

SB X7 1 (Steinberg) – October 23, 2009
Delta & Water Reform Legislation
SUMMARY: Water Rights Enforcement Tools

SUMMARY: Provides enforcement tools for the State Water Resources Control Board (SWRCB) to enforce existing water rights laws. Specifically, this part of SB X7 1:

- 1) Increases consequences for not reporting water diversions or use.
 - a) Establishes rebuttable presumption that diversions/use did not occur in certain SWRCB proceedings, but would not apply to diversion/use occurring before January 1, 2009;
 - b) Creates rebuttable presumption that no use occurred in certain SWRCB proceedings, but would not apply to diversion/use occurring before January 1, 2009;
 - c) Raises current additional penalty for unauthorized diversions from 100% of amount of fees that would have been collected had that diversion been reported, to 150%;
 - d) Authorizes additional penalty for failing to file, or material statements in, statements of diversion and use of 150% of the amount of fees that would have been collected; and,
 - e) Adds a new penalty for violators of monitoring requirements or activities, not to exceed five hundred dollars (\$500) for each day in which the violation occurs.
- 2) Imposes or increases penalties for violating water rights laws.
 - a) Increases penalties for unauthorized diversion or use to an amount not to exceed the larger of:
 - i) \$1,000 per day of violation for the first offense; \$5,000 for subsequent offenses; or
 - ii) the highest market value of the water subject to trespass
 - b) Increases penalties for violating a cease and desist order to the greater of \$1000 per day (1st offense)/\$5000 per day (subsequent offenses) or the highest market value of the water diverted or used in violation of the cease and desist order.
 - c) Adds penalty, not to exceed \$500 per day of violation, for any violation of term or condition of a permit, license, certificate, or registration, or any order or regulation adopted by SWRCB to prevent waste or unreasonable use.
 - d) Limits civil liability imposed by superior court to three years before filing of complaint.
- 3) Allows SWRCB, in certain investigations, to order any water diverter or water user to prepare technical or monitoring program reports under penalty of perjury;

- 4) Expands list of filing fees, to include: registrations for small domestic use or livestock stockpond use; petitions to change the point of diversion, place of use, or purpose of use of a water right that is not subject to a permit or license to appropriate water; and statements of water diversion and use.
- 5) Authorizes SWRCB to initiate statutory adjudication to determine rights of various claimants to the water of a stream system *under its own motion* if after a hearing it finds that the public interest and necessity will be served by a determination of the rights involved.
- 6) Deletes exemptions from water diversion/use reporting requirements for Delta diverters.
- 7) Appropriates approximately \$3.7 million in fee-related funding from the Water Rights Fund to hire 25 additional water rights enforcement personnel at SWRCB.

EXISTING LAW requires SWRCB to administer and enforce the California water rights system, and funds the SWRCB Water Rights Division by water diversion fees.

COMMENTS: Since the Assembly Water, Parks and Wildlife (WP&W) Committee considered provisions for these SWRCB water right enforcement tools, as part of SB 68 (the regular session version of this bill) on September 11, this portion of the 2009 Delta/water legislative package has changed significantly. In comparison to SB 68, this bill would:

- Add authority/appropriation for SWRCB to hire 25 additional enforcement personnel.
- Delete SWRCB authority to issue interim relief that would stop diversions as litigation over that diversion proceeds.
- Change the penalties for illegal diversion by:
 - distinguishing between first and subsequent offenses
 - introducing the concept of highest market value for the water diverted illegally
 - reducing fines for first offenses to up to \$1000/day (not \$1000/acre-foot as well)
 - increasing fines for subsequent offenses to up to \$5000 /day
 - capping the maximum fine at the greater of daily fine or highest market value
- Delete expansion of SWRCB authority to issue cease-and-desist orders for violations of unreasonable use limits, public trust doctrine that protects fishery and other public resources, or monitoring requirements.
- Delete legislative intent to enforce reasonable use/public trust vigorously.
- Delete requirement that SWRCB increase penalties for inflation.
- Add provisions to eliminate reporting exemptions for Delta diversions, consistent with AB 900 (DeLeon).

SWRCB Enforcement Tools: This bill provides new and increased penalties for violating water rights law and expands SWRCB's authority to enforce existing water rights laws. The bill does not change existing water rights law or expand SWRCB jurisdiction. In effect, these changes would level the playing field to support better enforcement of water rights laws. These penalties have not been increased in decades and fail to reflect the economic value of compliance. In some cases, there is no penalty at all, such as violation of permit terms. While SWRCB may be able to issue a cease-and-desist order for illegal diversions, such techniques set a high bar for enforcement and fail to recover enforcement costs.

The Delta Vision Committee Implementation Report (AKA the Chrisman Report, December 2008), while not commenting on this precise set of penalties and enforcement authorities, called

for legislation to enhance and expand the SWRCB's water rights administrative accountability. These recommendations do not adversely affect the current water right priority system, including area-of-origin priorities, but rather strengthen the current administrative system. As the Chrisman Report suggested, "appropriate enforcement will protect existing water rights." This proposal would give SWRCB authority to take actions to make the water rights system work for all water users and the environment, including:

- better enforcement of existing water diversion/use reporting requirements
- SWRCB authority to start an adjudication of water rights on a stream in response to a conflict or environmental problem
- connection between illegal diversions and economic values

Recent Changes: This part of SB X7 1 deletes the provisions that received the most criticism – SWRCB authority for interim relief and expanded authority for cease-and-desist orders. These deletions, however, do not eliminate the board's existing authority to issue cease-and-desist orders. The amendments also add provisions for a bill that received broad-based support this year – AB 900 (De Leon) – and would eliminate the reporting exemptions for in-Delta diversions. As the Delta Vision Blue Ribbon Task Force explained, eliminating exemptions for reporting will allow the state to better manage its water resources and one of its most precious natural resources – the Sacramento-San Joaquin Delta.

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