Colantuono, Levin & Rozell, APC
555 West 5th Street, 30th Floor
Los Angeles, CA 90013
Main: (213) 533-4155
FAX: (213) 533-4191
www.clrlawfirm.com

Michael G. Colantuono
mcolantuono@clrlawfirm.com

June 4, 2002

Appellate Court Invalidates Salinas' Storm Water Fee

Introduction. The federal Clean Water Act requires local governments which own storm drains that flow to rivers and oceans to obtain a permit from the State's Regional Water Quality Control Boards (RWQCBs) under the National Pollutant Discharge Elimination System (NPDES). In recent years, the State's regional boards have imposed increasingly expensive requirements on the operators of storm drains, such as the recently imposed requirement of the Los Angeles regional board that cities and counties which own storm drains eliminate **all** litter from those storm drains – if a single Styrofoam cup should reach the ocean, the agencies would be in violation of federal law.

The federal and state governments have not funded this mandate, and California's local governments have been looking for resources to fund these programs without harming other important local services such as police, fire, library and park programs. Salinas' decision to impose a storm water fee on owners of improved property in that City who benefit from the storm drain programs was thus closely watched by local governments around the state. That fee was challenged by the taxpayer groups, who argued that it was a "property related" fee which a 1996 ballot measure, Proposition 218, required to be approved by a vote of the affected property owners.

On June 3, 2002, in a decision[1] which this author views as contrary to controlling precedent, the Sixth District Court of Appeal in San Jose reversed a trial court ruling for Salinas. If the case is not reheard by the Court of Appeal or reviewed or depublished by the California Supreme Court, it will present a significant roadblock to funding NPDES compliance. This case note summarizes the issues in the case and the appellate court's reasoning and notes options for local governments seeking means to fund storm water programs.

The Decision. The appellate court tells us that Salinas imposed its fee on "every developed parcel of land, within the City, and the owners and occupiers thereof, jointly and severally" and calculated the fee "according to the degree to which the property contributed runoff to the City's drainage facilities" as measured by "impervious area." That phrase, in turn, was defined as areas "modified by the action of persons to reduce the land's natural ability to absorb and hold rainfall." The City argued that this is not a property-related fee within the sweep of Prop. 218, but rather a fee on those who elect to use a city service. The City pointed out that property owners could avoid the fee by not using the storm water service, as by leaving their

[1] The case is Howard Jarvis Taxpayers Ass'n, et al. v. City of Salinas, et al., Sixth DCA Case No. H022665 (filed June 3, 2002).

properties in their natural state or by making other arrangements to prevent storm water from reaching the City's facilities. This last point is not merely hypothetical, as the Los Angeles RWQCB's newest NPDES permit also requires certain new developments to include on-site groundwater recharge facilities sufficient to retain on-site rainfall from all but the largest storms.

The court rejected Salinas' argument in conclusory fashion: "Accordingly, the resolution [imposing the fee] makes the fee applicable to 'each and every developed parcel of land within the City.' This is not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business, as the City suggests." The court's references to metered water use and to business fees were intended to distinguish a 2000 decision of a Los Angeles panel of the Court of Appeal which had found metered water fees outside the scope of Prop. 218, and a 2001 decision of the California Supreme Court giving Prop. 218's definition of "property related fee" a very narrow sweep in a case involving housing code enforcement fees.

The appellate court in the *Salinas* case labeled the provision of that City's fee resolution allowing a property owner to reduce or eliminate the fee by showing that other arrangements for storm water were in place as "the Proportional Reduction clause." The court dismissed the City's claim that this made the fee non-property related with essentially no analysis, writing: "A property owner's operation of a private storm drain system reduces the amount owed to the City to the extent that runoff into the City's system is reduced. The fee nonetheless is a fee for a public service having a direct relationship to the ownership of developed property." This language quotes part of the definition of the property related fees to which Prop. 218 applies, but not all of it. It would seem that the fees for housing inspection services and metered water charges are also "fees for public services having a direct relationship to the ownership of developed property" but were nonetheless found exempt from Prop. 218 by previous courts. Thus, the decision would appear to be inconsistent with the Supreme Court's construction of Prop. 218 and the construction of the Los Angeles appellate court, as well.

The *Salinas* court also ignored a number of appellate cases holding that the "broad construction" language of the uncodified Section 5 of Prop. 218 is not a substitute for determining the actual intent of the framers of the measure. Instead, the court relies heavily on that section for both its conclusion that Salinas' fee is property-related and a conclusion the Salinas' fee is not exempt from the voter approval requirement of Proposition 218's Article 13D, section 6(c) as a "water" fee or a "sewer" fee.

The City of Salinas argued that, even if its fee were property related and subject to Prop. 218 in general, it was exempt from the voter approval requirement of Article 13D, Section 6(c) because that section expressly exempts "sewer" and "water" fees. The appellate court rejected the City's efforts to rely on dictionary definitions of the term "sewer," which Prop. 218 does not define. It also rejected the taxpayer groups' reliance on an advisory Attorney General's opinion which reasoned that, because Prop. 218 distinguishes flood control from sewer services in its provisions governing assessments on property (a revenue source technically distinct from "taxes" and "property related fees"), the word "sewer" ought to be read to exclude storm sewers in the fee provisions of Pro. 218, too. Instead, the court relied on what it deemed "[t]he popular, nontechnical sense of sewer service, particularly when placed next to 'water' and 'refuse collection' services, suggests the service familiar to most households and businesses, the sanitary sewerage system." The court found the term "sewer services" ambiguous and resorted to the "broad construction" language of Section 5 to resolve the point adversely to the City. While the AG's analysis might have provided a more persuasive basis for a ruling adverse to Salinas on this point, the court's analysis appears to be a naked conclusion, unsupported by persuasive analysis.

The court similarly rejected the City's reliance on the definition of "water services" adopted by two-thirds of each house of the Legislature and signed into law by then-Governor Pete Wilson, in the Proposition 218 Omnibus Implementation Act adopted immediately after the approval of Proposition 218, with support from both local government and taxpayer advocates. The court stated only that: "[t]he average voter would envision 'water service' as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean." Again, this is not persuasive analysis, but a mere conclusion

Options for Local Government. In light of this case, what are local governments' options for funding NPDES compliance? These include:

(1) Wait to see if the case becomes final in its current form, as Salinas may seek rehearing, depublication or review, and other interested groups may seek depublication, which would remove the case from the law books and eliminate it as precedent for future cases.

(2) Pursue a storm water fee drafted just a bit more tightly than Salinas' to make it clear that the fee is imposed on those who use storm water systems and not those who own improved property.

(3) Comply with the voter approval requirements of Prop. 218 (i.e., obtain the approval of a majority of property owners), which to the author's knowledge only one City has ever tried; that effort was unsuccessful.

(4) Fund NPDES compliance with other revenues. These might include a voter-approved special tax, a property-owner approved assessment, or other fee revenues.

Conclusion. This area of the law is developing rapidly. The California Supreme Court recently granted review of a case involving a Prop. 218 challenge to a water connection charge imposed by the Shasta Community Services District. A petition for review by that Court is also pending in a case involving in lieu franchise fees collected from utility rate-payers in the City of Roseville. These cases will likely be resolved in 2002 and 2003. As always, we'll keep you posted!