

Central Valley Flood Protection Board

March 22, 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 show below. Legislative Counsel would appropriately renumber the sections.)

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 include non-project works and clear statement of enforcement authority)

It is unlawful for any person or public agency to interfere with or obstruct the performance of the maintenance or operation of works or other plans adopted by the board within the jurisdiction of the board including, Facilities of the State Plan of Flood Control, where the State or a political subdivision of the State has given assurances to the Secretary of the Army pursuant to Article 2 of Chapter 3 of this part (Section 8615 et seq.), that the State or a political subdivision will maintain and operate works after completion in accordance with regulations prescribed by the Secretary of the Army, and any facilities or works construed as part of an adopted plan of flood control or areas protected thereto. The board, executive officer, department, and local agencies that operate and maintain facilities and works on behalf of the board ~~responsible for the operation of any project work as described in Section 12878(j)~~, 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 with such works. The unlawful interference proscribed by this section includes but is not limited to the construction of any encroachment or improvement without or in violation of the permits required by this part or the maintenance of a previously permitted encroachment that is deemed to interfere with such works pursuant to Section 8702.4.

8702.1 Notice of Violation (new)

a) ~~If the board, the executive officer, or department, or local agency responsible for the~~

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~~operation of any project work as described in Section 12878(j), if delegated authority by the board,~~ determines that any person or public agency has undertaken, is threatening to undertake, or maintains any encroachment, improvement, or activity in violation of this part, the board, executive officer, department, or local maintaining agency may issue a Notice of Violation to the person or public agency responsible for the encroachment or activity.

a)b) A local agency that operates and maintains facilities within the board’s jurisdiction may also issue a Notice of Violation pursuant to (a) if the board delegates it such authority. This subsection shall not require the local agency to accept the delegation.

b)c) The Notice of Violation shall include the following:

- (1) A statement describing the activity, failure to act, improvement, or encroachment that constitutes a violation of this article.
- (2) A statement of whether the activity, 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 ~~The~~ person or public agency’s may ~~ability to~~ 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 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 or public agency’s expense plus fines or penalties.
- (6) The name, address, and telephone number of the State or local office that is to 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 business 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 officer determines that any person 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 or public agency to whom the Notice of Violation was issued to cease and desist.

(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 or public agency will be subject to an Enforcement Order as described in Section 8702.3.

(4) Allow the person or agency subject to the Cease and Desist Order to request, within thirty (30) days, ~~an appeal~~ hearing before the board ~~within thirty (30) days~~.

(c) If the person ~~and~~ public agency subject to the Cease and Desist Order fails to request a hearing within the time specified, the right to a hearing will be deemed waived and no hearing shall be required prior to issuance of an Enforcement Order pursuant to Section 8702.3.

~~(d) If the person or public agency subject to the Cease and Desist Order requests a hearing, the board shall hold a public hearing on the Cease and Desist Order ~~prior to issuing an Enforcement Order~~.~~

(1) Notice of the hearing shall be provided pursuant to 8702.5 and shall include the date, time and location of the hearing and a statement that failure to appear at the hearing will constitute a waiver of the right to a hearing and will result in the entry of a default Enforcement Order.

(2) The hearing shall be held pursuant to the provisions of this part and regulations adopted by the board.

(3) At the conclusion of the hearing, the board may affirm, amend, or rescind the Cease and Desist Order. ~~issue an Enforcement Order or take whatever action is necessary to ensure compliance with this part.~~

~~(3)~~(4) If the Board affirms or modifies the Cease and Desist Order and the person or agency subject to the order fails to complete the corrective actions required in the Cease and Desist Order, no further hearing will be required prior to the Board's issuance of a subsequent Enforcement Order.

(d) If the person or public agency subject to the Cease and Desist Order fails to comply with the order and does not request a hearing, the Cease and Desist Order shall be recorded with the County Recorder's Office against the person or public agency's property associated with the violation.

(1) When the enforcement action has been fully resolved, including the payment of any costs and penalties, the Executive Officer shall issue a certificate of abatement to the person or agency against whose property the Cease and Desist order was recorded and that person or agency may, at the owner's expense, record the certificate with the county recorder's office.

8702.3 Enforcement Order

(new)

(a) If the board determines that any person or public agency has failed to correct a violation as outlined in a Cease and Desist Order the board may issue an Enforcement Order.

(b) The Enforcement Order may, within the board's discretion:

(1) Order the removal and restoration of the encroachment, improvement, or activity causing a violation of 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 or public agency by whatever legal remedies are available, including the placement of a lien on the property owned by the person or agency responsible for the ~~encroachment~~ violation pursuant to Section 8704.

(2) Assess and require the payment of ~~civil or~~ administrative penalties as set forth in Section 8703.

(3) Order the initiation of a civil action by the board in the name of the State for mandamus, injunction, or other appropriate remedy authorized by law.

(4) Order any other actions or conditions as the board ~~or the executive officer~~ may determine are necessary to avoid a potential adverse impact to public safety or to ensure compliance with this part.

(c) The Enforcement Order shall be served immediately pursuant to Section 8702.5.

(d) A person or public agency against whom the board has issued an Enforcement Order may seek judicial review of the Order pursuant to Section 8579. The Enforcement Order shall be deemed effective upon issuance, but no removal actions will be taken by the board until after the time for judicial review has passed.

(e) This section does not authorize the issuance of an Enforcement Order as to any lawful activity undertaken by a local public agency pursuant to a declaration of emergency by the governing body of the local public agency or the board of supervisors of the county in which the activity is being or may be undertaken.

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 **substantial** threat to safety rather than an imminent threat. Legislative Council: note that the words “significantly” and “imminent” are removed.)

(a) The board ~~or executive officer~~ may order the removal or modification of an encroachment that was previously issued a permit by the board ~~pursuant to the processes outlined in Sections 8702.1, 8702.2 and 8702.3 and after~~ if the board makes ~~making~~ one of the following findings:

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

(2) The encroachment impairs the functional capability of the levee, channel, or flood control work 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 where the board has given assurances to the United States, the standards and regulations of the Secretary of the Army.

~~(b)~~

(b) Routine maintenance that includes the removal or modification of abandoned property, fences, gates, and vegetation on the levee structure and other flood control structures is not subject to ~~subdivision (a)~~ this section.

~~(c) The findings required by this section, if applicable, shall be set forth in the Cease and Desist Order and Enforcement Order issued by the executive officer or the board.~~

8702.5 Notice
(new)

Notice and service required by this article shall be provided to the person 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 ~~and/or the person or public agency believed to be responsible for the violation~~ by:

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

8703 Penalties
(modification of current 8709.7 – placeholder, please see attached)

- (a) Any person or public agency that undertakes an activity, 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 civil penalties in an amount not greater than fifteen thousand dollars (\$15,000), per day for each day in which the violation occurs or persists

- (b) Administrative penalties may be assessed by the board in the same manner as civil penalties described in (a) ~~after~~ upon ~~an opportunity for a hearing pursuant to Section 8702.2~~ 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.
 - (1) ~~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.~~
 - (2) ~~After the time for judicial review has passed, the board may also recover assessed penalties through a lien against the property of the person or agency responsible for the violation pursuant to Section 8704.~~

- (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 was committed intentionally or knowingly.
- (3) Whether the violation is susceptible to restoration or other remedial measures.
- (4) Whether the function of the levee, channel, or other flood control work is affected by the violation.
- (5) The cost to the State of bringing the action.
- (6) With respect to the person 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) ~~(d)~~ Any penalties assessed shall be required to be paid within thirty (30) calendar days.
- (e) No person or agency shall be subject to both civil and administrative penalties for the same violation.
- ~~(f)~~(f) 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.
- ~~(g)~~(g) After the time for judicial review has passed, the board may also recover assessed penalties through a lien against the property of the person or agency responsible for the violation pursuant to Section 8704.
- ~~(g)~~(e) All funds generated by the imposition of penalties pursuant to this section shall be deposited into the Flood Risk Management Fund as set forth in Section 8703.1.
- (h) In addition to the penalties described herein, any individual who erects or maintains a

violation that is found to be the proximate cause of a failure of a levee or other flood control facility shall be liable for additional damages at law including any liability that may be incurred by the state.

8703.1 Flood Risk Management Fund
(new)

The Flood Risk Management Fund shall be maintained in the State Treasury. All funds received from penalties pursuant to this article shall be paid into the Fund. Upon appropriation by the legislature, the monies in the Fund shall be expended by the board ~~and the executive officer to carry out the board's duties and functions~~ to carry out enforcement pursuant to this part, including for the costs of the abatement and restoration of violations and related litigation.

8704 Lien Authority
(new)

(a) The Board, after providing the opportunity for a hearing, shall have the authority to record a lien with the County Clerk in the county of this State where the person 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) Civil or administrative penalties assessed pursuant to this article; and

~~(4)~~ (4) Attorney's fees associated with actions to enforce this part.

(b) The lien shall have the same force, effect and priority as a judgment lien.

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~~ substantive change).**

Any use of ~~any such~~ land, right of way, or easement within the jurisdiction of the board in violation of this part whether for cultivation, planting of crops, trees or other vegetation, storage or disposal of material, or other encroachment upon, improvement of, or use of such land, right of way, or easement which does or may interfere with or obstruct such operation or maintenance, 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 general prevails in a civil action to enforce this part, the board or 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, operate a flood control feature, or other emergency action necessary to protect the public welfare.

- (a) To the extent emergency action is required to abate an action, any aggrieved person may request a hearing before the Board within 30 days after the action has been commenced.
- (b) After a public hearing, by request or by its own motion, the ~~board or~~ 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)**

Any aggrieved person shall have a right to judicial review of any decision or action of the board, or the executive officer acting pursuant to delegated authority, by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure, within 60 days after the decision or action has become final.

For purposes of this section, an “aggrieved person” means any person 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 or who for good cause was unable to do either.

**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
(new)**

(a) No person or governmental agency may place an encroachment over, on, in, or under flood control facilities, works, or lands -under the jurisdiction of the board, including but not limited to those lands & required for a State Plan of Flood Control, without obtaining an encroachment permit from the board.

(b) Any 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 ~~governmental levee maintaining agency~~ do not require a permit under this section.

(d) Any person or public agency requesting approval of a permit for an encroachment shall, at the discretion of the board;

(1) Submit a reasonable filing fee prescribed by the board pursuant to regulation to cover the costs of the board and ~~the department~~ its agents to review and process the type of application applied for, or

(2) Agree to pay the actual costs of the board and the department to review and process the application.

8710.3 State and Local Flood Facility Improvements Permits, ~~33 USC 408 Projects~~ – Approval before commencement of construction (new)

(a) No state or local governmental agency may commence construction of any flood facility or flood facility improvement, including conservation and recreation elements, that encroaches on flood control facilities, works, or lands required for a State Plan of Flood Control under the jurisdiction of the board without obtaining a Flood Facility Improvement Permit from the board.

(b) Any Flood Facility 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.

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

(d) Any person or public agency requesting approval of a permit for an improvement shall, at the discretion of the board;

(1) Submit a reasonable filing fee prescribed by the board pursuant to regulation to cover the costs of the board and its agents to review and process the type of application applied for, or

(2) Agree to pay the actual costs of the board and the department to review and process the application.

~~(e)~~(e)

8710.4 Filing Fees (new)

a) Prior to the implementation of filing fees by the board under Section 8710.2 and 8710.3 , the board shall comply with this section.

(b) The Board shall perform a study to consider whether, and for what services, filing fees should be charged by the board. In conjunction with the study, the board shall hold at least two hearings, one in the Sacramento River watershed and one in the San Joaquin River watershed. In conducting the study, the board shall consider any relevant factor, including:

(1) The actual cost to the board of processing an application;

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(2) Whether charging the actual cost would encourage applicants to bypass the filing system and instead install illegal encroachments;

(3) Whether the work to be performed is an improvement to the State Plan of Flood Control and, inures to the benefit of the State;

(4) Whether different fees might be appropriate for different classes of applications;

(5) Such other factors as are appropriate.

(c) Following the study, the board shall publish in draft any proposed fee schedule and provide at least 60 days for comment by the public. The Board shall also provide notice to the Senate Committee on Natural Resources and Water, the Assembly Committee on Water, Parks and Wildlife, and the Senate and Assembly Appropriations Committees. The Board shall hold a hearing following the 60 day period and then may approve a fee schedule.

(d) Prior to adopting a revised fee schedule, the Board shall comply with subsections (b) and (c) of this section.