

CENTRAL VALLEY FLOOD PROTECTION BOARD

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January 24, 2013

Ms. Cindy Messer
Delta Plan Program Manager
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, California 95814

Subject: Written Comments on Proposed Rulemaking, California Code of Regulations,
Title 23, Division 6, Delta Stewardship Council

Dear Ms. Messer:

Thank you for your ongoing collaboration and coordination with the Central Valley Flood Protection Board (Board) on your rulemaking activities. Attached are the Board's written comments on your proposed Title 23 regulations. The Board's Chief Engineer, Len Marino will also summarize our comments in person at today's Delta Stewardship Council Public Meeting.

If you have any questions, please contact the Board's Chief Engineer, Len Marino, by phone at (916) 574-0608 or via email at lmario@water.ca.gov.

Sincerely,

A handwritten signature in blue ink that reads "Jay S. Punia".

Jay S. Punia
Executive Officer

Attachment

cc: (via electronic file)

Members of the Central Valley Flood Protection Board
Len Marino, Chief Engineer, CVFPB
Deborah Smith, Deputy Attorney General, Office of the Attorney General
Nicole Rinke, Deputy Attorney General, Office of the Attorney General
Eric Butler, Projects and Environmental Branch Chief
James Herota, Staff Environmental Scientist
Katherine Spanos, Department of Water Resources, Office of the Chief Counsel
Robin Brewer, Department of Water Resources, Office of the Chief Counsel
Laura Hollender, Department of Water Resources, Office of the Chief Counsel
Nancy Finch, Department of Water Resources, Office of the Chief Counsel

**Central Valley Flood Protection Board Comments on
Proposed California Code of Regulations, Title 23, Division 6
Delta Stewardship Council, November 16, 2012 Rulemaking Package
January 24, 2013**

§ 5001. General Definitions

- Add the following definitions:
 - “Board Regulations” means the regulations of the Central Valley Flood Protection Board as published in the California Code of Regulations, Title 23, Division 1, Waters, which may be viewed at the Board’s website at <http://cvfpb.ca.gov/regulations/>.
 - “Central Valley Flood Protection Board” or “Board” means the Central Valley Flood Protection Board (formerly The Reclamation Board) of the California Resources Agency of the State of California as provided in Water Code section 8521.
 - “Central Valley Flood Protection Plan (CVFPP)” means a State plan prepared by the Department of Water Resources that describes the challenges, opportunities, and a vision for improving integrated flood management in the Central Valley. The CVFPP documents the current and future risks associated with flooding and recommends improvements to the State-federal flood protection system to reduce the occurrence of major flooding and the consequence of flood damage that could result. The 2012 CVFPP was adopted by the Board on June 29, 2012, and is to be updated every five years thereafter.
 - “Designated Floodway” means a floodway adopted by the Board which either:
 - a) The channel of the stream and that portion of the adjoining floodplain reasonably required to provide for the passage of a design flood, as indicated by floodway encroachment line on an adopted map; or
 - b) The floodway between existing levees as adopted by the Board or the Legislature.

Maps of Board-adopted designated floodways may be viewed on the Board’s website at <http://cvfpb.ca.gov/maps/> by clicking on the “Best Available Maps” link.

- “Design Flood” means the flood against which protection is provided or may eventually be provided by means of flood protection or control works, or that flood which the Board otherwise determines to be compatible with future developments.
- “Levee” means a man-made barrier constructed of soil along a water course for the primary purpose of providing flood protection.
- “Non-project levee” means a levee or floodwall that is not a project levee.
- “Project levee” means a levee within the Board’s jurisdiction that has been approved or adopted by the Board or the Legislature.
- “Regulated stream” means those streams under Board jurisdiction as listed in Board Regulations, § 112.
- “Regulatory action”. The Board requests this be defined in the proposed regulations. While Board permit decisions and enforcement actions would clearly not be subject to the Delta Reform Act, other Board-sponsored projects and plans in the Delta may be subject to the Act.
- “State-Federal Flood Protection System” means the collective works or facilities of the State Plan of Flood Control (California Water Code Section 9602(c)), including but not limited to project levees, bypasses, designated floodways, and regulated streams.
- Modify the following definitions:
 - “Floodway” (including Board designated floodways) means the portion of the floodplain that is effective in carrying flow (that is, the channel of a river or other watercourse and the adjacent land areas that convey flood waters).
 - “Urban area” means a developed area in which there are 10,000 residents or more (Government Code Section 65007(j)).
 - “Urbanizing area” means a developed area or an area outside a developed area that is planned or anticipated to have 10,000 residents or more within the next 10 years (Government Code Section 65007(k)).

§ 5003. Covered Action Defined.

- Add new language to address the following situation:
 - Regulatory actions of the Board are not a covered action as defined under the Delta Reform Act, however flood control encroachment permit and project decisions made by local agencies would be subject to the Act. The proposed regulations contain no means by which the Board would be notified of appeals to the Council for these projects. The Board requests the Council add language giving specific notice to the Board of appeals received relating to projects subject to the Board's jurisdiction.
- Modify the following definitions:
 - (a) "Covered Action"
 - (4) Will have a significant impact on achievement of one or both of the coequal goals or the implementation of [State or federal](#) government-sponsored flood control programs to reduce risks to people, property, and State interests in the Delta; and,

§§ 5003, 5004. Covered Action Defined & Contents of Certifications of Consistency.

The Board requests the Council modify the proposed regulations to address the following situations:

- Under the current proposed Council regulations, it is possible that both the Council and the Board may exercise authority over flood control projects in the Delta. However, in order to ensure the most effective flood protection and limit the State's potential liability for flooding, the Council should closely coordinate with the Board regarding the State's obligations to the U.S. Army Corps of Engineers and the effects of any proposed project system-wide as envisioned and articulated in the Central Valley Flood Protection Plan.
 - Because the Board has special expertise in flood management, the Council should at a minimum consult with and defer to the Board on these issues. The Council regulations should be revised to specify when and how this consultation would occur.
- Under the proposed regulations and appeal procedures, there is the potential for a project to be appealed to the Council after a Board permit has already been issued. If the Council grants the appeal, the applicant may be required to amend their Board

permit. While it is unclear how often this could occur, there is the potential for the Board to expend additional resources reviewing and approving Board permit amendments.

- The proposed regulations and appeal procedures should be amended to require the certificate of consistency to be filed prior to obtaining a Board permit and requiring the project proponent to give notice to the Board if an appeal has been filed.

§ 5014. Prioritization of State Investments in Delta Levees and Risk Reduction.

(a) The Delta Stewardship Council, in consultation with the Department of Water Resources, the Central Valley Flood Protection Board, the Delta Protection Commission, local agencies, and the California Water Commission, shall develop funding priorities for State investments in Delta levees by ~~January 1, 2015~~ July 1, 2017. These priorities shall be consistent with the provisions of the Delta Reform Act in promoting effective, prioritized strategic State investments in levee operations, maintenance, and improvements in the Delta for both levees that are a part of the State Plan of Flood Control, as described in the Central Valley Flood Protection Plan, and non-project levees. Upon completion, these priorities shall be considered for incorporation into the Delta Plan and these regulations.

§ 5015. Require Flood Protection for Residential Development in Rural Areas.

The Board makes the following observation:

- Proposed Council regulation section 5015 prohibits new residential development of five or more parcels in certain rural areas unless 200-year flood protection is provided. Section 5015 appears to be inconsistent with one of the policy goals in the CVFPP, which focuses 200-year flood protection in urban, rather than rural, areas.

§ 5016. Floodway Protection.

The Board recommends the following modifications:

(a) No encroachment shall be ~~permitted~~ allowed or constructed in a floodway, unless it can be demonstrated by appropriate analysis that the encroachment will not unduly impede the free flow of water in the floodway or jeopardize public safety.

(b) For purposes of Water Code Section 85057.5(a)(3) and Section 5003(a)(5) of this Chapter, this policy covers a proposed action that would encroach in a floodway.

(c) This policy is not intended to exempt any proposed encroachment in a designated floodway or regulated stream from compliance with applicable regulations and

requirements of the Board. Written certification of compliance from the Board may be included as part of the detailed findings required by section 5004(b)(1), to show consistency of proposed encroachments in a designated floodway or regulated stream with this policy.

§ 5017. Floodplain Protection.

(a) No encroachment shall be ~~permitted~~ allowed or constructed in any of the following floodplains unless it can be demonstrated by appropriate analysis that the encroachment will not have a significant impact on floodplain values and functions:

(1) Areas located in the Yolo Bypass from Fremont Weir through Cache Slough to the Sacramento River including the confluence of Putah Creek into the bypass; ~~and~~.

(2) The Cosumnes River-Mokelumne River Confluence, as defined by the North Delta Flood Control and Ecosystem Restoration Project (McCormack-Williamson), or as modified in the future by the Department of Water Resources or the U.S. Army Corps of Engineers (Department of Water Resources 2010a); and,

(3) The Lower San Joaquin River Floodplain Bypass area, located on the Lower San Joaquin River upstream of Stockton immediately southwest of Paradise Cut on lands both upstream and downstream of the Interstate 5 crossing. This area is described in the Lower San Joaquin River Floodplain Bypass Proposal, submitted to the Department of Water Resources by the partnership of the South Delta Water Agency, the River Islands Development Company, Reclamation District 2062, San Joaquin Resource Conservation District, American Rivers, the American Lands Conservancy, and the Natural Resources Defense Council, March 2011. This area may be modified in the future through the completion of this project.

(b) For purposes of Water Code Section 85057.5(a)(3) and Section 5003(a)(5) of this Chapter, this policy covers a proposed action that would encroach in any of the floodplain areas described in subsection (a).

(c) This policy is not intended to exempt any proposed encroachment in a designated floodway or regulated stream that also includes any of the areas listed in subsection (a) from compliance with applicable regulations and requirements of the Board. Written certification of compliance from the Board may be included as part of the detailed findings required by section 5004(b)(1), to show consistency of proposed encroachments in a designated floodway or regulated stream that also includes any of the areas listed in subsection (a) with this policy.