

**Meeting of the Central Valley Flood Protection Board
January 29, 2011**

Committee Report

Title 23 Tier 1B Draft Revisions

Presented by Staff: Curt Taras

Legal Counsel: Deborah Smith, Ward Tabor, Robin Brewer

Board Committee Members: Emma Suarez, Butch Hodgkins

Item

Consider submission of the Title 23 Tier 1B Revisions of the Board's Regulations which address new California Laws authorizing delegated authority to the Executive Officer for permit approvals and enforcement actions to the Office of Administrative Law for public noticing.

Background

In 2009, Assembly Bill 1165 amended the California Water Code related to flood protection. The Bill made changes in California Law to allow the Board to delegate, by regulation, authority to the Executive Officer to issue permits and conduct enforcement actions. As a result of this legislation, Board Staff has written proposed revisions to the California Code of Regulations, Title 23 Waters, Division 1 Central Valley Flood Protection Board. These revisions are identified as Tier 1 B revisions and are ready for the Board to submit to the Office of Administrative Law for publishing and public comment.

The draft Tier 1B regulations were last presented in the December 3rd Board packet. At that meeting Board members voiced general satisfaction with the draft regulations and requested a few specific changes which are recorded in the transcript. Scott Shapiro commented on the regulation on behalf of the Central Valley Flood Control Association. His comments were later submitted in a letter which is attached to this report. Board Staff and Board Counsel used the Board member and public comments to write the attached draft regulations.

Summary of Major Incorporated Comments

Regulations Regarding Delegations - Ready for Board Authorization

- Definition of “Lawful existing encroachment” added to regulations.
- Delegations to the Executive Officer all use the terminology “Permits or other approvals.”
- Permits or approvals requiring USACE Division or HQ approval are not delegated
- Permits or approvals for environmental restoration or mitigation are no longer excluded from delegation.
- Reviews rights of the public to appeal decisions made by the Director of the Department of Water Resources to the Board have been deleted.

Regulations Regarding Enforcement Actions – Ready for Board Authorization

- Added section 21.e Maintenance Activities – Nothing in this section is intended to remove any authority already vested in the department or local maintaining entity in the performance of maintenance activities.
- Added section 24.c Cease and Desist Orders Issued by the Executive Officer may include:
 - Removal of the Work
 - Alteration of the Work
 - Filing a Permit Application
 - Other conditions to avoid public safety impacts including inspections
 - An Order that failure to comply could result in the work being done by others with the right to recover costs from respondent
 - An Order to file data as requested
- Added section 24.f A Cease and Desist Order shall state that the respondent has a right to an appeal hearing by submitting a written protest within 30 days.
- Added section 25.b.4 The respondent shall be provided a copy of the staff report at least 20 days prior to the hearing. The respondent may submit a statement of defense at least 15 days prior to the hearing.
- Added section 25.b.5 If the President appoints a hearing officer, the hearing officer shall be a board member.

- Modified section 25.b.9 to clarify that at the conclusion of the hearing the board may do any of the following:
 - Immediately adopt all or part of the staff report, notice, or order
 - Make changes to the staff report, notice, or order for immediate adoption
 - Direct a board member with counsel and staff to draft a proposed decision and order for adoption by the board at a subsequent meeting.

- Added section 26.a A permit may be revoked for the following reasons:
 - The permit was obtained by misrepresentation
 - The permit was approved or issued in error
 - The permit conditions were not satisfied or violated
 - The activity violates any law or statute
 - The activity threatens the public
 - The activity constitutes a public nuisance

Regulations Regarding Reconsideration – Ready for Board Authorization

- Reconsideration will remain in the regulations.

- Deleted section 23.5.a which stated that a cause for reconsideration could be the number of board members who were absent from the proceedings. This deletion removes confusion over what constitutes a quorum for the Board to vote.

Regulations Regarding Ex- Parte Communications – Board Authorized Sept 2010

Regulations Regarding General Cleanup – Board Authorized Sept 2010

STATE OF CALIFORNIA
CENTRAL VALLEY FLOOD PROTECTION BOARD
3310 EL CAMINO AVENUE, RM. 151 (JOC)
SACRAMENTO, CA 95821

DIVISION 1, CHAPTER 1, ARTICLE 2, OF THE
CALIFORNIA CODE OF REGULATIONS
REGARDING DELEGATED AUTHORITY

Proposed Text of Regulations
In Title 23, California Code of Regulations, Division 1
Amend Article 2, Sections 4 and 5 to read as follows:

CALIFORNIA CODE OF REGULATIONS
BARCLAY'S OFFICIAL CALIFORNIA CODE OF REGULATIONS

Title 23. Waters

Division 1. Central Valley Flood Protection Board

Chapter 1. Organization, Powers and Standards

Article 2. Definitions and Delegations

§ 4. Definitions.

(r) “Lawful existing encroachment,” as used in Water Code section 8709.4(a), shall mean an encroachment for which the board has previously issued a valid permit or otherwise authorized by written instrument approved by the board.

[Re-number subsequent subsections]

(ii) State Plan of Flood Control. “State Plan of Flood Control” shall have the same meaning as defined in subdivisions (e) and (j) of section 5096.805 of the Public Resources Code, including the state and federal flood control works, lands, programs, plans, conditions, and mode of maintenance and operations of the Sacramento River Flood Control Project described in Section 8350 of the Water Code, and of flood control projects in the Sacramento River and San Joaquin River watersheds authorized pursuant to Article 2 (commencing with Section 12648) of Chapter 2 of Part 6 of Division 6 of the Water Code for which the board or the department has provided the assurances of nonfederal cooperation to the United States.

(~~h~~j) Stream. “Stream” means...[no substantive changes to text]

(~~j~~kk) Top of Bank. “Top of bank” means...[no substantive changes to text]

(~~k~~ll) Toe of Bank. “Toe of bank” means...[no substantive changes to text]

NOTE: Authority cited: Section 8571, Water Code. Reference: Sections 8361, 8370, 8521, 8522, 8523, 8581, 8608, 8630 and 8710, Water Code. [Government Code Section 65007](#). [Public Resources Code 5096.805](#).

§ 5. Delegations.

(a) For the purposes of this division, all duties of the board, [including but not limited to the review and approval of encroachment permit applications](#), are hereby delegated to the Executive Officer, with the exception of the following:

~~(1) Matters that require the issuance of a permit;~~

[\(1\) Permits or other approvals that significantly affect any element of the State Plan of Flood Control or other adopted plan of flood control. Encroachments that do not significantly affect any element of the State Plan of Flood Control or other adopted plan of flood control are defined in subsection \(b\).](#)

[\(2\) Permits or other approvals for which the board has not received written comments from the U.S. Army Corps of Engineers pursuant to 33 C.F.R. section 208.10 or for which approval is required by the South Pacific Division or Headquarters of the U.S. Army Corps of Engineers, where the U.S Army Corps of Engineers has jurisdiction.](#)

[\(3\) Permits or other approvals which may create, in the judgment of the Executive Officer or Chief Engineer, more than a de minimus hydraulic impact to an adopted plan of flood control, including, for example, an increase in water surface elevation, a reduction of adequate freeboard, inability to convey design discharge, alteration of flow velocities or directions, increased scour, or expansion of the geographical floodplain or floodway inundation.](#)

[\(4\) Permits or other approvals which may have, in the judgment of the Executive Officer or Chief Engineer, adverse geotechnical impacts to an adopted plan of flood control, including but not limited to increases in under seepage or through seepage, slope-stability issues, increased phreatic pressures, and static or dynamic loading that exceed recommended thresholds.](#)

[\(5\) Permits or other approvals for which a formal written protest has been filed pursuant to Section 12.](#)

[\(6\) Permits or other approvals which require a variance, as defined in Section 11.](#)

~~(7)~~ [\(7\) Permits or other approvals which, in the judgment of the Executive Officer, may be controversial, based on substantial public concern, or for which the Executive Officer has received substantial negative public comment.](#)

~~(8)~~ [\(8\) Permits or other approvals which, in the judgment of the Executive Officer, may involve significant policy considerations.](#)

~~(4)~~(9) Permits or other approvals requiring the preparation of an environmental impact report by the board.

~~(5)~~(10) Permits or other approvals involving residential developments, as defined in Section 113.

~~(6)~~(11) Permits or other approvals involving surface mining except extensions of time for existing operations.

(b) Subject to subsection (a), the following types of encroachment permits, when in compliance with this division and the board's obligations to the U.S. Army Corps of Engineers, do not significantly affect any element of the State Plan of Flood Control or other adopted plan of flood control and are delegated to the Executive Officer for review and approval:

(1) Pipelines, conduits, and overhead utilities;

(2) Irrigation and drainage ditches;

(3) Septic systems;

(4) Retaining walls;

(5) Fences and gates;

(6) Private, non-commercial boating facilities;

(7) Water wells;

(8) Patrol roads and access ramps;

(9) Orchards, landscaping and vegetation;

(10) Bicycle, pedestrian and equestrian trails;

(11) Stairs and steps;

(12) Replacement of an existing permitted encroachment without an increase in scope or size;

(13) Above ground encroachments installed more than fifteen (15) feet landward of the landside levee toe.

(c) For all encroachment permit applications delegated to the Executive Officer pursuant to subsections (a) and (b) above, a short summary of the project and the proposed action on the permit shall be posted on the board's website for thirty (30) days prior to approval of the permit. During this posting period, the public may provide the Executive Officer with comments on the proposed action. The Executive Officer shall not be required to respond to such comments or change the proposed action based upon such comments.

(d) The Executive Officer shall make periodic reports to the board regarding encroachment permit applications acted upon pursuant to the delegated authority in subsection (a).

~~(b)~~(e) The Executive Officer shall have authority to approve notices of exemption, initial studies and negative declarations, notices of preparation, requests for shortened review, and notices of determination prepared pursuant to CEQA. The Executive Officer may conduct public hearings on any matter identified in this subsection. The Executive Officer may distribute draft environmental impact reports.

(f) The Executive Officer may authorize or direct work and approve permits or other matters in response to emergencies or situations that present an imminent threat to public safety in accordance with Section 17.

(g) The board delegates to the Executive Officer the authority to take action to remove or modify encroachments on levees, channels, and other flood control works pursuant to Water Code section 8709.4(c) and the authority to issue Cease and Desist Orders pursuant to Water Code section 8709.5(a) in the manner described in article 4 of this division.

(h) The board may, by resolution or written agreement, delegate other duties and responsibilities to the Executive Officer, the Director of the department, or others, with the authority to re-delegate.

Note: Authority cited: Section 8571, Water Code. Reference: Sections 8581, 8610.5, and 8710, Water Code.

STATE OF CALIFORNIA
CENTRAL VALLEY FLOOD PROTECTION BOARD
3310 EL CAMINO AVENUE, RM. 151 (JOC)
SACRAMENTO, CA 95821

DIVISION 1, CHAPTER 1, ARTICLE 7, OF THE
CALIFORNIA CODE OF REGULATIONS
REGARDING DELEGATED AUTHORITY

Proposed Text of Regulations
In Title 23, California Code of Regulations, Division 1
Amend Article 7, Section 109 to read as follows:

CALIFORNIA CODE OF REGULATIONS
BARCLAY'S OFFICIAL CALIFORNIA CODE OF REGULATIONS

Title 23. Waters
Division 1. Central Valley Flood Protection Board
Chapter 1. Organization, Powers and Standards
Article 7. Review Rights

§ 109. Right of Review of Delegated Authority.

Any person or public agency having an interest in a decision made by ~~the Director of the department or~~ the Executive Officer of the board pursuant to any delegation by the board, including those delegations in Section 5 and any other delegation of authority has the right to review by the board in accordance with the requirements of section 12. Adversely affected persons have the right to present arguments to the board in person or by a designated representative at a regularly scheduled board meeting in accordance with section 110.

NOTE: Authority cited: Section 8571, Water Code. Reference: Sections 8609 and 8710, Water Code.

**STATE OF CALIFORNIA
CENTRAL VALLEY FLOOD PROTECTION BOARD
3310 EL CAMINO AVENUE, RM. 151 (JOC)
SACRAMENTO, CA 95821**

**DIVISION 1, CHAPTER 1, ARTICLE 4, OF THE
CALIFORNIA CODE OF REGULATIONS
REGARDING ENFORCEMENT ACTIONS**

**Proposed Text of Regulations
In Title 23, California Code of Regulations, Division 1
Modify Article 4 to read as follows:**

**CALIFORNIA CODE OF REGULATIONS
BARCLAY'S OFFICIAL CALIFORNIA CODE OF REGULATIONS**

**Title 23. Waters
Division 1. Central Valley Flood Protection Board
Chapter 1. Organization, Powers and Standards
Article 4. Enforcement Actions**

ARTICLE 4. ENFORCEMENT ACTIONS

§ 20. Purpose and Authority.

(a) The board has authority pursuant to the Water Code to require permits and enforce standards for the erection, maintenance, and operation of levees, channels, and other flood control works within its jurisdiction, including but not limited to standards for encroachments, construction, vegetation, and erosion control measures. In addition, the board has enforcement authority under Water Code sections 8709.5 and 8709.6 to issue cease and desist orders, the violation of which may subject the violator to fines or penalties pursuant to Water Code section 8709.7.

(b) Examples of enforcement actions available to the board include administrative and civil actions, such as the following:

_____ (1) Notice of Violation;

_____ (2) Cease and Desist Order;

_____ (3) Restoration Order;

_____ (4) Permit revocation;

(5) The commencement of a civil lawsuit, including civil penalties.

Note: Authority cited: Section 8571, Water Code. Reference: Sections 8534, 8596, 8598, 8608, 8615, 8617, 8704, 8708, 8709, 8709.4, 8709.5, 8709.6, 8710, and 8719, Water Code.

§ 21. Maintenance Activities.

(a) In the performance of maintenance activities as defined in section 4(u), the department, local maintaining agency, or designated representatives of the board may remove unpermitted abandoned property that interferes with maintenance or inspections after notification by the Executive Officer as described in subsection (b).

(b) Prior to any removal allowed under (a), the Executive Officer shall notify the landowner or owner of the unpermitted abandoned property by one of the following methods: in person, phone, e-mail, or U.S. mail. If the landowner or owner of the abandoned property cannot be located after reasonable efforts, a notice may be posted on the property for a minimum of five (5) calendar days prior to removal. The posted notice shall be clearly visible, shall provide a board contact name, phone number, e-mail address, and mailing address, and shall state that the owner may contact the board to object to such removal. The notice shall also state the date by which removal will occur if no objection is made.

(c) If a timely objection is made, no removal shall take place until the Executive Officer has provided the objector a reasonable opportunity to present reasons why the items should not be removed. The Executive Officer shall provide a written decision, which may be reviewed by the board pursuant to section 110.

(d) For purposes of this section, “abandoned property” shall mean any structure, material, or object that appears to a reasonable person to have been discarded, cast aside, dumped, neglected, vacated, or left unoccupied. Examples of abandoned property may include, but are not limited to the following: refuse, vegetation, or structures such as stairs, fences, or boat docks that have fallen into a state of disrepair.

(e) Nothing in this section is intended to remove any authority already vested in the department or any local maintaining entity in the performance of maintenance activities.

Note: Authority cited: Section 8571, Water Code. Reference: Sections 8534, 8596, 8598, 8608, 8615, 8617, 8704, 8708, 8709, 8709.4, 8710, and 8719, Water Code.

§ 22. Emergency Impairment Response Authority.

(a) In addition to the emergency authority in section 17, the Executive Officer is delegated the authority to authorize or order the removal or modification of permitted or

unpermitted encroachments on levees, channels, and other flood control works that present an imminent threat to public health and safety without prior notice, order, or hearing.

(b) The Executive Officer shall attempt to give the landowner or owner of the encroachment prior notice when possible, and shall only take such actions as are reasonably necessary to abate the immediate threat to public health and safety.

(c) The Executive Officer shall report any action taken pursuant to this section to the board at the first reasonably available opportunity.

Note: Authority cited: Section 8571, Water Code. Reference: Sections 8534, 8596, 8598, 8608, 8704, 8708, 8709, 8709.4, 8709.5, 8709.6, 8710, and 8719, Water Code.

§ 23. Notice of Violation.

(a) An enforcement investigation may be conducted when board staff is aware of activities that may impair the flood control system, or any activity that may constitute a violation pursuant to subsection (b). An enforcement investigation may include, but is not limited to, document review, site visits, interviews, and public agency input to determine if violations under the jurisdiction of the board exist.

(b) If the Executive Officer believes that the results of an enforcement investigation so warrant, the Executive Officer may institute an administrative enforcement action pursuant to Water Code section 8709.5 by giving a Notice of Violation to the landowner, person, or public agency (referred to hereafter as the “respondent”) that is responsible for any activity described in Water Code section 8709.5(a), including but not limited to the following:

(1) Undertaking or threatening to undertake any activity that may encroach on levees, channels, or other flood control works under the jurisdiction of the board;

(2) Owning, undertaking, or maintaining any work in violation of or inconsistent with any condition of any permit previously issued by or subject to the jurisdiction of the board; or

(3) Any violation of any requirement in Part 4 of Division 5 of the Water Code, including but not limited to:

(i) Owning, undertaking, or maintaining any work that requires a permit or other approval from the board without securing such permit or approval;

(ii) Owning, undertaking, or maintaining any work in violation of Title 23, Division 1 of the California Code of Regulations; or

(iii) Owning, undertaking, or maintaining any work that is inconsistent with applicable federal regulations where the board has signed assurances with the U.S. Army Corps of Engineers that it will comply with such regulations.

(c) The Notice of Violation shall be given in the manner set forth in Water Code section 8709.5(b) and shall state:

(1) A description of the work subject to enforcement;

(2) Any corrective action that the Executive Officer determines may be necessary to avoid an unreasonable impact on public safety. “Unreasonable impact on public safety” shall mean as defined in subsection (d), below;

(3) The deadline to complete corrective action or otherwise respond to the notice;

(4) Staff contact name, address, and phone number; and

(5) A statement alerting the respondent that the described work or activity shall immediately cease or the respondent may receive a cease and desist order, the violation of which may subject the respondent to fines or penalties.

File copies of the written confirmation or notice shall be provided to the local levee maintaining agency and the levee inspector. Failure to provide copies of the notice to the local maintaining agency and the levee inspector shall not be grounds for invalidating the Notice of Violation.

(d) “Unreasonable impact on public safety” shall mean a threat of structural failure of the levee, flooding, channel obstructions, floating debris which may constitute a public safety risk, or other adverse impact on any adopted plan of flood control. Conditions imposed in the Notice of Violation or Cease and Desist Order that are necessary to avoid an unreasonable impact on public safety may include, for example, removal of the encroachment, the addition of fill material, the erection of barricades, and/or the compliance with board standards and permit conditions.

(e) Upon request by the respondent, the Executive Officer or designee shall conduct a meeting or an inspection to determine if actions taken by the respondent are in compliance with a Notice of Violation. If the Executive Officer or designee determines that no further action is necessary or appropriate, the respondent shall be notified that the file is closed.

Note: Authority cited: Section 8571, Water Code. Reference: Sections 8534, 8596, 8598, 8608, 8704, 8708, 8709, 8709.4, 8709.5, 8709.6, 8710, and 8719, Water Code.

§ 24. Cease and Desist Orders Issued by the Executive Officer.

(a) The Executive Officer may issue a Cease and Desist Order pursuant to Water Code section 8709.5 if the Executive Officer determines that any of the criteria of section 23(b) have been met and the respondent fails to respond to the Notice of Violation in a satisfactory manner.

(b) “Satisfactory manner,” as used in Water Code section 8709.5(b), shall mean a response which is made in the manner and within the deadline for compliance specified in the Notice of Violation, or within thirty (30) calendar days if no deadline is given, and that meets the following:

- (1) Provides information sufficient to convince the Executive Officer that the activity specified in the notice does not meet the criteria of section 23(b);
or
- (2) Provides information sufficient to convince the Executive Officer that the person or agency to whom the notice was directed is not the landowner and/or is not responsible for the violation; or
- (3) Provides information sufficient to convince the Executive Officer that the respondent has complied with all conditions and directives of the Notice of Violation and that no further action is necessary or appropriate.

(c) The Cease and Desist Order shall specify the action that must be taken by the respondent, if any, which may include, but is not limited to:

- (1) Removal of the work;
- (2) Alteration of the work;
- (3) Filing an application for a permit pursuant to this division;
- (4) Other terms and conditions the Executive Officer may determine to be necessary to avoid an unreasonable impact on public safety, as defined in section 23, above, including but not limited to inspection by the board or its authorized representatives;
- (5) An order that if the respondent does not comply with the decision within a specified amount of time, the board, local maintaining agency,

authorized representatives of the board, or a contractor hired by the board may take abatement actions, such as physical removal, and the board may recover any costs incurred from the respondent;

(6) An order requiring the respondent to file data as requested by the board or its authorized representatives.

(d) Pursuant to Water Code section 8709.5, the Executive Officer does not have the authority to issue a Cease and Desist Order that does the following:

(1) Imposes conditions other than those necessary to avoid an unreasonable impact on public safety, as defined in section 23, above. If the order contains any valid conditions, the order and all valid conditions shall remain in full force and effect; or

(2) Revokes a previously issued permit; or

(3) Requires restoration. The term “restoration,” as used in Water Code section 8709.6(d), means work in excess of that required to eliminate an unreasonable impact on public safety as defined in section 23, above, including, for example, work to re-establish an area to the condition it was in prior to the installation of an encroachment or other work. The term “restoration” shall also include environmental restoration work to re-create habitat lost by the construction of the encroachment.

If restoration is required, only the board may issue a Cease and Desist Order after a public hearing pursuant to section 25. Revocation hearings shall comply with the procedures in section 26.

(e) The Cease and Desist Order shall be effective upon its issuance and copies shall be served by certified mail as set forth in Water Code section 8709.5(d). “Immediately,” as used in Water Code section 8709.5(d), shall mean the Cease and Desist Order shall be served as soon as reasonably possible, but no later than two (2) working days after issuance.

(f) The Cease and Desist Order shall state that the respondent has a right to an appeal hearing in accordance with section 25 by submitting a written protest within thirty (30) calendar days in accordance with section 110. The order remains in full force and effect during the pendency of any appeal.

(g) The respondent may request an inspection to determine if the actions taken by the respondent are in compliance with a Cease and Desist Order issued by the Executive Officer. If the Executive Officer determines that no further action is necessary or appropriate, the respondent shall be notified that the enforcement action is closed.

Note: Authority cited: Section 8571, Water Code. Reference: Sections 8534, 8596, 8598, 8608, 8704, 8708, 8709, 8709.4, 8709.5, 8709.6, 8710, and 8719, Water Code.

§ 25. Cease and Desist Order Board Hearing Procedures.

(a) If the Executive Officer believes that the results of an enforcement investigation so warrant, the Executive Officer may schedule a Cease and Desist Order hearing before the board pursuant to Water Code sections 8709.5 and 8709.6 for any of the reasons stated in section 23(b). The Executive Officer shall issue a Notice of Violation pursuant to section 23 prior to scheduling a Cease and Desist Order hearing before the board.

(b) Cease and Desist Order hearings shall be conducted pursuant to the evidentiary hearing procedures described in subsections (c)-(g) and (j) of section 13 and section 13.1 of these regulations with the following changes:

- (1) The “applicant” shall be referred to as the “respondent”;
- (2) The “application” shall be referred to as the “enforcement action”;
- (3) Notice of the hearing shall be served on the respondent by certified mail or hand delivery at least thirty (30) calendar days prior to the hearing. The notice shall contain all the information required by section 13(g), as well as describe the violation and identify any statute(s) or regulation(s) the respondent is alleged to have violated;
- (4) The Executive Officer shall provide the respondent with a copy of the staff report, along with any proposed resolution or proposed order, as applicable, at least twenty (20) calendar days prior to the hearing. The respondent may submit a written statement of defense to the Executive Officer at least fifteen (15) calendar days prior to the hearing.
- (5) If the board President appoints a hearing officer, the hearing officer shall be a board member. A hearing may also be held by a partial committee of the board appointed by the board President. If the hearing is held by a partial committee of the board, the committee shall also follow the hearing officer procedures in section 13(f).
- (6) If the hearing is held before a hearing officer or partial committee of the board, the hearing officer or committee shall prepare the proposed order and proposed decision required by section 13(f) within thirty (30) calendar days of the conclusion of the hearing. The respondent shall be provided with a copy of the proposed order and proposed decision at least ten (10) calendar days prior to the board’s consideration of the proposed decision.

- (7) The written conclusions required by section 13.1(h) need not include a discussion of the elements identified in Water Code section 8610.5(c)(1)-(4).
- (8) Cross-examination shall not be allowed unless deemed appropriate by the President or appointed hearing officer.
- (9) At the conclusion of the hearing, to comply with the requirement in section 13.1(h) that the board adopt written findings, the board may do any the following;
- (i) Immediately adopt all or part of the staff report, enforcement notice, or order; or
 - (ii) Make such changes to the staff report, enforcement notice, or order as it deems appropriate for immediate adoption; or
 - (iii) The board President may direct a board member, along with board legal counsel and independent support staff, to draft a proposed decision and order for adoption by the board at a subsequent meeting pursuant to section 13.1(i). The respondent shall be provided with a copy of the proposed decision and order at least ten (10) calendar days prior to the board's consideration of the proposed decision. The Board's consideration of a proposed decision at a subsequent meeting does not reopen the hearing and no new evidence will be permitted unless allowed by the board President. However, all parties shall be given an opportunity to present argument related to the proposed decision.
- (10) The board decision shall include an order specifying the action that must be taken by the respondent, if any, which may include, but is not limited to:
- (i) Removal of the work;
 - (ii) Alteration of the work;
 - (iii) A restoration order;
 - (iv) Implementation of environmental mitigation;
 - (v) Filing an application for a permit pursuant to this division;

- (vi) Other terms and conditions the board may determine to be necessary, including but not limited to inspection by the board or its authorized representatives;
- (vii) An order that if the respondent does not comply with the decision within a specified amount of time, the board, local maintaining agency, authorized representatives of the board, or a contractor hired by the board may take abatement actions, such as physical removal, and the board may recover any costs incurred from the respondent;
- (viii) An order requiring the respondent to file data as requested by the board or its authorized representatives.

Note: Authority cited: Section 8571, Water Code, and Section 11400.20, Government Code. Reference: Sections 6253, 11125, and 11425.10, Government Code; and Sections 8534, 8560, 8596, 8598, 8608, 8704, 8708, 8709, 8709.4, 8709.5, 8709.6, 8710, and 8719, Water Code.

§ 26. Permit Revocation.

(a) A previously issued permit or approval may be revoked or modified for any of the following reasons:

- (1) The permit or approval was obtained by misrepresentation or fraud;
- (2) The permit or approval was approved or issued in error;
- (3) One or more of the conditions of the permit or approval have not been satisfied or have been violated;
- (4) One or more of the conditions of the permit or approval anticipate revocation if certain terms are met;
- (5) The activity permitted by the permit or approval violates an applicable statute, law, or regulation, including but not limited to federal regulations;
- (6) The activity permitted by the permit or approval is detrimental to the public health, safety, or welfare or interferes with the successful execution, functioning or operation of any flood control system feature; or
- (7) The activity permitted by the permit or approval constitutes a public nuisance.

(b) The permittee shall be given fifteen (15) days' prior notice by certified mail or hand delivery of a revocation hearing before the board, unless waived in writing.

(c) The board shall follow the hearing procedures in section 25(b), above, for permit revocation hearings.

(d) In addition to the notice requirements of section 25(b)(3), the notice shall describe any permit condition(s) that are the subject of the revocation hearing.

(e) The board may hold a single hearing to consider revocation and a Cease and Desist Order.

Note: Authority cited: Section 8571, Water Code, and Section 11400.20, Government Code. Reference: Sections 6253, 11125, and 11425.10, Government Code; and Sections 8534, 8560, 8596, 8598, 8608, 8704, 8708, 8709, 8709.4, 8709.5, 8709.6, 8710, and 8719, Water Code.

§ 27. Nuisance and Civil Penalty Provisions.

The Water Code authorizes the board to commence and maintain a civil suit in the name of the people of the State at any time for the prevention or abatement of public nuisances, as well as to seek civil penalties for violations. A summary of the amount of potential civil penalties is set forth in Water Code section 8709.7. Examples of the penalties for some violations are as follows:

<u>Violation</u>	<u>Minimum Fine</u>	<u>Maximum Fine</u>
<u>Permit conditions</u>	<u>\$500</u>	<u>\$30,000</u>
<u>Construction without permit</u>	<u>\$1000 per day</u>	<u>\$15,000 per day</u>
<u>Intentionally or negligently violating cease and desist order</u>	<u>No minimum</u>	<u>\$6000 per day</u>

Note: Authority cited: Section 8571, Water Code. Reference: Sections 8534, 8596, 8598, 8608, 8704, 8708, 8709, 8709.4, 8709.5, 8709.6, 8709.7, 8710, and 8719, Water Code.

ARTICLE 4. ENFORCEMENT PROCEEDINGS

~~§ 20. Initiation.~~

~~(a) The General Manager may institute an enforcement proceeding by serving a notice by certified mail, return receipt requested, to the landowner or person (referred to hereafter as the "respondent") owning, undertaking or maintaining a work that is in violation of~~

~~this division or threatens the successful execution, functioning or operation of an adopted plan of flood control. The notice must state the acts or omissions which the General Manager believes to be in violation of this division or threatens the successful execution, functioning or operation of an adopted plan of flood control. The notice must specify the statutes or regulations which the respondent is alleged to have violated. This notice must be accompanied by an order requiring the respondent to respond to the notice within thirty (30) days of the receipt of the notice. The notice and the order must state that the board may seek judicial enforcement should the respondent fail to respond to the notice in a timely manner and that the board may abate violations or threats to the adopted plan of flood control through actions identified in section 22(b).~~

~~(b) Other interested parties may become parties to an enforcement proceeding by filing a notice to that effect with the board. The board shall mail a copy of that notice to the respondent within ten (10) days of receipt.~~

~~(c) Notwithstanding subdivision (a), if there is work that has not been approved by the board, the General Manager or the Chief Engineer may issue an order for compliance with *this* division, including an order to stop work.~~

~~NOTE: Authority cited: Section 8571, Water Code. Reference: Sections 8596, 8608, 8710 and 8719, Water Code.~~

~~HISTORY~~

~~1. New article 4 (sections 20 through 22) and section filed 9-30-96; operative 10-30-96 (Register 96, No. 40). For prior history, see Register 85, No. 26.~~

~~§ 21. Hearing.~~

~~(a) The respondent shall have the opportunity for a hearing, which must be requested in the respondent's timely response to the notice of enforcement proceeding. Failure to file such response within thirty (30) days of receipt of the notice constitutes a waiver of respondent's right to a hearing.~~

~~(b) The respondent and other parties may request that the board provide a copy of any document, not exempt from disclosure under the Public Records Act, beginning at Government Code section 6521, that is relevant to the enforcement proceedings. The board may charge a reasonable fee for each copy.~~

~~(c) The board may hold the hearing or a partial hearing before a committee of one or more members of the board, or before the General Manager or Chief Engineer, at any place within the state. All hearings must be open to the public. The board President shall designate the hearing officer.~~

~~(d) Written notice of the hearing shall be mailed to the respondent and each other party at least ten (10) days prior to the date of the hearing.~~

~~(e) Respondents and other parties shall be mailed a copy of any staff report or recommendations on the enforcement proceedings at least ten (10) days prior to the hearing.~~

~~(f) The hearing officer shall take and make a record of the evidence. The hearing officer shall prepare a proposed decision based upon the record. At a minimum, record must include the following: (1) the notice of enforcement proceeding and all supplementary material; (2) any staff report or analysis; (3) comments or documents submitted by the respondent, protestants, any public agency, or other third person; and (4) the transcript of the hearing.~~

~~NOTE: Authority cited: Section 8571, Water Code. Reference: sections 8596, 8608, 8710, 8719, 8730, 8730.2, 8730.3, 8731, 8732, 8732.5 and 8733, Water Code.~~

~~HISTORY~~

~~1. New section filed 9-30-96; operative 10-30-96 (Register 96, No. 40). For prior history, see Register 69, No. 25.~~

~~§ 22. Board Decision.~~

~~(a) The hearing officer shall prepare the proposed decision within thirty (30) days after the conclusion of the enforcement hearing. The board shall adopt its final decision at the next regularly scheduled board meeting after issuance of the proposed decision.~~

~~(b) The board decision shall by order specify what action must be taken by the respondent, at respondent's cost, and the time within which such action must be taken. The required action may include, but is not limited to the following:~~

- ~~(1) Removal of the work;~~
- ~~(2) Alteration of the work;~~
- ~~(3) Performance of additional work;~~
- ~~(4) Implementation of specified mitigation for effects on the environment;~~
- ~~(5) Compliance with additional reasonable conditions;~~
- ~~(6) Filing an application for a permit pursuant to this division;~~
- ~~(7) Revocation of the permit.~~

~~The board decision may also give notice that if the respondent does not comply with the decision within a reasonable time, the board may take actions to abate violations or threats to the adopted plan of flood control, such as physical removal and recover its costs from the respondent.~~

~~(c) The conditions imposed pursuant to subdivision (b) may require the respondent to permit inspection by the board, its officers, staff, or authorized representatives of the department during and after construction.~~

~~(d) The conditions may require the respondent to file with the board reports and data, including a description of all work done under the approved application. The board may also request in writing at any time any reports or data, even if not expressly stated in a condition to the decision.~~

~~NOTE: Authority cited: Section 8571, Water Code. Reference: Sections 21002 and 21081, Public Resources Code; Sections 8608 and 8710, Water Code.~~

~~HISTORY~~

~~1. Renumbering of old section 22 to new section 16(d) and new section filed 9-30-96; operative 10-30-96 (Register 96, No. 40).~~

STATE OF CALIFORNIA
CENTRAL VALLEY FLOOD PROTECTION BOARD
3310 EL CAMINO AVENUE, RM. 151 (JOC)
SACRAMENTO, CA 95821

DIVISION 1, CHAPTER 1, ARTICLE 4.1, OF THE
CALIFORNIA CODE OF REGULATIONS
REGARDING RECONSIDERATION

Proposed Text of Regulations
In Title 23, California Code of Regulations, Division 1
Delete Article 4.1 in its entirety:

CALIFORNIA CODE OF REGULATIONS
BARCLAY'S OFFICIAL CALIFORNIA CODE OF REGULATIONS

Title 23. Waters
Division 1. Central Valley Flood Protection Board
Chapter 1. Organization, Powers and Standards
Article 4.1 Reconsideration

Article 4.1. Reconsideration

§ 23. Reconsideration.

(a) No later than thirty (30) days after adoption by the board of a decision or order, any interested person affected by the decision or order may petition the board for reconsideration of the matter ~~for~~ based on any of the following reasons ~~causes~~:

- (1) Irregularity in the proceeding, or any ruling, or abuse of discretion which prevented a fair hearing;
- (2) The decision or order is not supported by substantial evidence;
- (3) There is relevant evidence, which could not have reasonably been produced previously; or
- (4) Error in law.;

~~(5) The application or matter, upon a vote of the Board, failed to be approved, and;~~

~~(A) There were one or more members of the board absent from the proceedings at the time the application or matter was considered and voted upon, except that absences due to abstention shall not be counted; and~~

~~(B) The number of votes by which the application or matter failed to be approved is equal to or less than the number of board members that were absent.~~

(b) The petition for reconsideration shall be in writing and contain the following:

- (1) Name and address of petitioner;
- (2) The specific action of which petitioner requests reconsideration;
- (3) The specific reason the action was inappropriate or improper;
- (4) The specific action which the petitioner requests;
- (5) A statement that copies of the petition and accompanying material have been sent to all interested parties.

(c) The board, in its sole discretion, may:

(1) Refuse to reconsider the decision or order; ~~if the petition fails to raise substantial issues related to the criteria set forth in subdivision (a);~~

~~or~~

~~(2) After review of the record and the petition:~~

~~(A)(2) Deny the petition upon finding that the decision or order was proper;~~

~~(B)(3) Set aside or modify the decision or order; or~~

~~(C)(4) Take other appropriate action.~~

(d) Any order or decision subject to reconsideration remains in full force and effect during the pendency of the petition for reconsideration.



CALIFORNIA CENTRAL VALLEY
FLOOD CONTROL
ASSOCIATION

<i>Executive Director</i>	MELINDA TERRY
<i>President</i>	MIKE HARDESTY
<i>Vice President</i>	LEWIS BAIR
<i>Treasurer</i>	KENNETH A. RUZICH

January 11, 2011

Via email (jpunia@water.ca.gov)

Jay Punia
Executive Officer
Central Valley Flood Protection Board
3310 El Camino Avenue, Room 1140
Sacramento, California 95821

Re: Comments on Title 23 Tier 1B Draft Revisions

Dear Mr. Punia:

Thank you for the opportunity to comment on the Board's Draft Title 23 Tier 1B revisions. The following comments are an expanded list from those presented by Scott Shapiro at the last meeting of the Board.

Section 4 – Definitions

We believe the State Plan of Flood Control may include features which are not clearly included in the definition such as: (1) the Butte Basin, (2) Federal and State constructed reservoirs with dedicated or variable flood storage, (3) the San Joaquin levee system upstream from the Tuolumne River which do not have assurances provided to the Federal government, but which are part of the State Plan of Flood Control, and (4) features constructed by locals for which assurances have been provided. Perhaps the phrase "but not limited to" should be added after the word "including" in the second line.

Section 5 – Delegation

As a preliminary matter, for the list of items which is excluded from delegation, it is not clear how you selected some of the terminology that was used, and which is repeated, in this Section. For example, many of the sentences start with "permits or other approvals of encroachments." It is not clear what is meant by "or other approvals of encroachment." In the past the Board has taken the position that the only authority the Board has over encroachments is the issuance of a permit (although we have not agreed with this position). This then raises the question of what is referred to by the phrase "or other approval of encroachment." Because it is not clear what you intend with this change, we cannot provide any recommendation on how to modify it.

In the introductory phrase of subsection (a) you have proposed adding the phrase “including the review and approval of encroachment permit applications.” This phrase is not necessary as the rule previously read that “all duties of the Board” were delegated. However, if you wish to add this phrase we recommend you add the subphrase “including but not limited” so people recognize this is just one of the many categories of delegated duties.

What is the test for the use of the word “significant” as used in proposed Section 5(a)(1)? Is this different than the list of impacts contained in Sections 5(a)(4) and 5(a)(5)?

We recommend you add the phrase “where the Corps has jurisdiction” at the end of Section 5(a)(2).

Because the Corps has recently clarified that all permits issued under CFR section 208.10 are also under the authority of Section 408, we recommend you rephrase Section 5(a)(3) or else this sentence would cancel out all delegations. You could instead rephrase this to read as follows: “Permits or other approvals of encroachment approved by the South Pacific Division or Headquarters of the U.S. Army Corps of Engineers.” In this way, you are matching your delegation of items to those items delegated by the Corps to the Sacramento District.

The current phrasing of Section 5(a)(4) does not make sense. For example, this Section provides that there is no delegation where the staff determined that there is more than a de minimus hydraulic impact, including but not limited to increases in water surface elevation. However, the next phrase, which is presumably another way in which there is more than a de minimus hydraulic impact, is lack of adequate freeboard. Does that mean the very existence of a stretch of adjacent levee with inadequate freeboard means the project has a hydraulic impact, even if it does not actually affect the water surface elevation? The same observation would apply to “inability to convey design discharge.” Similarly, the words “that exceed the recommended thresholds” should be added after the phrase “static or dynamic loading” in Section 5(a)(5).

Why have permits for habitat restoration, environmental restoration, or environmental mitigation been excluded from the category of matters which may be delegated? The Board should be able to adopt standards which ensure that controversial permits go to the Board, but non-controversial permits, which meet all of the other criteria, can be simply and efficiently handled, just as the way in which orchard permits are handled.

In Section 5(c), the reference to “subsections (a) and (b)” should be changed by deleting (b). Subsection (b) does not delegate any authority.

In Section 5(f), we recommend you add the phrase “or approve permits or other matters” after the phrase “direct work.”

Section 109 – Right of Review of Delegated Authority

It is not clear why this section refers (in its current form) to decisions made by the Department Director. As phrased, it suggests that any time an aggrieved party doesn't like a decision of the Department Director that party may appeal the decision to this Board. We recommend you remove this odd reference.

Section 20 – Purpose and Authority

Subsection (c) should be deleted as this same paragraph is provided in Section 5(g).

Section 21 – Maintenance Activities

In Section 21(a) we recommend you add the phrase “as described in subsection (b)” following the proposed text.

In Section 21(d) the word “vacant” should be replaced with “vacated” to match the verb form of the remainder of the list.

Section 22 – Emergency Impairment Response Authority

As we provided in oral testimony during the December Board meeting, it is important for the Executive Officer to have financial authority to match the language in this Section. As we understand it, this is not a regulations issue, but rather a budget issue.

Section 23 – Notice of Violation

It is not clear why you are defining the phrase “unreasonable impact on public safety” in Section 23(d). We did not see this phrase used in Section 23. If there is a need for the definition, please explain what it is; then we think it is necessary to provide some modifier on the phrase “floating debris.” Floating debris, by itself, is not necessarily dangerous. For example, any floating stick would meet this test. Perhaps the phrase should be replaced with “floating debris which constitutes a risk for the flood protection facilities.”

It is also not clear why you are defining the phrase “lawful existing encroachment” in Section 23(e). We did not see the phrase used in this Section.

Section 24 – Cease and Desist Orders Issued by the Executive Director

The approach taken in the draft regulations in Section 24(c) is to state the authority that the Executive Director does not have in regard to cease and desist orders. While it is important to exclude those matters which are prohibited by statute, it might make more sense to state the Executive Director has all authority to issue cease and desist orders as described in Section 25(b)(8) with the exception of _____.”

We recommend you add the phrase “if the actions taken by the respondent are in” between the words “determine” and “compliance.”

Section 25 – Cease and Desist Order Board Hearing Procedures

We recommend removing the standard of “substantial evidence” from Section 25(b)(4) as listing the standard does not add anything to the Section and could create an additional basis to challenge the determination.

In regard to Section 25(b)(5), we recommend the Section include a statement that when a hearing is held before a hearing officer or a subcommittee of the Board, no additional evidence or testimony may be provided to the Board when the actual order is considered by the Board. However, we do believe written and oral arguments would both be appropriate at that time.

Section 26 – Permit Revocation

We believe that it would be appropriate to add a standard to this Section to clarify what findings need to be made for the Board to revoke a permit. For example, does there need to be a finding of potential injury to the flood protection system? That the encroachment is a nuisance? That it is no longer used? As this Section will provide the only guidance for the property owner wishing to argue against revocation, a standard is essential.

Section 27 – Nuisance and Civil Penalty Provisions

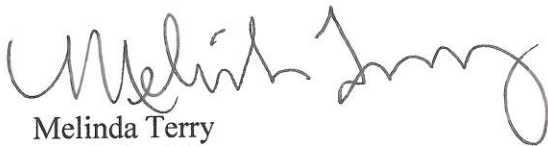
We recommend the word “intentional” be deleted before the phrase “construction without a permit.”

OLD Section 23 – Reconsideration

We would strongly urge the Board to reinstate this Section and to update it as appropriate. As is often the case, the Board can only communicate to a landowner the severity of the situation by issuing a final cease and desist order. However, a landowner who finally realizes the situation is then left with no choice but to litigate the issue. An opportunity for reconsideration can provide a negotiated, faster, and less acrimonious process for moving ahead with changes to the project in the interest of safety. In addition, reconsideration can allow the Board to resolve irregularities in the enforcement process without the need to begin anew.

If you have any questions in regard to these comments, please do not hesitate to contact Scott Shapiro at (916) 520-5234 or at sshapiro@downeybrand.com.

Thank you.



Melinda Terry
Executive Director