

## **MINUTES**

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

The following Subcommittee Members of the Board were present:

Mr. Francis "Butch" Hodgkins  
Ms. Maureen "Ladybug" Doherty  
Ms. Teri Rie

#### **1. INTRODUCTIONS**

*The first meeting of the Joint Power Authority Subcommittee ("the subcommittee") of the Central Valley Flood Protection Board (CVFPB) was called to order at 1:04 PM. CVFPB Executive Officer Jay Punia opened the meeting by noting that Subcommittee members Mr. Butch Hodgkins, Ms. Lady Bug Doherty, and Ms. Teri Rie were present. Mr. Punia also noted Subcommittee member Ms. Emma T. Suárez would not be attending. He also introduced the members of the CVFPB staff present: Ms. Virginia Cahill (legal counsel); Mr. Dan Fua (Supervising Engineer) and Ms. Lorraine Pendlebury (Staff Analyst).*

#### **2. SELECTION OF A CHAIRPERSON**

*Subcommittee members unanimously elected Ms. Suárez as Subcommittee chair, and in Ms. Suárez's absence, selected Ms. Rie as meeting chair. Ms. Rie asked the members of the audience to, if they wished, introduce themselves and their affiliation.*

#### **3. HISTORY OF THIS ISSUE**

*Mr. Punia and Ms. Cahill explained the CVFPB had agreed to form a subcommittee to consider whether the Board needed a policy addressing a requirement, in the form of a new permit condition or by entering into separate agreements, to have individual members of a Joint Power Authority(s) (JPA) promise to indemnify the Board for any liability that may arise from the facilities that constitute the authorized project. No such broad policy is currently in place, although in a recent past, one JPA – individual public members of the Three Rivers Levee Improvement Authority - was required to provide such assurances. Ms. Cahill concluded by noting that the subcommittee was tasked to consider whether the apparent inconsistency in treatment of JPAs could – and should - be reconciled under one policy.*

4. **PRESENTATION ON WHEN, AND FOR WHAT, JOINT POWERS AGENCY (JPA) MEMBER AGENCIES ARE LIABLE FOR THE DEBTS AND LIABILITIES OF THE JPA RELATING TO SIX SPECIFIC SITUATIONS**

*Chairwoman Rie noted the first item on the agenda was a discussion regarding under what circumstances the individual members that comprise a JPA can be held liable for the debt and liabilities of the JPA. Specifically, the subcommittee wanted to discuss various scenarios, such:*

- *Where a JPA is found liable in **tort**, are its member agencies liable for that tort, **during** the life of the JPA?*
- *Where a JPA is found liable in **tort**, are its member agencies liable for that tort, **after** the life of the JPA?*
- *Where a JPA is found liable for **breach of contract**, are its member agencies liable for that breach, **during** the life of the JPA?*
- *Where a JPA is found liable for **breach of contract**, are its member agencies liable for that breach, **after** the life of the JPA?*
- *Where a JPA is found liable in **inverse condemnation**, are its member agencies liable for that inverse condemnation, **during** the life of the JPA?*
- *Where a JPA is found liable in **inverse condemnation**, are its member agencies liable for that inverse condemnation, **after** the life of the JPA?*

*CVFPB Counsel Ms. Cahill noted a memorandum addressing these various scenarios had been prepared by Mr. Scott Shapiro, counsel for various JPAs. Ms Cahill also noted Mr. Shapiro was prepared to go through his analysis and had prepared a PowerPoint presentation to facilitate the discussion. Finally, Ms. Cahill noted she had reviewed the memo and the PowerPoint and generally agreed with how the issues were discussed.*

*Mr. Shapiro proceeded with his presentation. He first made it clear that the presentation was being provided by the JPAs to the Board in a collaborative effort to develop a policy that protects the State while at the same time accommodates the concerns of local entites. Mr. Shapiro also noted the materials that are part of his presentation are best characterized as "briefing memos" and are not intended to provide legal advice.*

*Mr. Shapiro began by explaining various legal concepts controlling the flow of liability to JPA individual members from the JPA itself. Specifically, he noted that liability may be based on tort law, contract law, or inverse condemnation. Whether the individual members of a JPA can be found liable for the acts of the JPA will depend under what "legal theory" is used to find the JPA liable.*



*Mr. Shapiro explained that a tort is a breach of a legal duty imposed other than by contract. Most accidents or careless acts that result in the injury of a person or loss of property are linked to the concept of tort. Also linked to this tort liability is the establishing that a party is "at fault" – that is, that the party had a duty under the law, that the party failed to live up to this duty, and this failure resulted in an injury to person or property. As to JPAs, Mr. Shapiro explained that state law (Government Code Section 895.2) already mandates that all members of the JPA be held liable for a tort committed by the JPA. So whether the JPA is still in existence or not, if the act which resulted in the liability occurred while the JPA was in existence, the individual members could be held liable.*

*By contrast, Mr. Shapiro explained State law (Government Code Section 6508.1) allows individual JPA members to protect themselves from the contract liabilities of the JPA, as long as the agreement entered to form the JPA itself provides for such language. Thus, 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. Ms. Cahill noted the issue of having an individual member agency sign an agreement to hold the Board harmless for any contractual claim arising from the JPA's work is a key concern. She also noted that Mr. Shapiro has indicated his clients recognize this is a legitimate matter of concern for the Board, and have suggested ways to deal with it in the form of agreements between the Board and the individual agency responsible for the "operation and maintenance" of the project, or portions of the project.*

*Mr. Shapiro opined, and Ms. Cahill agreed, that the courts would most likely deal with inverse condemnation liabilities during the existence of the JPA similarly as it would a tort. Inverse condemnation is a constitutional claim based on the concept of "taking of private property without just compensation." Mr. Shapiro explained no court case addresses the question directly, but it was likely that as long as there is a JPA in place, the liabilities incurred by the entity based on an inverse condemnation claim would not automatically pass to the individual members.*

*Finally, Mr. Shapiro suggested one way of dealing with the issue of what happens to the contract or inverse condemnation liability once the JPA dissolves is to focus on the specific language in each JPA agreement. Some agreements are structured in a manner so that it is almost impossible for the JPA to dissolve. Others may have language spelling out how liabilities are to be dealt with once the JPA dissolves. Thus, the agreements themselves may provide the assurances the Board appears to be seeking.*

*After much discussion between subcommittee members, Ms. Cahill, Mr. Ward Tabor (Department of Water Resources counsel) and members of the public, there appeared to be much consensus regarding:*

- Where a JPA 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.*
- Underlying any type of tort liability – whether to the JPA or its individual members – is the establishing that the JPA and/or the individual member is “at fault.”*
- 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.*
- It is not certain how the courts would treat inverse condemnation liability after the dissolution of the JPA.*

*Next followed a discussion regarding amending of the Board's Standard Permit Condition #10. The current permit language provides in part:*

*If any claim of liability is made against the State of California, or any departments thereof, the United States of America, a local district or other maintaining agencies and the officers, agents or employees thereof, the permittee shall defend and shall hold each of them harmless from each claim.*

*Mr. Shapiro noted that the current permit language was too broad for it implies that actions other than those arising out of the permit trigger the “hold harmless” obligation. He proposed language for the Subcommittee to consider which he opined would clarify the matter. Mr. Ward Tabor, staff counsel for the Department of Water Resources, opined the clarification may not be necessary since the regulations upon which the permit term is based are clear that only those liabilities directly related to the permit trigger the “hold harmless” obligation.*

*Thus, after much discussion between subcommittee members, Ms. Cahill, Mr. Tabor and members of the public, it was noted that in those cases where the Board has determined it to be desirable to obtain an indemnity agreement with the individual members of a JPA, it has not amended Standard Condition 10, which continues to apply to the permittee/JPA. Instead, the Board has inserted a special condition in the permit requiring an assurance agreement satisfactory to the Board signed by the JPA and its individual members. This requirement may, however, create problems for individual members to secure insurance to cover for what some believe is too broad of an obligation.*



*With this in mind, the discussion next focused on what indemnities are enforceable and insurable; that is, actually provide protections to the State and are reasonably available for purchase by the individual JPA members.*

**5. PRESENTATION ON WHAT INDEMNITIES ARE ENFORCEABLE AND INSURABLE, AND ON WHAT JPAs AND THEIR MEMBER AGENCIES CAN DO TO INSURE THEIR LOSSES (TYPES OF COVERAGE, AVAILABILITY, COVERAGE AMOUNTS, COSTS)**

*Mr. Shapiro introduced Mr. Paul Hight (County of Sacramento), noting Mr. Hight has an expertise in purchasing insurance for public entities. Messrs. Shapiro and Hight explained that if a JPA (or its member agency) agrees to indemnify the State, but the JPA (or its member agency) is not at fault in the first place, the insurance policy of the JPA (or its member agency) will not pay on the claim. This is because a promise to indemnify does not create fault. And insurance companies will not pay on a claim unless the bodily injury or property damage was, in fact, the fault of the party requesting for indemnification ("that the insured would have in the absence of the contract or agreement.") Thus, the gentlemen opined, no amount of contractual promises between the JPA members and the Board would result in actual payment to the Board by an insurance company absent a showing that the JPA members would be liable themselves for the injury.*

*Mr. Shapiro suggested the Subcommittee consider revising its Standard Condition #10 as follows:*

*To the extent allowed by State law, the permittee shall indemnify, defend, and hold harmless the State of California, or any departments thereof, the United States of America, and any local district or other maintaining agencies, and the officers, agents, or employees thereof, from and against any claims, demands, actions, losses, liabilities, damages, and costs incidental thereto **arising out of this permit**, including reasonable cost of defense, settlement, arbitration, and attorneys' fees, but **only to the extent caused by the negligent or wrongful act or omission of the permittee**, its officers, agents, or employees or the act or omission of anyone else directly acting on behalf of the permittee for which the permittee is legally liable under law*

*Ms. Cahill noted the proposed language may not cover situations where the liability is based on inverse condemnation. Mr. Shapiro suggested a modification "by the negligent, wrongful, or unreasonable act or omissions of the permittee..." Mr. Hight explained the determinative factor will be whether the insurance contract itself excludes liability based on inverse condemnation.*

*Finally, Messrs. Shapiro and Hight warned any new indemnity obligations on JPA members should respect the jurisdictional boundaries of the member. Mr. Steve Winkler from San Joaquin County explained the individual JPA members believe it would be inappropriate and unfair to hold local agencies liable for actions that occurred outside of their jurisdiction, and which likely involved no fault of their own. Mr. Winkler opined this would have a chilling effect as to future projects because it would impose new legal burdens on the entities due to the mere*



*fact the entity agreed to build a levee to protect the community and had to come to the Board for approval.*

*Finally, the Subcommittee was provided with some data regarding cost and availability of commercial insurance. Mr. Hight noted some agencies have extensive insurance (e.g., SAFCA has \$35 million this year), but the cost is steep, and keeps increasing every year. Others have limited ability and budget to obtain insurance. For example, Reclamation District 1000 has liability coverage for \$1 million (\$3 million aggregate), which costs the entity 75,000 annually, or nearly 3% of its budget.*

*Chairwoman Rie noted that when floods occur, damage is usually in the billions, not millions. Thus the question becomes how is the remainder of the liability to be covered if the insurance has paid out the maximum under the policy. Much discussion ensued regarding the policy and fiscal difficulties the agencies would face under such circumstances.*

## **6. PRESENTATION ON THE INTERESTS OF THE BOARD IN SEEKING PROTECTION BEYOND ITS STANDARD PERMIT TERMS**

*Mr. Tabor explained the existence of various state laws interpreted to require the Board insist on indemnities from local entities. Such include Water Code Sections 8617.1, 8370, 12642, 12643, 12828. Mr. Tabor opined it has been the Legislature's intent that the Board look for every way to make the beneficiaries of the project financially responsible, a sentiment Ms. Cahill has previously shared with the Board. He said the Subcommittee's discussion of the difficulties and limitations regarding the securing of insurance by local entities has been very instructive. Mr. Tabor concluded by noting that the best result is one where all parties work together to limit each individual's liability.*

## **7. PRESENTATION ON THE INTERESTS OF JPAs AND THEIR MEMBER AGENCIES IN LIMITING INDEMNITIES PROVIDED TO THE STATE**

*Mr. Shapiro explained what the local agencies hope the Subcommittee will consider in its deliberations. First, Mr. Shapiro agreed with Mr. Tabor that the best goal is to reduce liability for all, by reducing the risk of flooding. Specifically for the cities and counties members of the JPAs, to not take on liability for a flood control system that the cities and counties did not build, agree to maintain, or design. Mr. Shapiro noted the fair outcome is for the cities and counties to accept liability only where the cities or counties act in a manner which is unreasonable under the law. Similarly, fairness for the O&M agencies is acceptance of liability for their failure to properly O&M the project.*

*Mr. Shapiro said his clients agree that if they're acting unreasonable, that they should be responsible for the action. Conversely, Mr. Shapiro warned that if the Board proceeds to implement an overbroad indemnity: JPAs might elect to dissolve, discouraging regional flood management planning; Cities and counties might withdraw from JPAs; JPAs might elect to only plan and/or fund flood protection projects, instead relying on the O&M agencies to apply for permits and construct projects; and/or JPAs might wait for the State to improve flood protection, which will prolong potential State liability from existing facilities.*

## 8. DISCUSSION OF NEXT STEPS

*The Subcommittee agreed to meet again before the next Board meeting to flesh out some of the concepts presented during the afternoon's discussion. Ms. Cahill noted she will prepare a memorandum capturing the concepts discussed.*

## 9. SCHEDULING OF NEXT MEETING

*The next meeting of the subcommittee is scheduled for March 13, from 1:00 to 4:00 pm.*

## 10 ADJOURNMENT

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

Dated: 12/17/09

The foregoing minutes were approved by:

Emma Suarez

Emma Suarez, Chairperson

Teri Rie

Teri Rie, Acting Chairperson