

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 776 (Gonzalez)
Version: April 19, 2021
Hearing Date: April 27, 2021
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Safe drinking water and water quality

DIGEST

This bill refines the provisions of the Safe and Affordable Drinking Water Act, including clarifying and consolidating the authority available to the State Water Resources Control Board (State Water Board) to enforce the terms, conditions, and requirements of its financial assistance programs.

EXECUTIVE SUMMARY

In 2019, the Legislature passed the Safe and Affordable Drinking Water Act (SB 200 (Monning, Ch. 120, Stats. 2019)), which empowered the State Water Board to fund water operations, maintenance, and consolidation projects for disadvantaged communities. By allowing the State Water Board to fund water infrastructure projects, SB 200 gave the State Water Board a new tool to provide drinking water solutions to all Californians.

In the course of implementing SB 200, the State Water Board has identified a number of tweaks that will enable it to more effectively and efficiently implement the Safe and Affordable Drinking Water Act. This bill implements the State Water Board's suggested changes, including by streamlining enforcement provisions and providing the State Water Board with means to combat fraud in its funds disbursement programs. The author has agreed to minor amendments to clarify the State Water Board's right to seek recovery from a funding recipient who has an indemnity agreement with a third party.

This bill was originally triple referred to the Senate Committees on Environmental Quality, Judiciary, and Public Safety. The referral to the Senate Public Safety Committee was rescinded because of the limitations placed on committee hearings due to the ongoing health and safety risks of the COVID-19 virus, and this analysis includes input from the Senate Public Safety Committee on the matters within its jurisdiction.

This bill is sponsored by the State Water Board and is supported by Clean Water Action, Community Water Center, and the Leadership Counsel for Justice and

Accountability. There is no known opposition. This bill passed out of the Senate Environmental Quality Committee with a vote of 6-1.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes as state policy that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes. (Wat. Code, § 106.3.)
- 2) Establishes the California Safe Drinking Water Act and requires the State Water Resources Control Board (State Water Board) to administer provisions relating to the regulation of drinking water to protect public health. (Health & Saf. Code, div. 104, pt. 12, ch. 4, §§ 116270 et seq.)
- 3) Provides that the California Safe Drinking Water Act does not apply to small state water systems, except as specified. (Govt. Code, § 11352.)
 - a) A “small state water system” is a system for the provision of piped water to the public for human consumption that serves at least five, but not more than fourteen, service connections and does not regularly serve drinking water to more than an average of 25 individuals daily for more than 60 days out of the year. (Health & Saf. Code, § 116275(n).)
- 4) Requires any person operating a public water system to obtain and provide at that person’s expense an analysis of the water to the State Water Board, performed by a state-certified laboratory, in any form and containing any information as the State Water Board requires. (Health & Saf. Code, § 116385.)
- 5) Establishes 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. Monies deposited in the fund are continuously appropriated to the State Water Board to fund operations and maintenance costs to help deliver an adequate supply of safe drinking water and other water-related programs. (Health & Saf. Code, § 116766.)
- 6) Generally authorizes the State Water Board to enforce its programs, and provides that a party may seek relief from a State Water Board order in superior court. (E.g., Health & Saf. Code, §§ 25299.78, 116500, 116650, 116700-116701.)
- 7) Generally provides that persons making certain misrepresentations or false statements made to the Water Board in connection with various water programs are liable for civil penalties, as determined by the superior court in an action brought by the Attorney General. The severity of the civil penalties varies with the severity of the misstatement. (E.g., Health & Saf. Code, §§ 25299.78, 116725.)

- 8) Generally provides that certain knowing violations of water-related programs are punishable as misdemeanors, and that a second or subsequent violation is punishable as a felony. (E.g., Health & Saf. Code, §§ 25299.80.5, 116730.)

This bill:

- 1) Consolidates the administrative enforcement authority available to the State Water Board to enforce the terms, conditions, and requirements of its financial assistance programs, as specified.
- 2) Grants the State Water Board increased enforcement authority under the California Safe Drinking Water Act with respect to small state water systems.
- 3) Extends eligibility for financial assistance under the Safe and Affordable Drinking Water Act to public water systems or technical assistance providers not currently eligible for funding.
 - a) "Technical assistance provider" is a person whom the State Water Board has determined is competent to assist a water system by providing administrative, technical, operational, legal, or managerial services to meet the purposes of the Fund, pursuant to criteria adopted by Health & Safety Code section 116768.5.
- 4) Authorizes the State Water board to authorize funding of up to \$10,000 from the Fund without a written agreement, and provides that contracts may be awarded on a noncompetitive basis as necessary to implement the administration of the Fund's purposes.
- 5) For purposes of the consolidated administrative enforcement authority under the Safe and Affordable Drinking Water Act, defines the following:
 - a) "Agreement" is any agreement or contract for financial assistance from the State Water Board to an eligible recipient, including, but not limited to, a loan, grant, installment sale agreement, contract, or other form of agreement made for the purpose of providing financial assistance.
 - b) "Recipient" is any person or entity that receives any financial assistance from the State Water Board, including, but not limited to, a recipient's contractors or consultants who perform work for the recipient.
- 6) Authorizes the State Water Board, as part of the consolidation, to recover any costs incurred in the enforcement of an agreement, including any criminal, civil, or administrative action related to the agreement, as follows:
 - a) The State Water Board may recover any amount of financial assistance provided to a recipient not expended for purposes authorized by the agreement, up to the full amount of the agreement.
 - b) The Attorney General, on the request of the State Water Board, shall bring an action in superior court to recover costs under this section.

- c) The State Water Board may recover costs administratively.
- 7) Provides that, in connection with costs recovered, the amount of costs constitutes a lien on any property obtained through, or improved with the proceeds, of an agreement, which shall attach for a period of ten years and may be renewed unless the lien is released or discharged.
- 8) Provides that, in specified circumstances, if a person is criminally convicted under certain provisions for violations of the Safe and Affordable Drinking Water Act, the State Water Board may permanently disqualify that person receiving financial assistance from the State Water Board. If the State Water Board determines that the disqualified person is a contractor or consultant, the recipient shall not submit invoices for any work performed or directed.
- 9) Provides that, when a person has been convicted of, or found liable for a civil penalty for, making misrepresentations in connection with an application for funds under the Safe and Affordable Drinking Water Act, the State Water Board may permanently disqualify a recipient from further receipt of financial assistance from the State Water Board, if the State Water Board makes a finding that the alleged violation was knowing, willful, or intentional, taking into account the nature, circumstances, extent, and gravity of the violation, any prior history of misrepresentations, any economic benefits or savings that resulted or would have resulted from the false statement, and any other matters as justice may require.
- 10) Provides that, upon motion and sufficient showing by any party, a superior court or the State Water Board shall join to a court or administrative action a person who may be liable for costs or expenditures of the type recoverable for violation of an agreement.
- 11) Provides that the standard of liability for any costs recoverable is strict liability.
- 12) Provides that an indemnification, hold harmless, conveyance, or similar contract shall not preclude any liability for costs recoverable by the State Water Board, but that such contracts are not barred.
- 13) Provides that the entry of judgment against any party to a recovery action does not bar any future action by the State Water Board against any person who is later discovered to be potentially liable for costs incurred by the State Water Board related to any financial assistance program.
- 14) Provides that any person who violates any requirement or term of a financial assistance agreement is liable for a civil penalty for not more than \$1,000 per day of the violation, not to exceed 25 percent of the total amount of the financial assistance agreement. The penalty may be recovered in a civil action by the Attorney General

upon request of the State Water Board, or the State Water Board may impose the penalty administratively.

- 15) Provides that a recipient shall furnish, under penalty of perjury, any information relating to funds disbursed or costs claimed for reimbursement related to a financial assistance agreement, and that any person who fails or refuses to furnish such information is subject to civil liability of not more than \$10,000 per violation, where the violation was knowing, willful, or intentional, the recipient received a material economic benefit from the alleged violation, or the alleged violation is chronic and/or the recipient is a repeat violator. The penalty may be recovered in a civil action by the Attorney General upon request of the State Water Board, or the State Water Board may impose the penalty administratively.
- 16) Provides that a person who makes a misrepresentation in any submittal to the State Water Board for assistance under the Safe and Affordable Drinking Water Act, including, but not limited to, an application or other document submitted in connection with a financial assistance agreement, is subject to civil liability of not more than \$500,000 for each violation. The penalty may be recovered in a civil action by the Attorney General upon request of the State Water Board, or the State Water Board may impose the penalty administratively.
- 17) Provides that a person who knowingly makes or causes to be made any false statement, material misrepresentation, or false certification to the State Water Board relating to an agreement for assistance under the Safe and Affordable Drinking Water Act shall, upon conviction, be punished by a criminal fine of not more than \$10,000 and/or by imprisonment in a county jail for not more than one year, or in state prison for 16 months, two years, or three years. The Attorney General or a district attorney shall, upon request of the State Water Board, bring an action to impose the criminal penalty.
- 18) Provides that the remedies set forth in the bill are in addition to, and do not supersede, any other remedies available to the State Water Board by statute or in an agreement, except that civil liability shall not be imposed both administratively and by the superior court for the same action, and in determining the amount of liability for a violation, the court or State Water Board shall take into consideration all relevant circumstances, including any corrective action taken by the violator.

COMMENTS

1. Author's comment

According to the author:

There are close to three hundred low-income communities across California that do not have reliable access to safe, clean, and affordable drinking water. In 2019, however, the Governor signed SB 200 (Monning, Ch. 120, Stats. 2019), which established the Safe and Affordable Drinking Water Fund to help the State Water Resources Control Board fund its efforts to provide safe drinking water for the hundreds of communities without access to it.

Through its implementation of SB 200, however, the State Board has identified a number of clarifying statutory changes that are needed to enable a more effective and efficient implementation of the SB 200 program, the Safe Drinking Water Act, and the goals of the Human Right to Water policy.

SB 776 proposes a number of statutory changes that primarily seek to improve Fund accountability, provide greater administrative oversight, and implement program efficiencies to get help to the communities faster. These changes are critically urgent to help the communities that need safe drinking water the most, including those sheltering at home during the COVID-19 pandemic. SB 776 will allow the State Water Board to move quickly and effectively implement the goals of the Safe and Affordable Drinking Water Fund, while ensuring the state has proper enforcement mechanisms to prevent taxpayer funds from being misused.

2. Background: the State Water Board's authority to regulate safe drinking water and assist with water infrastructure projects

The State Water Board has the primary authority to enforce federal and state drinking water laws and is responsible for the regulatory oversight of about 7,400 public water systems throughout the state.¹ While the majority of the state receives drinking water that meets federal and state drinking water standards, there are many public water systems, particularly those serving small, disadvantaged communities, that fail to provide safe drinking water to their customers. According to the analysis of this bill by the Senate Environmental Quality Committee, nearly 300 systems currently cannot consistently meet public health standards. The state also has an unknown number of "small state water systems," which serve fewer than 15 service connections/households, and an untold number of domestic wells that likely tap into contaminated groundwater sources. The Senate Environmental Quality Committee

¹ According to the sponsor, the State Water Board, the number of public water systems fluctuates; the 7,400 number represents the State Water Board's most recent estimate.

analysis addresses the State Water Board's authority in greater detail, and is incorporated here by reference.

In 2019, the Legislature passed SB 200,² which enacted the Safe and Affordable Drinking Water Act (the Act), to help public water systems throughout the state provide an adequate and affordable supply of safe drinking water. SB 200 provided the State Water Board with \$130 million annually to assist public water systems in delivering safe and affordable drinking water, including by providing funding in the form of grants, loans, and contracts, to assist with long-term operations and maintenance for failing water systems. The State Water Board can also use these funds to develop unique solutions for failing water systems or groups of failing water systems, including, where appropriate, mandatory consolidations and the appointment of Administrators to operate and manage failing water systems.

According to the State Water Board, in the course of implementing SB 200, the Board identified a number of gaps left in the law that hamper its ability to effectively implement the Act. This bill is intended to fill those gaps, including by consolidating the State Water Board's enforcement authority. For jurisdictional reasons, this analysis focuses on the enforcement measures that may be brought in the superior court, and includes a comment from the Public Safety Committee relating to the bill's criminal provisions. An analysis of the other provisions of the bill may be found in the Senate Environmental Quality Committee's analysis.

3. This bill provides administrative and civil enforcement tools for violations of the Safe and Affordable Drinking Water Act

While the Act gave the State Water Board the authority to grant funds and financial assistance for badly needed water infrastructure and consolidation projects, the Act did not provide clear enforcement and recovery mechanisms for violations or fraud in connection with those grants. The State Water Board was thus left with limited authority to seek recovery of funds that were obtained by fraud or misused and to punish bad actors.

With respect to recovering funds that were granted to a recipient under an agreement with the State Water Board but were misused, the bill permits the State Water Board to recover the funds either administratively under the ambit the Board's existing administrative liability authority³ or, at the request of the State Water Board, by the Attorney General in a civil action in superior court. The State Water Board or court may, upon motion and sufficient showing by any party, join any other person who may be liable for those costs or expenditures. The bill permits the State Water Board to recover any costs incurred in the enforcement of an agreement, on a strict liability basis. Upon an award of costs, the State Water Board receives a lien on the property improved

² SB 200 (Monning, Ch. 120, Stats. 2019).

³ See Wat. Code, § 13323.

through the State Water Board's funds, which the owner may petition to have released or reduced; in such an action, the State Water Board must establish that the costs incurred were reasonable and necessary.

This bill also provides that, in administrative or civil actions to recover costs and funds, an indemnification, hold harmless, conveyance, or similar contract shall not preclude any liability for costs or funds otherwise recoverable. The author has clarified that this provision is intended to prevent such provisions between the recipient of the funds and a third party from preventing the State Water Board from seeking its funds from the recipient – not to permit the State Water Board to ignore such provisions in its own contracts. As explained by the author, this provision appears to be a reasonable measure; if a recipient of funds has an indemnity agreement with a third party, this provision would put the onus on the recipient to bring in the third party, rather than forcing the State Water Board to chase the third party, who may or may not be within the jurisdiction of the state. In order to clarify the scope of this provision, the author has agreed to the amendments set forth in Comment 4, below.

This bill also provides for penalties that may be imposed on the recipients of funds from the State Water Board pursuant to an agreement under the Act for specific bad acts. The penalties may be sought administratively by the State Water Board or, at the request of the Board, be sought by the Attorney General in an action in superior court. The specific administrative and civil penalties are:

- A penalty of up to \$1,000 per day, not to exceed 25 percent of the total amount of a financial assistance agreement under the Act, when a recipient violates any requirement or term of the agreement.
- A penalty of up to \$10,000 for failing or refusing to furnish information, under penalty of perjury, relating to funds disbursed or costs claims for reimbursement under a financial assistance agreement under the Act, when requested by the State Water Board; for the penalty to apply, the State Water Board or the court must find that the violation was knowing, willful, or intentional; that the recipient or the recipient's agent received a material economic benefit from the action that caused the alleged violation; or that the alleged violation is chronic or the alleged recipient is a recalcitrant violator.
- A penalty of up to \$500,000 for making a misrepresentation in any submittal to the State Water Board, in relation to a financial agreement for funds under the Act.

The bill provides that administrative and civil liability may not be imposed for the same violation. In all cases, when determining the amount of any administrative and civil penalty, the State Water Board or the court must take into consideration all relevant circumstances, including, but not limited to, 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 the corrective action, if any, taken by the violator.⁴ These considerations allow the State Water Board or the court to impose a reasonable penalty in light of the totality of the circumstances.

The bill also provides certain criminal penalties for intentionally making false statements or material misrepresentations to the State Water Board, which may be imposed in an action in superior court brought by the Attorney General or a district attorney at the request of the State Water Board. These provisions are discussed further below, in the analysis provided by the Public Safety Committee. In cases where a person has been assessed with any administrative, civil, or criminal penalties set forth in the bill, the bill also grants the State Water Board the authority to permanently disqualify the violator from receiving further financial assistance from the Board, if certain other conditions are met.

4. Comment from the Senate Committee on Public Safety

The Senate Public Safety Committee provided the following comment about the issues within its jurisdiction:

This bill contains a new wobbler providing that a person who knowingly makes or causes to be made any false statement, material misrepresentation, or false certification in any submittal to the state board relating to an agreement, including, but not limited to, applications, records, reports, certifications, plans, invoices, forms, or other documents that are submitted, filed, or required to be received by the state board for purposes of obtaining or administering a financial assistance agreement, shall, upon conviction, be punished by a criminal fine of not more than ten thousand dollars (\$10,000), or by imprisonment in a county jail for not more than one year, or in the state prison for 16 months, two years, or three years, or by both that fine and imprisonment. In addition to the \$10,000 fine there are approximately 300 percent penalty assessments added which would bring the fine closer to \$30,000. Why is a new wobbler necessary in addition to all the civil penalties included in this bill? Wouldn't an additional civil penalty be sufficient for making a false statement in this case? Would it be better to have an additional civil fine, if any additional enforcement is needed at all, and that money goes into the appropriate funds set forth in this bill whereas money from a criminal fine will go to the various entities in the criminal justice system that get a portion of fines?

5. Amendments

In order to clarify the bill's provision intending to prevent the State Water Board from seeking to recover costs or funds from a recipient where the recipient has an

⁴ These factors are similar to the factors that the State Water Board or a regional board must consider in determining the amount of penalties in other administrative actions. (See Wat. Code, § 13327.)

indemnification, hold harmless, conveyance, or similar contract with a third party, the author has agreed to the following amendments:

Amendment 1

On p. 12, in line 36, strike out “An” and insert “A recipient’s”

Amendment 2

On p. 12, in line 37, after “contract” insert “with a third party”

6. Arguments in Support

According to the State Water Board, sponsor of the bill:

In 2019, Le Legislature passed, and the Governor signed SB 200: the Safe and Affordable Drinking Water Act, which provides \$130 million annually to help public water systems deliver safe and affordable drinking water, and assists with long-term operations and maintenance for failing water systems. As the State Water Board works to implement the Safe and Affordable Drinking Water Program, the Board has identified several statutory changes that are needed to help communities more quickly address failing water systems.

Specifically, SB 776 will align the State Water Board’s drinking water authorities with its existing authorities to enforce water quality laws and better allow the State Water Board to move quickly and efficiently to help communities secure safe and affordable drinking water. This bill will also protect the Safe and Affordable Drinking Water Program Fund and the communities which rely on it from potential fraud by authorizing the State Water Board to recover misused funds, recover the costs of investigating and prosecuting fraud and misuse of funds, and prohibit entities and individuals found to have misused funds from being able to obtain future grants or loans from the State Water Board. These provisions mirror existing authorities currently exercised by the State Water Board and are important to protect communities and achieve our shared clean drinking water goals.

SUPPORT

State Water Resources Control Board (State Water Board) (sponsor)

Clean Water Action

Community Water Center

Leadership Counsel for Justice & Accountability

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

SB 552 (Hertzberg, 2021) requires small water suppliers and certain nontransient noncommunity water systems, no later than December 31, 2022, to develop and submit to the Division of Drinking Water for the state board an Emergency Response Plan that includes specified drought-planning elements, and require State Water Board, in partnership with the Department of Water Resources and no later than December 31, 2022, to conduct an assessment of drought and emergency water shortage resiliency measures for those small and nontransient noncommunity water systems, among other tasks. SB 552 is pending before the Senate Governance and Finance Committee.

SB 403 (Gonzalez, 2021) expands the State Water Board's authorization to order the consolidation of water systems under certain circumstances, to include ordering consolidation where a water system serving a disadvantaged community is at risk of failing to provide an adequate supply of safe drinking water or where a disadvantaged community is substantially reliant on domestic wells that are at risk of failing to provide an adequate supply of safe drinking water. SB 403 is pending before the Senate Governance and Finance Committee.

SB 351 (Caballero, 2021) creates the Office of Water Innovation at the California Water Commission for the furtherance of new technologies and other innovative approaches in the water sector, and creates the Water Innovation Fund, with all moneys available, upon appropriation, to the department, the state board, or other state agencies for the furtherance of water innovation. SB 351 is pending before the Senate Committee on Natural Resources and Water.

AB 1195 (Cristina Garcia, 2021) prohibits, once an operator of a public water system exercises water rights for the benefit of the public water system, those surface water rights or groundwater rights from being severed or otherwise separated from the public water system. AB 1195 is pending before the Assembly Environmental Safety and Toxic Materials Committee.

AB 588 (Eduardo Garcia, 2021) requires the State Water Board to identify actions necessary to assist water systems that are not able to achieve compliance with water quality requirements, and require the State Water board to identify a compliance period or periods, when it adopts a primary drinking water standard, of not less than 30 days and not more than 3 years, and to consider specified criteria when identifying the compliance period, which may be extended by the Water Board on a case-by-case basis.

AB 588 is pending before the Assembly Environmental Safety and Toxic Materials Committee.

AB 100 (Holden, 2021) expands the definition of “lead free” for purposes of limitations on lead in water coming from endpoint water delivery devices. AB 100 is pending before the Assembly Appropriations Committee.

Prior Legislation:

SB 669 (Caballero, 2019) would have created a Safe Drinking Water Fund in the State Treasury, and would have required the Fund to administer the fund to assist community water systems in disadvantaged communities that are chronically noncompliant relative to the federal and state drinking water standards and do not have the financial capacity to pay for operation and maintenance costs to comply with those standards. SB 669 died in the Senate Appropriations Committee.

SB 200 (Monning, Ch. 120, Stats. 2019) established the Safe and Affordable Drinking Water Fund to help water systems provide an adequate and affordable supply of safe drinking water to the state, and requires the State Water Board to adopt a fund-implementation plan and requires expenditures of the fund to be consistent with the plan.

SB 414 (Caballero, 2019) would have created the Small System Water Authority Act of 2019 to authorize the creation of small system water authorities that would have powers to absorb, improve, and competently operate noncompliant public water systems. SB 414 died in the Assembly Appropriations Committee.

AB 1381 (Salas, 2019) would have required the State Water Board to identify, within the state, public water systems that consistently fail to deliver water that meets all applicable standards under the California Safe Drinking Water Act, specified areas in which persons have, and specified populations having, limited access to, or ability to pay for, safe and affordable drinking water, and strategies to address the changing needs of current and future populations. AB 1381 died in the Assembly Environmental Safety and Toxic Materials Committee.

AB 402 (2019, Quirk) would have authorized the State Water Board to delegate partial responsibility for administering and enforcing the California Safe Drinking Water Act, and eliminated the annual drinking water surveillance program grant. AB 402 died in the Senate Appropriations Committee.

AB 134 (Bloom, 2019) would have required the State Water Board, upon adoption of an assessment of funding need, to convey to each regional engineer a list of at-risk water systems in that region and additional information, and to review the assessment of funding need and to prioritize the public water systems, community water systems,

state small water systems, and domestic wells with the most urgent need for state financial assistance. AB 134 died in the Senate Environmental Quality Committee.

AB 2050 (Caballero, 2018) would have created the Small System Water Authority Act of 2018, which authorizes the creation of a small system water authority that would have powers to absorb, improve, and competently operate noncompliant public water systems. This bill was vetoed by Governor Newsom, who stated he did not believe the bill did not address the significant problem of the lack of a stable source of funding to pay for ongoing operations and maintenance costs.

SB 623 (Monning, 2017) would have created the Safe and Affordable Drinking Water Fund, administered by the State Water Board, to assist communities and individual domestic well users to address contaminants in drinking water that exceed safe drinking water standards. This bill died in the Assembly Rules Committee.

AB 560 (Salas, Ch. 552, Stats. 2017) authorized the State Water Board to provide grant funding, and principal forgiveness and zero percent financing on loans, from the Safe Drinking Water State Revolving Fund to a project for a water system with a service area that qualifies as a severely disadvantaged community if the water system demonstrates that repaying a Safe Drinking Water State Revolving Fund loan with interest would result in unaffordable water rates, as defined.

PRIOR VOTES:

Senate Environmental Quality Committee (Ayes 6, Noes 1)
