

SENATE THIRD READING
SB 1390 (Caballero)
As Amended August 19, 2024
Majority vote

SUMMARY

Makes numerous changes to existing authority to temporarily divert floodflows for groundwater recharge without a water right or other permits.

Major Provisions

- 1) Adds a local hazard mitigation plan to the list of plans that a local or regional agency may rely upon to determine there is an imminent risk of flooding to authorize the temporary diversion of floodflows for groundwater recharge.
- 2) Provides that a local or regional agency must give notice that a "delineated area within its jurisdiction" (rather than "flows downstream of a point of diversion") are at imminent risk of flooding to authorize the temporary diversion of floodflows for groundwater recharge.
- 3) Provides that "floodflows" may include measured flows that are "projected" by a local or regional agency to be in excess of the maximum design capacity of a flood project or flows "projected" by a local or regional agency to inundate ordinarily dry areas in the bed of a terminal lake.
- 4) Clarifies that "imminent" means conditions that will begin or that are projected to begin within 72 hours.
- 5) Provides that a local or regional agency shall be responsible for determining when flood conditions have abated for purposes of ceasing the temporary diversion of floodflows for groundwater recharge.
- 6) Requires a local or regional agency to issue a declaration that flood conditions are projected to end at least 48 hours beforehand to inform the public and diverters. Requires a local or regional agency to notify the public and known diverters that flood conditions are abating, within 24 hours of the projected end of flood conditions. Regardless, diversions must cease no later than 30 days after notice by a local or regional agency is given.
- 7) Provides that floodflows may only be temporarily diverted for groundwater recharge when the Delta is in excess water conditions without restrictions. Requires a diverter exercising the authority to temporarily divert floodflows for groundwater recharge to monitor conditions daily using the Delta Operations Summary published on the Department of Water Resources' (DWR) website to determine whether the Delta is in excess conditions without restrictions.
- 8) Requires an entity that temporarily diverts floodflows for groundwater recharge to also provide reports on its diversion to the local or regional agency that issued the flood determination.
- 9) Requires the State Water Resources Control Board (State Water Board) to post any report it receives from an entity that is temporarily diverting floodflows for groundwater recharge on its website the next business day after receipt.

- 10) Provides that an entity temporarily diverting floodflows for groundwater recharge must provide an initial report to the State Water Board within 24 hours (rather than 48 hours) of commencing diversions.
- 11) Requires an entity's final report on the temporary diversion of floodflows for groundwater recharge to include information describing forecasting models used, a description of the methodology used to determine the abatement of flood conditions, and an explanation of any diversion renewals.

COMMENTS

Groundwater recharge is an important strategy to enhance water supply and water supply reliability in the face of climate change. This has been recognized in numerous state plans and strategies and by water agencies, nongovernmental organizations, and researchers. One manner in which groundwater recharge can be expanded is through the capture or diversion of high water flows or flood flows during wet periods such as the winters of 2017 and 2023. Capturing water during such events can be challenging if a potential diverter has not obtained the necessary permits to do so. For example, if a groundwater recharge project involves diverting surface water from a river or stream to a recharge area, a water right or permit is required. Obtaining a new water right can take a long time so, several projects in recent years have opted to seek a temporary urgency (180-day) permit to divert flood flows to groundwater recharge. The State Water Board can also issue a five-year temporary permit for groundwater recharge.

2023 Executive Orders (EO) and SB 122. To take advantage of the unexpected wet winter last year and capture high water flows for groundwater recharge, Governor Newsom issued EO N-4-23 which, among other provisions, authorized diverters to temporarily take "floodflows" off of streams and rivers for groundwater recharge without obtaining a water right, complying with the California Environmental Quality Act, and obtaining a Lake and Streambed Alteration Agreement. The authority in EO N-4-23 was modified and extended through EO N-7-23 and then codified into law with the passage of SB 122 last year. SB 122 makes various changes to the EOs, including adding a requirement that a local or regional agency must rely upon a local plan of flood control or a county general plan that considers flood risk in order for an unpermitted diversion of floodflows to occur within the agency's territory. Further, the diverted water cannot be applied to certain types of land (e.g., where manure has been applied in the previous 45 days) and the diversion must meet the following criteria:

- 1) Use existing diversion infrastructure or temporary pumps;
- 2) Use existing groundwater recharge locations;
- 3) Cannot use new permanent infrastructure or permanent construction; and
- 4) Use protective screens on temporary pumps to protect fish and other aquatic life when water is diverted directly from a river or stream. The protective screens must be constructed of any rigid material, perforated, woven, or slotted that allows water to pass while physically excluding fish. In addition, a protective screen must be parallel to the flow of water and adjacent to the water's edge and meet other specified criteria.

The State Water Board received and posted 78 reports of temporary diversion of floodflows for groundwater recharge under the authority granted by the EOs (see

https://www.waterboards.ca.gov/waterrights/water_issues/programs/groundwater-recharge/). The majority of these reports indicate that diversions began the same day or within days of, the issuance of the first EO, N-4-23, on March 10, 2024 and, in many cases continued through August and even September 2023. EO N-4-23 provides in paragraph 3c that "diversions cease when the flood conditions have abated to the point there is no longer a risk of flooding and inundation of land, roads, or structures downstream of the point of diversion" (EO N-7-23 extended the authority to divert and this restriction). Despite this requirement, it appears that many diversions under the authority granted by the EOs continued long after flood conditions had abated.

In May of this year, DWR released its Semi-Annual Groundwater Conditions report that indicates that groundwater storage in California improved for the first time since 2019. Per the report, the state achieved 4.1 million acre-feet (AF) of managed aquifer recharge water in 2023; 1.2 million AF of this was permitted by state agencies and approximately 453,000 AF occurred under the authority for the temporary diversion of floodflows for groundwater recharge authorized by EO N-4-23 and EO N-7-23. The remaining recharge occurred as a result of the wet conditions.

According to the Author

"[This bill] is a simple bill that provides clarity to current flood planning requirements and builds on the momentum of SB 122 and the Governor's [EO] issued in March of 2023. [This bill] will allow more groundwater projects to move forward during flood events by providing water agencies with information about when flood conditions begin and end by using sophisticated forecasting models to anticipate flood events, with increased accountability, public safety and water quality." The author further contends that "until statute is modified, California will be unable to make the most efficient use of flood flows, which will increasingly make up the source of water supplies in the state as the climate continues to warm."

Arguments in Support

This bill is sponsored by Sustainable Conservation (SusCon). SusCon points out that groundwater recharge is an important strategy to help respond to climate change and facilitate the implementation of the Sustainable Groundwater Management Act. By clarifying when flood conditions begin and end, recognizing the utilization of forecasting models, and increasing reporting and accountability, SusCon argues this bill "carries forward the progress of the [EO] and SB 122 by allowing more recharge projects to be completed in a safe and responsible manner."

Arguments in Opposition

The San Francisco Baykeeper opposes this bill asserting that it will "allow local agencies to freely pump water from California's already fragile river systems in a misguided effort to reclaim floodwaters for groundwater recharge. The current science continues to indicate aquatic ecosystems in California's rivers and the San Francisco Bay estuary, their fish, wildlife, and water quality, and the people that depend on them are in desperate need of more flows, not less."

FISCAL COMMENTS

According to the Assembly Appropriations Committee:

The State Water Board reports General Fund costs of \$250,000 in one-time contracting costs to update data management systems to incorporate increased information required by this bill.

VOTES**SENATE FLOOR: 37-0-3**

YES: Alvarado-Gil, Ashby, Atkins, Becker, Blakespear, Bradford, Caballero, Cortese, Dahle, Dodd, Durazo, Eggman, Glazer, Gonzalez, Grove, Hurtado, Jones, Laird, Limón, McGuire, Menjivar, Min, Nguyen, Niello, Ochoa Bogh, Padilla, Portantino, Roth, Rubio, Seyarto, Skinner, Smallwood-Cuevas, Stern, Umberg, Wahab, Wiener, Wilk

ABS, ABST OR NV: Allen, Archuleta, Newman

ASM WATER, PARKS, AND WILDLIFE: 13-0-2

YES: Papan, Addis, Alanis, Alvarez, Bennett, Gallagher, Davies, Garcia, Hart, Luz Rivas, Schiavo, Villapudua, Weber

ABS, ABST OR NV: Mathis, Bonta

ASM APPROPRIATIONS: 11-0-4

YES: Wicks, Arambula, Bryan, Calderon, Wendy Carrillo, Mike Fong, Grayson, Haney, Hart, Pellerin, Villapudua

ABS, ABST OR NV: Sanchez, Dixon, Jim Patterson, Ta

UPDATED

VERSION: August 19, 2024

CONSULTANT: Pablo Garza / W., P., & W. / (916) 319-2096

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