

**TO:** Senator Kevin Murray

**FROM:** Senator Sam Aanestad

**DATE:** March 1, 2006

**RE:** Minority Report on Water & Flood Control

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### Summary

The Governor's water and flood control bond measure (SB 1166/Aanestad) makes the first significant investments in flood protection and surface water storage in a generation. Over the last decade California voters approved \$6.6 billion in bonds labeled as "water" measures according to the Legislative Analyst, but less than 7% of the proceeds went to levees and an even smaller share toward surface storage. In marked contrast, SB 1166 earmarks a 28% share to flood protection and 14% for surface storage.

The Administration's proposed amendment to move \$1 billion for surface storage construction from the 2010 to the 2006 bond is good policy for both water and flood control. California must do what it can to bring significant new water supply on-line, as we face a severe shortage in our next drought season. Dams have also played a crucial role in managing Northern California's volatile rivers and restraining floodwaters that can easily overtop levees. Storage projects identified by the CALFED program can create major benefits in both areas.

Funds for levee improvements and repairs should also be "frontloaded" in a way that sufficiently addresses the immediate system needs without relying upon full federal matching funds or the success of a 2010 bond measure.

While sufficient funding for flood control is crucial, serious reforms of our levee management system are just as critical. State and local levee programs are beset by a regulatory process that delays important projects for years and puts human lives at risk. The Legislature needs to streamline the project approval process and provide a definable set of objectives for repairing and upgrading the state-managed system.

Eliminating unnecessary delays will help contain the rising costs associated with flood protection. We are aware of no other government service or public works that has experienced the kind of cost inflation seen recently with levee repair. Given the financial constraints on both the state and the many local governments responsible for managing levees, lawmakers must work not only to streamline the regulatory process but commit to cutting costs and improving project efficiency wherever possible.

We need a renewed focus on channel maintenance, particularly in the state-managed Sacramento River Flood Control Project. This man-made system of weirs and bypasses diverts heavy flood flows out of the rivers and away from populated communities. In the last few years, sediment and vegetation in rivers and bypasses has reduced system capacity significantly, creating urgent problems to which the state has responded in piecemeal fashion. A program for regular maintenance of rivers, streams, weirs, and bypasses of the Sacramento River project with a reliable budget is desperately needed.

On the water bond, integrated regional water management (IRWM) should be supported only as part of an overall plan to address water needs. It must be linked to surface water storage funding and assurances. Such assurances should include both the authorization and the continuous appropriation of funds for surface storage construction. We believe that sound water policy should address both the supply and demand for water. For too long this Legislature has focused almost solely on demand.

The Water Resources Investment Fund (WRIF) capacity charge contained in this measure is not part of the bond proposal, not necessary for the successful implementation of IRWM programs, and should be eliminated. There is no consensus that this tax is necessary or on the best way to both collect the money and spend it. It bears no relation to the bond package at all and will simply fund existing programs.

Senate Republicans oppose the WRIF not only because of the lack of need, but the charge is a tax, not a fee. WRIF expenditures do not

focus on water infrastructure and maintenance, and in fact will be used for many uses that are “public benefits” normally supported by general taxes.

### Levee Program

The administration’s levee program proposes \$210 million in the 2006 bond and \$300 million in the 2010 bond for levee repairs, sediment removal, evaluations, floodplain mapping, and the floodway corridor program.

### **Erosion Repairs**

The \$50 million for levee erosion repairs contained in SB 1166 is too little, as is the Administration’s proposal to raise that amount to \$75 million. The U.S. Army Corps of Engineers recently identified over 180 erosion sites along the Sacramento River Flood Control Project including three dozen listed as “critical” threats. In its white paper on flood control, DWR estimated \$600 million for repair of these sites.

The bond measure should outline a more aggressive approach to levee repair, anticipate problems with federal funding, and delineate specific objectives for these funds. Senate Republicans support a program targeting known erosion sites and levee deficiencies with funding and fast-track approvals.

Any use of funds for setback levees in this section should be subject to a cost comparison with simple repair of the existing levee.

### **Sediment Removal**

Any water bond should contain funding for sediment removal as a vital component of flood protection. The weirs and bypasses of the Sacramento River Flood Control Project were designed to carry three to five times as much water as parallel sections of the Sacramento River, but key parts of that system are choked with sediment and vegetation. Maintaining these channels is absolutely critical, as even small reductions in the bypass capacity puts significant additional pressure on river levees.

The real problem in our flood channels is a lack of regular maintenance. The design capacity of rivers, streams, and bypasses within the flood control system needs to be monitored and maintained on a regular basis. Instead, the state has taken a piecemeal approach to channel maintenance, waiting until significant problems arise. When they do, nearby levees assume the increased flood risk while state officials search for project-level funding and obtain necessary

approvals. The state cannot continue to allow a predictable maintenance issue to fester into major remediation projects.

Channel maintenance and levee maintenance go hand-in-hand. A poorly maintained river channel increases the likelihood of levee erosion by raising and diverting water flows. Raising a levee will not improve flood protection if the water level in the adjacent channel rises with it. Heavy vegetation, trees and sediment can also block the flow of floodwater, creating a pooling effect that saturates levee soils and causes ruptures.

There should be a full evaluation of the current capacity of the Central Valley flood control system, an allocation to sediment removal sufficient to restore the system's design capacity, and a formal system of regular maintenance of flood channels that includes all rivers, tributaries, and man-made structures of the Sacramento River Flood Control Project. The system should be maintained so that future channel clearing does not rise to the level of a "project" where it is subject to CEQA/NEPA and other permit requirements.

We disagree with the department's assessment that sedimentation in the Sacramento River does not impact flood protection, and recommend the Sacramento River be included in this program.

### **Regulatory Reform**

The need for reform of our flood protection programs could not be more evident. Over the last twenty years, the cost of levee repair has risen from an average of \$300 per linear foot to \$5,000, with some projects approaching \$9,000. Regulatory delays have reached five years or more in some cases, doubling and tripling overall costs. These delays are a result of a burdensome process of reviewing, permitting, and mitigating levee projects on a site-by-site basis with the oversight of multiple state and federal agencies. According to DWR estimates, mitigation and permitting have devoured as much as 45% of the funds for recent levee projects. Additional construction costs resulting from related delays are impossible to calculate but clearly significant.

To one extent or another, both parties have acknowledged the role that the regulatory process plays in reducing available flood funds and delaying projects. Some have argued that federal agencies are largely responsible for regulatory entanglements and costs associated with flood control, so there is little the Legislature can do in this area.

We disagree wholeheartedly. To achieve significant reforms of this state/federal regulatory system, California must take the lead. We

also find that state laws and regulations are frequently a hindrance to flood control efforts:

- In its enforcement of the California Endangered Species Act (CESA), the Department of Fish and Game (DFG) currently requires 2-1 and 3-1 mitigation ratios for habitat impacted by levee projects in the Delta. This means that each individual shrub or tree affected or removed must be replaced two and three-fold. Though not as burdensome as the 5-1 mitigation ratios required by the National Fish and Wildlife Service (NFWS), these state ratios nevertheless require a flood agency to purchase additional acreage elsewhere for planting, as well as the need to hire consultants for ongoing monitoring.
- State regulations also present roadblocks to channel maintenance. The \$80 million in flood damages along the Mojave River in 2005 were a direct result of a decade of unabated sediment and vegetation accumulation over nearly a decade, caused by the elimination of a local maintenance program. San Bernardino County cited DFG's interpretation of "no net loss" of habitat as a key reason for its discontinuation of channel maintenance.
- The stipulated facts of the Arreola v. Monterey County (99 Cal. App. 4<sup>th</sup> 722, 2002) outline DFG's role in obstructing channel maintenance along the Pajaro River and the role of those decisions in a 1995 flood that caused hundreds of millions in damages. When locals applied for a permit to clear the channel in 1991, DFG "issued the permit, but limited its permission to hand clearing and then later halted the work." When its levees overtopped four years later, the Pajaro River was flowing at only two-thirds of its design capacity.
- DWR's own evaluation of five recent levee projects point to hurdles created costs added by CESA and the California Environmental Quality Act (CEQA), including off-site mitigation, as reasons for project delay and mitigation costs that approached 90% of the levee project itself.
- The Legislature has mandated that the Delta Levees Program include a net improvement of wildlife habitat (AB 360/1996). Over the past five years, DWR used 28% of funds in the Delta program to purchase land for habitat restoration.
- Delays and paperwork costs are inherent in a system that requires site-by-site, district-by-district review of flood repairs

and maintenance. Both sides in the Legislature acknowledge this problem, though the Majority contends that the system wide permit for the Delta Levees Program is an example of “ample streamlining mechanisms to reduce costs and delays....” However, no such program currently exists for the Sacramento and San Joaquin Rivers, despite various efforts on the local level. State directive is needed in this area.

After the 1997 floods, the Legislature exempted “non-project” levees from CEQA review through the enactment of SB 181 (Kopp). That measure was an acknowledgement that CEQA was an impediment to swift action on our levees. We argue the situation is no less urgent today, and perhaps more urgent because we now have the opportunity to prevent such catastrophes.

Serious reforms are needed to create a workable, more cost-effective system that fixes levees sooner rather than later. The following steps can reduce regulatory “red tape” and contain flood control costs:

- ✓ Establish a single permit or agreement among all regulatory agencies, similar to that for the Delta Levees Program, for flood control repairs and maintenance in the Sacramento and San Joaquin River systems.
- ✓ Set a reasonable “one-to-one” limit, based on habitat affected, for mitigation related to flood control projects. This not only reduces costs, it is an acknowledgement that human habitat is as important as wildlife habitat, and recognizes the severe environmental hazards posed by weakened levees.
- ✓ Codify the Governor’s recent emergency actions on our levee system. Critical and potentially critical deficiencies or erosions of our levees should be granted all of the “fast-track” clearances from regulatory reviews and consultations that are allowed after levee failures. This measure should include the 36 critical and potentially critical erosion sites identified by the Army Corps of Engineers and any others identified by DWR.
- ✓ Streamline the CEQA process for flood control and water projects according to the reforms suggested in SB 1191 (Hollingsworth) which will further reduce process delays, limit abusive litigation, and clarify cumulative impacts
- ✓ Eliminate any existing or proposed requirements that a project or program of flood control not only mitigate but *restore* species habitat.

- ✓ Provide clear statutory directives to wildlife agencies emphasizing the significance of flood protection and the need to expedite such projects.
- ✓ Provide an exemption from streambed alteration permit requirements (Fish and Game Code Section 1600) that will allow immediate remediation of existing flood threats statewide.

## **Other Issues**

**Poorly Maintained Levees** - Poorly maintained levees should remain eligible for repair. DWR should consider maintenance efforts in its prioritization, but should not hold a local agency accountable for problems caused by regulatory delay or obstruction.

**Cost-Benefit Analysis** – Levee repairs should not automatically receive low priority based solely on a lower cost-benefit ratio, as the Administration's proposal suggests. Such a policy strongly biases the levee program against rural communities. Priority criteria should also include project readiness, availability of both local and federal funding, and consistency with the State Plan of Flood Control.

**Cost Sharing on Sediment Removal** – Sediment removal in the Sacramento River Flood Control Project is a state responsibility (Water Code Section 8361) and should not require a local cost share.

**Flowage Easements** – Oppose the unfettered use of levee repair funds to purchase flowage easements on private property, and particularly the use of those funds as a substitute for levee repairs, outside of the existing plan of flood control. If DWR is contemplating changes to the Sacramento River Flood Control System, that policy should be clarified and provided with separate and appropriately earmarked funds.

## Flood Control System Subaccount

### **Lower Limit on Expenditures**

Support funding for the state cost share of the projects identified in this section. However, this section allocates \$200 million while the specific projects are earmarked at \$115 million, leaving up to \$85 million for cost overruns or other uses as the Legislature sees fit. We recommend this section be reduced to no more than \$125 million, and have additional funds re-directed at key programs such as levee repair and improvement and sediment removal or to specific system upgrades.

### **City/County Indemnification**

This section requires cities and counties to indemnify the state for flood control system improvements. This policy places an unreasonable burden on local governments who cannot possibly afford payments similar to recent flood settlements.

To the extent that DWR wishes to “link” local land-use decisions to flood liability, we find this to be a blunt approach to that problem because it relaxes the necessary pressure on the state to put an end to decades of neglect of federal levees. The best and surest way to address the state’s newfound liability is to heed the admonition of the *Paterno* court and establish a “reasonable plan of flood control” that provides the appropriate tools to maintain levees and flood channels.

## Delta Subventions and Special Projects

Support project funding in this area to maintain levees in the Delta that are critical to the California’s water supply and the safety of local residents. This support is contingent on two proposed changes to the Governor’s proposal:

- The \$60 million for Delta subventions should be eliminated from both bonds. This is a maintenance program and is therefore an inappropriate use of bond funds.
- Program requirements for ecosystem restoration (AB 360) should be eliminated. Over the last five years DWR spent 28% of the funds designated for Delta flood control on habitat restoration projects.



### Flood Control Subventions

The statewide program for flood control subventions is a capital program supported by Senate Republicans. More funding is needed in this area, whether through this bond measure or a match from the General Fund. According to DWR figures, the state already owes \$237 million to local jurisdictions for past projects, so the \$250 million allocated in the 2006 bond likely will be exhausted by the end of the calendar year. A proposal to meet the full needs of this program should be outlined as part of this measure.

### Floodplain Mapping Program

Consideration should be given to support of the mapping program as a scientific means of assessing flood risk. Mapping also carries with it a number of reasonable federal guidelines related to development within the 100-year floodplain.

### Floodway Corridor Program

This program is a conspicuous example of what has become of flood control in this state – a needlessly expensive endeavor that places greater value on land purchases and wildlife set-asides than repairing levees and should be eliminated.

As an example, DWR presented the Natural Resources and Water Committee with details of a project on the Sacramento River at Hamilton City. That project replaces 6.8 miles at a total cost of \$44 million. That averages \$6.5 million per levee mile, about 50% higher than typical repair costs. The project also took years in the planning and approval stages and is still 2 ½ years from awarding a contract for levee construction, three months after an accompanying re-vegetation program is scheduled for completion.

The Floodway Corridor program is strikingly similar to the former Floodplain Corridor program, under which the state contributed \$17.5 million in 2001 to a nonprofit group for the purchase of Staten Island in the Delta. According to recent news reports, the new owners have failed to maintain 70% of the surrounding levees, despite a specific provision in the project agreement to keep sufficient moneys in a trust fund for levee maintenance. This measure contains the same provision, and there is no reason to believe DWR will hold program participants accountable this time.

## Integrated Regional Water Management

### Regional Water Management Program

#### **Address Both Sides of the Water Equation**

While we support local and regional water investments, we do not consider Integrated Regional Water Management (IRWM) or the implementation of the latest California Water Plan, Bulletin 160-05 a panacea for California's water shortage. Growth is coming to this state, and while effective water management is helpful California also needs significant new water supplies to maintain our quality of life. In prior generations, California's political leaders acknowledged their necessary role in guiding the construction of water storage and conveyance; today, with all of the difficulties facing water development there is an even greater need for such leadership.

#### **Reduce Funding, Mandates**

The Administration's proposal to reduce funding for this program from \$1 billion to \$500 million is the correct thing to do. We also recommend that any funds for IRWM be administered according to the existing IRWM guidelines, and that any potential changes be debated in a policy bill later this year. Water agencies are virtually unanimous in their concern that this proposal is too restrictive and blocks many of the partnerships that spring from local initiative.

We are also concerned about the exclusion of levee maintenance and repair in the IRWM program. We will oppose any effort to starve levee maintenance to make a case for new taxes.

#### **Eligibility of Nonprofits**

We oppose the eligibility of nonprofit organizations for "applicant" status in the IRWM program. We further recommend that nonprofit participation in such plans be limited to 5% of the regional funding.

Leaving unspecified amounts of money to nonprofits creates an incentive for groups to lobby local water agencies for these funds. Putting together an integrated water plan among multiple agencies is difficult enough; these funds should be as free from outside political influences as possible.

## Statewide Water Management Program

### **Surface Storage Construction Assurances**

The Administration has proposed amending SB 1166 to provide a continuous appropriation for surface storage construction funds. While this change is supportable, there are concerns with the Administration's desire to revoke the continuous project authorization. In its response to questions from the Natural Resources and Water Committee hearing of February 14, the Administration expressed a desire to allow "legislative oversight of any final decision to construct any of the CALFED surface storage facilities." Given that such decisions will be left to future Legislatures with no part in this agreement, we have little confidence that these funds will be used for their intended purpose.

Senate Republicans recommend DWR be granted both a continuous authorization to participate in construction of one of the CALFED facilities and a continuous appropriation of those funds. SB 1166 should also provide that if no projects are approved, the funds earmarked in this section will not be used for any other purpose.

### **Frontload Money for Storage**

There is strong support for the Administration's proposal to shift \$1 billion from the 2010 bond to the 2006 bond for construction of surface water storage. This is a critical need for water supply and more flexible management of water systems.

We also support DWR's stated desire to provide a specific allocation for groundwater storage in this measure.

### **Science**

While there is support for scientific research as a guide to regulatory decision-making, funding this research through a capital-outlay bond is inappropriate. The \$800 million for these programs should be eliminated from this measure, less any portion the Administration wishes to identify as capital outlay for desalination.

### **Ecosystem Restoration**

Ecosystem restoration is a lower priority than the public safety considerations and water infrastructure needs identified in this bill. We recommend the \$700 million in this section be removed or redirected.

The restoration projects identified in this section are potentially enormous in scope but have yet to be defined in any meaningful way. Costs for San Joaquin River restoration run up to \$1 billion but do not provide certainty that the river's anadromous fishery can ever be restored. The Salton Sea restoration study may produce alternatives ranging from \$1 billion to \$35 billion.

As for the Bay Delta, a recent financial review of the CalFed program shows state dollars supported ecosystem restoration more than any other program element. Still, environmental groups complain of a "crash" in the Delta ecosystem and continue to use litigation to delay water projects. We fail to see how the restoration funds in this bond, unlike the hundreds of millions previously committed by California taxpayers, will improve regulatory certainty in the Delta. We oppose further funding of Delta ecosystem restoration until a complete, independent review of past expenditures can demonstrate direct benefits to water users.

#### California Water Resources Investment Fund (WRIF)

The California Water Resources Investment Act of 2006 creates the California Water Resources Investment Program and California Water Resources Investment Fund, supported by a new "water resources capacity charge" imposed on every retail water supplier in the state. This new charge is projected to generate \$5 billion of revenues over the ten-year period of the Strategic Growth Plan, according to the LAO.

As introduced, the bill delegates the responsibility to increase the fee annually to an unelected State Water Commission. It will be presumed to go into effect unless the Legislature acts, by statute, within 60 days after the receipt of the recommendations. Since it must happen so quickly, it will take 2/3 of the legislature to reject the "fee" increase.

#### **Fee vs. Tax**

The bill specifically states that this charge is not a tax, but should be treated as a "fee." We believe it is a tax. There is no effort to proportion the amount of the levy to any benefits conferred to fee payers. Rather, this charge is levied proportionally to all users statewide for projects that may vary widely in their benefits to different regions and their relation to actual water improvements.

There is no voluntary element to the fee – a customer gets hit automatically by virtue of their status as a retail water user.

Senate Republicans have other concerns with the WRIF charge:

- Proposition 13 mandates that tax increases be supported by 2/3 of the Legislature. By calling this “tax” a “fee,” it circumvents Proposition 13.
- The state should not be in the business of taxing basic human necessities such as water.
- There is concern among local water agencies that the creation of this tax will compromise their ability to raise their own rates to finance local water resources improvements.
- While the Governor’s bond proposal is designed to meet needs over a ten-year period, this tax has no corresponding sunset date and goes on in perpetuity.
- There are no constitutional guarantees that revenue generated by this tax will not be redirected for general fund purposes other than those outlined in the bill.
- The notion that 50% of the tax should go to the State of California only to be returned to local water suppliers is misguided. It is far less costly and complicated to allow local water suppliers simply to retain revenue from their rate base.
- This tax is not relevant to the bond package as it has nothing to do with building infrastructure, but will simply fund existing programs. Bottom line – this tax should be eliminated from the bond proposal.

### **Proposition 218**

Senate Republicans are concerned with implementation problems related to the WRIF tax. According to the Association of California Water Agencies (ACWA):

The bill imposes the legal obligation to pay the tax on the water supplier without specifically authorizing the water supplier to collect the tax. Water supplier’s rate increases to collect the tax could be subject to Proposition 218’s notice and hearing procedures. Therefore, water suppliers would be forced to hold

an election under the provision of Proposition 218 or be at risk of a successful Proposition 218 challenge that could preclude them from collecting the fee while still being under the obligation to pay the tax.

There is also question as to whether investor-owned utilities will be able to recoup the tax owed to the state through their rate structures, and how quickly the Public Utilities Commission would allow that to happen.

#### Parks Expenditures (SB 1163/Ackerman)

The Governor proposes \$215 million in facility and infrastructure improvements for the California Department of Parks and Recreation, as contained in SB 1163 (Ackerman). Democrats indicate that number falls woefully short of the state's needs and are supporting Senator Chesbro's \$3.945 billion bond measure, SB 153.

Senate Republicans believe the title of the bond measure in SB 153, "the California Clean Water, Clean Air, Safe Neighborhood Parks, and Coastal Protection Act of 2006," is misleading, as it does comparatively little to clean the water or air or create safe neighborhood parks. We question the relative importance of additional government land acquisitions compared to the life-sustaining needs of flood protection and water supply.

While the voters have not had the opportunity in recent years to pay for bonds that significantly improve our levees and water supply systems, they have had the opportunity to vote for plenty of park bond funding, both in 2000 (Prop 12 for \$2.1 billion) and 2002 (Prop 40 for \$2.6 billion). The Legislature should now give voters the opportunity to vote on brick and mortar projects that will keep their families safe.

Traditionally, a department's facilities repair and improvements costs are funded in an annual budget allocation. This allocation would provide for minor facilities repairs and smaller scale capital outlay projects. Major capital outlay and rehabilitation projects have typically been funded by budget augmentations.

In the case of the Department of Parks and Recreation, bond funds (i.e. Prop. 12, Prop. 40) have been used for both minor and major maintenance projects because the department's facilities repair needs outpace the annual budget appropriations. This is primarily due to the Legislature's policy of acquiring land without consideration for the need to maintain the properties.

Of California's 101 million acres of land, approximately 52 million acres are owned by state local and federal governments, and another 27 million acres is set aside for farmland. This leaves only 22 million acres for housing, schools, businesses, and other development. Rather than developing more parks and public access ways, any park bond ought to prioritize funding for the most critical facility repairs and code upgrades, with no additional park development until the State can feasibly fund maintenance on its existing park properties.