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**AB-313 Water.** (2017-2018)

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ENROLLED SEPTEMBER 19, 2017

PASSED IN SENATE SEPTEMBER 16, 2017

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AMENDED IN ASSEMBLY APRIL 18, 2017

CALIFORNIA LEGISLATURE— 2017–2018 REGULAR SESSION

**ASSEMBLY BILL**

**NO. 313**

**Introduced by Assembly Member Gray**

**February 06, 2017**

An act to add Article 2.5 (commencing with Section 11375) to Chapter 4 of Part 1 of Division 3 of Title 2 of the Government Code, and to amend Section 1825 of, to amend, repeal, and add Sections 1055, 1552, and 1845 of, to add Section 1837 to, and to repeal and add Article 2 (commencing with Section 1831) of Chapter 12 of Part 2 of Division 2 of, the Water Code, relating to water.

**LEGISLATIVE COUNSEL'S DIGEST**

AB 313, Gray. Water.

Existing law declares that the diversion or use of water, other than as authorized by specified provisions of law, is a trespass. Existing law authorizes the executive director of the State Water Resources Control Board to issue a complaint to a person who violates certain use and diversion of water provisions and subjects the violator to administrative civil liability. Existing law authorizes the board to adopt an order setting administrative civil liability based on the allegations set forth in the complaint without a hearing, unless a written request for a hearing signed by, or on behalf of, the party served with the complaint is delivered to or received by mail by the board within 20 days after receipt of the complaint.

This bill, commencing July 1, 2018, would establish a Water Rights Division within the Office of Administrative Hearings, as prescribed. The bill would require a hearing to set the above-described administrative civil liability to be held before the division in accordance with the Administrative Procedure Act. The bill would deem a decision made by an administrative law judge in the division to be a recommendation and not final until accepted by the board, as prescribed. The bill would authorize an appeal of

the board's decision on the recommendation or of the adoption of the recommendation due to the failure to act to a superior court. The bill would add expenditures of the division to the purposes for which the moneys in the Water Rights Fund are available for expenditure, upon appropriation by the Legislature.

Existing law authorizes the board to issue an order to a person to cease and desist from violating, or threatening to violate, certain requirements relating to water use, including diverting or using water, other than as authorized.

This bill, commencing July 1, 2018, would authorize the board to issue a complaint seeking an order, instead of directly issuing the order, requiring a person to cease and desist from diverting or using water, other than as authorized, and would make conforming changes. The bill would require that the complaint be served by personal notice or certified mail and inform the person that the person may request a hearing conducted by the Water Rights Division of the Office of Administrative Hearings. The bill would deem a decision made by an administrative law judge in the division to be a recommendation and not final until accepted by the board, as prescribed. Following the board's acceptance, modification, or rejection of the recommendation, the bill would authorize the board to issue a cease and desist order. The bill would authorize an appeal of the board's decision on the recommendation or of the adoption of the recommendation due to the failure to act to a superior court.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

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## THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

**SECTION 1.** Article 2.5 (commencing with Section 11375) is added to Chapter 4 of Part 1 of Division 3 of Title 2 of the Government Code, to read:

### **Article 2.5. Water Rights Division**

**11375.** (a) There is within the Office of Administrative Hearings a Water Rights Division, consisting of no fewer than four full-time administrative law judges. An administrative law judge of the division shall have the same qualifications as other administrative law judges and have no less than eight years experience as an attorney dealing with water rights matters.

(b) The director shall select an administrative law judge as the supervisor of the division. The director and the supervisor shall assign at least three other administrative law judges to the division. The supervisor shall supervise the administrative law judges' training and coordinate the publication of the division's decisions. The division shall include only those administrative law judges specifically qualified and shall at no time constitute more than 25 percent of the total number of administrative law judges within the Office of Administrative Hearings. If the members of the division do not have a full water rights-related case workload, they may be assigned other work by the director. When the water rights-related case workload exceeds the capacity of the members of the division, the supervisor shall request the director to assign additional judges as appropriate. When this workload overflow occurs on a temporary basis, the director shall supply judges from the office to adjudicate the cases.

(c) The administrative law judges of the division shall have experts available. The director, with the advice of the supervisor, shall appoint experts. The administrative law judges of the division may call on these experts to testify on the record about any matter relevant to a proceeding and these experts shall be subject to cross-examination by all parties. The administrative law judge may award reasonable expert witness fees to any person serving as an expert, which shall be paid from the Water Rights Fund upon appropriation by the Legislature.

(d) Section 11430.30 does not apply in a proceeding under this section.

**11375.5.** An administrative law judge shall conduct a hearing relating to any water rights pursuant to the Administrative Procedure Act.

**11376.** The office shall provide facilities and support personnel for the division.

**11376.5.** A decision made by an administrative law judge in the division shall be deemed a recommendation and is not final until accepted by the State Water Resources Control Board. The State Water Resources Control Board may review materials from the hearing record, as necessary, and has the authority to accept, modify, or reject the recommendation. The State Water Resources Control Board shall make a final decision accepting, modifying, or rejecting the division's recommendation within 30 days of the issuance of that recommendation. If the State Water Resources Control Board does not act on a recommendation within 30 days, the recommendation shall be deemed adopted. The State Water Resources Control Board's decision on the recommendation, or the adoption of the recommendation due to the failure to act, is a final agency action that may be appealed to a superior court of the State of California.

**11377.** This article shall become operative on July 1, 2018.

**SEC. 2.** Section 1055 of the Water Code is amended to read:

**1055.** (a) The executive director of the board may issue a complaint to any person or entity on which administrative civil liability may be imposed pursuant to Section 1052, Article 4 (commencing with Section 1845) of Chapter 12 of Part 2 of Division 2, or Section 5107. The complaint shall allege the act or failure to act that constitutes a trespass or violation, the provision of law authorizing civil liability to be imposed, and the proposed civil liability.

(b) The complaint shall be served by personal notice or certified mail. The complaint shall inform the party served that the party may request a hearing not later than 20 days from the date the party was served and that the board may adopt an order setting administrative civil liability based on the allegations set forth in the complaint without a hearing if the party does not sign a written request for a hearing that is delivered to, or received by mail by, the board within 20 days after the date the party was served. The hearing shall be before the board or a member of the board, in accordance with Section 183.

(c) The board, after any necessary hearing, may adopt an order setting administrative civil liability, or determining that a liability shall not be imposed.

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

(e) This section shall become inoperative on July 1, 2018, and, as of January 1, 2019, is repealed.

**SEC. 3.** Section 1055 is added to the Water Code, to read:

**1055.** (a) The executive director of the board may issue a complaint to any person or entity on which administrative civil liability may be imposed pursuant to Section 1052, Article 4 (commencing with Section 1845) of Chapter 12 of Part 2 of Division 2, or Section 5107. The complaint shall allege the act or failure to act that constitutes a trespass or violation, the provision of law authorizing civil liability to be imposed, and the proposed civil liability.

(b) The complaint shall be served by personal notice or certified mail. The complaint shall inform the party served that the party may request a hearing conducted by the Water Rights Division of the Office of Administrative Hearings not later than 20 days from the date the party was served and that the board may adopt an order setting administrative civil liability based on the allegations set forth in the complaint without a hearing if the party does not sign a written request for a hearing that is delivered to, or received by mail by, the board within 20 days after the date the party was served. The hearing shall be before an administrative law judge of the Water Rights Division of the Office of Administrative Hearings in accordance with Article 2.5 (commencing with Section 11375) of Chapter 4 of Part 1 of Division 3 of Title 2 of the Government Code.

(c) The executive director, after any necessary hearing, may adopt an order setting administrative civil liability, or determining that a liability shall not be imposed.

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

(e) This section shall become operative on July 1, 2018.

**SEC. 4.** Section 1552 of the Water Code is amended to read:

**1552.** (a) Except as provided in subdivision (e) of Section 1058.5, moneys in the Water Rights Fund are available for expenditure, upon appropriation by the Legislature, for the following purposes:

(1) For expenditure by the State Board of Equalization in the administration of this chapter and the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code) in connection with any fee or expense subject to this chapter.

(2) For the payment of refunds, pursuant to Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code, of fees or expenses collected pursuant to this chapter.

(3) For expenditure by the board for the purposes of carrying out this division, Division 1 (commencing with Section 100), Part 2 (commencing with Section 10500) and Chapter 11 (commencing with Section 10735) of Part 2.74 of Division 6, Article 7 (commencing with Section 13550) of Chapter 7 of Division 7, and the water diversion related provisions of Article 6 (commencing with Section 19331) of Chapter 3.5 of Division 8 of the Business and Professions Code.

(4) For expenditures by the board for the purposes of carrying out Sections 13160 and 13160.1 in connection with activities involving hydroelectric power projects subject to licensing by the Federal Energy Regulatory Commission.

(5) For expenditures by the board for the purposes of carrying out Sections 13140 and 13170 in connection with plans and policies that address the diversion or use of water.

(b) This section shall become inoperative on July 1, 2018, and, as of January 1, 2019, is repealed.

**SEC. 5.** Section 1552 is added to the Water Code, to read:

**1552.** (a) Except as provided in subdivision (e) of Section 1058.5, moneys in the Water Rights Fund are available for expenditure, upon appropriation by the Legislature, for the following purposes:

(1) For expenditure by the State Board of Equalization in the administration of this chapter and the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code) in connection with any fee or expense subject to this chapter.

(2) For the payment of refunds, pursuant to Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code, of fees or expenses collected pursuant to this chapter.

(3) For expenditure by the board for the purposes of carrying out this division, Division 1 (commencing with Section 100), Part 2 (commencing with Section 10500) and Chapter 11 (commencing with Section 10735) of Part 2.74 of Division 6, Article 7 (commencing with Section 13550) of Chapter 7 of Division 7, and the water diversion related provisions of Article 6 (commencing with Section 19331) of Chapter 3.5 of Division 8 of the Business and Professions Code.

(4) For expenditures by the board for the purposes of carrying out Sections 13160 and 13160.1 in connection with activities involving hydroelectric power projects subject to licensing by the Federal Energy Regulatory Commission.

(5) For expenditures by the board for the purposes of carrying out Sections 13140 and 13170 in connection with plans and policies that address the diversion or use of water.

(6) For expenditures by the Water Rights Division of the Office of Administrative Hearings for the purposes of carrying out Article 2.5 (commencing with Section 11375) of Chapter 4 of Part 1 of Division 3 of Title 2 of the Government Code.

(b) This section shall become operative on July 1, 2018.

**SEC. 6.** Section 1825 of the Water Code is amended to read:

**1825.** It is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of permits licenses, certifications, and registrations to appropriate water, to enforce all orders and decisions, and to prevent the unlawful diversion of water.

**SEC. 7.** Section 1837 is added to the Water Code, to read:

**1837.** This article shall become inoperative on July 1, 2018, and, as of January 1, 2019, is repealed.

**SEC. 8.** Article 2 (commencing with Section 1831) is added to Chapter 12 of Part 2 of Division 2 of the Water Code, to read:

**Article 2. Cease and Desist Orders**

**1831.** (a) (1) (A) Notwithstanding paragraph (2), when the board determines that any person is violating, or threatening to violate, any requirement described in paragraphs (2) to (6), inclusive, of subdivision (c), the board may issue an order to that person to cease and desist from that violation.

(B) The board may issue a cease and desist order only after notice and an opportunity for hearing pursuant to subparagraph (C).

(C) (i) The board shall give notice by personal notice or certified mail, pursuant to which the party shall be informed that he or she may request a hearing not later than 20 days from the date on which the notice is received, to the person allegedly engaged in the violation. The notice shall contain a statement of facts and information that would tend to show the proscribed action, and notification of the requirements of clause (ii).

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

(2) (A) When the board determines that any person is violating, or threatening to violate, paragraph (1) of subdivision (c), the board may issue a complaint seeking an order requiring that person to cease and desist from that violation. The complaint shall

contain a statement of facts and information that tend to show the conduct that constitutes a violation or threatened violation of paragraph (1) of subdivision (c) and a description of the terms and conditions of the proposed cease and desist order.

(B) The complaint shall be served by personal notice or certified mail. The complaint shall inform the party served that the party may request a hearing conducted by the Water Rights Division of the Office of Administrative Hearings not later than 20 days from the date the party was served and that the board may adopt a cease and desist order based on the allegations set forth in the complaint without a hearing if the person does not sign a written request for a hearing that is delivered to, or received by mail by, the board within 20 days after the date the party was served. The hearing shall be before an administrative law judge of the Water Rights Division of the Office of Administrative Hearings in accordance with Article 2.5 (commencing with Section 11375) of Chapter 4 of Part 1 of Division 3 of Title 2 of the Government Code.

(C) A decision made by an administrative law judge in a hearing conducted pursuant to subparagraph (B) shall be deemed a recommendation and is not final until accepted by the board. The board may review materials from the hearing record, as necessary, and has the authority to accept, modify, or reject the recommendation. Following the board's acceptance, modification, or rejection of the recommendation, the board may issue a cease and desist order under this paragraph. The board shall make a final decision accepting, modifying, or rejecting the division's recommendation within 30 days of the issuance of that recommendation. If the board does not act on a recommendation within 30 days, the recommendation shall be deemed adopted. The board's decision on the recommendation, or the adoption of the recommendation due to the failure to act, is a final agency action that may be appealed to a superior court of the State of California.

(b) A cease and desist order shall require that person to comply forthwith or in accordance with a time schedule set by the board or, if issued pursuant to paragraph (2) of subdivision (a), in accordance with a time schedule set by the administrative law judge presiding over the hearing described in subparagraph (B) of paragraph (2) of subdivision (a).

(c) The cease and desist order may be issued in response to a violation or threatened violation of any of the following:

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

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

(3) Any decision or order of the board issued under this part, Section 275, Chapter 11 (commencing with Section 10735) of Part 2.74 of Division 6, or Article 7 (commencing with Section 13550) of Chapter 7 of Division 7, in which decision or order the person to whom the cease and desist order will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or order.

(4) A regulation adopted under Section 1058.5.

(5) Any extraction restriction, limitation, order, or regulation adopted or issued under Chapter 11 (commencing with Section 10735) of Part 2.74 of Division 6.

(6) Any diversion or use of water for cannabis cultivation if any of paragraphs (1) to (5), inclusive, or any of the following applies:

(A) A license is required, but has not been obtained, under Chapter 6 (commencing with Section 26060) or Chapter 7 (commencing with Section 26070) of Division 10 of the Business and Professions Code.

(B) The diversion is not in compliance with an applicable limitation or requirement established by the board or the Department of Fish and Wildlife under Section 13149.

(C) The diversion or use is not in compliance with a requirement imposed under paragraphs (1) and (2) of subdivision (b) of Section 26060.1 of, and paragraph (3) of subdivision (a) of Section 26070 of, the Business and Professions Code.

(d) This article does not alter the regulatory authority of the board under other provisions of law.

**1832.** (a) Cease and desist orders of the board shall be effective upon the issuance thereof.

(b) The board, for cease and desist orders issued pursuant to paragraph (1) of subdivision (a) of Section 1831, may, after notice and opportunity for hearing, upon its own motion or upon receipt of an application from an aggrieved person, modify, revoke, or stay in whole or in part any cease and desist order issued pursuant to this chapter.

(c) A cease and desist order issued pursuant to paragraph (2) of subdivision (a) may be modified, revoked, or stayed in whole or in part only after notice and a hearing, before an administrative law judge of the Water Rights Division of the Office of Administrative Hearings in accordance with Article 2.5 (commencing with Section 11375) of Chapter 4 of Part 1 of Division 3 of Title 2 of the Government Code, if applicable.

**1833.** As used in this chapter, "person" includes any city, county, district, the state, or any department or agency thereof, and the United States to the extent authorized by law.

**1834.** Nothing in this chapter shall preclude the board from issuing any order or taking any other action authorized pursuant to Section 275.

**1835.** This article shall become operative on July 1, 2018.

**SEC. 9.** Section 1845 of the Water Code is amended to read:

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

(b) (1) A person or entity who violates a cease and desist order issued pursuant to this chapter may be liable in an amount not to exceed the following:

(A) If the violation occurs in a critically dry year immediately preceded by two or more consecutive below normal, dry, or critically dry years or during a period for which the Governor has issued a proclamation of a state of emergency under the California Emergency Services Act (Chapter 7 (commencing with Section 8550) of Division 1 of Title 2 of the Government Code) based on drought conditions, ten thousand dollars (\$10,000) for each day in which the violation occurs.

(B) If the violation is not described by subparagraph (A), one thousand dollars (\$1,000) for each day in which the violation occurs.

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

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

(c) This section shall become inoperative on July 1, 2018, and, as of January 1, 2019, is repealed.

**SEC. 10.** Section 1845 is added to the Water Code, to read:

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

(b) (1) A person or entity who violates a cease and desist order issued pursuant to this chapter may be liable in an amount not to exceed the following:

(A) If the violation occurs in a critically dry year immediately preceded by two or more consecutive below normal, dry, or critically dry years or during a period for which the Governor has issued a proclamation of a state of emergency under the California Emergency Services Act (Chapter 7 (commencing with Section 8550) of Division 1 of Title 2 of the Government Code) based on drought conditions, ten thousand dollars (\$10,000) for each day in which the violation occurs.

(B) If the violation is not described by subparagraph (A), one thousand dollars (\$1,000) for each day in which the violation occurs.

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

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

(c) This section shall become operative on July 1, 2018.