AB 460 (BAUER-KAHAN) STATE WATER RESOURCES CONTROL BOARD: WATER RIGHTS AND USAGE: INTERIM RELIEF: PROCEDURES – OPPOSE

CalChamber
California Chamber of Commerce
ACWA
Association of California Water Agencies
California Farm Bureau
Agricultural Council of California
United Water Conservation District
California Association of Winegrape Growers
NCWA
Northern California Water Association
Western Growers
Fresh produce from our families to yours
Association of California Egg Farmers
California Association of Wheat Growers
California Bean Shippers Association
California Grain & Feed Association
California Pear Growers Association
CBIA
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California Seed Association
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PePa
San Gabriel Valley Municipal Water District
Azusa | Sierra Madre | Monterey Park | Alhambra
SCV Water
MID Modesto Irrigation District
Water and Power
CMTA
California Manufacturers & Technology Association
KRWA
Kings River Water Association
Wine Institute
Kern County Water Agency
RWA
Regional Water Authority
Building Alliances in Northern California
KRCD
Kings River Conservation District
Dunnigan Water District
CMUA
California Municipal Utilities Association
Stockton East Water District
Solano Irrigation District
Humboldt Bay Municipal Water District
San Luis & Delta-Mendota Water Authority
Three Valleys MWD
Friant Water Authority
EVMWD
Elsinore Valley Municipal Water District
Valley Center Municipal Water District
LACSD
Lake Arrowhead Community Services District
County of Tuolumne California
Tuolumne County Water Agency
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Desert Water
Napa County Flood Control and Water Conservation District
American Canyon • Calistoga • Napa
St. Helena • Yountville • Napa County
Water District
Tehachapi-Cummings County Water District
Our Water • Our Future
Antelope Valley - East Kern Water Agency
AVEK
Established 1959
Elk Grove Water District
A Department of the Florin Resource Conservation District
Montecito Water District
San Gorgonio Pass Water Agency
Established 1961
MesaWater District
PCWA
water • energy • stewardship
TUD
Rosedale-Rio Bravo Water Storage District
San Juan Water
Since 1854
OID
Oakdale Irrigation District
Yuba Water Agency
Carmichael Water District
Serving the Community of Carmichael, California Since 1916
SSJID
South San Joaquin Irrigation District
Coastside County Water District
SCWC
Cucamonga Valley Water District
Service Beyond Expectation
Tri-County Water Authority
California Apple Commission
Grower-Shipper Association
of Central California
Since 1930
California Blueberry Association
California Blueberry Commission
Olive Growers Council of California
wph Western Plant Health
HealthyPlants.org
California Cotton Ginners and Growers Association
WAPA
Western Agricultural Processors Association
Almond Alliance

April 11, 2023

TO: Members, Assembly Judiciary Committee

SUBJECT: **AB 460 (BAUER-KAHAN) STATE WATER RESOURCES CONTROL BOARD: WATER RIGHTS AND USAGE: INTERIM RELIEF: PROCEDURES**
OPPOSE - AS AMENDED MARCH 30, 2023
SCHEDULED FOR HEARING APRIL 18, 2023

The undersigned organizations must respectfully **OPPOSE AB 460**, which would provide expansive new authority for the State Water Resources Control Board to issue "interim relief orders," on its own motion or upon petition of an interested party, to apply or enforce such things as the Reasonable Use and Public Trust Doctrine. The bill would also eliminate and weaken constitutionally protected rights to judicial review of State Water Board actions. While our organizations believe that illegal diversions are serious and should not be sanctioned, **AB 460** goes far beyond what is needed for the State Water Board to enforce and discourage illegal water diversions. **AB 460** is not only contrary to both the State and Federal constitutions, and in conflict with California's Administrative Procedures Act, but it portends ill-conceived and uninformed water management actions that will, in all likelihood, result in worse outcomes for the fish and wildlife resources that the bill purports to protect.

The Scope Is Overly Broad and Implicates Questions Unsuitable for Interim Relief

We are concerned that this bill encompasses far more than alleged illegal diversions of surface water or violations of State Water Board orders. First, the bill proposes to authorize interim relief order and limit judicial review of numerous constitutional, statutory and common law doctrines that, by definition, require robust evidentiary records and full judicial review. For example, in addition to the Reasonable Use and Public Trust Doctrines, **AB 460** would authorize interim relief in actions concerning standards promulgated under the state's comprehensive water quality law (Porter-Cologne). For example, Water Code section 13241 governs the State Water Board's and regional water quality control boards' (Regional Boards) obligations to set water quality objectives, and the considerations and balancing that the boards must undertake when establishing and amending objectives. Water Code section 13241 includes, for instance, the need to develop housing in the area and the need to develop and use recycled water, among other local and regional considerations, when setting water quality objectives. Water Code sections 13550 *et seq.* relate directly to uses of recycled water. This bill would allow third parties to use the interim enforcement proceedings in **AB 460** as a new pathway to attack decisions relating to housing and recycled water projects.

Furthermore, as part of Porter-Cologne, Water Code sections 13241 and 13550 *et seq.* are already subject to a different set of mechanisms for enforcement and interim relief.[1] It is concerning that this could create a different, duplicative procedure for aggrieved parties to seek State Water Board investigation of water quality-related orders, discharges to water, or uses of recycled water. It is unnecessary to create new enforcement authority to address water quality issues when Porter-Cologne already provides adequate enforcement authority.

In addition, **AB 460** allows the State Water Board to issue interim relief for alleged violations of the Public Trust Doctrine, which is not defined in the bill. While the concept of public trust has long been interwoven in water and environmental law, courts have struggled to define exactly what it means and when it applies. For example, the doctrine requires the state to hold in trust designated resources for the benefit of the people; but, to which natural resources it applies has been subject to debate. And even the *National Audubon* case, which famously applies the Public Trust Doctrine to the State Water Board's allocation decisions,[2] requires the State Water Board to balance the interests of the environmental and other beneficial uses of water. Moreover, we are aware of no

[1] See Wat. Code §§ 13301-13304, 13320, 13330.
[2] *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.

authority that would extend the SWRCB's public trust authority and balancing to riparian and pre-1914 appropriative water rights.

Given these nebulous legal concepts and applications, it is concerning that the State Water Board would be able to issue an interim relief order on these grounds without an evidentiary hearing and regardless of the basis of right. These concerns are particularly heightened when there are limited opportunities for a diverter to understand the basis for the allegations and defend themselves. And **AB 460**'s proposed restrictions on independent judicial review of these types of State Water Board actions further heightens our concerns about the implications of this bill.

The bill also allows the State Water Board to issue interim relief to enforce Fish & Game Code section 5937. Again, this section contains language that makes the potential violations that could be implicated much broader than illegal diversions in critically dry conditions. For instance, Fish & Game Code section 5937 provides that dam owners must ensure sufficient flows through or around the dam in order to maintain in "good condition" any fish populations below the dam. **AB 460** would allow interested parties who disagree with dam releases to seek immediate state intervention and authorize the State Water Board to essentially take over operations, potentially at a moment's notice.

Plenary Discretion Given to State Water Board to Initiate and Shape Interim Relief Proceedings

We are also concerned that this bill conflicts with the California Administrative Procedures Act, including the Administrative Bill of Rights, because the bill provides significant discretion to the State Water Board in pursuing and issuing interim relief orders, particularly in the event that the relief is initiated by the State Water Board itself. For instance, the bill outlines the requirements that an interested party must meet if it petitions for an interim relief order, but the same does not appear to apply to an own-motion process initiated by the State Water Board.

More concerning is that the State Water Board could immediately issue an interim relief order before holding a hearing if it makes certain findings. This is unnecessary given that the State Water Board already has the authority to act swiftly to address, for example, violations of curtailment regulations. Water Code section 1052 allows the State Water Board to go to court to obtain a temporary restraining order to stop diversions that are impacting fish and wildlife. A temporary restraining order is much more effective and enforceable than an interim relief order and, importantly, is issued by a neutral arbitrator. AB 460 lacks the procedural protections that should be afforded to all property rights. This bill would have the State Water Board serve as prosecutor, judge, jury, and executioner in deciding whether an interim relief order is warranted. This is critical considering that a diverter's rights to water are at stake without sufficient time to prepare a real case in defense.

Once the process has been initiated, the bill grants broad authority to the State Water Board to determine what evidence will be allowed at the hearing on the matter and how arguments will be presented. This is on a case-by-case basis, meaning that a diverter has no way to know ahead of time what evidence they may want or need to provide in order to defend themselves. The right to present evidence and testimony, to cross examine witnesses and to test evidence against you is a fundamental civil right that must be guaranteed before the state may restrict the use of vested property rights, including water rights.

Due Process and Access to Judicial Review Are Limited or Eliminated

Water rights are property rights, and as such may not be infringed without due process of law. As written, **AB 460** deprives diverters of due process when the State Water Board makes certain findings. Under this scenario, the State Water Board does not have to provide at least 10 days' notice before a hearing to consider interim relief. Rather, the interim relief order may issue *without* notification or opportunity to be heard until after the fact, and only upon the diverter's request.

The bill would also allow an interim relief order to remain in place for 180 days. 180 days (or 6 months) is an entire irrigation season. This means that a diverter has no real opportunity to defend themselves for an entire 6-month period, and in the meantime, their right to divert water has been suspended.

AB 460 would not only provide expansive new administrative authorities to the State Water Board, but would also substantially weaken the existing, long-standing standards of review and, in many cases, eliminate any judicial review at all. Moreover, the bill would provide a very limited and unreasonably deferential standard of review for review of interim relief orders and preclude judicial review until the State Water Board acts on the underlying

matter. In short, this bill deprives water rights holders from seeking any judicial or administrative review of an interim order. Given that the interim relief order may be issued with no due process, this compounds the injury to water rights holders.

We understand that AB 460 is motivated in part by certain illegal actions that occurred in violation of the State Water Board's curtailment orders in late summer 2022. We do not condone such actions and do support efforts to better deter illegal water diversions. Flagrant violations of the law should not be merely a cost of doing business. However, we believe that AB 460 goes well beyond enforcement and grants the State Water Board broad new authority that injects new risks and infringes upon due process for water rights holders. For these and other reasons, the undersigned organizations must respectfully **OPPOSE AB 460**.

Sincerely,

Brenda Bass
Policy Advocate
On behalf of

Agricultural Council of California, Tricia Geringer
Almond Alliance, Aubrey Bettencourt
Association of California Egg Farmers, Debbie Murdock
Association of California Water Agencies, Kristopher Anderson
Antelope Valley-East Kern Water Agency, Matthew Knudson
California Alfalfa and Forage Association, Nicole Helms
California Apple Commission, Todd Sanders
California Blueberry Association, Todd Sanders
California Blueberry Commission, Todd Sanders
California Business Properties Association, Matthew Hargrove
California Association of Winegrape Growers, Michael Miiller
California Association of Wheat Growers, Brooke Palmer
California Bean Shippers Association, Jane Townsend
California Building Industry Association, P. Anthony Thomas
California Chamber of Commerce, Brenda Bass
California Cotton Ginners and Growers Association, Roger Isom
California Farm Bureau, Alexandra Biering
California Fresh Fruit Association, Ian LeMay
California Grain and Feed Association, Chris Zanobini
California Manufacturers & Technology Association, Dean Talley
California Municipal Utilities Association, Andrea Abergel
California Pear Growers Association, Debbie Murdock
California Seed Association, Donna Boggs
Carmichael Water District, Cathy Lee
City of Roseville, Bruce Houdesheldt
Coachella Valley Water District, J.M. Barrett
Coastside County Water District, Mary Rogren
Cucamonga Valley Water District, John Bosler
Desert Water Agency, Mark Krouse
Dunnigan Water District, William Vanderwaal
East Turlock Subbasin Groundwater Sustainability Agency, Mike Tietze
Elsinore Valley Municipal Water District, Bruce Kamilos
Friant Water Authority, Jason Phillips
Grower-Shipper Association of Central California, Christopher Valdez
Humbolt Bay Municipal Water District, John Friedenbach
International Bottled Water Association, James Toner
Kern County Water Agency, Thomas McCarthy
Kings River Conservation District, David Merrritt
Kings River Water Association, Steven Haugen
Lake Arrowhead Community Services District, Catherine Cerri
McKinleyville Community Services District, Patrick Kaspari

Mesa Water District, Paul Shoenberger
Modesto Irrigation District, Ed Franciosa
Mojave Water Agency, Allison Febbo
Montecito Water District, Tobe Plough
Napa County Flood Control & Water Conservation District, Rick Thomasser
Northern California Water Association, Ivy Brittain
Oakdale irrigation District, Scott Moody
Olive Growers Council of California, Todd Sanders
Pacific Egg & Poultry Association, Debbie Murdock
Pinedale County Water Agency, Jason Franklin
Placer County Water Agency, Anthony Firenzi
Regional Water Authority, James Peifer
Rosedale-Rio Bravo Water Storage District, Trent Taylor
Rowland Water District, Tom Coelman
San Gabriel Valley Municipal Water District, Darin Kasamoto
San Gorgonio Pass Water Agency, Lance Eckhart
San Juan Water District, Paul Helliker
San Joaquin River Exchange Contractors Water Authority, Chris White
San Luis & Delta-Mendota Water Authority, J. Scott Petersen
Santa Clarita Valley Water Agency, Matt Stone
Santa Margarita Water District, Daniel R. Ferons
Santa Clarita Valley Water Agency, Matt Stone
Solano County Water Agency, Chris Lee
Solano Irrigation District, Cary Keaten
South San Joaquin Irrigation District, Peter M. Rietkerk
Southern California Water Coalition, Glenn Farrel
Stockton East Water District, Richard Atkins
Tehachapi-Cummings County Water District, Tom Neisler
Three Valleys Municipal Water District, Matthew Litchfield
Tranquillity Irrigation District, Danny Wade
Tuolumne County Water Agency, Kathleen K. Haff
Tuolumne Utilities District, Don Perkins
Turlock Irrigation District, Michelle Reimers
Tri-County Water Authority, Deanna Jackson
United Water Conservation District, Mauricio Guardado
Valley Center Municipal Water District, Gary Arant
Western Agricultural Processors Association, Roger Isom
Western Growers Association, Gail Delihant
Western Municipal Water District, Craig Miller
Wine Institute, Noelle Cremers
Western Plant Health Association, Renee Pinel
Yuba Water Agency, Willie Whittlesey

Cc: Legislative Affairs, Office of the Governor
Estefani Avila, Office of Assemblymember Bauer-Kahan
Nicholas Liedke, Assembly Judiciary Committee
Daryl Thomas, Assembly Republican Caucus