Tort/Nuisance Liability for CSOs & Stormwater

QUESTION

The following question was sent via e-mail to the NACWA Legal Affairs Committee on February 20, 2007:

"We are reaching out to you as a member of NACWA's Legal Affairs Committee with a request for information from a member agency, which has asked the following question:

Are you aware of any jurisdictions that have been involved in a lawsuit where the plaintiff's attorneys were arguing that a municipality's duty covered not only operation and maintenance of sewer/storm infrastructure but also the duty to upgrade, expand or extend those structures to "keep up" with development and to maintain an ability to handle 25 year storms without ponding or flooding on private property?"

RESPONSES

NACWA received the following responses from members, broken down by the state or city from which the response originated:

California: The West County Wastewater District in Northern California just settled a similar claim filed by Baykeeper and other environmental groups. The settlement did not involve a 25 year storm but was settled based on a 10 year 24 hour event. The environmentalists argued for more than a 10 year event but eventually capitulated.

The plaintiffs were clearly focused in part on capacity related SSOs. The District agreed to certain performance goals which allow 15 SSOs per 100 miles of sewer line in 2007 and scale down to 5 SSOs per 100 miles of sewer in 2016. The District also agreed not to have any capacity related SSOs after September 1, 2012 except those that result from an event that exceeds the 10year/24 hour design storm. Any capacity related SSOs that occur that do not fall within the exception can begin a meet and confer process regarding how SSOs can be avoided. The WCWD was represented by Melissa Thorme and Nicole Granquist of Downey, Brand's Sacramento office. They can be contacted for additional information.

Wisconsin: In Wisconsin there are no regulations to that effect, but common law can impose liability if the municipal system has unreasonably diverted stormwater onto another property. There are a number of defenses and immunities available to municipalities but depending on the facts of the case there could be a cause of action.

Arkansas: AR has statutory tort immunity and we are unaware of any AR inverse condemnation cases which would be relevant. In *City of Little Rock v. Sierra Club*, 351 F3rd 840 (8th Cir. 2003), plaintiff argued that the City had failed to discharge its CWA planning obligations regarding handling storm water in areas of new development (see headnote 13 discussion on page 847), although the opinion on appeal dealt mostly about the attorney's fee issues with just two paragraphs of discussion on the planning issue which plaintiff appealed.

Colorado: Colorado had a case a while back, *Powell v. Colorado Springs*, 131 P.3d 1129 (Colo. Ct. App. 2005), dealing with maintenance of sanitation facilities. That case is now pending before the Colorado Supreme Court. As a result of that case, a bill was introduced in the General Assembly, HB 07-1218: (http://www.leg.state.co.us/Clics/Clics2007A/csl.nsf/BillFoldersHouse?openFrameset) that would require not only maintenance but upgrade of the sanitation facilities.

Massachusetts: In Massachusetts municipalities have immunity for "discretionary functions." Discretionary functions include planning and design. They also include the decision to allocate resources, generally. However, negligent maintenance of public property is actionable. This is set out in Section 258, Section 10 of the Massachusetts General Laws, as follows:

Chapter 258: Section 10. Application of Secs. 1 to 8

Section 10. The provisions of sections one to eight, inclusive**, shall not apply to**:-

(a) any claim based upon an act or omission of a public employee when such employee is exercising due care in the execution of any statute or any regulation of a public employer, or any municipal ordinance or by-law, whether or not such statute, regulation, ordinance or by-law is valid;

(b) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused;

(c) any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations or interference with contractual relations;

(d) any claim arising in respect of the assessment or collection of any tax, or the lawful detention of any goods or merchandise by any law enforcement officer;

(e) any claim based upon the issuance, denial, suspension or revocation or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization;

(f) any claim based upon the failure to inspect, or an inadequate or negligent inspection, of any property, real or personal, to determine whether the property complies with or violates any law, regulation, ordinance or code, or contains a hazard to health or safety, except as otherwise provided in clause (1) of subparagraph (j).

(g) any claim based upon the failure to establish a fire department or a particular fire protection service, or if fire protection service is provided, for failure to prevent, suppress or contain a fire, or for any acts or omissions in the suppression or containment of a fire,

but not including claims based upon the negligent operation of motor vehicles or as otherwise provided in clause (1) of subparagraph (j).

(h) any claim based upon the failure to establish a police department or a particular police protection service, or if police protection is provided, for failure to provide adequate police protection, prevent the commission of crimes, investigate, detect or solve crimes, identify or apprehend criminals or suspects, arrest or detain suspects, or enforce any law, but not including claims based upon the negligent operation of motor vehicles, negligent protection, supervision or care of persons in custody, or as otherwise provided in clause (1) of subparagraph (j).

(i) an claim based upon the release, parole, furlough or escape of any person, including but not limited to a prisoner, inmate, detainee, juvenile, patient or client, from the custody of a public employee or employer or their agents, unless gross negligence is shown in allowing such release, parole, furlough or escape.

(j) any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer. This exclusion shall not apply to:

(1) any claim based upon explicit and specific assurances of safety or assistance, beyond general representations that investigation or assistance will be or has been undertaken, made to the direct victim or a member of his family or household by a public employee, provided that the injury resulted in part from reliance on those assurances. A permit, certificate or report of findings of an investigation or inspection shall not constitute such assurances of safety or assistance; and

(2) any claim based upon the intervention of a public employee which causes injury to the victim or places the victim in a worse position than he was in before the intervention; and

(3) any claim based on negligent maintenance of public property; (4) any claim by or on behalf of a patient for negligent medical or other therapeutic treatment received by the patient from a public employee.

Nothing in this section shall be construed to modify or repeal the applicability of any existing statute that limits, controls or affects the liability of public employers or entities.

Emphasis added.

Nuisance, on the other hand, is allowed as a cause of action. A factfinder, judge or jury, would have to find that a water and sewer utility was making "unreasonable use of its property" in causing water to flow onto the property of another and causing damage. The theory is that a landowner has the right to make reasonable use of his property regardless of the fact that the natural course of waters is altered and that harm to another landowner is caused thereby. If this theory fails - as it did in *DeSanctis v. Lynn Water and Sewer Commission*, 423 Mass 112 (1996), then the plaintiff can sue on the theory of negligent trespass. The jury must determine that the utility was negligent and that the negligent entry of water onto the plaintiff's land caused him harm. This claim likewise failed in

DeSanctis because of comparative negligence on the part of the plaintiff, in this case illegally filling wetlands on his property.

Raleigh, NC: The City of Raleigh is involved in a slightly less aggressive demand. The plaintiffs contend the City is liable because it failed to maintain or improve a private drainage which starts with a stormwater retention pond. The plaintiffs contend that it is now part of the stormwater utility for which stormwater fees are being charged. The rapid draw down time for the stormwater pond causes yard flooding, but no structural flooding, after rain events.

We are defending on several grounds including the fact that we have no ownership interest in the drainage, and thus no access to improve or maintain the drainage.