

MEMORANDUM

TO: NDWA BOARD OF DIRECTORS; MELINDA TERRY
FROM: AUSTIN C. CHO
DATE: DECEMBER 6, 2023
RE: SUMMARY OF SENATE BILL 389

I. Introduction

In October 2023, Governor Gavin Newsom signed Senate Bill (“SB”) 389 into law to amend Section 1051 of the California Water Code and expand the State Water Board’s authority to investigate water use under any claimed rights. This memorandum provides a brief overview and summary of the impact SB 389 may have on water users in the Delta after it goes into effect January 1, 2024.

II. Background

State Senator Ben Allen introduced SB 389 in response to a 2022 paper released by the Planning and Conservation League entitled “Updating California Water Laws to Address Drought and Climate Change,” in the same legislative session as number of other bills that aimed to substantially change water right enforcement procedures in California.¹ That paper suggested the State Water Board needed clearer authority to determine the validity of pre-1914 appropriative and riparian water rights to effectively manage the State’s water resources in times of drought. The State Water Board’s authority is much more limited with respect to those types of water rights when compared to its administration of post-1914 appropriative rights, as held in *California Water Curtailment Cases* (2022) 83 Cal.App.5th 164, 196. There, the Court of Appeal for the Sixth District explained that the State Water Board’s authority to curtail diversions as trespass under Water Code section 1052(a) “does not include the power to curtail an entire class of pre-1914 appropriative water rights solely on the basis that the Board believes that there will be insufficient water to serve all pre-1914 appropriative rights.” (*Id.*)

Existing law under Section 1051 enables the State Water Board to investigate streams, rivers, lakes, and other bodies of surface water, and take testimony regarding claimed water rights to ascertain whether or not water diversions are consistent with State law. According to Senator Allen, the purpose of SB 389 was to address gaps in the State Water Board’s information gathering and enforcement tools it can use to more effectively determine water availability and ensure water is being put to beneficial use under valid rights.

¹ Assembly Bill 460 (Bauer-Khan) would have enabled the State Water Board to issue interim relief orders to halt diversions while it investigates the validity of water right claims made by interested parties or on its own motion. Assembly Bill 1337 (Wicks) would have authorized the State Water Board to adopt regulations that curtail any classification of diversions, including riparian and pre-1914 appropriative rights. Both Assembly Bills were tabled during Senate hearings.

III. Analysis

When first introduced, SB 389 would have created a process for the State Water Board to *determine* the validity of claimed rights; order water users to provide technical reports or other information to support their claim; issue decisions that determine the validity and scope of claimed rights; and deem forfeiture of claimed rights, even in the absence of a conflicting claim from another water user. Under the original draft, SB 389 placed the evidentiary burden on the holder of an investigated water right to affirmatively prove the validity of their right.

In the face of political opposition, SB 389 underwent several amendments to pass both legislative chambers. As enacted, SB 389 expands the State Water Board's pre-existing authority under Water Code section 1051 to "investigate and ascertain" the availability of water, to also include the power to investigate and ascertain whether or not diversions under claimed surface water rights are valid. SB 389 makes clear that the State Water Board's investigative powers apply to any water rights, including pre-1914 appropriative and riparian rights, though the express ability to make a "determination" on the validity of a right was removed. In carrying out its investigations, the State Water Board's executive officer is authorized to issue information orders to water right holders, claimants, and diverters of water.

Information orders may include: (i) information to be provided in annual diversion and use reports; (ii) information concerning the basis of a water right claim; (iii) information related to the patent date claimed for the place of use if the claimed right is riparian; (iv) information on the date an appropriation was first noticed and the date water was first put to beneficial use; and (v) information concerning prior diversions and use, including direct diversions and diversions to storage. (Wat. Code, § 1051(b)(2).)

The burden of any information order, including costs, must bear "a reasonable relationship to the need for the requested information and the benefits to be obtained from the board receiving that information." (*Id.* at subd. (c).) To support the reasonableness of the information order relative to the burden it places on a water user, the State Water Board must provide a written explanation of the need for the information and identify the evidence supporting its decision to issue an information order. (*Id.*) While the codified version of SB 389 no longer grants the power to "determine" the validity of a claimed right at the end of its investigation, curtailment is still possible if the State Water Board ascertains that diversions exceed the scope of a claimed right. If, following its investigation, the State Water Board finds such water use is, in whole or in part, unauthorized, it may move to enforce the unauthorized water use as a trespass under Water Code section 1052, after providing notice and an opportunity for a public hearing.

IV. Implications for Delta Water Users

The expected result of SB 389's enactment is that diversions under claimed riparian and pre-1914 water rights may be subject to increased regulatory scrutiny, beginning January 1, 2024. Previously, the State Water Board's investigatory powers focused on the availability of water in a particular river or system. While amendments to the bill removed the ability to make dispositive determinations on the existence or forfeiture of claimed water rights, the State Water Board may now investigate individual water users it has reason to believe are diverting more water than their claimed right allows.

In our opinion it is likely that the State Water Board will attempt to utilize this new statutory authority to investigate water rights in the Delta. Whether it will utilize this authority to investigate water rights within the North Delta Water Agency is less clear in light of the water supply and water quality protections contained in the 1981 Contract between NDWA and the Department of Water Resources.

While the burden of the State Water Board's information orders must be commensurate with the value of the information sought, pre-1914 and riparian water users in the Delta should endeavor to maintain clear records of their diversions and the bases for their claimed rights in the event of an investigation. We recommend that NDWA send a memorandum to water users within NDWA alerting them to this new legislation and providing recommendations regarding record-keeping.