
SENATE COMMITTEE ON ENVIRONMENTAL QUALITY

Senator Allen, Chair

2021 - 2022 Regular

Bill No: AB 2877
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Version: 4/19/2022
Urgency: No
Consultant: Jacob O'Connor

Hearing Date: 6/29/2022
Fiscal: Yes

SUBJECT: Safe and Affordable Drinking Water Fund: tribes

DIGEST: Requires the State Water Resources Control Board (State Water Board) when administering funds under the Safe and Affordable Drinking Water Fund (Fund) to work with California Native American tribes to remove barriers for those tribes to access funding under the Fund. Additionally, provides that a limited waiver of tribal sovereignty is not required for a tribe that is an eligible recipient to access funding under the Fund.

ANALYSIS:

Existing law:

- 1) Establishes the California Safe Drinking Water Act (SDWA) and requires the State Water Resources Control Board (State Water Board) to maintain a drinking water program. (Health & Safety Code (HSC) § 116270, et seq.)
- 2) Requires the State Water Board to submit to the Legislature a comprehensive Safe Drinking Water Plan for California every five years. (HSC § 116355)
- 3) Creates the Safe and Affordable Drinking Water Fund (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. (HSC § 116766) Moneys in this fund can be used to fund:
 - a) Operation and maintenance costs for delivering safe drinking water;
 - b) Consolidating water systems or extending drinking water services to other public water systems, domestic wells, and small state water systems;
 - c) Providing replacement water as a short-term solution to protect health and safety;
 - d) Services for helping water systems become self-sufficient;
 - e) The development, implementation, and sustainability of long-term drinking water solutions; and

- f) Board costs associated with implementing and administering these programs.
- 4) Specifies that public agencies, nonprofit organizations, public utilities, mutual water companies, federally recognized California Native American Tribes, nonfederally recognized Native American tribes identified by the Native American Heritage Commission, administrators, groundwater sustainability agencies, community water systems, and technical assistance providers are the entities eligible for receiving moneys from this fund.
- 5) 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) Provides that a waiver of tribal sovereignty is not required for a tribe that is an eligible recipient to access funding under the Fund.
- 2) Requires the State Water Board to work with tribes that are eligible recipients to remove any barriers for those tribes to accessing funding. Authorizes the State Water Board to use a professional service agreement, service contract or other mechanism with each eligible tribe.
- 3) Requires the State Water Board to ensure an equitable distribution of funds under the Fund, including funds to eligible recipients that are federally recognized California Native American tribes or nonfederally recognized Native American tribes.
- 4) Requires the State Water Board to post on its internet website, and update annually, the number of applications for funding received from tribes and the total amount of funding granted to tribes each year.

Background

- 1) *Human right to water.* In 2012, California became the first state to enact a Human Right to Water law, AB 685 (Eng, Chapter 524, Statutes of 2012). This bill states that 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. The human right to water extends to all Californians, including disadvantaged individuals and groups and communities in rural and urban areas. Additionally, AB 685 requires all

relevant state agencies, including the State Water Board, to consider this human right to water policy when revising, adopting, or establishing policies, regulations and grant criteria when those policies, regulations and criteria are pertinent to the uses of water. Although most of the state's residents receive drinking water that meets federal and state drinking water standards, many drinking water systems in the state consistently fail 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.

- 2) *The Safe and Affordable Funding for Equity and Resilience (SAFER) program.* SB 200 (Monning, Chapter 120, Statutes of 2019) created SAFER and the Safe and Affordable Drinking Water Fund (Fund). The SAFER program supports permanent and sustainable drinking water solutions that ensure all Californians have access to safe, affordable, and reliable drinking water. The Fund was established to address funding gaps and provide solutions to water systems, especially those serving disadvantaged communities, to address both their short- and long-term drinking water needs. SB 200 requires the annual transfer of 5 percent of the Greenhouse Gas Reduction Fund (GGRF) (up to \$130 million) into the Fund until June 30, 2030. Money transferred into the Fund is continuously appropriated and must be expended consistent with the Expenditure Plan (Plan), which is adopted annually by the State Water Board. The Plan is based on a drinking water needs assessment and will document past and planned expenditures and prioritize projects for funding. Potential options for funding include consolidation with larger water systems, operations and maintenance costs, building local technical and managerial capacity, providing interim replacement water, and administrators to run the small systems.
- 3) *State Water Board's Racial Equity Resolution and Racial Equity Action plan.* The State Water Board adopted its Racial Equity Resolution (#2021-0050) by a unanimous five to zero vote on November 16, 2021. The Racial Equity Resolution cites the California Environmental Protection Agency's 2021 Pollution and Prejudice StoryMap and CalEnviroScreen data that demonstrate that historically redlined neighborhoods are "generally associated with worse environmental conditions and greater population vulnerability to the effects of pollution today" and that Black, Indigenous, and people of color are overrepresented in the neighborhoods that are the most environmentally degraded. They specifically discussed how California Native American Tribes continue to face barriers to accessing, controlling, and protecting water rights and disrupted traditional food sources. They also note these injustices are exacerbated by climate change and complex water resource and watershed management processes.

In the resolution, the State Water Board committed to making racial equity, diversity, inclusion and environmental justice central to its work, including improving communication, working relationships, and co management practices with all California Native American Tribes,

- 4) *Tribal access to clean water.* According to data from the U.S. Environmental Protection Agency (EPA), there are 88 tribal water systems in California that serve more than 160,000 people. In the State Water Board's most recent Drinking Water Needs Assessment, the EPA estimated 13 of these tribal water systems are currently in violation of state or federal drinking water standards, and 22 are at risk of violating standards in the future. Tribal drinking water systems often have a small customer base, making it difficult to support maintenance costs.
- 5) *Tribal Access to SAFER Funding Support.* According to the State Water Board's policy for developing the Expenditure Plan for the Fund, Native American Tribes will be prioritized in outreach, program design and funding elements of the SAFER Program. The water system needs of California Native American Tribes will be evaluated for funding based on the same criteria as other eligible recipients. All State Water Board funding agreements contain compliance obligations, such as monitoring, reporting, inspection, and accounting. In order to fund a project with a federally recognized Native American Tribe, the State Water Board may require a limited waiver of sovereign immunity strictly to ensure compliance with the terms of the financial assistance agreement.

Comments

- 1) *Purpose of Bill.* According to the author, "Ensuring tribes have equitable access to the SAFER Program would help California meet its promise of providing every person in the state the right to safe, clean, affordable, and accessible water."
- 2) *Do tribal sovereignty waivers limit access to SAFER funds?* Tribal sovereign immunity protects federally recognized Native American tribes from suits in tribal, state or federal court, unless the tribe expressly waives its sovereign immunity or sovereign immunity is abrogated by an "unequivocal express" of Congress. On a case-by-case basis, tribes may waive sovereign immunity and negotiate limited waivers that are suitable to all involved parties. The State Water Board's policy is to require such a limited waiver as a part of funding, in order to ensure compliance with the terms of the financial assistance agreement. According to the author, waiving sovereignty has been an important

barrier to tribes accessing these funds. Without the waiver it would seem the State Water Board would have to ask for compliance information rather than be able to require it as part of the funding, fundamentally changing the power dynamic in the funding relationship. Rather than the tribes having to limitedly waive sovereignty to access funds the board would have to provide funds and then attempt to negotiate an oversight mechanism with the awardee. ***The committee may wish to amend the bill to clarify that any limited waiver of immunity from suit entered into by federally recognized California Native American Tribes should be limited in scope and narrowly tailored.***

- 3) *What does “ensuring an equitable distribution” mean?* The word equity is consciously used in place of equality by many activists and academics in order to recognize that different communities have different needs that must be accounted for when allocating resources in order to reach an equal outcome. In contrast, equality aims to ensure that everyone gets the same things, no matter their starting place. More specifically, equity is often broken down further into more detailed components, such as:
- a) Procedural equity, when public decision-making processes are transparent, accessible, fair, and inclusive;
 - b) Structural equity, when government institutions and systems have the processes, practices, and policies to operationalize equity in how they function and make decisions; and
 - c) Distributional equity, when there is an equitable distribution of resources, community burdens, and benefits.

This bill requires the State Water Board to “ensure an equitable distribution of funds”, a form of distributional equity. This would suggest that when deciding where to allocate funds the State Water Board must weigh where funds are most needed and allocate more in communities that require more aid to access safe and reliable water services. However, because equity relies on an assessment of need, it is often subjective and this bill provides no reference to a framework for how the State Water Board is to make this assessment, potentially creating legal risk for the Board. ***The committee may wish to amend the bill to clarify that rather than ensure an equitable distribution of funds the State Water Board should make diligent efforts to ensure distribution of funds to tribes.***

- 4) *Looping in tribal coordinators.* The Water Board hires tribal coordinators to help them perform outreach to tribes and engage them in decision-making processes. Tribal representatives have found the inclusion of tribal coordinators in meetings with the Department of Water Resources to help improve the engagement process. ***The committee may wish to amend the bill to require***

tribal coordinators to be involved in negotiations of limited waivers of tribal sovereignty and in discussions with potential tribal recipients of SAFER funds.

- 5) *Committee amendments. Staff recommends the committee adopt the bolded amendments contained in comments 2, 3, and 4 above.*

Related/Prior Legislation

AB 2108 (Robert Rivas and Christina Garcia) requires the State Water Board and the Regional Water Quality Control Boards to ensure that at least one member of the State Water Board and at least one member of each of the Regional Water Boards has specialized experience to represent environmental justice or tribal communities. Additionally, requires the State Water Board to make programmatic findings on potential environmental justice, tribal impact, and racial equity considerations, when issuing regional or statewide plans or policies, or waste discharge requirements or waivers of waste discharge requirements. The bill was heard in the Senate Environmental Quality Committee on June 15, 2022 and passed 5-1 and was referred to the Senate Natural Resources and Water Committee.

AB 1252 (Robert Rivas) would have authorized the California Environmental Protection Agency (CalEPA) to distribute advance payments to nonprofit entities or federally recognized tribal governments and non-federally recognized California Native American tribes with nonprofit status and specified grant payment terms for projects providing service to or benefitting disadvantaged or low-income communities for grants awarded under the Environmental Justice Small Grant Program. AB 1252 was vetoed by the Governor in 2020 because “state agencies have to ensure state monies are appropriately spent by verifying the expense prior to disbursing the funds.”

SOURCE: Author

SUPPORT:

Association of California Water Agencies (ACWA)
Morongo Band of Mission Indians

OPPOSITION:

None received

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