

AMENDED IN ASSEMBLY APRIL 16, 2001

CALIFORNIA LEGISLATURE—2001–02 REGULAR SESSION

ASSEMBLY BILL

No. 946

Introduced by Assembly Member Kelley

February 23, 2001

An act to amend Sections 1055, 1055.2, 1126, 1211, 1704, 1825, 1831, 1832, 1834, 1845, and 1850 of, to add Sections 1701.1, 1701.2, 1701.3, 1701.4, 1703.1, 1703.2, 1703.3, 1703.4, 1703.5, and 1703.6 to, and to repeal Section 1833 of, the Water Code, relating to water.

LEGISLATIVE COUNSEL'S DIGEST

AB 946, as amended, Kelley. Water rights.

(1) Existing law authorizes any person aggrieved by any decision or order of the State Water Resources Control Board to file a petition for a writ of mandate in accordance with specified provisions and, in this connection, provides that unless reconsideration makes available a higher level of review of a decision or order issued under authority delegated to an officer or employee of the board, that the right to petition is not affected by the failure to seek reconsideration before the board. Existing law provides that, except as otherwise provided, prescribed provisions of the Code of Civil Procedure govern the judicial proceedings and requires the court to exercise independent judgment on the evidence in specified cases relating to the appropriation of water.

This bill would provide that, except in cases where the decision or order is issued under that delegated authority, reconsideration is not required to be exhausted before filing a petition for writ of mandate. The bill would delete the provision relating to the exercise of independent judgment by a court.

(2) Existing law requires the owner of any wastewater treatment plant to obtain approval of the board for any change in the point of discharge, place of use, or purpose of use of treated wastewater.

This bill would provide that this requirement does not apply to changes in the discharge or use of treated wastewater that do not result in decreasing the flow in any portion of a watercourse.

(3) Existing law authorizes an applicant to appropriate water, or a permittee or licensee, to petition to change the point of diversion, place of use, or purpose of water from that described in the application, permit, or license, as applicable.

This bill would require a petition for change filed in connection with an application, permit, or license, to include prescribed information and would authorize the board to request additional information regarding the petition, as specified. The bill would authorize any interested person to file with the board a written protest against the approval of the petition and would impose requirements in connection with the filing of that protest. The bill would authorize the board to request additional information regarding the protest, as prescribed. The bill would authorize the board to cancel a protest or petition for failure to provide information requested by the board in accordance with specified provisions.

The bill would authorize the board, after holding a hearing, to approve with conditions or deny a petition. The bill would authorize the board, under certain circumstances, to approve or deny a petition without holding a hearing.

(4) Existing law authorizes the board to issue a preliminary cease and desist order to any person holding a permit or license to appropriate water if the board determines that that person is violating a term or condition of that permit or license and provides for the issue of a final cease and desist order. Existing law requires the Attorney General, if so requested by the board and upon the failure of any person to comply with a final cease and desist order, to petition the superior court for the issuance of specified relief.

This bill would delete references to a preliminary or final cease and desist order and, instead, would authorize the board to issue a cease and desist order to any person who the board determines is violating, or threatening to violate, a prohibition against unauthorized diversion or use of water, any term or condition of a permit, license, certification or registration issued by the board, or prescribed orders or decisions of the board. *The bill would require the board, prior to adopting a cease and*



desist order, to give prescribed notice by personal notice or certified mail to the person allegedly engaged in the violation.

The bill would specify that civil liability may be imposed by the superior court, and would authorize the board to impose that liability administratively, on any person who violates a cease and desist order.

(5) Existing law makes a statement of legislative intent regarding the need for the state to take action to enforce the terms and conditions of permits and licenses to appropriate water.

This bill, in addition, would declare that it is the intent of the Legislature that the state take action to enforce certifications and registrations to appropriate water and to enforce the orders and decisions of the board.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1055 of the Water Code is amended to
2 read:

3 1055. (a) The executive director of the board may issue a
4 complaint to any person on which administrative civil liability
5 may be imposed pursuant to Section 1052, Section 1845, or
6 Section 5107. The complaint shall allege the act or failure to act
7 that constitutes a trespass or violation, the provision of law
8 authorizing civil liability to be imposed, and the proposed civil
9 liability.

10 (b) The complaint shall be served by personal notice or
11 certified mail, and shall inform the party so served that the party
12 may request a hearing within 20 days after the party has been
13 served. The hearing shall be before a member of the board as it may
14 specify.

15 (c) After any hearing, the member shall report a proposed
16 decision and order to the board and shall supply a copy to the party
17 served with the complaint, the board's executive director, and any
18 other person requesting a copy. The member of the board acting
19 as hearing officer may sit as a member of the board in deciding the
20 matter. The board, after making an independent review of the
21 record and taking any additional evidence as may be necessary and
22 could not reasonably have been offered before the hearing officer,



1 may adopt, with or without revision, the proposed decision and
2 order.

3 (d) Orders setting administrative civil liability shall become
4 effective and final upon issuance thereof and payment shall be
5 made.

6 SEC. 2. Section 1055.2 of the Water Code is amended to read:

7 1055.2. No person shall be subject to both civil liability
8 imposed under Section 1055 and civil liability imposed by the
9 superior court under subdivision (d) of Section 1052 or Section
10 1845 for the same act or failure to act.

11 SEC. 3. Section 1126 of the Water Code is amended to read:

12 1126. (a) It is the intent of the Legislature that all issues
13 relating to state water law decided by the board be reviewed in state
14 courts, if a party seeks judicial review. It is further the intent of the
15 Legislature that the courts assert jurisdiction and exercise
16 discretion to fashion appropriate remedies pursuant to Section 389
17 of the Code of Civil Procedure to facilitate the resolution of state
18 water rights issues in state courts.

19 (b) Any party aggrieved by any decision or order may, not later
20 than 30 days from the date of final action by the board, file a
21 petition for a writ of mandate for review of the decision or order.
22 Except in cases where the decision or order is issued under
23 authority delegated to an officer or employee of the board,
24 reconsideration before the board is not an administrative remedy
25 that is required to be exhausted before filing a petition for writ of
26 mandate. The time for filing the petition for writ of mandate shall
27 be extended for any person who seeks reconsideration by the board
28 pursuant to this article.

29 (c) Except as otherwise provided in this section, Section 1094.5
30 of the Code of Civil Procedure shall govern the judicial
31 proceedings.

32 (d) If no aggrieved party petitions for a writ of mandate within
33 the time provided by this section, the decision or order of the board
34 shall not be subject to review by any court.

35 (e) In any court case reviewing a decision or order by the state
36 board relating to a permit or license to appropriate water held by
37 the state through the department or any other state agency, or to a
38 permit or license to appropriate water held by the United States
39 through the Bureau of Reclamation or any other federal agency,
40 the election by the United States, or any agency thereof, not to be



1 a party shall not, in and of itself, be the basis for dismissal pursuant
2 to Section 389 of the Code of Civil Procedure or any other
3 provision of law.

4 SEC. 4. Section 1211 of the Water Code is amended to read:

5 1211. (a) Prior to making any change in the point of
6 discharge, place of use, or purpose of use of treated wastewater, the
7 owner of any wastewater treatment plant shall obtain approval of
8 the board for that change. The board shall review such changes
9 pursuant to the provisions of Chapter 10 (commencing with
10 Section 1700) of Part 2 of Division 2.

11 (b) Subdivision (a) does not apply to changes in the discharge
12 or use of treated wastewater that do not result in decreasing the
13 flow in any portion of a watercourse.

14 SEC. 5. Section 1701.1 is added to the Water Code, to read:

15 1701.1. A petition for change filed after notice of an
16 application shall meet all of the following requirements:

17 (a) State the name and address of the petitioner.

18 (b) Be signed by the petitioner, or the petitioner's agent or
19 attorney.

20 (c) Set forth amendments to the application or an amended
21 application reflecting the proposed change, including any
22 information necessary for the amended application to comply with
23 Section 1260.

24 (d) Include sufficient information to demonstrate a reasonable
25 likelihood that the proposed change will not injure any other legal
26 user of water.

27 (e) Contain other appropriate information and be in the form
28 required by applicable regulations.

29 SEC. 6. Section 1701.2 is added to the Water Code, to read:

30 1701.2. A petition for change in a permit or license shall meet
31 all of the following requirements:

32 (a) State the name and address of the petitioner.

33 (b) Be signed by the petitioner, or the petitioner's agent or
34 attorney.

35 (c) Include all information reasonably available to the
36 petitioner, or that can be obtained from the Department of Fish and
37 Game, concerning the extent, if any, to which fish and wildlife
38 would be affected by the change, and a statement of any measures
39 proposed to be taken for the protection of fish and wildlife in
40 connection with the change.



1 (d) Include sufficient information to demonstrate a reasonable
2 likelihood that the proposed change will not injure any other legal
3 user of water.

4 (e) Contain other appropriate information and be in the form
5 required by applicable regulations.

6 SEC. 7. Section 1701.3 is added to the Water Code, to read:

7 1701.3. (a) After a petition is filed, the board may request
8 additional information reasonably necessary to clarify, amplify,
9 correct, or otherwise supplement the information required to be
10 submitted under this article. The board shall provide a reasonable
11 period for submitting the information.

12 (b) The additional information may include, but is not limited
13 to, any of the following:

14 (1) Information needed to demonstrate that the change will not
15 injure any other legal user of water.

16 (2) Information needed to comply, or demonstrate compliance
17 with, any applicable requirements of the Fish and Game Code or
18 the federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531
19 et seq.).

20 (3) Information needed to comply with Division 13
21 (commencing with Section 21000) of the Public Resources Code.

22 SEC. 8. Section 1701.4 is added to the Water Code, to read:

23 1701.4. If, within the period provided, the petitioner does not
24 provide the information requested pursuant to Section 1701.3, the
25 board shall cancel the petition, unless, for good cause shown, the
26 board allows additional time in which to submit the requested
27 information.

28 SEC. 9. Section 1703.1 is added to the Water Code, to read:

29 1703.1. Any interested person, within the time allowed in the
30 notice of petition, or within the time the board may allow for good
31 cause shown, may file with the board a written protest against
32 approval of the petition.

33 SEC. 10. Section 1703.2 is added to the Water Code, to read:

34 1703.2. The protest shall meet all of the following
35 requirements:

36 (a) State the name and address of the protestant.

37 (b) Be signed by the protestant, or the protestant’s agent or
38 attorney.



1 (c) Clearly and specifically set forth the protestant's objections
2 to the approval of the petition, and state the bases for these
3 objections.

4 (d) Contain other appropriate information and be in the form
5 required by applicable regulations.

6 (e) Be served on the petitioner by the protestant by mailing a
7 duplicate copy of the protest to the petitioner or through service
8 undertaken in another manner determined to be adequate by the
9 board.

10 SEC. 11. Section 1703.3 is added to the Water Code, to read:

11 1703.3. The board may request from the protestant additional
12 information reasonably necessary to clarify, amplify, correct, or
13 otherwise supplement the information required to be submitted
14 pursuant to Section 1703.2. The board shall provide a reasonable
15 period for submitting the information, and may allow additional
16 time for good cause shown.

17 SEC. 12. Section 1703.4 is added to the Water Code, to read:

18 1703.4. The protestant and the petitioner shall make a good
19 faith effort to resolve the protest not later than 180 days from the
20 date on which the period provided pursuant to Section 1330
21 expires. For good cause, the board may allow additional time for
22 the protestant and the applicant to attempt to resolve the protest.

23 SEC. 13. Section 1703.5 is added to the Water Code, to read:

24 1703.5. The board may request from the protestant or the
25 petitioner additional information that the board determines is
26 reasonably necessary to attempt to resolve the protest. The board
27 shall provide a reasonable period for submitting the information,
28 and may allow additional time for good cause shown.

29 SEC. 14. Section 1703.6 is added to the Water Code, to
30 read:

31 1703.6. (a) The board may cancel a protest or petition for
32 failure to provide information requested by the board under this
33 article within the period provided.

34 (b) Except as provided in subdivisions (c) and (d), a protest
35 shall not be canceled for failure to submit information not in the
36 possession or under the control of the protestant if the protest
37 meets the requirements of Section 1703.2 and the petitioner is or
38 could be required to submit the information under Section 1701.1,
39 1701.2, and 1701.3.



1 (c) Subject to subdivision (d), if a protest is based on injury to
2 a legal user of water, the board may cancel the protest if the
3 protestant fails to submit any of the following information
4 requested by the board:

5 (1) Information that the protestant is required to submit to the
6 board to comply with Part 5.1 (commencing with Section 5100)
7 during any period after the protest is filed.

8 (2) Information that is reasonably necessary to determine if the
9 protestant has a valid water right.

10 (3) Information concerning the protestant's historical, current,
11 or proposed future diversion and use of water that is reasonably
12 necessary to determine if the proposed appropriation will result in
13 injury to the protestant's exercise of its water right.

14 (d) If the protest is based on an allegation that the proposed
15 change would not be in the public interest, would adversely affect
16 public trust uses, or would have adverse environmental impact, the
17 board may cancel the protest for failure to submit information
18 requested by the board if the board determines both of the
19 following:

20 (1) The public review period has expired for any draft
21 environmental document or negative declaration required to be
22 circulated for public review and comment pursuant to Division 13
23 (commencing with Section 21000) of the Public Resources Code.

24 (2) In the absence of the requested information, there is no
25 substantial evidence in light of the whole record to support the
26 allegation.

27 SEC. 15. Section 1704 of the Water Code is amended to read:

28 1704. (a) The board, after a hearing, may approve with
29 conditions, or deny, a petition.

30 (b) Notice of hearing shall be given by mailing the notice not
31 less than 20 days before the date of hearing to the petitioner and
32 to any protestant by registered mail.

33 (c) (1) The board may, but is not required to, hold a hearing
34 prior to approving an unprotested petition, or if the board
35 determines that undisputed facts support the approval of the
36 petition and there is no disputed issue of material fact.

37 (2) The board may, but is not required to, hold a hearing prior
38 to denying a petition, if, after notice, the board determines that the
39 petition is defective, the petition fails to provide information



1 requested by the board, or undisputed facts support the denial of
2 the petition and there is no disputed issue of material fact.

3 SEC. 16. Section 1825 of the Water Code is amended to read:

4 1825. It is the intent of the Legislature that the state should
5 take vigorous action to enforce the terms and conditions of
6 permits, licenses, certifications and registrations to appropriate
7 water, to enforce state board orders and decisions, and to prevent
8 the unlawful diversion of water.

9 SEC. 17. Section 1831 of the Water Code is amended to read:

10 1831. (a) When the board determines that any person is
11 violating, or threatening to violate, any requirement described in
12 subdivision (d), the board may issue an order to that person to
13 cease and desist from such violation.

14 (b) The cease and desist order shall require such person to
15 comply forthwith or in accordance with a time schedule set by the
16 board.

17 (c) The board may issue a cease and desist order only after
18 notice and an opportunity for hearing pursuant to Section 1834.

19 (d) The board may issue a cease and desist order in response to
20 a violation or threatened violation of any of the following:

21 (1) The prohibition set forth in Section 1052 against
22 unauthorized diversion or use of water subject to this division.

23 (2) Any term or condition of a permit, license, certification, or
24 registration issued under this division.

25 (3) Any order or decision of the board issued under this part,
26 Section 275, Part 1 (commencing with Section 1000) of this
27 division, Part 2 (commencing with Section 10500) of Division 6;
28 Article 7 (commencing with Section 13550) of Chapter 7 of
29 Division 7, or the public trust doctrine.

30 SEC. 18. Section 1832 of the Water Code is amended to read:

31 1832. Cease and desist orders of the board shall be effective
32 upon the issuance thereof. The board may, after notice and
33 opportunity for hearing, upon its own motion or upon receipt of an
34 application from an aggrieved person, modify, revoke, or stay in
35 whole or in part any cease and desist order issued pursuant to this
36 chapter.

37 SEC. 19. Section 1833 of the Water Code is repealed.

38 SEC. 20. Section 1834 of the Water Code is amended to read:

39 1834. (a) In the event that a violation of a requirement
40 described in subdivision (d) of Section 1831 is occurring or



1 threatening to occur, the board shall give notice ~~in writing~~ by
2 *personal notice or certified mail, pursuant to which the party shall*
3 *be informed that he or she may request a hearing not later than 20*
4 *days from the date on which the notice is received,* to the person
5 allegedly engaged in the violation. The notice shall contain a
6 statement of facts and information that would tend to show the
7 proscribed action, and notification of the requirements of
8 subdivision (b).

9 (b) Unless a written request for a hearing signed by or on behalf
10 of the notified party is delivered to or received by mail by the board
11 within ~~15~~ 20 days after receipt of the notice, the board may adopt
12 a cease and desist order, based on the statement of facts and
13 information set forth in the notice, without a hearing.

14 SEC. 21. Section 1845 of the Water Code is amended to read:

15 1845. (a) Upon the failure of any person to comply with a cease
16 and desist order issued by the board pursuant to this chapter, the
17 Attorney General, upon the request of the board, shall petition the
18 superior court for the issuance of prohibitory or mandatory
19 injunctive relief as appropriate, including a temporary restraining
20 order, preliminary injunction, or permanent injunction.

21 (b) (1) Any person or entity who violates a cease and desist
22 order issued pursuant to this chapter may be liable for a sum not
23 to exceed one thousand dollars (\$1,000) for each day in which the
24 violation occurs.

25 (2) Civil liability may be imposed by the superior court. The
26 Attorney General, upon the request of the board, shall petition the
27 superior court to impose, assess, and recover those sums.

28 (3) Civil liability may be imposed administratively by the
29 board pursuant to Section 1055.

30 (c) In determining the appropriate amount, the court, or the
31 board, as the case may be, shall take into consideration all relevant
32 circumstances, including, but not limited to, the extent of harm
33 caused by the violation, the nature and persistence of the violation,
34 the length of time over which the violation occurs, and the
35 corrective action, if any, taken by the violator.

36 (d) All funds recovered pursuant to this section shall be
37 transferred to the General Fund of the state.

38 SEC. 22. Section 1850 of the Water Code is amended to read:

39 1850. Any factual or legal determinations made pursuant to a
40 cease and desist order shall be conclusive and shall preclude any



- 1 party to the order from raising such issues in any subsequent
- 2 administrative proceeding.

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