

Date of Hearing: June 11, 2024

ASSEMBLY COMMITTEE ON WATER, PARKS, AND WILDLIFE

Diane Papan, Chair

SB 1226 (Cortese) – As Introduced February 15, 2024

**SENATE VOTE:** 38-0

**SUBJECT:** Hunting: navigable waters

**SUMMARY:** Clarifies that hunting by boat over private land that is temporarily flooded is not trespass if the floodwaters are navigable and that the right of the public to use navigable waters for hunting, fishing, or other public purpose is protected, consistent with the California Constitution. Specifically, **this bill:**

- 1) Restricts to non-navigable waters the application of provisions that make it unlawful to enter land temporarily inundated by water flowing outside the established banks of a waterway for the purpose of discharging a firearm or taking or destroying any mammal or bird, including waterfowl, on that land.
- 2) States that nothing in this statute restricts the right of the public to use navigable waters for hunting, fishing, or other public purpose as guaranteed under Section IV of Article X of the California Constitution.

**EXISTING LAW:**

- 1) States that no individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and that the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state shall be always attainable for the people thereof (Section IV of Article X of the California Constitution).
- 2) Makes a person who unlawfully obstructs the navigation of any navigable waters guilty of a misdemeanor [Harbors and Navigation Code (HNC) § 131].
- 3) Declares the unlawful obstruction of the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, among other provisions, a public nuisance (Penal Code § 370; Civil Code § 3479; Civil Code § 846).
- 4) Authorizes entities with jurisdiction, as specified, to adopt emergency rules and regulations relating to boats or vessels to ensure the safety of persons and property because of disaster or other public calamity, which can include the closure of navigable waterways to recreational boaters during periods of emergency (HNC § 660).
- 5) Prohibits the sale of any land below the ordinary high water mark of a navigable waterway (Public Resources Code § 7991).
- 6) Makes it unlawful to enter land for the purpose of discharging a firearm or taking or destroying any mammal or bird, including waterfowl, on that land, without having first

obtained written permission from the owner, the owner's agent, or the person in lawful possession of that land, if either of the following applies:

- a) The land belongs to, or is occupied by, another person and is either under cultivation or enclosed by a fence; or
  - b) There are signs forbidding trespass or hunting or both displayed at intervals not less than three per mile along all exterior boundaries and at all roads and trails entering those lands, including land temporarily inundated by water flowing outside the established banks of a waterway (FGC § 2016).
- 7) Makes it unlawful to hunt or discharge a firearm within 150 yards of an occupied structure, or across a public road or other established way open to the public in an unsafe and reckless manner (FGC § 3004).
- 8) Makes it unlawful for any person, while taking any bird, mammal, fish, reptile, or amphibian, to cause damage, or assist in causing damage, to real or personal property, or to leave gates or bars open, or to break down, destroy, or damage fences, or to tear down or scatter piles of rails, posts, stone, or wood, or, through carelessness or negligence, to injure livestock of any kind (FGC § 2004).

**FISCAL EFFECT:** Unknown. This bill is keyed fiscal.

**COMMENTS:**

- 1) **Purpose of this bill.** This bill amends statute to ensure consistency with provisions of the California Constitution regarding the use of navigable waters for public purposes, including hunting by boat over land that is temporarily flooded and navigable. The statutory restriction on hunting in FGC § 2016 would still apply to any non-navigable waters and lands that meet the signage and other requirements of that section. According to the author, “this bill supports California’s renowned outdoor recreation by protecting public use of waterways from unwarranted legal challenges. [This bill] strikes the right balance between respecting private property and ensuring Californians’ right to enjoyment of natural resources.”
- 2) **Background.** The Public Trust Doctrine is an ancient legal doctrine dating back to 6<sup>th</sup> century Roman law that states “[b]y the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea.”<sup>1</sup> In California, this Doctrine has been extended to navigable surface waters, other aquatic resources, and wildlife resources. These resources are held in trust for all of the people and the state acts as the Trustee to protect these resources for present and future generations. Article X, Section IV of the California Constitution protects access to navigable waters consistent with the public trust, and states “the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.”

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<sup>1</sup> A Legal Guide to the Public’s Right to Access and Use California’s Navigable Waters.  
<https://www.slc.ca.gov/public-access/a-legal-guide-to-the-publics-rights-to-access-and-use-californias-navigable-waters/>

*Whatever floats your boat.* Under California law, the public has a general legal right to access and enjoy California’s navigable waterways at any point below the high water mark. While there are several navigability tests under state and federal laws, in California a waterway is considered “navigable” if it is “capable of being navigated by oar or motor-propelled small craft.”<sup>2</sup> HNC § 100 states that navigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of navigation and of such transportation. HNC §§ 101–106 enumerate certain waterways as being navigable. However, a 1985 opinion by the California Attorney General (No. 85-602) details case law that supports the assertion that “[d]esignation of some waters does not, however, preclude other waters from being found to be navigable in law or in fact.”<sup>3</sup> The Indiana Supreme Court concurs that “nature is competent [...] to make a navigable river without the help of the legislature.”<sup>4</sup> Both California and federal courts have repeatedly held that interpreting navigability is a question of fact properly left for judicial resolution, not the legislature.

*Rising tides lift all boats.* Waters do not need to be navigable year-round to be navigable for public use or access purposes. HNC § 100 specifies that the floodwaters, except those of extraordinary times of flood, of any navigable river, stream, slough, or other watercourse while temporarily flowing above the normal high-water mark over public or private lands outside any established banks of such river, stream, slough, or other watercourse are navigable waters. The Attorney General’s opinion also recognize that regular flooding cycles constitute navigable waters.<sup>5</sup>

*FGC § 2016 conflicts.* In 1982, the Legislature amended FGC § 2016 (via Chapter 1607, Statutes of 1982) to add the phrase “including lands temporarily inundated by waters flowing outside the established banks of a river, stream, slough, or other waterway,” to protect the interests of private property owners with regard to the presence of hunters boating over their lands without their permission. The stated purpose of the 1982 legislation “was to exclude the public so as to ‘provide needed protection to privately owned lands.’” The changes made in 1982 are in conflict with the public’s right to utilize navigable waters for public purposes per Article X, Section IV of the California Constitution.

The 1985 Attorney General Opinion found that “the ‘overflow waters’ provision of [FGC § 2016] is unconstitutional in its application to navigable waters of the state due to conflict with Section 4 of Article X of the Constitution. Section 2016 is, however, constitutional as applied to ‘non-navigable waters’ which are those not useable by small craft or in which the state holds no sovereign fee or public trust interest.”

Case law cited in the opinion summarizes the public’s ability to use all navigable waters for recreational purposes such as hunting, irrespective of the underlying land being in private ownership. A previous court decision in *Forestier v. Johnson* (1912) found that “hunting of wild game [...] is a privilege which is incidental to the public right of navigation.” Attorney

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<sup>2</sup> *Baker v Mack*, 19 Cal. App. 3d at 1050 (1970).; California Attorney General Opinion No. 85-602, [https://www.oag.ca.gov/system/files/opinions/pdfs/85-602\\_0.pdf](https://www.oag.ca.gov/system/files/opinions/pdfs/85-602_0.pdf)

<sup>3</sup> California Attorney General Opinion No. 85-602, [https://www.oag.ca.gov/system/files/opinions/pdfs/85-602\\_0.pdf](https://www.oag.ca.gov/system/files/opinions/pdfs/85-602_0.pdf).

<sup>4</sup> *Martin v Bliss*, 5 Blackf. 35, 35 (1838).

<sup>5</sup> California Attorney General Opinion No. 85-602

General Opinion No. 97-307 also mentions this and an additional legal analysis comes to a similar conclusion.<sup>6,7</sup>

*Management of hunting.* As noted above, the public right of navigation is in inextricable tied recreation, including hunting.<sup>8</sup> It is important to note that all other laws under the FGC or other codes still apply, and the Fish and Game Commission can still restrict or ban hunting anywhere in the state, including banning all hunting upon specified navigable waters in certain situations (see Existing Law). Private landowners may not interfere with the public use of recreationally navigable waters on their property.<sup>9</sup> The public does not have a right to enter private property where no right of access exists and signs forbidding trespass are displayed without approval of the owner or legal occupant. However, in California, the public can legally use navigable floodwaters on private lands as long as the public can access the floodwaters without trespassing on private property (i.e., via a navigable waterway with a public access point).<sup>10</sup> The definition of navigable waters in HNC § 100 confirms that nothing in the definitions shall be construed as permitting trespass.

There are known cases of hunters in boats being cited for trespassing on navigable floodwaters. The Attorney General opinions are not widely known, and many law enforcement personnel as well as district attorneys are unaware of them. While judges generally dismiss charges brought under FGC § 2016 for hunting on navigable floodwaters, the legal process to that point can still incur significant financial and other costs for the accused and the court system.

*Birds of a feather.* AB 859 (Gallagher) of 2023 also sought to address the ability of hunters and others to access temporarily inundated navigable waters by, in part, revising the same provision in the FGC. After passing the Legislature, including this Committee, with near unanimous support, AB 859 was vetoed by Governor Newsom, who wrote:

*“I support the intent of this bill to clarify the public's right to navigate temporarily inundated waterways for fishing, hunting, or other enjoyment, as guaranteed by the California Constitution. However, this bill contains overly broad language that could extend access rights beyond the public trust doctrine, thus impacting private property owners' rights. The bill also creates inconsistency with the definition of navigable waters in the Harbors and Navigation Code, which is likely to result in confusion in communities across California. I encourage the Legislature to refine these revisions in subsequent legislation.”*

- 3) **Arguments in support.** A coalition of organizations write in support, citing the opinions that highlight the unconstitutionality of FGC § 2016 and stating that this bill “will not only

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<sup>6</sup> California Attorney General Opinion No. 97-307, <https://oag.ca.gov/system/files/opinions/pdfs/97-307.pdf>

<sup>7</sup> Berrey, A.R. (1984). Public Access to Lands Annually Flooded: A Constitutional Analysis of Section 2016 of the California Fish and Game Code, 16 Pac. L. J. 353. <https://scholarlycommons.pacific.edu/mlr/vol16/iss1/9>

<sup>8</sup> *Forestier v Johnson*, 164 Cal. 24. The Supreme Court stated “... the hunting of wild game... is a privilege which is incidental to the public right of navigation. [...] But wherever [a hunter] may lawfully go, [they] may take and kill such game as [they] may find there, subject, of course, to the restrictions of the game laws.”

<sup>9</sup> *Hitchings v Del Rio Woods Recreation & Park District*, 55 Cal. App. 3d at 568 (1970).; Civil Code § 3479

<sup>10</sup> *Bohn v Albertson*, 107 Cal. App. 2d at 738, 749.

help ensure that sportsmen exercising their rights on navigable floodwaters are not wrongly cited for trespassing, but will save the court system time and money.”

- 4) **Related legislation.** AB 859 (Gallagher) of 2023 was similar to this bill and would have clarified hunter trespass via navigable waters. AB 859 was vetoed by the Governor.

AB 1162 (Chesbro), Chapter 590, Statutes of 2012, expands the trespass sign provision to encompass signs forbidding trespass or hunting, or both, among other provisions.

AB 2132 (Houston) of 2008 would have required signs forbidding trespass to be at least 8 1/2 by 11 inches in size, among other provisions. AB 2132 was vetoed by the Governor.

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

California Waterfowl Association (Sponsor)  
Backcountry Hunters and Anglers, California Chapter  
Black Brant Group, the  
Cal-Ore Wetlands and Waterfowl Council  
California Bowman Hunters  
California Deer Association  
California Hawking Club  
California Houndsmen for Conservation  
Congressional Sportsmen's Foundation  
Delta Waterfowl  
Ducks Unlimited  
Max McGraw Wildlife Foundation  
Nor-Cal Guides and Sportsmen's Association  
Safari Club International  
Safari Club International, Golden Gate Chapter  
San Diego County Wildlife Federation  
Suisun Resource Conservation District  
Theodore Roosevelt Conservation Partnership  
Tulare Basin Wetlands Association

### **Opposition**

None on file

**Analysis Prepared by:** Stephanie Mitchell / W., P., & W. / (916) 319-2096