

## MINUTES

### Joint Power Authority Subcommittee of the Central Valley Flood Protection Board March 13, 2009

#### The following Subcommittee Members of the Board were present:

Ms. Emma Suarez, Chairwoman  
Mr. Francis "Butch" Hodgkins  
Ms. Maureen "Ladybug" Doherty  
Ms. Teri Rie

#### 1. INTRODUCTIONS

*The second meeting of the Joint Power Authority Subcommittee ("Subcommittee") of the Central Valley Flood Protection Board (CVFPB) was called to order at 1:10 PM. Subcommittee Chairwoman Emma T. Suárez opened by noting that Subcommittee members Mr. Butch Hodgkins, Ms. Lady Bug Doherty, and Ms. Teri Rie were present. Ms. Suárez also introduced the members of the Central Valley Flood Protection Board (CVFPB) staff present: Mr. Jay Punia (Executive Director) and Ms. Virginia Cahill and Matt Campbell (legal counsels). Ms. Suárez invited members of the public to introduce themselves.*

#### 2. APPROVAL OF AGENDA

*Subcommittee members unanimously approved the meeting agenda.*

#### 3. APPROVAL OF FEBRUARY 13, 2009 MEETING MINUTES

*Subcommittee members unanimously approved the February 13, 2009 meeting minutes after accepting a suggested change proposed by Ms. Cahill. Ms. Cahill correctly noted that on page 3 of the draft minutes, the word "not" needs to be inserted on the first sentence that begins with "Mr. Shapiro opined ...."*

#### 4. SUMMARY OF HIGHLIGHTS OF FEBRUARY 13, 2009

*Ms. Suárez provided a summary of the key issues addressed during the Subcommittee's first meeting. She noted the Board had asked that the Subcommittee consider circumstances, if any, meriting additional "hold harmless" promises or assurances from the individual members of a joint power authority (JPA) as part of a JPA's permit application. In the past, it has not been the practice of the Board to require such assurances, although it has, at times, required such assurances.*

*Chairwoman Suárez also noted Ms. Cahill would provide a brief presentation exploring how a policy may evolve from the concepts developed during the first meeting. Suárez concluded by stating that her inclination was to stay away from the Subcommittee drafting permit language, and instead focus on providing general guidance to staff and future JPA permittees about possible additional assurances the State may require in particular circumstances. Before asking Ms. Cahill to proceed with her presentation, Ms. Suárez invited other Subcommittee members to comment.*

*Subcommittee member Hodgkins stated he envisioned the development of a policy that dealt with the Board's obligations regarding public safety and financing stability that, at the same time, did not discourage the formation of JPAs to facilitate flood control projects. Mr. Hodgkins noted that since the first Subcommittee meeting he has come to appreciate the various legal theories that may trigger obligations on the part of individual JPA members without any additional need of commitments in the form of permit language or assurance agreements. He suggested the Subcommittee focus on the State's interest to see that there is a commitment for perpetual operation and maintenance (O&M) of an authorized project, and along with that, indemnification for the State for liability arising from O&M failures. Mr. Hodgkins stated this issue is particularly troublesome when (1) JPA formation agreements do not address how O&M will be covered once the JPA dissolves, and (2) areas have been heavily urbanized.*

##### **5. CIRCUMSTANCES AND APPROACHES FOR CVFPB TO IMPLEMENT A REQUIREMENT THAT INDIVIDUAL MEMBERS OF A JPA HOLD THE STATE HARMLESS**

*Ms. Cahill began her presentation by recalling that at the Subcommittee's first meeting there was general agreement that where a joint powers agreement provides that the obligations of the JPA will not be those of the members, the individual members will not be liable for the contractual obligations of the JPA or inverse condemnation liabilities during the existence of the JPA. Tort obligations of the JPA are obligations of the members due to Government Code section 895.2. Following dissolution of a JPA, its members do not become liable for the contractual obligations of the JPA, although they probably remain liable for torts of the JPA or an individual member. Ms. Cahill also noted that, based on current case law, it was unclear how the courts would treat inverse condemnation liability after the dissolution of the JPA.*

*Regarding previous Board practice relating to securing "hold harmless" promises from JPAs, Ms. Cahill explained the Board has not included the JPA's individual members on the permit, thus making them subject to Condition 10 directly. Instead, the Board has required, as a condition of the permit, a satisfactory assurance agreement between the JPA and its members and the Board. In other words, in order for the permit to be valid, the permittee/JPA must persuade its individual members to execute the assurance agreement.*

*Ms. Cahill further noted that at the first Subcommittee meeting, there seemed to be agreement that the JPA member responsible for O&M activities should sign the*

*assurance agreement to agree to provide O&M and to offer to hold the state harmless from consequences of improper O&M. Therefore, Ms. Cahill explained, it appeared that the remaining issues focus on under what other circumstances, if any, should the Board require some or all of the individual members to sign assurance agreements with the Board. Ms. Cahill outlined various approaches, including “pros and cons.” One approach the Board could take would be that such broad assurances should be sought from JPAs, always. At the other end of the range of alternatives, Ms. Cahill said the Board can decide not to ever require such assurances.*

*Finally, an in-between approach would have the Board develop a series of factors which would be considered before JPA members are required to provide additional assurances. Such factors could include:*

- Provisions that require the JPA to meet its obligations before dissolution*
- Responsibility for the Project*
- Prior Relationship with the Board*
- Apparent ability to raise necessary funds to pursue the project to completion in a satisfactory manner*
- JPA’s history*
- Ability to obtain insurance*
- Geographical considerations*

*Ms. Cahill concluded her presentation, at which point Ms. Suárez asked members of the public present for reaction based on what they had heard. Mr. Randy Margo, representing the County of Yuba, reminded the Board that, notwithstanding the promises extracted from local agencies, at the end of the day financial considerations will dictate the true value of the assurances provided, and how much responsibility the individual members of the JPA can realistically assume. Further, Mr. Margo noted in response to a question by Subcommittee member Rie, that if the County is asked to provide assurances that maintenance will be performed on a project, it should not be interpreted as the County actually assuming the work. Mr. Scott Shapiro echoed the sentiment, adding that the local entities will provide the assurances needed in good faith, and will work to comply with the intent of the promise – which is that the project will be properly maintained. Other members of the public expressed similar sentiments.*

*Mr. Hodgkins restated his main concern – that some entity besides the State of California stand ready, in perpetuity, to ensure the O&M will be appropriately done, and if not appropriately done, that any liability which arises from this failure be covered by an entity other than the State of California, even after the JPA has been dissolved but its individual members continue to benefit from the project’s protections. With this in mind, Mr. Hodgkins suggested the Subcommittee focus on this narrow – but important – component of the broader liability issue.*

*Ms. Suárez asked the other Subcommittee members if they were in agreement to start developing a policy which addresses the O&M obligations of individual JPA members.*

*Ms. Doherty said that while concerns remained regarding the broader liability issues, she agreed the securing of assurances relating to O&M was a good starting point. Both Ms. Rie and Ms. Suárez agreed with the proposed approach, although Ms. Rie noted that, in her opinion, the issue of who will assume responsibility for the long term O&M has always been addressed by entering into agreements with entities who commit to take over that task once the project is completed. Thus, in her mind, a broad policy which essentially alters this approach is unnecessary.*

## **6. PUBLIC COMMENTS REGARDING O&M**

*Ms. Suárez invited members of the public to comment on Mr. Hodgkin's proposal that the CVFPB focus on developing a policy which deals with assurances by individual members of a JPA relating to the O&M of permitted projects. Many of the attendees noted that there was little likelihood that the entity responsible for providing the O&M would disappear or go unfunded. Mr. Shapiro added that any indemnification must be based on concepts of fault, something discussed in the Subcommittee's first meeting. Finally, Mr. Tom Eres, representing Hofman Ranch, urged the Subcommittee not to narrow its deliberations to just O&M, but to consider how to secure assurances of individual JPA members for all liability, whether it is related to O&M, design or construction, or activities or omissions. Mr. Eres opined that it was only under the cloud of such broad liability would local entities be willing to take accountability of the projects they are benefiting from.*

## **7. ADDITIONAL SUBCOMMITTEE DISCUSSION**

*Chairwoman Suárez asked the members what the next steps should be. Mr. Hodgkins offered to prepare a draft resolution outlining a policy dealing with JPAs and their individual members and the various ways they can provide "proof" to the Board that either the JPA or the individual members will hold the State harmless from any injury that arises from failure in project O&M. The group and members of the public discussed the possible forms such "proof" could take. For example, such proof could be promises in the joint powers agreement that the individual members will step up to accept all liability flowing from the JPA once it dissolves. Another form of proof is language in the joint powers agreement noting that the JPA will never dissolve. Finally, the JPA's members can agree to enter into an O&M assurances agreement with the Board. The Subcommittee accepted Mr. Hodgkin's offer to prepare a draft policy resolution. Ms. Rie voiced a concern that any deviation from past Board practices may unfairly single out the JPAs, and place additional burdens on one class of permittees.*

## **8. SCHEDULING OF NEXT MEETING**

*The next meeting of the subcommittee is scheduled for April 9th, from 1 to 4 pm.*

## **9. ADJOURNMENT**

*Ms. Suárez adjourned the meeting at 4:02 pm.*

Dated: 1-29-2010

The foregoing Minutes were approved:

  
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Emma Suarez, Chairwoman