

Assembly Bill No. 2895

CHAPTER 675

An act to amend Sections 1015, 1725, and 1726 of, to amend, renumber, and add Section 1727 of, to add Section 1725.5 to, and to repeal Section 1728 of, the Water Code, relating to water.

[Approved by Governor September 28, 2022. Filed with
Secretary of State September 28, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2895, Arambula. Water: permits and licenses: temporary changes: water or water rights transfers.

Under existing law, the State Water Resources Control Board administers a water rights program pursuant to which the board grants permits and licenses to appropriate water. Existing law authorizes a permittee or licensee to temporarily change the point of diversion, place of use, or purpose of use due to a transfer or exchange of water or water rights if the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change, would not injure any legal user of the water, and would not unreasonably affect fish, wildlife, or other instream beneficial uses.

Existing law prescribes the process for a permittee or licensee to petition the board for a temporary change due to a transfer or exchange of water rights, and imposes on the board related notice, decision, and hearing requirements. Under that process, a petitioner is required to publish notice of a petition in a newspaper, as specified. Existing law requires a petition to contain specified information and requires a petitioner to provide a copy of the petition to the Department of Fish and Wildlife, the board of supervisors of the county or counties in which the petitioner currently stores or uses the water subject to the petition, and the board of supervisors of the county or counties to which the water is proposed to be transferred.

Existing law authorizes a person entitled to the use of water to petition the board for a change to a water right for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation and authorizes the board to approve the petition only if certain requirements are met. Existing law authorizes that petition to be submitted in accordance with specified requirements, including those regulating temporary changes due to a transfer or exchange of water rights.

This bill would revise and recast the provisions regulating temporary changes due to a transfer or exchange of water rights, including, among other revisions, specifying that those provisions apply to a person who proposes a temporary change for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation. The bill would

eliminate the requirement that a petitioner publish notice of a petition in a newspaper.

The bill would establish a new process for petitions for which notice is submitted to the board no later than January 31 for a temporary change due to a transfer or exchange of water rights initiated in the same year, and would impose on the board related notice, decision, and hearing requirements. Under this new process, the board would be required, among other things, to post on its internet website and disseminate by email LISTSERV by February 15 of each year a list of all timely and complete notices for which notice is filed.

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

SECTION 1. Section 1015 of the Water Code is amended to read:

1015. During the term of a temporary change, as defined in Section 1725.5, if an enforcement action or other proceeding is commenced that alleges that the use of water violates Section 2 of Article X of the California Constitution, Sections 100, 101, 1410, and 1675, or any other legislative, administrative, or judicial limitation on the water that is subject to that water transfer and the water involved is, at the time of the alleged violation, subject to a water transfer, the determination of the alleged violation shall be based on an assessment of the transferee's use of transferred water. If a transferee's right to use transferred water is divested, in whole or in part, on the basis of the transferee's abandonment, forfeiture, waste, or unreasonable use of the transferred water, the divested portion of the right shall revert immediately to the transferor.

SEC. 2. Section 1725 of the Water Code is amended to read:

1725. (a) A permittee or licensee may temporarily change the point of diversion, place of use, or purpose of use due to a transfer or exchange of water or water rights if the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change, would not injure any legal user of the water, and would not unreasonably affect fish, wildlife, or other instream beneficial uses.

(b) The provisions of this article applicable to a permittee or licensee proposing a temporary change apply to a person entitled to the use of water who proposes pursuant to this article a temporary change under Section 1707 and the temporary change shall be deemed a transfer of water or water rights.

SEC. 3. Section 1725.5 is added to the Water Code, to read:

1725.5. For purposes of this article, the following definitions apply:

(a) "Consumptively used" means the amount of water that has been consumed through use by evapotranspiration, has percolated underground, or has been otherwise removed from use in the downstream water supply as a result of direct diversion.

(b) “Temporary change” means a change involving a transfer of water or water rights for a period of one year or less. The one-year period does not include any time required for monitoring, reporting, or mitigation before or after the temporary change is carried out. If, within a period of one year or less, the water involved in the temporary change is moved to offstream storage outside of the watershed where the water originated, the change shall be considered a temporary change, and the water moved to offstream storage outside the watershed where the water originated may be put to beneficial use in the place of use and for the purposes of use specified in the board’s order approving the temporary change either during or after that period.

(c) “Transfer” includes an exchange of water or water rights.

SEC. 4. Section 1726 of the Water Code is amended to read:

1726. (a) (1) A permittee or licensee who proposes a temporary change shall submit to the board a petition to change the terms of the permit or license as required to accomplish the proposed temporary change. The petition for a temporary change shall be filed by the permittee or licensee. If the proposed temporary change is for the benefit of a contractor or user supplied directly or indirectly by the permittee or licensee, the permittee or licensee may authorize the contractor or user to participate as a copetitioner. The permittee or licensee shall identify any copetitioner in the petition.

(2) A contractor or user described in paragraph (1), whether or not designated as a copetitioner, and the person to whom the water is proposed to be transferred, shall be named as parties to the proceeding, with the same rights to receive notices, respond to board determinations, and petition for writ of mandate as the petitioner.

(b) In order to be complete, a petition shall include both of the following:

(1) Reference to the permit or license, or to the water right proposed to be changed under Section 1707, that serves as the basis for the water transfer.

(2) A written description of the changes, including, but not limited to, changes in timing, in water storage, in point of diversion, in place and purpose of use, in point of return flow, in water quality, or in instream flows, that are likely to occur as a result of the proposed temporary change.

(c) A petitioner shall provide a copy of the complete petition to the Department of Fish and Wildlife, the board of supervisors of the county or counties in which the petitioner currently stores or uses the water subject to the petition, and the board of supervisors of the county or counties to which the water is proposed to be transferred.

(d) The board shall, in a timely manner, provide to the petitioner a list of water right holders of record on file with the board who may be affected by the transfer, and the petitioner shall provide written notice to those water right holders not later than 10 days after the date on which the complete petition is submitted. The board shall post the notice of petition on its internet website not later than 10 days after the date on which the complete petition is submitted. The notice of the petition shall specify the date on which comments are due. The board may impose on the petitioner any other notice requirement it determines to be necessary.

(e) Within 10 days of the date of receipt of a complete petition, the board shall commence an investigation of the proposed temporary change. Pursuant to that investigation, the board shall determine if the water proposed to be transferred would have been consumptively used or stored pursuant to the petitioner's permit or license in the absence of the proposed transfer or conserved pursuant to Section 1011. The board also shall evaluate the changes, including, but not limited to, changes in timing, in water storage, in point of diversion, in place and purpose of use, in point of return flow, in water quality, or in instream flows, that are likely to occur as a result of the proposed temporary change.

(f) Water users that may be affected by a proposed temporary change and any other interested party may file a written comment regarding a petition with the board. Comments shall be filed not later than 30 days after the date that the notice was provided pursuant to subdivision (d). The board shall evaluate and take into consideration all comments that are filed in a timely manner.

(g) (1) Except as specified in paragraphs (2), (3), and (4), the board shall render a decision on the petition not later than 35 days after the date that investigation commenced or the date that the notice was distributed, whichever is later. The board's decision shall be in accordance with the substantive standards set forth in Section 1728. The board shall explain its decision in writing and shall send copies of the decision to the petitioner, the Department of Fish and Wildlife, the board of supervisors of the county or counties described in subdivision (c), the proposed transferee, and any party who has filed a written comment in accordance with subdivision (f).

(2) If comments are filed in accordance with subdivision (f), or for any other good cause, the board may extend the date of its decision for up to 20 days.

(3) If the board or the petitioner determines that an additional extension of time for a decision is necessary for the board to make the findings required by Section 1728, the board may extend the time for a decision with the consent of the petitioner.

(4) If the board or the petitioner determines before the deadline for issuing a decision under paragraph (1), (2), or (3), as applicable, that a hearing is necessary, the board shall identify the issues for which additional evidence is required and shall fix a time and place for the hearing not later than 45 days after the board determines that a hearing is necessary. The board shall provide notice of the time, place, and subject matter of the hearing to the petitioner, the Department of Fish and Wildlife, the board of supervisors of the county or counties described in subdivision (c), the water right holders of record identified pursuant to subdivision (d), the proposed transferee, and any party who has filed a written comment in accordance with subdivision (f). The board shall issue a decision on the petition within 60 days after the matter is submitted. The board may extend the deadlines under this paragraph with the consent of the petitioner.

SEC. 5. Section 1727 of the Water Code is amended and renumbered to read:

1728. (a) The board shall review a petition for a temporary change of water rights in accordance with this section.

(b) The board shall approve a temporary change if it determines that a preponderance of the evidence shows both of the following:

(1) The proposed temporary change would not injure any legal user of the water, during any potential hydrologic condition that the board determines is likely to occur during the proposed change, through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of the water, or reduction in return flows.

(2) The proposed temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses.

(c) The petitioner shall have the burden of establishing that a proposed temporary change would comply with paragraphs (1) and (2) of subdivision (b). If the board determines that that petitioner has established a *prima facie* case, the burden of proof shall shift to any party that has filed a comment pursuant to subdivision (f) of Section 1726 to prove that the proposed temporary change would not comply with paragraphs (1) and (2) of subdivision (b). The board may make a determination required by this subdivision without a hearing.

(d) In reviewing a petition for a temporary change, the board shall not modify any term or condition of the petitioner's permit or license, including those terms that protect other legal users of water, fish, wildlife, and other instream beneficial uses, except as necessary to carry out the temporary change in accordance with this article.

(e) In applying the standards set forth in paragraphs (1) and (2) of subdivision (b), the board shall not deny, or place conditions on, a temporary change to avoid or mitigate impacts that are not caused by the temporary change. Neither the Department of Fish and Wildlife, nor any other state agency that comments on the proposed temporary change, shall propose conditions to mitigate effects on fish, wildlife, or other instream beneficial uses that are not caused by the proposed temporary change. This subdivision does not limit the board, the Department of Fish and Wildlife, or any other state agency, in proceedings pursuant to any provision of law other than this article.

(f) The board shall explain its decision on a petition in writing and provide copies of the decision to the petitioner, the Department of Fish and Wildlife, the board of supervisors of the county or counties in which the petitioner currently stores or uses the water subject to the petition, the board of supervisors of the county or counties to which the water is proposed to be transferred, the proposed transferee, and any party who has filed a written comment on the petition.

SEC. 6. Section 1727 is added to the Water Code, to read:

1727. (a) This section applies to a petition for temporary change for which notice is provided to the board under this section no later than January 31 of the year in which the transfer will be initiated.

(b) A permittee or licensee considering a temporary change may provide notice to the board as provided in this section. The notice shall be in a form required by the board and shall include all of the following:

(1) The permit or license number, or the water right proposed to be changed under Section 1707, being considered for a temporary change.

(2) The method by which water will be made available for the transfer.

(3) An email address to which interested parties or the board may submit inquiries regarding the potential temporary change.

(c) By February 15 of each year, the board shall post on its internet website and disseminate by email LISTSERV a list of all timely and complete notices for which notice is filed under this section.

(d) By March 1 of each year, an interested person may request notice of a petition submitted under Section 1726 by submitting to the board that person's email address, the permit or license, or water right to be changed under Section 1707, for which the interested person requests notice of a petition for temporary change, and the concerns related to effects on other legal users, fish, wildlife, instream beneficial uses, or groundwater conditions the person may raise in comments on the petition. The board shall forward to the permittee or licensee considering the temporary change any concerns received from interested persons under this subdivision.

(e) After submittal of a complete petition for which notice is provided under this section, the board shall provide notice of the petition by sending a copy to all persons who submitted complete requests under subdivision (d), posting the petition on its internet website, and disseminating the petition by email LISTSERV. Any interested party may file a written comment on the petition not later than 30 days after submittal of a complete petition.

(f) The board shall issue a decision within 35 days after submittal of a complete petition for which notice is provided under this section. If comments are filed in accordance with subdivision (f), or for any other good cause, the board may extend the date of its decision for up to 20 days. If the board or the petitioner determines that an additional extension of time for a decision is necessary for the board to make the findings required by Section 1728, or that a hearing is necessary for the board to make those findings, the board may extend the time for a decision with the consent of the petitioner.

SEC. 7. Section 1728 of the Water Code is repealed.