

STATE CENTRAL VALLEY FLOOD PROTECTION BOARD
LEVEE ENCROACHMENT AUTHORITY

SUMMARY

This bill would give the State Central Valley Flood Protection Board (Board) greater powers to remove encroachments (pipes, stairs, docks, etc.) on Federal-State levee lands where the owner of the encroachment does not have a permit for the encroachment or is “out of compliance” with the permit.

BACKGROUND

“Project levees” are Federal-State levees in the Central Valley for which the state or a political subdivision committed to the United States Army Corps of Engineers (“the Corps”) to operate and maintain the levee and hold the federal government harmless under any liability that might result, including if the levee fails.

In the Paterno lawsuit (*Paterno v. State of California* (2003) 113 Cal.App.4th 998), the court determined that the state was responsible for the failure of the Feather River levee that resulted in the flooding of the town of Linda in 1986. Under the facts of that case, the court found the state liable because its plan had failed to adequately provide for the operation and maintenance of the levee. The cost to the state was about \$500 million.

In SB 5 (Machado, 2007), the Legislature required that levees protecting large urban areas be upgraded to 200-year protection (twice the “standard” 100-year protection) and that small communities attempt to achieve 100-year protection. The Legislature also required the Department of Water Resources to develop a new flood plan for the Central Valley, essentially an upgrade of the 1910 plan prepared by the Corps of Engineers.

The Corps is the federal partner in these levees. After Hurricane Katrina, the Corps has begun making comprehensive evaluations of levees and encroachments. In 2012, the Corps determined that 51 of 119 regulated levee systems in the Central Valley are no longer eligible for federal funding to repair flood-damaged levees, in some cases because of encroachment problems. This determination probably shifts these costs to state and local agencies. These determinations also may increase the likelihood that the state would be found liable under Paterno if the levee failed.

In the past the Board has not been particularly diligent in removing illegal encroachments and “out of permit compliance” encroachments. As a result, there are many encroachment issues that need to be addressed if levees are to be upgraded in accordance with SB 5 – typically by increasing levee height, bulk, or by adding impervious slurry walls through the middle of the levee.

CURRENT LAW AND PROPOSED BILL:

- (1) Under current law, it is unlawful for any person or public agency to place an encroachment on project levee lands without getting a permit from the State Central Valley Flood Protection Board (Board). [WC Sections 8608, 8708, 8709.5, 8709.6, CCR Title 23, Section 6]

- (2) Under current law, the Board is required to provide oral, written, or certified mail notice to any affected person prior to issuing a cease and desist order. [WC Section 8709.5, 8709.6]

Under this bill, if the Board is considering a cease and desist order but is unable to notify the affected person by oral, written, or certified mail, the Board may place a copy of the notice on the structure or facility that is the subject of the order.

- (3) Under current law, if someone places an encroachment on a levee or on levee lands without a permit or is out of compliance with an issued permit, the Board may issue a cease and desist order to the offending party. After providing an opportunity for a public hearing, the cease and desist order may require removal of the encroachment [WC Section 8709.5, 8709.6]

Under this bill, the Board's authority to take summary abatement action or remedial action to repair the levee is clarified and the Board is authorized to recover its costs by pursuing any legal remedies that are available, including placing a lien on the property. A person subject to the Board's authority may seek judicial review.

- (4) Under current law, the Board may request the Attorney General to take the offending party to court. The court may impose fines and enjoin the unauthorized activity. [WC Sections 8596, 8608, 8704, 8709, 8709.7]

Under this bill, the Board after holding a public hearing may levy administrative fines, identical to what a court may impose. A person subject to administrative fines may seek judicial review. All fines collected will be deposited into the Flood Risk Management Fund, a fund designated for the Board's use to carry out its duties and functions following appropriation by the Legislature.

- (5) Under current law, The Board may hold hearings before a committee of one or more members of the board or before the chief engineer of the board. [WC Section 8732]

Under this bill, the Board may also hold hearings before a qualified neutral hearing officer.

- (6) The bill provides for due process prior to the Board's exercise of its abatement, remedial, or penalty authority.

- (7) Under existing law, the Board does not have clear authority to charge for the cost of evaluating and issuing permits for encroachments.

Under this bill, the Board may clearly charge for the cost of the Board and the Department of Water Resources time in processing and reviewing permit applications.

COMMENTS:

- (1) As an example of the Board's limited authority to resolve encroachment issues, the Board spent one and a half years trying to authorize the construction of a fence on state-owned lands adjacent to a project levee that was repeatedly damaged by motorcycles and other vehicles. This levee protects the town of Linda, the town that was flooded in 1986, which resulted in the Paterno decision.
- (2) Under current law, the Board's administrative enforcement authority is limited and the Board must often engage in lengthy administrative proceedings or rely on the Attorney General to file litigation against a person who has illegally placed an encroachment on a levee or is out of compliance with a permit. Litigation is expensive and time consuming. Given higher priorities and the cost, the Attorney General may choose not to litigate. The delay in resolving the encroachment may put public safety at risk and may increase the risk of state liability.
- (3) This bill would give the Board authorities similar to that given under current law to cities and counties to abate nuisances pursuant to Government Code sections 38773 and 25845, as well as new abatement authority recently granted to the State Lands Commission (AB 2082, 2012).
- (4) The Board recognizes that the exercise of the authorities of this bill would have to be used in a reasonable and appropriate manner.

WATER CODE SECTIONS 8709.5, 8709.6, 8709.7, and 8732 are amended as follows:

WATER CODE 8709.5. Activity encroaching on levees, channel, or other flood control works under jurisdiction of the board; cease and desist order; notice; terms and conditions; effective date and service

(a) Notwithstanding Section 8709 or 8709.4, if the board, or the executive officer if delegated authority by the board, determines that any person or public agency has undertaken, or is threatening to undertake, any activity that may encroach on levees, channels, or other flood control works under the jurisdiction of the board, the board or executive officer may issue an order directing that person or public agency to cease and desist. The order may also be issued to enforce any requirement of a permit or any requirement under this part that is subject to the jurisdiction of the board.

(b) The cease and desist order shall be issued only if the person or public agency has failed to respond in a satisfactory manner to an oral notice given in person or by telephone, followed by a written confirmation; or a written notice given by certified mail or hand delivered to the landowner or the person performing the activity; or, if the Board is unable to determine how to contact a person or public agency, by regular mail followed by posting a copy of the notice on the structure or facility that is the subject of the order. The notice shall include the following:

(1) A description of the activity that meets the criteria of subdivision (a) of Section 8709.4 or a statement that the described activity constitutes an encroachment that is in violation of this article because it is not authorized by a valid permit.

(2) A statement that the described activity shall immediately cease or the alleged violator may receive a cease and desist order, the violation of which may subject the violator to fines or penalties.

(3) The name, address, and telephone number of the staff member who is to be contacted for further information.

(c) The cease and desist order may be subject to terms and conditions as the board or the executive officer may determine are necessary to avoid an unreasonable impact on public safety.

(d) The cease and desist order shall be effective upon its issuance, and copies shall be served immediately by certified mail upon the person or agency subject to the order; or, if the Board is unable to determine how to contact a person or public agency, by regular mail followed by posting a copy of the order on the structure or facility that is the subject of the order.

WATER CODE 8709.6. Activity requiring permit; cease and desist order; restoration of site

(a) Notwithstanding Sections 8709 and 8709.4, if the board, after a public hearing, determines that any person or public agency has undertaken, or is threatening to undertake, any activity that requires a permit from the board without securing a permit or is inconsistent with any permit previously issued by the board, the board may issue an order directing that person or public agency to cease and desist. The board may also issue the order to enforce any requirement of a permit, or any requirement of this part that is subject to the jurisdiction of the board. The board may take summary abatement or remedial actions and recover its costs

of abatement or remedial actions and administrative costs by pursuing whatever legal remedies are available, including placing a lien against the property owned by the person responsible for the encroachment. The board may appoint a hearing officer to take evidence and render a proposed decision.

(b) The cease and desist order may be subject to terms and conditions as the board may determine are necessary to ensure compliance with this part, including immediate removal of any encroachment or the setting of a schedule within which action shall be taken to obtain a permit pursuant to this part. **The cease and desist order may include the assessment of penalties as provided in section 8709.7.**

(c) Notice of the public hearing on a proposed cease and desist order shall be given to any affected person and public agency and the order shall be final and effective upon the issuance of the order. Copies **of the order shall be served immediately. The notice of the hearing and order shall be served** by certified mail or hand delivered upon the person or public agency subject to the order **and upon other affected persons and public agencies that appear at the hearing or request a copy;** or, if the Board is unable to determine how to contact a person or public agency, by regular mail followed by posting a copy of the order on the structure or facility that is the subject of the order.

(d) In addition to any other authority to order restoration, the board may, after a public hearing, order restoration of a site if it finds that an encroachment has occurred without a permit from the board.

(e) A person or public agency against whom the board has issued an order imposing a remedy provided in this article may seek review of the order pursuant to Section 8579.

WATER CODE 8709.7. Civil and administrative liability; penalties

(a) Any person or public agency that violates any provision of this **article-part** may be civilly or **administratively** liable in accordance with this section.

(b)(1) Civil **or administrative** liability may be imposed by the superior court **or the board** in accordance with this article on any person or public agency that performs or undertakes an encroachment that is in violation of this article or that is inconsistent with any permit previously issued by the board in an amount that shall not exceed thirty thousand dollars (\$30,000), but shall not be less than five hundred dollars (\$500).

(2) Civil **or administrative** liability may be imposed for any violation of this part other than a violation specified in paragraph (1) in an amount that shall not exceed thirty thousand dollars (\$30,000).

(c) Any person or public agency that performs or undertakes an encroachment that is in violation of this part or in a manner that is inconsistent with any permit previously issued by the board, when the person or public agency intentionally and knowingly performs or undertakes the encroachment in violation of this part or in a manner that is inconsistent with any previously issued permit, may, in addition to any other penalties, be civilly **or administratively** liable in accordance with this subdivision. Civil **or administrative** liability may be imposed by the superior court **or the board** in accordance with this article for a violation described in this subdivision 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.

(d) In determining the amount of civil or administrative liability, 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) The function of the levee, channel, or other flood control work affected by the violation.
- (4) The cost to the state of bringing the action.
- (5) With respect to the violator, 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.

(e) Any person 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 or administrative 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.

(f) This section does not authorize the issuance or enforcement of any cease and desist order as to any 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. This section shall not be construed to limit the authority of the board or the department to act in an emergency or threatened emergency.

(g) If the Attorney General prevails in a civil action to enforce this section, the Attorney General shall be awarded attorney's fees and costs.

(h) After the time for judicial review under Section 8709.6(e) has expired, the board may apply to the clerk of the appropriate court in the county in which the civil or administrative liability or penalty was imposed for a judgment to collect the civil or administrative liability or penalty. 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 the judgment immediately in conformity with the application. The judgment so entered has the same force and effect as, 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.

(i) The remedies provided by this section are in addition to and not in lieu of any other penalty, sanction, or order provided by law.

(j) All funds generated by the imposition of liabilities pursuant to this section shall be deposited into the Flood Risk Management Fund. Upon appropriation by the Legislature, the monies in this fund shall be expended by the board to carry out its duties and functions.

(k) The Board shall not issue administrative penalties except as a part of ~~unless it has issued~~ a cease and desist order pursuant to Section 8709.6.

(l) The board shall not issue administrative penalties unless it has ~~and has adopted~~ regulations necessary to carry out the administrative penalty provisions of this Section.

WATER CODE 8732. Hearing officers

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.

WATER CODE SECTIONS 8579 and 8724 are added as follows:

WATER CODE 8579. Petition for writ of mandate; aggrieved person

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 8724. Filing fee

Any person or public agency making application for approval of plans pursuant to this article shall submit a reasonable filing fee prescribed by the board pursuant to regulation to cover the costs of the board and the department to review and process the type of application applied for.

~~Any person or public agency making application for approval of plans pursuant to this article shall submit a reasonable filing fee prescribed by the board pursuant to regulation, but such fee may not exceed the actual or average cost, including the cost of Board and Department of Water Resources staff time, to review and process the type of application applied for.~~