

**Bay Delta Conservation Plan  
Review Document Comment Form**

**Document:** REGULATORY ASSURANCES AND CHANGED CIRCUMSTANCES AND UNFORESEEN CIRCUMSTANCES]

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No.	Page #	Section #	Line #	Comment	Disposition
	6-5	2	24-26	This section contains a provision that must be revised because it fundamentally misconstrues the nature and obligations of local levee maintaining agencies and would undermine the spirit of cooperation we expect the BDCP Management Entity should have with local flood control agencies. The provision asserts that the BDCP Management Entity should seek funding from a levee maintaining agency to pay for habitat-related damages that occur from a levee break. However, local maintaining agencies are not insurance policies for landowners, and are almost never financially responsible for damage from floods just because they result in levee breaks. The provision should therefore be revised to require the BDCP Management Entity to cooperate with the local maintaining agency to repair breached levees in the project area, while itself making	

<sup>1</sup> See, e.g., Water Code § 8370.

<sup>2</sup> See generally Gov't Code § 810 et seq.

<sup>3</sup> See, e.g., *Kambish v. Santa Clara Valley Water Conservation District*, 185 Cal.App.2d 107 (1960).

			<p>expeditious repairs to the flood-damaged habitat.</p> <p>Page 6-5 of the Working Draft Plan Implementation includes the following provision, with the objectionable portion underlined:</p> <p style="padding-left: 40px;">Failure of levees not constructed as part of a BDCP activity reduces the benefits to covered species produced by restored tidal marsh.</p> <p style="padding-left: 40px;">In the event of a failure of a levee not constructed as part of a BDCP action, the entity with jurisdiction and responsibility for the levee will be expected to make all necessary repairs. Following repair of the levee, the BDCP Management Entity will, to the extent practicable, identify and undertake actions through the adaptive management process to restore the degraded or lost habitat. <u>The Management Entity will seek to obtain funding from the party responsible for the levee failure for the actions necessary to restore habitat functions provided by the tidal marsh.</u></p> <p>Most levees within the Sacramento-San Joaquin River Delta were constructed 100 or more years ago by private landowners. Local reclamation and levee districts were formed later to operate and maintain (O&amp;M) the levees. The U.S. Army Corps of Engineers upgraded many of these levees (called federal project levees) to engineering standards, and many have also been incorporated by the State into the Adopted Plan of Flood Control. However, for almost all Delta levees, the districts have retained their historical role in conducting O&amp;M.<sup>1</sup> In this capacity, local districts perform multiple inspections of the levees within their jurisdiction annually and conduct O&amp;M as needed throughout the year, helping assure that the levees will perform as expected during floods. In the event of a levee break, the districts engage in flood-fighting and afterward work with State and Federal authorities to arrange for an expeditious repair.</p> <p>Districts are not, however, akin to an insurance</p>	
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			<p>policy and somehow legally responsible for all damage that results from floods that happen to result in a levee failure. For one thing, levees do not remove all risk of flooding. Levees are constructed of compacted soil with some rock and other additional protections, and are intended to <u>reduce</u> flood risk to a level consistent with the levee's design criteria. When a break occurs, it is almost always because the levee was subjected to an overwhelming natural force. Because no flood control system is ever without risk of failure, landowners who purchase property within a flood plain do so with the understanding that their property may ultimately be damaged due to flooding. Accordingly, many local levee districts provide occasional notifications to landowners to that effect. One example, from Reclamation District No. 2068, is attached.</p> <p>Moreover, with very limited exceptions, California law grants local districts with immunity from suit.<sup>2</sup> Even if a local district has been negligent in conducting O&amp;M, and that negligence is associated with a levee break, a damaged landowner still cannot recover.<sup>3</sup> The recent case of <i>Tilton v. Reclamation Dist. No. 800</i>, 142 Cal.App.4th 848 (2006), provides a good overview of negligence law's limited application to levee districts. There are admittedly a few exceptions to immunity for a flood control project, such as a design that uses private property not historically subject to flooding as a retention basin to provide flood protection to other property. Although the exceptions tend to be highly publicized, they are rare and have little application to Delta levees, which almost always extend around an island's entire exterior boundary and thereby provide equal protection to all lands.</p> <p>The reason for district immunity is simple: the law is intended to encourage the formation and continued existence of districts in order to maximize flood control projects. If local districts were financially responsible for all flood damage in their jurisdictions, they would be quickly dissolved, leaving landowners to maintain their own levees—a virtually impossible task without a competent staff, engineering consultants, heavy equipment, and a</p>	
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				<p>stable funding source.</p> <p>As an additional matter, it is highly implausible that a levee break would cause damage to tidal habitat restored under the BDCP. The habitat areas will all, or virtually all, be located <i>outside</i> of levees, where they can be influenced by ocean tides and left exposed to seasonal flood waters. Levees breaks, by contrast, result in flood water inundating areas within their boundaries. The levees do, however, provide protection to water conveyance infrastructure and other systems relied upon by the members of the BDCP Steering Committee. Consequently, the BDCP Management Entity should be directed to support and cooperate with local reclamation and levee districts in the event of a levee break, not attempt to hold them financially responsible for the effects of natural disasters.</p> <p>We therefore request that the above-cited provision be revised, preferably as follows:</p> <p style="padding-left: 40px;">Failure of levees not constructed as part of a BDCP activity reduces the benefits to covered species produced by restored tidal marsh.</p> <p style="padding-left: 40px;">In the event of a failure of a levee not constructed as part of a BDCP action, the entity with jurisdiction and responsibility for the levee will be expected to pursue necessary and reasonable repairs. Following repair of the levee, the BDCP Management Entity will, to the extent practicable, identify and undertake actions through the adaptive management process to restore the degraded or lost habitat. <u>The Management Entity will further cooperate with and provide support to local levee maintaining agencies to ensure an expeditious repair of the failed levee.</u></p>	

