

Date of Hearing: April 18, 2023

ASSEMBLY COMMITTEE ON WATER, PARKS, AND WILDLIFE

Rebecca Bauer-Kahan, Chair

AB 1337 (Wicks) – As Introduced February 16, 2023

**SUBJECT:** State Water Resources Control Board: water shortage enforcement

**SUMMARY:** Authorizes the State Water Resources Control Board (State Water Board) to adopt regulations to ensure water is used in the public's interest and to implement regulations through orders curtailing water use under any claim of right. Specifically, **this bill:**

- 1) Authorizes the State Water Board to adopt regulations for any of the following purposes:
  - a) To prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water;
  - b) To promote water recycling or water conservation;
  - c) To protect public trust resources;
  - d) To require curtailment of diversions when water is not available under the diverter's priority of right; or
  - e) To require reporting of diversion or use or the preparation of monitoring reports in furtherance of the purposes outlined in (a) through (d), above.
- 2) Authorizes the State Water Board to implement regulations through orders to curtail the diversion of water under any claim of right.
- 3) Requires the State Water Board to provide the party receiving an order under this bill notice and an opportunity to be heard except where an opportunity to be heard before issuance of an order would be impractical given the likelihood of harm to the purposes outlined in #1, above. Further provides that the opportunity to be heard:
  - a) May be tailored to the circumstances, may be a collective rather than individual process, and may be written or oral; and
  - b) Shall be promptly provided if an order is issued before an opportunity to be heard is provided.
- 4) Provides that a person or entity may be civilly liable for any regulation or order issued under this bill in an amount as follows:
  - a) \$1,000 for each day in which the violation has occurred; and
  - b) \$2,500 for each acre-foot (AF) of water diverted or used in violation of the applicable requirement.

- 5) Provides that civil liability may be imposed by a superior court after receiving a petition by the Attorney General, acting on behalf of the State Water Board, or administratively by the State Water Board through existing processes for this purpose.
- 6) Provides that a regulation or order issued by the State Water Board under this bill shall be exempt from the California Environmental Quality Act (CEQA).
- 7) Provides that this bill does not limit any authority held by the State Water Board under any other provision of law.

**EXISTING LAW:**

- 1) Provides that the diversion or use of water other than as authorized is a trespass and sets administrative penalties for trespass of \$500 per day or, during periods of drought, of \$1,000 per day and \$2,500 per AF of water diverted in excess of a diverter's water right (Water Code § 1052).
- 2) Authorizes the executive director of the State Water Board to issue a complaint to any person that diverts water in violation of a water right, fails to comply with a cease and desist order issued by the State Water Board, or makes a willful misstatement on a water diversion and use statement. Prescribes procedure for service of such a complaint and authorizes the State Water Board to issue an order to impose administrative civil liability after any necessary hearing (Water Code § 1055).
- 3) Authorizes the State Water Board to adopt reasonable rules and regulations to carry out its powers and duties under the Water Code (Water Code § 1058).
- 4) Authorizes the State Water Board to adopt emergency regulations during times of drought to enforce the reasonable use doctrine, promote water recycling or conservation, curtail diversions due to lack of water availability, or to require reporting on water use. Provides such emergency regulations are not subject to review by the Office of Administrative Law and may only remain in effect for one year. Sets penalties for violations of emergency regulations at \$500 per day (Water Code § 1058.5).
- 5) States legislative intent that all issues relating to state water law decided by the State Water Board be reviewed in state court if a party seeks judicial review. Requires an aggrieved party seeking judicial review to file a petition for a writ of mandate within 30 days of the State Water Board's final action leading to the petition for review (Water Code § 1126).
- 6) Authorizes the State Water Board to issue a cease and desist order for specified violations of the Water Code including unauthorized diversion or use, violation of a water right permit or license, or an emergency regulation (Water Code § 1831).

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

**COMMENTS:**

- 1) **Purpose of this bill.** According to the author, "in the Sixth Appellate District's recent decision in *California Water Curtailment Cases* No. H047270, it upheld the position that the Water Commission Act of 1913 exempted pre-existing water rights from regulation. This

stands in stark contrast to other Western States who simply incorporated pre-existing rights into their regulatory system. This exemption has both major policy and equity implications. Pre-1914 rights are the strongest claims to water in the state, yet these claims were unavailable to minorities. In the latter 1800s and early 1900s, several laws in California made it illegal or practically impossible for any minority to obtain or maintain a water right.”

The author asserts that by explicitly placing pre-1914 water right holders under the jurisdiction of the State Water Board this bill will “ensure that all parties are fairly participating in our water system, to protect public trust resources, to promote conservation, and to prevent waste and unreasonable use.”

- 2) **Background.** This bill responds to the appellate case cited by the author, *California Water Curtailment Cases* (6<sup>th</sup> Dist. September 2022). This case addressed the State Water Board’s 2015 curtailment of diversions by senior water right (pre-1914) holders in the Sacramento-San Joaquin Delta (Delta), when drought conditions reduced available water for diversion. Certain Delta water agencies challenged the State Water Board’s authority, under Water Code § 1052(a), to curtail pre-1914 water right holders. (The 1914 Water Commission Act created the State administrative process for establishing and regulating water rights.) The Court of Appeal held that Section 1052(a) excluded pre-1914 water rights from the State Water Board’s regulatory authority.

*California water rights.* California law recognizes riparian and appropriative water rights for surface water. The 1850 Constitution adopted the Common law, which included riparian water rights. Riparian rights grant all landowners contiguous to a river a share of the water in the river. Five years later, the California Supreme Court adopted the Appropriation Doctrine, commonly called “first in time, first in right,” in *Irwin v. Phillips*. California was the first Western state to recognize this doctrine, which had developed in Gold Rush mining camps, on streams where there were no private landowners. For the next 58 years, those needing water could appropriate water for their needs by simply diverting water and using it for a beneficial use. The one who diverted water first enjoyed the senior right to divert the water needed before the next water right holder could divert water. The state had no administrative process for establishing these water rights until enactment of the Water Commission Act in 1914.

*The California Water Curtailments Cases* dealt with this very question: the extent of the State Water Board’s authority over pre-1914 appropriative rights. The Court of Appeal ruled that Section 1052(a) did not give the State Water Board authority, but identified other possible sources for their authority suggesting the State Water Board could use emergency regulation or a reasonable use determination. Both options could present difficulty, limiting the effectiveness of the State Water Board’s regulation in times of drought, which climate change has made increasingly common. In discussing the reasoning behind its ruling, the court suggests that the time may be ripe for the Legislature to re-visit the question of whether the State Water Board should have broader authority over pre-1914 water rights: “Whether this approach to water rights in California represents sound policy in a time of increasing water scarcity is a question for the Legislature.”

- 3) **Policy considerations.** An amicus curiae brief filed by the Environmental Law Clinic at Stanford Law School filed on behalf of the Winnemem Wintu, the Shingle Springs Band of Miwok Indians, Little Manila Rising, and Restore the Delta in the *California Water*

*Curtailments Cases* argues that “exempting senior water rights from [State Water] Board authority perpetuates a *de jure* racist water rights system and compounds historical harms.” The amicus brief authoritatively describes how early Californians advanced policies (e.g., the “Act for the Government and Protection of Indians” passed in 1850) to dispossess Indigenous Peoples of their land and, therefore, their ability to obtain water rights. Likewise, the brief cites the “Alien Land Law” passed in 1913 that prevented Asian immigrants from acquiring land until 1952 when the California Supreme Court finally declared the law unconstitutional. The amicus brief goes on to point out that laws barring targeted populations from acquiring property also barred them from acquiring water rights because property ownership is necessary to obtain a riparian right and property ownership or control is necessary to obtain and put an appropriative right to beneficial use. The amicus brief concludes that the pre-1914 appropriative and riparian water right claims asserted by respondents in the case “stand on violent, racist origins. Allowing these water rights claims to exist outside of regulations and enforcement would compound historical and ongoing harms to Indigenous Peoples and other people of color.” In its decision, the court acknowledges the arguments in the amicus brief, “we do not question the importance of the issues identified by the amici,” but states its task is one of statutory interpretation and that “the policy question of how to treat water rights given their history (as addressed in the amicus brief) and in the face of decreasing water supplies” is a question that only the Legislature can take up. The Committee may wish to consider the historical context of water rights raised in the amicus brief as it deliberates on this bill.

- 4) **Possible committee amendments.** This bill is intended to address the gap in the State Water Board’s authority over pre-1914 appropriative rights revealed by the court in the *California Water Curtailments Cases* decision. The court’s ruling was narrow and found that, in the instance in question, the State Water Board lacked authority; however, the court noted a number of instances in which the State Water Board did have authority over pre-1914 appropriative rights. The Committee may wish to ask the author to take another approach to address the court’s narrow ruling and to clarify the Legislature’s intent that the pre-1914 appropriative water rights be subject to the full authority of the State Water Board. The following amendments would accomplish this:

**Amendment 1** – Strike the current contents of this bill.

**Amendment 2** – add legislative intent language as follows:

*It is the intent of the Legislature that the State Water Resources Control Board be able to exercise its full authority under Section 2, Article X of the California Constitution, the public trust doctrine, and Division 1 (commencing with Section 100) and Division 2 (commencing with Section 1000) of the Water Code to ensure that the use or diversion of water under any claim of right serves the public interest.*

*It is the intent of the Legislature that this bill clarify that the State Water Resources Control Board has authority to curtail pre-1914 water rights and address the gap in the Board’s authority revealed by the court in the California Water Curtailment Cases.*

**Amendment 3** – Amend Section 1052 of the Water Code to read:

1052. (a) The diversion or use of water subject to this division other than as authorized ~~in this division~~ is a trespass.

**Amendment 4** – Add Section 1065 to the Water Code to read:

CHAPTER 2.5. Water Shortage Enforcement

1065. The board may issue a curtailment order for any diversion, regardless of basis of right, when water is not available under the diverter's priority of right.

(a) Failure to comply with a curtailment order is a trespass as provided in Section 1052.

(b) The board may adopt regulations to implement this section.

**Amendment 5** – Amend Section 1831 of the Water Code to read:

1831. (a) When the board determines that any person is violating, or threatening to violate, any requirement described in subdivision (d), the board may issue an order to that person to cease and desist from that violation.

(b) The cease and desist order shall require that person to comply forthwith or in accordance with a time schedule set by the board.

(c) The board may issue a cease and desist order only after notice and an opportunity for hearing pursuant to Section 1834.

(d) The board may issue a cease and desist order in response to a violation or threatened violation of any of the following:

(1) The prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to this division.

(2) When a water right holder fails to curtail diversions when water is unavailable under the water right holder's priority of right.

(3) Any term or condition of a permit, license, certification, or registration issued under this division.

~~(3)~~ (4) Any decision or order of the board issued under this part, Section 275, Chapter 11 (commencing with Section 10735) of Part 2.74 of Division 6, or Article 7 (commencing with Section 13550) of Chapter 7 of Division 7, in which decision or order the person to whom the cease and desist order will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or order.

~~(4)~~ (5) A regulation adopted under Section 1058.5.

~~(5)~~ (6) Any extraction restriction, limitation, order, or regulation adopted or issued under Chapter 11 (commencing with Section 10735) of Part 2.74 of Division 6.

~~(6)~~ (7) Any diversion or use of water for cannabis cultivation if any of paragraphs (1) to ~~(5)~~ (6), inclusive, or any of the following applies: [...]

- 5) **Arguments in support.** The Mono Lake Committee supports this bill arguing that in times of shortage, it is necessary for the State Water Board to curtail water rights. There is no question about whether the State Water Board has authority to curtail junior water rights (i.e., post-1914 rights), but it has limited authority to curtail pre-1914 and riparian rights and may only do so when authorized by the Governor through an emergency order. The Mono Lake Committee contends that the current situation increases pressure to use water dedicated to environmental purposes and that “in order to protect legal water rights holders and the environment from otherwise avoidable harm, it is necessary for the [State Water] Board to be able to curtail pre-1914 or riparian water rights and enforce that curtailment.”
- 6) **Arguments in opposition.** The California Municipal Utilities Association (CMUA) opposes this bill arguing that it “may effectuate a regulatory taking” and that it materially alters the water rights system in California that “could result in the inability of water agencies to meet existing needs and to plan for the future because there is no certainty of receiving the full extent of their water rights.” CMUA asserts that this bill is not justified as the State Water Board already has authority to adopt emergency regulations during times of drought and “there should be no need to curtail diversions” when there is no water shortage. In addition, CMUA expresses concerns that this bill exempts the adoption of regulations from CEQA without a requirement that the State Water Board make any findings that the regulations will not have an adverse impact on the environment. Finally, CMUA contends this bill violates due process by allowing the State Water Board to issue an order without first providing an opportunity to be heard.
- 7) **Double-referral.** This bill is also referred to the Judiciary Committee.
- 8) **Related legislation.** AB 460 (Bauer-Kahan) of the current legislative session grants the State Water Board authority to issue an interim relief order to enforce the reasonable use doctrine, public trust doctrine, water rights, and other provisions of water law. Increases penalties for specified violations from \$500 per day to \$10,000 per day and \$2,500 per AF of water illegally diverted. AB 460 is pending before this Committee.

SB 389 (Allen) of the current legislative session authorizes the State Water Board to investigate the diversion and use of water from a stream to determine whether the diversion and use is based upon an appropriative right, riparian right, or other basis of right. SB 389 is set for hearing in the Senate Natural Resources and Water Committee.

## REGISTERED SUPPORT / OPPOSITION:

### Support

California Coastkeeper Alliance (co-sponsor)  
 Planning and Conservation League (co-sponsor)  
 Mono Lake Committee  
 Ban SUP (single use plastic)  
 California Environmental Voters  
 California Trout  
 Clean Water Action  
 Coachella Valley Waterkeeper  
 Defenders of Wildlife  
 Friends of the Eel River

Friends of the River  
Humboldt Baykeeper  
Inland Empire Waterkeeper  
Los Angeles Waterkeeper  
Mono Lake Committee  
Monterey Waterkeeper  
Orange County Coastkeeper  
Russian Riverkeeper  
San Diego Coastkeeper  
Santa Barbara Channelkeeper  
South Yuba River Citizens League  
Trout Unlimited  
Union of Concerned Scientists  
Wholly H2O  
Yuba River Waterkeeper

### **Opposition**

Agricultural Council of California  
Antelope Valley East Kern Water Agency  
Association of California Water Agencies  
Byron-Bethany Irrigation District  
California Association of Winegrape Growers  
California Building Industry Association  
California Business Properties Association  
California Cattlemen's Association  
California Chamber of Commerce  
California Farm Bureau Federation  
California Manufacturers & Technology Association  
California Municipal Utilities Association  
California Special Districts Association  
Carmichael Water District  
Central Delta Water Agency  
City of Corona  
City of Roseville  
Coachella Valley Water District  
Coastside County Water District  
County of San Joaquin  
Cucamonga Valley Water District  
Desert Water Agency  
Dunnigan Water District  
East Turlock Subbasin Groundwater Sustainability Agency  
Elk Grove Water District  
Elsinore Valley Municipal Water District  
Friant Water Authority  
Humboldt Bay Municipal Water District  
Imperial Irrigation District  
Irvine Ranch Water District  
Kern County Water Agency

Lake Arrowhead Community Services District  
Manteca Chamber of Commerce  
McKinleyville Community Services District  
Mesa Water District  
Metropolitan Water District of Orange County  
Modesto Irrigation District  
Mojave Water Agency  
Montecito Water District  
Napa County Flood Control and Water Conservation District  
Northern California Water Association  
Oakdale Irrigation District  
Placer County Water Agency  
Regional Water Authority  
Rosedale-Rio Bravo Water Storage District  
Rowland Water District  
San Francisco Public Utilities Commission  
San Gabriel Valley Municipal Water District  
San Geronimo Pass Water Agency  
San Juan Water District  
San Luis Delta-Mendota Water Authority  
Santa Clarita Valley Water Agency  
Santa Margarita Water District  
Solano County Water Agency  
Solano Irrigation District  
South San Joaquin Irrigation District  
Southern California Water Coalition  
Stockton East Water District  
Tehachapi-cummings County Water District  
Three Valleys Municipal Water District  
Tranquility Irrigation District  
Tri-county Water Authority  
Tuolumne County Water Agency  
Tuolumne Utilities District  
Turlock Irrigation District  
United Water Conservation District  
Valley Center Municipal Water District  
Walnut Valley Water District  
Western Growers Association  
Western Municipal Water District  
Wine Institute  
Yuba Water Agency

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