
SENATE COMMITTEE ON ENVIRONMENTAL QUALITY
Senator Allen, Chair
2021 - 2022 Regular

Bill No: SB 1254
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Version: 2/17/2022
Urgency: No
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Hearing Date: 3/28/2022
Fiscal: Yes

SUBJECT: Drinking water: administrator: managerial and other services

DIGEST: Limits the liability of a drinking water administrator and the State Water Resources Control Board (State Water Board) when the State Water Board appoints an administrator to operate and manage failing and at-risk water systems.

ANALYSIS:

Existing law:

- 1) Establishes the California Safe Drinking Water Act (SDWA) and requires the State Water Board to maintain a drinking water program. (Health & Safety Code (HSC) § 116270, *et seq.*)
- 2) Requires the State Water Board to submit to the Legislature a comprehensive Safe Drinking Water Plan for California every five years. (HSC § 116355 (a))
- 3) Creates the Safe and Affordable Drinking Water Fund in the State Treasury to help water systems provide an adequate and affordable supply of safe drinking water in both the near and long terms. (HSC § 116766)
- 4) Authorizes the State Water Board, where a public water system or a state small water system serving a disadvantaged community consistently fails or is at risk of failing to provide an adequate supply of safe drinking water, to order a physical or operational consolidation with a receiving water system. (HSC § 116682 (a))
- 5) Authorizes the State Water Board, in order to provide an adequate supply of affordable, safe drinking water to disadvantaged communities and to prevent fraud, waste, and abuse, to:
 - a) Contract with, or provide a grant to, an administrator to provide administrative and managerial services to a designated public water system

- to assist the designated public water system with the provision of an adequate and affordable supply of safe drinking water; and,
- b) Order the designated public water system to accept administrative, technical, operational, legal, or managerial services, including full management and control, from an administrator selected by the State Water Board. (HSC § 116686 (a))
- 6) Establishes as the policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes. (Water Code § 106.3)

This bill:

- 1) Provides that a drinking water administrator appointed by the State Water Board to operate and manage failing and at-risk water systems is not liable for claims by past or existing ratepayers, or those who consumed water provided through the designated water system:
 - a) If good faith, reasonable effort, and ordinary care were used to assume possession of, or to operate, the designated water system; or
 - b) For any injury or damages that occurred before the commencement of the operation period.
- 2) Limits State Water Board liability in the context of its powers to appoint administrators by clarifying that the State Water Board is not liable for claims that occurred prior to the state of the operation period or for the operation and/or supply of water from the designated water system during the administrator's operation period.
- 3) Stipulates that the above liability protection provisions shall not:
 - a) Relieve a water district, water wholesaler, or any other entity from complying with any provision of federal or state law pertaining to drinking water quality.
 - b) Impair any cause of action by the Attorney General, a district attorney, a city attorney, or other public prosecutor, or impair any other action or proceeding brought by, or on behalf of, a regulatory agency.
 - c) Impair any claim alleging the taking of property without compensation within the meaning of either the Fifth Amendment to the United States Constitution or Section 19 of Article I of the California Constitution.
 - d) Relieve any person or entity from liability for action or inaction in bad faith, or without reasonable effort or ordinary care.

- 4) Specifies that the above liability protection provisions shall not absolve, indemnify, or protect a prior operator, district, or individual from liability based on injuries or damages that occurred before the operation period.
- 5) Expands the definition of “designate water system” to include “at-risk” water systems for the purposes of an administrator appointment.
- 6) Defines “operation period” to mean the period during which an administrator provides services to a designated water system.

Background

- 1) *Regulation of drinking water.* The federal SDWA was enacted in 1974 to protect public health by regulating drinking water. California has enacted its own SDWA to implement the federal law and establish state standards. The United States Environmental Protection Agency (U.S. EPA) enforces the federal SDWA at the national level. However, most states, including California, have been granted "primacy" by the U.S. EPA, giving them authority to implement and enforce the federal SDWA at the state level.

The State Water Board regulates public water systems that provide water for human consumption and have 15 or more service connections, or regularly serve at least 25 individuals daily at least 60 days out of the year. (A "service connection" is usually the point of access between a water system's service pipe and a user's piping.) The state does not regulate water systems with less than 15 connections; county health officers oversee those systems. At the local level, 30 of the 58 county environmental health departments in California have been delegated primacy-known as Local Primacy Agencies (LPAs)-by the State Water Board to regulate systems with between 15 and 200 connections within their jurisdiction. For investor-owned water utilities under the jurisdiction of California Public Utilities Commission (CPUC), the State Water Board or LPAs share water quality regulatory authority with CPUC.

The State Water Board regulates approximately 7,500 water systems. About one-third of these systems have between 15 and 200 service connections. The number of smaller systems-specifically, those with 14 or fewer connections-is unknown but estimated to be in the thousands.

- 2) *Lack of clean safe drinking water.* Although most of the state's residents receive drinking water that meets federal and state drinking water standards, many drinking water systems in the state consistently fail or are at-risk of

failing to provide safe drinking water to their customers. Lack of safe drinking water is a problem that disproportionately affects residents of California's disadvantaged communities.

Drinking water systems serving disadvantaged communities often lack the rate base, as well as the technical, managerial, and financial capacity to effectively manage operations and maintenance costs related to water treatment. Without being able to pay for maintenance, these systems are effectively barred from accessing capital improvement funding. In contrast, larger water systems have the financial capacity both to pay treatment costs and to provide for a well-trained and technically competent workforce of water system operators.

- 3) *Background on Administrators.* An administrator is a person or entity whom the State Water Board has determined is qualified to operate and manage a water system. Potential administrators include individual persons, businesses such as engineering firms, non-profits, local agencies, and other entities.

There are two scenarios where a water system qualifies for an administrator: First, a water system qualifies if it both serves a disadvantaged community, and consistently fails to provide an adequate supply of safe and affordable drinking water. Second, a water system qualifies if the State Board has ordered it to consolidate with another water system.

The Legislature first gave the State Water Board the authority to appoint administrators to failing water systems through SB 552, Wolk (Statutes of 2016). In 2019, The Legislature authorized use of the Safe and Affordable Drinking Water Fund for the appointment of administrators to water systems that have been ordered to consolidate (SB 200, Monning, Statutes of 2019). An administrator has the authority to provide full or limited scope administrative, technical, operational, or managerial services, or any combination of those services to a designated water system.

- 4) *Human right to water.* In 2012, California became the first state to enact a Human Right to Water law, AB 685 (Eng, Chapter 524, Statutes of 2012). Public policy continues to be focused on the right of every human being to have safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitation. Water supply, contaminants, costs of treatment and distribution systems, the number and nature of small public water systems, especially in disadvantaged communities, and many other factors will continue to challenge progress in addressing the Human Right to Water.

Comments

- 1) *Purpose of Bill.* According to the author, “Access to water is a fundamental human right and every Californian should be able turn on their tap and expect clean water to flow – it is unacceptable this is not the case for over one million Californians, primarily those in small and disadvantaged communities. Over 300 public water systems are failing to provide safe drinking water, and over 600 water systems are at-risk of failing.

“While the State Water Resources Control Board can appoint third-party administrators to assist failing public water systems, the SWRCB struggles to recruit and retain administrators due to uncertainty around legal liability. SB 1254 provides statutory limited liability clarifications for appointed administrators and the SWRCB, and expands administrator appointment authority to at-risk water systems. This ensures the SWRCB can more effectively appoint administrators and advances the state’s goal of providing safe drinking water for all Californians.”

- 2) *What is Administrator Liability?* Administrator liability refers to the civil liability an administrator could potentially face as a result of being appointed to operate and manage a water system. Currently, there are no statutory provisions that address when an administrator may be liable. Accordingly, it is difficult to determine exactly and to what extent an administrator can be held liable for serving in that capacity. Because the administrator position is unique and newly created by the Legislature, there is uncertainty regarding how existing legal principles regarding executive and officer liability will apply. According to the State Water Board, this legal uncertainty has prevented many potential administrators from participating in the program.

Without the proposed liability statute, the Board is finding it extremely difficult to find and retain qualified persons or entities willing to be appointed as administrators for water systems that need them. Presently, the State Water Board has 13 active administrator projects in public water systems and state small water systems that need administrators, but only one administrator has been appointed. Many more administrators will be needed as the Board updates its Human Right to Water list and prioritizes projects. This lack of available, qualified administrators has undermined progress towards providing safe and affordable drinking water. At present, approximately 2,400 people are

currently affected by the lack of ability to appoint administrators. Most reside in the Central Valley; other areas include Sonoma, Tehama, and Inyo.

This proposal could encourage potential administrators to join the Board's qualified administrator pool and ensure that failing water systems receive necessary assistance in providing clean and affordable drinking water to their communities.

- 3) *Similar Liability Protections Exist for Other State Water Board-Related Programs.* The proposed liability protection language is similar to limited liability protection that the Legislature has authorized for public water systems that take over the operations of failing water systems as part of a State Water Board ordered consolidation. Similar language is also found in AB 1577 (Gipson, Statutes of 2018), where the Legislature provided limited liability for a successor agency to assume the role of an Administrator of the Sativa Los Angeles County Water System.

This proposal exempts Administrators from liability for water delivered by the water system prior to the appointment of the Administrator. However, the water system itself may still be liable for circumstances that existed before the appointment of an administrator. Thus, a wronged individual may still bring an action directly against the water system itself for any past wrongdoings.

Without these provisions, an administrator might be liable for health impacts from poor water quality before their appointment and/or was not related to their work efforts. An administrator can be held accountable for injuries or damages that result from circumstances resulting from an administrator's action or inaction during the operation period if that action or inaction was taken in bad faith, or without reasonable effort or ordinary care.

- 4) *Addition of Administrator Appointment Authority for "At-Risk" Water Systems.* An "at-risk" water system means a water system that meets the following criteria: the water system is either a public water system with 3,300 or fewer connections or a state small water system; the system serves a disadvantaged community; and the system is at-risk of consistently failing to provide an adequate supply of safe drinking water.

The Water Board's 2021 Drinking Water Needs Assessment identified approximately 326 public water systems that were failing and 617 public water systems "at-risk" of failing. Extending the Water Board's administrator appointment authority to include water systems meeting the three criteria above

gives the Water Board an additional tool to ensure that communities have access to safe drinking water. The limited liability provisions will apply in the same manner and will allow the Water Board to appoint administrators more quickly and efficiently to serve at-risk systems for communities that do not have safe and reliable access to clean drinking water.

DOUBLE REFERRAL:

If this measure is approved by the Senate Environmental Quality Committee, the do pass motion must include the action to re-refer the bill to the Senate Judiciary Committee.

Related/Prior Legislation

SB 403 (Gonzalez, Chapter 242, Statutes of 2021) authorized the State Water Board to order the consolidation of at-risk domestic wells and at-risk water systems.

SB 200 (Monning, Chapter 120, Statutes of 2019) created SAFER and the Safe and Affordable Drinking Water Fund to help water systems provide an adequate and affordable supply of safe drinking water in both the near and long-term. Requires the State Water Board to develop a fund expenditure plan and provide funding according to that expenditure plan to identify failing water systems and provide safe and affordable drinking water in the short- and long-term to those who rely on drinking water from those failing water systems.

AB 1577 (Gibson, Chapter 859, Statutes of 2018) required the State Water Board to order the Sativa-Los Angeles County Water District to accept administrative and managerial services.

SB 623 (Monning, 2017) would have created the Safe and Affordable Drinking Water Fund, administered by the State Water Board, and would have imposed water, fertilizer, and dairy fees to fund safe drinking water programs. This bill was held in the Assembly Rules Committee.

SB 553 (Wolk, Chapter 773, Statutes of 2016) authorized the State Board to contract with an administrator to provide administrative and managerial services to a designated public water system, as defined, to assist with the provision of an adequate and affordable supply of safe drinking water.

SB 88 (Committee on Budget and Fiscal Review, Chapter 27, Statutes of 2015) authorized the State Water Board to require water systems that are serving disadvantaged communities with unreliable and unsafe drinking water to consolidate with or receive service from public water systems with safe, reliable, and adequate drinking water.

SOURCE: Author

SUPPORT:

California Municipal Utilities Association
Eastern Municipal Water District

OPPOSITION:

Consumer Attorneys of California

ARGUMENTS IN SUPPORT: According to the California Municipal Utilities Association, “CMUA was proud to support SB 200 (Monning), which created the Safe and Affordable Drinking Water Fund. Subsequently, we have engaged with the State Water Board on their implementation of the SAFER program, including appointing third-party administrators to public water systems consistently failing to provide an adequate and affordable source of safe drinking water, and to systems ordered to consolidate by the board. Administrators are tasked with providing the public water system with managerial support to help resolve issues preventing the delivery of safe drinking water. However, according to the Board it has been difficult to recruit these administrators in large part due to legal uncertainty surrounding administrator liability.

“SB 1254 would provide much needed liability protection to clean drinking water administrators appointed by the State Water Board to operate and manage these failing and at-risk water systems. By clarifying the legal liability of administrators, SB 1254 advances California’s “Human Right to Water” goal and moves the state forward in its effort to ensure all communities have reliable access to safe and affordable drinking water.”

ARGUMENTS IN OPPOSITION: According to the Consumer Attorneys of California, “The Consumer Attorneys of California has reviewed SB 1254 as currently drafted and would like to continue working with the sponsor to ensure that the legal rights of communities affected by contaminated water are not unintentionally weakened by the language in the bill... While the Board has

committed that it has no intention to immunize negligent conduct by a take over administrator of designated water systems, the language is a work in progress. Further, the Board already enjoys existing liability protections as a public entity so we do not believe any further protections are necessary for the Board itself. We have met with the Board and consultants from both the Environmental Quality and Judiciary Committees. We hope to continue the discussion to ensure the goals of the bill are met without unintended consequences that weaken the rights of communities who may be damaged by negligent acts on behalf of the administrators.”

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