



A REGIONAL WATER AGENCY
SINCE 1954

REGULAR MEETING OF THE BOARD OF DIRECTORS

TUESDAY, MAY 2, 2023 – 2:00 P.M.

PUBLIC PARTICIPATION

Public participation is welcome and encouraged. You may participate in the May 2, 2023, meeting of the San Bernardino Valley Municipal Water District online and by telephone as follows:

Dial-in Info: (877) 853 5247 US Toll-free

Meeting ID: 684 456 030

PASSCODE: 3802020

<https://sbvmwd.zoom.us/j/684456030>

If you are unable to participate online or by telephone, you may also submit your comments and questions in writing for the District's consideration by sending them to comments@sbvmwd.com with the subject line "Public Comment Item #" (insert the agenda item number relevant to your comment) or "Public Comment Non-Agenda Item". Submit your written comments by 6:00 p.m. on Monday, May 1, 2023. All public comments will be provided to the President and may be read into the record or compiled as part of the record.

IMPORTANT PRIVACY NOTE: Participation in the meeting via the Zoom app is strongly encouraged. Online participants MUST log in with a Zoom account. The Zoom app is a free download. Please keep in mind: (1) This is a public meeting; as such, the virtual meeting information is published on the World Wide Web and available to everyone. (2) Should you participate remotely via telephone, your telephone number will be your "identifier" during the meeting and available to all meeting participants; there is no way to protect your privacy if you elect to call in to the meeting.



A REGIONAL WATER AGENCY
SINCE 1954

SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT
380 E. Vanderbilt Way, San Bernardino, CA 92408

REGULAR MEETING OF THE BOARD OF DIRECTORS

AGENDA

2:00 PM Tuesday, May 2, 2023

CALL TO ORDER/PLEDGE OF ALLEGIANCE/ROLL CALL

1) PUBLIC COMMENT

Members of the public may address the Board regarding any item within the subject matter jurisdiction of the Board; however, no action may be taken on off-agenda items except as authorized by law. Each speaker is limited to a maximum of three (3) minutes.

2) CONSENT CALENDAR

2.1 Approve Minutes of the Board of Directors' Workshop - Resources/Engineering - April 11, 2023(2 min) - Page 3

[Staff Recommendation - Approve Minutes of the Board of Directors Workshop - Resources/Engineering 041123](#)

2.2 Approve Minutes of the Regular Board of Directors' Meeting - April 4, 2023 (2 min) - Page 11

[Staff Recommendation - Approve Minutes of the Regular Board of Directors Meeting - 041823](#)

3) DISCUSSION AND POSSIBLE ACTION ITEMS

3.1 Receive information regarding proposed Water Rights Legislation(20 min) - Page 17

[Staff Memo - Receive information regarding proposed water rights legislation](#)

[AB 460 Bill Analysis Assembly Water, Parks and Wildlife Committee](#)

[AB 460 Bill Analysis Assembly Judiciary Committee](#)

[AB 1337 Bill Analysis Assembly Water, Parks and Wildlife Committee](#)

[SB389 Bill Analysis Senate Natural Resources and Water Committee](#)

4) REPORTS (Discussion and Possible Action)

4.1 CEO/General Manager's Report(20 min) - Page 64

[CEO/General Manager's Report](#)

3-month Look ahead
Project Status Update

4.2 Directors' Report of Activities and Travel Requests in accordance with Resolution 1100

4.3 General Counsel Report

4.4 SAWPA Meeting Report

5) **FUTURE BUSINESS**

6) **ANNOUNCEMENTS**

6.1 List of Announcements(2 min) - Page 72
[List of Announcements 050223](#)

7) **CLOSED SESSION**

7.1 Conference with Real Property Negotiators Property: Southern California Edison East End Hydroelectric Generation Plants Agency negotiator: Heather Dyer, Wen Huang Negotiating parties: Southern California Edison Company Under negotiation: Price and terms of payment

7.2 Conference with Real Property Negotiators - Pursuant to Government Code Section 54956.8 Property APN 0281-041-67, and a portion of APN 0264-201-31 (approximately 13.5 acres). Agency negotiators: Heather Dyer, Wen Huang, Joanna Gibson. Negotiating parties: Diversified Pacific - Under negotiation: Price and terms of payment.

7.3 CONFERENCE WITH LEGAL COUNSEL- EXISTING LITIGATION (Paragraph (1) of subdivision (d) of Section 54956.9)
Name of case: In re BlueTriton Brands, Inc. (successor by name change to Nestle Waters North America, Inc.) on draft Cease and Desist Order, pending before State Water Resources Control Board Administrative Hearings Office.

8) **ADJOURNMENT**

PLEASE NOTE:

Materials related to an item on this Agenda submitted to the Board after distribution of the agenda packet are available for public inspection in the District's office located at 380 E. Vanderbilt Way, San Bernardino, during normal business hours. Also, such documents are available on the District's website at www.sbvmd.com subject to staff's ability to post the documents before the meeting. The District recognizes its obligation to provide equal access to those individuals with disabilities. Please contact Melissa Zoba at (909) 387-9228 two working days prior to the meeting with any special requests for reasonable accommodation.

**MINUTES
OF
THE
BOARD OF DIRECTORS WORKSHOP – RESOURCES/ENGINEERING
SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT**

April 11, 2023

Directors Present: Gil J. Botello, T. Milford Harrison, June Hayes, and Paul R. Kielhold

Directors Absent: Susan Longville

Staff Present:

Heather Dyer, MS, MBA – Chief Executive Officer/General Manager
 Joanna Gibson, MS – Executive Director Upper SAR Habitat Conservation Program
 Wen Huang, PE, MS – Chief Operating Officer/Assistant General Manager
 Jose Macedo, ML, CPT-P (USA Retired) – Chief of Staff/Clerk of the Board
 Cindy Saks, CPA – Chief Financial Officer/ Deputy General Manager
 Bob Tincher, PE, MS – Chief of Statewide Water Initiatives/Deputy General Manager
 Melissa Zoba, MBA, MPA – Chief Information Officer

Leo Ferrando, PE – Assistant Chief Engineer
 Anthony Flordelis – Business Systems Analyst
 Adekunle Ojo, MPA – Water Resources Manager
 Matthew Olivo – Senior Accountant

Members of the Public in Attendance:

Brian Dickinson, City of Colton
 Joyce McIntire, Yucaipa Valley Water District
 Nyles O’Harra, Yucaipa Valley Water District
 Joseph Zoba, Yucaipa Valley Water District
 Melody McDonald, San Bernardino Valley Conservation District

The Resources/Engineering Workshop of the Board of Directors was called to order by Chairperson June Hayes at 2:00 p.m. A quorum was noted present by the Clerk of the Board.

Agenda Item 1. Introductions. Brian Dickinson with the City of Colton introduced himself.

Agenda Item 2. Public Comment.

Chair Hayes invited public comment. Joyce McIntire of Yucaipa Valley Water District introduced herself and thanked staff for producing Dawn of a New Generation event.

Agenda Item 3. Presentations.

3.1 Summary Findings of the 2022 Change in Storage Report. Water Resources Manager Adekunle Ojo explained this report was presented to the Basin Technical Advisory Committee (BTAC) with slight differences last week and represents a balance sheet for the storage “savings account.”

Mr. Ojo reminded that San Bernardino Valley (SBV) is actively involved in the management of four groundwater basins: Rialto-Colton, San Bernardino, and Yucaipa, along with Riverside.

It is typical for basins to gain or lose storage based on local rainfall, availability of imported water, and management activities, Mr. Ojo explained. He reminded that 2021 was a dry year, and State Water Project (SWP) allocation for 2021 and 2022 was only five percent, resulting in a consistent decline in storage. Rialto-Colton declined by .53 percent, ending 2022 at about 86 percent full (1.5 million acre-feet); San Bernardino declined by almost 93,000 acre-feet (less than 2 percent) and still has about 4.7 million af in storage. Yucaipa Basin had a mild decline in storage and ended 2022 with about 2.2 million af in storage, Mr. Ojo reported.

The basins have been relatively stable throughout the 24 -year drought, Mr. Ojo added. This demonstrates the value of imported water supplies and groundwater production has been consistently below the safe yield. Overall, there is about 10.3 million af of storage capacity, Mr. Ojo stated.

This area alternates between long drought and wet years, Mr. Ojo said, which makes storage essential to manage water here, and the primary water strategy is to capture water when it is available and store it in the groundwater basins. Keeping the basins full also reduces pumping costs for producers and increases water resilience, he added. In addition, the groundwater is high quality and is the lowest cost water available. Preserving the groundwater basins provides the least cost water into the future, he noted.

Mr. Ojo reviewed the proactive water management strategy focused on putting imported water into the ground and maximizing storage this year and pointed to SBV recharge and recycled water projects.

Director Botello pointed out as the high quality water moves downstream to Orange County, it becomes less pristine. Mr. Ojo described the water quality from streambed percolation and downstream dilution. Chief Executive Officer/General Manager Heather Dyer acknowledged urban runoff and more challenging surface water conditions

downstream. She noted that the basin had primarily orchard types of agriculture over the years and has less intensive problems.

Director Botello recalled recent heavy weather systems and asked if the basins were expected to significantly increase. Mr. Ojo noted nature is the best source of groundwater recharge and acknowledged the recent rainfall is not captured in this report. He indicated that when precipitation and demand management is factored, then a positive significant change can be anticipated for 2023.

Mr. Huang explained the 1969 judgment requirements for basin replenishment. He noted that was triggered for the first time in 2018, and SBV has worked with Western Municipal Water District and plaintiff parties to address the issue and recharge in that area. However, as of January and March data, the basin water level is at 829 feet; seven feet above the judgment threshold, he reported. Staff will continue to work on facilities to address the issue in the future, he advised. In response to President Kielhold, Mr. Huang noted the level had been as low as 809 feet. Ms. Dyer emphasized that management efforts must remain diligent.

In response to Director Hayes, Mr. Huang discussed Total Dissolved Solids (TDS) in the system.

3.2 Update on the Upper Santa Ana River Habitat Conservation Plan. Executive Director Upper SAR Habitat Conservation Program Joanna Gibson reviewed activity since the 2022 report. She advised of the release of the Environmental Impact Report (EIR) and ongoing conversations with the US Fish and Wildlife Service (USFWS).

Ms. Gibson detailed revisions made to the EIR in response to USFWS:

- Removal of some large projects which significantly reduced impacts to the San Bernardino Kangaroo Rat (SBKR)
- Differentiation of the ongoing impacts from new impacts in every category of species
- Addition of the four areas of new mitigation land at Sunrise Ranch and Lytle Creek
- Revision of goals and objectives
- Addition of data to demonstrate that the mitigation management would work
- Significant change in analysis of the effects

Documents for the National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA) were separated, and both are being prepared for the Habitat Conservation Plan (HCP), Ms. Gibson advised.

On March 17, a new strategy was agreed upon, remaining items are begin addressed, and the NEPA document is moving forward, Ms. Gibson stated. A Joint Powers Authority (JPA) meeting is scheduled in May to review cost calculations which are a primary component of the participation and financing agreement.

The final EIR is hoped to be ready in June, Ms. Gibson advised. The NEPA document should be finalized by the end of the second quarter, but is dependent on the USFWS, she noted.

Issues with Army Corps of Engineers permitting were experienced with a major component of advanced mitigation strategies: the four tributaries along the main stem of the Santa Ana River, Ms. Gibson indicated. There has been a significant increase in cost for any grading projects, she said, and reviewed the activities for the restoration sites.

Due to the delays, a time extension to March 2025 has been received for the Santa Ana River Conservation and Conjunctive Use Program (SARCCUP) grant and adjustments were made to the work plan, Ms. Gibson explained. She expressed hope that the recent application for a \$3 million grant for Hidden Valley Creek will be successful.

Staff is working on the Sterling Natural Resources Center conservation measures, Ms. Gibson continued. She described the work in progress in the River and noted success in obtaining a grant for work with the Santa Ana sucker and progress on the purple pipe project. Habitat management for the SBKR is ongoing, including cleanup of a homeless encampment. Ms. Gibson noted the presence of a glossy snake on the airport property.

In response to a question from President Kielhold, Ms. Gibson stated there will be an annual amount paid into the JPA for ongoing operational costs by each of the permittees. In addition, there will be a per acre amount for mitigation, based on proportional impacts. Ms. Dyer added that the SBV portion will be about 60 percent, covering the District's large stormwater capture projects, and maintenance and operation of pipelines.

Chief of Staff/Clerk of the Board Jose Macedo read public comments from Ms. McDonald and Mr. O'Harra.

Director Hayes asked about the canceled projects. Ms. Gibson explained they would be cost prohibitive in terms of needed mitigation. She reminded that there are only three populations SBKR remaining and there is little mitigation land available. Staff is working on siting other projects in areas that are already impacted to reduce mitigation obligations, she explained.

Ms. Gibson described the EPA-approved methods for addressing non-native plants in response to Vice President Hayes.

Director Botello recalled the presence of the invasive trees and noted the problem of toxicity if they caught on fire. Ms. Gibson described the strategy for removal.

In response to Director Botello, Ms. Gibson noted there are nearly 400 acres of SBKR critical habitat at Sunrise Ranch. She provided details on the identified 400 to 500 acres of conservation areas for mitigation.

Agenda Item 4. Discussion And Possible Action Items.

4.1 Consider Operation Agreement for the Santa Ana River Conservation and Conjunctive Use Program (SARCCUP). Chief of Statewide Water Initiatives/Deputy General Manager Bob Tincher provided background on the SARCUUP program for arundo removal, the habitat projects, water use efficiency, and the groundwater bank, which is the largest portion of the program.

The SARCUUP groundwater bank serves to store SBV's surplus imported water supplies in wet years, Mr. Tincher continued. The primary management strategy is to capture water in wet years to be available in dry years to enhance water supply reliability, he explained. The storage location is nearby and more accessible. In the Metropolitan Water District (MWD) area, this new source provides an extraordinary supply, he explained.

The San Bernardino Basin is the largest storage area in the SARCUUP program, which totals 137,000 acre-feet (af) of storage (about the size of Lake Perris), Mr. Tincher explained. Participating agencies anticipate getting a little more than 11,000 af per year for three years once the program is full, he noted.

SBV has no facilities in the program and returns water to the agencies via an exchange with MWD, Mr. Tincher said.

Mr. Tincher provided an overview of how SBV works with both SARCUUP and the Bunker Hill Conjunctive Use Program (BHCUP), which is the facilities side of the program still being developed. The Basin is a shared resource with retail agencies, and is better with a conjunctive use program, but the Watermaster will likely need to acknowledge the program and create an agreement to acknowledge the storage and the plaintiff parties' use, he advised.

The Integrated Regional Urban Water Management Plan developed with partner agencies indicated that it makes sense to do a conjunctive use plan or proposal for the region to consider and provided guidelines, Mr. Tincher said. The plan would be submitted to BTAC for review and recommendation to the Watermaster, he explained.

Mr. Tincher reviewed the existing process including an ordinance regarding surplus water. He emphasized that the agreement gives no authority to staff to declare water surplus, it sets up a framework for staff to work on operating SARCUUP but any financial decisions or declarations of surplus come back to the Board.

A declaration of surplus water would be brought to the Board for consideration, and the ordinance gives staff criteria to consider when making a recommendation, Mr. Tincher indicated. Staff has been transparent with partners, noting there are no guarantees of water available for the SARCUUP program, he noted. He pointed to existing agreements and reminded the Board that the program has been approved in concept, but the detailed agreement is still waiting for analysis to be finished.

Mr. Tincher provided modeling data showing the advantage of conjunctive use. Agencies interested in SBV's portion of SARCUUP are Yucaipa Valley Water District and the San Gorgonio Pass Water Agency, he noted. Each agency has requested about 20,000 af of storage in the basin, but SBV's portion is 34,250. The other 29,750 af is for partners, Mr. Tincher stated. The extra storage space needed to get to the total of 40,000 af is available in the BHCUP, he noted.

Mr. Tincher explained the existing agreements have already been executed and reiterated the agreement before the Board provides governance in terms of staff structure to work with the other partners on operating the program and sets dates. Specific decisions must come back to the Board for approval, he assured.

Mr. Tincher outlined the process for the sale of surplus water, reporting of accounting transactions, and production of an annual report.

The term of the agreement is the same as the 2021 SARCUUP agreement (December 31, 2035) with ability to be extended, Mr. Tincher noted. The agreement has been approved as to form by house Counsel, he noted.

Director Botello asked how the agreements might impact the availability of State Project Water that is sold to Groundwater Council retailer members, and if it would negatively affect local partners. There is no impact, Mr. Tincher explained. In order for water to be declared surplus, staff would need to show the Board that all needs have been met and no agency in the District wants to purchase supplemental water, and the basins are full with no storage space left. One condition that could occur is a limitation based on facility constraints, which would result in water otherwise lost to the ocean, he noted.

In response to Vice President Hayes, Mr. Tincher noted that costly infrastructure may have to be built to take more than 11,000 af in one year. The faster the extraction of water, the more costly, he stated. There are also limitations on exchanges, he advised. This was based on what was believed would be a feasible number, he indicated, but may change over time. If all water has been extracted by the third year, the storage account must be built back up again before extracting more, he noted. This agreement does not allow for mining water out of the Basin.

Vice President Hayes asked about the process for an agency drilling another well into the Basin. Mr. Huang noted that a new well would require a CEQA process and assurance that no one else is being harmed. He pointed out the exception in the Institutional Control and Settlement Agreement Area (ICSA) within the City of San Bernardino which requires a modeling exercise to assure there is no harm to the current remedy in place.

West Valley Water District is interested in another well and has reached out to the City of San Bernardino to begin discussion, and other Baseline Feeder stakeholders are also interested in wells, Mr. Huang advised.

The Board of Directors authorized the Chief Executive Officer / General Manager to execute the Operation of the Santa Ana River Conservation and Conjunctive Use Program Water Banking Facilities Interagency Agreement (SARCUUP Operation Agreement) by the following roll-call vote:

| | | |
|----------------|------------------------------------|---------------|
| Moved: Botello | Second: Harrison | APPROVED: 4-0 |
| AYES: | Botello, Harrison, Hayes, Kielhold | |
| NOES: | None | |
| ABSTAIN: | None | |
| ABSENT: | Longville | |

2:20 p.m. - Chief Executive Officer/General Manager Heather Dyer excused herself from the remainder of the meeting.

4.2 Consider Adoption of Resolution No. 1174 in support of Ernesto A. Avila as a candidate for the Association of California Water Agencies' Vice- President. Director Milford Harrison advised that Mr. Avila serves as chairman of the ACWA Local Government Committee and has been deeply involved. He recommended support. There was a short discussion.

The Board of Directors adopted Resolution No. 1174 in support of Ernesto A. Avila as a candidate for the Association of California Water Agencies Vice President by the following roll-call vote:

| | | |
|-----------------|------------------------------------|---------------|
| Moved: Kielhold | Second: Botello | APPROVED: 4-0 |
| AYES: | Botello, Harrison, Hayes, Kielhold | |
| NOES: | None | |
| ABSTAIN: | None | |
| ABSENT: | Longville | |

RESOLUTION NO. 1174

A RESOLUTION OF THE BOARD OF DIRECTORS OF SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT IN SUPPORT OF THE NOMINATION OF CONTRA COSTA WATER DISTRICT PRESIDENT ERNESTO A. AVILA AS A CANDIDATE FOR THE POSITION OF ACWA VICE PRESIDENT

(See Resolution Book)

Agenda Item 5. Future Business. None.

Agenda Item 6. Adjournment

The meeting was adjourned by Chair Hayes at 3:33 p.m.

| |
|---|
| <p>APPROVAL CERTIFICATION</p> <p>I hereby certify to approval of the foregoing Minutes of San Bernardino Valley Municipal Water District.</p> <hr/> <p>Secretary</p> <p>Date _____</p> |
|---|

Respectfully submitted,

Lynda J. Kerney
Contract Assistant

**MINUTES
OF
THE
REGULAR BOARD MEETING
SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT**

April 18, 2023

Directors Present: Gil J. Botello, T. Milford Harrison, June Hayes, Paul R. Kielhold, and Susan Longville.

Directors Absent: None.

Staff Present:

Heather Dyer, MS, MBA – Chief Executive Officer/General Manager
Wen B. Huang, PE, MS – Chief Operating Officer/Assistant General Manager
Jose Macedo, ML, CPT-P (USA Retired) – Chief of Staff/Clerk of the Board
Cindy Saks, CPA – Chief Financial Officer/Deputy General Manager
Bob Tincher, PE, MS – Chief of Statewide Water Initiatives/Deputy General Manager
Greg Woodside – Chief of Planning and Watershed Resilience
Melissa Zoba, MBA, MPA – Chief Information Officer

Brent Adair – Project Manager II
Michael R. Esquer – Senior Project Manager
Leo Ferrando, PE – Assistant Chief Engineer
Anthony Flordelis – Business Systems Analyst
Adekunle Ojo, MPA – Water Resources Manager
Matthew Olivo – Senior Accountant
Karen Resendez, MAOL – Human Resources/Risk Manager
Shavonne Turner, MPA – Water Conservation Program Manager

Brad Neufeld, Varner & Brandt, District Legal Counsel

Members of the Public in Attendance:

Jennifer Ares, Yucaipa Valley Water District
Melody McDonald, San Bernardino Valley Water Conservation District
James Morales, East Valley Water District

The regular meeting of the Board of Directors was called to order by President Kielhold at 2:00 p.m. Director Botello led the Pledge of Allegiance. A quorum was noted present by roll call.

Agenda Item 1. Public Comment

President Kielhold stated that any member of the public wishing to make any comments to the Board regarding non-agenda items may do so. There were none.

Agenda Item 2. Consent Calendar

2.1) Approve Minutes of the Regular Board of Directors Meeting – April 4, 2023

2.2) Approve Minutes of the Board of Directors Workshop - Policy/Administration – April 6, 2023

2.3) Approve Consulting Services Agreement with SWA Group, Inc. for Preparing a Master Plan for the Sunrise Ranch Property

The Board of Directors approved the Consent Calendar by the following roll-call vote:

| | | |
|--------------|---|---------------|
| MOVED: Hayes | SECONDED: Harrison | APPROVED: 5-0 |
| AYES: | Botello, Hayes, Harrison, Kielhold, Longville | |
| NOES: | None | |
| ABSTAIN: | None | |
| ABSENT: | None | |

Agenda Item 3. Discussion and Possible Action Items.

3.1) Progress Report on the SARER 1A Lining Rehabilitation Project. Chief Executive Officer/General Manager Heather Dyer introduced the presentation on the Santa Ana River Enhanced Recharge Phase 1A project, the lining and rehabilitation of the sedimentation basin.

Senior Project Manager Mike Esquer advised the project has been successful. The primary function of the project is a sedimentation basin, with part use as a recharge basin. The recharge component was working at about 20 feet per day at a rate of about 30 cubic feet per second (cfs). To slow this action, a liner of Bentonite was added, he explained.

The life expectancy of the liner is 25 years or more, Mr. Esquer continued. In response to a question from Director Harrison, Mr. Esquer assured the liner contains no PFAS.

Mr. Esquer provided an overview of the recharge operation and project work. The impervious liner design was completed by GHD, and on September 2, 2022, the Board approved the installation of the new liner for \$1.69 million. The cost was shared with Western Municipal Water District (27.95 percent).

Project Manager II Brent Adair shared photos of the project and provided further details on the liner installation. Mr. Esquer added that currently 60 to 80 cfs is coming from the dam, and all the water running through the basin is being captured.

Nate Scheevel of Scheevel Engineering tested the flows and determined a loss of less than 1 cfs between the inlet channel and the basin, Mr. Adair noted.

Mr. Esquer reviewed the project budget and expenditures. The Board approved amount of \$1,690,670 was spent without dipping into the contingency budget. The project was slated for a 90-day construction period, and took exactly 90 days, he noted.

A bio monitor was on site for the entire project and identified a rock wren nest in the channel, Mr. Esquer reported. No work was allowed to be done near the rock wren, and the contractor was good in working with staff.

A few cfs are still coming out of the discharge channel, Mr. Esquer indicated. Staff is measuring and believes it can be completely controlled on the site to the northwest with no adjacent flooding of lands that are not owned by SBV. If that continues, it will create a wetlands area, he stated. Staff believes the situation is manageable, but if necessary, will bring a future project to the Board to line some portion or all of the discharge channel.

Director Longville commented on seeing the project already functional.

Vice President Hayes asked how the wellbeing of the liner will be monitored. Mr. Esquer said testing would be done yearly, and the liner will be reassessed if any drastic change in the amount of water coming out of the basin is observed.

Director Harrison commended staff on the work. Mr. Esquer said the team works well and it is good to achieve success.

Director Botello congratulated the team and asked if there were any lessons learned regarding the project coming in as projected. Mr. Esquer assured that lessons are always learned, and the partnering approach is getting better and better. He noted some challenges and said that staff listened to recommendations from the contractor.

President Kielhold pointed out that zero contingency is always sought but rarely achieved.

In response to questions from CEO / General Manager Dyer, Mr. Esquer noted the wall is working as intended, slowly and evenly distributing water across the basin. There was a lot of rock, but staff partnered with the City of Yucaipa to exchange rock for sand. He described the operations needed to work with and move the amount of rock on the site.

Agenda Item 4. Reports (Discussion and Possible Action Items).

4.1) Directors' Report of Activities and Travel Requests in accordance with Resolution 1100.

Director Botello reported that he attended:

- April 10 – ACWA Business Development Committee meeting

Vice President Hayes reported that she attended:

- April 6 – West Valley Water District meeting
- April 7 – Water Advisory Committee of Orange County
- April 12 – San Bernardino Valley Water Conservation District meeting

Director Harrison reported that he attended:

- April 5 – Loma Linda Chamber of Commerce meeting and branding meeting
- April 6 – East Valley Water District Plant 134 Ribbon Cutting ceremony
- April 10 – Association of Special Districts Board meeting
- April 12 – San Bernardino Valley Water Conservation District meeting
- April 14 – Habitat Conservation Plan (HCP) Government Relations Committee Meeting
- April 17 – Atmospheric River Water Affiliates Group (WAG) / Forecast Informed Reservoir Operations (FIRO) meeting
- April 17 – Association of San Bernardino County Special Districts dinner

Director Longville reported that she attended:

- April 11 – Climate Center Summit in Sacramento
- April 13 – Press conference on broadband installation
- April 17 – Association of San Bernardino County Special Districts dinner

Director Kielhold reported that he attended:

- April 12 – San Bernardino Valley Water Conservation District meeting

Director Longville requested authorization to attend the Association of California Water Agencies conference.

The Board of Directors approved this request by the following roll-call vote:

| | | |
|------------------|---|---------------|
| MOVED: Longville | SECONDED: Hayes | APPROVED: 5-0 |
| AYES: | Botello, Harrison, Hayes, Kielhold, Longville | |
| NOES: | None | |
| ABSTAIN: | None | |
| ABSENT: | None | |

CEO / General Manager Dyer will double check the preauthorization for attendance at ACWA conferences.

4.2) General Counsel Report. No report.

4.3) SAWPA Meeting Report. Director Harrison reported on the following items taken at the April 18, 2023, Commission Meeting:

- Approved \$74,600 from the building fund for the design, building support, and construction administration for the SAWPA Building Lobby Security Improvements project, including improvements to provide equal access to persons with disabilities as required by the Americans with Disabilities Act (ADA).

4.4) Treasurer's Report. Director Harrison presented the report noting that \$4.7 million of the payment to the State Water Contract Fund was the semi-annual East Branch Extension payment.

The Board approved the following expenses for the month of March 2023: State Water Contract Fund \$7,378,417.00 and General Fund \$13,996,952.32 by the following roll-call vote:

| | | |
|-----------------|---|---------------|
| MOVED: Harrison | SECONDED: Botello | APPROVED: 5-0 |
| AYES: | Botello, Hayes, Harrison, Kielhold, Longville | |
| NOES: | None | |
| ABSTAIN: | None | |
| ABSENT: | None | |

Agenda Item 5. Future Business. None.

Agenda Item 6. Announcements. CEO / General Manager Dyer introduced Greg Woodside, the new Chief of Planning and Watershed Resilience.

Chief of Staff/Clerk of the Board Jose Macedo highlighted the following:

- May 2 – Regular Board Meeting
- May 18 – New date for Engineering Workshop (shifted from May 9 due to ACWA)
- May 22 – Wages, Benefits, and Insurance Workshop
- May 23 – Workshop on the Board of Directors handbook

Director Longville advised the Headwaters Resiliency Partnership meetings have changed to bimonthly.

Director Harrison noted that he will attend the California Special Districts Association (CSDA) Legislative Conference in Sacramento on May 16 and 17 and may attend the May 18 workshop remotely. Counsel Neufeld advised that would be a Just Cause

situation for participating remotely, as Director Harrison will be traveling on official business.

Agenda Item 8. Adjournment.

The meeting was adjourned by President Kielhold at 2:45 p.m.

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| <p>APPROVAL CERTIFICATION</p> <p>I hereby certify to approval of the foregoing Minutes of San Bernardino Valley Municipal Water District.</p> <p>_____</p> <p>Secretary</p> <p>Date _____</p> |
|--|

Respectfully submitted,

Lynda J. Kerney
Contract Assistant



DATE: May 2, 2023
TO: Board of Directors
FROM: Heather Dyer, Chief Executive Officer/General Manager
SUBJECT: Receive information regarding proposed water rights legislation

Staff Recommendation

Provide direction to staff if the Board would like to take a formal position on bills AB 460, AB 1337, and SB 389. If the Board's position is neutral, staff will continue to monitor the legislative activity.

Summary

The 2023 California Legislative session includes the introduction of multiple bills that would modify existing water rights regulations and enforcement. Of note are AB 460, AB 1337, and SB 389. Each of these bills propose to modify the existing water rights structure, authority of existing judgements, and the State Water Resources Control Board enforcement process to varying degrees. Following discussion at the March 21, 2023, Board of Directors meeting, staff was requested to provide additional information on these bills at an upcoming meeting.

For today's meeting, our legal counsel, Downey Brand, will be presenting an overview of the bills' content along with common talking points from both supportive and opposing positions. They will be able to answer specific questions regarding potential applicability to our agency's water rights and other interests. Our state lobbyist, Jack Gualco, will also be participating to answer questions regarding the bills' current status and upcoming legislative decision points.

We have also included in the agenda packet bill analyses available for key committees that have recently considered the legislation. Each bill analysis presents a summary, background, and arguments both supporting and opposing the legislation. These sections have been highlighted in the attachments. You can also find tracked changes to bills following committee hearings at the following links:

AB460

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB460

AB 1337

https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202320240AB1337&showamends=false

SB389

https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202320240SB389&showamends=false

Background

AB 460 (Bauer-Kahan) would grant the State Water Resources Control Board (State Water Board) additional authority to issue interim relief orders against water diverters and users prior to holding a hearing.

AB 1337 (Wicks) would authorize the State Water Board to adopt new regulations and enforcement efforts regarding curtailing diversions.

SB 389 (Allen) would modify the existing evidentiary standard for the forfeiture of water rights.

Fiscal Impact

There is no fiscal impact associated with the recommended action.

Attachments

- 1) AB 460 Bill Analysis Assembly Water, Parks and Wildlife Committee
- 2) AB 460 Bill Analysis Assembly Judiciary Committee
- 3) AB 1337 Bill Analysis Assembly Water, Parks and Wildlife Committee
- 4) SB 389 Bill Analysis Senate Natural Resources and Water Committee

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

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

Date of Hearing: April 25, 2023

ASSEMBLY COMMITTEE ON JUDICIARY
Brian Maienschein, Chair
AB 460 (Bauer-Kahan) – As Amended March 30, 2023

As Proposed to be Amended

SUBJECT: STATE WATER RESOURCES CONTROL BOARD: WATER RIGHTS AND USAGE: INTERIM RELIEF: PROCEDURES

KEY ISSUE: SHOULD THE STATE WATER RESOURCES CONTROL BOARD BE AUTHORIZED TO ISSUE INTERIM ORDERS REQUIRING THE CESSATION OF CONDUCT THAT VIOLATES SPECIFIED WATER LAWS?

SYNOPSIS

California's propensity to fall into periods of extreme drought places incredible burdens on the state's water system and the allocation of water to various water rights holders and the environment. Seeking to maintain order and balance, the State Water Resources Control Board is tasked with overseeing water rights, protecting the environment, and protecting the quality of water utilized by millions of Californians. Despite the State Water Resources Control Board's significant powers, the most recent drought exposed a gap in the Board's ability to quickly prevent illegal diversions and other immediate threats to water rights and the state's water supply.

Recognizing these deficiencies, this bill adopts a process whereby the State Water Resources Control Board can issue an interim order to stop conduct that poses an imminent or irreparable injury to other legal users of water, or to instream beneficial uses. As proposed to be amended, this bill tasks the State Water Resources Control Board with developing formal procedures for hearings to review the orders, and provides for a method of judicial review for the Board's decision. As proposed to be amended, this bill would provide that an interim order can only remain in effect for 180 days. The amendments are incorporated into the SUMMARY and explained in the analysis. This bill imposes civil penalties for violating an interim order and adopts procedures for amending an order. Although not in the jurisdiction of this Committee, the bill also lays out the specific areas of water law that may be subject to an interim order.

This measure is co-sponsored by Trout Unlimited and the Planning and Conservation League and is supported by a broad coalition of environmental advocates. The proponents note that California's recent drought highlighted the need for the State Water Resources Control Board to be able to act swiftly to protect water rights and the environment from bad actors who seek to ignore state law. This bill is opposed by a coalition of business, agricultural interests, and water districts and utilities. The opposition primarily objects to the scope of the water-related issues that can be subject to interim orders. The opposition also contends that the bill, as currently in print, denies their due process rights. It should be noted that the extensive amendments proposed by this Committee should address the latter concern and the prior is outside of the core jurisdiction of this Committee. This bill was previously heard and approved by the Committee on Water, Parks, and Wildlife by a vote of 9-4.

SUMMARY: Enhances the ability of the State Water Resources Control Board to issue interim orders to protect water rights and deter unlawful conduct. Specifically, **this bill:**

- 1) Authorizes the State Water Resources Control Board to issue an interim relief order to a diverter or user of water in adjudicative proceedings to apply or enforce any of the following with respect to water held under any basis of right:
 - a) Section 2 of Article X of the California Constitution;
 - b) The public trust doctrine;
 - c) Water quality objectives or principles and guidelines, as specified;
 - d) The requirements set forth in permits, licenses, certificates, and registrations, including actions that invoke the board's reserved jurisdiction or continuing authority; and
 - e) Fish and Game Code provisions related to dam flows.
- 2) Provides that the State Water Resources Control Board may commence an interim relief proceeding on its own motion or upon the petition of an interested party so long as the petition contains the following:
 - a) The name and mailing address of the petitioner;
 - b) A description of the specific diversion or use of water that the petitioner is contesting;
 - c) A statement of the petitioner's interest in the contested diversion or use of water;
 - d) Identification of the 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 the petitioner is requesting;
 - h) A statement of reasons explaining why the relief is justified; and
 - i) Any additional information that the board may deem appropriate.
- 3) Authorizes the State Water Resources Control Board to dismiss a petition that does not raise substantial issues that are appropriate for review.
- 4) Requires that, except as provided in 5), the State Water Resources Control Board provide ten days' notice before holding a hearing on an interim order.
- 5) Authorizes the State Water Resources Control Board to issue an interim order without a hearing pursuant to 4) if the order includes a finding by the board that immediate compliance is necessary to prevent imminent or irreparable injury to other legal users of water, or to instream beneficial uses.

- 6) Requires, if the State Water Resources Control Board issues an interim order within a hearing pursuant to 5) to hold a hearing within 15 days of the date the Board receives a request for a hearing from the party to whom the order is issued, unless the party to whom the interim relief order is issued agrees to an extension of that period.
- 7) Provides that if the State Water Resources Control Board issues an interim order it is to remain in effect for a period not to exceed 180 days unless the party to whom the interim relief order is issued agrees to an extension of that period.
- 8) Provides that nothing in 7) precludes the issuance of an additional interim order if circumstances change and qualify for the issuance of another order.
- 9) Provides that a party aggrieved by an order issued pursuant to 5) may, not later than 15 days after the hearing provided for in 6), file a petition for a writ of mandate for review of the decision or order, and that reconsideration before the board is not an administrative remedy that is required to be exhausted before filing a petition for writ of mandate.
- 10) Provides that the existing Code of Civil Procedure provisions governing writ of mandate proceedings will govern the proceedings commenced pursuant to 9).
- 11) Requires the State Water Resources Control Board, on or before December 31, 2014, to adopt regulations for the conduct of the hearing authorized by 6) that may include the following:
 - a) Whether evidence to be considered is to be based on declarations under penalty of perjury, the testimony of witnesses at the hearing, or both;
 - b) Whether to consider oral or written legal argument that is provided in a timely manner by the parties;
 - c) A schedule by which the Board will accept filed declarations, exhibits, and written arguments prior to a hearing;
 - d) Any other evidentiary or procedural rules the board deems necessary and appropriate to carry out the hearing.
- 12) Provides that as part of an interim relief order issued by the State Water Resources Control Board, a water diverter may be required 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 board determines are reasonably necessary to evaluate the impact of the diversion or use that is the subject of the adjudicative proceeding;

- e) Reimburse the board's expenses for the preparation of any necessary environmental documentation; and
 - f) Take any other action required by the Board on a schedule determined by the Board.
- 13) Requires that upon the issuance of an interim order the State Water Resources Control Board to set a schedule, as soon as reasonably possible, for the board's consideration of permanent relief, as specified.
- 14) Provides that the issuance of an interim order is deemed to be necessary to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment.
- 15) Authorizes the State Water Resources Control Board to review and revise any part of an interim relief order at any time after notice to all interested parties and an opportunity for a hearing which must occur within 15 days of the Board's receiving the request.
- 16) Prohibits the State Water Resources Control Board from reviewing or revising the order until the hearing required by 15) occurs.
- 17) Provides that the issuance or denial of an interim relief order by the State Water Resources Control Board does not alter the burdens of proof or the burdens of coming forward with respect to the Board's final decision on the merits in the adjudicative proceeding in which interim relief is requested.
- 18) Requires that if a water diverter or user does not comply with an interim relief order, the Attorney General, upon the request of the State Water Resources Control Board, to petition the superior court for prohibitory or mandatory injunctive relief, as necessary, through the issuance of a temporary restraining order, preliminary injunction, or permanent injunction.
- 19) In addition to the relief provided in 18) any person or entity that violates an interim relief order issued by the board is liable for a civil penalty not to exceed the sum of the following:
- a) Ten thousand dollars (\$10,000) for each day in which a violation occurs; and
 - b) Two thousand five hundred (\$2,500) for each acre-foot of water diverted in violation of the interim relief order.
- 20) Provides that the penalties provided in 19) may be imposed via a civil action filed by the Attorney General or through administrative action of the State Water Resources Control Board.
- 21) Requires when determining the penalty level provided in 19) the adjudicatory body to consider all the relevant circumstances, including the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and any corrective action undertaken by the violator.
- 22) Provides that all penalties recovered pursuant to 19) to be deposited in the Water Rights Fund.
- 23) Provides that nothing in 1) through 22) supersedes or limits the jurisdiction of any court, existing remedies, or other authorities of the State Water Resource Control Board.

- 24) Provides that the enforcement provisions of 1) through 23) take effect January 1, 2025.
- 25) Requires the scope of judicial review for an interim relief order to be the same as for a court of appeal review of a superior court decision granting or denying a preliminary injunction.
- 26) Revises and recasts the penalties for water rights violations as follows:
 - a) A penalty of fifteen hundred dollars (\$1,500) for each day in which the violation occurs may be imposed by the State Water Resources Control Board through administrative action; and
 - b) Penalties of ten thousand dollars (\$10,000) for each day in which the violation occurs plus two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used may be imposed through civil penalties assessed through a civil action brought by the Attorney General.

EXISTING LAW:

- 1) Authorizes the executive director of the State Water Resources Control 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 Resources Control Board, or makes a willful misstatement on a water diversion and use statement. (Water Code Section 1055.)
- 2) Prescribes procedures for service of the complaint authorized pursuant to 1) and authorizes the State Water Board to issue an order to impose administrative civil liability after any necessary hearing. (*Ibid.*)
- 3) Authorizes the State Water Resources Control Board to adopt reasonable rules and regulations to carry out its powers and duties under the Water Code. (Water Code Section 1058.)
- 4) Authorizes the State Water Resources Control 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 Section 1058.5.)
- 5) States legislative intent that all issues relating to state water law decided by the State Water Resources Control Board be reviewed in state court if a party seeks judicial review and 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 Section 1126.)
- 6) Requires a court reviewing a decision of the State Water Resources Control Board pursuant to 5) to exercise its independent judgment on the evidence. (*Ibid.*)
- 7) Declares the Legislature's intent that the State Water Resources Control 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 Section 1825.)

- 8) Authorizes the State Water Resources Control 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 Section 1831.)
- 9) Imposes a penalty of up to \$500 per day for violations of water rights or orders or regulations adopted by the State Water Resources Control Board. (Water Code Section 1846.)
- 10) 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 Section 5937.)
- 11) Provides, pursuant to the Public Trust Doctrine, that the state is charged with protecting, and preventing the sale of, the public's lands including tidelands and submerged lands. (*Illinois Central Railroad Co. v. Illinois* (1892) 146 U.S. 387.)
- 12) Provides, pursuant to the Administrative Procedures Act, that an agency head may do any of the following with respect to a decision of the presiding officer or the agency:
 - a) Determine to review some but not all issues, or not to exercise any review;
 - b) Delegate its review authority to one or more persons; and
 - c) Authorize review by one or more persons, subject to further review by the agency head. (Government Code Section 11440.10 (a).)
- 13) Provides that an agency may issue an emergency decision for temporary, interim relief under the Administrative Procedures Act if the agency has adopted a regulation that provides that the agency may use the procedure provided in the Act and the regulation includes the following:
 - a) The specific circumstances in which an emergency decision may be issued;
 - b) The nature of the temporary, interim relief that the agency may order; and
 - c) The procedures that will be available before and after issuance of an emergency decision. (Government Code Section 11460.20.)
- 14) Requires that after issuing an emergency decision pursuant to 13) for temporary, interim relief, the agency conduct an adjudicative proceeding under a formal, informal, or other applicable hearing procedure to resolve the underlying issues giving rise to the temporary, interim relief within 10 days of issuing the emergency decision. (Government Code Section 11460.60.)
- 15) Provides that issuance of an emergency decision under the Administrative Procedures Act, the person to which the agency action is directed may obtain judicial review of the decision by seeking a writ of mandate, as specified. (Government Code Section 11460.80.)
- 16) Provides for the process, known as a writ of mandate, whereby the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing

is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case can be heard by the court sitting without a jury. (Code of Civil Procedure Section 1094.5.)

- 17) Provides that a preliminary injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. (Code of Civil Procedure Section 527 (a).)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: California's temperate climate has long resulted in significant fluctuations in the state's annual precipitation levels. As a result, water has always been a precious commodity in the state for both water users and the environment. In order to maintain the delicate balance between protecting the environment, ensuring water quality, and maintaining water rights, the State Water Resources Control Board (SWRCB) is tasked with overseeing the use of water in the state. As climate change worsens the state's droughts and makes balancing the use of water even more difficult, the SWRCB's existing tools are proving inadequate when water users seek to flaunt the law. To provide the SWRCB the necessary tools to quickly stop violations of state water law this bill would provide new interim enforcement tools to the agency. In support of this measure the author states:

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.

Currently, the State Water Board lacks authority to take immediate action, similar to a preliminary injunction or temporary restraining order, to stop harm from happening from illegal water diversion; in addition, the existing penalties for violations are insufficient to deter unlawful behavior. AB 460 will simply give the State Water Board an additional tool to enforce existing law and enhance penalties so that potential violators will see a penalty as more than a cost of doing business.

A brief background on the enforcement authority of the State Water Resources Control Board.

In order to maintain the complex system of water rights in California the SWRCB has been tasked as the primary regulatory of water in the state. The SWRCB maintains various enforcement tools to administer the water rights system. The SWRCB can issue informational orders to determine whether a person is adhering to its water right or unlawfully diverting and using water; notices of violations to attempt to get a violator to comply with the law; cease and desist orders to compel a person to halt unlawful use or diversion of water; and impose administrative civil liability penalties on violators. Under existing law, when seeking to issue a cease and desist order, the SWRCB must provide notice and opportunity for an evidentiary hearing. A party receiving the notice has 20 days to request or decline a hearing. In the event the cease and desist order is related to an unlawful diversion or water, or potential contamination of water, a 20-day delay in deterring unlawful conduct would have extremely damaging consequences to the state's waters.

The recent drought highlighted the limits of the State Water Resources Control Board's enforcement authority in the face of unlawful activity. The state's most recent drought stressed

water users across California. For years, farmers in the Central Valley were receiving virtually none of their allotted supply of water from state and federal projects. In many parts of the state, water users were restricted from taking their share of water in order to protect fragile ecosystems. In one such ecosystem, the Klamath River Watershed, the SWRCB adopted emergency regulations significantly reducing water diversion rights in order to protect Chinook salmon, Coho salmon, and steelhead. However, the Shasta River Water Association did not heed the reductions. In August 2022, it came to the SWRCB's attention that the Shasta River Water Association was illegally diverting water. Utilizing the existing law, the SWRCB began the process to issue a cease and desist order and started the 20-day hearing timeline. However, for eight days, the Shasta River Water Association continued its illegal diversions, resulting in a dangerous and significant reduction in stream flows. Knowing that the SWRCB would have to wait to seek the cease and desist order, the Association essentially opted to accept the fines that would eventually be imposed by the SWRCB and take as much water as possible while the legal processes played out. Although in cases like the Shasta River Water Association diversion matter the SWRCB could seek a temporary restraining order, that process would involve referring the issue to the Attorney General to litigate the dispute. Given the critical timing issues involved, this procedure may still result in significant delays and irreparable harm.

This bill. Recognizing that the existing law significantly limits the SWRCB's ability to quickly act to prevent harm to state water resources, this bill provides for an interim order that would allow the SWRCB to immediately order illegal activity to stop and then provide a water user the ability to seek a hearing on the matter within 15 days. As proposed to be amended, the bill provides clear deadlines for seeking a hearing and appealing the SWRCB's interim order to the court. The bill also provides a clear process for the SWRCB to amend an order, and a user to subsequently object. The bill limits an interim order's duration to 180 days and requires the SWRCB to adopt regulations setting forth the procedures and timelines that will govern hearings regarding interim orders. This bill provides for civil penalties for violation of the order. Finally, the bill makes several modifications to the penalties imposed on parties who violate water rights decisions of the SWRCB.

Opposition objects to the scope of water laws implicated by this bill, however, this issue is largely outside the authority of this Committee. This measure is opposed by a coalition of agricultural interests, business organizations, and local water utilities. The opposition lays out several concerns. The first, and perhaps largest, concern of the coalition relates to the scope of water rights actions that may be subject to an interim order. They also contend that some of the actions are too amorphous to be included in an interim order process. On this front, the opposition is not wholly unreasonable. Indeed, the bill provides that an interim order can be issued for a broad range of concerns including issues as straightforward as violating permit or license requirements to more theoretical issues like a violation of the Public Trust Doctrine. While for all practical matters, the more amorphous grounds for an interim order would almost certainly be attached to a more concrete violation. For example, an illegal dredging operation may implicate the Public Trust Doctrine in addition to a myriad of permit violations. Nonetheless, while some members of the opposition coalition have viewed the broad grant of authority with near hysteria, the reality may not be as dire as some think. *That said, the author may wish to consider narrowing the scope of laws that may trigger an interim order.*

Regardless of the actual severity of the issue, this Committee has jurisdiction over this bill as a result of the court process and civil penalty provisions of the legislation. Given that the water-specific issues were previously evaluated by the Committee on Water, Parks, and Wildlife, the

experts on issues related to water law, this Committee sees no reason to second guess that Committee's judgment on the scope of water laws that may trigger an interim order. Accordingly, no amendments to the provisions of the bill related to the scope of an order are currently being proposed by this Committee.

Responding to objections that the bill in print gives the State Water Resources Control Board "plenary discretion" to adopt hearing procedures on an ad hoc basis, proposed amendments require the Board to adopt clear procedures. A second issue regarding the measure raised by the opposition relates to the actual procedures utilized by the SWRCB when conducting a hearing after issuing an interim order. A letter submitted by a coalition of opponents to this bill notes, "Once the process has been initiated, the bill grants broad authority to the State Water Board to determine what evidence will be allowed at the hearing on the matter and how arguments will be presented. This is on a case-by-case basis, meaning that a diverter has no way to know ahead of time what evidence they may want or need to provide in order to defend themselves." Indeed, the bill as currently in print can be read to permit the SWRCB to determine the rules governing each hearing on an interim order on a case-by-case basis. To the extent this may produce different procedures for two similar hearings, these provisions can arguably be said to detrimentally impact the due process rights of those subject to an interim order.

While the need for clarity is important, given the diverse array of water issues that can trigger an interim order, one set of rules may not be sufficient. Recognizing the need to balance due process expectations with the flexibility required to adjudicate different types of water-related matters, the author is proposing amendments that delay the implementation of the bill by one year and require the SWRCB to develop regulations specifying the evidentiary rules and hearing procedures applicable to SWRCB proceedings related to interim orders. Accordingly, provisions of the bill related to hearing procedures, subdivision (g) of Water Code Section 1115 will be amended to read as follows:

(g)(1) In any hearing pursuant to this section, the board may, in its discretion, provide that the evidence to be considered shall be based on declarations under penalty of perjury, the testimony of witnesses at the hearing, or both.

On or before December 31, 2024 The board shall adopt regulations providing for a formal process for which any hearing pursuant to this section is to be governed. That regulations may including the following:

(A) Whether to provide that the evidence to be considered shall be based on declarations under penalty of perjury, the testimony of witnesses at the hearing, or both.

(B) also Whether to consider oral or written legal argument that is provided in a timely manner by the parties.

(C) A schedule by which the The board will accept filed declarations, exhibits, and written arguments prior to a hearing pursuant to this section ~~may establish a schedule for filing declarations, exhibits, and written arguments.~~

(D) Any other evidentiary or procedural rules the board deems necessary and appropriate to carry out this section.

The author is also proposing to narrow the grounds for which an interim order can be issued prior to a hearing to only implicate those instances in which immediate compliance is absolutely necessary to protect against imminent or irreparable harms. Accordingly, subdivision (e) of the same code section will now read:

(e) The board may issue an interim order prior to the opportunity for a hearing ~~in either of the following cases:~~ so long as the order

~~(1) The order~~ includes a finding by the board that immediate compliance is necessary to prevent imminent or irreparable injury to other legal users of water, or to instream beneficial uses.

~~(2) The motion or petition alleges violation of a regulation or order adopted by the board pursuant to Section 1058.5 or a regulation adopted pursuant to Section 1058 to curtail diversions to protect instream flows or prior water rights.~~

Both of these amendments should significantly clarify the processes to be utilized by the SWRCB to ensure that all parties can reasonably understand their rights and expectations of the process. Additionally, a further amendment will be made to the provisions of the bill regarding amending orders to clarify that modifications cannot be made without a hearing. Water Code Section 1117 will now read as follows:

The board may review and revise any part of an interim relief order at any time after notice to all interested parties and an opportunity for a hearing. *If a hearing is requested the board shall establish the hearing date within 15 calendar days and shall not review or revise the order until the hearing occurs.*

These amendments appear to satisfy any reasonable due process concerns regarding the lack of clarity surrounding SWRCB procedures, while still providing the SWRCB with flexibility in adjudicating interim orders.

Although opposition concerns regarding due process and judicial review appear overstated, and potentially misconstrue the application of existing law to this bill, proposed amendments will clarify administrative and judicial review provisions of this bill to ensure due process. The third issue with the bill raised by the opposition relates to their view that the bill limits judicial review and therefore their due process rights. The opposition coalition writes, “AB 460 would not only provide expansive new administrative authorities to the State Water Board, but would also substantially weaken the existing, long-standing standards of review and, in many cases, eliminate any judicial review at all.” This view is a bit unclear to the Committee, as nothing in the text of the bill in print appears to limit the subject of an interim order from utilizing the existing laws process for challenging agency decision making.

Pursuant to existing law, the procedures for decision making at state agencies is largely governed by the Administrative Procedures Act. Although the bill seeks to create a unique administrative process, it does not appear to waive the Act. Even if it did, the remedy for a party aggrieved by a government agency’s decision under the Administrative Procedures Act, as well as the more widely applicable provisions of the Code of Civil Procedure, is the filing of a writ of mandate. (See, e.g. *State of California v. Superior Court* (1974) 12 Cal. 3d 237.) This bill does not appear to alter that right.

However, the bill currently in print does not explicitly state that the writ of mandate is the remedy, and due to ambiguity in the bill relating to the duration of the *interim* order it could be argued that a *final* decision was not made, making it hard for an aggrieved party to appeal. The author notes that eliminating judicial review and appellate rights was never the intent of the bill. Accordingly, in order to ameliorate the due process concerns of the opposition, and to clarify the bill, the author is proposing several amendments. First, the author is proposing that *all* interim

orders are to last no more than 180 days, regardless of the evidence presented at the hearing on the matter. Accordingly, subdivision (h) of Water Code Section 1115 will now read:

(h) If the board issues an interim relief pursuant to (e) ~~order after considering the declaration of any witness who is not made available during the hearing for cross-examination,~~ the interim relief order shall remain in effect for a period not to exceed 180 days unless the party to whom the interim relief order is issued agrees to an extension of that period. This subdivision is not a limitation on the authority of the board to issue any additional interim relief in response to changed circumstances.

This modification should ensure that no interim order serves as a de facto final order that remains in place indefinitely, thus giving the party subject to the order clear appellate rights. Additionally, to make it abundantly clear that an interim order can be appealed and to provide clarity regarding the timeline for the appeal, two new subdivisions will be added to Water Code Section 1115 to read:

(j) Any party aggrieved by any an interim relief order may, not later than 15 days after the hearing provided for in subdivision (f) file a petition for a writ of mandate for review of the decision or order. Reconsideration before the board is not an administrative remedy that is required to be exhausted before filing a petition for writ of mandate.
(k) Section 1094.5 of the Code of Civil Procedure shall govern judicial proceedings under pursuant to subdivision (j).

It should be noted that the review of agency decision making pursuant to a writ of mandate is an abuse of discretion standard. In practice, this would mean the SWRCB would only be overruled if they acted outside of their authority (which this bill appears to be conferring) or acted in a manner that contradicts the substantial evidence on the record. (*Benetatos v. City of Los Angeles* (2015) 235 Cal. App. 1270.) Based on the tone and tenor of some of the opposition's statements, this relatively high burden may not be ideal for the opponents. Nonetheless, this standard appears to be well in line with existing law and the opposition offered no alternative standards that would be appropriate for such an appeal.

This bill does not constitute a regulatory taking, despite the contention of some members of the opposition. In a separate writing to this Committee outside of the large coalition letter, the California Municipal Utilities Association notes that, "Water rights, once acquired, become vested and fundamental to the livelihoods that depend on the water." They further elaborate that the bill in print violates the holding of *Stanford Vina Ranch Irrigation Co. v. State* (2020) 50 Cal.App.5th 976. This argument appears to indicate that the opposition believes this bill might be a regulatory taking in violation of the United States Constitution. Proof of an unconstitutional taking of property requires evidence of the scope of the property right and how government action takes most or all of the beneficial use of that property right. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003.)

In light of the holding of the two above cases it is worth examining how the state classifies water as a matter of property. Water Code Section 102 provides, "All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law." Accordingly, while state law provides the *right* to use water, the water itself is no single entity's property, but rather is a public good. Notably, the right to divert and use water does not include an unlimited ability to divert water when there is not enough water to serve more senior water rights. To view water rights in any other manner

would result in a regulatory taking every time the state entered a cycle of drought. Instead, state law protects the property rights of senior water right holders by enforcing water right priorities. At most, this system represents a “temporary taking” an act that has been upheld in numerous circumstances when “extraordinary circumstances” exist. (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Authority* (2002) 535 U.S. 302, 303-304.)

The bill’s proposed modification to judicial review standards for water rights cases do not substantially alter the existing law. Under existing law, a court is to review water rights decisions made by the SWRCB using the court’s “independent judgment on the evidence.” This bill proposes to replace that standard with a requirement to review the decision as it would a “decision granting or denying a preliminary injunction.” The rules governing injunctions would require the court to determine if the SWRCB is likely to prevail on the merits of the claim and then balance the harm presented. It would appear that both standards permit the court to review and make decisions regarding the evidence in a matter, as there is no way a court can determine the likelihood the SWRCB could prevail on a decision without examining the evidence. Accordingly, this change appears relatively minor and certainly does not rise to the level of a due process violation.

Additional author’s amendments clarify the imposition of administrative and civil penalties. The bill currently in print eliminates administrative penalties for water rights violations and replaces them with civil penalties sought by the Attorney General. Recognizing that this may not be entirely efficient, proposed amendments seek a hybrid approach where the SWRCB can administratively impose lower penalties and the higher levels must be sought in court. Thus Water Code Section 1846 will now read:

(a) (1) A person or entity may be liable for a violation of paragraph (2) in an amount not to exceed the sum of the following:

(A) **Fifteen hundred dollars (\$1,500) for each day in which the violation occurs.**

(B) Ten thousand dollars (\$10,000) for each day in which the violation occurs.

(C) ~~(B)~~ Two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used that amounted to the violation.

(2) (A) A term or condition of a permit, license, certificate, or registration issued under this division.

(B) A regulation or order adopted by the board.

(b) Civil liability may **be imposed pursuant to paragraphs (B) or (C) of subparagraph (A) of subdivision (a)** by the superior court. The Attorney General, upon the request of the board, shall petition the superior court to impose, assess, and recover those sums.

(c) Civil liability may be imposed **pursuant to paragraph (A) of paragraph (1) of subdivision (a)** administratively by the board pursuant to Section 1055.

Additionally, the penalty level set forth in that code section and the penalties proposed for violating an interim order were intended to align. However, the penalties for the interim order violations are higher. An amendment will be made to Water Code Section 1119 so that the penalties will align with the provisions of Section 1846 (a)(1)(C) above.

ARGUMENTS IN SUPPORT: This bill is co-sponsored by Trout Unlimited and the Planning and Conservation League and is supported by a broad array of environmental organizations. A coalition letter in support of this bill states:

The Board's job is made even more difficult when water rights violators choose to intentionally divert water not allocated to them during critically dry years. In August of last year, individuals from the Shasta

River Water Association intentionally turned on their pumps despite being under curtailment orders, fully acknowledging that the penalty was a cost of doing business. This reduction in flow to one of the most critical salmonid tributaries to the Klamath River in the height of summer during a declared drought emergency was likely lethal to salmonids. These actions were also in direct violation of existing curtailment orders from the Board, yet the fines given to the Shasta River Water Association came out to around \$40 per violating individual.

This bill would only affect those that violate existing law. Effective enforcement of penalties for violators is critical as the state continues to battle drought and judiciously allocate available water. AB 460 would increase the penalties for water rights violators and allow the State Board to immediately halt illegal actions to protect sensitive species and downstream water rights holders, while still ensuring that all potential water rights violators get their due process.

AB 460 is built on sensible recommendations. The Assembly Water Parks and Wildlife held a water rights hearing on February 28, 2023 that gave voice to the importance of the solutions offered in AB 460.

Ellen Hanak, Vice President and Director of Water Policy at PPIC, presented "Adapting California's Water Right's System to the 20th Century." In this presentation, PPIC called for enabling the board to move more quickly more quickly to changing conditions and explained that climate change is exposing weaknesses in our water rights system. We agree, and believe that AB 460 is a sensible step in the right direction.

Although the bill does not introduce any restrictions on legal water rights holders, it does, importantly, give the Board the authority to halt illegal actions before they cause harm to downstream water users, fish, and the environment. This bill is critical in ensuring the Board can achieve its missions and protect fish, water, and people.

ARGUMENTS IN OPPOSITION: As noted, this bill is opposed by a coalition of business and agricultural organizations and several local water districts and utilities. The coalition letter in opposition states:

The bill would also eliminate and weaken constitutionally protected rights to judicial review of State Water Board actions. While our organizations believe that illegal diversions are serious and should not be sanctioned, AB 460 goes far beyond what is needed for the State Water Board to enforce and discourage illegal water diversions. AB 460 is not only contrary to both the State and Federal constitutions, and in conflict with California's Administrative Procedures Act, but it portends ill-conceived and uninformed water management actions that will, in all likelihood, result in worse outcomes for the fish and wildlife resources that the bill purports to protect.

We are concerned that this bill encompasses far more than alleged illegal diversions of surface water or violations of State Water Board orders. First, the bill proposes to authorize interim relief order and limit judicial review of numerous constitutional, statutory and common law doctrines that, by definition, require robust evidentiary records and full judicial

review. For example, in addition to the Reasonable Use and Public Trust Doctrines, AB 460 would authorize interim relief in actions concerning standards promulgated under the state's comprehensive water quality law (Porter-Cologne). For example, Water Code section 13241 governs the State Water Board's and regional water quality control boards' (Regional Boards) obligations to set water quality objectives, and the considerations and balancing that the boards must undertake when establishing and amending objectives. Water Code section 13241 includes, for instance, the need to develop housing in the area and the need to develop and use recycled water, among other local and regional considerations, when setting water quality objectives. Water Code sections 13550 et seq. relate directly to uses of recycled water. This bill would allow third parties to use the interim enforcement proceedings in AB 460 as a new pathway to attack decisions relating to housing and recycled water projects.

Furthermore, as part of Porter-Cologne, Water Code sections 13241 and 13550 et seq. are already subject to a different set of mechanisms for enforcement and interim relief.¹ It is concerning that this could create a different, duplicative procedure for aggrieved parties to seek State Water Board investigation of water quality-related orders, discharges to water, or uses of recycled water. It is unnecessary to create new enforcement authority to address water quality issues when Porter-Cologne already provides adequate enforcement authority.

In addition, AB 460 allows the State Water Board to issue interim relief for alleged violations of the Public Trust Doctrine, which is not defined in the bill. While the concept of public trust has long been interwoven in water and environmental law, courts have struggled to define exactly what it means and when it applies. For example, the doctrine requires the state to hold in trust designated resources for the benefit of the people; but, to which natural resources it applies has been subject to debate. And even the National Audubon case, which famously applies the Public Trust Doctrine to the State Water Board's allocation decisions,² requires the State Water Board to balance the interests of the environmental and other beneficial uses of water. Moreover, we are aware of no authority that would extend the SWRCB's public trust authority and balancing to riparian and pre-1914 appropriative water rights.

Given these nebulous legal concepts and applications, it is concerning that the State Water Board would be able to issue an interim relief order on these grounds without an evidentiary hearing and regardless of the basis of right. These concerns are particularly heightened when there are limited opportunities for a diverter to understand the basis for the allegations and defend themselves. And AB 460's proposed restrictions on independent judicial review of these types of State Water Board actions further heightens our concerns about the implications of this bill.

REGISTERED SUPPORT / OPPOSITION:

Support

California Coastkeeper Alliance
California Environmental Voters
California Sportfishing Protection Alliance
California Trout
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 (NRDC)
North Bay Jobs With Justice
Northern California Council of Fly Fishers International
Pacific Coast Federation of Fishermen's Association
Planning and Conservation League
Restore the Delta
San Francisco Baykeeper
Trout Unlimited
Trust for Public Land
Union of Concerned Scientists
Wholly H2o

Opposition

Agricultural Council of California
Almond Alliance of California
Antelope Valley East-kern Water Agency
Association of California Egg Farmers
Association of California Water Agencies (ACWA)
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 & Feed Association
California Manufacturers & Technology Association
California Municipal Utilities Association
California Pear Grower Association

California Seed Association
Carmichael Water District
Central Delta Water Agency
City of Roseville
Coachella Valley Water District
Coastside County Water District
County of San Joaquin
County of Stanislaus
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
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
Orange County Water District
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 Geronimo 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
United Water Conservation 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

Analysis Prepared by: Nicholas Liedtke / JUD. / (916) 319-2334

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* (6th 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

SENATE COMMITTEE ON NATURAL RESOURCES AND WATER

Senator Dave Min, Chair

2023 - 2024 Regular

| | | | |
|--------------------|------------------|----------------------|----------------|
| Bill No: | SB 389 | Hearing Date: | April 25, 2023 |
| Author: | Allen | | |
| Version: | February 9, 2023 | Introduced | |
| Urgency: | No | Fiscal: | Yes |
| Consultant: | Genevieve Wong | | |

Subject: State Water Resources Control Board: determination of water right

BACKGROUND AND EXISTING LAW

California's water rights system. A February 3, 2022, paper entitled, "Updating California Water Laws to Address Drought and Climate Change" (paper), which was drafted by water law experts convened by the Planning & Conservation League, proposes various recommendations on how the state's water laws can be updated to address the impacts of drought and climate change. The paper also provides a good overview of the state's water rights system:

"Unlike other western states, California has a patchwork system for allocating surface water that divides the right to water between statutory water rights issued and regulated by the State Water Resources Control Board [SWRCB] or its predecessors under the Water Commission Act of 1913 and water rights recognized prior to the act's 1914 effective date. With some exceptions, surface water rights recognized prior to 1914 are limited to riparian rights, rights derived from ownership of land adjacent to a watercourse, and pre-1914 appropriative rights, rights unrelated to land ownership secured through application of the Gold Rush mining customs of water diversion and delivery to beneficial use.

In times of shortage, the priority principle of first in time, first in right generally determines the allocation of pre-1914 and post-1914 appropriative rights. In contrast, riparians mutually share shortages with other riparians. (*Millview County Water District v. State Water Resources Control Board*, 229 CalApp.4th 879, 888-889 (2014).) The priority of riparian rights over other rights depends upon the date of the land patent for the riparian land. (*McKinley Brothers v. McCauley*, 215 Cal. 229, 230-231 (1922).) Neither holders of riparian nor pre-1914 appropriative rights require a permit or license from [SWRCB].

Due to these historical circumstances, riparian rights and pre-1914 appropriative rights typically hold a senior priority to post-1914 appropriative rights and are entitled to satisfaction in times of shortage over the claims of post-1914 rights. ... Because [SWRCB] does not issue permits or licenses for riparian and pre-1914 appropriative rights, the extent and scope of these rights are poorly understood."

The paper's recommendations. The recommendations include more SWRCB and CDFW funding, ensuring environmental justice expertise on the Water Boards, updating SWRCB's statutory adjudication process, among others. The recommendations also include "Improving Surface Rights Verification," which proposed amending the Water Code (Wat. C.) to:

- 1) Allow SWRCB to investigate individual water right claimants to verify their basis of right;
- 2) Allow SWRCB to require information from the claimants relevant to the investigation;
- 3) Allow SWRCB to rule upon the water right claim after notice and opportunity for hearing;
- 4) Impose the burden upon the water right claimant to prove the elements of the claimant's right; and
- 5) Clarify that any determination of forfeiture of an appropriative right held in these proceedings would not require a showing of a competing claim or clash of rights from other rights holders as has been required by recent court decisions.

According to the paper,

"The intent of the proposed Water Code amendment is to provide [SWRCB] with more flexible tools to determine whether senior water rights claimants who assert riparian or pre-1914 appropriative water right claims have defensible grounds for their diversion and use of water. Presently, self-reported data are [SWRCB]'s primary information source about the extent and scope of these senior water rights. According to [SWRCB], this self-reported '[d]iverison data contained within the annual reports forms the basis for estimates of water demand used in [SWRCB's] Water Unavailability Methodology. In times of shortage, [SWRCB] uses these water demand estimates, coupled with supply estimates, to determine the extent that [SWRCB] may curtail junior water right users. To the extent that these demand data inflate the amount of water that senior water right claimants have a right to divert, then less water is available for junior water right holders and for fishery and other beneficial uses of water.

[SWRCB] presently lacks the tools for promptly investigating and determining whether senior water right claims are inflated or represent the amounts that the claimants have the right to divert and use. Section 1051 of the Water Code grants [SWRCB] the general authority to investigate stream systems but does not explicitly grant the power to verify the water rights of users claiming rights outside of the Water Commission Act. (Wat. C. §1051.) Sections 2500 through 2900 of the Water Code allow [SWRCB] to 'determine ... all rights to water of a stream system whether based upon appropriation, riparian rights, or other basis of rights,' proceedings commonly known as statutory adjudications. (Wat. C. §2501.) However, these sections do not allow [SWRCB] to initiate an adjudication of rights to a stream system. Only claimants to water from the stream may initiate a statutory adjudication. (Wat. C. §2525.) Further, the sections do not allow [SWRCB] to determine the rights of individual diverters or a narrow set of diverters."

Existing law:

- 1) Authorizes SWRCB to:
 - a) Investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water.
 - b) Take testimony in regard to the rights to water or the use of water.
 - c) Ascertain whether or not water filed upon or attempted to be appropriated is appropriated under the laws of the state. (Wat. C. §1051)
- 2) Provides that the diversion or use of water other than as authorized is a trespass and a person committing trespass may be civilly liable, as specified. (Wat. C. §1052)
 - a) Authorizes the SWRCB executive director to issue a complaint by personal notice or certified mail to any person or entity on which an administrative civil liability may be imposed, as specified, and requires the complaint to inform the party served that the party may request a hearing not later than 20 days from the date the party was served and that the board may adopt an order setting administrative civil liability based on the allegations set forth in the complaint without a hearing if the party does not sign a written request for a hearing, as specified. (Wat. C. §1055)
- 3) Requires the appropriation must be for some useful or beneficial purpose, and when the appropriator or their successor in interest ceases to use it for such purposes the right ceases. (Wat. C. §1240)
- 4) Provides that if a person entitled to the use of water fails to use beneficially all or any part of the water claimed by them, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of five years, that unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water. (Wat. C. §1241)
- 5) Authorizes SWRCB to determine all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right upon petition by a claimant to water of the steam system requesting the determination of the rights of the various claimants to the water of that stream system. Requires SWRCB to comply with specific notice, proceeding, and investigation processes and requires claimants to notify SWRCB of their intention to file proof of claim and to submit proof of their respective claims. (Wat. C. §§2500 et seq.)
- 6) Requires each person who diverts water to file with SWRCB a statement of their diversion and use except that a statement is not required in specific circumstances. (Wat. C. §5101)

PROPOSED LAW

This bill:

- 1) Authorizes SWRCB to investigate the diversion and use of water from a stream system to determine whether the diversion and use are based upon appropriation, riparian right, or other basis of right.
- 2) Authorizes SWRCB, in furtherance of this investigation, to issue an information order to a water right claimant, diverter, or user to provide technical reports or other information related to a diversion and use of water, including but not limited to, all of the following:
 - a) Information in addition to any information required to be reported for water diversions and use, as specified.
 - b) Information related to the basis of the water right claimed.
 - c) Information related to the patent date claimed for the place of use.
 - d) Information related to the notice date of the appropriation and the date of actual delivery of water to beneficial use.
 - e) Information related to prior diversions and use, including direct diversions and diversions to storage.
 - f) Information related to the diversions and use of transferred water.
- 3) After notice and opportunity for hearing, authorizes SWRCB to issue a decision or order determining the diversion and use basis of right, including the authorized scope of the diversion and use, or may issue a decision or order determining that the diversion and use is not authorized under any basis of right.
- 4) Provides that, in determining whether a holder of an appropriative water right has forfeited the right or any portion of the right, SWRCB is not required to find the existence of a conflicting claim by any water right holder within the stream system during the period of forfeiture.
- 5) Puts the burden of proving by the preponderance of evidence the elements of the basis of right on the water right claimant, diverter, or user in any SWRCB proceeding to determine a diversion and use basis of right.
- 6) Provides that nothing in these provisions limits the authority of SWRCB to issue any decision or order, or to take any other action authorized by law.

ARGUMENTS IN SUPPORT

According to the author, "In the face of climate change and the increasing prevalence of drought, it is critical that the State of California has thorough and up-to-date data for assessing water availability for all holders in a watershed. An accurate determination of water rights requires verification of a watershed's diversions or use, including those of senior water right holders not governed by the permitting system of the California Water Commission Act of 1913. To address critical gaps in authority, SB 389 provides information-gathering and enforcement tools that allow the State Water Board to align a watershed's reported demand with the diversions and use authorized under California

law, thus more accurately determining water availability for all beneficial uses.”

According to a coalition letter submitted by Planning and Conservation League, sponsor of the bill, and other environmental groups such as California Environmental Voters, Climate Action California, Sierra Club California, and Wholly H2O, “[n]either holders of riparian rights nor pre-1914 appropriative rights require a permit or license from [SWRCB]. According to one study, self-reported riparian and pre-1914 water claims account for the diversion of over 2.3 million acre-feet of water a year from the Sacramento-San Joaquin Delta watershed. Because [SWRCB] does not issue permits or licenses for riparian and pre-1914 appropriative rights, the extent and scope of these rights are poorly understood. ...

[SWRCB] presently lacks the tools for promptly investigating and determining whether senior water right claims are inflated or represent the amounts that the claimants have the right to divert and use. Reforms allowing [SWRCB] to verify these claimed water rights could make water available for more junior water rights holders and for fishery and other beneficial uses of water in times of scarcity.

The Water Code amendment proposed by SB 389 would address this gap in [SWRCB] authority by allowing [SWRCB] to selectively investigate and determine whether a water right claimant, diverter, or user is diverting or using water under a defensible claim of right. With this authority, [SWRCB] will have the ability to better manage the system for the benefit of all users, and the ecology of California’s many beautiful streams.”

ARGUMENTS IN OPPOSITION

According to a coalition letter of various water districts, water agencies, and agricultural groups, among others (opposition coalition letter), SB 389 provides “minimal due process protections” and “places the burden of proof on the right holder.” Opponents of SB 389 feel that the bill “is not designed to create a fair and transparent process,” and is not “narrowly tailored to investigate dubious claims to right.” The letter points out that the “bill would not require [SWRCB] to provide a basis for initiating an investigation of a water right claim” and argues that, although there is a notice and opportunity for hearing, “SB 389 provides no further details about the hearing process ... [and] [t]he claimant may have no opportunity to present evidence and testimony, to cross examine witnesses, and to test evidence against them.” The letter compares this to the existing requirements that SWRCB must comply with during statutory adjudications, where SWRCB is “authorized to initiate a statutory adjudication of all water rights to a stream system upon petition of a water rights claimant,” and includes a “robust opportunity for involvement in the investigative process.”

According to California Municipal Utilities Association (CMUA), “Water agencies rely on their water rights to conduct water supply and demand assessments and ensure there will be sufficient water to meet the needs of their customers,” and has concern that “materially altering the water rights system in California could result in the inability of water agencies to meet existing needs and to plan for the future because there is not certainty of receiving the full extent of their water rights.” According to CMUA, “SB 389 may effectuate the regulatory taking of a right crucial to water agencies, could impair many aspects of California’s economy, and may lead to an increased risk of communities not having enough water.”

COMMENTS

Authority to investigate and request information. SB 389 authorizes SWRCB to investigate the diversion and use of water from a stream system to determine whether the diversion and use are based upon appropriation, riparian right, or other basis of right, and authorizes SWRCB to require the water right claimant, diverter, or user to provide information related to the diversion and use of water. This authorization appears to be open-ended, and, according to the sponsors, is intended to provide SWRCB with the ability to gather information and better understand water usage by water right claimants.

Because of this open-ended authorization, opponents of the bill worry, as expressed in a coalition letter, that SWRCB would not be required “to provide a basis for initiating an investigation of a water right claim, meaning any claimant could be subject to an investigation at any time.”

Sponsors of the bill argue that requiring SWRCB to justify the investigation with specific facts assumes that the action of requesting information is punitive, when it is “information-gathering.”

Currently, SWRCB may determine the rights to water of a stream system upon petition of a claimant to water of the stream system and upon a finding that facts and conditions are in the public interest and necessity will be served by the determination (Wat. C. §§ 2501, 2525).

The committee may wish to amend the bill to require SWRCB to make a finding that there is reason to believe that the information would protect the public interest or further the SWRCB’s responsibilities under section 2 of Article X of the California Constitution or the public trust doctrine. (*See Amendment 1*)

More details requested. Opponents of the bill have expressed concern that SB 389 would “stack the deck against all right holders forced into these proceedings by providing minimal due process protections and placing the burden of proof on the right holder.” Opponents of the bill do not feel that the bill is “designed to create a fair and transparent process, nor is it narrowly tailored to investigate dubious claims of right.”

As an example, the opponents point to the lack of details in what constitutes “notice and opportunity for a hearing.” SB 389 authorizes SWRCB to issue a decision or order determining the diversion and use basis of right or a decision or order determining that the diversion and use is not authorized under any basis of right, after notice and opportunity for hearing.

It is unclear what processes SWRCB would be subject to, if any, when providing notice and opportunity to hearing. However, examples of similar authority exist in statute. For example, the SWRCB executive director is authorized to issue a complaint to any person or entity on which an administrative civil liability may be imposed and requires the complaint to inform the party served that the party may request a hearing not later than 20 days from the date the party was served and that SWRCB may adopt an order setting an administrative civil liability based on the allegations in the complaint without a hearing if the party does not sign a written request for a hearing. (Wat. C. §1055.)

Additionally, SWRCB is authorized to issue cease and desist orders in certain circumstances but only after SWRCB gives notice by personal notice or certified mail, pursuant to which the party is required to be informed that they may request a hearing not later than 20 days after the notice is received. (Wat. C. §§1831, 1834.)

Further, SWRCB has adopted regulations governing various types of investigations, including notice and hearing. (Title 23, California Code of Regulations.)

The committee may wish to amend the bill to give SWRCB authority to adopt regulations to implement the bill's provisions. This will help provide opponents of the bill with transparency to SWRCB's processes while also giving SWRCB flexibility to set its own processes. (See *Amendment 2*)

Forfeiture provisions. Under SB 389, SWRCB is not required to find the existence of a conflicting claim within the stream system when determining whether a holder of an appropriative right has forfeited the right or any portion of the right. According to the paper, this proposed amendment is in response to two recent California Court of Appeal decisions.

Existing law requires that an appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases. (Wat. C. §1240.) Further, existing law reverts the water back to the public to be regarded as unappropriated public water, if the person entitled to the use of water, for a period of five years, fails to use beneficially all or any part of the water claimed for the purpose for which it was appropriated or adjudicated and upon SWRCB making a finding following notice and a public hearing, if requested by the water right holder. (Wat. C. §1241.)

As noted by the paper, neither of these sections requires that the party claiming the forfeiture of an appropriative right due to non-use prove the presence of a conflicting diverter who has relied upon the unused water during the forfeiture period. However, as discussed by the paper, two recent Court of Appeal decisions have held that "what is required for forfeiture is not merely nonuse by the rights holder of its full appropriation, but also 'the presence of a competing claim' to the unused water by a rival diverter who is prepared to use, or is using, the surplus." (*Millview County Water Dist. v. State Water Resources Control Board*, 229 Cal.App.4th 879, 900 (2014); *North Kern Water Storage District v. Kern Delta Water District*, 147 Cal.App.4th 555, 586-587, 594-595 (2007).) The *Millview* court conceded that "the [conflicting claim] principal appears not to be announced explicitly by earlier decisions, but upheld the principal because all earlier forfeiture cases had involved conflicting claims and "there is no policy reason for finding a forfeiture until an alternative use has been asserted." (*Millview*, supra, 229 Cal. App. 4th at pp. 900-901).

According to the opposition coalition letter, "Courts in the state have long recognized there is no policy justification for finding a forfeiture until an alternative use has been asserted, as the purpose of the forfeiture doctrine is to free unused water for beneficial use. If no other beneficial use has been asserted, there is no reason to find a forfeiture."

However, the policy paper argues that the *Millview* court failed to consider one policy reason for not requiring proof of a conflicting claim as an element of forfeiture; keeping forfeited water in-stream will frequently benefit fishery and other public trust values. Since *Millview* and *North Kern* do not expressly treat public trust users as conflicting claimants, the paper argues, then the public trust use of the unused water would not appear to trigger the forfeiture period under these cases.

Although proposed Wat. C. §1863 would not be consistent with the Court of Appeal cases, the Separation of Powers Doctrine vests in the Legislature the authority to write and pass bills. The courts interpret the laws that are signed by the Governor. Thus, if the Legislature does not agree with a court's interpretation of statute, it can amend the statute.

Who should have the burden of proof? Proposed Wat. C. §1864 provides that, in any SWRCB proceeding to determine a diversion and use basis of right, the water right claimant, diverter, or user has the burden of proving by the preponderance of evidence the elements of the basis of right.

CMUA writes that “shifting the burden of proof may place undue hardship on water rights holders that are brought before [SWRCB] to show historical use in a process that is similar to statutory adjudications but without any due process protections present in statutory adjudications.”

Given the committee amendments which authorize SWRCB to adopt regulations to implement the bill's provisions, including notice and opportunity for hearing, this concern may be addressed.

San Francisco Public Utilities Commission (SFPUC) writes that putting the burden of proof on the water right holder means “the [SWRCB]'s investigation essentially commences with the assumption that the water right, which has supplied that community with reliable supply of water for decades, is invalid.” SFPUC has concern that, “unless the water right holder is able to prove the validity of the right with a ‘preponderance of the evidence,’ meaning to [SWRCB]'s satisfaction, [SWRCB] can eliminate that right in whole or in part.”

According to the sponsors, this principal is similar to the one used by SWRCB when it conducts a statutory adjudication of a stream system to determine the basis of right of claimants to a stream. Under the statutory adjudication provisions, whenever proceedings are instituted for the determination of water rights, it is the duty of the claimants, upon notice of the proceeding, to notify SWRCB of their intention to file a proof of claim and to submit proof of their claims. (Wat. C. §2528.) A water right claimant is also required to submit a proof of claim that includes all “facts as the board requires to show the extent and nature of the right and compliance with the law in acquiring it.” (Wat. C. §2575.)

If SWRCB can require water right claimants to prove their water rights during the adjudication of an entire stream system, the sponsors argue that there is no policy justification to impose a lesser burden when SWRCB investigates and initiates a proceeding as to individual water rights.

Related legislation

AB 460 (Bauer-Kahan) of this legislative session authorizes SWRCB to commence an interim relief proceeding on its own motion or upon the petition of an interested party, to issue an interim relief order to a diverter or user of water in adjudicative proceedings to apply or enforce specified water provisions, among others, and provides that a person who violates an interim relief order may be liable for a civil penalty. AB 460 was heard in the Assembly Water, Parks, and Wildlife Committee (9-4-2) and is pending before the Assembly Judiciary Committee.

AB 1337 (Wicks) of this legislative session authorizes SWRCB 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 was heard in the Assembly Water, Parks and Wildlife Committee (9-4-2) and is pending before the Assembly Judiciary Committee.

SUGGESTED AMENDMENTS**AMENDMENT 1**

Amend proposed Section 1860 to read:

Upon a finding that there is reason to believe that the information would protect the public interest or further the state board's responsibilities under section 2 of Article X of the California Constitution or the public trust doctrine, the state board may investigate the diversion and use of water from a stream system to determine whether the diversion and use are based upon appropriation, riparian right, or other basis of right.

AMENDMENT 2

Add a new Section 1866 that reads:

1866. The state board may adopt regulations to implement this article.

SUPPORT

Planning and Conservation League
(sponsor)
California Climate Reality Coalition
California Coastkeeper Alliance
California Environmental Voters
(formerly CLCV)
California Outdoors
California Sportfishing Protection
Alliance
California Water Research

Climate Action California
Defenders of Wildlife
Friends of the River
Mono Lake Committee
Natural Heritage Institute
Northern California Council, Fly Fishers
International
Sierra Club California
Wholly H2O

OPPOSITION

African American Farmers of California
Agricultural Council of California
Antelope Valley East-kern Water
Agency

Association of California Water
Agencies
Bella Vista Water District
Byron-Bethany Irrigation District

| | |
|---|---|
| Cal Chamber | Municipal Water District of Orange County |
| California Alliance for Jobs | Napa County Flood Control and Water Conservation District |
| California Association of Winegrape Growers | Nisei Farmers League |
| California Building Industry Association | Northern California Water Association |
| California Business Properties Association | Oakdale Irrigation District |
| California Cattlemen's Association | Palmdale Water District |
| California Cotton Ginners & Growers Association | Placer County Water Agency |
| California Farm Bureau Federation | Rosedale-Rio Bravo Water Storage District |
| California Fresh Fruit Association | Rowland Water District |
| California Manufacturers and Technology Association | San Francisco Public Utilities Commission |
| California Municipal Utilities Association | San Gabriel Valley Municipal Water District |
| California Walnut Commission | San Geronio PASS Water Agency |
| Carmichael Water District | San Joaquin River Exchange Contractors Water Authority |
| City of Corona | San Juan Water District |
| City of Roseville | San Luis Delta-Mendota Water Authority |
| Coachella Valley Water District | Santa Clarita Valley Water Agency |
| Coastside County Water District | Santa Margarita Water District |
| County of San Joaquin | Solano County Water Agency |
| County of Stanislaus | Solano Irrigation District |
| Cucamonga Valley Water District | South San Joaquin Irrigation District |
| Desert Water Agency | Southern California Water Coalition |
| Dunnigan Water District | Stockton East Water District |
| East Turlock Subbasin Groundwater Sustainability Agency | Tehachapi-Cummings County Water District |
| El Dorado Irrigation District | The Wine Institute |
| Elk Grove Water District | Three Valleys Municipal Water District |
| Elsinore Valley Municipal Water District | Tranquility Irrigation District |
| Friant Water Authority | Tri-County Water Authority |
| Imperial Irrigation District | Tuolumne County Water Agency |
| Kern County Water Agency | Tuolumne Utilities District |
| Kings River Conservation District | Turlock Irrigation District |
| Kings River Water Association | United Water Conservation District |
| Lake Arrowhead Community Services District | Valley Ag Water Coalition |
| Manteca Chamber of Commerce | Valley Center Municipal Water District |
| McKinleyville Community Services District | Walnut Valley Water District |
| Mesa Water District | Western Agricultural Processors Association |
| Modesto Irrigation District | Western Growers Association |
| Mojave Water Agency | Western Municipal Water District |
| Montecito Water District | Yuba Water Agency |



A REGIONAL WATER AGENCY
SINCE 1954

DATE: May 2, 2023
TO: Board of Directors
FROM: Heather Dyer, Chief Executive Officer/General Manager
SUBJECT: CEO/General Manager's Report

In this report:

- I. Dawn of a New Generation**
- II. Check Presentation (Congressman Aguilar)**
- III. State Water Project Allocation Increased to 100%**
- IV. New Staff**
- V. Santa Ana River Watermaster Report**
- VI. San Bernardino Basin Groundwater Council**
- VII. Project Updates/ Agendas for the next 90 days**

The following is an update from the Chief Executive Officer/General Manager on the status of several items at the Agency.

I. Dawn of a New Generation

On April 5, we launched our new Strategic Vision and Brand identity representing a renewed direction built from our Strategic Plan that reinforces the organization's values for those we serve and priorities for the region. During this event we honored our past, focused on the present and established the way-ahead for the future. Achieving a diverse, equitable, and resilient water supply in the upper Santa Ana River watershed is critical to San Bernardino Valley's communities, businesses, economy, environment, and

overall quality of life both for people today and future generations. San Bernardino Valley's new vision and commitments in the Strategic Plan are key to ensuring the organization is equipped to tackle priority issues like improved water quality, adequate and reliable water supply, and a comprehensive program to conserve, reuse, and recycle water to meet the region's needs. With this also comes the responsibility to maintain the health of local ecosystems and to protect the quality of life for people and the shared environment.

II. Check Presentation (Congressman Aguilar)

On April 7, Congressman Pete Aguilar awarded \$2,500,000 of federal funding to the Santa Ana River Enhanced Stormwater Recharge Project. This project will increase the amount of storm water from the Santa Ana River that can be captured and recharged from the Seven Oaks Dam. The water captured by this project in the San Bernardino Basin will help approximately 400,000 residents. With recent storms battering the Inland Empire, this project will play a key role in our region's long-term drought resiliency and water-conservation efforts.

San Bernardino Valley is excited to move forward with this critical water supply project as it demonstrates our commitment to collaboration, regional partnership, innovation, and perseverance in getting hard things done. This project is unique because of its many integrated benefits; as it captures much-needed local stormwater during wet years for use during future dry years; it improves the long-term water quality of our groundwater; it supports and actually enhances endangered species habitat; and finally it serves as the foundation of our long-term climate resilience strategy for the upper Santa Ana River watershed.

III. State Water Project Allocation Increased to 100%

The allocation for State Water Project (SWP) water has been increased to 100% based on the rainfall and the historic snowpack the State of California received this year. The last time the SWP allocation was 100% was 2006. Assistant General Manager, Wen Huang, and his staff are actively working to recharge the maximum amount possible into our groundwater basins for use in future years.

IV. New Staff

April was a big month for our team.

Our new Chief of Water Resources, Michael Plinski, started with us on April 27, 2023. His background was included in last month's GM report.

Kelly Malloy, our new Strategic Communications Manager joined us on April 24, 2023, and brings 15 years of experience as a leader in the public sector. Kelly joins us from East Valley Water District where she worked for 10 years on many different projects and programs, including leading the Sterling Natural Resource Center project. Prior to East

Valley, Kelly worked at the City of Hesperia for seven years in the Public Information Office. Kelly brings a wealth of knowledge in strategic communications, legislative, and brand management.

V. Santa Ana River Watermaster Report

The Santa Ana River Watermaster is a creation of the 1969 Orange County Judgment and it is made up of Inland Empire Utilities Agency, Orange County Water District, San Bernardino Valley Municipal Water District, and Western Municipal Water District who fulfill the Judgment obligations on behalf of the parties. The 52nd Annual Report of the Santa Ana River Watermaster was submitted to the Superior Court of Orange County by the April 30th deadline; the report was for the Water Year which started on October 1, 2021 and ended on September 30, 2022. At the end of the 2021-22 Water Year, Inland Empire Utilities Agency and Western Municipal Water District have a cumulative credit of 3.8 million acre-feet to their Base Flow obligation at Prado Dam. San Bernardino Valley has a cumulative credit of 1,412,812 acre-feet to its Base Flow obligation at Riverside Narrows. Based on these findings, the Watermaster concludes that there was full compliance with the provisions of the Stipulated Judgment in Water Year 2021-22.

VI. San Bernardino Basin Groundwater Council

The Groundwater Council (GC) was established in 2018 for a five-year term to cooperatively and equitably recharge the Basin; the Framework Agreement (“Agreement”) expired in February 2023 and the parties are currently discussing potential refinements. In the interim, the parties have agreed to extend the Agreement through June 30, 2024 to allow for further deliberations on key technical issues; this amendment will be coming to the Board for consideration in May or early June. As the Groundwater Council is a financing mechanism for wet-year water storage, it has been collecting funds in recent dry years and has funds currently on deposit with San Bernardino Valley to import about 44,000 acre-feet. Funds for approximately 23,000 acre-feet will be collected starting July 1, 2023, thereby increasing the total purchase capacity of the GC to 67,000 acre-feet. With the Table A allocation at 100% and availability of excess water in the State Water Project (SWP), otherwise known as Article 21 water, San Bernardino Valley expects to have sufficient water to cover at least 61,000 acre-feet or 91% of GC’s water demand. Since its establishment, the GC has imported almost 61,000 acre-feet of SWP water and over half of that amount was delivered in the last wet year on the SWP - 2019. The 2023 deliveries have a potential to double the total deliveries from the first five years.

VII. Project Updates and 90 day-Look Ahead

See attached.

Staff Recommendation

Receive and file.

Agendas: 3 Month Look Ahead

| Item | May | June | July |
|--|-----|------|------|
| Board Handbook Reformatting and Review | X | | |
| San Bernardino Mountains Headwaters Resiliency Partnership Update | X | | |
| Enterprise Resource Program System Update and Consideration | X | | |
| SB County Flood Control Master Recharge Agreement for Consideration | X | | |
| Memorandum of Understanding for the County Line Road Recharge Project with San Gorgonio Pass Water Agency | X | | |
| Funding agreement with South Mesa WC for County Line Recharge | X | | |
| Annual Wages and Benefits Review and Consideration (2 nd Thu) | X | | |
| Project Status Update on the Feasibility Study for the Foothill Pipeline Crossing at City Creek | X | | |
| Proposed Legislation on Water Rights Discussion | X | | |
| Board of Directors Committees Policy Discussion | X | | |
| Outreach Activities - Community Trails Hike Update | X | | |
| AECOM Tunneling Feasibility Study for Foothill Pipeline Crossing at City Creek Project | X | | |
| Scheevel Engineering Design and Construction of Native Fish Habitat Enhancement Structures in the Santa Ana River | X | | |
| Watershed Connect Program and Valley District WIFIA Loan | X | | |
| State and Federal Legislative Update | | X | |
| Upper Santa Ana River Habitat Conservation Plan Update | | X | |
| Water Sales Agreement w/ SB County Flood control for Glen Helen area | | X | |
| Section 6 Grant Agreement with CDFW and Resolution for Consideration (Upper SAR HCP) | | X | |
| Louis Rubidoux Parkland and Pecan Grove (LRPPG) Project Update | | X | |
| LRPPG Opportunities and Constraints | | X | |
| Headwaters Resilience Partnership (HRP) Facilitator Consideration | | X | |
| Tributaries Restoration Purple Pipe Project: CEQA/NEPA and Permitting Consultant Contract and Cost-Share Agreement with RPU for Consideration | | X | |
| Upper SAR HCP Final Environmental Impact Report and Joint Powers Authority Agreement | | X | |
| Climate Adaptation and Resilience Plan Update | | X | |
| Geoscience, Inc. ESRI modeling Conjunctive Use Project Plan as part of the Three-Party Agreement between San Gorgonio Pass Water Agency, Valley District, and YVWD | | X | |
| Salt and Nutrient Management Plan for Strategic Communications and Engagement Plan | | X | |
| UC San Diego, USACOE Forecast-Informed Reservoir Operations at Seven Oaks Dam Preliminary Viability Assessment | | X | |
| Enhanced Recharge 1B Groundbreaking Event | | X | |
| Staff augmentation contract with Scheevel Engineering | | X | |
| San Bernardino Basin Groundwater Council Renewal Agreement | | | X |

Agendas: 3 Month Look Ahead

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|--|--|--|---|
| Foothill Pump Station and Inland Feeder Intertie Project Agreement with Metropolitan Water District of Southern California | | | X |
| East Branch Extension Intertie Project - Equipment Procurements for the Central Feeder | | | X |
| Sunrise Ranch Property Master Plan Update | | | X |
| Basin Optimization Plan, WSC and Dopoudja & Wells | | | X |

Project Status Updates

| Item | Status | Estimated Next Board Update or Action |
|--|--|---------------------------------------|
| AECOM Tunneling Feasibility Study for Foothill Pipeline Crossing at City Creek Project | In progress. Recently finished geotechnical investigation and staff is reviewing technical reports. | May |
| County Line Road Basin Recharge Project | In progress. Project partners finalizing agreement, and coordinating bid and construction contract award. | May |
| East Branch Extension Intertie Project - Equipment Procurements for the Central Feeder | Materials procurement in progress. | Upon completion |
| ESRI Enterprise Advantage Program | In progress. | June |
| Geoscience, Inc. modeling Conjunctive Use Project Plan as part of the Three-Party Agreement between San Gorgonio Pass Water Agency, Valley District, and YVWD | In progress. Project partners and stakeholders coordination is ongoing. | June |
| Grant application to DWR, \$7 million for 2022 Urban Community Drought Relief Grant (\$4 mil for conjunctive use wells; 3 mil for water conservation programs) | Application completed. Staff will be notified of grant award status in coming months. | Upon notification |
| Master Plan Development for the Louis Rubidoux Parkland & Pecan Grove | In progress. Community meetings and planning by project partners is ongoing. | May |
| Purchase new Core Switches | In procurement. | None. Complete |
| Regional Recycled Water System Construction, Weaver Basins and Regional Pipeline | Construction in progress. Contract amendment 4 approved Feb 23. Projected completion on or about Nov 2023. | November |
| Replacement of Two Air Conditioning Units at Greenspot and Crafton Hills Pump Stations | In procurement; anticipated to be installed and completed in May 2023. | None |
| Rincon Climate Adaptation and Resilience Plan (CARP) with expanded stakeholder engagement | In progress. Engagement with stakeholders and staff ongoing. Climate Resilience Committee update scheduled for June. | June |
| Salt and Nutrient Management Plan for the Upper Santa Ana River Watershed Groundwater Basins | In progress. Multi-agency technical team coordination and modeling is ongoing. | June |

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| Santa Ana Low Turnout Upgrades | Environmental Complete. NOE filed with San Bernardino County Clerk December 5, 2022 | Upon completion |
| SARER 1A Lining Rehabilitation Project | Project is substantially complete. Project close out in progress. | None. Complete |
| SB County Flood Control Recharge Agreement | In negotiation. One final point for resolution is ongoing. District staff and legal counsel have been meeting regularly with County staff and legal counsel regarding perceived risk to water quality from recharge at Cactus Basins. | May |
| Scheevel Engineering Design and Construction of Native Fish Habitat Enhancement Structures in the Santa Ana River | In progress. Pilot projects have been constructed and results measured. | May |
| Strategic Communications and Engagement Plan | In progress. Draft document in review by staff. | June |
| Strategic Plan: Goals and Objectives | Complete. Reformatting in progress for consistency with new Brand materials. | None. Complete |
| Strategic Plan: Our Foundation | Complete. Reformatting in progress for consistency with new Brand materials. | None. Complete |
| UC San Diego, USACOE Forecast-Informed Reservoir Operations at Seven Oaks Dam Preliminary Viability Assessment | In progress Steering committee being formed, meetings being scheduled. | June |
| Upper Santa Ana River Habitat Conservation Plan | Final EIR and NEPA in progress. | Update provided in April. Anticipated Board action in June. |
| USGS Cooperative Study Program (Watershed/Hydrology Studies) | In progress. | August |
| USGS Data Collection Program (Water/Well Data) | In progress. | August |
| USGS Technical Assistance Agreement Western Ecological Research Center (Biological Studies) | In progress. | August |
| WIFIA | Master loan agreement and term sheet in preparation with WIFIA team and EPA. | May |
| Waterman Basins Maintenance (Environmental Permits) | Extensions to 401 and 404 submitted January 2023. | None. Complete |
| Yucaipa Sustainable Groundwater Management Agency, Dudek preparation of the Water Year 2022 Annual Report | Complete | None. Complete |
| Enhanced Recharge 1B | Construction contract was awarded in March. Preconstruction meeting in late | June |

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| | March, Mobilization in April, and groundbreaking ceremony in June. | |
| Greenspot Pipeline @ Mill Creek emergency | Complete post project reporting | None. Complete |
| Basin Optimization Plan, WSC and Dopoudja & Wells | In progress. | July |
| Regional Salt Mitigation Feasibility Study, Rincon | In progress. Grant application is in preparation for the study. | July |
| Sunrise Ranch Property Master Plan | Project kickoff in May. First public outreach in June. | June |
| Foothill Pump Station and Inland Feeder Intertie Project | Staff is finalizing the design and coordinating terms on a joint operational agreement with Metropolitan Water District staff | July |
| San Bernardino Mountains Headwaters Resiliency Partnership | In progress. Staff coordinating with partners on partnership development, monitoring plans, and implementation of partner projects. | May |
| Board Handbook | In progress. Initial review with Board; Workshop upcoming; Spreadsheet of all changes in progress | May |
| Outreach Activities – Community Trails Hike Update | Update on Community Trails Hike event planning and budget. | May |

DATE: May 2, 2023

TO: Board of Directors

SUBJECT: List of Announcements

- A. May 2, 2023, 9:30 a.m. – SAWPA Commission Meeting by Teleconference or In-Person
- B. May 2, 2023, 10:00 a.m. – PA 24 Committee Meeting by Teleconference or In-Person
- C. May 2, 2023, 2 p.m. – Regular Board Meeting by Teleconference or In-Person
- D. May 3, 2023, 8:30 a.m. – Upper SAR WIFA In-Person (Cancelled)
- E. May 4, 2023, 2 p.m. – Board Workshop – Policy/Administration by Teleconference or In-Person
- F. May 8, 2023, 6 p.m. – ASBCSD dinner (Vince's Spaghetti - Ontario)
- G. May 10, 2023, 8:30 a.m. – Upper SAR WIFA Technical Advisory Committee In-Person
- H. May 16, 2023, 2 p.m. – Regular Board Meeting by Teleconference or In-Person
- I. May 17, 2023, 8:30 a.m. – Upper SAR WIFA In-Person
- J. May 17, 2023, 1:30 p.m. – SBVW Conservation District Board Meeting
- K. May 18, 2023, 9:00 a.m. – Headwaters Resiliency Partnership Committee Meeting by Teleconference
- L. May 18, 2023, 2 p.m. – Board Workshop – Resources/Engineering by Teleconference or In-Person – Rescheduled from May 9
- M. May 22, 2023, 2 p.m. – Board Workshop – Wages, Benefits, and Insurance by Teleconference or In-Person

N. May 23, 2023, 2 p.m. – Board Workshop – BOD Handbook by Teleconference or In-Person

O. May 24, 2023, 8:30 a.m. – Upper SAR WIFA Technical Advisory Committee In-Person

P. May 29, 2023 – Memorial Day - District Closed