

PROPOSED LEGISLATION WOULD GRANT THE STATE WATER RESOURCES CONTROL BOARD NEW AUTHORITY OVER ALL SURFACE WATER DIVERSIONS

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A pair of bills introduced last week propose sweeping new authorities for the State Water Resources Control Board (SWRCB) that would increase state oversight of surface water diversions. AB 460 (Bauer-Kahan) and SB 389 (Allen) would create new administrative enforcement processes that would allow the SWRCB to make binding determinations on water rights.

Significantly, AB 460 in particular would grant interested parties the right to file petitions for the SWRCB to impose restrictions on water rights that could significantly limit or eliminate a diverter's ability to exercise those rights.

Collectively, both bills would undermine existing legal protections for pre-1914 and riparian water rights and result in significant changes to how California's water rights system is administered. The discussion below provides background on existing law, the key changes to existing law proposed by each bill, and their respective impacts on water rights holders.

AB 460 (Bauer-Kahan):

The enforcement regime proposed by AB 460 would significantly expand existing opportunities for the SWRCB and interested members of the public to investigate whether a particular water right holder is violating: (1) Section 2 of Article X of the California Constitution; (2) the public trust doctrine; (3) Water quality objectives; (4) the terms of post-1914 water rights permits, licenses, certificates, and registrations; or (5) Section 5937 of the Fish and Game Code.

Under existing law, SWRCB has jurisdiction to regulate all diversions of water (including pre-1914 and riparian rights) under Article X, Section 2 of the California Constitution (*Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1487-1488) and the public trust doctrine. (*Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976, 1007.) The SWRCB's ability to regulate diversions in this manner is constrained, however, by the procedural and substantive requirements that apply when adopting new regulations. (See *California Water Curtailment Cases* (2022) 83 Cal.App.5th 164, 194-195 [the SWRCB did not have authority to enforce curtailment notices it issued without first adopting regulations].)

Pre-1914 and riparian water rights are not conditioned on compliance with water quality objectives, Section 5937 of the Fish and Game Code, or permit terms (e.g., Term 91 that restricts Delta diversions when water is released from storage to meet water quality objectives); however, post-1914 appropriative water rights are subject to the terms listed on each permit or license. The SWRCB enforces compliance with permit and license terms through an administrative hearing process that frequently takes many months or years to complete.

Under AB 460, the SWRCB, on its own motion or in acting on a petition by an interested party, could issue an “interim relief order” to any diverter to enjoin violations of the laws above based on “the same showing as would be required for a superior court to grant a preliminary injunction” (the moving party demonstrates a likelihood of success on the merits and that the relative interim harm from issuance of the injunction weighs in its favor). The interim relief order would only be issued after opportunity for hearing, which could be held on 20-days’ notice or less.

Upon issuing an interim relief order, the SWRCB could demand that the diverter “cease all harmful practices” (presumably some or all diversions), mitigate harm, fund technical and environmental studies, and reimburse the SWRCB for the cost of preparing any required documentation. When the SWRCB issues an interim relief order, the bill provides that it must also schedule a hearing on permanent relief measures that would be imposed on the diverter.

AB 460 provides that, although permanent relief is subject to compliance with the California Environmental Quality Act (CEQA), an interim relief order would be exempt from CEQA if the SWRCB determines that it would not result in environmental effects or would result in environmental benefits. Non-compliance with an interim relief order would result in fines of up to \$10,000 per day or \$5,000 per acre foot of water diverted.

If enacted, this legislation would provide the SWRCB with authority to issue what would amount to a curtailment order to an individual diverter and require that they fund studies and other mitigation or face steep penalties.

The low bar for initiating such proceedings, and the rapid timeline for holding hearings, stands in stark contrast to existing law that requires the SWRCB to develop regulations or initiate enforcement proceedings in order to regulate diversions under the laws above. The significant costs associated with participating in a hearing process on short notice and complying with an interim relief order would be prohibitive for all but the largest diverters.

SB 389 (Allen):

SB 389 would provide the SWRCB with authority to investigate the basis for any water right and require that a diverter provide information or technical reports regarding the characteristics of its water right before a hearing is held regarding the validity of the water right.

Under existing law, anyone that diverts more than 25-acre feet of water per year under a riparian or pre-1914 right must file a “initial statement of diversion and use” describing the characteristics of their riparian or pre-1914 right. (Water Code § 5101.) The initial statement must identify the point of diversion, the capacity of the diversion, the year that diversion was commenced, and the place and purpose of use. Each year, the diverter is required to file supplemental statements of diversion and use that state how much water was diverted under their water rights.

Existing law also provides that riparian and pre-1914 water rights have certain characteristics that restrict diversions under those water rights. The characteristics of an appropriative water right include its relative priority and scope (amount of diversion, season of diversion, place of use, etc.). Appropriative water rights can be lost by forfeiture if there are no (or reduced) diversions under that right for at least five years and there is a conflicting claim within the same stream system during the period of forfeiture. (North Kern Water Storage Dist. v. Kern Delta Water Dist. (2007) 147 Cal.App.4th 555, 559-560.) The characteristics of a riparian water right include its place of use and priority date relative to appropriative rights within the same watershed.

Following notice and opportunity for hearing, SB 389 would provide that the SWRCB can require any diverter to prove the elements of their water right “by the preponderance of the evidence” – the same burden of proof that applies to a plaintiff proving their case in civil court. Establishing the elements of a water right requires the diverter to provide facts necessary to demonstrate that a water right was lawfully established under applicable law (e.g., water has been continuously diverted since before 1914 or water is diverted for use on lands that possess riparian rights). This showing is factually intensive and often requires extensive historical research.

After a hearing, SB 389 would authorize the SWRCB to issue an order determining the basis, scope, and relative priority of the right or determining that diversions are not authorized by a water right. The SWRCB could also determine that a water right has been subject to forfeiture due to non-use without satisfying the common law requirement that there is a conflicting claim within the same stream system during the period of forfeiture.

Because all appropriative water rights with a priority date later than 1914 are issued permits that contain information on the scope of the right, this legislation is designed to target pre-1914 and riparian water rights that are not based on state-issued permits.

For example, the scope of a pre-1914 right is defined by evidence of past diversions and water use. In some instances, evidence regarding the scope of a pre-1914 right is unavailable or does not support the claimed scope of the water right. Also, because the SWRCB can determine that forfeiture has occurred without evidence of competing diversions, it can reduce or eliminate otherwise valid pre-1914 water rights that are not used or partially used for a period of five years (riparian rights are not lost by non-use).

Under the status quo, the primary legal mechanism to investigate and extinguish water rights is through an adjudication. An adjudication (statutory or judicial) examines all water rights on a particular stream system and results in a binding judgment that defines the scope and relative priority of all water rights.

If enacted, SB 389 would provide the SWRCB with a new powerful tool for investigating and extinguishing water rights without the years-long (potentially decades-long) process of an adjudication. It would also allow the SWRCB to extinguish pre-1914 water rights, currently seen as the “most valuable” water rights in California due to their relative priority and lack of SWRCB oversight, based on a finding of forfeiture.

Takeaways

AB 460 and SB 389 have been introduced on the heels of the second record-setting drought that California has experienced within the last decade. The increasing frequency of drought has resulted in growing pressure to reform the state’s water rights system to eliminate legal protections for pre-1914 and riparian rights.

Granting the SWRCB new authority to impose substantive restrictions on individual diverters with 20-days’ notice or less would blur the current brightline distinction between pre-1914 and riparian rights that are not subject to SWRCB jurisdiction, and post-1914 water rights that are. The authority to investigate water rights and determine that forfeiture has occurred is an existential threat to pre-1914 rights that are not supported by documentation or are infrequently exercised. As a result, AB 460 and SB 389 would significantly undermine the legal protections that apply to pre-1914 and riparian rights under the status quo and would change how the water rights system is administered.

A link to both bills is here: [AB 460](#) & [SB 389](#). We will continue to monitor this legislation and provide updates.

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