

ASSEMBLY BILL

No. 2442

**Introduced by Assembly Member Gordon
(Principal coauthor: Assembly Member Alejo)**

February 21, 2014

An act to amend Section 13304 of the Water Code, relating to water quality.

LEGISLATIVE COUNSEL'S DIGEST

AB 2442, as introduced, Gordon. Porter-Cologne Water Quality Control Act: remedial action: liability.

Existing law, the Porter-Cologne Water Quality Control Act, requires a person who discharges waste into the waters of the state in violation of waste discharge requirements or other order or prohibition issued by a California regional water quality control board or the State Water Resources Control Board to clean up the waste or to abate the effects of the waste. Existing law authorizes the regional board to expend available money to perform any cleanup, abatement, or remedial work required under those circumstances.

This bill would prohibit the state board, a regional board, and any authorized person, as defined, from being civilly or criminally liable for any act or omission of the state board, regional board, or any authorized person in connection with any investigation, cleanup, abatement, or other remedial work, as defined, unless the act or omission was performed in a grossly negligent manner. The bill would require that these provisions apply to a claim against a public entity presented on or after January 1, 2015, or, if no claim is presented, to a cause of action in a civil complaint or a writ petition filed on or after January 1,

2015. The bill would also make various technical, nonsubstantive changes.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

1 SECTION 1. Section 13304 of the Water Code is amended to
2 read:

3 13304. (a) ~~Any~~A person who has discharged or discharges
4 waste into the waters of this state in violation of any waste
5 discharge requirement or other order or prohibition issued by a
6 regional board or the state board, or who has caused or permitted,
7 causes or permits, or threatens to cause or permit any waste to be
8 discharged or deposited where it is, or probably will be, discharged
9 into the waters of the state and creates, or threatens to create, a
10 condition of pollution or nuisance, shall upon order of the regional
11 board, clean up the waste or abate the effects of the waste, or, in
12 the case of threatened pollution or nuisance, take other necessary
13 remedial action, including, but not limited to, overseeing cleanup
14 and abatement efforts. A cleanup and abatement order issued by
15 the state board or a regional board may require the provision of,
16 or payment for, uninterrupted replacement water service, which
17 may include wellhead treatment, to each affected public water
18 supplier or private well owner. Upon failure of ~~any~~ a person to
19 comply with the cleanup or abatement order, the Attorney General,
20 at the request of the board, shall petition the superior court for that
21 county for the issuance of an injunction requiring the person to
22 comply with the order. In the suit, the court shall have jurisdiction
23 to grant a prohibitory or mandatory injunction, either preliminary
24 or permanent, as the facts may warrant.

25 (b) (1) The regional board may expend available money to
26 perform any cleanup, abatement, or remedial work required under
27 the circumstances set forth in subdivision (a), including, but not
28 limited to, supervision of cleanup and abatement activities that, in
29 its judgment, is required by the magnitude of the endeavor or the
30 urgency for prompt action to prevent substantial pollution,
31 nuisance, or injury to any waters of the state. The action may be
32 taken in default of, or in addition to, remedial work by the waste

1 discharger or other persons, and regardless of whether injunctive
2 relief is being sought.

3 (2) The regional board may perform the work itself, or with the
4 cooperation of any other governmental agency, and may use rented
5 tools or equipment, either with operators furnished or unoperated.
6 Notwithstanding any other provisions of law, the regional board
7 may enter into oral contracts for the work, and the contracts,
8 whether written or oral, may include provisions for equipment
9 rental and in addition the furnishing of labor and materials
10 necessary to accomplish the work. The contracts are not subject
11 to approval by the Department of General Services.

12 (3) The regional board shall be permitted reasonable access to
13 the affected property as necessary to perform any cleanup,
14 abatement, or other remedial work. The access shall be obtained
15 with the consent of the owner or possessor of the property or, if
16 the consent is withheld, with a warrant duly issued pursuant to the
17 procedure described in Title 13 (commencing with Section
18 1822.50) of Part 3 of the Code of Civil Procedure. However, in
19 the event of an emergency affecting public health or safety, the
20 regional board may enter the property without consent or the
21 issuance of a warrant.

22 (4) The regional board may contract with a water agency to
23 perform, under the direction of the regional board, investigations
24 of existing or threatened groundwater pollution or nuisance. The
25 agency's cost of performing the contracted services shall be
26 reimbursed by the regional board from the first available funds
27 obtained from cost recovery actions for the specific site. The
28 authority of a regional board to contract with a water agency is
29 limited to a water agency that draws groundwater from the affected
30 aquifer, a metropolitan water district, or a local public agency
31 responsible for water supply or water quality in a groundwater
32 basin.

33 (5) (A) *The state board, regional board, and any authorized*
34 *person shall not be civilly or criminally liable for any act or*
35 *omission of the state board, regional board, or authorized person*
36 *in connection with any investigation, cleanup, abatement, or other*
37 *remedial work, unless the act or omission was performed in a*
38 *grossly negligent manner.*

39 (B) *The following applies for the purposes of this paragraph:*

40 (i) *“Authorized person” means any of the following:*

1 (I) An employee or independent contractor of the state board
2 or regional board.

3 (II) A person from whom investigation, cleanup, abatement, or
4 other remedial work is contracted by the state board or regional
5 board.

6 (III) An employee or independent contractor of a person
7 described in subclause (I) or (II).

8 (ii) “Investigation, cleanup, abatement, or other remedial work”
9 includes investigation, cleanup, abatement, or other remedial work
10 performed pursuant to this section or Section 13267, or corrective
11 action performed pursuant to Section 25296.10 or 25299.36 of the
12 Health and Safety Code.

13 (C) It is not the intent of this paragraph to do any of the
14 following:

15 (i) Impair any cause of action by the state board or regional
16 board against any person, including, but not limited to, a cause
17 of action for breach of contract or indemnity.

18 (ii) Limit the state board’s or regional board’s authority over
19 any person.

20 (iii) Limit any other applicable defenses to liability.

21 (c) (1) If the waste is cleaned up or the effects of the waste are
22 abated, or, in the case of threatened pollution or nuisance, other
23 necessary remedial action is taken by ~~any~~ a governmental agency,
24 the person or persons who discharged the waste, discharges the
25 waste, or threatened to cause or permit the discharge of the waste
26 within the meaning of subdivision (a), are liable to that
27 governmental agency to the extent of the reasonable costs actually
28 incurred in cleaning up the waste, abating the effects of the waste,
29 supervising cleanup or abatement activities, or taking other
30 remedial action. The amount of the costs is recoverable in a civil
31 action by, and paid to, the governmental agency and the state board
32 to the extent of the latter’s contribution to the cleanup costs from
33 the State Water Pollution Cleanup and Abatement Account or other
34 available funds.

35 (2) The amount of the costs constitutes a lien on the affected
36 property upon service of a copy of the notice of lien on the owner
37 and upon the recordation of a notice of lien, that identifies the
38 property on which the condition was abated, the amount of the
39 lien, and the owner of record of the property, in the office of the
40 county recorder of the county in which the property is located.

1 Upon recordation, the lien has the same force, effect, and priority
2 as a judgment lien, except that it attaches only to the property
3 posted and described in the notice of lien, and shall continue for
4 10 years from the time of the recording of the notice, unless sooner
5 released or otherwise discharged. ~~Not~~ *No* later than 45 days after
6 receiving a notice of lien, the owner may petition the court for an
7 order releasing the property from the lien or reducing the amount
8 of the lien. In this court action, the governmental agency that
9 incurred the cleanup costs shall establish that the costs were
10 reasonable and necessary. The lien may be foreclosed by an action
11 brought by the state board on behalf of the regional board for a
12 money judgment. Money recovered by a judgment in favor of the
13 state board shall be deposited in the State Water Pollution Cleanup
14 and Abatement Account.

15 (d) If, despite reasonable effort by the regional board to identify
16 the person responsible for the discharge of waste or the condition
17 of pollution or nuisance, the person is not identified at the time
18 cleanup, abatement, or remedial work is required to be performed,
19 the regional board is not required to issue an order under this
20 section.

21 (e) “Threaten,” for purposes of this section, means a condition
22 creating a substantial probability of harm, when the probability
23 and potential extent of harm make it reasonably necessary to take
24 immediate action to prevent, reduce, or mitigate damages to
25 persons, property, or natural resources.

26 (f) Replacement water provided pursuant to subdivision (a) shall
27 meet all applicable federal, state, and local drinking water
28 standards, and shall have comparable quality to that pumped by
29 the public water system or private well owner prior to the discharge
30 of waste.

31 (g) (1) ~~Any~~ *A* public water supplier or private well owner
32 receiving replacement water by reason of an order issued pursuant
33 to subdivision (a), or ~~any~~ *a* person or entity who is ordered to
34 provide replacement water pursuant to subdivision (a), may request
35 nonbinding mediation of all replacement water claims.

36 (2) If so requested, the public water suppliers receiving the
37 replacement water and the persons or entities ordered to provide
38 the replacement water, within 30 days of the submittal of a water
39 replacement plan, shall engage in at least one confidential
40 settlement discussion before a mutually acceptable mediator.

1 (3) Any agreement between parties regarding replacement water
2 claims resulting from participation in the nonbinding mediation
3 process shall be consistent with the requirements of any cleanup
4 and abatement order.

5 (4) A regional board or the state board is not required to
6 participate in any nonbinding mediation requested pursuant to
7 paragraph (1).

8 (5) The party or parties requesting the mediation shall pay for
9 the costs of the mediation.

10 (h) As part of ~~any~~ a cleanup and abatement order that requires
11 the provision of replacement water, a regional board or the state
12 board shall request a water replacement plan from the discharger
13 in cases where replacement water is to be provided for more than
14 30 days. The water replacement plan is subject to the approval of
15 the regional board or the state board prior to its implementation.

16 (i) A “water replacement plan” means a plan pursuant to which
17 the discharger will provide replacement water in accordance with
18 a cleanup and abatement order.

19 (j) This section does not impose any new liability for acts
20 occurring before January 1, 1981, if the acts were not in violation
21 of existing laws or regulations at the time they occurred.

22 (k) Nothing in this section limits the authority of ~~any~~ a state
23 agency under any other law or regulation to enforce or administer
24 any cleanup or abatement activity.

25 (l) The Legislature declares that the amendments made to
26 subdivision (a) ~~of this section by Senate Bill 1004 of the 2003–04~~
27 ~~Regular Session by Chapter 614 of the Statutes of 2003~~ do not
28 constitute a change in, but are declaratory of, existing law.

29 (m) *Paragraph (5) of subdivision (b) shall apply to a claim*
30 *presented pursuant to Part 3 (commencing with Section 900) of*
31 *Division 3.6 of Title 1 of the Government Code on or after January*
32 *1, 2015, or, if no claim is presented pursuant to those provisions,*
33 *to a cause of action in a civil complaint or writ petition filed on*
34 *or after January 1, 2015.*