

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 460 (Bauer-Kahan)
Version: June 12, 2024
Hearing Date: June 25, 2024
Fiscal: Yes
Urgency: No
ID

SUBJECT

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

DIGEST

This bill increases certain civil and administrative liabilities and penalties that the State Water Resources Control Board may impose upon violators of the Board's rules, orders, or permits and registrations, creates new penalties for violating a curtailment order, and requires civil and administrative liabilities and penalties to be adjusted annually by the change in the consumer price index.

EXECUTIVE SUMMARY

The State Water Resources Control Board (SWRCB) allocates water rights, adjudicates water right disputes, and enforces water rights and the allocation of water resources. It can issue orders, such as curtailments or cease and desist orders, requiring water users to limit or stop their diversion of water from rivers and other water bodies. As part of those authorities, the SWRCB is able to impose civil or administrative liabilities or penalties on persons or entities that violate SWRCB's orders, regulations, and permits and registration requirements. However, the recent example of water diverters in the Shasta River watershed during a significant drought and in violation of a curtailment order of the SWRCB evidences that the liabilities and penalties the SWRCB can charge are insufficient to ensure water users comply with orders of the SWRCB. This bill attempts to address that by increasing the liabilities and penalties that the SWRCB may impose, creating new penalties for violating a curtailment order, and by requiring such liabilities and penalties to be adjusted for inflation annually. AB 460 is sponsored by California Trout, Trout Unlimited, and the Planning and Conservation League, and is supported by various environmental and conservation organizations. Most previous opposition has gone neutral or now supports AB 460. AB 460 passed the Senate Natural Resources and Water Committee by a vote of 10 to 0.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides the State Water Resources Control Board (SWRCB) with the authority to investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water; take testimony regarding to water rights or use of water in any such bodies of water; and to investigate and ascertain whether or not any water right filed upon or claimed is valid under the laws of the state. (Wat. Code § 1051.)
- 2) Provides that any diversion of water other than as authorized is a trespass, and that the Attorney General, independently or on behalf of SWRCB, may bring an action for injunctive relief against the diversion. Specifies that a person or entity committing such trespass may be liable for specified amounts, and that civil liability may be imposed by superior court or the SWRCB. (Wat. Code § 1052.)
- 3) Authorizes the executive director of the SWRCB 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 SWRCB, or makes a willful misstatement on a water diversion and use statement. Prescribes the procedure for service of such a complaint and authorizes SWRCB to issue an order to impose administrative civil liability after any necessary hearing. (Wat. Code § 1055.)
- 4) Authorizes SWRCB to adopt reasonable rules and regulations to carry out its powers and duties under the Water Code. (Wat. Code § 1058.)
- 5) Authorizes SWRCB 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. (Wat. Code § 1058.5.)
- 6) Declares the Legislature's intent that SWRCB take vigorous action to enforce the terms and conditions of permits, licenses, certifications, and registrations to appropriate water, to enforce SWRCB orders and decisions, and to prevent the unlawful diversion of water. (Wat. Code § 1825.)
- 7) Authorizes SWRCB to issue a cease and desist order for specified violations of the Water Code, including unauthorized diversion or use, a violation of a water right permit or license, or for an emergency regulation. (Wat. C. § 1831.)
- 8) Imposes a penalty of up to \$500 per day for violations of water rights or orders or regulations adopted by SWRCB. (Wat. Code § 1846.)

This bill:

- 1) Beginning January 1, 2025, requires SWRCB to annually adjust all civil and administrative liabilities or penalties imposed by SWRCB in an action brought by the SWRCB or at the SWRCB's request, for inflation, as provided. Provides for rounding of liabilities or penalties based on the size of the liability or penalty.
 - a) Specifies that inflation adjustments are exempt from the requirements of the Administrative Procedure Act at Government Code Section 11340. Updated civil and administrative liability or penalties pursuant to these provisions must be filed with the Secretary of State and published in the Code of California Regulations.
 - b) Specifies that SWRCB must report to the Legislature, as specified, with regard to the implementation of the bill's provisions.
- 2) Increases the penalty the SWRCB may impose for a person who violates certain cease and desist orders issued by the SWRCB from \$1,000 to \$2,500 per day the violation occurs, as specified.
- 3) Increases the civil penalty from \$500 to \$1,000 for each day that the violation occurs for a person or entity who violates a term or condition of a permit, license, certification or registration issued by SWRCB; an order or regulation adopted by SWRCB; or a condition or reporting requirement for the diversion of floodwaters for groundwater recharge; as provided.
- 4) Provides that, if the violation is of a regulation or order adopted by SWRCB that constitutes the diversion of water contrary to a curtailment order, the person or entity may be liable for an additional \$10,000 for each day the violation occurs, and \$2,500 for each acre-foot of water diverted in violation of the curtailment order, as specified.

COMMENTS

1. Author's statement

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. The existing penalties for violations are insufficient to deter unlawful behavior. AB 460 simply enhances penalties so that potential violators will see a penalty as more than a cost of doing business.

2. Incidents of illegal diverters assuming SWRCB fines as a “cost of doing business”

The SWRCB possesses a variety of powers available to help it achieve its mission “to preserve, enhance, and restore the quality of California’s water, resources, and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper water resource allocation and efficient use, for the benefit of present and future generations.”¹ These powers include the power to impose civil and administrative penalties for violators of the SWRCB’s rules, orders, regulations, and permits. (Wat. Code §§ 1845, 1846.) In 2021, due to the significant drought in California, the SWRCB adopted emergency regulations to limit diversions of water to protect Chinook and Coho Salmon and Steelhead trout in the Scott and Shasta River watersheds.² As succinctly summarized by the Senate Natural Resources and Water Committee’s analysis:

Pursuant to these regulations, SWRCB 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 SWRCB, [the Shasta River Water Association (SRWA)] began diverting water from the Shasta River on August 17, 2022. SWRCB 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. SWRCB expeditiously provided notice and a draft cease and desist order (CDO) to SRWA, which had 20 days to request a hearing. After eight days, SRWA ceased its illegal diversion and a hearing never occurred. SWRCB 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. SWRCB 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.³

3. AB 460 increases the fees that the SWRCB can charge for violations of its orders

In response to this incident, and in order to increase the ability of the SWRCB to enforce its orders through financial penalties, AB 460 proposes increases the fines that the SWRCB may impose upon an individual or entity that violates its orders. It increases

¹ State Water Resources Control Board, About the Water Board, Dept. of Water Resources (accessed Jun. 15, 2024), available at https://www.waterboards.ca.gov/about_us/.

² State Water Resources Control Board, Order Imposing Water Right Curtailment and Reporting Requirements in the Shasta River Watershed, Department of Water Resources, Order WR 2021-0082-DWR (Sept. 10, 2021), available at https://www.waterboards.ca.gov/drought/scott_shasta_rivers/shasta_addendums.html.

³ Senate Natural Resources and Water Committee, Analysis: AB 460 (Jun. 03, 2024).

the fees that the SWRCB may impose for a violation of a cease and desist order issued by the SWRCB, not occurring during a critically dry year, from \$1,000 per day to \$2,500 per day. This penalty was last raised in 1987, when it was doubled from \$500 to \$1,000. (AB 1641 (Sher), Ch. 760, Stats. 1987.) With an average increase in the Consumer Price Index of 2.8 percent per year since 1987, the increase in this penalty is within and just about the inflation rate since 1987.⁴ AB 460 also increases the fee that the SWRCB may impose on a person or entity for violating a term or condition of a permit or other registration, a regulation or order of the SWRCB, or a condition or reporting requirement for diversion from \$500 to \$1,000 for each day that the violation occurs. That fee has not been increased since the bill that created it was enacted into law. (SB 104 (Committee on Budget and Fiscal Review), Ch. 3, Stats. 2014.) This increase is greater than the increase in the rate of inflation for that time period; however, as noted by the author, the purpose of AB 460 is to provide added disincentive for water users to violate orders of the SWRCB. Thus, this increase may well be justified beyond its comparability with the rate of inflation since the fee's last increase.

AB 460 also adds additional penalties, and provides for annual increases in the civil liabilities or penalties. It specifies that a person or entity that violates of a curtailment order of the SWRCB may be liable for an amount not more than: \$10,000 for each day in which the violation occurs; or \$2,500 for each acre-foot of water diverted in violation of the curtailment order. AB 460 requires the SWRCB to adjust annually by January 1 of each year the maximum amounts of all civil and administrative liabilities or penalties imposed by the board by the amount by which the California Consumer Price Index has increased in June of the year prior from June of the year in which the penalty was established or last amended by statute. AB 460 also provides for the rounding of such adjustments in specified circumstances. The SWRCB is required to report to the Legislature with regard to the implementation of AB 460's provisions.

SUPPORT

California Trout (sponsor)
Trout Unlimited (co-sponsor)
Planning and Conservation League (co-sponsor)
Audubon California
California Coastkeeper Alliance
California Environmental Voters
California Municipal Utilities Association
California Outdoors
California Sportfishing Protection Alliance

⁴ See, U.S. Bureau of Labor Statistics, CPI Inflation Calculator (accessed Jun. 15, 2024), https://www.bls.gov/data/inflation_calculator_inside.htm; Federal Reserve Bank of Minneapolis, "Consumer Price Index, 1913 - " (accessed Jun. 15, 2024), available at <https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator/consumer-price-index-1913->.

California Water Impact Network
California Water Research
Clean Water Action
Climate Action California
Coast Action Group
Defenders of Wildlife
Earthjustice
Environmental Justice Coalition for Water
Environmental Law Foundation
Environmental Working Group
Friends of The Eel River
Friends of The River
Heal the Bay
Institute for Conservation Advocacy Research and Education
Karuk Tribe
Laura Stokes, Online Art Sales and Gallery
League of Women Voters of California
Metropolitan Water District of Southern California
Mono Lake Committee
North Bay Jobs With Justice
Northern California Council, Fly Fishers International
Northern California Water Association
Restore the Delta
San Francisco Baykeeper
Sierra Club California
Silicon Valley Youth Climate Action
State Water Contractors
Trust for Public Land
Union of Concerned Scientists
Water Foundation
Water Replenishment District of Southern California
Wholly H2o
Yurok Tribe

OPPOSITION

Bay Area Council
City of Lodi
City of Stockton
County of Fresno
County of Stanislaus
Mayor of City & County of San Francisco London Breed
Modesto Irrigation District
Mountain Counties Water Resources Association

Orange County Water District
San Joaquin County Board of Supervisors
Solano County Board of Supervisors
Tulare; County of
Turlock Irrigation District

RELATED LEGISLATION

Pending Legislation: AB 1337 (Wicks, 2023) authorizes SWRCB to issue a curtailment order for any diversion, regardless of basis of right, when water is not available under the diverter's priority of right, and expands the instances in which an unauthorized diversion or use of water is considered a trespass. AB 1337 is currently in the Senate Natural Resources and Water Committee.

Prior Legislation:

SB 389 (Allen, Ch. 486, Stats. 2023) authorized SWRCB to investigate and ascertain whether or not a water right is valid, authorized SWRCB to issue an information order in furtherance of the investigation, and authorized a diversion of use of water ascertained to be unauthorized to be enforced as a trespass.

SB 104 (Committee on Budget and Fiscal Review, Ch. 3, Stats. 2014.) created a fee of \$500 for each day that the violation occurs that the SWRCB may impose on a person or entity for violating a term or condition of a permit or other registration, a regulation or order of the SWRCB, or a condition or reporting requirement for diversion.

AB 2017 (Kelley, Ch. 1098, Stats. 1991) updated SWRCB's enforcement authority so that it could impose civil liability in any water year type (not just "critical" water years), removed the requirement that SWRCB hold a hearing any time it imposed administrative civil liability instead holding a hearing at the request of party, and gave the party 20 days to request a hearing.

AB 1641 (Sher, Ch. 760, Stats. 1987) last increased the civil fee that the SWRCB may impose for a violation of a cease and desist order issued by the SWRCB, not occurring during a critically dry year, from \$500 to \$1,000.

PRIOR VOTES:

Senate Natural Resources and Water Committee (Ayes 10, Noes 0)
Assembly Floor (Ayes 43, Noes 20)
Assembly Appropriations Committee (Ayes 11, Noes 4)
Assembly Judiciary Committee (Ayes 7, Noes 2)
Assembly Water, Parks and Wildlife Committee (Ayes 9, Noes 4)
