

Date of Hearing: April 18, 2023

ASSEMBLY COMMITTEE ON WATER, PARKS, AND WILDLIFE

Rebecca Bauer-Kahan, Chair

AB 460 (Bauer-Kahan) – As Amended March 30, 2023

SUBJECT: State Water Resources Control Board: water rights and usage: interim relief: procedures

SUMMARY: Grants the State Water Resources Control Board (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 acre-foot (AF) of water illegally diverted.

Specifically, **this bill:**

- 1) Authorizes the State Water Board to inspect property or facilities to determine whether water is being put to beneficial use and ascertain compliance with any permit, license, certification, registration, decision, order, or regulation issued by the State Water Board.
- 2) Authorizes the State Water Board to obtain an inspection warrant pursuant to procedures established under the Civil Code of Procedure and permits the State Water Board to conduct an inspection without consent or issuance of a warrant in the event of an emergency affecting public health or safety.
- 3) Requires the State Water Board to adjust all civil and administrative liabilities or penalties related to water rights administration that are imposed by the State Water Board on an annual basis beginning January 1, 2025. The maximum amount of penalties shall be adjusted for inflation based on the California Consumer Price Index. Penalties shall be rounded off to nearest ten, one hundred, one thousand, or five thousand depending on the size of the penalty. Specifies that inflation adjustments are not subject to the Administrative Procedure Act and shall be filed with the Secretary of State.
- 4) Authorizes the State Water Board to issue an interim relief order to enforce any of the following with respect to water held under any basis of right:
 - a) The reasonable use doctrine enshrined in Section 2 of Article X of the Constitution;
 - b) The public trust doctrine;
 - c) Water quality objectives, principles and guidelines to implement the state policy for water quality control, water quality control plans, or diversion and use of water for cannabis cultivation;
 - d) Requirements of water right permits, licenses, certificates, and registrations;
 - e) General state policy on water use, water rights, and prohibition on use of potable water for landscape irrigation when recycled water is available; and
 - f) Section 5937 of the Fish and Game Code.

- 5) Authorizes the State Water Board to commence an interim relief proceeding on its own motion or upon the petition of an interested party. Provides that a petition shall include all of the following:
 - a) Name and address of petitioner;
 - b) A description of the specific diversion or use of water being contested;
 - c) A statement of petitioner's interest in the contested use of water;
 - d) Identification of adjudicative proceedings in which interim relief is requested;
 - e) A description of the harm or injury complained of;
 - f) An explanation of the nexus between the diversion or use and the alleged harm or injury;
 - g) The relief requested by petitioner;
 - h) A statement of reasons why relief is justified; and
 - i) Any additional information deemed appropriate by the State Water Board.
- 6) Provides that that State Water Board may dismiss a petition that does not raise substantial issues that are appropriate for review.
- 7) Requires the State Water Board to provide at least 10 days' notice before a hearing date on the issuance of an interim relief order.
- 8) Authorizes the State Water Board to issue an interim relief order before providing an opportunity for hearing in either of the following cases:
 - a) The State Water Board finds that immediate compliance with an order is necessary to prevent imminent or irreparable injury to other legal users of water or to instream beneficial uses; or
 - b) The motion or petition alleges a violation of an emergency order, emergency regulation, or regulation adopted by the State Water Board to curtail diversions to protect instream flows or prior water rights.
- 9) Provides that if the State Water Board issues an interim relief order before providing opportunity to be heard, it shall hold a hearing within 15 days of receiving a request for hearing unless the party that is recipient of an interim relief order agrees to an extension of that period.
- 10) Provides that the State Water Board may require that evidence submitted at a hearing on an interim relief order be based on declarations under penalty of perjury, the testimony of witnesses at the hearing, or both. Requires the State Water Board to also consider oral or written arguments that are provided in a timely manner and permits the State Water Board to establish a schedule for filing declarations, exhibits, and written arguments.

- 11) Provides that if the State Water Board issues an interim relief order after considering the declaration of any witness who is not made available during the hearing for cross-examination, the interim relief order shall only remain in effect for a period not to exceed 180 days unless the party agrees to an extension.
- 12) Requires the State Water Board to consider all relevant circumstances, including available information concerning the effects on other legal users of water, fish, wildlife, and other instream beneficial uses, the extent of harm, the necessity for relief, and any appropriate measures to minimize any adverse effects of interim relief when determining whether to provide interim relief. Provides that sufficient grounds shall exist for interim relief upon the same showing as would be required for a superior court to grant a preliminary injunction.
- 13) Provides that an interim relief order may require a water user to do any of the following:
 - a) Cease all harmful practices;
 - b) Employ specific procedures and operations to prevent or mitigate the harm;
 - c) Complete technical and monitoring work and prepare and submit reports on that work, including draft environmental documentation;
 - d) Participate in, and provide funding for, studies that the State Water Board determines are reasonably necessary to evaluate the impact of the diversion or use subject to the interim relief order; or
 - e) Take other required action.
- 14) Requires the State Water Board to set a schedule as soon as reasonably possible for consideration of permanent relief if it orders interim relief. Specifies the contents of said schedule, including actions to be taken by the water user subject to interim relief, and provides that any permanent relief shall be granted after notice and opportunity for hearing.
- 15) Clarifies that the issuance of an interim relief order is subject to a Class 8 categorical exemption from the California Environmental Quality Act (CEQA) pertaining to actions by regulatory agencies for the protection of the environment.
- 16) Provides that the State Water Board may review and revise an interim relief order after providing notice and opportunity for hearing to all parties.
- 17) Authorizes the State Water Board to refer a matter to the Attorney General for action in superior court to obtain a temporary restraining order, preliminary injunction, or permanent injunction if a water user does not comply with an interim relief order.
- 18) Provides that an entity that violates an interim relief order is liable for a civil penalty imposed by superior court or administratively by the State Water Board not to exceed the following:
 - a) \$10,000 per day the violation occurs; and
 - b) \$5,000 per AF of water diverted in violation of an interim relief order.

- 19) Requires an aggrieved party to exhaust its administrative remedies before seeking judicial review of an allegation that the State Water Board has not complied with CEQA only if the initial decision or order subject to challenge is issued under authority delegated to an officer or employee of the State Water Board.
- 20) Provides that the scope of judicial review for an interim relief order shall be the same as for a court of appeal review of a superior court decision granting or denying a preliminary injunction.
- 21) Increases penalties for water right violations or violations of orders or regulations issued by the State Water Board from \$500 per day of violation to the sum of the following:
 - a) \$10,000 per day of violation; and
 - b) \$2,500 per AF of water diverted in violation of a water right, regulation, or order.

EXISTING LAW:

- 1) 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).
- 2) 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).
- 3) 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).
- 4) 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 to 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).
- 5) Declares the Legislature's intent that the State Water Board take vigorous action to enforce the terms and conditions of permits, licenses, certifications, and registrations to appropriate water, to enforce State Water Board orders and decisions, and to prevent unlawful diversion of water (Water Code § 1825).
- 6) Authorizes the State Water Board to issue a cease and desist order (CDO) 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).

- 7) Imposes a penalty of up to \$500 per day for violations of water rights or orders or regulations adopted by the State Water Board (Water Code § 1846).
- 8) Requires the owner of any dam to allow sufficient water to pass below a dam at all times to keep in good condition any fish below the dam (Fish and Game Code § 5937).

FISCAL EFFECT: Unknown. This bill is keyed fiscal.

COMMENTS:

- 1) **Purpose of this bill.** According to the author, climate change is challenging California's water rights system like never before. Extreme drought and weather events are revealing some inherent weaknesses and gaps in the existing system. One of these areas is in the State Water Board's ability to enforce the water rights system and the author contends that "the State Water Board lacks an enforcement tool to immediately halt illegal water diversions that cause harm to other water right holders or public trust resources. Instead, the State Water Board typically issues a [cease and desist order (CDO)] when it becomes aware of unlawful water use. The recipient of the CDO has up to 20 days to request a hearing on the CDO. This lag can result in substantial amounts of water being diverted unlawfully and can result in significant harm." The author acknowledges that the State Water Board has the option to refer an enforcement matter to the Attorney General who can then seek a temporary restraining order or preliminary injunction in a court with jurisdiction over the alleged violation; however, referring the matter, making a filing, and obtaining a hearing can take time. In instances where harm is occurring, several days may pass before the Attorney General is able to secure relief on behalf of the State Water Board and the general public. To allow the State Water Board to act more swiftly, this bill grants the State Water Board an enforcement tool to take immediate action to stop harm resulting from an illegal water diversion.

The author also maintains that the current penalties for illegal diversions are insufficient to be an effective deterrent: "at \$500/day per violation, these penalties are insubstantial relative to the value of water, especially during drought periods. Because of these low penalties, unlawful diversion of water is viewed by some as a 'cost of doing business.' If this practice becomes normalized, it will undermine the entire system of water rights in the state."

- 2) **Background.** As the primary regulator of water rights in the state, the State Water Board has various enforcement tools to administer the water rights system. It can issue informational orders to determine whether a person is adhering to its water right or unlawfully diverting and using water, issue notices of violations to attempt to get a violator to comply with the law, issue cease and desist orders (CDO) to compel a person to halt unlawful use or diversion of water, and impose administrative civil liability penalties on violators. Prior to issuing a CDO, the State Water Board must provide notice and opportunity for an evidentiary hearing. A party receiving the notice has 20 days to request or decline a hearing. This bill would establish a new enforcement tool, an interim relief order that would require 10-day notice of opportunity for hearing or, in cases where injury is imminent or irreparable, an interim relief order could be issued before an opportunity for hearing. A party subject to an interim relief order issued before an opportunity for hearing would be granted an opportunity for a hearing within 15 days. The courts have concurrent jurisdiction over water rights and all State Water Board decisions are subject to judicial review. The State Water Board can also refer matters

to the Attorney General to pursue judicial remedies for illegal water diversion and use.

Shasta River Water Association (SRWA). Due to drought conditions, the State Water Board adopted emergency regulations in August 2021 to establish minimum instream flows to protect Chinook salmon, coho salmon, and steelhead in the Scott and Shasta River watersheds. Pursuant to these regulations, the State Water Board issued curtailment notices to senior water right holders (to a priority date of April 1885) in the watershed on August 2, 2022. Though subject to the curtailment order issued by the State Water Board, SRWA began diverting water from the Shasta River on August 17, 2022. State Water Board staff observed a precipitous decline in flows on the Shasta River once SRWA began illegally diverting water and observed SRWA's point of diversion during the illegal activity. The State Water Board expeditiously provided notice and a draft CDO to SRWA, which had 20 days to request a hearing. After eight days, SRWA ceased its illegal diversion and a hearing never occurred. The State Water Board eventually imposed the maximum penalty allowable on SRWA: \$4,000 (\$500 per day for eight days). It appears that SRWA viewed that paying the minimal allowable fine was simply a cost of doing business. The State Water Board could have referred this matter to the Attorney General in order to seek a temporary restraining order or preliminary injunction to halt illegal activity, but it is unclear how long this would have taken and whether such action would have been timely given that the duration of SRWA's violation was eight days.

Updating California Water Laws to Address Drought and Climate Change (February 2022). A group of legal scholars and individuals with decades of experience in California's water sector released a series of recommendations to update California's water rights laws in response to drought and climate change. The authors note that nearly 1 million Californians lack access to safe drinking water, domestic wells have been going dry at an unprecedented rate, and more than 100 freshwater-dependent species of plants and wildlife are listed as threatened or endangered under state and federal protection laws, including 18 native fish species that are "highly vulnerable to extinction." The report asserts that "California's current system of water laws is ill-equipped to respond to modern water shortages. California's water laws need to be reassessed to address today's challenges, safeguard the health, safety, and livelihoods of California's 40 million residents, support its economy, and protect California's imperiled ecosystems." This bill is based on the report's recommendation (#7) to provide the State Water Board with interim relief authority.

California's Water Supply Strategy, Adapting to a Hotter, Drier Future (August 2022). Governor Newsom released this strategy to address a projected 10% decrease in water supply (6 million to 9 million AF of water) by 2040 due to climate change. To address this shortfall, the strategy sets targets and outlines actions for increased water recycling, desalination, stormwater capture, and water conservation as well as an expansion of 4 million AF of surface and underground storage. Achieving the targets laid out in the strategy would "close the evaporative gap." The strategy does include action on water rights: "water rights modernization and reform is a critical component of ensuring we can efficiently and effectively adapt to a changing climate." Some of the steps to modernize water rights include improved data and forecasting, modern data infrastructure, upgrading infrastructure to move water more flexibly, and "increased capacity to halt water diversions when the flows in streams diminish."

- 3) **Arguments in support.** This bill is co-sponsored by the Planning and Conservation League, California Trout, and Trout Unlimited (co-sponsors), which state that this bill “will protect the human right to water, agricultural communities that depend on consistent water allocations, and the rights of all Californians to enjoy access to our water resources that our fish depend on.” The co-sponsors point to the SRWA case last summer as evidence that this bill is needed as they “intentionally turned on their pumps despite being under curtailment orders, fully acknowledging that the penalty was a cost of doing business.” The co-sponsors observe that the actions of SRWA on a critical salmonid tributary to the Klamath River was “likely lethal to salmonids.” Finally, the co-sponsors maintain that “this bill would only affect those violating existing law. Effective enforcement of penalties for violators is critical as the state continues to battle and judiciously allocate available water.”
- 4) **Arguments in opposition.** A number of water agencies, local agencies, and water and agricultural associations oppose this bill arguing that it grants the State Water Board overly broad authority and casts doubt on the validity of vested rights. The points raised by the California Municipal Utilities (CMUA) are illustrative of concerns raised by others. CMUA maintains that this bill calls into question water supply for urban communities thereby adding challenges to building more housing. CMUA also expresses concerns that this bill goes well beyond the SRWA case discussed above, allowing the State Water Board to issue an interim relief order to enforce the reasonable use doctrine, Fish and Game Code § 5937, and the public trust doctrine, which are all actions that require “fact-finding and balancing – which is something only an adjudicator should be able to do.” CMUA further contends that this bill violates due process by allowing the State Water Board to take action before providing an opportunity for hearing. Finally, CMUA argues that the form of interim relief, which includes technical and monitoring work and reimbursement to the State Water Board, is “expensive and overly expansive.” CMUA does state that it supports “enforcement against illegal diversions” and “agrees that sufficient fines may be necessary to discourage and prevent illegal diversion,” but contends the authority provided by this bill is excessive.
- 5) **Double-referral.** This bill is also referred to the Judiciary Committee.
- 6) **Related legislation.** AB 1337 (Wicks) of the current legislative session authorizes the 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. AB 1337 is set for hearing in 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.

SB 681 (Pavley) of 2009, among other provisions, would have granted the State Water Board interim relief authority similar to this bill. SB 681 died on the Senate Floor.

SB 229 (Pavley) of 2009, among other provisions, would have granted the State Water Board interim relief authority similar to this bill. SB 229 died in Conference Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Trout (co-sponsor)
Planning and Conservation League (co-sponsor)
Trout Unlimited (co-sponsor)
California Coastkeeper Alliance
California Environmental Voters
California Sportfishing Protection Alliance
California Water Impact Network
California Water Research
Clean Water Action
Clean Water Fund
Defenders of Wildlife
Earthjustice
Environmental Working Group
Friends of The Eel River
Friends of The River
Heal the Bay
Institute for Conservation Advocacy Research and Education
Karuk Tribe
Mono Lake Committee
Natural Resources Defense Council
North Bay Jobs With Justice
Northern California Council of Fly Fishers International
Pacific Coast Federation of Fishermen's Association
Restore the Delta
San Francisco Baykeeper
Trust for Public Land
Union of Concerned Scientists
Wholly H2O

Opposition

Agricultural Council of California
Antelope Valley East Kern Water Agency
Association of California Egg Farmers
Association of California Water Agencies
Bellflower Somerset Mutual Water Company
Byron-Bethany Irrigation District
California Alfalfa & Forage Association
California Apple Commission
California Association of Wheat Growers
California Association of Winegrape Growers
California Bean Shippers Association
California Blueberry Association
California Blueberry Commission
California Building Industry Association
California Business Properties Association
California Cattlemen's Association

California Chamber of Commerce
California Cotton Ginners and Growers Association
California Farm Bureau
California Fresh Fruit Association
California Grain and Feed Association
California Manufacturers and Technology Association
California Municipal Utilities Association
California Pear Growers Association
California Seed Association
Carmichael Water District
Central Delta Water Agency
City of Corona
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
El Dorado Irrigation District
Elsinore Valley Municipal Water District
Friant Water Authority
Grower-shipper Association of Central California
Humboldt Bay Municipal Water District
Imperial Irrigation District
International Bottled Water Association
Kern County Water Agency
Kings River Conservation District
Kings River Water Association
Lake Arrowhead Community Services District
Manteca Chamber of Commerce
McKinleyville Community Services District
Mesa Water District
Modesto Irrigation District
Mojave Water Agency
Montecito Water District
Napa County Flood Control and Water Conservation District
Northern California Water Association
Oakdale Irrigation District
Olive Growers Council of California
Pacific Egg & Poultry Association
Palmdale Water District
Pinedale County Water Agency
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 Geronio PASS Water Agency
San Joaquin River Exchange Contractors Water Authority
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
Tranquillity Irrigation District
Tri-county Water Authority
Tuolumne County Water Agency
Tuolumne Utilities District
Turlock Irrigation District
Valley Ag Water Coalition
Valley Center Municipal Water District
Walnut Valley Water District
Western Agricultural Processors Association
Western Growers Association
Western Municipal Water District
Western Plant Health Association
Wine Institute
Yuba Water Agency

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