



REPORT TO LAW & LEGISLATION COMMITTEE City of Sacramento

915 I Street, Sacramento, CA 95814-2671

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Staff Report
August 21, 2007

Honorable Members of the
Law and Legislation Committee

**Title: Legislative Position: Oppose Assembly Bill 70 (as amended July 17, 2007)
Relating to Flood Liability.**

Location/Council District: Citywide

Recommendation: Staff recommends that the Law and Legislation Committee continue to oppose AB 70.

Contact: Dave Brent, Engineering Manager, (916) 808 -1420

Presenters: Dave Brent and Gary Reents

Department: Utilities

Division: Administration

Organization No: 3311

Description/Analysis

Issue: At the request of Assembly Member Dave Jones, Councilmember Sheedy has asked staff to bring AB 70 to the Committee. On May 1, 2007, the Committee adopted an oppose position on AB 70. Even though there have been modifications to the proposed legislation, staff continues to believe the legislation places unreasonable liability on local land use agencies and recommends that the Committee continue to oppose AB 70.

AB 70, introduced by Assembly Member Jones, currently provides that a city or county may be required to contribute its fair and reasonable share of the property damage caused by a flood to the extent that the city or county increases the state's exposure to liability for property damage by unreasonably approving new development in a previously undeveloped area, i.e. open space or agricultural land not designated for development, that is protected by a state flood control project and if it is determined that the city or county failed to comply with other applicable provisions of existing law.

AB 70 would apply whether or not a city or county participates in the operation or maintenance of the state flood control project.

Currently, a package of proposed legislation containing multiple bills that deal comprehensively with flood control issues is working its way through the State Legislature. The City's State Lobbyist and staff are working to assure the City's interests are represented in this package consistent with the Council approved legislative flood principles.

Policy Considerations: AB 70 would subject a city or county, that has no responsibility for a failed state flood control facility, to a share of the State's liability for property damage, to the extent that the city or county increases the state's exposure to such liability by approving new development in a previously undeveloped area and if it is determined that the city or county failed to comply with other applicable provisions of existing law. While staff concurs that applicable floodplain regulations should be adhered to in land use decisions, liability for flood damages should remain with the agencies responsible for the operation and maintenance (O&M) of the flood control system. A local land use agency should not be liable for the failure of a flood control project unless it is the O&M agency and it is found to be negligent.

AB 70 would change current law. To date, the courts have rightly found only entities that have played some role in the design, maintenance, or operation of a failed flood control project liable for property damages caused by the failure. Under current law, liability does not attach to a local public agency where that agency's sole affirmative action was the issuance of permits and/or approval of a subdivision map.

In addition to this basic flaw in the bill's approach, numerous undefined terms in AB 70 create uncertain obligations that would make it difficult for cities and counties to make land use decisions, and that also make it difficult to assess the bill's potential impact on cities and counties. For example, AB 70 would require a city or county to contribute a "fair and reasonable share of the property damage caused by a flood," without providing any guidance on how this share would be determined.

Similarly, the bill imposes this liability if the city or county "unreasonably" approves new development, but the bill does not indicate (1) what this means, (2) whether a determination of reasonableness would be based, in whole or in part, on the existing or anticipated level of flood protection provided by the applicable State flood control facilities, and, if so, what level of existing or anticipated flood protection would be considered reasonable, (3) what flood risk information would be available for a city or county to utilize and rely upon in determining whether to approve new development, and (4) if the Legislature adopts any of the other pending bills imposing or revising State and local responsibilities relating to flood risk and flood control, how will these requirements affect the new responsibility and liability being shifted to cities and counties under AB 70?

Finally, the bill conditions this shift in liability from the State to cities and counties upon a determination "that the city of county failed to comply with other applicable provisions of existing law," but does not indicate what specific provisions of existing law this is intended to refer to.

Environmental Considerations: None

Rationale for Recommendation: Staff is recommending an oppose position on AB 70 because basing liability not on fault, but on the increase in the state's exposure to liability, is inappropriate. In addition, AB 70 does not address a means for a city or county to reduce or eliminate its liability exposure, for example, if 200 year flood protection is attained, under AB 70, the city's or county's level of liability would remain the same.

A better approach for the State to consider would be to fix the underlying problem – inadequate and poorly maintained levees – by establishing a process that identifies what needs to be done to address this problem, and determine the state and local roles and responsibilities in achieving this goal and how such efforts will be funded. Once this is done, both local agencies and the State can clearly understand their responsibilities and make decisions accordingly.

Financial Considerations: None.

Emerging Small Business Development (ESBD): None.

Respectfully Submitted by: 
for Dave Brent, Engineering Manager

Approved by: 
Gary Reents, Director of Utilities

Recommendation Approved:

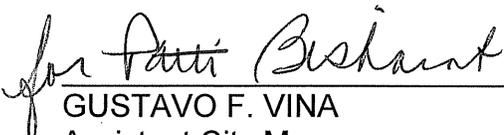

GUSTAVO F. VINA
Assistant City Manager

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AMENDED IN SENATE JULY 17, 2007
AMENDED IN ASSEMBLY JUNE 4, 2007
AMENDED IN ASSEMBLY APRIL 11, 2007
AMENDED IN ASSEMBLY FEBRUARY 21, 2007
CALIFORNIA LEGISLATURE—2007—08 REGULAR SESSION

ASSEMBLY BILL

No. 70

Introduced by Assembly Member Jones

December 4, 2006

An act to add Section 8307 to the Water Code, relating to flood liability.

LEGISLATIVE COUNSEL'S DIGEST

AB 70, as amended, Jones. Flood liability.

Existing law, under various circumstances, subjects a public entity or an employee of a public entity to liability for property damage or personal injury caused by or from floods or floodwaters.

This bill would provide that a city or county may be required to contribute its fair and reasonable share of the property damage caused by a flood to the extent that the local public entity increases the state's exposure to liability for property damage by unreasonably approving new development in a previously undeveloped area, as defined, that is protected by a state flood control project and if it is determined that the city or county failed to comply with other applicable provisions of existing law.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 8307 is added to the Water Code, to read:
2 8307. (a) A city or county may be required to contribute its
3 fair and reasonable share of the property damage caused by a flood
4 to the extent that the city or county increases the state's exposure
5 to liability for property damage by unreasonably approving new
6 development in a previously undeveloped area that is protected
7 by a state flood control project and if it is determined that the city
8 or county failed to comply with other applicable provisions of
9 existing law.
- 10 (b) For the purposes of this section:
11 (1) "State flood control project" means any flood control works
12 within the Sacramento River Flood Control Project described in
13 Section 8350, and of flood control projects in the Sacramento River
14 and San Joaquin River watersheds authorized pursuant to Article
15 2 (commencing with Section ~~12468~~ 12648) of Chapter 2 of Part
16 6 of Division 6.
17 (2) "Undeveloped area" means an area devoted to "agricultural
18 use," as defined in Section 51201 of the Government Code, or
19 "open space land," as defined in Section 65560 of the Government
20 Code, which is not already designated for development in a general
21 or specific plan or by a local zoning ordinance.

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SENATE RULES COMMITTEE	AB 70
Office of Senate Floor Analyses	
1020 N Street, Suite 524	
(916) 651-1520 Fax: (916)	
327-4478	

THIRD READING

Bill No: AB 70
 Author: Jones (D)
 Amended: 7/17/07 in Senate
 Vote: 21

SENATE NATURAL RES. & WATER COMMITTEE : 5-2, 6/26/07
 AYES: Steinberg, Kehoe, Kuehl, Machado, Migden
 NOES: Margett, Hollingsworth
 NO VOTE RECORDED: Cogdill

SENATE JUDICIARY COMMITTEE : 3-2, 7/10/07
 AYES: Corbett, Kuehl, Steinberg
 NOES: Harman, Ackerman

ASSEMBLY FLOOR : 44-33, 6/6/07 - See last page for vote

SUBJECT : Flood liability

SOURCE : Author

DIGEST : This bill establishes that a city or county may be required to contribute its fair and reasonable share for the property damage caused by a flood, to the extent that the city or county increases the state's exposure to liability for property damage by unreasonably approving new development in a previously undeveloped area that is protected by a state flood control project, and if it is determined that the city or county failed to comply with other applicable provisions of existing law.

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AB 70

ANALYSIS : In 2003, a state Court of Appeals held in Paterno v. State of California that the state could be held liable, under a theory of inverse condemnation, for property damages caused by the failure of a state project levee. Although the state played no role in the design or construction of the failed levee, the Paterno court held that "[w]hen a public entity operates a flood control system built by someone else, it accepts liability as if had planned and built the system itself."

This bill provides that a city or county may be required to contribute its fair and reasonable share of the property damage caused by a flood to the extent that the city or county increases the state's exposure to liability for property damage by unreasonably approving new development in a previously undeveloped area that is protected by a state flood control project and if it is determined that the city or county failed to comply with other applicable provisions of existing law.

This bill, for purposes of its provisions, defines "state flood control project" and "undeveloped area" -- Sacramento-San Joaquin Valley.

Background

Under current state law, the 1911 report of the California Debris Commission, as modified by the 1925 report of the California Debris Commission, and as amended or modified by the Reclamation Board, is approved as a plan for controlling the flood waters of the Sacramento and San Joaquin Rivers and their tributaries. That 1911 report included the design for the by-pass system of flood conveyance and heavy flows within the main channel of the Sacramento River by means of high, strong levees not too far apart, and the control of the overflow into the by-passes through a system of weirs. To accomplish all this, the plan required almost 500 miles of riverbank and by-pass levees.

The 1925 modification included the establishment of the Sacramento River Flood Control Project (SRFCP). The SRFCP consists of a vast and intricate general plan for levees, bypasses, weirs, and other works designed for flood

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control, reclamation, and improvement of navigation. The Reclamation Board is to execute the plan and may make such

modifications and amendments to the plan as are necessary to execute the plan. The state has taken over the responsibility for the SRFCP. This responsibility includes holding the United States harmless from any damages that may result from the project.

In recent years, the Legislature has been engaged in the formulation of a comprehensive flood package that would resolve issues of assessment of the current system, liability concerns, developing a flood improvement plan, flood insurance, and building planning and development in flood-prone areas.

The author's office asserts that the Paterno decision creates a "disconnect" between local land-use and development planning and decisions and state flood control efforts. That is, while the state is liable for property damage caused by failure of any of the 1,600 miles of project levees in the Central Valley, decisions to place new development behind those levees are made by local governmental entities. The author's office states that this bill seeks to create a system of fair and equitable shared liability between the state and local governmental entities for property damage from a failure of a state flood control project.

FISCAL EFFECT : Appropriation: No Fiscal Com.: No
Local: No

SUPPORT : (Verified 7/17/07)

American Federation of State, County and Municipal Employees
California Federation of Teachers
California League of Conservation Voters
California School Employees Association
California State Employees Association
Mayor Antonio R. Villaraigosa, City of Los Angeles
Mayor Gavin Newsom, City of San Francisco
Planning and Conservation League
Sierra Club California

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OPPOSITION : (Verified 7/17/07)

Amador County Board of Supervisors
California Association of Joint Powers Authorities
California Chamber of Commerce
California Central Valley Flood Control Association
California State Association of Counties

Contra Costa County
League of California Cities
Regional Council of Rural Counties

ARGUMENTS IN SUPPORT : According to the author:

"[W]e must ensure that state flood control policies are reinforced by wise local land-use planning. Under existing law, the state is responsible for the structural integrity and overall operation of flood control projects. But local decisions to place homes and businesses behind those projects are made by local governments. Local planners cannot continue to allow new developments behind suspect levees and then expect taxpayers from throughout the state to bear the inevitably increased costs of flood damage - which could easily amount to billions of dollars.

"In short, the bill creates a fair and equitable means of distributing responsibility for flood control damage among state and local entities. AB 70 will not absolve the state of liability, but it will properly encourage local planning agencies to give greater consideration to the potential consequences of approving new developments in areas that may not offer adequate flood protection and to take steps to mitigate those risks. In addition to protecting lives and property, this bill will help to preserve the state's general fund for schools, social services and public infrastructure."

ARGUMENTS IN OPPOSITION : According to the League of California Cities, "The League opposes AB 70 because we do not believe it is appropriate or fair to require local governments that approve development in accordance with state and federal law and that have no responsibility for the operation or maintenance of levees and flood control systems to be liable for damages simply because they

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approved the development. AB 70 does not address the underlying problem with the state's levee and flood control system - that of deferred maintenance and lack of funds for repairs. Instead, it simply brings in local governments to share in the liability for damages in order to shield the state from future lawsuits."

_____ The Central Valley Flood Control Association believes that this bill does not improve public policy, "but rather diverts attention away from developing plans to ensure that flooding does not occur or that appropriate aid will be available to those property owners damaged in floods.

Flood control agencies have, in effect, become insurers against flood damage. This ignores the fact that levees are designed to reduce the inherent risks of flooding in certain areas, not eliminate the risks completely. And, the fact that flood control facilities make private property more valuable has been lost in the debate."

ASSEMBLY FLOOR :

AYES: Arambula, Bass, Beall, Berg, Blakeslee, Brownley, Carter, Coto, Davis, De La Torre, De Leon, DeSaulnier, Dymally, Eng, Evans, Feuer, Fuentes, Hancock, Hayashi, Hernandez, Huffman, Jones, Karnette, Krekorian, Laird, Leno, Levine, Lieber, Lieu, Ma, Mendoza, Mullin, Nava, Portantino, Price, Richardson, Ruskin, Salas, Saldana, Solorio, Swanson, Torrico, Wolk, Nunez

NOES: Adams, Aghazarian, Anderson, Benoit, Berryhill, Caballero, Cook, DeVore, Duvall, Emmerson, Fuller, Gaines, Garcia, Garrick, Horton, Houston, Huff, Jeffries, Keene, La Malfa, Maze, Nakanishi, Niello, Parra, Plescia, Sharon Runner, Silva, Smyth, Spitzer, Strickland, Tran, Villines, Walters

NO VOTE RECORDED: Charles Calderon, Galgiani, Soto

CTW:mw 7/17/07 Senate Floor Analyses

SUPPORT/OPPPOSITION: SEE ABOVE

**** END ****

