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California's Rainwater Recapture Act Lets State Residents Capture, Use Harvested Rainwater

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Overview

Californians may now legally capture and use rainwater harvested from rooftops. Departing from Western states' long-standing tradition of making it illegal to capture and use precipitation based on the prior appropriation doctrine, the California Legislature enacted and Governor Brown signed the "Rainwater Capture Act of 2012" [2012 Cal. Stats. ch. 537, Sec. 2.] (the Act). The Act exempts the capture and use of rainwater from rooftops from the State Water Resources Control Board's (SWRCB) permitting authority over appropriations of water. This development affords residential users and private and public entities with a new source of on-site water supply, which should reduce reliance on potable water for landscaping needs and provide a recharge benefit to underlying groundwater aquifers.

Summary of the Act

Prior to enactment of the Act, the SWRCB required all would-be appropriators to apply for and obtain a permit to appropriate water from any source, including water falling in the form of precipitation. Under the Act, however, the use of rainwater - defined as "precipitation on any public or private parcel that has not entered an offsite storm drain system or channel, a flood channel, or any other stream channel, and has not been previously been put to beneficial use" - is not subject to the California Water Code's SWRCB permit requirement [California Water Code §§ 1200 *et seq.*] Relief from the permit requirement enables residents, private businesses, and public agencies to create new on-site water supplies to meet landscaping needs, thus decreasing the use of potable water to meet those needs. The language of the Act Page 1 recognizes that it may contribute to attainment of the state-wide "20x2020 goal", which aims to achieve a 20 percent reduction in urban per capita potable water demand by December 31, 2020. [2012 Cal. Stats. ch. 537, Sec. 2.]

The Act further provides that it is not intended to alter or impair existing rights, change existing water rights law, affect the use of rainwater on agricultural lands, or impair the authority of water suppliers to protect the public health and safety of public water supplies as authorized by California law.

Surprisingly, the Act explicitly defines certain terms - "developed or developing lands" and "rain barrel system" - although they are not used in the newly added Water Code sections. This suggests that in the future the Legislature may seek to expand and/or further define the scope of the Act.

Implications for the Future and Unanswered Questions

"Public Water of the State"

The Act's language does not exclude rainwater from being "public water of the State" pursuant to Water Code section 1201; it merely exempts use of rainwater collected from rooftops from the permitting requirement. Accordingly, use of rainwater is still subject to Article X, Section 2 of the California Constitution's prohibition on waste or unreasonable use of water, which is enforced by the SWRCB. This means that the water collected may not be used in a wasteful or unreasonable manner or be put to non-beneficial uses. The SWRCB will presumably retain its authority to prevent wasteful use of captured rainwater even though it may not require a permit to appropriate that water.

The status of captured rainwater as "public water of the State" also raises several issues that are not addressed by the Act. First, it is not clear whether the capture of rainwater is exempt from the competing claims of other existing water users who hold rights that do not require permits. Under the common law priority system, which applies to pre-1914 appropriative rights and appropriative rights to extract groundwater (i.e., non-permitted appropriative rights), the first person to put water to beneficial use has priority over subsequent water users - this is commonly referred to as "first in time, first in right" principle. [See *generally* California Water Law and Policy § 2.07.] The capture and use of rainwater may have the effect of reducing inflows to surface waters and recharge to groundwater aquifers. If a user's capture of rainwater interferes with the ability of pre-1914 right holders or appropriative groundwater users to exercise their more senior rights (i.e., by reducing their source of supply), courts will have to settle whether the common law priority system protects those senior rights as against subsequent appropriators of captured rainwater. A similar issue will arise with respect to the rights of riparian and overlying users - whose rights stem from their ownership of lands contiguous to or overlying water sources and are superior to those of appropriative right holders. Riparian and overlying users may also experience impacts on their water supply due to the capture and use of rainwater. If conflicts arise between riparians and overlying right holders on the one hand and rainwater users on the other, courts will likely be expected to adjudicate these competing claims.

Second, the Act does not clarify whether the capture and use of rainwater is subject to California's public trust doctrine, which requires consideration of the effects of water diversions upon interests protected by the public trust, including environmental values [See *generally National Audubon Society v. Superior Court (1983) 33 Cal.3d 419; California Water Law and Policy § 2.14 [7].*] If the capture and use of rainwater reduces flows in a surface stream that previously supported fish and plant habitat, courts and the state may be confronted with the question of whether the cumulative impacts of rainwater capture activities are in conflict with public trust values.

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Scope of Demand Reductions

With more of California's future water supply expected to fall as rain rather than as snowmelt due to the impacts of climate change, the question raised is what will be the scope of potable demand reduction resulting from application of the Act.

Presently in California, outdoor water use (e.g., watering gardens and lawns) is estimated to make up as much as Page 2 70 percent of residential use in some parts of the state. [Pacific Institute, *Waste Not, Want Not: The Potential for Urban Water Conservation in California*, Nov. 2003.] In short, outdoor water use for landscaping constitutes the bulk of residential water use in California. Allowing residents, private businesses and public agencies to serve their landscaping needs with rainwater collected from rooftops would be expected to sizably decrease residential potable demand and potable water demand associated with business parks and public agency buildings in the short term.

However, as snow pack decreases in the long term, more of our water supply - potable and non-potable - must necessarily come from precipitation. Under such circumstances, the collection of rainwater for non-potable uses could theoretically undercut supplies for potable use, especially in drier years, by diverting water that might otherwise flow into surface waters to strictly non-potable use. For example, if rooftop rainwater collection and use becomes widespread for large private businesses and/or public agencies, there is some risk that the practice may have the practical effect of diverting significant quantities of water from surface water delivery systems, including streams and rivers. On the other hand, the collection and application of rainwater to gardens and lawns should have the opposite effect on groundwater supplies by percolating through soil to replenish groundwater aquifers, which provide key water supply throughout the state.

The accessibility, practicability and financial feasibility of installing a rainwater capture system may also affect the extent of reductions that might be expected to result from the Act. The existence of relatively inexpensive, non-complex rainwater capture system options should increase market penetration of the technology (by enabling individual residents to install units), which should increase the reductions in potable demand that can be achieved through rainwater capture and reuse. Conversely, if the cost to purchase and install rainwater capture systems is high, this may deter smaller-scale users from installing a system, resulting in less significant reductions.

Another hurdle that could restrain the use of rainwater capture systems is the complexity of building standards that might apply to rainwater capture systems. Some expect the California Building Standards Commission to adopt building standards for rainwater capture systems in response to enactment of the Act. Depending on the rigor and complexity of these building standards, they could deter would-be residential or small business users from installing and using rainwater capture systems. Any individual, business or agency who seeks to install a rainwater capture system should consult with its contractor

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and legal counsel to ensure such construction and installation is in accordance with any existing or new building standards applicable to rainwater capture systems.

The above factors make it unclear how application of the Act will ultimately impact potable water supplies. Nonetheless, in the short term it is clear that the Act has the potential to reduce potable water demand and aid the state in achieving its 20x2020 reduction goal.

This document is intended to provide you with general information regarding the Rainwater Recapture Act of 2012 Endangered Fish Recovery Programs Extension Act of 2012. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed below or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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