

RECOMMENDATION OF THE DRAFTING COMMITTEE

Central Valley Flood Protection Board

March 27, 2013

Draft Senate Bill 753

An Act to Amend the Water Code Related to Flood Protection

Note - (This proposal would delete all of existing Article 6 (Water Code Sections 8700-8709.7) currently titled “Encroachments on Flood Control Works”, and then replace that Article with the language shown below.)

Note – (The parenthesis below the section heading indicate whether it is a new, modified or existing section.)

Proposed Article 6

Enforcement of Unauthorized Activities and Encroachments

8702. Interference with maintenance and operation of works – Enforcement Authority (current 8708, modified to clarify scope and include clear statement of enforcement authority)

(a) It is unlawful for any person, entity, or public agency to interfere with, obstruct the performance, maintenance, or operation of, or otherwise take actions that may adversely affect Facilities of the State Plan of Flood Control, Designated Floodways, or streams that are regulated by the Board.¹

(b) The board, executive officer, department, and local agencies that operate and maintain facilities and works on behalf of the board, shall have the authority as set forth in this article to take administrative or civil enforcement actions to abate and remedy any interference or potential interference proscribed in subsection (a).

8702.1 Notice of Violation (new)

a) If the board or the executive officer determines that any person, entity, or public agency has undertaken, is threatening to undertake, or maintains any encroachment, flood system improvement,² or activity in violation of this part, the board, executive officer, or department

¹ Policy Question – Scope?

² Policy Question – Should flood system improvements be subject to enforcement?

may issue a Notice of Violation to the person, entity, or public agency responsible for the encroachment, flood system improvement, or activity.

- b) The department or a local agency may issue a Notice of Violation pursuant to (a) for facilities within the board’s jurisdiction that it operates and maintains if the board delegates it such authority. This subsection shall not require the local agency to accept the delegation³.
- c) The Notice of Violation shall include the following:
 - (1) A statement describing the activity, failure to act, flood system improvement, or encroachment that constitutes a violation of this article, including the sections of this part or board regulations that are being violated.
 - (2) A statement of whether the activity, flood system improvement, or encroachment may be eligible for a permit from the board.
 - (3) The corrective actions that must be taken within a specified time period.
 - (4) Whether the person, entity, or public agency may correct the violation without obtaining prior approval from the board or executive officer, or whether prior approval from the board or executive officer must be obtained prior to taking corrective actions.
 - (5) A statement that the Notice of Violation will be referred to the board and that the failure to take the requested actions within the time specified may subject the person, entity, or public agency to a Cease and Desist Order and the imposition of further remedial and enforcement actions, including but not limited to correction of the violation by the board at the person, entity, or public agency’s expense and penalties; and
 - (6) The name, address, and telephone number of the State or local office that may be contacted for further information.
- d) The notice shall be served in accordance with Section 8702.5 and a copy transmitted to the board executive officer within five (5) days of its issuance. The board or the executive officer may amend the Notice of Violation and such amended Notice of Violation, once served in accordance with Section 8702.5, shall supersede any Notice of Violation previously issued for the same violation.

8702.2 Cease and Desist Order

(new – borrows from and clarifies current 8709.5)

- (a) If the board or executive officer⁴ determines that any person, entity, or public agency has failed to adequately respond to a Notice of Violation, the board or executive officer may issue an order directing that the person, entity, or public agency to whom or to which the Notice of Violation was issued to cease and desist.

³ Term for LMA’s? Policy issues – Drafted to allow LMAs to issue NOV’s once delegate authority by the board. Also allows LMA’s to reject the delegation.

⁴ Policy Issue - Board or Executive Officer can issue CDO

(b) The Cease and Desist Order shall:

- (1) Include a copy of the Notice of Violation.
- (2) Be effective upon its issuance and served immediately pursuant to Section 8702.5.
- (3) Require that the corrective actions described in the Notice of Violation be completed within a specified time period or the person, entity, or public agency will be subject to an Enforcement Order as described in Section 8702.3.
- (4) Provide date, time, and location of a public meeting before the board at which the person, entity, or public agency may appear to contest the Cease and Desist Order.⁵

(c) The meeting shall comply with the following:

- (1) The meeting shall be scheduled at least thirty (30) days after issuance of the Cease and Desist Order and shall be held pursuant to the provisions of this part and regulations adopted by the board.⁶
- (2) At the meeting the board may affirm, amend, modify, stay or rescind the Cease and Desist Order.⁷
- (3) If the person, entity, or public agency subject to the Cease and Desist Order fails to appear at the meeting, the Cease and Desist Order may be approved by default.

8702.3 Enforcement Hearing and Order

(new)

- (a) If the board or executive officer determines that any person, entity, or public agency has failed to correct a violation as outlined in a Cease and Desist Order the board shall hold an enforcement hearing to consider the issuance of an Enforcement Order.
- (b) The enforcement hearing shall comply with the following:
 - (1) Notice of the hearing shall be provided at least thirty (30) days before the hearing is scheduled pursuant to Section 8702.5, unless it is determined that the public interest necessitates a shorter notice period.
 - (2) Notice of the hearing shall include a proposed Enforcement Order.
 - (3) The hearing shall be held pursuant to the provisions of this part and regulations adopted

⁵ Policy Issue – Hearing is automatic.

⁶ Note, the idea here is that approval would be on consent, unless the person/agency appears and requests otherwise. This would need to be specified in the regulations.

⁷ Policy Issue – Does the board want authorization to record the CDO against the property? That has been removed from this draft.

by the board.⁸

- (4) If the person, entity, or public agency subject to the Cease and Desist Order fails to appear at the hearing, the right to a hearing will be deemed waived.
- (c) At the conclusion of the hearing the board may approve, amend, or reject the proposed enforcement order and thereby:
- (1) Order the removal, modification, or abatement of the encroachment, flood system improvement, or activity causing a violation of this part.
 - (2) Order the restoration of the site.
 - (3) Impose and require the payment of administrative penalties as set forth in Section 8703.
 - (4) Order the initiation of a civil action by the board in the name of the State for mandamus, injunction, civil penalties or other appropriate remedy authorized by law.
 - (5) Order any other actions or conditions as the board may determine are necessary to resolve the violation and ensure compliance with this part.
- (d) The Enforcement Order shall state any necessary findings and shall be served immediately pursuant to Section 8702.5.
- (e) A person, entity, or public agency against whom the board has issued an Enforcement Order may seek judicial review of the Enforcement Order pursuant to Section 8579. The Enforcement Order shall be deemed effective upon issuance, but no removal actions shall be taken by the board until after the time for judicial review has passed.
- (f) If the board orders removal and restoration pursuant to this part, the board, its contractor, or its designee may conduct the removal and restoration, the costs of which will be collected from the responsible person, entity, or public agency by whatever legal remedies are available, including the placement of a lien on the property owned by the person, entity, or agency responsible for the violation pursuant to Section 8704.
- (g) This section does not authorize the issuance of an Enforcement Order as to any lawful activity undertaken by a local public agency pursuant to Section 8709.

8702.4. Removal or modification of previously permitted encroachments (current 8709.4, some modifications to include violation of state/federal standards as a basis for removal and to allow removal based on a threat to safety rather than an imminent threat. Legislative Council: note that the words “significantly” and “imminent” are removed.)⁹

⁸ Note, this would be an evidentiary hearing.

⁹ Policy Issue - Specify the process? As a matter of statutory construction and unless otherwise specified in the regulations, the default would be the process outlined for other violations. As with all, the board retains discretion to negotiate a settlement, etc.

(a) 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:

(1) The encroachment presents a threat¹⁰ to the structural integrity of the levee, channel, flood control work, or other facility of the State Plan of Flood Control.

(2) The encroachment impairs¹¹ the functional capability of the levee, channel, 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 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.¹²

(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 abandoned property, fences, gates, and vegetation on a levee or other flood control structures is not subject to this section.

(c) The removal of previously permitted encroachments shall not be subject to administrative or civil penalties pursuant to 8703 or 8703.1.¹³

8702.5 Notice (new)

Notice and service required by this article shall be provided to the person, entity, or public agency believed to be responsible for the violation and the owner of the property on which a violation occurred or is threatened to occur by:

- (1) Hand delivery;
- (2) Certified Mail; or
- (3) If the person, entity, or agency cannot be reached or reasonably notified by other means, by posting a copy of the notice or order on the encroachment or property.

8703 Civil Penalties (current 8709.7 penalty amounts, but cleaned up)¹⁴

(a) Any person, entity, or public agency that undertakes an activity, flood system improvement, or encroachment that is in violation of this part or that is inconsistent with any permit or cease and desist order previously issued by the board or executive officer may be assessed

¹⁰Policy Issue – imminent? Substantial?

¹¹ Policy Issue - Substantially? Significantly? As is?

¹² Allow removal for violations of law/Corps standards? Note, that Section 108 of the regulations also addresses this and may need to be amended.

¹³ Policy Issue – allow penalties for removal of previously permitted encroachments?

¹⁴ Policy Issue – retain current civil penalty structure.

civil penalties in an amount not less than five hundred dollars (\$500) and not greater than thirty thousand dollars (\$30,000).¹⁵

- (b) Any person, entity, or public agency that intentionally and knowingly undertakes an activity, flood system improvement, or encroachment that is in violation of this part or that is inconsistent with any permit or cease and desist order previously issued by the board or executive officer, may, in addition to any other penalties, be assessed civil penalties in an amount that shall not be less than one thousand dollars (\$1,000), nor more than fifteen thousand dollars (\$15,000), per day for each day in which the encroachment persists.
- (c) In determining the amount of liability under sections (a) and (b), the following factors shall be considered:
 - (1) The nature, circumstance, extent, and gravity of the violation.
 - (2) Whether the violation is susceptible to restoration or other remedial measures.
 - (3) Whether the function of the levee, channel, or other flood control work is affected by the violation.
 - (4) The cost to the State of bringing the action.
 - (5) With respect to the person, entity, or public agency responsible for the violation, any voluntary restoration or remedial measures undertaken, any prior history of violations, the degree of culpability, economic profits, if any, resulting from, or expected to result as a consequence of, the violation, and other matters the board deems relevant.
- (d) Any person, entity, or public agency that intentionally or negligently violates any cease and desist order issued, reissued, or amended by the board, or any restoration order issued, reissued, or amended by the board may be liable for a civil penalty in an amount that shall not exceed six thousand dollars (\$6,000) for each day in which that violation persists. Any actual penalty imposed shall be reasonably proportionate to the damage suffered as a consequence of the violation.

8703.1 Administrative Penalties

(new)

- (a) Administrative penalties may be imposed by the board in the same manner as civil penalties described in Section 8703, upon an enforcement hearing and issuance of an Enforcement Order pursuant to Section 8702.3, but may not be less than five hundred dollars (\$500) or exceed fifty thousand dollars (\$50,000) for a single violation.¹⁶

¹⁵ Policy issue – amount of civil penalties.

¹⁶ Policy issue – amount of administrative penalties. Cap?

- (b) In imposing penalties, the board must make express its rationale for the amount and specifically address the findings in 8703(c).
- (c) Any penalties imposed shall be required to be paid within sixty (60) days.
- (d) No person, entity, or agency shall be subject to both civil and administrative penalties for the same violation.
- (e) After the time for judicial review pursuant to Section 8579 has passed, the board may apply to the clerk of the appropriate court in the county in which the administrative penalties were imposed for a judgment to collect the penalties assessed. The application, which shall include a certified copy of the board action, constitutes a sufficient showing to warrant issuance of the judgment. The clerk shall enter judgment immediately in conformity with the application. The judgment so entered has the same force and effect, and is subject to all the provisions of law relating to, a judgment in a civil action and may be enforced in the same manner as any other judgment of the court in which it is entered.

8703.2 Flood Risk Management Fund (new)

The Flood Risk Management Fund shall be maintained in the State Treasury. All funds received from penalties pursuant to Sections 8703 and 8703.1 of this article shall be paid into the Fund. Upon appropriation by the legislature, the monies in the Fund shall be expended by the board to carry out enforcement pursuant to this part, including for the costs of the abatement and restoration of violations and related litigation¹⁷.

8704 Lien Authority (new)

- (a) The Board shall have the authority to record a lien with the County Clerk in the county of this State where the person, entity, or agency's property responsible for the violation is located, to recover any and all:
 - (1) Costs incurred in abating, removing and restoring a violation, including costs incurred in seeking removal, abatement and restoration pursuant to this part;
 - (2) Costs incurred in the summary abatement of emergencies; and
 - (3) Attorney's fees associated with actions to enforce this part.¹⁸
- (b) The lien shall have the same force, effect and priority as a judgment lien.
- (c) Prior to recording a lien, the board shall provide notice and an opportunity for a hearing to contest the amount of the lien.

¹⁷ Policy question – designation of use of funds narrow to enforcement?

¹⁸ Policy question: should the board be able to lien property to collect penalties?

- a. Notice shall be provided twenty (20) days prior to the hearing pursuant to 8702.5.
- b. The hearing required by this Section may be satisfied by an Enforcement Order hearing pursuant to 8702.3 or, in the summary abatement of emergencies, a hearing pursuant to 8709.

**8705. Concurrent and additional remedies
(current 8704 and 8705, combined with no other change).**

The remedies provided by this article are not exclusive of, but shall be concurrent with and in addition to, any other remedy, penalty, or sanction which may exist by law, civil or criminal. The board may enforce compliance with the provisions of this article by mandamus, mandatory injunction or by any other appropriate remedy authorized by law. The action or proceeding may be commenced and maintained by the board in the name of the State.

**8706. Actions to ensure the free flow of water
(current 8706 and 8707, combined with no other change).**

The board may maintain actions in the name of the State to compel by injunction the owner or owners of any bridge, trestle, wire line, viaduct, or embankment or other structure or obstruction which shall be intersected, traversed or crossed by any by-pass, drainage canal, channel, or overflow channel, to construct or alter any structure in order to offer a minimum of obstruction to the free flow of water. The board may in the case of existing works compel the removal or alteration of structures or obstructions that impede the free flow of water.

**8707. Public nuisance; abatement
(current § 8709, renumbered, no other change).**

Any activity that does or may interfere with, obstruct the performance, maintenance, or operation of, or otherwise adversely affect Facilities of the State Plan of Flood Control, Designated Floodways, or streams that are regulated by the board constitutes a public nuisance, and the board may commence and maintain a suit in the name of the people of the State for the prevention or abatement of such nuisance.

**8708 Attorneys Fees
(new)**

If the board or attorney general¹⁹ prevails in a civil action to enforce this part, the board or

¹⁹ Policy issue – should the LMAs also be able to seek atty’s fees and costs? Note that under the proposed framework, there are three scenarios in which a LMA will be involved:

- (1) issuing NOVs – does not entail significant costs.
- (2) removal/restoration of a violation as the board’s “contractor or designee” (see 8702.3(b)(1)) – b/c the LMA would be acting as an agent of the board, (a) the LMA can contract with the board re. payment of its costs; and (b) the board can recover its costs, including those of the LMA through its enforcement order, lien authority or by pursuing civil action.

attorney general shall be awarded attorney’s fees and costs, including any fees and costs incurred by its agents.

8709 Summary Abatement of Emergencies
(new)

Nothing in this article shall be construed to prevent the department, the board, the executive officer, or a levee maintaining agency from taking any action to prevent an imminent failure of a levee, channel, floodway, or stream bank; operation of a flood control feature; or other emergency action necessary to protect the public welfare.

- (a) To the extent emergency action is required that involves the removal, modification, or abatement of an encroachment, flood system improvement, or activity maintained by an individual, entity, or public agency, the individual, entity or public agency person may request a hearing before the Board within thirty (30) days after the action has been commenced.
- (b) After a public hearing, by request or by its own motion, any entity that has carried out abatement functions pursuant to this section may seek reimbursement of its abatement costs, and may pursue any legal remedies available to recover its costs including imposing a lien pursuant to Section 8704.

Amendments to other articles:

WATER CODE 8579. Petition for writ of mandate; aggrieved person
(new – modeled after Coastal Commission provision, Public Resources Code Section 30801)

Any aggrieved person shall have a right to seek judicial review of any permit or Enforcement Order issued by the board, by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure, within thirty (30) days after the action has become final.

For purposes of this section, an “aggrieved person” means any person, entity, or public agency who, in person or through a representative, appeared at a public hearing of the board in connection with the decision or action appealed, or who, by other appropriate means prior to the decision, informed the board of the nature of their concerns.

WATER CODE 8732. Hearing officers
(current 8732 modified)

The board may hold a hearing or partial hearing before a committee of one or more members of the board, before a qualified neutral hearing officer designated by the board president, or before the executive officer or chief engineer of the board, at any place within the State.

8710.2 Encroachment Permits – Approval before commencement of construction

(3) 8709 – emergency removal (see 8709) where the LMA can act independently and recover its costs – as already specified.

(new)

(a) No person, entity, or public agency may place an encroachment over, on, in, or under flood control facilities, works, or lands under the jurisdiction of the board, including those associated with Facilities of the State Plan of Flood Control, Designated Floodways, or streams that are regulated by the Board, without obtaining an encroachment permit from the board.

(b) Any encroachment permit issued shall be subject, at the board’s discretion, to conditions necessary to ensure compliance with this part, including the condition that the permit be recorded to the affected parcels with the county recorder’s office.

(c) Levee maintenance and minor repairs by a local public agency that operates and maintains facilities and works on behalf of the board do not require a permit under this section.²⁰

8710.3 State and Local Flood System Improvements Permits– Approval before commencement of construction²¹

(new)

(a) No state or local governmental agency may commence construction of any flood facility or flood system improvement, including conservation and recreation elements that encroaches on flood control facilities, works, or lands under the jurisdiction of the board, including those associated with Facilities of the State Plan of Flood Control, Designated Floodways, or streams that are regulated by the Board without obtaining a Flood System Improvement Permit from the board.

(b) Any Flood System Improvement Permits issued shall be subject, at the board’s discretion, to conditions necessary to ensure compliance with this part, including the condition that the permit be recorded to the affected parcels with the county recorder’s office.²²

(c) Levee maintenance and minor repairs by a local public agency that operates and maintains facilities and works on behalf of the board do not require a permit under this section.

²⁰ Policy Issue – filing fees have been omitted.

²¹ Policy Issue – distinguish between encroachment and improvement permits? Should improvements be limited to facility improvement or something more?

²² Policy Issue – Does the board want the discretion to record Improvement Permits?