

SB 389 (Allen): State Water Resources Control Board: determination of water right
OPPOSE



May 5, 2023

The Honorable Anthony Portantino
Chair, Senate Appropriations Committee
State Capitol, Room 412
Sacramento, CA 95814

RE: SB 389 (Allen): State Water Resources Control Board: determination of water right
Position: OPPOSE

Dear Chair Portantino:

The undersigned organizations write to express our opposition to SB 389, which would authorize the State Water Resources Control Board (State Water Board) to investigate the diversion and use of water from a stream system to determine whether the diversion and use are based upon appropriation, riparian right, or other basis of right.

Of California's 40,000 active water rights claims, public water agencies hold approximately 80 percent of the surface water right claims by volume. Water suppliers are collectively responsible for delivering water to cities, farms, and businesses throughout the state. Many of these agencies also provide water for fish and wildlife uses across the state. Dependability in water rights is essential to our state's economic, social, and environmental stability.

SB 389 could undermine the reliability of any water right, and, in turn, interests that depend on these rights. The bill would authorize the State Water Board to drag any water rights holder before the Board to defend its claim of right. Once the State Water Board begins adjudicating a claim, the bill would stack the deck against all right holders forced into these proceedings by providing minimal due process protections and placing the burden of proof on the right holder. This bill is not designed to create a fair and transparent process, nor is it narrowly tailored to investigate dubious claims to right. The risk with this bill is its potential to strip public agencies of water rights that have been used to sustain communities for decades.

SB 389 threatens to undermine water rights reliability by authorizing the State Water Board to strip claimants of their rights with little due process.

The consequences of SB 389 would be of interest to all water right holders. The bill would require the State Water Board to meet a minimum threshold to initiate an investigation of a water right claim, meaning any claimant could be subject to an investigation at any time. Amendments in the Senate Natural Resources and Water Committee attempted to address concerns of the opposition that no findings were necessary for the State Water Board to investigate a water right. The April 27 amendments would not require the State Water Board to investigate the claim "[u]pon a finding that there is reason to believe that the information would protect the public interest or further the state board's responsibilities under Section 2 of Article X of the California Constitution or the public trust doctrine." It is hard to imagine a scenario where the State Water Board could not make this finding, meaning it provides little in the way of guardrails to ensure investigations only target questionable claims of right.

Once an investigation is initiated, water right claimants would be subject to onerous reporting requirements, forced to provide countless amounts of information in the hopes of proving the validity of

their right. The investigative process and ultimate decision on the validity or scope of right in SB 389 is designed to allow the State Water Board to operate in the dark. The only opportunity for the claimant to participate in the investigation is “after notice and opportunity for a hearing.” Unfortunately, SB 389 provides no further details about the hearing process. The claimant may have no opportunity to present evidence and testimony, to cross examine witnesses, and to test evidence against them. These are all fundamental civil rights that must be afforded before the state may restrict the use of property. Ultimately, the final decision on the validity or scope of the water right would not be made by a neutral arbitrator, but the State Water Board itself. Despite the fact that the bill allows the State Water Board to investigate and make a decision without meaningful involvement of the water right claimant, the burden of proof would still rest with the claimant.

The April 27 amendments would allow the State Water Board to adopt regulations to implement the bill. However, the State Water Board would not be required to adopt regulations, and it’s unknown whether regulations would adequately bolster the due process protections that are woefully absent from the bill.

The investigative process proposed in this bill is a far cry from the requirements the State Water Board must comply with during statutory adjudications. Under existing law, the State Water Board is authorized to initiate a statutory adjudication of all water rights to a stream system upon petition of a water rights claimant.¹ The State Water Board proceeds, after giving notice to all interested parties, by receiving claims, conducting an investigation, holding hearings, and making an order of determination. This process offers water right claimants a robust opportunity for involvement in the investigative process. After an investigation, the State Water Board is required to provide claimants with a preliminary report describing water supply and claims of water rights. This report is provided to all claimants, with an opportunity to inspect the evidence and object to the findings. The hearing on objections includes the ability to offer testimony and present and cross-examine witnesses. The State Water Board’s order of determination is filed with a court—a neutral arbitrator—and the court then issues a final decree.

Unfortunately, SB 389 provides none of the safeguards that existing law recognizes as essential to making informed and defensible decisions on the validity and scope of water rights. Instead, SB 389 is designed to insulate the State Water Board and would enable arbitrary outcomes.

Authorizing the State Water Board to conclude water rights have been forfeited in the absence of a conflicting claim would disrupt settled law.

Two key concepts govern appropriative water rights. First, their relative priorities are based on the concept of “first in time, first in right.” Second, they are based on use, so they are lost if that use ceases. In other words, an appropriative right holder must “use it or lose it.” Courts have held that forfeiture does not occur “in the abstract,” but rather a competing claim to the unused water must be asserted by a rival diverter who is using, or is prepared to use, the surplus water. If no competing claim is asserted, an appropriative right holder may resume full use of its right.

SB 389 would authorize the State Water Board to determine that all or a part of an appropriative water right is forfeited regardless of whether a conflicting claim within the stream system during the period of forfeiture existed. This provision seeks to overturn two Court of Appeal decisions: *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555 and *Millview County Water Dist. v.*

¹ Water Code § 2500 *et seq.*

State Water Resources Control Bd. (2014) 229 Cal.App.4th 879. Courts in this state have long recognized there is no policy justification for finding a forfeiture until an alternative use has been asserted, as the purpose of the forfeiture doctrine is to free unused water for beneficial use. If no other beneficial use has been asserted, there is no reason to find a forfeiture.

Investigating individual water right holders would waste resources that should be directed to efforts that would allow the State to better manage water resources at a watershed-scale during droughts.

SB 389 claims to provide the State Water Board with authority necessary to obtain up-to-date data for assessing water availability for all right holders in a watershed. Individual watersheds may have hundreds or thousands of water rights. The proposition that authorizing the State Water Board to allocate extensive resources toward investigating the claims of an individual water right holder would not improve water management in dry years when demand outpaces supply. An investigation of an individual water right—if properly done with adequate due process protections—would take months or more to complete. The costs of SB 389 far outweigh any benefits the bill would provide.

There is a need for the State to improve information and data collection efforts to support the existing water rights structure. However, instead of creating a piecemeal and inefficient process, the Legislature should support measured efforts that would modernize administration of the water rights priority system with improved data, efficiency, and transparency.

Governor Newsom has proposed appropriating more than \$30 million to implement a new State Water Board project called Updating Water Rights Data for California (UPWARD). This program is intended to improve the way the state collects and manages its water rights data and information, which will be critical for data-driven water management decisions, particularly when hydrology affects supply, such as during droughts. In addition, we support proposals that have been introduced that would lead to increased deployment of stream gages, which would provide data essential to better water management. The Legislature has recognized the importance of improved data, as well, investing more than \$82 million over the past two years to help advance this important effort.

SB 389 presents significant concerns, namely that it would unjustly expand the authority of the State Water Board and subject water right holders to costly and resource intensive investigations without adequate due process protections. For these reasons, we oppose SB 389 and respectfully request your “NO” vote when the bill is heard in the Senate Appropriations Committee. If you have any questions regarding this position, please contact Kristopher Anderson, Legislative Advocate with the Association of California Water Agencies, at KrisA@acwa.com.

Sincerely,

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