

AMENDED IN SENATE APRIL 29, 2013

AMENDED IN SENATE APRIL 18, 2013

AMENDED IN SENATE APRIL 1, 2013

SENATE BILL

No. 753

Introduced by Senator Steinberg

(Coauthors: Assembly Members Dickinson and Pan)

February 22, 2013

An act to amend Section 8732 of, to add Section 8579 to, and to repeal and add Article 6 (commencing with Section 8700) of Chapter 3 of Part 4 of Division 5 of, the Water Code, relating to flood protection.

LEGISLATIVE COUNSEL'S DIGEST

SB 753, as amended, Steinberg. Central Valley Flood Protection Board.

(1) Existing law provides for the Central Valley Flood Protection Board with the authority to construct and maintain various flood control works. Existing law authorizes the board to hold a hearing or partial hearing before a committee of one or more members of the board, or before the general manager or chief engineer of the board, at any place within the state.

This bill would eliminate the authorization for the board to hold a hearing before the general manager and would authorize the board to hold a hearing or partial hearing before a qualified neutral hearing officer designated by the board president or the executive officer.

(2) Existing law requires specified plans that contemplate the construction, enlargement, revetment, or alteration of any levee, embankment, canal, or other excavation in the bed of or along or near the banks of the Sacramento or San Joaquin Rivers or any of their

tributaries or specified lands to be approved by the board before construction is commenced.

Existing law authorizes the board, and the executive officer if delegated that authority, to issue an order directing a person or public agency to cease and desist from undertaking, or threatening to undertake, an activity that may encroach on levees, channels, or other flood control works under the jurisdiction of the board. Existing law requires the cease and desist order to be issued only if the person or public agency has failed to respond in a satisfactory manner to a prescribed notice provided, as specified. Existing law provides that a cease and desist order is effective upon its issuance and that copies are required to be served immediately by certified mail upon the person or agency subject to the order.

This bill would repeal these provisions and provide that 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, as specified. This bill would authorize the board to order the removal or modification of an encroachment that was previously issued a permit by the board if the board makes a specified finding.

This bill would authorize the board, the executive officer, the department, or certain local agencies to issue a notice of violation, as specified, if it is determined that any person or public agency has undertaken, is threatening to undertake, or maintains any encroachment, improvement, or activity in violation of certain provisions. If the board or executive officer determines that any person or public agency has failed to adequately respond to a notice of violation, this bill would authorize the board or executive officer to issue an order directing that person or public agency to cease and desist, as specified. This bill would provide that if the board determines that any person or public agency has failed to correct a violation as required in a cease and desist order, the board may issue an enforcement order, as prescribed.

This bill would provide the board, executive officer, Department of Water Resources, and local agencies that operate and maintain facilities and works on behalf of the board with the authority, as prescribed, to take administrative or civil enforcement actions to abate and remedy any interference or potential interference with these works. This bill would establish the Flood Risk Management Fund in the State Treasury and require all funds received from these penalties to be paid into the fund and available, upon appropriation by the Legislature, to be

expended by the board to carry out enforcement of these provisions. *The bill would require the board to adopt emergency regulations necessary to implement these provisions.*

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. Section 8579 is added to the Water Code, to read:
2 8579. (a) Any aggrieved person shall have a right to judicial
3 review of any decision or action of the board, or the executive
4 officer acting pursuant to delegated authority, by filing a petition
5 for a writ of mandate in accordance with Section 1094.5 of the
6 Code of Civil Procedure, within 60 days after the decision or action
7 has become final.

8 (b) For purposes of this section, an “aggrieved person” means
9 any of the following:

10 (1) A person or public agency that, in person or through a
11 representative, appeared at a public hearing of the board in
12 connection with the decision or action appealed.

13 (2) A person or public agency that, by other appropriate means
14 prior to the decision, informed the board of the nature of the person
15 or public agency’s concerns.

16 (3) A person or public agency that for good cause was unable
17 to appear, as described in paragraph (1), or inform the board, as
18 described in paragraph (2).

19 SEC. 2. Article 6 (commencing with Section 8700) of Chapter
20 3 of Part 4 of Division 5 of the Water Code is repealed.

21 SEC. 3. Article 6 (commencing with Section 8700) is added
22 to Chapter 3 of Part 4 of Division 5 of the Water Code, to read:

23

24 Article 6. Enforcement of Unauthorized Activities and
25 Encroachments

26

27 8700. It is unlawful for any person or public agency to interfere
28 with or obstruct the performance of the maintenance or operation
29 of works or other plans adopted by the board within the jurisdiction
30 of the board, including facilities of the State Plan of Flood Control,
31 if the state or a political subdivision of the state has given
32 assurances to the Secretary of the Army pursuant to Article 2

1 (commencing with Section 8615), that the state or a political
2 subdivision of the state will maintain and operate works after
3 completion in accordance with regulations prescribed by the
4 Secretary of the Army, and any facilities or works constructed as
5 part of an adopted plan of flood control or areas protected thereto.
6 The board, executive officer, department, and local agencies that
7 operate and maintain facilities and works on behalf of the board
8 shall have the authority, as set forth in this article, to take
9 administrative or civil enforcement actions to abate and remedy
10 any interference or potential interference with these works. The
11 unlawful interference proscribed by this article includes, but is not
12 limited to, the construction of any encroachment or improvement
13 without, or in violation of, the permits required by this part or the
14 maintenance of a previously permitted encroachment that is deemed
15 to interfere with these works pursuant to Section 8702.

16 8701. (a) If the board, the executive officer, or department
17 determines that any person or public agency has undertaken, is
18 threatening to undertake, or maintains any encroachment,
19 improvement, or activity in violation of this part, the board,
20 executive officer, or department may issue a notice of violation to
21 the person or public agency responsible for the encroachment or
22 activity.

23 (b) A local agency that operates and maintains facilities within
24 the board's jurisdiction may also issue a notice of violation
25 pursuant to subdivision (a) if the board delegates the local agency
26 that authority. This subdivision shall not require the local agency
27 to accept that delegation of authority.

28 (c) A notice of violation shall include all of the following:

29 (1) A statement describing the activity, failure to act,
30 improvement, or encroachment that constitutes a violation of this
31 article.

32 (2) A statement of whether the activity, improvement, or
33 encroachment may be eligible for a permit from the board.

34 (3) The corrective actions that ~~must~~ *shall* be taken within a
35 specified time period.

36 (4) Whether the person or public agency may correct the
37 violation without obtaining prior approval from the board or
38 executive officer, or whether prior approval from the board or
39 executive officer must be obtained prior to taking a corrective
40 action.

1 (5) A statement that the notice of violation shall be referred to
2 the board and that the failure to take the requested actions within
3 the time specified may subject the person or public agency to a
4 cease and desist order and the imposition of further remedial and
5 enforcement actions, including, but not limited to, correction of
6 the violation by the board at the expense of the person or public
7 agency plus fines or penalties.

8 (6) The name, address, and telephone number of the state or
9 local agency that may be contacted for further information.

10 (d) The notice of violation shall be served in accordance with
11 Section 8703 and a copy transmitted to the executive officer within
12 five business days of its issuance. The board or the executive
13 officer may amend the notice of violation, and, once served in
14 accordance with Section 8703, the amended notice of violation
15 shall supersede any notice of violation previously issued for the
16 same violation.

17 8701.2. (a) If the board or executive officer determines that
18 any person or public agency has failed to adequately respond to a
19 notice of violation, the board or executive officer may issue an
20 order directing that the person or public agency to whom the notice
21 of violation was issued cease and desist.

22 (b) A cease and desist order shall include a copy of the notice
23 of violation and shall require that the corrective actions described
24 in the notice of violation be completed within a specified time
25 period or the person or public agency shall be subject to an
26 enforcement order pursuant to Section 8701.4. A cease and desist
27 order shall be effective upon its issuance and shall be served
28 immediately pursuant to Section 8703.

29 (c) (1) A cease and desist order shall allow the person or agency
30 subject to the order to request a hearing before the board within
31 30 days of being served with the order.

32 (2) If a person or public agency subject to a cease and desist
33 order fails to request a hearing within the time specified in
34 paragraph (1), the right to a hearing shall be deemed waived and
35 no hearing shall be required prior to issuance of an enforcement
36 order pursuant to Section 8701.4.

37 (d) If a person or public agency subject to a cease and desist
38 order requests a hearing in accordance with paragraph (1) of
39 subdivision (c), the board shall hold a public hearing on the cease
40 and desist order as follows:

1 (1) Notice of the hearing shall be provided pursuant to Section
2 8703 and shall include the date, time, and location of the hearing
3 and a statement that failure to appear at the hearing will constitute
4 a waiver of the right to a hearing and will result in the entry of a
5 default enforcement order.

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

8 (3) At the conclusion of the hearing, the board may affirm,
9 amend, or rescind the cease and desist order. If the board affirms
10 or modifies the cease and desist order and the person or agency
11 subject to the order fails to complete the corrective actions required
12 in the cease and desist order, no further hearing shall be required
13 prior to the issuance of a subsequent enforcement order by the
14 board.

15 (e) If a person or public agency subject to a cease and desist
16 order fails to comply with the order and does not request a hearing
17 in accordance with paragraph (1) of subdivision (c), the cease and
18 desist order shall be recorded with the appropriate county recorder's
19 office by the board against the person or public agency's property
20 associated with the order.

21 (f) When an enforcement action has been fully resolved,
22 including the payment of any costs and penalties, the executive
23 officer shall issue a certificate of abatement to the person or public
24 agency against whose property the cease and desist order was
25 recorded pursuant to subdivision (e). That person or public agency
26 may, at the person or public agency's expense, record the certificate
27 with the appropriate county recorder's office.

28 8701.4. (a) If the board determines that any person or public
29 agency has failed to correct a violation as required in a cease and
30 desist order issued pursuant to Section 8701.2, the board may issue
31 an enforcement order.

32 (b) An enforcement order may do the following:

33 (1) Order the removal and restoration of the encroachment,
34 improvement, or activity causing a violation of this part. The board,
35 its contractor, or its designee may conduct the removal and
36 restoration, the costs of which shall be collected from the
37 responsible person or public agency by whatever legal remedy is
38 available, including, but not limited to, the placement of a lien on
39 the property owned by the person or public agency responsible for
40 the violation pursuant to Section 8704.2.

1 (2) Assess and require the payment of administrative penalties
2 as set forth in Section 8704.

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

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

9 (c) The enforcement order shall be served immediately pursuant
10 to Section 8703.

11 (d) A person or public agency against which the board has issued
12 an enforcement order may seek judicial review of the enforcement
13 order pursuant to Section 8579. The enforcement order shall be
14 deemed effective upon issuance, but ~~no~~ *a removal action may*
15 *action shall not* be taken by the board until after the time for
16 judicial review has passed.

17 (e) This section shall not be construed to authorize the issuance
18 of an enforcement order against a local public agency undertaking
19 any lawful activity pursuant to a declaration of emergency by the
20 governing body of the local public agency or the board of
21 supervisors of the county in which the activity is being or may be
22 undertaken.

23 8702. (a) The board may order the removal or modification
24 of an encroachment that was previously issued a permit by the
25 board if the board makes one of the following findings:

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

29 (2) The encroachment impairs the functional capability of the
30 levee, channel, or flood control work to fulfill its particular
31 intended role in the overall flood control plan.

32 (3) The encroachment is not in conformance with an adopted
33 plan of flood control, state law, board regulations, or, in the case
34 of facilities of the State Plan of Flood Control where the board has
35 given assurances to the United States, the standards and regulations
36 of the Secretary of the Army.

37 (b) Routine maintenance that includes the removal or
38 modification of abandoned property, fences, gates, and vegetation
39 on the levee structure and other flood control structure shall not
40 be subject to this section.

1 8703. Notice and service required by this article shall be
2 provided to the person or public agency believed to be responsible
3 for the violation and the owner of the property on which the
4 violation occurred or is threatened to occur by one of the following
5 means:

6 (a) Hand delivery.

7 (b) Certified mail.

8 (c) If the person or agency cannot be reached or reasonably
9 notified pursuant to subdivision (a) or (b), by placing a copy of
10 the notice or order on the encroachment or property.

11 8704. (a) Any person or public agency that undertakes an
12 activity, improvement, or encroachment that is in violation of this
13 part or that is inconsistent with any permit or cease and desist order
14 previously issued by the board or executive officer may be assessed
15 a civil penalty in an amount not greater than fifteen thousand
16 dollars (\$15,000) per day for each day in which the violation occurs
17 or persists.

18 (b) Administrative penalties may be assessed by the board in
19 the same manner as civil penalties described in subdivision (a)
20 upon issuance of an enforcement order pursuant to Section 8701.4,
21 but may not be less than five hundred dollars (\$500) or exceed
22 fifty thousand dollars (\$50,000) for a single violation.

23 (c) In determining the amount of liability pursuant to
24 subdivisions (a) and (b), the following factors shall be considered:

25 (1) The nature, circumstance, extent, and gravity of the violation.

26 (2) Whether the violation was committed intentionally or
27 knowingly.

28 (3) Whether the violation is susceptible to restoration or other
29 remedial measures.

30 (4) Whether the function of the levee, channel, or other flood
31 control work is affected by the violation.

32 (5) The cost to the state of bringing the action.

33 (6) With respect to the person or public agency responsible for
34 the violation, any voluntary restoration or remedial measures
35 undertaken, any prior history of violations, the degree of
36 culpability, economic profits, if any, resulting from, or expected
37 to result as a consequence of, the violation, and other matters the
38 board deems relevant.

39 (d) Any penalties assessed shall be required to be paid within
40 30 calendar days.

1 (e) ~~No~~A person or public agency shall *not* be subject to both
2 civil and administrative penalties for the same violation.

3 (f) After the time for judicial review pursuant to Section 8579
4 has passed, the board may apply to the clerk of the appropriate
5 court in the county in which the administrative penalties were
6 imposed for a judgment to collect the penalties assessed. The
7 application, which shall include a certified copy of the board action,
8 constitutes a sufficient showing to warrant issuance of the
9 judgment. The clerk shall enter judgment immediately in
10 conformity with the application. The judgment so entered has the
11 same force and effect, and is subject to all the provisions of law
12 relating to, a judgment in a civil action and may be enforced in the
13 same manner as any other judgment of the court in which it is
14 entered.

15 (g) After the time for judicial review pursuant to Section 8579
16 has passed, the board may also recover assessed penalties through
17 a lien against the property of the person or agency responsible for
18 the violation pursuant to Section 8704.2.

19 (h) All funds generated by the imposition of penalties pursuant
20 to this section shall be deposited into the Flood Risk Management
21 Fund as set forth in Section 8705.

22 (i) In addition to the penalties described in this section, any
23 individual who erects or maintains a violation that is found to be
24 the proximate cause of a failure of a levee or other flood control
25 facility shall be liable for additional damages at law, including any
26 liability that may be incurred by the state.

27 8704.2. (a) The board, after providing the opportunity for a
28 hearing, shall have the authority to record a lien with the county
29 clerk in the county of this state where the person or agency's
30 property responsible for the violation is located, to recover any
31 and all of the following:

32 (1) Costs incurred in abating, removing, and restoring a
33 violation, including, but not limited to, costs incurred in seeking
34 removal, abatement, and restoration pursuant to this part.

35 (2) Costs incurred in the summary abatement of emergencies.

36 (3) Civil or administrative penalties assessed pursuant to this
37 article.

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

39 (b) A lien recorded pursuant to this section shall have the same
40 force, effect, and priority as a judgment lien.

1 8704.4. The remedies provided by this article are not exclusive
2 of, but shall be concurrent with and in addition to, any other
3 remedy, penalty, or sanction that may exist by law, civil or
4 criminal. The board may enforce compliance with the provisions
5 of this article by mandamus, mandatory injunction, or by any other
6 appropriate remedy authorized by law. The action or proceeding
7 may be commenced and maintained by the board in the name of
8 the state.

9 8705. The Flood Risk Management Fund is hereby established
10 in the State Treasury. All funds received from penalties pursuant
11 to this article shall be paid into the fund. Upon appropriation by
12 the Legislature, the moneys in the fund shall be expended by the
13 board to carry out enforcement pursuant to this part, including the
14 costs of the abatement and restoration of violations and recent
15 litigation.

16 8706. The board may maintain actions in the name of the state
17 to compel by injunction the owner or owners of any bridge, trestle,
18 wire line, viaduct, embankment, or other structure or obstruction
19 that shall be intersected, traversed, or crossed by any bypass,
20 drainage canal, channel, or overflow channel to construct or alter
21 any structure in order to offer a minimum of obstruction to the free
22 flow of water. In the case of existing works, the board may compel
23 the removal or alteration of structures or obstructions that impede
24 the free flow of water.

25 8706.5. Any use of land, right of way, or easement within the
26 jurisdiction of the board, whether for cultivation, planting of crops,
27 trees or other vegetation, storage or disposal of material, or other
28 encroachment upon, improvement of, or use of that land, right of
29 way, or easement that does or may interfere with or obstruct
30 operation or maintenance in violation of this part constitutes a
31 public nuisance, and the board may commence and maintain a suit
32 in the name of the people of the state for the prevention or
33 abatement of that nuisance.

34 8707. If the board or Attorney General prevails in a civil action
35 to enforce this part, the board or Attorney General shall be awarded
36 attorney's fees and costs, including, but not limited to, any fees
37 and costs incurred by its agents.

38 8708. (a) Nothing in this article shall be construed to prevent
39 the department, the board, the executive officer, or a
40 levee-maintaining agency from taking any action to prevent an

1 imminent failure of a levee, to operate a flood control feature, or
2 to take other emergency action necessary to protect the public
3 welfare.

4 (b) To the extent emergency action is required to abate an action,
5 any aggrieved person may request a hearing before the board within
6 30 days after the action has been commenced.

7 (c) After a public hearing, by request or by its own motion, the
8 entity that has carried out the abatement functions pursuant to this
9 section may seek reimbursement of its abatement costs and may
10 pursue any legal remedies available to recover its costs, including
11 imposing a lien pursuant to Section 8704.2.

12 *8709. The board shall adopt emergency regulations necessary*
13 *to implement this article in accordance with Chapter 3.5*
14 *(commencing with Section 11340) of Part 1 of Division 3 of Title*
15 *2 of the Government Code. The adoption of emergency regulations*
16 *shall be deemed an emergency and necessary for the immediate*
17 *preservation of the public peace, health and safety, or general*
18 *welfare.*

19 SEC. 4. Section 8732 of the Water Code is amended to read:

20 8732. The board may hold a hearing or partial hearing before
21 a committee of one or more members of the board, before a
22 qualified neutral hearing officer designated by the board president,
23 or before the executive officer or chief engineer of the board, at
24 any place within the state.