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Senate Bill 820 Dramatic Changes Proposed for California Water Law

On February 23, 2005, Senator Sheila Kuehl, Chair of the powerful Senate Natural Resources and Water Committee, unveiled SB 820, a bill that provides for sweeping changes in California water law affecting both urban and agricultural water users. Appropriately, the bill has been coined the “Mega Water Bill.”ⁱ This note highlights key provisions of the bill and possible impacts and outcomes associated with it.

The stated objectives of the bill are: (1) to strengthen water conservation policy; (2) to reduce uncertainty about the use and abundance of the state’s water resources; and (3) to increase the integrity and integration of water resource planning and management. The bill includes three broad approaches to achieve these objectives:

- Mandatory water conservation;
- Mandatory reporting of water use; and
- Expanded water resources planning requirements.

MANDATORY WATER CONSERVATION

The California Constitution prohibits the unreasonable and wasteful use of water. Under existing law, the burden of proof on a waste claim falls on the party alleging waste. SB 820 would reverse that burden by establishing a “rebuttable presumption” of waste “whenever any person fails to implement cost-effective water conservation practices.”

Conservation is deemed to be “cost-effective” if the monetary benefits of conservation exceed the monetary costs of conservation. Benefits include the cost of avoided water supply, energy savings, labor savings and “any other avoided costs or savings.” “Water conservation” may be achieved by reducing currently irrecoverable water losses, or by reducing diversions or extractions while maintaining the current “social and economic benefits” of the current uses of water. If enacted, the provision would become operative on January 1, 2011.

The bill in its current form will likely result in increased litigation because a party need only make a claim that water is being wasted for the presumption of waste to apply; the burden of defending the litigation will then shift to the water rights holder.

MANDATORY REPORTING OF WATER USE

Groundwater Use

Overcoming past initiatives,ⁱⁱ groundwater use in California remains largely unregulated; only specified groundwater producers experiencing severe overdraft in certain Southern California counties have been required to report annual groundwater extraction. SB 820 takes a dramatic step toward the regulation of all groundwater use in the state by requiring all groundwater users who extract more than 25 acre-feet of water per year to report annual extractions to the State Water Resources Control Board (SWRCB) or to a designated depository agency beginning in 2006. The bill also provides penalties for failure to file the required reports, including potential forfeiture of water rights and loss of eligibility to receive state grant funds.

Presently, many of the state's groundwater basins have no monitoring capabilities in place. The bill provides no funding for groundwater monitoring systems and is unclear whether metering to substantiate reported groundwater use will be required.

Surface Water Use

SB 820 also enhances reporting requirements for surface water use. Current law requires all surface water appropriators to make periodic reports of their water use to the SWRCB, but no penalty is associated with the failure to report, and the reports themselves are purely informational. Under SB 820, failure to file annual water use reports will be deemed to constitute non-use for the years not reported and will result in civil penalties and loss of eligibility to receive state grant funds.

EXPANDED WATER RESOURCES PLANNING REQUIREMENTS

Following the direction of her SB 221, Senator Kuehl also proposes to expand the requirements in current law related to the preparation of Urban Water Management Plans (UWMPs) and Groundwater Management Plans (GWMPs). SB 820 also reinstates and greatly expands the scope of the law relating to Agricultural Water Management Plans (AWMPs).

Urban Water Management Plans

SB 820 would make the preparation and adoption of UWMPs subject to the California Environmental Quality Act (CEQA). The bill will also make permanent and expand the scope of the requirement that a UWMP be filed with the Department of Water Resources (DWR) as a condition of receiving state grant funds from DWR, the SWRCB or the California Bay-Delta Authority. Under current law, this requirement will sunset on December 31, 2005, and is limited to only a few grant programs.



The bill would require energy demands and costs to be considered in UWMPs when evaluating alternative strategies and water conservation measures, including coordination with local electric and gas utilities. The bill also calls for expanded distribution of UWMPs to facilitate public review.

The most onerous of these new planning requirements is the removal of the CEQA exemption for UWMPs. CEQA compliance is time-consuming and expensive, and the projects described in a UWMP are already projects subject to CEQA. Environmental review at the planning stage is often difficult because it requires speculation on the physical impacts of projects that may or may not become part of a water supplier's water supply portfolio in the future. This single change in the law will impose substantial time and expense burdens on all urban water suppliers.

Groundwater Management Plans

SB 820 requires that existing GWMPs be updated by December 31, 2008 (unless the original GWMP was adopted on or after January 1, 2004) and every five years thereafter. It also requires an update to:

- evaluate the progress made in achieving the adopted basin management objectives;
- identify successes and shortcomings in meeting those objectives;
- revise the basin management objectives as appropriate; and
- develop a plan to achieve the revised basin management objectives.

Agricultural Water Management Plans

SB 820 would also reinstate and expand the scope of AWMPs in several significant ways. The bill:

- Requires the filing of AWMPs by all agricultural water suppliers serving at least 2,000 acre-feet of water annually beginning December 31, 2010 and every five years thereafter. Current law has a floor of 50,000 acre-feet annually, so this represents a significant expansion of the agricultural reporting requirement.
- Expands the required elements of AWMPs to include operating rules and regulations, water rate schedules, water shortage allocation policies, and water supply reliability estimates.
- Eliminates the financial assistance provisions included in prior law so that agricultural water suppliers must bear the cost of preparing AWMPs.
- Maintains the CEQA exemption for AWMPs, unlike UWMPs.
- Requires wide distribution of the AWMPs as a condition for receiving grant funds from DWR, the SWRCB or the California Bay-Delta Authority.
- Expands the definition of "conservation."

The reinstatement and expansion of AWMPs will be one of the most controversial elements of SB 820. The bill's provisions will cause agricultural water suppliers to bear significant costs in the preparation of AWMPs and make many of the details of their water supplies, existing and projected water use, and operations subject to public scrutiny.



SB 820 also adds “early warning” provisions regarding the likely availability of water from stream systems and the State Water Project. While existing law prohibits the SWRCB from accepting new applications to appropriate water from streams that have been formally declared to be fully appropriated, SB 820 requires the SWRCB to publish a list of stream systems that are “likely” to be declared fully appropriated and therefore may no longer be available for additional consumptive uses. Similarly, the bill will require DWR to provide all State Water Project contractors, city and county planning departments, and regional and metropolitan planning departments with a report of the then existing overall delivery capability of the project facilities and the allocation of that capacity to each contractor.

NEXT STEPS

Senator Kuehl’s office has asked for input from interested parties and will hold a series of working group meetings to refine the language of the bill. Senator Kuehl wants to know any policy concerns with the bill, and also asks for specific proposals for changes to the bill’s language and provisions.

Senator Kuehl’s SB 820 will make major changes to California water law and will place heavy burdens on water users and state government alike. The bill is a first step toward comprehensive regulation of groundwater in California, and it makes validity and security of water rights contingent on meeting government reporting requirements and policy objectives. ***All water users and water suppliers will be affected by this bill and need to follow its progress.***

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If you would like to know more about SB 820, obtain a copy of the bill, or speak with one of our lawyers or legislative advocates about how the bill may affect you, your water rights, or business operations, please contact Chris Frahm or Jeff Volberg at (916) 441-1232, or Stephanie Hastings at (805) 882-1415.



ⁱ The bill amends Sections 5000, 5001, 5003, 5004, 5005, 5009, 5101, 5106, 5107, 10004.5, 10004.6, 10620, 10631, 10644, 10645, 10652, 10656, 10753.7, 10811, 10814, 10816, 10840, 10841, and 10844 of, to add Sections 139, 276, and 1205.5 to, to repeal Sections 4999, 5108, 10657, 10822, 10823, 10824, 10826, and 10855 of, and to repeal and add Sections 10820, 10821, 10825, 10845, 10853, and 10854 of, the Water Code, relating to water.

ⁱⁱ In 2002, the SWRCB hired Berkeley law professor Joseph Sax to review its legal basis for asserting water rights permitting authority over groundwater. The so-called “Sax Report” concluded that it would be preferable to regulate all hydraulically connected surface and groundwater under a single permitting scheme, but that the historical resistance in California to regulating groundwater would make full regulation infeasible. Instead, Sax suggested a series of “quantitative” criteria that the SWRCB could use in deciding whether to assert jurisdiction based on the need to protect surface waters from adverse impacts from groundwater pumping. He also suggested that the SWRCB could utilize its jurisdiction under other statutes to limit groundwater use where the result would violate the public trust or constitute “waste.” SB 820 takes these same approaches and issues “head on.”