

Date of Hearing: April 18, 2023

ASSEMBLY COMMITTEE ON WATER, PARKS, AND WILDLIFE

Rebecca Bauer-Kahan, Chair

AB 830 (Soria) – As Amended March 28, 2023

SUBJECT: Lake and streambed alteration agreements: exemptions

SUMMARY: Exempts the temporary operation of existing infrastructure or temporary pumps being used to divert flood stage and monitor stage flows to beneficial groundwater recharge necessary to protect downstream life and property from the requirements of the lake and streambed alteration agreement (LSAA) process. Specifically, **this bill:**

- 1) Exempts the temporary operation of existing infrastructure or temporary pumps being used to divert flood stage and monitor stage flows, as identified by the California Nevada River Forecast Center or the State Water Resources Control Board (State Water Board), to beneficial groundwater recharge necessary to protect downstream life and property from the requirements of the LSAA process.
- 2) Applies the requirement to notify the Department of Fish and Wildlife (DFW) of the work, in writing, within 14 days of beginning the work to the new exemption.

EXISTING LAW:

- 1) Prohibits a person, a state or local governmental agency, or a public utility from substantially diverting or obstructing the natural flow of, or substantially changing or using any material from the bed, channel, or bank of, any river, stream, or lake, or depositing or disposing of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake, unless prescribed requirements are met, including written notification to DFW regarding the activity [Fish and Game Code (FGC) § 1600 *et seq.*]
- 2) Requires DFW to determine whether the activity may substantially adversely affect an existing fish and wildlife resource and, if so, to provide a draft LSAA to the entity within 60 days. Specifies that the entity has 30 days to contest or accept the draft LSAA. If contested, DFW must meet with the entity within 14 days of receiving the response to resolve the issues presented (FGC § 1603).
- 3) Exempts, for activities for which notice was given and an LSAA with DFW was attained prior to January 1, 1977, routine maintenance and operation of water supply, drainage, flood control, or waste treatment and disposal facilities, after the initial notification and LSAA, unless the work or conditions affecting fish and wildlife resources have substantially changed and those resources are adversely affected by the activity under the LSAA (FGC § 1602).
- 4) Exempts immediate emergency work necessary to protect life or property, immediate emergency repairs to public service facilities necessary to maintain a service as a result of a disaster in an area subject to gubernatorial emergency declaration, or emergency projects undertaken to maintain, repair, or restore an existing highway damaged as the result of natural disaster, from the need to obtain an LSAA (FGC § 1610).

- 5) Defines “emergency” to mean a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. “Emergency” includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage (FGC § 1601, which references the definition in Public Resources Code § 21060.3).
- 6) Requires the entity performing the emergency work to notify the DFW of the work, in writing, within 14 days of beginning the work, and specifies that any work described in the emergency notification that does not meet the criteria for the emergency work is a violation of the provisions of the LSAA statute if the entity did not first notify DFW in accordance with FGC § 1602 or § 1611 (FGC § 1610).

FISCAL EFFECT: Unknown. This bill is keyed fiscal.

COMMENTS:

- 1) **Purpose of this bill.** This bill exempts the temporary operation of existing infrastructure or temporary pumps being used to divert flood stage and monitor stage flows to beneficial groundwater recharge from obtaining an LSAA. The author states, “it is crucial that we provide every possible tool to water managers in our state, ensuring they can capture wet-year water and put it to beneficial use in dry years. [This bill] is a common-sense approach that will support water managers – especially groundwater sustainability agencies – by allowing them to divert identified near-flood and flood-stage water into groundwater recharge by spreading that water onto farm fields and other open land.”
- 2) **Background.** The LSAA program requires any person, state or local governmental agency, or public utility to notify DFW and receive approval prior to beginning any activity that may do one or more of the following:
 - Divert or obstruct the natural flow of any river, stream, or lake;
 - Change the bed, channel, or bank of any river, stream, or lake;
 - Use material from any river, stream, or lake; or
 - Deposit or dispose of material into any river, stream, or lake.

The “lake and streambed alteration” statute begins at FGC § 1600. It contains the provisions relating to LSAAs that, when issued, determine the extent to which a planned activity within a stream or river may adversely affect fish or wildlife or habitat and what off-setting mitigation may be required. In the absence of an LSAA, an entity may not substantially divert or obstruct the natural flow of a stream or deposit or dispose of material. Existing law requires the entity to notify DFW, which triggers the negotiation of the standards that may apply to the request. At that point, the entity and DFW enter into an LSAA that contains any necessary provisions to mitigate the planned activity’s potentially adverse consequences. Before issuing an LSAA, DFW typically must comply with the California Environmental Quality Act (CEQA).

The LSAA law was enacted first in 1970, reenacted in 1976, and amended in 2003, but the purpose of the law has never changed. The law declares “the protection and conservation of the fish and wildlife resources of this state are of utmost public interest. Fish and wildlife are

the property of the people and provide a major contribution to the economy of the state, as well as providing a significant part of the people's food supply; therefore their conservation is a proper responsibility of the state.”

Under historical practice, an LSAA could be required for an activity adversely affecting a river, stream, or lake, including those that are episodic and dry for periods of time. An LSAA may also apply to work undertaken within the floodplain of a body of water.

Recent executive orders relating to drought and groundwater recharge have exempted some projects from LSAA or CEQA review of LSAA. The Governor's recent Executive Order N-4-23 exempts groundwater recharge projects that redirect flood flows occurring between March 10, 2023, and June 1, 2023, from the need to have an LSAA. Projects must adhere to specified criteria, including the need for simple screens to be installed on temporary pump intakes and limitations on where the water can be diverted to in order to prevent water quality issues.

Flood mitigation and emergency use. The term “emergency” in this section of the Fish and Game Code is defined as a sudden, unexpected occurrence involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services, and can include fire, flood, earthquake, soil movements, or other manmade occurrences of large-scale damage. As such, an LSAA exemption typically applies in response to an emergency, but not in anticipation of such an emergency. Under the new exemption proposed by this bill, only flood stage and monitor stage flows, as identified by the California Nevada River Forecast Center or the State Water Board, may be diverted.

State Water Board permit needed. Diversion of flood flows for groundwater recharge requires a temporary permit from the State Water Board. Temporary permits are not water rights. Temporary permits are a conditional approval to divert and use available water that has not been claimed by a water right holder. Permits are junior to all water rights and include terms and conditions that prohibit diversions in times of water shortage when the demands of other right holders may not be met. There are two options for temporary permits for groundwater recharge (180 day permits and 5 year permits). Temporary permits can usually be processed more quickly than standard permits and may be renewed, but are subject to change or revocation at any time.

Temporary permits generally are required to comply with CEQA. Independent from CEQA, the State Water Board must consider the effect of the project on public trust resources and where feasible, avoid or minimize harm to those resources. If all or a portion of a project is found to be exempt from CEQA, an analysis will still be needed to evaluate the project's effects on public trust resources and the beneficial uses of water. Public trust resources may include, but are not limited to, wildlife, fish, aquatic dependent species, streambeds, riparian areas, tidelands, and recreation. Governor Edmund G. Brown Jr.'s Executive Order B-39-17, dated April 6, 2017, directs the State Water Board to prioritize temporary water right permits to accelerate approvals for projects that enhance the ability of a local or state agency to capture high runoff events for local storage or recharge, consistent with water rights priorities and protections for fish and wildlife. The Order also suspends CEQA for State Water Board actions on these types of temporary permits.

To simplify the process used to determine whether water is available for appropriation, the State Water Board Division of Water Rights (Division) in its *Water Availability Analysis for Streamlined Recharge Permitting* has identified two possible methods for a demonstration of water availability during high flow conditions by new diversions:

- “90th Percentile/20 Percent Method” (90/20 method): The 90/20 method assumes that flows above the 90th percentile daily flow, between December 1 and March 31, are protective of aquatic ecosystem functionality if the total amount of water diverted is capped at 20 percent of the daily flow. The 90th percentile metric is readily available through the U.S. Geological Survey (USGS) Daily Streamflow webpage.
- Threat of Flood Conditions: This method relies on the presence or imminent threat of flood conditions to demonstrate water availability, such as when flows exceed thresholds that trigger flood control actions necessary to avoid threats to human health and safety. These thresholds and actions are established in written flood management protocols adopted by a flood control agency that determines that flood control actions are necessary during the time of diversion. Flood conditions must be present in the waterbody that is the source of the diversion.

3) **Policy considerations.** The author and sponsors cite the recent notification by the sponsors to DFW, and subsequent issuance of an LSAA, for a Flood-MAR (Managed Aquifer Recharge) project in eastern Merced County as the need for this bill. The project would divert flood flows from Mariposa, Deadman, and Dutchman Creeks and North Slough. Flood-MAR is a voluntary activity in which individual landowners divert flood and stormwater onto their fields from nearby streams as a means of recharging groundwater. The background materials provided to the committee for this bill state that, “the required Lake and Streambed Alteration permit from [DFW] was burdensome, impractical, and unfeasible to most potential diverters under the permit.”

However, DFW determined that an LSAA was needed for those activities because the proposed Flood-MAR project in Merced County could substantially adversely affect existing fish or wildlife resources. The LSAA that was issued includes measures necessary to protect those resources, including requirements for screens on pump intakes, maximum instantaneous diversion rates, work timing requirements, and reporting requirements, among other provisions.

Similar to previous legislation relating to LSAAs, it is unclear that the LSAA process itself is preventing projects from moving forward. Rather, the mitigation requirements imposed on the entities by DFW are viewed as too onerous for them to pursue their intended project. For projects like Flood-MAR, which likely involve advance planning and a commitment from willing landowners, an LSAA may be appropriate and necessary. Under FGC § 1605, an LSAA can have a term of up to five years, and be renewed for an additional five years.

The exemption from LSAA proposed by this bill states that diverting flood stage and monitor stage flows for groundwater recharge is necessary to protect downstream life and property. However, immediate emergency work, including water pumping, necessary to protect life or property is already exempted from the LSAA process under FGC § 1610(a)(1). Diverters may conduct such work without the need to notify DFW and obtain an LSAA, or to comply

with the terms of existing LSAA's.

- 4) **Suggested committee amendments.** The committee may wish to amend subparagraph (4) of this bill with criteria to ensure that minimum environmental protections similar to Executive Order N-4-23 apply to the LSAA exemption as follows:

(4) The temporary operation of existing infrastructure or temporary pumps being used to divert flood stage and monitor stage flows, as identified by the California Nevada River Forecast Center or the State Water Resources Control Board, to beneficial groundwater recharge ~~necessary to protect downstream life and property~~ *as long as all of the following conditions are met:*

(A) The diversions cease when the flows are no longer flood stage or monitor stage flows.

(B) Any water diverted is not diverted to and will not be applied to:

(i) dairy land application areas;

(ii) any agricultural field where pesticide or fertilizer application has occurred in the prior 30 days;

(iii) any area that could cause damage to critical levees, infrastructure, wastewater and drinking water systems, drinking water wells or drinking water supplies, or exacerbate the threat of flood and other health and safety concerns; or

(iv) any area that has not been in active irrigated agricultural cultivation within the past three years, including grazing lands, annual grasslands, and natural habitats. This limitation does not apply to facilities already constructed for the purpose of groundwater recharge or managed wetlands.

(C) The diversion uses:

(i) either existing diversion infrastructure or temporary pumps;

(ii) existing groundwater recharge locations, where available;

(iii) no new permanent infrastructure or permanent construction; and

(iv) simple screens installed on pump intakes to minimize the impacts of diversion to salmon and other aquatic life.

- 5) **Arguments in support.** Several agricultural organizations and irrigation districts write in support. The Merced Irrigation District states that this bill “would support groundwater recharge done by private landowners who voluntarily agree to take water from nearby streams that have either reached flood stage or flood-monitor stage.”

- 6) **Related legislation.** AB 1581 (Kalra) of the current legislative session exempts certain entities authorized to import, export, take, or possess any endangered species, threatened species, or candidate species for scientific, educational, or management purposes from the requirement to obtain an LSAA, but still requires a similar notification process. AB 1581 is set for a hearing in the Assembly Water, Parks, and Wildlife Committee.

AB 1024 (Aguiar-Curry) of the current legislative session exempts entities that hold a registration for small domestic, small irrigation, or livestock stockpond water use from the requirement to enter into an LSAA. AB 1024 is set for a hearing in the Assembly Water, Parks, and Wildlife Committee.

AB 1458 (Frazier) of 2021 would have exempted fire-prevention and mitigation measures approved by a state or local agency from the LSAA process. AB 1458 was never heard in the Assembly Water, Parks, and Wildlife Committee.

AB 1420 (Aguiar-Curry) of 2017 was substantially similar to AB 1024 of the current legislative session. AB 1420 died in the Senate Appropriations Committee.

SB 506 (Nielsen) of 2017 would have limited diversions and obstructions regulated by an LSAA and would exempt maintenance and repair facilities for in-stream agricultural diversions. SB 506 was vetoed by the Governor.

SB 1026 (Nielsen) of 2016 would have limited diversions and obstructions regulated by the LSAA process and would have exempted maintenance and repair of facilities for in-stream agricultural diversions. SB 1026 failed passage in the Senate Natural Resources and Water Committee.

SB 418 (Sher), Chapter 736, Statutes of 2003, revised and reauthorized the LSAA process.

REGISTERED SUPPORT / OPPOSITION:**Support**

A Voice for Choice Advocacy
Joseph Gallo Farms
Legrand-Athlone Water District
Madera County
Merced Irrigation District Water & Power
Modesto Irrigation District
Sandy Mush Mutual Water Company
Turlock Irrigation District
Valley Ag Water Coalition

Opposition

None on file

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