

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

SB 756 (Laird)
Version: February 17, 2023
Hearing Date: April 18, 2023
Fiscal: Yes
Urgency: No
AM

SUBJECT

Water: unlicensed cannabis cultivation site: procedure

DIGEST

This bill provides explicit authority to the State Water Resources Control Board (SWRCB) to obtain an inspection warrant in conducting investigations and proceedings for violations of the Water Code. The bill exempts the SWRCB and regional water boards from seeking prior consent or complying with other procedural requirements for an inspection warrant in connection with an investigation into unlicensed cannabis activity. The bill authorizes the SWRCB and regional water boards from participating in an inspection of an unlicensed cannabis cultivation site conducted pursuant to a warrant duly issued pursuant to the Penal Code, as provided.

EXECUTIVE SUMMARY

This bill seeks to provide the SWRCB and regional water boards with enhanced tools and power to investigate and enforce violations of the Water Code regarding quality and diversion violations especially as it respects unlicensed cannabis activity. According to the author, unlicensed cannabis cultivation poses a significant threat to water supply and quality in the state causing grave harm to California, including discharging banned pesticides and other chemicals into the state's watersheds. The author notes that complaints to the SWRCB have risen sharply in the past decade and that the bill's provisions should help the SWRCB and regional boards focus on priority watersheds that are at high risk of environmental damage and unsafe drinking water supply.

The bill is author sponsored and supported by a coalition of various environmental organizations. There is no known opposition. The bill passed the Senate Committee on Natural Resources and Water on a vote of 11 to 0.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that a diversion or use of water other than as authorized by the Water Code is a trespass and a person who commits such trespass may be civilly liable, as specified. (Wat. Code §1052.)
- 2) Requires the Department of Water Resources (DWR) and the SWRCB to take all appropriate proceedings or actions to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state. (Wat. Code §275.)
- 3) Declares that it is the intent of the Legislature that the state 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 unlawful diversion of water. A person or entity may be civilly liable for a violation of a term or condition of a permit, license, certificate, or registration issued, or a regulation or order adopted by the board. (Wat. Code §§ 1825, 1846.)
- 4) Authorizes the executive director of SWRCB to issue a complaint to any person or entity on which an administrative civil liability may be and requires the complaint be served by personal notice or certified mail. (Wat. Code § 1055.)
 - a) Requires, for certain decisions or orders, the SWRCB to serve a copy of a decision or order on parties by personal delivery or registered mail. (Wat. Code § 1121.)
- 5) Enacts the Porter-Cologne Water Quality Control Act (Porter-Cologne), which establishes responsibilities and authorities of the SWRCB and the nine regional water quality control boards (regional water boards) as the principal state agencies with primary responsibility for the coordination and control of water quality. (Wat. Code § 13000 et. seq.)
 - a) Requires cease and desist orders of the SWRCB become effective and final upon its issuance. Copies of the order are required to be served by personal service or by registered mail on the person charged with a violation of the Act's requirements and upon other affected persons who appeared at the hearing and requested a copy. (Wat. Code § 13303.)
 - b) Authorizes an executive officer of a regional water board to issue a complaint to any person on whom administrative civil liability may be imposed and requires that the complaint be served by certified mail. (Wat. Code § 13323.)
 - c) Orders imposing administrative civil liability become effectively immediately upon issuance and copies of the orders are required to be

- served by certified mail upon the party served the complaint and provided to others person who appeared at the hearing and requested a copy. (*Ibid.*)
- d) Authorizes a regional board to obtain an inspection warrant in conducting an investigation if consent to inspect is withheld. However, in the event of an emergency affecting the public health or safety, an inspection may be performed without consent or the issuance of a warrant. (Wat. Code § 13267.)
- 6) Provides a process for state and local officials to obtain inspection warrants in the name of the people, signed by a judge of a court of record, commanding the official to conduct any inspection required or authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning. (Code Civ. Proc. § 1822.50 et. seq.)
- a) Requires an inspection arrant to be supported by an affidavit, particularly describing the place, dwelling, structure, premises, or vehicle to be inspected and the purpose for which the inspection is made, and the affidavit must contain either a statement that consent to inspect has been sought and refused or facts or circumstances reasonably justifying the failure to seek such consent. (Code Civ. Proc. § 1822.51.)
- b) Prohibits an inspection pursuant to these provisions from being made between 6:00 p.m. of any day and 8:00 a.m. of the succeeding day, nor in the absence of an owner or occupant of the particular place, dwelling, structure, premises, or vehicle unless specifically authorized by the judge upon a showing that such authority is reasonably necessary to effectuate the purpose of the regulation being enforced. (Code Civ. Proc. § 1822.56.)
- c) An inspection pursuant tis prohibited from being made by means of forcible entry, except that the judge may expressly authorize a forcible entry where facts are shown sufficient to create a reasonable suspicion of a violation of a state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning, which, if such violation existed, would be an immediate threat to health or safety, or where facts are shown establishing that reasonable attempts to serve a previous warrant have been unsuccessful. (*Ibid.*)
- d) Where prior consent has been sought and refused, notice that a warrant has been issued must be given at least 24 hours before the warrant is executed, unless the judge finds that immediate execution is reasonably necessary in the circumstances shown. (*Ibid.*)
- 7) Specifies the manner of service of summons and persons on who service of summons can be served upon. (Code Civ. Proc. § 415.10 et. seq.; § 416.10 et. seq.)

This bill:

- 1) Authorizes the SWRCB to:

- a) When conducting certain investigations or proceedings, to inspect the property or facilities of any person or entity to determine compliance with the law and water policy that requires waste, unreasonable use, or unreasonable method of use of water be prevented.
 - i. If consent is denied, authorizes the SWRCB to obtain an inspection warrant in accordance with specified procedures in the Code of Civil Procedure.
 - ii. In the event of an emergency affecting the public health or safety, an inspection may be performed without consent or the issuance of a warrant.
 - b) When investigating an unlicensed cannabis cultivation site, to obtain an inspection warrant without seeking prior consent of the owner or possessor of the property or complying with the provisions of 6)b)-d) above.
 - c) Participate in an inspection of an unlicensed cannabis cultivation site conducted pursuant to a warrant duly issued pursuant to the Penal Code when requested by the party seeking that warrant, and when there is probable cause that the unlicensed cannabis cultivation and its associated activities may involve a violation of the Water Code.
- 2) Expands and clarifies various notice provisions for serving complaints, copies of a decision or order, or a cease and desist order to include serving notice by personal service or certified mail, pursuant to the existing provisions for service of summons under the Code of Civil Procedure, or by any method of physical delivery that provides a receipt.
- a) Specifies that physical delivery that provides a receipt includes electronic confirmation of delivery to the intended address.
 - b) For persons who appeared at a hearing and request a copy of any orders, the orders may be delivered by first class mail or electronic mail.
- 3) Authorizes a regional board to:
- a) When investigating an unlicensed cannabis cultivation site, to obtain an inspection warrant without seeking prior consent of the owner or possessor of the property or complying with the provisions of 6)b)-d) above.
 - b) Participate in an inspection of an unlicensed cannabis cultivation site conducted pursuant to a warrant duly issued pursuant to the Penal Code when requested by the party seeking that warrant, and when there is probable cause that the unlicensed cannabis cultivation and its associated activities may involve a violation of the Water Code.

COMMENTS

1. Stated need for the bill

The author writes:

Unlicensed cannabis cultivation poses a significant threat to California's water supply and quality, which can harm our communities and sensitive wildlife. Thousands of pounds of sediment, banned rodenticides and pesticides, and chemicals are improperly discharged into our watersheds. Millions of gallons of water are illegally diverted or stolen daily. These water violations are felt all the way down to the taps in our homes where residents' drinking water have been threatened.

Senate Bill 756 equips the State and Regional Water Boards with the tools to investigate and enforce water quality and diversion violations associated with unlicensed cannabis cultivation, focusing on priority watersheds that are at high risk of environmental damage and unsafe drinking water supply. The bill authorizes Water Boards staff to obtain inspection warrants for suspected illegal water diversions, participate alongside law enforcement who have obtained appropriate criminal warrants, and serve enforcement documents through mail delivery methods that track receipt to prevent unlicensed cultivators from evading enforcement notices.

2. Unlicensed cannabis cultivation poses a significant threat to California's water quality and supply

The Senate Committee on Natural Resources and Water writes:

There is no doubt that unlicensed cannabis cultivation poses a significant threat to California's water quality and supply. Illegal operations often use excessive amounts of water, use harmful pesticides and fertilizers that can contaminate the water supply, and disrupt local wildlife habitats.

In 2018, the Sacramento Bee reported an increase of illegal operations in Yosemite National Park and other public parks, where the use of banned pesticides are polluting water and poisoning endangered species.¹ Illegal operations have begun using carbofuran, an illegal pesticide in California, as a rodenticide to kill the animals that eat the plants at the grow sites. The use of such chemicals, according to the article, has led to further imperilment of

¹ Sam Stanton, *Illegal pot grows found in Yosemite, forests. Officials crack down, citing 'catastrophic' poisons*, Sac. Bee (June 2, 2018), available at <https://www.sacbee.com/news/california/california-weed/article212123169.html>.

species such as the California fisher and the spotted owl. Additionally, some of the poisons are now being detected in elk and other wildlife. In the past a majority of grow sites were found in Trinity, Mendocino, and Humboldt counties. Now, they can be found in at least 40 of California's 58 counties.

Of the 1.5 million illegal plants eradicated at illegal grow sites by the U.S. Forest Service nationwide last year, 1.4 million were found in California. According to U.S. Forest Service officials, California now produces more marijuana than Mexico and is serving as an illegal growing lab for consumption from buyers mostly outside of California. The grow sites are contaminating and diverting millions of gallons of water, leaving trash heaps at hundreds of locations and endangering the public using the forests.

In 2022, both CalMatters and the LA Times carried major stories describing widespread water theft by illegal marijuana grows. A federal Drug Enforcement Agency agent is quoted, saying "By our calculation, the illegal grows in Los Angeles, Riverside and San Bernardino counties require an astounding 5.4 million gallons of water a day, every day."² And the problem is statewide. (footnotes in original.)³

3. Notice and service of summons

The various notice statutes for serving complaints, copies of a decision or order, or a cease and desist orders by the SWRCB or regional boards require the notice be provided either by personal service or certified or registered mail, or in certain instances just by certified mail. This bill seeks to standardize and expand the ways notice can be achieved by specifying that notice can be provided via personal service or certified mail, in accordance with the existing provisions under the Code of Civil Procedure, or by any method of physical delivery that provides a receipt. "Physical delivery that provides a receipt" includes electronic confirmation of delivery to the intended address. For persons who appeared at a hearing and requests a copy of any orders, the bill authorizes the orders to be delivered by first class mail or electronic mail. The bill provides that physical delivery that provides a receipt includes electronic confirmation of delivery to the intended address.

² Julie Cart, *Thieves are stealing California's scarce water. Where's it going? Illegal marijuana farms*, CalMatters (May 4, 2022) available at <https://calmatters.org/environment/2021/07/illegal-marijuana-growers-steal-california-water/>; Jaclyn Cosgrove, et. al., *Illegal pot invades California's deserts, bringing violence, fear, ecological destruction*, L.A. Times (Jul. 11, 2021) available at <https://www.latimes.com/california/story/2021-07-11/illegal-marijuana-growers-have-overrun-the-california-desert>.

³ Cal. Sen. Comm. on Nat. Resources and Wat. analysis of SB 756 (2023-24 reg. session) as introduced Feb. 17, 2023, at pp. 4-5.

Existing law provides that wherever any notice or other communication is required by any law to be mailed by registered mail to or by the state, or any officer or agency thereof, the mailing of such notice or other communication by certified mail or any other means of physical delivery that provides a receipt shall be deemed to be a sufficient compliance with the requirements of such law. (Gov. Code § 8311.) The court has interpreted this statute to mean that no receipt is required to be obtained for providing notice by certified mail.⁴ The court noted Section 8311 was amended in 2017 to include “any other means of physical delivery that provides a receipt” but that this amendment did not impose a receipt requirement if service was made by certified mail.⁵ The court noted that it was “well established that the statute ‘does not require proof of service in the form of a return receipt signed by the party or other acknowledgment of receipt by the party, unlike other statutes governing service by mail’⁶ prior to 2017 amendments and that the “commentary contains no suggestion that the amendment was intended to change existing law with respect to the sufficiency of certified mail or that the receipt requirement applies to certified mail.”⁷ The changes the bill makes to the notice requirements seem consistent with Section 8311 and existing law.

The author states that historically, the SWRCB and regional water have relied on certified mail to serve enforcement-related documents; however, they have been encountering issues with this method of service, particularly within the cannabis enforcement and industrial stormwater programs where the responsible parties are more likely to be unenrolled and uncooperative. Many of these individuals anticipate that enforcement documents will be sent via certified mail, whether it be from personal experience or word of mouth within the community, and therefore refuse to accept documents from those boards served in that manner. The author argues that limiting the method of traceable delivery to certified mail increases the likelihood that such individuals will effectively evade service. In contrast, the use of alternative couriers such as FedEx, UPS, or even USPS Priority Mail Flat Rate envelopes, which are often used for personal deliveries, may have a greater probability of being accepted by the recipient. These types of deliveries provide a traceable method of service and staff can confirm electronically when a delivery has been completed without requiring a signed certified mail return receipt.

4. Inspection warrants

Existing law provides a process for state and local officials to obtain inspection warrants in the name of the people, which are signed by a judge of a court of record, commanding the official to conduct any inspection required or authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning. (Code Civ. Proc. § 1822.50 et. seq.) Various requirements must be met

⁴ *Medical Bd. of Cal. v. Superior Court of San Francisco* (2018) 20 Cal.App.5th 1191 at p. 1193.

⁵ *Id.* at 1194.

⁶ *Ibid.*

⁷ *Id.* at 1194-95.

for an inspection warrant to be issued, such as being issued upon cause, unless another standard is provided by law, and being supported by an affidavit, particularly describing the place, dwelling, structure, premises, or vehicle to be inspected and the purpose for which the inspection is made. (Code Civ. Proc. § 1822.51.) Additionally, there are various procedural requirements and prohibitions that must be met or followed. These include:

- An attempt to receive consent to inspect the premises or property generally must be made before obtaining an inspection warrant. (*Ibid.*)
- An inspection is prohibited from being made between 6:00 p.m. and 8:00 a.m. of the succeeding day, or in the absence of an owner or occupant of the place being inspected, unless specifically authorized by the judge upon a showing that such authority is reasonably necessary to effectuate the purpose of the regulation being enforced. (Code Civ. Proc. § 1822.56.)
- An inspection is prohibited from being made by means of forcible entry, except that the judge may expressly authorize a forcible entry where facts are shown sufficient to create a reasonable suspicion of a violation of a state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning, which, if such violation existed, would be an immediate threat to health or safety, or where facts are shown establishing that reasonable attempts to serve a previous warrant have been unsuccessful. (*Ibid.*)
- Where prior consent has been sought and refused, notice that a warrant has been issued must be given at least 24 hours before the warrant is executed, unless the judge finds that immediate execution is reasonably necessary in the circumstances shown. (*Ibid.*)

This bill provides the SWRCB with the express authority to inspect the property or facilities of any person or entity to determine compliance with the law and water policy that requires waste, unreasonable use, or unreasonable method of use of water be prevented. Arguably the SWRCB already possess this authority under the Code of Civil Procedures provisions for inspection warrants. (*See* Code Civ. Proc. § 1822.50.) However, this express statutory authority is provided for regional boards under Porter-Cologne. (*See* Wat. Code § 13267.) The bill requires the SWRCB to attempt to first obtain consent for an inspection and if they are unable to obtain that consent, then they can apply to the court for an inspection warrant. However, in the event of an emergency affecting the public health or safety, an inspection may be performed without consent or the issuance of a warrant. The ACLU expressed some concerns with the “in the event of an emergency” exception to the general requirement to obtain consent of an inspection warrant for the SWRCB and the author has offered to amend this provision to make it clear that the emergency event affecting public health or safety must pertain to the particular site that the SWRCB is seeking to inspect.

The bill provides that when investigating an unlicensed cannabis cultivation site the SWRCB and regional water boards do not need to seek prior consent or comply with the procedural requirements and prohibitions listed above. No other state entity is

granted a blanket exemption to the prior consent requirement or the procedural prohibitions listed above for inspection warrants. The existing statutes build in flexibility for a judge to expressly grant exceptions to the requirements when specified facts or circumstances exist. If the boards feel that circumstances exist that would warrant being granted an exception, they can make that case to the judge who can then evaluate the specific facts involved to decide if such an exception is warranted. In light of this and concerns expressed by the ACLU, the author has offered to remove these provisions.

The specific amendments can be found below in Comment 6.

5. Authorization to participate in an inspection of an unlicensed cannabis cultivation site conducted pursuant to a warrant duly issued pursuant to the Penal Code

According to the author state and local law enforcement typically do not possess the subject matter expertise necessary to document Water Code violations and, therefore, water board staff participation in site inspections is key to providing the necessary subject matter expertise for felony enhancement prosecutions and to support administrative enforcement actions by the SWRCB or regional water boards. The author further notes that staff of the water boards have regularly participated in warrant inspections as authorized within criminal search warrants obtained by law enforcement partners and have been added to such warrants pursuant to the broad general investigative authority set forth in the Water Code. According to the author, judges in some counties started denying staff of the water boards the ability to participate in criminal warrants in 2021, citing the authority to obtain administrative inspection warrants and directing staff to seek inspection warrants instead. In order to ensure that staff can continue to participate in site inspections pursuant to criminal search warrants, this bill provides express authority for the SWCRB and regional water boards to participate in an inspection of an unlicensed cannabis cultivation site conducted pursuant to a warrant duly issued pursuant to the Penal Code when requested by the party seeking that warrant, and when there is probable cause that the unlicensed cannabis cultivation and its associated activities may involve a violation of the Water Code (for SWCRB) or Porter-Cologne (for regional water boards). A judge would still have to authorize the SWCRB to participate in such an inspection; however, this provision would make it clear that the SWRCB is not prohibited from participating just because it can seek an investigation warrant under the Code of Civil Procedure.

6. Proposed amendments

The specific amendments are:

Amendment 1

On page 3, in line 17, strike out “safety,” and insert:

safety pertaining to the particular site under which the inspection is being sought,

Amendment 2

On page 4, strike out lines 1 to 7, inclusive, in line 8, strike out “(d)” and insert:
(c)

Amendment 3

On page 7, strike out lines 4 to 10, inclusive, in line 11, strike out “(e)” and insert:
(d)

Amendment 4

On page 7, in line 20, strike out “(f)” and insert:
(e)

Amendment 5

On page 7, in line 29, strike out “(g)” and insert:
(f)

Amendment 6

On page 7, in line 32, strike out “which” and insert:
that

Amendment 7

On page 7, in line 35, strike out “(h)” and insert:
(g)

7. Statements in support

A coalition of various environmental organizations, including the California Coastkeeper Alliance, the Sierra Club California, and Defenders of Wildlife write in support stating:

Illegal water diversions and violations to water quality by unlicensed cannabis cultivators are harming California’s natural habitats and wildlife. Unlicensed cultivators pipe water from threatened wetlands, often building unpermitted roads to transport and filter water through an elaborate system of unpermitted pipelines and reservoirs. Already low levels of flow are further reduced to critical waterways that habitats rely on. Thousands of pounds of sediment, fertilizer, and runoff from harmful and sometimes banned pesticides and chemicals are improperly discharged, also causing harm to already impaired waterways and degradation to wildlife that rely on the waterway.

Illegal water diversions have a trickle effect on California communities that can be felt all the way down to taps in homes. Over pumping of local aquifers and

private wells by unlicensed cannabis cultivators have left wells dry, caused city water mains to break, and even required one municipality to consider issuing boil water notices for residents.

SB 756 equips the State and Regional Water Boards with the tools to preserve beneficial use of water for all Californians by addressing water quality violations and illegal diversions of water associated with unlicensed cannabis cultivation. The bill explicitly authorizes State and Regional Water Boards staff to participate in unlicensed cannabis site inspections alongside law enforcement with criminal warrants when requested. This bill also codifies the State Water Board's authority to obtain inspections warrants for water rights violations.

SUPPORT

California Coastal Protection Network
California Coastkeeper Alliance
California Municipal Utilities Association
Defenders of Wildlife
Friends of The River
Humboldt Baykeeper
Monterey Waterkeeper
Otter Project, the
Russian Riverkeeper
Sierra Club California
South Yuba River Citizens League
Yuba River Waterkeeper

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

SB 753 (Caballero) provides that a person 18 years or older who plants, cultivates, harvests, dries, or processes more than six living cannabis plants may be subject to a felony if it results in substantial environmental harm to surface or groundwater, intentionally or with gross negligence, and makes it a crime for a person 18 years or older who plants, cultivates, dries, or processes more than 50 living cannabis plants, punishable by imprisonment in a county jail for not more than six months, by a fine of not more than \$500, or both, or be charged with a felony if the offense involves a violation of pesticide provisions, taking or using water from a conveyance or storage

facility without permission, or extraction or use of groundwater from an unpermitted well or from a well in excess of a restriction. SB 753 is pending before the Senate Committee on Natural Resources.

AB 460 (Bauer-Kahan), among other things, similarly authorizes SWRCB to inspect the property or facilities of a person or entity to determine compliance with certain provisions of the Water Code and expands the way SWRCB can serve a complaint. AB 460 is pending in the Assembly Water, Parks, and Wildlife Committee.

Prior Legislation:

AB 195 (Committee on Budget and Fiscal Review, Ch. 56, Stats. 2022), among other things, authorized a civil action for a violation resulting from unlicensed cannabis cultivation to be brought by a county counsel or city attorney, upon approval of the SWRCB, instead of requiring the Attorney General to bring the civil action upon request of SWRCB.

SB 1426 (Caballero, 2021) would have made it a misdemeanor or felony to plant, cultivate, harvest, dry, or process more than 50 living cannabis plants if it involved unauthorized tapping into a water conveyance or storage infrastructure or digging or extracting groundwater from an unpermitted well. SB 1426 was held in the Senate Appropriations Committee on suspense.

AB 2525 (Wood, 2018) would have required the California Department of Fish and Wildlife to collaborate with the Department of Parks and Recreation to conduct an annual survey of all public lands and all surface water sources on public lands for unlawful cannabis cultivation activity, to compile a database of that information, and to ensure that the activity is eradicated by the Watershed Enforcement Team or other authority. AB 2525 was held in the Assembly Appropriations Committee on suspense

PRIOR VOTES:

Senate Committee on Natural Resources and Water (Ayes 11, Noes 0)
