

AMENDED IN SENATE JUNE 12, 2012

AMENDED IN SENATE JUNE 22, 2011

AMENDED IN ASSEMBLY MAY 27, 2011

AMENDED IN ASSEMBLY MARCH 31, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1095**

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**Introduced by Assembly Members Bill Berryhill, ~~Fuentes, and Hill~~  
and Buchanan  
(Coauthor: Assembly Member Perea)**

February 18, 2011

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An act to ~~add Sections 38582 and 38583 to the Health and Safety Code, relating to air pollution~~ *amend Section 85057.5 of the Water Code, relating to the Sacramento-San Joaquin Delta.*

LEGISLATIVE COUNSEL'S DIGEST

AB 1095, as amended, Bill Berryhill. ~~Air pollution: hearing board: State Air Resources Board. Sacramento-San Joaquin Delta Reform Act of 2009: covered actions.~~

*Existing law, the Sacramento-San Joaquin Delta Reform Act of 2009, establishes the Delta Stewardship Council as an independent agency of the state. Existing law requires a state or local public agency that proposes to take a covered action that will occur within the boundaries of the Delta or the Suisun Marsh to prepare, and submit to the council, a specified written certification of consistency with the Delta Plan prior to taking those actions. Existing law defines a "covered action" to mean a plan, program, or project, as specified.*

*Existing law, the Johnston-Baker-Andal-Boatwright Delta Protection Act of 1992, requires the Delta Protection Commission to review and maintain a comprehensive long-term resource management plan for land uses within the primary zone, as defined, of the Delta. Existing law defines the secondary zone as all the Delta land and water area within the boundaries of the Delta not included within the primary zone, subject to the land use authority of local government, as prescribed.*

*This bill would exclude from the definition of “covered action” any project or portion of a project that falls within an urban or urbanizing area within the Delta’s secondary zone and which is covered by a general plan, sphere of influence, specific or master plan, community plan, or development agreement adopted by the relevant local land use authority.*

*Existing law, the California Environmental Quality Act (CEQA) requires a lead agency to prepare and certify the completion of an environmental impact report on a project, as defined, that it proposes to carry out or approve that may have a significant impact on the environment or to adopt a negative declaration if it finds that the project will not have that effect. The National Environmental Policy Act (NEPA) requires federal agencies to prepare environmental assessments or environmental impact reports that contain statements of the environmental effects of proposed federal agency actions.*

*This bill would exclude from the definition of “covered action” any upgrade to an existing drinking water, stormwater, or wastewater treatment, storage, or conveyance facility within the existing physical footprint of the facility, to meet a state or federal water quality compliance order, as specified. This bill would also exclude from the definition of “covered action” any flood control project undertaken within the Delta’s secondary zone that is consistent with the Central Valley Flood Protection Act of 2008 and which would provide protection to an urban or urbanizing area or existing public infrastructure. These upgrades and projects would have to comply with CEQA or NEPA, or both.*

~~Existing law grants air pollution control districts and air quality management districts the primary responsibility for the control of air pollution from all sources other than vehicular sources. Existing law establishes one or more hearing boards in each district for the purposes of performing specified functions, including issuing interim variances from specified provisions of law relating to excess emissions. Existing law, the California Global Warming Solutions Act of 2006, grants the~~

~~State Air Resources Board with authority over the regulation of emissions of greenhouse gases.~~

~~This bill would require the creation of a hearing board within the state board, based on the provisions applicable to district hearing boards, for the resolution of disputes arising from the enforcement of, and variance requests relating to, rules and regulations adopted by the state board pursuant to the California Global Warming Solutions Act of 2006. The bill would specify the scope of, and limitations on, the hearing board’s authority. The bill would authorize specified persons to apply to the hearing board for variances from specified rules and regulations, and resolution of disputes regarding executive officer findings, decisions, orders, and determinations, pursuant to the California Global Warming Solutions Act of 2006.~~

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1     SECTION 1. *The Legislature finds and declares all of the*
- 2     *following:*
- 3     (a) *The Legislature passed and the Governor signed Senate Bill*
- 4     *1 of the Seventh Extraordinary Session of 2009 (Chapter 5 of the*
- 5     *Seventh Extraordinary Session of the Statutes of 2009), which*
- 6     *establishes the framework to achieve the coequal goals of providing*
- 7     *a more reliable water supply to California and restoring and*
- 8     *enhancing the Delta ecosystem.*
- 9     (b) *This statute created the Delta Stewardship Council (DSC),*
- 10    *an independent seven-member body that is tasked with developing*
- 11    *a long-term plan for the Delta that meets the coequal goals of*
- 12    *providing a more reliable water supply for California while*
- 13    *preserving, enhancing, and protecting the Delta ecosystem and*
- 14    *respecting the unique cultural, recreational, natural resource, and*
- 15    *agricultural values of the Delta as an evolving place.*
- 16    (c) *The DSC is tasked with drafting and implementing the Delta*
- 17    *Plan, and requires that actions in the primary and secondary zones*
- 18    *be consistent with the plan as determined by the council upon an*
- 19    *appeal.*
- 20    (d) *Inherent in Senate Bill 1 of the Seventh Extraordinary*
- 21    *Session of 2009 is the subjective standard of consistency of the*
- 22    *coequal goals as interpreted by the DSC. Local government*

1 *decisions on private and public development within the primary*  
2 *and secondary zones of the Delta are subject to decisions where*  
3 *statutory ambiguity related to their sovereign powers is the cause*  
4 *of unintended consequences.*

5 *(e) Several projects in the secondary zone are located in areas*  
6 *that will not cause any findings of inconsistency with the coequal*  
7 *goals, but are currently under a significant cloud due to this*  
8 *ambiguity.*

9 *(f) The ambiguity will have the significant impact of either*  
10 *stalling or destroying years of actions and local government*  
11 *approvals for municipal private development, and local*  
12 *governments' authority to comply with state and federal law with*  
13 *respect to flood control projects in the secondary zone consistent*  
14 *with the Bay Delta Conservation Plan or levee improvements are*  
15 *also clouded, jeopardizing public safety.*

16 *(g) It is the intent of this act to provide a very narrow description*  
17 *of enumerated actions in order to relieve the necessity of these*  
18 *actions from being reviewed by the DSC for consistency, including*  
19 *specific exclusions from the statutory definition of "covered*  
20 *actions" as defined in subdivision (b) of Section 85057.5 of the*  
21 *Water Code for specific areas of private development and for a*  
22 *limited and specific number of levee and flood control projects*  
23 *within the secondary zone.*

24 *(h) It is the intent of this act to relieve these enumerated projects*  
25 *from the cloud of ambiguity of the consistency standard that could*  
26 *disrupt financing of private developments in the final stages.*

27 *SEC. 2. Section 85057.5 of the Water Code is amended to read:*

28 *85057.5. (a) "Covered action" means a plan, program, or*  
29 *project as defined pursuant to Section 21065 of the Public*  
30 *Resources Code that meets all of the following conditions:*

31 *(1) Will occur, in whole or in part, within the boundaries of the*  
32 *Delta or Suisun Marsh.*

33 *(2) Will be carried out, approved, or funded by the state or a*  
34 *local public agency.*

35 *(3) Is covered by one or more provisions of the Delta Plan.*

36 *(4) Will have a significant impact on achievement of one or*  
37 *both of the coequal goals or the implementation of*  
38 *government-sponsored flood control programs to reduce risks to*  
39 *people, property, and state interests in the Delta.*

40 *(b) "Covered action" does not include any of the following:*

- 1 (1) A regulatory action of a state agency.
- 2 (2) Routine maintenance and operation of the State Water  
3 Project or the federal Central Valley Project.
- 4 (3) Regional transportation plans prepared pursuant to Section  
5 65080 of the Government Code.
- 6 (4) Any plan, program, project, or activity within the secondary  
7 zone of the Delta that the applicable metropolitan planning  
8 organization under Section 65080 of the Government Code has  
9 determined is consistent with either a sustainable communities  
10 strategy or an alternative planning strategy that the State Air  
11 Resources Board has determined would, if implemented, achieve  
12 the greenhouse gas emission reduction targets established by that  
13 board pursuant to subparagraph (A) of paragraph (2) of subdivision  
14 (b) of Section 65080 of the Government Code. For purposes of  
15 this paragraph, “consistent with” means consistent with the use  
16 designation, density, building intensity, transportation plan, and  
17 applicable policies specified for the area in the sustainable  
18 communities strategy or the alternative planning strategy, as  
19 applicable, and any infrastructure necessary to support the plan,  
20 program, project, or activity.
- 21 (5) Routine maintenance and operation of any facility located,  
22 in whole or in part, in the Delta, that is owned or operated by a  
23 local public agency.
- 24 (6) Any plan, program, project, or activity that occurs, in whole  
25 or in part, in the Delta, if both of the following conditions are met:  
26 (A) The plan, program, project, or activity is undertaken by a  
27 local public agency that is located, in whole or in part, in the Delta.  
28 (B) Either a notice of determination is filed, pursuant to Section  
29 21152 of the Public Resources Code, for the plan, program, project,  
30 or activity by, or the plan, program, project, or activity is fully  
31 permitted by, September 30, 2009.
- 32 (7) (A) Any project within the secondary zone, as defined  
33 pursuant to Section 29731 of Public Resources Code as of January  
34 1, 2009, for which a notice of approval or determination pursuant  
35 to Section 21152 of the Public Resources Code has been filed  
36 before the date on which the Delta Plan becomes effective.  
37 (B) Any project for which a notice of approval or determination  
38 is filed on or after the date on which the final Bay Delta  
39 Conservation Plan becomes effective, and before the date on which

1 the Delta Plan becomes effective, is not a covered action but shall  
2 be consistent with the Bay Delta Conservation Plan.

3 (C) Subparagraphs (A) and (B) do not apply to either of the  
4 following:

5 (i) Any project that is within a Restoration Opportunity Area  
6 as shown in Figure 3.1 of Chapter 3: Draft Conservation Strategy  
7 of the Bay Delta Conservation Plan, August 3, 2009, or as shown  
8 in a final Bay Delta Conservation Plan.

9 (ii) Any project that is within the alignment of a conveyance  
10 facility as shown in Figures 1 to 5, inclusive, of the Final Draft  
11 Initial Assessment of Dual Delta Water Conveyance Report, April  
12 23, 2008, and in future revisions of this document by the  
13 department.

14 (8) *Any project, as defined by Section 21065 of the Public*  
15 *Resources Code, or part of a project, including, but not limited*  
16 *to, subsequent entitlements and supporting infrastructure*  
17 *improvements required for implementation of a project, that is*  
18 *both within an urban area or urbanizing area, as shown in Figure*  
19 *5-1 in the Final Staff Draft Delta Plan (dated May 14, 2012), and*  
20 *in the secondary zone, as defined by Section 29731 of the Public*  
21 *Resources Code, and is contained within, covered by, and*  
22 *substantially conforms with a general plan, sphere of influence,*  
23 *specific or master plan, community plan, or a development*  
24 *agreement adopted by the applicable local land use authority*  
25 *within the urban or urbanizing area.*

26 (9) *Any upgrade to an existing drinking water, stormwater, or*  
27 *wastewater treatment, storage, or conveyance facility, within the*  
28 *existing physical footprint of that facility, to meet a state or federal*  
29 *water quality compliance order, or both, consistent with state*  
30 *standards or federal standards, or both, and which complies with*  
31 *the California Environmental Quality Act (Division 13*  
32 *(commencing with Section 21000) of the Public Resources Code)*  
33 *or the National Environmental Protection Act (42 U.S.C. Sec. 4321*  
34 *et seq.), or both.*

35 (10) *Any flood control project in the secondary zone of the Delta*  
36 *that is consistent with the applicable provisions of the Central*  
37 *Valley Flood Protection Act of 2008 (Part 6 of Division 5*  
38 *(commencing with Section 9600)), which would provide protection*  
39 *to an urban or urbanizing area, as shown by Figure 5-1 in the*  
40 *Final Staff Draft Delta Plan (dated May 14, 2012), and as defined*

1 by Section 65007 of the Government Code, or existing public  
2 infrastructure, and which has complied with the California  
3 Environmental Quality Act (Division 13 (commencing with Section  
4 21000) of the Public Resources Code) or the National  
5 Environmental Quality Act (42 U.S.C. Sec. 4321 et seq.), or both.

6 (c) Nothing in the application of this section shall be interpreted  
7 to authorize the abrogation of any vested right whether created by  
8 statute or by common law.

9 ~~SECTION 1. Section 38582 is added to the Health and Safety  
10 Code, to read:~~

11 ~~38582. (a) It is the intent of the Legislature that the hearing  
12 board created by this section shall not have any authority over  
13 rules adopted by local or regional authorities, including districts,  
14 and shall not have any authority over decisions of district hearing  
15 boards in cases where the district has an agreement with the state  
16 board to implement or enforce a rule adopted by the state board  
17 pursuant to this division.~~

18 ~~(b) There shall be a hearing board within the state board for the  
19 resolution of disputes arising from the enforcement of rules and  
20 regulations adopted by the state board pursuant to this division.~~

21 ~~(c) The provisions of Chapter 8 (commencing with Section  
22 40800) of Part 3 of Division 26 shall apply to the hearing board  
23 created pursuant to this section, to the extent those provisions can  
24 be made applicable. For purposes of this subdivision, all references  
25 in Chapter 8 (commencing with Section 40800) of Part 3 of  
26 Division 26 to a "district board" shall mean the state board, and  
27 all references to a "hearing board" shall mean the hearing board  
28 created pursuant to this section.~~

29 ~~(d) The hearing board created pursuant to this section shall have  
30 authority to do all of the following:~~

31 ~~(1) Resolve disputes that compliance entities and facilities may  
32 have with state board executive officer findings, decisions, orders,  
33 or determinations adopted pursuant to this division, except for  
34 disputes regarding penalties.~~

35 ~~(2) Make variance decisions on variance requests due to  
36 unavoidable noncompliance with a state permit or regulation  
37 adopted pursuant to this division, except for decisions regarding  
38 penalties.~~

39 ~~(3) (A) Exercise the powers set forth in Section 42309, Article  
40 2 (commencing with Section 42350) of Chapter 4 of Part 4 of~~

1 ~~Division 26, Article 2.5 (commencing with Section 42365) of~~  
2 ~~Chapter 4 of Part 4 of Division 26, and Article 4 (commencing~~  
3 ~~with Section 42450) of Chapter 4 of Part 4 of Division 26, with~~  
4 ~~respect to rules adopted by the state board pursuant to this division,~~  
5 ~~except where there is an existing agreement between the state~~  
6 ~~board and an air district for the air district to implement or enforce~~  
7 ~~a permit or rule adopted by the state board to implement this~~  
8 ~~division.~~

9 ~~(B) Notwithstanding subparagraph (A), where there is an~~  
10 ~~agreement between the state board and a district board for the~~  
11 ~~district to implement or enforce a permit or rule adopted by the~~  
12 ~~state board in implementation of this division, the hearing board~~  
13 ~~of the district in which the regulated entity is operating shall have~~  
14 ~~jurisdiction to exercise the authorities listed in this paragraph.~~

15 ~~(e) The hearing board created pursuant to this section shall not~~  
16 ~~have any authority over rules adopted by local or regional~~  
17 ~~authorities, including districts, and shall not have any authority~~  
18 ~~over decisions of district hearing boards.~~

19 ~~(f) The hearing board created pursuant to this section shall not~~  
20 ~~have authority to change the terms of any rule adopted by the state~~  
21 ~~board or any district.~~

22 ~~(g) Nothing in this section shall be construed to supersede the~~  
23 ~~authority of a district hearing board to exercise the powers set forth~~  
24 ~~in Section 42309, Article 2 (commencing with Section 42350) of~~  
25 ~~Chapter 4 of Part 4 of Division 26, Article 2.5 (commencing with~~  
26 ~~Section 42365) of Chapter 4 of Part 4 of Division 26, or Article 4~~  
27 ~~(commencing with Section 42450) of Chapter 4 of Part 4 of~~  
28 ~~Division 26, with respect to any rule adopted by the district to~~  
29 ~~implement greenhouse gas emission requirements, including rules~~  
30 ~~implementing requirements adopted pursuant to this division. The~~  
31 ~~district hearing board with jurisdiction shall be the hearing board~~  
32 ~~for the air district within which the affected facility is located.~~

33 ~~SEC. 2. Section 38583 is added to the Health and Safety Code,~~  
34 ~~to read:~~

35 ~~38583. Any person that is subject to a rule, regulation, order,~~  
36 ~~or decision of the state board pursuant to this division may apply~~  
37 ~~to the hearing board created pursuant to Section 38582 for any of~~  
38 ~~the following purposes:~~

39 ~~(a) (1) A variance from a rule or regulation of the state board~~  
40 ~~adopted pursuant to this division.~~

1     ~~(2) Notwithstanding paragraph (1), if there is an agreement~~  
2     ~~between the state board and a district for the district to implement~~  
3     ~~or enforce a permit or rule adopted by the state board to implement~~  
4     ~~this division, or if the district has adopted and is implementing a~~  
5     ~~rule to implement this division, a person shall apply to the district,~~  
6     ~~and the hearing board of the air district shall have jurisdiction to~~  
7     ~~issue variances pursuant to Article 2 (commencing with Section~~  
8     ~~42350) and Article 2.5 (commencing with Section 42365) of~~  
9     ~~Chapter 4 of Part 4 of Division 26.~~

10    ~~(b) Resolution of disputes with state board executive officer~~  
11    ~~findings, decisions, orders, or determinations pursuant to this~~  
12    ~~division. An application to the hearing board for purposes of this~~  
13    ~~subdivision shall be made within 60 days after the adoption of the~~  
14    ~~finding, decision, order, or determination.~~