

Preprint SB 2 (SB 229 content) by Senator Pavley

Summary and Comments

Summary: Preprint Senate Bill No. 2 (PSB 2) would revise existing water use reporting and water rights enforcement and would establish a statewide groundwater elevation monitoring program

Specifically, this proposal would:

1) Increase Consequences for Not Reporting Water Diversions or Use:

- a) Add a provision that, in a proceeding before the State Water Resources Control Board (SWRCB) in which (1) it is alleged that an appropriative right water has ceased or is subject to forfeiture or revocation for nonuse, (2) SWRCB had imposed a requirement that the diversion or use required to be reported, and (3) that diversion or use was not reported to SWRCB, that diversions or use would be deemed not to occur. This provision would not apply to any diversion or use that occurred before January 1, 2009.
- b) Add a provision that, in any proceeding before SWRCB in which (1) it is alleged that an appropriative right has ceased or is subject to forfeiture or revocation for nonuse, (2) that diversion or use was not included in a statement of diversion or use as required by statute or (3) that required statement was submitted six months or later after it was required to be filed with SWRCB, there would be a rebuttable presumption that no use occurred. This provision would not apply to any diversion or use that occurred before January 1, 2009.
- c) Raise the current additional penalty for unauthorized diversions from 100% of the amount of fees that would have been collected had that diversion been reported to 150% of that amount.
- d) Authorize an 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 had those reports been filed.
- e) Add a new penalty that, any person or entity subject to a monitoring or reporting requirement who (1) violates that reporting or monitoring requirement, (2) makes a material misstatement in any record or report submitted under that reporting or monitoring requirement, or (3) tampers with or renders inaccurate any monitoring device required under that reporting or monitoring requirement, would be liable for a sum not to exceed five hundred dollars (\$500) for each day in which the violation occurs.

2) New and Increased Penalties for Violating Water Rights Laws:

- a) Change the penalties for unauthorized diversion or use from not more than \$500 per day of violation to not more than the sum of:
 - i) \$1,000 per day of violation
 - ii) \$1,000 per acre foot diverted in violation

- b) Change the penalties for violating a cease and desist order from not more than \$1,000 per day of violation to not more than the sum of:
 - i) \$2,500 per day of violation
 - ii) \$2,500 per acre foot diverted in violation
- c) Add a 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 under preventing waste or unreasonable use.
- d) Require SWRCB to adjust all maximum penalties for inflation as measured by the June to June change in the California CPI.

3) New and Increased Enforcement Authorities:

- a) Allow SWRCB, in any investigation regarding waste or unreasonable use, legality of appropriation, etc, to order any water diverter or water user to prepare technical or monitoring programs reports regarding the diversion or use, under penalty of perjury.
- b) Expand existing Legislative intent language to include that the state should also take vigorous enforcement actions to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, and to enforce reporting and monitoring requirements.
- c) Add the following to the list of actions that SWRCB can issue a cease and desist order:
 - i) violations of unreasonable use regulations.
 - ii) violations of reporting or monitoring requirements.

4) Additional Water Rights Fees

- a) Add to the list of filings subject to a filing fee:
 - i) Registrations for small domestic use or livestock stockpond use.
 - ii) 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.
 - iii) Statements of water diversion and use.

5) Authorize SWRCB to Initiate Statutory Adjudication

- a) Authorize SWRCB to initiate a determination of rights of the 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) Provide for Interim Relief

- a) Authorize SWRCB to issue an interim relief order in appropriate circumstances, after notice and an opportunity for a hearing, in proceedings to enforce all of the following:
 - i) Section 2 of Article X of the California Constitution, regarding prohibition of waste and unreasonable use.
 - ii) The public trust doctrine.
 - iii) Water quality objectives adopted under the Porter-Cologne Water Quality Act.
 - iv) Water rights requirements set forth in permits and licenses issued by SWRCB.

- v) Water rights requirements established in statute.
 - vi) Section 5937 of the Fish and Game Code, regarding to keep in good condition any fish that exist below a dam.
- b) Require SWRCB in determining whether to provide interim relief, and the nature and extent of the relief, to consider all relevant circumstances, including the effects on other legal users of water, fish, wildlife, and other instream beneficial uses, the extent of harm, the necessity for relief, and any appropriate measure to minimize any adverse effects of providing interim relief. Sufficient grounds would exist for interim relief upon the same showing as would be required for a superior court to grant a preliminary injunction.
 - c) Authorize SWRCB, as part of the interim relief order, to require the water diverter or user to do any of the following:
 - i) Cease all harmful practices.
 - ii) Employ specific procedures and operations to prevent or mitigate the harm.
 - iii) Complete technical and monitoring work and prepare and submit reports on that work, including draft environmental documentation.
 - iv) Participate in and provide funding for studies that SWRCB determines are reasonably necessary to evaluate the impact of the diversion or use that is the subject of the proceeding.
 - v) Reimburse SWRCB's expenses for the preparation of any necessary environmental documentation.
 - vi) Take other required action.
 - d) Except any interim relief order issued by SWRCB from CEQA if SWRCB makes specific findings.
 - e) Require the Attorney General, upon the request of SWRCB, to petition the superior court to issue a temporary restraining order, preliminary injunction, or permanent injunction should any water diverter or user fails to comply with any part of an interim relief order.
 - f) Add a provision that any person or entity who violates any interim relief order issued by SWRCB would be liable for a civil penalty of not more than five thousand dollars (\$5,000) for each day in which a violation occurs.
 - i) Civil liability could be imposed by the superior court. The Attorney General, upon request of SWRCB, would petition the superior court to impose the liability.
 - ii) Civil liability could be imposed administratively by SWRCB.
 - iii) In determining the appropriate amount, the court or SWRCB, as the case may be, shall consider all the relevant circumstances, including the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and any corrective action undertaken by the violator.

7) Establish Statewide Groundwater Monitoring

- a) State Legislative intent that by January 1, 2012, groundwater elevations in all groundwater basins and subbasins be regularly and systematically monitored locally and that the resulting groundwater information be made readily and widely available.

- b) Require local groundwater management interests to notify DWR as to who would conduct the monitoring of groundwater elevations, what area they would monitor, their qualifications for conducting the monitoring, etc.
 - c) Require DWR, in situations where more than one party seeks to become the monitoring entity for the same portion of a basin or subbasin, to consult with the interested parties to determine who would perform the monitoring functions. In determining which party would conduct the monitoring, DWR would be required to adhere to the following priority:
 - i) A watermaster or water management engineer who was appointed by a court as a part of an adjudication proceeding.
 - ii) Either (a) a groundwater management agency with statutory authority to manage groundwater pursuant to its implementing legislation, or (b) a water replenishment district.
 - iii) Either (a) A local agency that is managing all or part of a groundwater basin or subbasin under what is known as an AB 3030 plan (Water Code Section 10750 et seq.), or (b) A local agency or county that is managing all or part of a groundwater basin pursuant to any other legally enforceable groundwater management plan with provisions that are substantively similar to AB 3030.
 - iv) A local agency that is managing all or part of a groundwater basin or subbasin pursuant to an integrated regional water management plan that includes a groundwater management component that complies with the requirements of SB 1938 (Water Code Section 10753.7).
 - v) A county that is not currently managing all or a part of a groundwater basin.
 - vi) A voluntary cooperative groundwater monitoring association.
 - d) Require monitoring entities to start monitoring and reporting groundwater elevations by January 1, 2012. The groundwater elevation data would be made readily available to DWR, interested parties, and the public.
 - e) Require DWR, by January 1, 2012, to identify the extent of monitoring of groundwater elevations that is being undertaken within each basin and subbasin. If DWR determines that no one is monitoring all or part of a basin or subbasin, DWR would be required to determine if there was a local party willing to conduct the monitoring.
 - f) If (a) DWR determines there is no local interest in conducting the monitoring, and (b) DWR determines the existing monitoring network is insufficient to demonstrate seasonal and long term trends in groundwater elevations, and (c) Board of Mining and Geology concurs with that determination; then DWR would be authorized to monitor groundwater elevations and to assess a fee to well owners within the DWR monitored area to recover its direct costs.
 - g) Require DWR to update the groundwater report by January 1, 2012, and thereafter in years ending in 5 and 0.
- 8) Provide for other miscellaneous issues
- a) Technical amendments to ensure all water rights holders, including cities, counties, & special districts, are required to pay filing fees.
 - b) Technical amendments to ensure board can enforce the new filing requirements.

Comments

A. Water Diversion and Use: Reporting

- **Failing to File.** This proposal would significantly increase the consequences of not filing required reports on diversion and use, in order to increase compliance with existing reporting requirements under statute and board regulations and orders. State law has required such reports for decades, but many diverters do not comply, because penalties for non-compliance are minimal. In short, it may make more economic sense to pay a small fine – if the violator is ever discovered – than file the required reports.

The Delta Vision Strategic Plan, while not speaking directly on increased consequences for failing to file required reports, did say: *“The information about current diversions and use in the current water system is inadequate to the task of managing the co-equal values. More comprehensive data from throughout the Delta watershed would provide a better foundation for changes in water diversion timing. California must also develop and use comprehensive information on the local, regional and statewide availability, quality, use, and management of groundwater and surface water resources to help improve opportunities for regional self-sufficiency.”*

This proposal adds provisions regarding failing to file required diversion and use reports. However, the consequences are different depending on whether the requirements are statutory or imposed by SWRCB. In the case of statutorily required reports, failure to file would create a rebuttable presumption that the diversion or use did not occur. That is, the person or persons who did not file the required reports would be allowed to prove that such diversion or use did occur, but the burden of proof would be upon them. However, if the requirement was imposed by SWRCB as a condition of a water rights permit, as an example, the failure to file would be deemed non-use. Under existing water law, such non-use can result in loss of the right, under certain circumstances. The Conference Committee might wish to consider whether having two different consequences for the two different circumstances is appropriate.

The issue of better information on diversion and use is also addressed in AB 900 (De Leon), albeit in a different though complementary way. AB 900 would eliminate a number of current exemptions from filing reports of diversion and use. Currently, AB 900 and this proposal do not conflict. However, the Conference Committee may wish to consider reviewing the language for both proposals together to determine if PSB 2 would need additional technical amendments to further harmonize the two bills.

B. Water Rights: Enforcement

- **Penalties and Enforcement:** This proposal would provide new and increased penalties for violating water rights law and would expand SWRCB’s authority to enforce water rights laws. 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, such actions set a high bar for enforcement and fail to recover enforcement costs.

Delta Vision Committee Implementation Report (a.k.a. the Chrisman Report), dated December 31, 2008, while not commenting on this precise set of penalties and enforcement authorities, called for legislation “to enhance and expand the State Water Resources Control Board's water rights administrative accountability. These recommendations are not intended to adversely affect the current water right priority system, including area-of-origin priorities but rather to strengthen the current administrative system. Appropriate enforcement will protect existing water rights.” It later stated that “many existing water right permit terms and conditions are not directly enforceable, and the law should be amended to correct this problem.” Despite the Administration's comment about enforcement protecting all water rights, some object to stronger enforcement. It is not clear whether these opponents are violators who wish to avoid enforcement.

- **Statutory Adjudication:** Currently, SWRCB is authorized to conduct stream adjudications upon petition. This proposal would further authorize SWRCB to conduct such adjudications upon its own motion, after conducting a hearing and finding that such an adjudication would be in the public interest. In some situations, when water rights holders seek to avoid any adjudication, the loser is the environment, which may have no advocate for clarifying water rights in the context of protecting the public trust. This provision would allow the SWRCB to identify such a problem and begin the clarification process on its own.

Delta Vision Committee Implementation Report observed “the Water Board needs to clarify existing water rights in many parts of the State in light of poorly defined or unreported riparian and appropriative water right claims and the unquantified needs of fish and wildlife. SWRCB needs the authority to initiate stream adjudications and collect adjudication costs from the parties diverting water. This process will respect area of origin rights.”

- **Interim Relief:** This proposal would authorize SWRCB to require interim remedies as specified. Interim remedies are designed to prevent or halt potentially permanent harm while allowing the full evidentiary process to continue. It protects due process and restores the status quo, so that adjudication of the conflict may proceed without further damage to the environment. It again levels the playing field for enforcement of water rights law. This provision is patterned after a preliminary injunction proceeding in court, where the court can stop "irreparable" damage while litigation proceeds. It also allows SWRCB to require a violator to pay the costs of developing sufficient information to resolve the conflict.

Delta Vision Committee Implementation Report states “The Water Board needs authority to require interim remedies, after opportunity for hearing, to prevent irreparable harm to the environment and other water right holders, while underlying proceedings continue. Interim remedies could include requiring the diverter to take appropriate action to mitigate potential harm or to provide necessary information. As with courts, Water Board evidentiary proceedings can take many years. Unlike courts, however, the Water Board currently has no authority to issue interim orders designed to prevent irreparable harm.”

C. Groundwater Monitoring

- This proposal would establish a statewide groundwater monitoring program to ensure that groundwater elevations in all groundwater basins and subbasins be regularly and systematically monitored locally and that the resulting groundwater information be made readily and widely available.

As noted above, the Strategic Plan observed, “Plainly said, the information about current diversions and use in the current water system is inadequate to the task of managing the co-equal values. More comprehensive data from throughout the Delta watershed would provide a better foundation for changes in water diversion timing. California must also develop and use comprehensive information on the local, regional and statewide availability, quality, use, and management of groundwater and surface water resources to help improve opportunities for regional self-sufficiency.

In the past five years, the Legislature has approved three bills to improve the State's access to groundwater information, but the Governor vetoed all three. In the intervening years, groundwater problems have grown worse, largely because California is the last western state without any state groundwater management – and very little information about the conditions of the state's groundwater basins. Excessive pumping in the last century has led to substantial subsidence, as much as 55 feet in some areas. Recently, for example, on the Westside of the San Joaquin Valley, where allocations of Delta water from the federal Central Valley Project were minimal, farmers responded by pumping more groundwater. Reports then surfaced that the State Water Project's canal, which passes through the area on its way to Southern California, may suffer cracks because of the high level of pumping and resulting slumping of the ground under the canal.

Other Issues:

As the Conference Committee begins deliberating this proposal, it also may want to consider technical amendments to address the following:

- Provide parallel provisions to enforce riparian monitoring.
- Provide SWRCB authority to initiate rulemaking to specify monitoring reporting requirements such as frequency of reporting and form of reporting; e.g., regulations regarding electronic monitoring and reporting.

The Assembly Water, Parks & Wildlife Committee and the Senate Natural Resources & Water Committee collaborated in preparing this analysis.