
SENATE COMMITTEE ON NATURAL RESOURCES AND WATER

Senator Henry Stern, Chair

2021 - 2022 Regular

Bill No: AB 2895 **Hearing Date:** June 20, 2022
Author: Arambula
Version: June 9, 2022 Amended
Urgency: No **Fiscal:** Yes
Consultant: Dennis O'Connor

Subject: Water: permits and licenses: temporary changes: water or water rights transfers

BACKGROUND AND EXISTING LAW

Under existing law, the State Water Resources Control Board (water board) administers a water rights program under which the board grants permits and licenses to appropriate water. (Water Code (WC) §§1200 et seq.) These provisions of the Water Code:

- 1) Authorize a permittee or licensee to temporarily change the point of diversion, place of use, or purpose of use due to a transfer or exchange of water or water rights if the transfer would:
 - a) Only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change,
 - b) Not injure any legal user of the water, and would
 - c) Not unreasonably affect fish, wildlife, or other instream beneficial uses. (WC §1725)
- 2) Prescribe the process for a permittee or licensee to petition the water board for a temporary change due to a transfer or exchange of water rights, and imposes on the board related notice, decision, and hearing requirements. (WC §1726)
 - a) Under that process, a petitioner is required, among other things, to:
 - i) Provide a copy of the petition to the Department of Fish and Wildlife (DFW), the board of supervisors of the county or counties in which the petitioner currently stores or uses the water subject to the petition, and the board of supervisors of the county or counties to which the water is proposed to be transferred. (WC §1726(c))
 - ii) Publish notice of a petition in a newspaper. (WC §1726(d))
 - b) Under that process the water board, with certain exceptions, is required to render a decision not more than 35 days after the date the investigation began or the date the notice was published. (WC §1726(g))

- i) If the water board or the petitioner determines that an additional extension of time for a decision is necessary for the board to make the required findings, or that a hearing is necessary for the board to make those findings, the board may extend the time for a decision with the consent of the petitioner.
 - ii) If the petitioner agrees to a hearing, the water board shall identify the issues for which additional evidence is required and shall fix a time and place for the hearing.
- 3) Authorize a person entitled to the use of water to petition the water board for a change to a water right for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation and authorizes the board to approve the petition only if certain requirements are met. (WC §1707) Further authorizes that petition to be submitted in accordance with specified requirements, including those regulating temporary changes due to a transfer or exchange of water rights.

PROPOSED LAW

This bill would:

- 1) Revise and recast the provisions regulating temporary changes due to a transfer or exchange of water rights, including,
 - a) Eliminating the requirement that a petitioner publish notice of a petition in a newspaper.
 - b) Requiring the petition to include documentation of consultation with DFW.
 - c) Specifying that those provisions apply to a person who proposes a temporary change for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation.
 - d) Eliminating the provision whereby a petitioner may determine that a hearing is necessary for the water board to make the required findings.
 - e) Making other technical and conforming changes.
- 2) Establish a new process for petitions for which notice is submitted to the water board no later than January 31 for a temporary change due to a transfer or exchange of water rights initiated in the same year, and would impose on the board related notice, decision, and hearing requirements.
 - a) Under this new process, the water board would be required, among other things, to post on its internet website and disseminate by email LISTSERV by February 15 of each year a list of all timely and complete notices for which notice is filed.
 - b) By March 1 of each year, an interested person would be able to request notice of a submitted petition for temporary change, and the concerns related to effects on other legal users, fish, wildlife, instream beneficial uses, or groundwater conditions the person may raise in comments on the petition.

- c) After submittal of a complete petition, the water board would be required to provide notice of the petition by sending a copy to all persons who submitted complete requests under subdivision (d), posting the petition on its internet website, and disseminating the petition by email LISTSERV. Any interested party may file a written comment on the petition not later than 30 days after submittal of a complete petition.
- d) The water board would be required to issue a decision within 35 days after submittal of a complete petition for which notice is provided under these provisions, with certain exceptions.

ARGUMENTS IN SUPPORT

According to the author, “As California’s climate becomes more extreme, water transfers are effective means to provide drought resiliency throughout the state. Efficient review and approval by the State Water Board are needed to ensure that water transfers can be successfully executed. Unfortunately, current requirements for processing temporary transfer petitions cause delays both for the petitioner and Water Board. AB 2895 will allow California to adapt to evolving drought conditions more effectively by modernizing and streamlining the water transfer petition process. This bill also improves communication between impacted agencies and increases accessibility of transfer petition information by the public.”

ARGUMENTS IN OPPOSITION

East Bay MUD writes, “AB 2895 could directly impair the ability of EBMUD and others to access supplemental water supplies through temporary water transfers. These transfers are often used to supplement supplies during droughts, are time sensitive, and based on hydrologic conditions that vary over time. EBMUD’s comprehensive water supply management program includes the use of temporary water transfers, in addition to conservation and recycling, to minimize rationing during dry years. The timing of temporary water transfers depends on hydrology and once water is determined to be available, usually in the spring, there is a very short period within which EBMUD must gain the necessary regulatory approval.”

The Association of California Water Agencies (ACWA) and California Municipal Utilities Association (CMUA) add, “The bill proposes to add a new step in the initial petition development process where a potential petitioner must provide ‘documentation of consultation’ with the California Department of Fish and Wildlife (Fish and Wildlife) prior to an application being considered complete. Current regulations of the State Water Board require petitioners to provide proof of service to Fish and Wildlife when submitting a petition (Title 23, section 794(d)). It is our understanding that the intent of this new language is to mirror the regulatory requirement in statute; that being the case, the statute should be clear about that requirement. Documentation of consultation and proof of service are very different standards for petitioners to meet, and ACWA and CMUA are concerned that this language, instead of streamlining the process, may be inadvertently making it more difficult to make these critical transfers.”

Finally, “The California News Publishers Association and California Black Media strongly oppose your AB 2895, unless amended to no longer eliminate the published

notice in a newspaper of general circulation. ... Public notice newspaper advertising is an extension of journalism that protects the authenticity of and access public information. In this case it also helps protect the peace of mind of many millions of Californians. Please do not disrupt this vital aspect of service to the people.”

COMMENTS

Recent Amendments Generally Well Received. As ACWA and CMUA note in their letter of opposition unless amended, “ACWA and CMUA are supportive of some of the changes proposed to the existing process. First, this bill will clarify that the temporary transfer process is also applicable to transfers under Water Code section 1707 relating to instream flows for the preservation of wetlands habitat, fish and wildlife resources, or recreation. Second, the bill would modernize the process by deleting the requirement for a petitioner to notice the petition in the newspaper, which is an antiquated requirement. Finally, the amendments on June 9 reinstated required timeframes consistent with existing law, which will provide certainty in the process for petitioners.”

Notice By Publication. As noted in the arguments in opposition, not everyone is happy with eliminating the newspaper notice. However newspapers, especially paper newspapers, are much rarer than they used to be. Since the notice is going on the Board’s website, that’s a much more reliable source of information than a notice in the paper. This is especially true in a location where there are may still be multiple papers, so an interested person would have to scour all the papers on a daily basis for water notices instead of just checking online.

Notice vs Consultation. Under 23 CCR §794 (d) “The petition for change(s) will not be accepted for filing unless it contains all of the information required by subdivision (a) and proof that a copy of the petition has been served on the Department of Fish and Game.” This bill proposes to override this with statutory language requiring proof of consultation with DFW.

Currently, consultation with DFW, should DFW decide to consult, happens in parallel with the water board’s consideration of the petition. This not only saves time in processing the petition, but allows the consultation to adapt to any changes that the water board or petitioners make to the proposal during the process of review. This bill would require DFW to consult before the water board begins consideration of the petition. If the purpose is to expedite approval of these short term transfers, where time is of the essence, it is not clear how this provision is helpful. (See amendment 1)

Petitioner May No Longer Determine Need For Hearing. As noted above, this bill proposes to eliminate a petitioners ability under current law to determine there is a need for a hearing on a petition. This situation may arise when it looks like the petition is going to be denied and the petitioner wants to formally make their case. It the name of fairness, it might make sense to allow the petitioners their day in court (so to speak). (See amendment 2)

Not Clear Many Will Use The New Process. This new process will require water rights holders to notify the water board by January 31 that they have water they are willing to transfer. Things can change a lot between January 31 and the end of the traditional rain and snow season. As evidenced by this year, what at first looks like is going to be

a wet year can quickly change. Nonetheless, there is probably no harm in setting up this new process.

SUGGESTED AMENDMENTS

AMENDMENT 1

On page 4, delete lines 39 & 40

AMENDMENT 2

On page 6, line 13, after “board” insert “or petitioner”

SUPPORT

Sustainable Conservation

OPPOSITION

Association of California Water Agencies (Unless amended)
California Municipal Utilities Association (Unless amended)
California News Publishers Association (Unless amended)
East Bay Municipal Utility District (Unless amended)
Regional Water Authority (Unless amended)
Santa Clara Valley Water District (Unless amended)

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