

Date of Hearing: April 18, 2023

ASSEMBLY COMMITTEE ON WATER, PARKS, AND WILDLIFE

Rebecca Bauer-Kahan, Chair

AB 859 (Gallagher) – As Introduced February 14, 2023

SUBJECT: Hunting: navigable waters

SUMMARY: Specifies that hunter trespass on private property is limited to lands and lands temporarily inundated by non-navigable waters, as specified, 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 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 [Fish and Game Code (FGC) § 2016].
- 3) Makes a person who unlawfully obstructs the navigation of any navigable waters guilty of a misdemeanor [Harbors and Navigation Code (HNC) § 131].

- 4) 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).
- 5) 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).
- 6) Establishes the Fish and Game Commission and delegates the authority to regulate the taking or possession of birds, mammals, fish, amphibians, and reptiles (Section 20 of Article IV of the California Constitution; FGC § 200 *et seq.*).
- 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, “our Constitution guarantees the public’s right to access and utilize navigable waters, including for the purposes of hunting and fishing. [This bill] clarifies and protects this important right, ensuring that Californians can continue to enjoy our state’s natural resources.”
- 2) **Background.** Generally, navigable waters “are capable of being navigated by oar or motor-propelled small craft. [...] Navigability may be found despite the fact that the water overlies the land only a seasonal basis.”¹ 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. This section also specifies that the floodwaters 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 not navigable waters and that nothing in HNC § 100 shall be construed as permitting trespass on any such lands. For the purposes of HNC § 100, floodwaters refers to the elevation of water which occurs at extraordinary times of flood and does not mean the water elevation of ordinary annual or recurring high waters

¹ California Attorney General Opinion No. 85-602, https://www.oag.ca.gov/system/files/opinions/pdfs/85-602_0.pdf

resulting from normal runoff. HNC §§ 101 - 106 enumerate certain waterways as being navigable. However, the Attorney General opinion 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.”²

In 1982 (Chapter 1607, Statutes of 1982), the Legislature amended FGC § 2016 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. This section 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.”

Attorney General opinions. California Attorney General Opinion No. 85-602, dated October 10, 1985, 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, irrespective of the underlying land being in private ownership. “The owners of lands under navigable waters, however, do not have an interest in the waters that would be protectable by the Legislature as contemplated in [FGC § 2016].”³ The opinion recognizes that the constitutional right of navigation is unaffected – i.e. traveling by boat over the lands in question does not violate the statute – since FGC § 2016 is only directed at hunting. However, 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 General Opinion No. 97-307 also mentions this and an additional legal analysis comes to a similar conclusion.^{4,5}

Recent related issues. 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. The sponsors of this bill provided the following recent examples:

² Ibid.

³ Ibid.

⁴ California Attorney General Opinion No. 97-307, <https://oag.ca.gov/system/files/opinions/pdfs/97-307.pdf>

⁵ 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. Accessed 4/5/2023 at <https://scholarlycommons.pacific.edu/mlr/vol16/iss1/9>

In the late 2000s, a hunter using navigable floodwaters was cited under Section 2016 of the Fish and Game Code by a law enforcement officer for hunting via boat on the Cosumnes River in Sacramento County. During the hearing, the judge was given the relevant State Attorney General's opinions on hunting on navigable waters and the Constitutional protections for that activity. The judge ultimately dismissed the trespassing charge, citing the information and conclusions in the State Opinions.

In the late 2010s, a hunter in the Butte Sink area of Sutter County was hunting by boat on navigable floodwaters and was approached by a local private landowner, who threatened the hunter and then told them to leave immediately or that the sheriff would be called. The hunter left for fear of a further confrontation with the landowner, and did not return to that hunting location for the rest of the season.

In January of 2023, a hunter in the Yolo Bypass was warned by a state law enforcement officer that they may be trespassing when hunting by boat during flood conditions. The hunter's information was taken but they were not cited; however, the law enforcement officer referred the issue to the Yolo County District Attorney, who has yet to charge the hunter with trespassing or any other crime.

Management of hunting. 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 the Existing Law section for some examples.

- 3) **Arguments in support.** A coalition of organizations write in support, stating that this bill “will not only 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 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

Backcountry Hunters and Anglers, California Chapter
Black Brandt Group
Cal-Ore Wetlands and Waterfowl Council
California Bowmen Hunters/State Archery Association
California Deer Association
California Hawking Club
California Houndsmen for Conservation
California Waterfowl Association
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 - San Francisco Bay Area Chapter
San Diego County Wildlife Federation
Suisun Resource Conservation District
Theodore Roosevelt Conservation Partnership
Tulare Basin Wetlands Association

Opposition

None on file

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