REPORT TO LAW & LEGISLATION COMMITTEE
City of Sacramento

915 I Street, Sacramento, CA 95814-2671

Staff Report
September 4, 2007

Honorable Members of the
Law and Legislation Committee

Title: Legislative Position: Continue to 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 pending the opportunity to consider action in context of a comprehensive flood control legislative package.

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 amendments 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.

In addition currently there are three flood control packages under consideration at the State. The Governor and Senator Machado and Assemblywoman Wolk each have packages of proposed legislation containing multiple bills that attempt to deal comprehensively with flood control issues that are working their way through the State Legislature. These packages are still in flux and are changing daily. In addition, Senator Steinberg has a flood control package, in which AB 70 is one component. However, at the time this report was written, Senator Steinberg's package had not been made public; therefore, AB 70 could not be

evaluated in context of the entire flood package. Staff recommends that we continue to oppose AB 70 until such time that it can be considered as part of a broader more comprehensive legislative package.

Further, there are also numerous bills relating to flood control that are making their way through the State legislative process. These bills overlap in one form or another making it difficult to determine what the final flood control laws might be. According to the analysis done by the Senate Judiciary Committee on July 10, 2007, "All the pending flood-related bills overlap in one form or another. While all are promoting policies that respond to the issues, the differences are still significant. Key outstanding issues include: What restrictions, if any, will there be on development in deep flood plains? Does the state play an approval or advisory role in adopting local flood plans? What will be the role of the State Reclamation Board in overseeing DWR's flood activities? Does the state's interest lie primarily in projects that are a part of the State Plan of Flood Control (also known as "project levees") or does the state's interest extend into at least some non-project levees, such as those protecting urban areas? What unique responsibilities do the state, local flood agencies, and cities and counties have, if any, in improving flood protection for non-urban economically disadvantaged communities? How will liability be determined and apportioned?"[1]

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

[1] Senate Judiciary Committee Analysis, pg 11 of attachment 2

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.

Approved by: for Patti Beshard
Gary Reents, Director of Utilities

Recommendation Approved:

for Patti Beshard
RAY KERRIDGE
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:

SECTION 1. Section 8307 is added to the Water Code, to read:

8307. (a) 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.

(b) For the purposes of this section:

(1) "State flood control project" means any flood control works within the Sacramento River Flood Control Project described in Section 8350, and of flood control projects in the Sacramento River and San Joaquin River watersheds authorized pursuant to Article 2 (commencing with Section ~~12468)~~ *12648)* of Chapter 2 of Part 6 of Division 6.

(2) "Undeveloped area" means an area devoted to "agricultural use," as defined in Section 51201 of the Government Code, or "open space land," as defined in Section 65560 of the Government Code, which is not already designated for development in a general or specific plan or by a local zoning ordinance.

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SENATE JUDICIARY COMMITTEE
Senator Ellen M. Corbett, Chair
2007-2008 Regular Session

AB 70 A
Assemblymember Jones B
As Amended June 4, 2007
Hearing Date: July 10, 2007 7
Water Code 0
ADM:rm

SUBJECT

Flood Liability

DESCRIPTION

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 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 would, for purposes of its provisions, define "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

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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 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.

In 2003, a state Court of Appeal held that the state could be liable, under a theory of inverse condemnation (private property owner must be justly compensated for property damage caused by public act or omission), for property damages caused by the failure of a state levee project. (Paterno v. State of California (2003) 113 Cal.App.4th 998, rev. denied, 2004 Cal. LEXIS 2253, March 17, 2004.) Although the state did not play a role in the design or construction of the failed levee, the court held that "[w]hen a public entity operates a flood control system built by someone else, it accepts liability as if it had planned and built the system itself."

The author 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 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.

CHANGES TO EXISTING LAW

Existing law authorizes the Department of Water Resources (DWR) to supervise the maintenance and operation of the flood control works of various projects within the state and delineates specific areas of DWR's responsibility for levees, weirs, and other flood control works within that system. (Water Code (WC) Sections 8370-8484.)

Existing law allocates duties and liabilities among various state and local reclamation districts, municipalities, and other public agencies within the Sacramento River Flood Control Project. (WC Sections 8370-8371.)

Existing law defines the powers, duties, and jurisdiction of the State Reclamation Board (SRB) regarding the construction and maintenance of flood control projects, including the power to construct, clear, and maintain bypasses, levees, canals, sumps, channels, reservoirs, and other flood control works. Existing law also provides that the SRB must establish and enforce standards for the

maintenance and operation of levees, channels, and other flood control works of an authorized project or adopted plan. (Id.)

Existing law provides that the taking or damaging of private property for public use must be justly compensated. (Cal. Const. art. I, Section 19.)

Existing case law provides that when a public use or improvement, such as a flood control project, results in damage to private property, without having been preceded by just compensation, the private property owner may bring a civil action to recover just compensation from the responsible public entity or entities (so-called "inverse condemnation.") (See, e.g. Arreola v. County of Monterey (2002) 99 Cal.App.4th 722.)

Existing case law provides that when a public entity (including the state) operates a flood control system built by some other entity, it accepts liability as if it had

built and operated the system itself. Existing case law also provides that the state is liable for property damage, under a theory of inverse condemnation, where a court finds that the property damage was caused by the failure of a flood control project due to the state's "unreasonable plan." (Paterno v. State of California (2003) 113 Cal.App.4th 998, rev. denied, 2004 Cal. LEXIS 2253, March 17, 2004.)

Existing case law provides that a governmental entity may not be liable for damages in inverse condemnation solely for approving a subdivision map, or issuing a building permit; not substantially participating in the planning, construction, or maintenance of a public improvement; not expressly or implicitly accepting the dedication of a public improvement; or not exercising dominion and control over a public improvement. (Ullery v. County of Contra Costa (1988) 202 Cal.App.3d 562; DiMartino v. City of Orinda (DiMartino v. City of Orinda (2000) 80 Cal.App.4th 329.)

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 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 would, for purposes of its provisions, define "state flood control project" to mean any flood control works within the Sacramento River Flood Control Project, as described in law, and flood control projects in the Sacramento River and San Joaquin River watersheds authorized by law.
This bill would, for purposes of its provisions, define "undeveloped area" to mean an area devoted to "agricultural use," as defined, or "open space," as defined, which is not already designated for development in a general or specific

plan or by a local zoning ordinance.

COMMENT

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1. Stated need for the bill

The author writes:

> Existing law holds the state liable for damages caused by the failure of a state project levee. AB 70 ensures that state and local entities will share the costs of such damages. Most significantly, AB 70 would require a local government to contribute its fair share of the costs of damages to the extent that its development decisions increase the measure of damages caused by the project failure.
>
> The patchwork of levees and weirs that constitute the Central Valley's flood control system is in dire need of upgrading. At the same time, the consequences of a failure of this system have been greatly exacerbated as new developments are permitted in historically flood prone areas. Voter approval of recent bond measures will provide desperately needed funds to survey, strengthen, and better maintain flood control infrastructure. But, strengthening our flood control projects does not, by itself, completely address the problem.
>
> Most importantly, we 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, 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.

2. Issues and areas of concern raised by AB 70 and other pending flood-related bills

Nearly everyone agrees that Hurricane Katrina and its aftermath demonstrated the need for more vigilant action in managing flood risk. In particular, most agree that the flood management system in the Sacramento-San Joaquin

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Valley provides an unacceptably low level of protection for current and future citizens of the valley. The broad

elements of a comprehensive solution are also generally agreed upon, although the preferred approaches are not. The elements of a comprehensive flood package should include:

- Assessing the current flood management system.
- Developing and implementing a flood improvement plan, including a strategic finance plan.
- Clarifying state and local responsibilities for flood protection.
- Resolving issues of flood liability.
- Better linkage of land use decisions to flood management.
- Better informing the public about flood risk and the need for flood insurance.

All the pending flood-related bills (See Comment 3) overlap in one form or another. While all are promoting policies that respond to the issues, the differences are still significant. Key outstanding issues include:

- What restrictions, if any, will there be on development in deep flood plains?
- Does the state play an approval or advisory role in adopting local flood plans?
- What will be the role of the State Reclamation Board in overseeing DWR's flood activities?
- Does the state's interest lie primarily in projects that are a part of the State Plan of Flood Control (also known as "project levees") or does the state's interest extend into at least some non-project levees, such as those protecting urban areas?
- What unique responsibilities do the state, local flood agencies, and cities and counties have, if any, in improving flood protection for non-urban economically disadvantaged communities?
- How will liability be determined and apportioned?

3. Related pending legislation

Numerous flood-related bills are currently proceeding through the Legislature. In addition to this bill, the other major pending bills are:

AB 5 (Wolk) - Would establish notice/insurance

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requirements for developments in floodplains, provide for adoption of local flood protection plans, and require creation of a Central Valley Flood Protection Plan. This bill is set for hearing in this committee on July 10, 2007.

AB 156 (Laird) - Would enhance information and planning related to Central Valley Flood Protection and the management of the system by DWR, the Reclamation Board, and local agencies. This bill is set for hearing on July 10, 2007 in the Senate Committee on Natural Resources and Water.

AB 162 (Wolk) - Would require cities and counties to increase their attention to flood-related matters in the land use, conservation, safety, and housing elements of their general plans. This bill is set for hearing on July 11, 2007 in the Senate Committee on Local Government.

AB 1452 (Wolk) - Would set priorities for state

funding of Central Valley flood activities and establishes criteria for "early implementation" flood projects. This bill is set for hearing on July 10, 2007 in the Senate Committee on Natural Resources and Water.

SB 5 (Machado) - Would establish and clarify the roles and responsibilities for flood management for the state, local flood agencies, cities, counties, developers, and other property owners. This bill is currently in the Assembly Committee on Appropriations.

SB 17 (Florez) - Would restructure the State Reclamation Board, including requiring the board to act independently of DWR, requiring Senate Confirmation of appointees to the board, establish specific conflict of interest and ex parte communication rules, and require the board to adopt regulations relating to evidentiary hearings. This bill is currently in the Assembly Committee on Appropriations.

SB 378 (Steinberg) - Would establish polices and procedures to implement Proposition 1E, including requiring expenditures of certain programs to be deemed to be in response to an emergency, requiring the Governor's annual investment strategy to include information concerning the cost of those projects and programs, and establishing a process to develop guidelines for the storm water flood management

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program. This bill is currently in the Assembly Committee on Water, Parks, and Wildlife.

4. Support arguments in favor of AB 70

Supporters raise the following arguments in support:

Local governmental entities share responsibility with other governmental entities, including the state, when developing properties in flood-prone areas.

If flood damage occurs, California taxpayers should not have to shoulder the entire financial burden when a local governmental entity chooses to develop property in a flood control project area.

The missing link in current flood control project areas is sound local governmental entity land use and development planning and decisions.

AB 70 would incentivize local governmental entities to do a better, more thorough job of planning and development, particularly in flood-prone areas.

5. Opposition arguments

Opponents raise the following arguments in opposition:

Local governments do not own or control the state's levees; do not have the power to repair or improve them; and do not have the responsibility to operate or maintain the levees.

AB 70 would shift liability from the state to local governments.

AB 70 could potentially bankrupt local governments.

AB 70 could make it increasingly difficult to develop much needed housing for the state's growing population.

AB 70 could potentially place local governmental entities out of compliance with their Regional Housing Needs Assessment.

6. Technical amendment

On page 2, line 15, delete Section 12468, and insert: "Section 12648"

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AB 70 (Jones)
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Support: Los Angeles City Council; CA League of Conservation Voters; City and County of San Francisco; The Planning and Conservation League; Sierra Club of CA; CA State Employees Association

Opposition: CA Central Valley Flood Control Association; Regional Council of Rural Counties; CA Association of Joint Powers Authorities; League of CA Cities; CA State Association of Counties; Amador County Board of Supervisors; CA Chamber of Commerce

HISTORY

Source: Author

Related Pending Legislation: See Comment 3

Prior Legislation: AB 3050 (Jones of 2006) would have provided that the state would be entitled to rights of indemnity and contribution against any local public entity whose actions contributed, or whose failure to act contributed, to the failure of a flood control project when that failure caused property damage or personal injury. The bill would have subjected a local public entity to joint liability and the state's rights of indemnity and contribution to the extent that the local public entity increased the amount of property damage sustained in a flood by approving new development in a previously undeveloped area, as defined. This bill died on the inactive file in the Assembly.

Prior Vote: Assembly Judiciary Committee (Ayes 7, Noes 3)
Assembly Floor (Ayes 44, Noes 33)
Senate Natural Resources and Water Committee (Ayes 5, Noes 2)

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AB 70 (Jones)
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