

SB 389: Surface Water Rights Verification

Potential Q and A

- 1. Does this bill “stack the deck against all rights holders” by providing “minimal dues process protections” as opponents argue in their letter?**
 - a. The committee amendments would allow for regulations to be set that would provide clarity to this structure.
 - b. We want to offer some flexibility to the Board, and allowing the opportunity for regulations to be set by entities that understand how to go about this in the most equitable yet efficacious fashion seems appropriate.
 - c. Placing the burden of proof on claimants is not unreasonable given they are in the best position to present relevant evidence and are only being asked to meet a preponderance of the evidence.
 - d. Regarding arguments that this constitutes a regulatory taking, until proven otherwise, there is no right to be taken. This bill is actually offering an avenue for claims to receive Board certification, arguably expanding protections to the holder.

- 2. Not narrowly tailored to investigate dubious claims to right?**
 - a. The rhetoric seems to focus on this being an enforcement bill. It’s not. It’s an information gathering tool with a component allowing the Board to make a decision based on the evidence.
 - b. This is not just about cracking down on bad actors.

- 3. Is this bill going to mean less water for water agencies who claim to hold pre-1914 water rights?**
 - a. What this bill does is provide an opportunity for the Board to inquire about the extent and scope of senior water rights. It is not intended to be a weapon to take water away from residents who rely on it. Any finding made by the Board will have considered all relevant evidence and facts. For that reason, the bill is intentionally flexible – to allow for these considerations.
 - b. We have created an issue for ourselves by not requiring more transparency about these rights earlier on. There is no perfect way to do

this, and fixing this system is going to require good-faith efforts from all involved.

- c. Further, it is unreasonable to expect public entities to have adequate records to meet a preponderance of the evidence.

4. Is SB 389 seeking to overhaul our current water right system or “materially altering it?”

- a. No. The authorities granted to the Water Board in this bill actually seek to strengthen our current water rights system. By asking for a claimant to prove-up their right, the Board will get a better understanding of the actual usage and diversions in a given system versus the reported values.
- b. In doing so, all users in a given system would benefit from the increased information, and holders of senior rights would now have the certification of their right by the Board.
- c. Ultimately, this bill moves our current water rights system in a more equitable direction that respects senior rights holders, defends “First in time, first in right,” and allows the State better opportunity for proper resource management.
- d. In other words, this is moving our water rights system in a direction more aligned with how it is supposed to work.

5. How common are pre-1914 and riparian rights?

- a. That answer is not entirely clear, largely because much of the data currently known about these rights is self-reported data. One study indicates that pre-1914 right account for diversion of over 2.3 million acre-feet per year in the Sacramento-San Joaquin Delta watershed.

6. Is this going to extinguish pre-1914 water rights?

- a. No, it would verify them. This claim assumes that the Board will use this tool in a bad faith manner to invalidate pre-1914 rights as they wish. Further, it would not be in the interest of the Board to do so nor is there a history to indicate that they would.
- b. All decisions made by the Board are appealable.
- c. Further, the committee amendments allow for the creation of regulations that would provide procedural clarity as an additional safe-guard against bad faith activity.

7. What kinds of things could be used to prove a right?

- a. The proof would be things like: documentation of initial acts toward diversion and use; County Recorder documents if any; other public documents such as articles of incorporation, bylaws, company or district charters, litigation filings, etc.; diversion records over time; use records over time; and declaration of facts by district or company managers; etc.
- b. This is not an exhaustive list, and I appreciate the committee amendments to allow for the setting of regulations that could consider what information would both reasonably prove a claim while also being retrievable by claimants.

8. Will this disproportionately impact smaller diverters?

- a. No. It is important to consider the resources of the Board. It is unlikely that a diverter like a small, family owned farm would use enough water to make a full investigation and expense of resources worthwhile. Further, were an investigation into a small diverter to take place, the Board would have the ability to consider the circumstances of the claimant during this process.
- b. While opponents have argued against the lack of specificity within SB 389, it is this very flexibility that would allow for the Board to be considerate of the particular circumstances for each claimant.

9. Does the structure in SB 389 constitute a regulatory taking?

- a. In order for this to be considered a regulatory taking, there would need to be a right to take in the first place.
- b. For example, if the Board were to make a determination on a claim that results in a reduction of what the claimant diverts, that determination would be based on evidence that there was no right to the excess diversion, hence there would be no taking.
- c. Otherwise, where do we draw the line?

10. Why allow for forfeiture without a competing claim?

- a. The argument in favor of requiring a competing claim neglects the benefit to fisheries or other public trust values.

11. Would this encourage the waste of water to prove a claim?

- a. This argument comes largely from concern around the possibility for a decision of unauthorization due to lack of use of the full extent of a claim. If a user conserves water, there are statutory provisions to prevent forfeiture for non-use (Wat. § 1011).
- b. A claim cannot be proven through the wasting of water because, at the time of waste, there is technically no claim to waste.
- c. Forfeiture laws have existed since the mid-19th Century, and SB 389 does not change them. The argument that using more water to avoid forfeiture is not a specific claim to SB 389, and it neglects other factors like economic considerations of the return-on-investment of that use.
- d. Further, the Board is within its bounds to review recent changes in usage as a factor of consideration during any investigation.

12. Is it improper to put the Burden of Proof on the claimant?

- a. No. It is reasonable for those in the best position to present evidence to bear the burden of proof. How could the Water Board prove or disprove the existence of a claim for which they have no evidence?
- b. Further, *proof* in this instance is established by a preponderance of the evidence. Simply, is it more likely than not that the claim exists? This is not an unreasonable threshold to ask a claimant to meet when providing evidence of their claim.