

**Robert Pyke, Consulting Engineer**

**Memorandum**

To: Phil Isenberg, Joe Grindstaff  
From: Robert Pyke  
Subject: Foot and Knuckle-Dragging  
Date: June 29, 2012

Phil, Joe,

As part of my personal wellness program I take little pills to lower my blood-pressure and I did not want to offset that by attending your discussion of Delta levees this morning. In spite of receiving a nice note from Joe following my early submission of comments on Chapter 7 of the Sixth Staff Draft, I was afraid that you would not have addressed them and that in fact turned out to be correct. And, in the privacy of my own home I can yell epithets and expletives at the computer monitor without disrupting a public meeting.

But when Phil appeared to take pride in the fact that the DSC has not adopted the basic recommendations of the Economic Sustainability Plan with respect to levees (following the initial staff recommendation, although I have seen no evidence that the staff or the Council members had read Chapter 5 of the ESP at that time, or have read it subsequently – if I am wrong on that perhaps you could tell me which if any parts of Chapter 5 you disagree with), I yelled “That’s the problem. I’ll see you in court”. More on that later relative to the Delta Plan and its EIR, but the remark also applies to that State’s inverse condemnation liability with respect to levees, including Delta levees. I thought that I had addressed that in my formal comments but there indeed appears to have been a failure to communicate. I believe that Phil is correct in claiming that there is no statute on the books pledging funding for improvement of Delta levees to the Delta-specific PL 84-99 standard, but that does not get the State off the inverse condemnation hook. It has been the policy of the State and federal governments since 1982 to improve Delta levees to at least this standard. That has been reinforced by the ESP, funding for that purpose was authorized by Propositions 84 and 1E and even the draft DWR Investment Framework, which is now being reconsidered partly as a result of pressure from the Corps of Engineers, did not eliminate that as a goal. It merely put impediments in the way of achieving that goal. Please talk to an inverse condemnation expert and ask whether that reduces or increases the State’s inverse condemnation liability.

When Dan Ray claimed that if the currently available funds are spent on improving selected levees to the PL 84-99 standard, that might not allow for raising all Delta levees to the HMP non-standard, I was struck dumb, but when I recovered I yelled something uncomplimentary about bureaucrats. Dan is wrong at least three different ways: (1) DWR

has a current round of funding which is intended to bring all Delta levees up to the HMP standard; following that round of funding they intend to resume funding PL 84-99 projects; (2) Dan may or may not be correct on the remaining funds available that have been appropriated by the legislature but there should be an additional \$250 million for Delta levees from the Propositions 84 and 1E authorizations for Delta levees that have not yet been appropriated; of course, under political pressure the legislature could redirect these funds to urban levees or some other use, but while you have the ear of your inverse condemnation expert, ask how this would impact that State's inverse condemnation liability in the event of a Delta levee failure; (by the way, don't ask the OAG – I don't know about their expertise on takings, but their record on inverse condemnation is not so hot); and (3) you yourselves are proposing the creation of Delta Flood Risk Management Agency with the power to raise money in accordance with the "beneficiary pays" principle; what the heck are these funds going to be used for?

By the time that Joe said that he had checked with DWR and been told that "prioritization" could not be completed in less than 3 years I guess I was just slumped in my chair. But I got up and checked the statute. In spite of being foreign-born I can read English and I do not see in W.C. Section 85306 any requirement that involves DWR. It does say "The council, in consultation with the Central Valley Flood Protection Board, shall recommend in the Delta Plan priorities for state investments in levee operation, maintenance, and improvements in the Delta ...". Omigod, it says "in the Delta Plan" – that would be the Delta Plan that was required to be adopted by January 1 of this year, would it not? I contend that that could and should have been done, especially since most of the necessary legwork had already been done by the Delta Protection Commission in developing the ESP. You don't believe me? Read Chapter 5! Perhaps my estimate given in conversation with Council members of half a day to complete "prioritization" was a little optimistic, but 3 years is just ridiculous.

That brings me to my principal point which is to reinforce what Ms Terry and Mr Zuckerman were saying this morning. Ms Terry quite correctly pointed out that the relevant chapter of the Delta Plan is grandly titled "Reduce Risk to People, Property, and State Interests in the Delta". Yet all you propose to do is delay reduction of risk. Isn't that the same as increasing risk? Doesn't that make the State more exposed to inverse condemnation liability? Using Mr Zuckerman's excellent analogy, the Delta needs a wellness program starting now, in fact it needed one starting January 1 of this year, not one that might start in 3-years-time. I do, however, have a little quibble with Mr Zuckerman who, I think in deference to his blood pressure, ended up pleading with you simply not to get in the way of existing programs to reduce risk. I think you have an affirmative duty to go much beyond that. Not just because the co-equal goals have to be implemented in a manner that protects and enhances the unique values of the Delta but because maintenance and improvement of the levee system is necessary to achieve the co-

equal goals! Again, read Chapter 5 of the ESP.

So, what's the connection here with my "see you in court" epithet above? The connection is that you propose slowing down existing levee improvement programs and fail to initiate an overall plan for making the Delta sustainable in the face of floods, earthquakes and possible more rapid sea-level rise. As far as I know, you are free to do that in the Delta Plan, although I would not personally want that to be part of my legacy, but you believe that you have to prepare a companion EIR in order that your policies become legally enforceable regulations. That EIR must make it clear that your proposals to reduce risk actually do the opposite and have enormous adverse environmental impacts. If it fails to do that it will likely be challenged in court since the comments that I and others have made already, and will make on the recirculated EIR, will be part of the administrative record.

But it is not the threat of legal consequences that I want to emphasize. It is more that the people of California deserve a more generally forward-looking and definitive Delta Plan than the pallid one that the Council is proposing to adopt. Simply to wait for other people to do the heavy lifting is not much of a plan. While it may be true that adopting a non-plan will enable the Council to more effectively act as a facilitator coordinating the activities of multiple federal, state and local agencies going forward, I do not see that as the role that the legislature envisioned for the Council.

A handwritten signature in black ink, appearing to read "Bob".

Robert Pyke, Ph.D., G.E.