

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 315 (Stone)
Version: April 21, 2021
Hearing Date: July 6, 2021
Fiscal: Yes
Urgency: No
CK

SUBJECT

Voluntary stream restoration property owner liability: indemnification

DIGEST

This bill requires the state to indemnify and hold harmless property owners who allow their property to be used for fish and wildlife habitat restoration projects where certain requirements are met.

EXECUTIVE SUMMARY

Streams and rivers serve many purposes, including water supply, wildlife habitat, energy generation, transportation and recreation. A stream is a dynamic, complex system that includes not only the active channel but also the floodplain and the vegetation along its edges. For the overall health of streams and rivers, and to counteract any destabilization, significant efforts at the state and federal level have been made to restore these systems. Stream restoration is the re-establishment of the general structure, function and self-sustaining behavior of the stream system that existed prior to any destabilization. Restoration includes a broad range of measures, including the removal of the watershed disturbances that are causing stream instability; and installation of structures and planting of vegetation to protect streambanks and provide habitat. Despite the resources that have been committed to such efforts, restoration has been impeded due to the fact that many of the stream habitats that need restoration cross through privately owned land. Concerns about exposure to liability have apparently made some property owners reluctant to allow such projects to take place on their land.

This bill requires the state to indemnify and hold harmless landowners that voluntarily allow their property to be used for specific restoration projects. The bill is sponsored by Trout Unlimited. It is supported by various groups, including environmental protection organizations and water agencies. There is no known opposition. This bill passed out of the Senate Natural Resources and Water Committee on a 9 to 0 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Requires any person, state or local governmental agency, or public utility to submit written notification to the California Department of Fish and Wildlife (CDFW) and to receive approval from the department if they wish to divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake. (Fish & G. Code § 1602.)
- 2) Defines “habitat restoration or enhancement project” as a project with the primary purpose of improving fish and wildlife habitat. (Fish & G. Code § 1651(b).)
- 3) Requires a habitat restoration or enhancement project to meet the eligibility requirements for the State Water Resources Control Board’s Order for Clean Water Act Section 401 General Water Quality Certification for Small Habitat Restoration Projects, or its current equivalent at the time the project proponent submits a written request pursuant to Section 1652 or 1653. (Fish & G. Code § 1651(b).)
- 4) Provides that a person, public agency, or nonprofit organization seeking to implement a habitat restoration or enhancement project may submit a written request to approve a habitat restoration or enhancement project to the director of CDFW if the project has not received certification pursuant to the State Water Resources Control Board’s Order for Clean Water Act Section 401 General Water Quality Certification for Small Habitat Restoration Projects, or its current equivalent at the time the project proponent submits the written request. If the project has received certification pursuant to that order, or its current equivalent, the project proponent may submit a request for approval of the project pursuant to Section 1653. (Fish & G. Code § 1652.)
- 5) Provides the CDFW may enter into an agreement to accept funds from any public agency, person, business entity, or organization to achieve the purposes of habitat restoration and enhancement. (Fish & G. Code § 1655.)
- 6) Requires the department to deposit any funds so received in the account and the funds received shall supplement existing resources for department administration and permitting of projects and programs included in the Habitat Restoration and Enhancement Act. (Fish & G. Code § 1655.)

This bill:

- 1) Requires the state to indemnify and hold harmless a property owner who voluntarily allows their property to be used for a project to restore fish and wildlife habitat from civil liability for property damage or personal injury resulting from the project if all of the following requirements are met:
 - a) the project is authorized pursuant to Section 1602, 1652, or 1653 of the Fish and Game Code;
 - b) the project is funded, at least in part, by a state or federal agency whose mission includes restoring habitat for native fish or wildlife;
 - c) the project has received all approvals required under specified sections of the Water Code;
 - d) the liability arises from the construction, design specifications, surveying, planning, supervision, testing, or observation of construction related to the project to restore fish and wildlife habitat; and
 - e) the property owner does not perform, or retain any person or entity to perform, any construction, design specifications, surveying, planning, supervising, testing, or observation of construction related to the project.
- 2) Authorizes the state to develop any regulations, forms, or contracts necessary to implement these provisions and allows it to seek to enter into an agreement with the United States government, or subdivision thereof, to share the cost of any civil liability incurred.
- 3) Provides that any civil liability is not chargeable to and does not constitute an obligation of a state agency that provides funding for the project. It clarifies that it shall not be construed to alter any existing rights, duties, or obligations arising from Title 12 (commencing with Section 2772) of Part 4 of Division 3 of the Civil Code.
- 4) Includes a severability clause.

COMMENTS

1. Stated intent of the bill

According to the author:

AB 315 (Stone) seeks to encourage landowners to voluntarily permit restoration work to occur on their property by providing landowners with limited liability protection should streambed restoration work result in damages. Recognizing that habitat and ecosystem restoration is a public good that benefits all Californians, AB 315 provides that the State of California will indemnify landowners for any damages caused by the

construction, design specifications, surveying, planning, supervision, testing, or observation of construction related to the project to restore fish and wildlife habitat. It should be noted that nothing in this bill limits the ability of neighboring landowners to recover damages should they occur as a result of a restoration project, nor does this force the state to pay for any damages incurred as a result of the negligent actions of a landowner. AB 315 strikes a balance between protecting landowners and their neighbors from liability while ensuring that critical habitat and ecosystem restoration work occurs.

2. Removing barriers to critical stream restoration

The deteriorating quality of the state's streams and rivers have real world consequences. "More than 80% of California's native freshwater fishes are in decline, an indication of the degrading quality and quantity of freshwater habitats throughout the state. Thirty-three of the state's freshwater fish species are formally listed as threatened or endangered, and seven native fish species have gone extinct."¹ The issue is not necessarily a lack of public support or resources.

"Since 2000, California voters have approved eight water bonds dedicating \$27 billion to various water projects. So far, \$17 billion has been spent, including roughly \$4 billion each for ecosystem restoration and the management of floods and stormwater."² In 2014, California voters overwhelmingly approved Proposition 1, which approved general obligation bonds for various state water supply infrastructure projects.³ These projects include public water system improvements, surface and groundwater storage, drinking water protection, water recycling and advanced water treatment technology, water supply management and conveyance, wastewater treatment, drought relief, emergency water supplies, and ecosystem and watershed protection and restoration. Almost \$1.5 billion of the approved bonds are required to be spent on competitive grants for multi-benefit ecosystem and watershed protection and restoration projects. Recognizing that California has some of the most diverse ecosystems and habitats, California voters followed Proposition 1 by passing Proposition 68 in 2018, allocating millions more in additional support for waterway and habitat work.

However, one issue that has impeded efficient use of these resources for stream restoration is the reluctance of property owners. Many of these waterways cut their

¹ *Southern California Fish Moves Closer to Endangered Species Act Protection Santa Ana Speckled Dace Imperiled by Dams, Drought, Climate Chaos* (June 16, 2021) Center for Biological Diversity, <https://biologicaldiversity.org/w/news/press-releases/southern-california-fish-moves-closer-to-endangered-species-act-protection-2021-06-16/#:~:text=More%20than%2080%25%20of%20California's,fish%20species%20have%20gone%20extinct.>

All internet citations are current as of June 17, 2021.

² *Water Bond*, Public Policy Institute of California, <https://www.ppic.org/blog/tag/water-bond/>.

³ *Ibid.*

paths through private land. Although restoration projects generally pose little risk of causing damages or injuries, property owners are hesitant to allow restoration projects on their land for fear of civil liability.

The bill responds to this hesitance by requiring the state to indemnify and hold harmless a property owner who voluntarily allows their property to be used for a project to restore fish and wildlife habitat from civil liability for property damage or personal injury resulting from the project. This liability protection only applies where certain criteria are met. The project needs to be authorized pursuant to specified sections of the Fish and Game Code and have received all approvals required pursuant to relevant sections of the Water Code. The project must also be funded, at least in part, by a state or federal agency whose mission includes restoring habitat for native fish or wildlife.

In addition, the liability must arise from the construction, design specifications, surveying, planning, supervision, testing, or observation of construction related to the project to restore fish and wildlife habitat, but the liability protections do not apply where the property owner performs, or retains another to perform, those activities. Thus, this is not an immunity from suit where a property owner is negligent and causes harm or damages through the project. Rather, it ensures that the state takes on any liability that results from a government-funded project that meets the above qualifications. Any injured party would still have the ability to seek redress, it would simply be the state stepping in to accept responsibility. The bill does explicitly contemplate and authorize the state to seek a joint agreement with federal counterparts to share the costs of any resultant liability. However, any financial liability is not chargeable to or constitute an obligation of a state agency that provides funding for the project.

As the state will be exposed to financial liabilities, the bill authorizes it to develop any regulations, forms, or contracts that are necessary to properly implement the law. The increased exposure for the state is arguably justified in order to encourage more thorough stream restoration, which ultimately benefits the state as a whole.

Writing in support, a coalition of groups, including the sponsor, Trout Unlimited, the Environmental Defense Fund, Defenders of Wildlife, and the Nature Conservancy, explain the need for the bill:

Much of the critical stream habitat that needs to be restored to ensure the state meets its conservation goals lies on private land. Therefore, cooperation from landowners who have the ultimate say in whether the project can be constructed on their property, is essential. However, the current lack of clarity surrounding liability for these projects discourages some landowners from allowing this work to occur on their land since they have no certainty that they will not be held responsible for them.

Since the precautions and insurance required before projects can be constructed are extremely robust, the risk of liability from these projects is incredibly low, and to our knowledge, there have been no instances where claims have been made for damages that have occurred as a result of the kind of project covered by AB 315. But even if liability could arise, damages that occur due to restoration work that is funded by the state or a state administered program to meet state ecosystem and habitat conservation objectives and that provides public benefits, is the responsibility of the state to cover and should not fall on an individual landowner.

SUPPORT

Trout Unlimited (sponsor)
Association of California Water Agencies
California Association of Realtors
California Association of Resource Conservation Districts
California Council for Environmental and Economic Balance
California Native Plant Society
California Trout
California Watershed Network
Defenders of Wildlife
East Bay Municipal Utility District
Environmental Defense Action Fund
Lagunitas Creek Technical Advisory Committee
Marin Resource Conservation District
Midpeninsula Regional Open Space District
The Nature Conservancy
Regional Water Authority
Santa Clara Valley Water District
Solano County Water Agency
Sonoma Land Trust

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: AB 2518 (Wood, 2020) would have provided that a landowner who voluntarily allows land to be used for a project to restore fish and wildlife habitat shall not be held civilly liable for property damage or personal injury resulting from the

project if the project meets specified criteria. This bill died in the Assembly Water, Parks, and Wildlife Committee.

PRIOR VOTES:

Senate Natural Resources and Water Committee (Ayes 9, Noes 0)

Assembly Floor (Ayes 78, Noes 0)

Assembly Appropriations Committee (Ayes 16, Noes 0)

Assembly Judiciary Committee (Ayes 10, Noes 0)

Assembly Water, Parks and Wildlife Committee (Ayes 15, Noes 0)
