

Date of Hearing: June 25, 2024

ASSEMBLY COMMITTEE ON WATER, PARKS, AND WILDLIFE

Diane Papan, Chair

SB 1390 (Caballero) – As Amended June 17, 2024

**SENATE VOTE:** 37-0

**SUBJECT:** Groundwater recharge: floodflows: diversion

**SUMMARY:** Makes numerous changes to existing authority to temporarily divert floodflows for groundwater recharge without a water right or other permits. Specifically, **this bill:**

- 1) Adds a county emergency operations plan (EOP) and a local hazard mitigation plan to the list of plans that a local or regional agency may rely upon to determine there is an imminent risk of flooding to authorize the temporary diversion of floodflows for groundwater recharge.
- 2) Provides that a local or regional agency must give notice that a “delineated area within its jurisdiction” (rather than “flows downstream of a point of diversion”) are at imminent risk of flooding to authorize the temporary diversion of floodflows for groundwater recharge.
- 3) Provides that “floodflows” may include measured flows that are “projected” by a local or regional agency to be in excess of the maximum design capacity of a flood project or flows “projected” by a local or regional agency to inundate ordinarily dry areas in the bed of a terminal lake.
- 4) Clarifies that “imminent” means conditions that will begin or that are projected to begin within 72 hours.
- 5) Provides that a local or regional agency shall be responsible for determining when flood conditions have abated for purposes of ceasing the temporary diversion of floodflows for groundwater recharge.
- 6) Provides that the temporary diversion of floodflows for groundwater recharge shall cease no later than 14 days after commencing, unless renewed (see #8, below).
- 7) Requires a local or regional agency to issue a declaration that flood conditions are projected to end at least 48 hours beforehand to inform the public and diverters. Requires a local or regional agency to notify the public and known diverters that flood conditions are abating, within 24 hours of the projected end of flood conditions.
- 8) Provides a local or regional agency may renew a temporary diversion of floodflows for groundwater recharge for an additional 14 days by notifying the State Water Resources Control Board (State Water Board) seven days before the authority to do so expires.
- 9) Provides that floodflows may only be temporarily diverted for groundwater recharge when the Delta is in excess water conditions without restrictions. Requires a diverter exercising the authority to temporarily divert floodflows for groundwater recharge to monitor conditions daily using the Delta Operations Summary published on the Department of Water Resources’ (DWR) website to determine whether the Delta is in excess conditions without restrictions.

- 10) Defines “excess water conditions” for purposes of #9, above, as those determined pursuant to the coordinated operation agreement (COA) for the federal Central Valley Project (CVP) and State Water Project (SWP), as amended.
- 11) Defines “without restrictions” for purposes of #9, above, as when Delta exports are not constrained by any requirements, including for the protection of water quality and endangered species per COA.
- 12) Provides that a temporary diversion of floodflows for groundwater recharge shall not be used as basis for a water right.
- 13) Requires an entity that temporarily diverts floodflows for groundwater recharge to also provide reports on its diversion to the local or regional agency that issued the flood determination.
- 14) Requires the State Water Board to post on its website any reports it receives from an entity that is temporarily diverting floodflows for groundwater recharge within 24 hours.
- 15) Provides that an entity temporarily diverting floodflows for groundwater recharge must provide an initial report to the State Water Board within 24 hours (rather than 48 hours) of commencing diversions.
- 16) Requires an entity’s final report on the temporary diversion of floodflows for groundwater recharge to include information describing forecasting models used, a description of the methodology used to determine the abatement of flood conditions, and an explanation of any diversion renewals.
- 17) Provides that temporary floodflow diversions for groundwater recharge are consistent with the most junior priority relative to all water rights holders in the watershed and shall not injure a prior water rights holder.
- 18) Extends the sunset date on the authority to temporarily divert floodflows for groundwater recharge from January 1, 2029 to June 1, 2032.
- 19) Makes technical and clarifying changes.

**EXISTING LAW:**

- 1) Exempts the temporary diversion of floodflows for groundwater recharge from requirements to obtain a water right if specified conditions are met (see discussion under Background, below) (Water Code § 1242.1).
- 2) Authorizes the State Water Board to issue a temporary urgency permit (water right) so long as the diversion does not harm other lawful users of water and meets other conditions. Temporary urgency permits shall automatically expire after 180 days, unless renewed (Water Code § 1425 *et seq.*).
- 3) Authorizes the State Water Board to issues a temporary permit (water right) to divert water for groundwater recharge so long as the diversion does not harm other lawful users of water and meets other conditions. Temporary permits for groundwater recharge shall automatically expire after five years, unless renewed (Water Code § 1433 *et seq.*).

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

**COMMENTS:**

- 1) **Purpose of this bill.** According to the author, “[this bill] is a simple bill that provides clarity to current flood planning requirements and builds on the momentum of SB 122 and the Governor’s Executive Order [EO] issued in March of 2023. [This bill] will allow more groundwater projects to move forward during flood events by providing water agencies with information about when flood conditions begin and end by using sophisticated forecasting models to anticipate flood events, with increased accountability, public safety and water quality.” The author further contends that “until statute is modified, California will be unable to make the most efficient use of flood flows, which will increasingly make up the source of water supplies in the state as the climate continues to warm.”
- 2) **Background.** Groundwater recharge is an important strategy to enhance water supply and water supply reliability in the face of climate change. This has been recognized in numerous state plans and strategies and by water agencies, nongovernmental organizations, and researchers. One manner in which groundwater recharge can be expanded is through the capture or diversion of high water flows or flood flows during wet periods such as the winters of 2017 and 2023. Capturing water during such events can be challenging if a potential diverter has not obtained the necessary permits to do so. For example, if a groundwater recharge project involves diverting surface water from a river or stream to a recharge area, a water right or permit is required. Obtaining a new water right can take a long time so, several projects in recent years have opted to seek a temporary urgency (180-day) permit to divert flood flows to groundwater recharge. The State Water Board can also issue a five-year temporary permit for groundwater recharge.

*2023 EOs and SB 122.* To take advantage of the unexpected wet winter last year and capture high water flows for groundwater recharge, Governor Newsom issued EO N-4-23 which, among other provisions, authorized diverters to temporarily take “floodflows” off of streams and rivers for groundwater recharge without obtaining a water right, complying with the California Environmental Quality Act, and obtaining a Lake and Streambed Alteration Agreement (LSAA). The authority in EO N-4-23 was modified and extended through EO N-7-23 and then codified into law with the passage of SB 122 last year. SB 122 makes various changes to the EOs, including adding a requirement that a local or regional agency must rely upon a local plan of flood control or a county general plan that considers flood risk in order for an unpermitted diversion of floodflows to occur within the agency’s territory. Further, the diverted water cannot be applied to certain types of land (e.g., where manure has been applied in the previous 45 days) and the diversion must meet the following criteria:

- Use existing diversion infrastructure or temporary pumps;
- Use existing groundwater recharge locations;
- Cannot use new permanent infrastructure or permanent construction; and
- Use protective screens on temporary pumps to protect fish and other aquatic life when water is diverted directly from a river or stream. The protective screens must be constructed of any rigid material, perforated, woven, or slotted that allows water to pass while physically excluding fish. In addition, a protective screen must be parallel to the flow of water and adjacent to the water’s edge and meet other specified criteria.

The State Water Board received and posted 78 reports of temporary diversion of floodflows for groundwater recharge under the authority granted by the EOs (see [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/groundwater-recharge/](https://www.waterboards.ca.gov/waterrights/water_issues/programs/groundwater-recharge/)). The majority of these reports indicate that diversions began the same day or within days of, the issuance of the first EO, N-4-23, on March 10, 2024 and, in many cases continued through August and even September 2023. EO N-4-23 provides in paragraph 3c that “diversions cease when the flood conditions have abated to the point there is no longer a risk of flooding and inundation of land, roads, or structures downstream of the point of diversion” (EO N-7-23 extended the authority to divert but also this restriction). Despite this requirement, it appears that many diversions under the authority granted by the EOs continued long after flood conditions had abated.

In May of this year, DWR released its Semi-Annual Groundwater Conditions report that indicates that groundwater storage in California improved for the first time since 2019. Per the report, the state achieved 4.1 million acre-feet (AF) of managed aquifer recharge water in 2023; 1.2 million AF of this was permitted by state agencies and approximately 453,000 AF occurred under the authority for the temporary diversion of floodflows for groundwater recharge authorized by EO N-4-23 and EO N-7-23. The remaining recharge occurred as a result of the wet conditions.

*Flood and emergency plans.* SB 122 constrained the temporary diversion of floodflows for groundwater recharge in comparison to the EOs by requiring a local or regional agency that determines flooding is imminent to have adopted a local plan of flood control or considered flood in its most recent general plan. This bill adds two additional plans that can provide the basis for an agency to make a determination that flooding is imminent: (1) a county EOP; and (2) a local hazard mitigation plan adopted pursuant to the federal Disaster Mitigation Act of 2000.

Per the Office of Emergency Services (CalOES), EOPs are “a document that defines the scope of preparedness and emergency management activities necessary for that jurisdiction to effectively respond to large-scale incident or disaster.” EOPs do identify hazards relevant to a given county but focus more on how to communicate risks to the public, evacuate the public if in harm’s way, describe how resources will be deployed in response to a disaster, and how to ensure continuity of basic services. CalOES establishes best practices for EOPs and is required to review at least ten EOPs annually through 2028 pursuant to AB 580 (Rodriguez), Chapter 744, Statutes of 2022. While EOPs vary across jurisdictions, they do not appear to provide an appropriate basis for determining when flooding is imminent.

Local hazard mitigation plans are adopted under the federal Disaster Mitigation Act of 2000. The Federal Emergency Management Agency (FEMA) establishes requirements and best practices for these plans and supports their development through various grant programs. FEMA requirements for local hazard mitigation plans pertain to the planning process, assessment of risks, mitigation strategy, plan maintenance, plan adoption, and, if applicable, addressing high hazard potential dams.

*COA.* This bill provides that temporary diversions of floodflows for groundwater recharge from tributaries to the Delta can only occur when the Delta is “in excess conditions without restrictions.” The basis for determining this is COA, an agreement between the Federal government and the State of California for the coordinated operation of the federal CVP and

SWP. The COA was initiated in 1986 and most recently revised in 2018. Delta conditions (“Delta Operations Summary”) are posted daily on DWR’s web site: <https://water.ca.gov/Programs/State-Water-Project/Operations-and-Maintenance/Operations-and-Delta-Status>. This provision was added in the most recent round of amendments to this bill and is intended to protect junior water right holders.

- 3) **Arguments in support.** This bill is sponsored by Sustainable Conservation (SusCon). SusCon points out that groundwater recharge is an important strategy to help respond to climate change and facilitate the implementation of the Sustainable Groundwater Management Act. By clarifying when flood conditions begin and end, recognizing the utilization of forecasting models, and increasing reporting and accountability, SusCon argues this bill “carries forward the progress of the [EO] and SB 122 by allowing more recharge projects to be completed in a safe and responsible manner.”
- 4) **Oppose unless amended.** The Golden Gate Salmon Association (GGSA) and two environmental organizations have taken an “oppose unless amended” position on this bill arguing that this bill will exacerbate conditions in the San Francisco Bay-Delta Estuary where various runs of salmon and other fish are endangered and even “on the brink of extinction.” GGSA seeks amendments to (1) clarify that only agencies with flood management responsibilities be able to issue a declaration that flooding is imminent; (2) strike general plans and emergency operations plans as a basis for determining when flooding is imminent; (3) consider flood liability; (4) strike the inundation of “ongoing agricultural activities” from the definition of “floodflows;” (5) define land that is “an outlier with respect to nitrogen application;” and (6) retain the sunset date in existing law of 2029. Some of the amendments requested by GGSA address provisions of existing law.
- 5) **Arguments in opposition.** The San Francisco Baykeeper (SF Baykeeper) opposes this bill asserting that it will “allow local agencies to freely pump water from California’s already fragile river systems in a misguided effort to reclaim floodwaters for groundwater recharge. The current science continues to indicate aquatic ecosystems in California’s rivers and the San Francisco Bay estuary, their fish, wildlife, and water quality, and the people that depend on them are in desperate need of more flows, not less.”
- 6) **Proposed committee amendments.** The Committee may wish to consider the following amendments to this bill.

*Which plans?* As discussed above, EOPs describe how a county will deploy resources, ensure continuity of services, and evacuate members of the public in the event of an emergency. They are operational plans, not descriptive plans of what is flood stage or where flooding will occur. As such, they are inappropriate as a basis for determining whether flooding is imminent for the purposes of temporary diversion for groundwater recharge. The Committee may wish to request that the author take the following amendment to delete EOPs as a basis for determining imminent risk of flooding:

#### **Amendment 1**

1242.1 The diversion of floodflows for groundwater recharge does not require an appropriative water right if all of the following conditions are met:

(a) (1) A local or regional agency with the responsibility for flood management has taken the following actions:

(A) Made a declaration that diversion of floodflows for groundwater recharge from a delineated stretch of waterway within its jurisdiction is in accordance with one of the following:

(i) An adopted local plan of flood control pursuant to Section 8201.

(ii) An applicable general plan updated within the previous eight years that considers flood risk.

(iii) ~~A county emergency operations plan.~~

~~(iv)~~ A local hazard mitigation plan under the federal Disaster Mitigation Act of 2000 (Public Law 106-390).

*Duration of “temporary” diversions?* This bill provides that temporary diversions must cease no later than 14 days after commencing, unless renewed; however, renewals should not be necessary as an agency can issue new declaration that flooding is imminent should conditions change. To address this, the Committee may wish ask the author to strike the renewal provision and extend the time limit on diversions from 14 to 30 days to account for longer flood events:

### Amendment 2

1242.1 ... (b) The diversions cease when the flood conditions described in the public notice provided pursuant to subdivision (a) have abated to the point there is no longer a risk of flooding and inundation of land, roads, or structures downstream of the point of diversions, as determined by the local or regional agency making the diversion. Diversions shall cease no later than 14 30 days after commencing, unless they are renewed.

(c) ~~(1)~~ Not less than 48 hours from the projected end of flood conditions, a local or regional agency that has made a declaration authorizing flood diversions pursuant to this section shall issue a declaration when flood conditions are projected to end informing the public and diverters when diversions authorized pursuant to this section shall cease. Within 24 hours of the declaration, that agency shall post the declaration in the manner described in subparagraph (B) of paragraph (1) of subdivision (a) and forward the declaration to all diverters that have informed the agency of diversion pursuant to subdivision (h).

~~(2) A local or regional agency may renew a diversion pursuant to paragraph (1) for an additional 14 days by notifying the board of its intention to continue diverting 7 days before its expiration.~~

*Sunset extension?* This bill proposes to extend the sunset date on the authority to temporarily divert floodflows for groundwater recharge by three years from 2029 to 2032. Given that this authority was enacted less than a year ago and will be in effect for another four and a half years, extending the sunset is premature. Further, retaining the current sunset of 2029 will require more timely review of this new approach to diverting high flows for the purposes of groundwater recharge. The Committee may wish to request that the author retain the existing sunset date of 2029:

### Amendment 3

1242.1.... (j) ~~The diversions are commenced before June 1, 2032. This section does not apply to diversions commenced on or after June 1, 2032. This section shall only apply to diversions commenced before January 1, 2029.~~

- 7) **Related legislation.** AB 2060 (Soria) of the current legislative session exempts a temporary urgency permit for diversion to underground storage from LSAA requirements if specified conditions are met. AB 2060 is pending in the Senate Natural Resources and Water Committee.

SB 122 (Committee on Budget and Fiscal Review), Chapter 51, Statutes of 2023, exempted, among other substantive provisions, the diversion of floodflows for groundwater recharge from requirements to obtain a water right and other permits if specified conditions are met (see discussion, above).

AB 830 (Soria) of 2023 would have exempted temporary operation of existing infrastructure or temporary pumps to divert flood stage flows, or near-flood stage flows, to groundwater recharge from LSAA requirements if certain conditions were met. AB 830 was held on the suspense file in the Senate Appropriations Committee.

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

Sustainable Conservation (sponsor)  
Almond Alliance  
California State Association of Counties  
Fresno, County of  
Kings River Conservation District  
Kings River Water Association

### **Opposition**

Friends of the River  
Restore the Delta  
San Francisco Baykeeper

### **Oppose Unless Amended**

Defenders of Wildlife  
Golden State Salmon Association  
Planning and Conservation League

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