



Swiftly Address Liability Concerns to Encourage Local, State, and National Levee Safety Programs

Liability for Levees

Anecdotal evidence suggests that liability concerns in government and industry may impede development and implementation of strong state levee safety programs throughout the nation. Concern also is growing in the engineering community and among levee districts, owners, and operators regarding potential liability that may be incurred through performance of levee services. These services include certification of data for National Flood Insurance Program accreditation purposes, as well as levee design, construction, and maintenance services. Preliminary survey evidence suggests that at least some engineering firms are declining to perform levee work, in part out of liability concerns.

In the 2003 Paterno decision, the California Court of Appeals found the state liable for damages incurred by about 3,000 residents, who sued both the State of California and a local reclamation district for damages caused by the failure of a Yuba County levee that had been incorporated into the federally authorized Sacramento River Flood Control Project. The court reasoned that when California accepted the levee from the federal government, it accepted liability as if it had planned and built the levee itself. Although the state had accepted the levee many years prior to its failure, it had never investigated the levee's underlying structural flaws. The court ultimately determined that the state's plan was unreasonable because the state accepted the levee as built but never took steps to ensure that its foundation was sound. The court did not find liability on the part of the reclamation district, reasoning that it only had responsibility for maintenance, and did not have any authority to correct structural flaws. The court found the state liable for inverse condemnation damages that totaled nearly \$500 million.

National Committee on Levee Safety Recommendations to Address Liability

The NCLS has adopted the vision of "an involved public and reliable levee systems working as part of an integrated approach to protect people and property from floods." Strong state levee safety programs in all states are essential to achieving that vision. The NCLS recommends Congress swiftly address concerns regarding liability for harm due to levee-related flooding to help ensure state and local interest in developing levee safety programs and to prevent necessary levee repairs, rehabilitation, and National Flood Insurance Program accreditation from coming to a halt.

Addressing Liability

Because anecdotal evidence suggests that liability concerns may impede development and implementation of strong state levee safety programs throughout the nation, the NCLS is participating in research in collaboration with stakeholders to identify the current state of the law as it applies to liability in the following contexts. Research also will explore possible measures to prevent liability concerns from hindering development of robust safety programs.

- ❖ Public and private sector liability associated with damages due to levee failure or overtopping.
- ❖ Public and private sector liability associated with damages related to levee evaluation for National Flood Insurance Program purposes.

The National Committee on Levee Safety

Congress created the National Committee on Levee Safety to develop recommendations for a national levee safety program, including a strategic plan for implementation of the program. The NCLS adopted the vision of an involved public and reliable levee systems working as part of an integrated approach to protect people and property from floods, and has been working toward this goal since October 2008.

The NCLS recommendations for a National Levee Safety Program are based on three central concepts:

- Leadership via a National Levee Safety Commission that provides for participating state levee safety programs, national technical standards, risk communication, and coordination of environmental and safety concerns;
- Strong levee safety programs in and within all states that, in turn, provide oversight and critical levee safety processes; and
- A foundation of well-aligned federal agency programs and processes.

For more information on the NCLS and its recommendations for a National Levee Safety Program, please visit: www.leveesafety.org

- ❖ How levee infrastructure reliability is viewed differently in the courts from other public infrastructure systems such as dams, bridges, and water treatment works.
- ❖ How changing states of engineering, insurance, and legal practice may impact consideration of levee-related damage claims.
- ❖ How professional liability insurance practices may be changing to drive some practitioners or firms out of the levee services market.

The NCLS and stakeholders' research also will explore the public policy implications of measures to manage liability for state and local levee management programs and for practitioners providing levee services, including:

- ❖ Limitations on third-party liability for engineering firms providing levee services.
- ❖ Limitations on liability due to design and construction deficiencies for state and local agencies that sponsor, and then accept, federal flood control projects.
- ❖ Limitations on liability for state and local agencies that, by implementing levee safety programs, provide oversight, funding, or other services for nonfederal levees.

The NCLS recommends that Congress address growing concerns related to liability and explore a range of measures aimed at reducing the potential liability of engineering firms and/or government agencies that perform engineering services for levee systems (Recommendation 8). The research being conducted on the current state of the law as it applies to public- and private-sector liability will help inform Congress on the urgency of this recommendation and the policy implications of various approaches.

Flood Insurance & Liability

Currently, many people who live in leveed areas do not believe they need flood insurance. NCLS Recommendation 18 calls for risk-based flood insurance required for structures in areas protected by levees. This recommendation will increase risk awareness and preparedness of the public residing in leveed areas. Furthermore, flood insurance is one of the most effective ways to limit financial exposure in the case of flooding and to speed recovery of flood-damaged properties. The benefit of reduced financial exposure would be shared by all parties involved, including property owners, levee owners, operators, and engineering practitioners, as well as for states and local governments. This is in keeping with the principle that addressing flood risk in leveed areas is a shared responsibility.

Terminology

The term "certification," as used to meet National Flood Insurance Program data requirements, is not intended to provide a guarantee or warranty of the condition of the levee or its performance. The term refers to the certification of data. However, the terminology may be misleading, giving communities and individuals the misperception that because they live in an area with an accredited or "certified" levee, it will not fail and they are not at risk. For this reason, the NCLS recommended that federal agencies change the term "certification" to "compliance determination" to better communicate to policy makers and the public that the determination does not imply a guarantee or warrantee (Recommendation 6).

Responding to this recommendation, the US Army Corps of Engineers has adopted the term "levee system evaluation" to replace "certification" to describe the evaluation of levees for accreditation in the National Flood Insurance Program. The Federal Emergency Management Agency, which administers the National Flood Insurance Program, also is striving to communicate that "certification" refers only to the data being submitted as part of the accreditation package, and that no warranty or guarantee of the levee's condition is made or implied.