIMS IN LITIGATION BY PUBLIC AGENCIES TO RESTORE DRINKING WATER SUPPLIES DO NOT IMPLICATE ANY OF THE SUPREME COURT'S CONCERNS IN CLANCY.

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[35] *See, e.g.,. Selma Pressure Treating Co, supra. (failure to warn of chemical's threat of contamination of groundwater supports nuisance liability); contra, City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575 (nuisance should not "become a monster that would devour in one gulp the entire law of tort").

[36] *See, e.g., City of Modesto v. Superior Court, supra* 119 Cal.App.4th at 43 (manufacturers of drycleaning solvents "who took affirmative steps directed toward the improper discharge of solvent wastes-for instance, by manufacturing a system designed to dispose of wastes improperly or by instructing users of its products to dispose of wastes improperly-may be liable" for nuisance, "but those who merely placed solvents in the stream of commerce without warning adequately of the dangers of improper disposal are not liable").

[37] *Id.*

[38] *See, e.g., In re MTBE Litigation I, supra,* 175 F.Supp.2d 593, 627 -630 (applying California nuisance law); *In re MTBE Litigation II, supra,* 457 F.Supp.2d at 465-66 (same, to nuisance damages claim by water district).

Nuisance litigation by public agencies to restore drinking water supplies to communities implicate none of the concerns about outside contingency fee counsel that underlay the Supreme Court's decision in *People ex rel Clancy v. Superior Court* (1985) 39 Cal.3d 740. At least three fundamental features of such actions distinguish them from the public nuisance abatement actions in *Clancy*.

First, because water agencies hold a usufructuary interest in the affected water,[39] they suffer special injury from the nuisance created by polluters.[40] Whether the nuisance action seeks abatement or damages, plaintiff's claims sound essentially in tort; the relief sought is to restore the community's water supply to its pre-contaminated condition and compensate it for its losses.[41] There are no criminal or quasi-criminal[42] aspects to these actions. Rather, plaintiffs' role in such suits "is that of a tort victim, rather than a

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[39] California public water suppliers hold a "usufructuary" interest in the underground water pumped by their wells. *In re MTBE II, supra,* 457 F.Supp.2d at 466. This interest equates to a possessory, protectable interest in real property. *See, e.g., National Audubon Soc. v. Superior Court* (1983) 33 Cal.3d 419, 441; *Wright v. Best* (1942) 19 Cal.2d 368, 382; *Fullerton v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 590, 598-99.

[40] *In re MTBE Litigation II, supra,* 457 F.Supp.2d at 466.

[41] *Id.*

[42] There are, of course, contamination-related actions in which the relief sought is civil penalties and other quasi-criminal relief. *See, e.g.,* Health & Safety Code § 25189.2 (unlawful disposal of hazardous waste); Fish & Game Code § 5650 (unlawful deposit of petroleum product into waters of the state). However, these are actions not related to special injuries suffered by public agency plaintiffs from the public nuisance presented by pollution of drinking water supplies. Amicus need not address such actions here.

sovereign seeking to vindicate the rights of its residents or exercising governmental powers."[43]

Second, a polluter whose conduct fouls drinking water engages in no constitutionally-protected activity. Defendants in actions to restore drinking water to communities stand in stark contrast to the defendant in *Clancy*, who faced quasi-criminal prosecution for activities that implicated First Amendment rights.

Third, plaintiffs' counsel in these cases have no need to "argue about the policy choices or value judgments ... regarding the regulation [of pollution]. Rather, plaintiffs' attorneys simply will be arguing, as they likely have in many other cases for private sector clients, that a tort has been committed against their clients."[44]

Moreover, the trial court's rule prohibiting outside contingency counsel simply because a case involves public agencies and public nuisances would seriously undermine the public's interest in obtaining clean water and holding polluters responsible for their actions. The Legislature has made clear that "Every citizen of California has the right to pure and safe drinking water," and that "It is the policy of the state to reduce to the *lowest level*

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[43] *City and County of San Francisco v. Philip Morris, Inc.*, 957 F.Supp. 1130, 1135 (N.D.Cal. 1997) (declining to disqualify contingency fee counsel in public agency action to recoup public costs related to smoking).
[44] *Id.* at 1135.

feasible all concentrations of toxic chemicals ...."[45] The trial court's rule would undercut these important policies by making litigation to enforce these rights and policies less likely.

Litigation against polluters to recoup the costs of protecting and restoring public water supplies promote issues of pressing public interest. Brought to protect both the public health and the public fisc, they are highly complex cases both legally and technically. They are also extremely expensive to litigate. The legal resources of many, if not most, public agencies are already stretched beyond their limits. As a practical matter, without the help of highly qualified, well-funded outside contingency counsel, many (if not most) many actions to protect public water supplies would simply not be brought because public water agencies lack the resources to pursue them.

The trial court's ruling, which bars public entities from retaining outside legal counsel on a contingency fee basis wherever the complaint asserts a public nuisance claim, would effectively stymie this kind of litigation, and with it any hope of abating the serious and expensive public health threats posed by pollution. It would jeopardize the ability of public water agencies to remedy large-scale, serious and ongoing public health and environmental hazards. And it would give the companies responsible for the problems –

[45] Health & Safety Code § 116270(a), (d).

many of which have virtually unlimited war chests to pay for lawyers and experts – a free pass for their misconduct.

In short, nuisance actions by public agencies to restore a contaminated environmental resource and compensate public agencies for the costs of doing so implicate none of the features present in *Clancy* that would impose limitations on retention of outside counsel on a contingency basis. Moreover, the trial court's rule would vitiate public policy by assuring that many of these important cases against polluters could not be brought.

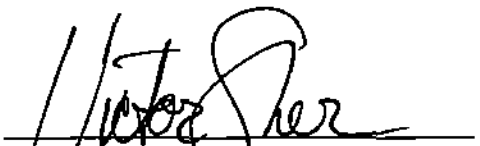
CONCLUSION

This Court should reverse the Order of the Trial Court.

DATED: August 20, 2007

Respectfully submitted,

SHER LEFF LLP



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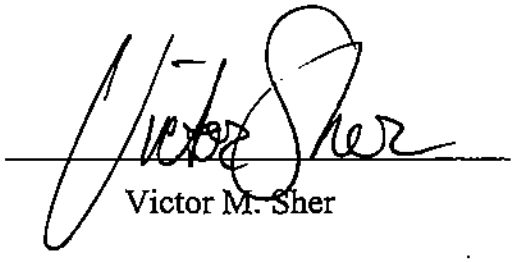
CERTIFICATION OF WORD COUNT

Pursuant to Rule 28.1(d)(1) of the California Rules of Court, I certify that, as counted by the computer program used to prepare this Amicus Brief, the Brief contains 3,022 words, not including the tables of contents and authorities, the caption page, signature block, or this certification.



Victor M. Sher

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PROOF OF SERVICE BY MAIL

County of Santa Clara v. Atlantic Richfield Company, et al. Case No. H 031540

I, Jessica S. Hall, say:

I am now and at all times herein mentioned have been over the age of eighteen years, employed in Santa Clara County, California, and not a party to the within action or cause; that my business address is 450 Mission Street, Suite 400, San Francisco, CA 94105. I am readily familiar with the County's business practice for collection and processing of correspondence for mailing with the United States Postal Service. I served a copy of **AMICUS CURIAE BRIEF OF THE ASSOCIATION OF CALIFORNIA WATER AGENCIES IN SUPPORT OF PETITIONERS COUNTY OF SANTA CLARA, ET AL.** by placing said copy in an envelope addressed to:

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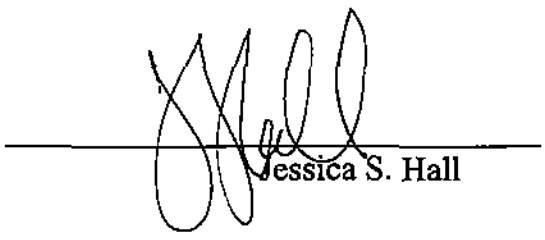

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