No Good Deed Goes Unpunished: Public Agency Liability For Flood Control

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Beginning the afternoon of April 3, 2006 and continuing through the next, the rains came to Merced County. They were unprecedented. For a six-hour period in the worst hit area, the rainfall was a one-in-445-year event, and for a 12-hour period, the rainfall was a one-in-113-year event. Nevertheless, for 12 hours, the creeks and canals handled the storm flows, which caused the water levels to rise from 157 feet above sea level to more than 164 feet above sea level. But on April 4, at approximately 7:30 a.m., after more than five hours of overtopping, the levee on one of the canals washed out and the waters flooded an adjacent neighborhood.

By September 2007, more than 2,000 residents of the adjacent neighborhood sued the Merced Irrigation District and the City of Merced and Merced County. Together, these public agencies were an informal group called the Merced Streams Group that, for many years, worked together to maintain the streams and canals so that they would not flood adjacent properties and, also, carry irrigation water. After approximately 200 depositions, dozens of experts and more than four years of litigation, the City settled for less than it would have cost to try the case. This experience highlights the complexity of flood cases and the breadth of the laws governing liability for flood control facilities.

Liability for Floods – It Doesn't Take Much

If a public agency substantially participates in the planning, approval, construction or operation of a public project or improvement that causes injury to private property, it may liable for its involvement. It does not matter whether an agency's involvement ended years ago or if another agency owns and has always been primarily responsible for the project. In California, this liability arises from inverse condemnation, dangerous condition of public property and nuisance. These claims differ in terms of the standard of liability and the remedies available to a plaintiff.

For inverse condemnation, the California provision requires that, when private property is taken or damaged for public use, the public agency must compensate the owner for the property damages. An inverse condemnation claim alleges that the flood control improvement served the public use and flood damages require just compensation, as established in Article I, section 19 of the California Constitution. Because inverse condemnation is a strict liability claim, a plaintiff must only prove that an agency's public improvement substantially caused the property damage, even if it was only one of several concurrent causes. By contrast, a plaintiff with a negligence claim must prove that his or her injury was reasonably foreseeable to the defendant.

However, this strict liability rule is balanced by the reasonableness rule, which requires a plaintiff to prove that the pubic agency's design, construction or maintenance of a flood control project posed an unreasonable risk of harm. (*Belair v. Riverside County Flood Control District*, 47 Cal.3d 550, 565, 559 (1988)). While a reasonableness analysis can be complicated, an agency will likely be liable if the flood control protection does not perform as designed or if the facility is not properly operated or maintained. In that event, a plaintiff will recover his or her property damages and attorney's fees.

Although a plaintiff is not entitled to personal injury damages for inverse condemnation, a plaintiff may obtain personal injury damages with a claim for dangerous condition of public property. This is a form of negligence addressed in Government Code section 835 that makes a public agency liable for property it owns or controls if there was:

> a dangerous condition that created a reasonably foreseeable risk of the

injury that occurred; the agency created the dangerous condition or was aware of the condition in time to prevent it; and the condition caused plaintiff's harm.

A plaintiff may also recover personal injury damages for a nuisance claim. A nuisance is anything that "is injurious to health . . . offensive to the senses . . . or [interferes] with the comfortable enjoyment of life or property," according to California Civil Code section 3479. A plaintiff may bring a civil action for an injunction, damages or both.

As the Merced case described above shows, what often begins as a well-intentioned effort to protect residents from flooding can become a continuing obligation to maintain and operate those facilities. Also, facilities that serve as streets, irrigation canals or creeks may be viewed as flood control facilities which the agency must operate and maintain to protect against floods. Or a limited effort to solve a problem, such as designing a fix or assisting with maintenance, may draw the public agency into responsibility for a flood long after its involvement ended. In each of these circumstances, if the flood control improvement did not perform up to standard and caused flooding of a plaintiff's property, there is a pretty good chance the public agency will be liable.

Preventing and Defending Claims – Prevention is Cheaper

As public agencies are all too aware, avoiding litigation is always preferable - and almost always cheaper. Here are some steps to avoid litigation:

Preventative maintenance. If it has not already done so, an agency should develop and follow a maintenance plan. This could include an inspection schedule, clearing channel obstructions, repairing weak spots in levees and dams, and making sure that flood control gates, grates and other facilities are in proper working order.

Analyze the performance of the flood improvement. A consultant can inspect the agency's facilities to ensure they are up to standard. Also, with computer modeling, the consultant can evaluate the structures' ability to perform under different rain events.

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Insurance policies. The agency may purchase insurance for inverse condemnation claims and flood damages and keep any old policies. Although most recent policies exclude inverse condemnation and flood damages, older policies may not have exclusions and may apply to old facilities that fail.

Flooding easements. Some agencies have paid property owners for easements that allow them to flood the owners' properties. However, the courts have severely limited their effectiveness, so this should be used with caution, if at all. (*Salton Bay Marina, Inc. v. Imperial Irrigation District*, 172 Cal.App.3d 914, 935-36 (1985)) (Cal. Ct. App. 1985))

When faced with litigation, an agency should consider several approaches:

Experts. It is important to involve experts at the outset to avoid missteps in discovery and assess whether early settlement is advisable. This may involve hydrologists to evaluate the movement of the flood waters and performance of the flood protections; engineers to consider the reasonableness of the public agency's design, construction and maintenance of its facilities; and architects or contractors to measure the harm to a plaintiff's property. If personal injuries are involved, the agency will need medical professionals to examine the alleged injuries.

Insurance coverage counsel. Insurance coverage attorneys can see whether the claim is insured. If the agency has flood insurance, those attorneys can make sure the insurer steps up, and defense counsel does not make decisions in litigation that bar coverage. As mentioned above, old insurance policies that pre-date the flood may provide coverage. For the Merced Stream Group, insurance companies paid a significant share of their settlements.

Organizing plaintiffs into classes. Cases with a large number of plaintiffs can be a logistical challenge. Typically, the plaintiffs will fall into different classes according to how they were affected by the flood water and the nature and extent of their damages. Defense counsel should consider these classes as he or she frames pretrial motions and discovery

Obviously, flood control improvements serve a vital public service and laws protect residents from unreasonable risk or defects from those improvements. For the public agencies trying to help their residents, flood claims may seem unfair. However, knowing the requirements and remedies enable the agencies to manage the risks. If the predicted El Nino arrives this winter, it is worth thinking about these issues. **M.**



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