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

SB 1254 (Hertzberg)
Version: April 18, 2022
Hearing Date: April 26, 2022
Fiscal: Yes
Urgency: No
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SUBJECT

Drinking water: administrator: managerial and other services

DIGEST

This bill provides a level of immunity to administrators of water systems appointed or selected by the State Water Resources Control Board ("the board"). The bill also expands the water systems for which administrators can be appointed.

EXECUTIVE SUMMARY

The California Safe Drinking Water Act (CSDWA) provides for the operation of public water systems and imposes on the board various responsibilities and duties. The act authorizes the board to contract with, or provide a grant to, an administrator to provide administrative, technical, operational, legal, or managerial services, or any combination of those services, to a designated water system to assist with the provision of an adequate supply of affordable, safe drinking water. CSDWA lays out guidelines pursuant to which the board may identify a designated water system in need of services, order a designated water system to accept services from an administrator, and work with the administrator of a designated water system to develop adequate technical, managerial, and financial capacity to develop an adequate supply of affordable, safe drinking water so that administrator services are no longer necessary.

The board has found it difficult to secure an adequate roster of administrators to take charge of troubled systems. The board has identified liability concerns as a factor for the reluctance of administrator candidates to take on the role. This bill immunizes drinking water administrators from liability for certain claims in connection with the assumption and operation of designated water systems, as specified. The bill also expands what water systems can be targeted for appointment of an administrator, including at-risk water systems in the definition of designated water system.

This bill is sponsored by the State Water Resources Control Board. It is supported by various water districts and associations, including the California Municipal Utilities Association and the California Water Association. There is no known opposition. This bill passed out of the Senate Environmental Quality Committee on a 7 to 0 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes the CSDWA and requires the board to maintain a drinking water program. (Health & Saf. Code § 116270 et seq.)

2) Requires the board to submit to the Legislature a comprehensive Safe Drinking Water Plan for California every five years. (Health & Saf. Code § 116355 (a).)

3) Creates the Safe and Affordable Drinking Water Fund in the State Treasury to help water systems provide an adequate and affordable supply of safe drinking water in both the near and long terms. (Health & Saf. Code § 116766.)

4) Authorizes the board, where a public water system or a state small water system serving a disadvantaged community consistently fails or is at risk of failing to provide an adequate supply of safe drinking water, to order a physical or operational consolidation with a receiving water system. (Health & Saf. Code § 116682(a).)

5) Authorizes the board, in order to provide an adequate supply of affordable, safe drinking water to disadvantaged communities, voluntary participants, and public water systems that have demonstrated difficulty in maintaining technical, managerial, and financial capacity and to prevent fraud, waste, and abuse, to:
    a) contract with, or provide a grant to, an administrator to provide administrative and managerial services to a designated public water system to assist the designated public water system with the provision of an adequate and affordable supply of safe drinking water; and
    b) order the designated public water system to accept administrative, technical, operational, legal, or managerial services from an administrator selected or appointed by the board. (Health & Saf. Code § 116686(a).)

6) Defines a “designated water system” as a public water system or state small water system that has been ordered to consolidate pursuant to Section 116682 or that serves a disadvantaged community, and that the state board finds consistently fails to provide an adequate supply of affordable, safe drinking water. (Health & Saf. Code § 116686(m)(2).)

7) Defines an "at-risk water system" as a water system that meets all the following conditions:
    a) is either a public water system with 3,300 or fewer connections or a state small water system;
    b) serves a disadvantaged community; and
    c) the system is at risk of consistently failing to provide an adequate supply of safe drinking water, as specified. (Health & Saf. Code § 116681(d).)

8) Establishes as the policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes. (Water Code § 106.3)

This bill:

1) Expands the definition of "designated water system" to include "at-risk water systems" for the purposes of an administrator appointment.

2) Provides that a drinking water administrator appointed by the board to operate and manage failing and at-risk water systems is not liable for claims by past or existing ratepayers, or those who consumed water provided through the designated water system if good faith, reasonable effort, and ordinary care were used by the administrator to assume possession of, or to operate, the designated water system. The administrator is also not liable for any injury or damages that occurred before the commencement of the operation period.

3) Provides that it does not limit or supersede any other law authorizing claims against the board or providing a defense to liability, and shall not be construed to create any new or expanded basis for liability.

4) Clarifies that it should not be construed to do any of the following:
    - relieve a water district, water wholesaler, or any other entity from complying with any provision of federal or state law pertaining to drinking water quality;
    - impair any cause of action by the Attorney General, a district attorney, a city attorney, or other public prosecutor, or impair any other action or proceeding brought by, or on behalf of, a regulatory agency;
    - impair any claim alleging the taking of property without compensation within the meaning of either the Fifth Amendment to the United States Constitution or Section 19 of Article I of the California Constitution; or
    - relieve any person or entity from liability for action or inaction in bad faith, or without reasonable effort or ordinary care.

5) Provides that it does not absolve, indemnify, or protect a prior operator, designated water system, or individual from liability based on injuries or damages that occurred before the operation period.

6) Defines "operation period" to mean the period during which an administrator provides services to a designated water system.

COMMENTS

1. California's drinking water systems

California has declared it is the policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes. This Human Right to Water law was established by AB 685 (Eng, Ch. 524, Stats. 2012). Unfortunately, many drinking water systems in the state consistently fail or are at-risk of failing to provide safe drinking water to their customers. Lack of safe drinking water is a problem that disproportionately affects residents of California's disadvantaged communities.

Overseeing these water systems is the State Water Resources Control Board. The Legislature has repeatedly granted new authority to the board to enable them to effectuate the ambitious policy of the state. For instance, the board is empowered to consolidate drinking water systems under certain circumstances.

In order to provide an adequate supply of affordable, safe drinking water to disadvantaged communities and to prevent fraud, waste, and abuse, SB 552 (Wolk, Ch. 773, Stats. 2016) authorized the board to contract with, or provide a grant to, an administrator to provide administrative, technical, operational, legal, or managerial services, or any combination of those services, to a designated water system to assist the designated water system with the provision of an adequate supply of affordable, safe drinking water, which may include steps necessary to enable consolidation. The board can also order the designated water system to accept administrative, technical, operational, legal, or managerial services, including full management and control of all aspects of the designated water system or full oversight of certain projects, from an administrator selected or appointed by the state board.

SB 200 (Monning, Ch. 120, Stats. 2019) established the Safe and Affordable Drinking Water Fund to help water systems provide an adequate and affordable supply of safe drinking water and specifically authorized funds from this account to cover costs of an administrator appointment for water systems that have been ordered to consolidate.

An administrator is a person whom the state board has determined is competent to perform the administrative, technical, operational, legal, or managerial services required, pursuant to established criteria. Administrators may be individual persons, businesses such as engineering firms, non-profit organizations, local agencies, and other entities. An administrator can serve in a limited or full scope capacity.

The "designated water systems" that qualify to receive an administrator are water systems that have been ordered to consolidate or that serve a disadvantaged community and have been found by the board to consistently fail to provide an adequate supply of affordable, safe drinking water.

2. Immunity as a tool to recruit administrators

Despite the powers instilled in the board, the board's 2021 Drinking Water Needs Assessment identified over 600 at-risk water systems and over 500 additional systems potentially at risk.[1] The author asserts that in response the board has undergone the required processes to make 13 of these water systems eligible for administrators, but only one administrator is in place. The author states that "while the State Water Resources Control Board (SWRCB) can appoint third-party administrators to assist failing public water systems, the SWRCB struggles to recruit and retain administrators due to uncertainty around legal liability."

This bill responds to this asserted concern by limiting the liability of administrators in connection with certain claims. Specifically, administrators cannot be held liable for claims by past or existing ratepayers, or those who consumed water provided through the designated water system, for any injury or damages that occurred *before* the commencement of the operation period. This is likely already the state of the law, but clarifies that administrators are not responsible for preexisting claims.

Additionally, the bill provides that an appointed administrator is not liable for any such claims if the administrator acted in good faith and used reasonable effort and ordinary care to assume possession of, or to operate, the designated water system. The motivation is again that these are systems with many issues, and therefore, administrators should not be held liable for any damage that occurs even after the operation period has begun if it is through no lack of effort or care on the part of the administrator. Again, existing law arguably already protects administrators from liability for damages not proximately caused by their actions and where they have acted reasonably and with all due care.

The bill also clarifies that the changes to the law being made do not limit or supersede any other law authorizing claims against the board or providing a defense to liability. It provides that nothing therein should be construed to create any new or expanded basis for liability. This language simply avoids any interpretation of the provisions regarding administrators' liability that places additional liability or duties on the board itself.

In order to avoid any unintended interpretations of the language, the bill provides that nothing therein should be construed to do the following:

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[1] *2021 Drinking Water Needs Assessment* (April 2021) California State Water Resources Control Board, https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/documents/needs/2021_needs_assessment.pdf [as of Apr. 19, 2022].

- relieve a water district, water wholesaler, or any other entity from complying with any provision of federal or state law pertaining to drinking water quality;
- impair any cause of action by the Attorney General, a district attorney, a city attorney, or other public prosecutor, or impair any other action or proceeding brought by, or on behalf of, a regulatory agency;
- impair any claim alleging the taking of property without compensation within the meaning of either the Fifth Amendment to the United States Constitution or Section 19 of Article I of the California Constitution; or
- relieve any person or entity from liability for action or inaction in bad faith, or without reasonable effort or ordinary care.

The first provision highlights that it does not relieve any entity of the duty to comply with drinking water quality laws. However, the bill should not be construed to relieve any entity of *any* obligation. To ensure no such interpretation is possible, the author has agreed to amend this paragraph to read:

Amendment

(k) Nothing in this section shall be construed to do any of the following:
(1) Relieve a water district, water wholesaler, or any other entity from complying with any provision of federal or state law**, including those** pertaining to drinking water quality.

There is some precedent for legislating the liability that applies when troubled water systems receive administrators or are taken over by new entities, albeit in distinct and much narrower circumstances.

AB 1577 (Gipson, Ch. 859, Stats. 2018) required the board to order the Sativa-Los Angeles County Water District to accept administrative and managerial services and to bypass the usual procedural requirements in response to deficiencies associated with Sativa's lack of proper fiscal management and operational capacity. The bill provided liability provisions similar to those in this bill for an administrator appointed for the Sativa-Los Angeles County Water District and any successor agency taking over the district. SB 1130 (Roth, Ch. 173, Stats. 2014) applied similar provisions in connection with troubled systems in Riverside but with various conditions precedent.

As a general rule, California law provides that persons are responsible, not only for the result of their willful acts, but also for an injury occasioned to another by their want of ordinary care or skill in the management of their property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon themselves. (Civ. Code § 1714(a).) Liability has the primary effect of ensuring that some measure of recourse exists for those persons injured by the negligent or willful acts of others; the risk of that liability has the primary effect of ensuring parties act reasonably to avoid harm to those to whom they owe a duty.

Conversely, immunity from liability disincentivizes careful planning and acting on the part of individuals and entities. When one enjoys immunity from civil liability, it is relieved of the responsibility to act with due regard and an appropriate level of care in the conduct of its activities. Immunity provisions are also disfavored because they, by their nature, preclude parties from recovering when they are injured, and force injured parties to absorb losses for which they are not responsible. Liability acts not only to allow a victim to be made whole, but to encourage appropriate compliance with legal requirements.

Here, there is evidence that a factor for the board's inability to recruit and retain qualified administrators is concern over potential liability. However, not a single example of an administrator being held liable for the type of reasonable conduct contemplated by the bill has been found or provided. Therefore, it is unclear that such provisions are useful or necessary. Ultimately, the provisions are fairly narrow and arguably do not immunize any conduct that an administrator would otherwise be held liable for.

In addition, nothing within the bill provides any immunity for prior entities or individuals, and, in fact, the bill explicitly makes clear that claims based on injuries or damages that occurred before the operation period are unaffected. However, there is the possibility that culpable conduct on the part of a prior operator that occurs before the operation period results in an injury or damage that occurs after the beginning of the operation period. To ensure that such situations are not impacted by the changes made by this bill, the author has agreed to amend this provision to read:

> Amendment
>
> (l) Nothing in this section shall absolve, indemnify, or protect a prior operator, designated water system, or individual from liability based on ~~injuries or damages that occurred before the operation period~~ **an act or failure to act prior to the operation period.**

The bill also includes at-risk water systems within the designated water systems eligible to receive an administrator. An "at-risk water system" is a water system that meets all the following conditions:

- is either a public water system with 3,300 or fewer connections or a state small water system;
- serves a disadvantaged community; and
- the system is at risk of consistently failing to provide an adequate supply of safe drinking water, as specified. (Health & Saf. Code § 116681(d).)

Just last year, SB 403 (Gonzalez, Ch. 242, Stats. 2021) made at-risk systems eligible for mandated consolidation by the board based on the idea, as put by the author, that

"[w]aiting until a system fails before taking action makes no sense." As stated, the board has identified a number of systems that qualify as at-risk. This provision of the bill allows such systems to receive the benefits that are attendant with an administrator's services and furthers the goal of realizing the right to safe, clean, affordable, and accessible water without waiting for conditions to get even worse.

According to the author:

> SB 1254 provides statutory limited liability clarifications for appointed administrators and the SWRCB, and expands administrator appointment authority to at-risk water systems. This ensures the SWRCB can more effectively appoint administrators and advances the state's goal of providing safe drinking water for all Californians.

3. Stakeholder positions

The California Municipal Utilities Association writes in support:

> Administrators are tasked with providing the public water system with managerial support to help resolve issues preventing the delivery of safe drinking water. However, according to the Board it has been difficult to recruit these administrators in large part due to legal uncertainty surrounding administrator liability.
>
> SB 1254 would provide much needed liability protection to clean drinking water administrators appointed by the State Water Board to operate and manage these failing and at-risk water systems. By clarifying the legal liability of administrators, SB 1254 advances California's "Human Right to Water" goal and moves the state forward in its effort to ensure all communities have reliable access to safe and affordable drinking water.

Also writing in support, the Eastern Municipal Water District argues:

> While Administrators, as outlined, provide a unique and desirable solution in many instances, liability constraints from the actions of past system operators can serve as a disincentive to attracting capable Administrators. SB 1254 provides a narrowly crafted solution to the liability constraints that serves as a detractor to securing much needed Administrators capable of assisting the state in achieving safe and reliable drinking water for all Californians.

SUPPORT

State Water Resources Control Board (sponsor)
Association of California Water Agencies
California Municipal Utilities Association
California Water Association
Eastern Municipal Water District

OPPOSITION

None known

RELATED LEGISLATION

Prior Legislation:

SB 403 (Gonzalez, Ch. 242, Stats. 2021) *See* Comment 2.

SB 200 (Monning, Ch. 120, Stats. 2019) *See* Comment 1.

AB 1577 (Gipson, Ch. 859, Stats. 2018) *See* Comment 2.

SB 552 (Wolk, Ch. 773, Stats. 2016) *See* Comment 1.

SB 1130 (Roth, Ch. 173, Stats. 2014) *See* Comment 2.

AB 685 (Eng, Ch. 524, Stats. 2012) *See* Comment 1.

PRIOR VOTES:

Senate Environmental Quality Committee (Ayes 7, Noes 0)

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