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# M e m o r a n d u m

To : President Bill Edgar
Central Valley Flood Protection Board
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**BY E-MAIL**

Date: June 12, 2013
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From : Nicole U. Rinke
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**Office of the Attorney General – Sacramento**

**Subject : SB 753 – Questions Regarding Section 8702; Comparison to Existing 8709.4**

This memorandum is in repsonse to your questions regarding SB 753 and specifically section 8702. You asked me to: (1) explain in non-legal terms the changes SB 753 would make to existing Water Code Section 8709.4, which SB 753 would renumber as Section 8702, (2) articulate the reasons for the changes proposed by the board to this section, and (3) provide a redline showing the propsoed changes in this section.

When the board initially decided to seek revision of its enforcement procedures as outlined in the Water Code (specifically Article 6, Water Code Sections 8700 - 8709.7), its goal was to clarify the existing process and provide some additional administrative enforcement tools (e.g., administrative penalties). Its initial approach was to make minimal changes to exisitng law, limited to changes necessary to achieve its narrow goals. The Central Valley Flood Control Association, however, requested that rather than a minimalist, surgical revision, the board revise the entire enforcement Article – largely because the Article as written is confusing and unclear to both levee districts and the public. The board agreed that the Article as written is confusing and, therefore, agreed to undertake a more comprehensive revision of the Article.

Article 6 currently includes Water Code Section 8709.4, which authorizes the board to remove or modify permitted encroachments under certain specified conditions. SB 753 renumbers this section as Section 8702, but retains much of the existing language with a few modifications. The modifications are:

(1) The first paragraph in subsection (a) is rewritten for clarity, but the basic authorization to remove permitted encroachments following a hearing and based on substantial evidence remains the same.

(2) Exsiting law allows the executive officer to order the removal of existing encroachments. SB 753 would limit the exercise of this authority to the board. The board seeks this modification because it understands that the removal or modification of

existing permitted encroachments is more sensitive than the removal of unpermitted encroachments and should be handled only at the board level.

(3) Existing law allows the removal or modification of a permitted encroachment if the encroachment represents an "imminent" threat to the structural integrity of the flood facility. SB 753 would delete the word "imminent." The board seeks this change because if an encroachment is determined to be a threat to the flood control system it should not be required to wait, nor may it be practical to wait, until the threat is "imminent" before taking steps to remove the encroachment.

(4) Existing law allows the board or executive officer to remove or modify a permitted encroachment if the encroachment "significantly" impairs the functional capability of the levee. The proposed bill would delete the word "significantly." The board seeks this change so that it can address any encroachments that impair the functional capability of the levee and, therefore, fully protect public safety.

(5) SB 753 also allows the board to remove or modify a permitted encroachment if the encroachment is not in conformance with an adopted plan of flood control, state law, board regulations, or, in the case of facilities of the State Plan of Flood Control where the board has given assurances to the United States, the standards and regulations of the Secretary of the Army. This additional authority is important to ensure that levees conform with modern standards and remain in the federal program that provides financial assistance in the event of levee damage during a high water event. Conformity with current standards can also impact eligibility and rates for federal flood insurance.

(6) SB 753 clarifies that the board or a court may not levy penalties for removal or modification of permitted encroachments. The board seeks this amendment to clarify that although it may require the modification or removal of a permitted encroachment, penalites will not apply as they otherwise might in the case of removal of an unpermitted enroachment.

Here is a redline showing the differences between the propsoed Section 8702 as compared to existing law Section 8709.4.

~~8709.4~~ 8702.

(a) ~~Before removing or modifying a lawful existing encroachment on levees, channels, and other flood control works pursuant to powers granted by this part, a permit, or standards adopted pursuant to this part, the board shall make one of the following findings, based on substantial evidence, regarding the encroachment's impact on public safety:~~ *The board, following notice and opportunity for a hearing, may order the removal or modification of an encroachment that was previously issued a permit by the board if the board makes one of the following findings based on substantial evidence*:

(1) The encroachment presents a~~n~~ ~~imminent~~ threat to the structural integrity of the levee, channel, ~~or other~~ flood control work, *or other facility of the State Plan of Flood Control*.

(2) The encroachment ~~significantly~~ impairs the functional capability of the levee, channel, ~~or other~~ flood control work, *or other facility of the State Plan of Flood Control* to fulfill its particular intended role in the overall flood control plan.

*(3) The encroachment is not in conformance with an adopted plan of flood control, state law, board regulations, or, in the case of facilities of the State Plan of Flood Control the standards and regulations of the Secretary of the Army.*

(b) Routine maintenance *by the board, the executive officer, or local agencies that operate and maintain facilities and works on behalf of the board* that includes the removal or modification of fences, gates, and vegetation on ~~the levee structure and~~ *a levee or* other flood control structure~~s~~ ~~is~~ *shall* not subject to ~~subdivision (a)~~ *this section*.

~~(c) The board may delegate authority to the executive officer to take action to remove or modify encroachments on levees, channels, and other flood control works in accordance with subdivision (a).~~

*(c) The removal of previously permitted encroachments shall not be subject to administrative or civil penalties pursuant to Sections 8704 or 8704.1.*

If you have additional questions, please let me know.

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