PUTTING CALIFORNIA ON A WATER BUDGET

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From 2012 to 2016, California endured its worst drought on record, drier than any four-year period in the last 450 years. [1] In response, on May 31, 2018, the California Legislature and Governor Jerry Brown enacted two bills aimed at establishing long-term water use efficiency standards to better stretch limited water supplies for California's cities and farms. [2] Together, Senate Bill 606 and Assembly Bill 1668 amend portions of the California Water Code [3] and create efficiency standards and new reporting requirements across California's urban and rural economies. [4] Below, we highlight key provisions of the laws and analyze potential impacts for industrial water users and commercial agriculture.

SENATE BILL 606

Senate Bill 606 ("SB 606") imposes new reporting obligations on urban retail water suppliers. An "urban retail water supplier" is defined as a water supplier, either publicly or privately owned, that directly provides potable municipal water to more than 3,000 end users or that supplies more than 3,000 acre-feet of potable water annually at retail for municipal purposes. [5] Additionally, both bills define a new type of water use: "CII water," which is water used by commercial, industrial, institutional, and large landscape water users. [6]

Starting November 1, 2023, SB 606 requires every urban retail water supplier to calculate a water budget, referred to as an "urban water use objective," [7] by tallying the sum of the following: aggregate residential indoor water use, aggregate residential outdoor water use, aggregate CII outdoor use (defined as CII landscape areas with dedicated irrigation meters), aggregate water loss, aggregate variances, and bonus incentives. [8] The aggregate figures used must be based on the amount of water that *would have been used* in the previous year if that water had been used efficiently. [9]

An urban retail water supplier may adjust its urban water use objective by a bonus incentive if it augments its water supply with potable reuse water. The bonus incentive is the volume of potable reuse water delivered to residential water users and to landscape areas with dedicated irrigation meters in connection with CII water use. [10]

Starting in November 2023, every urban water retail supplier is required to submit an annual report to the Department of Water Resources ("DWR"). The annual report must include its urban water use objective, state its actual water usage for the prior year, document its performance measure implementation for CII water use, and describe the progress it has made towards meeting its urban water use objectives. [11]

Starting in 2023, the State Water Resources Control Board (the "State Board") may issue informational orders to urban retail water suppliers that do not meet their water use objectives. Informational orders are intended to obtain information to identify any technical assistance the supplier may need to meet its objectives. [12] By 2024,

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the State Board may issue written notices to suppliers that do not meet their objectives; written notices are intended to warn a supplier that it is not meeting its water use objectives, and may request the supplier address areas of concern. By 2025, the State Board may issue conservation orders to those suppliers that fail to meet their water use objectives. The State Board is authorized to issue conservation orders requiring the supplier to take certain actions to increase water-use efficiency. [13]

An urban retail water supplier can be held liable for violating an order or regulation issued pursuant to the new laws. [14] If the violation occurs during a critically dry year or a period when the Governor has issued a proclamation of a state of emergency, the penalty is $10,000 for each day the violation occurs. Violations that occur at other times are assessed at $1,000 for each day the violation occurs. [15] Notably, only an urban water supplier may be fined. [16] The new law makes no provision for fines to be assessed against individual customers of the water supplier. Furthermore, existing law already authorizes public entities that supply water to urban customers to enact and enforce ordinances that penalize the excessive use of water by their customers. [17]

Existing law already requires urban retail water suppliers to submit urban water management plans every five years to the DWR. [18] Now, under the new law, urban retail water suppliers will be required to prepare and adopt water shortage contingency plans as part of their urban water management plans. [19] These contingency plans must include an analysis of water supply reliability, as well as the procedures the supplier will use each year to conduct an annual water supply and demand assessment, or "stress test." [20] Suppliers also are required to provide drought risk assessments that examine water shortage risks that may exist in the face of a drought lasting five consecutive years. [21]

ASSEMBLY BILL 1668

Assembly Bill 1668 ("AB 1668") establishes the authority of the State Board, in coordination with the DWR, to set standards for efficient residential water use. [22] The bill also contains discrete provisions that relate specifically to small water suppliers, rural communities, and agricultural water suppliers, described in more detail below. [23]

Efficiency Standards for Indoor and Outdoor Residential Use

AB 1668 sets the initial standard for *indoor* residential water use at 55 gallons per capita per day, which is the same as the existing standard for indoor residential water use. [24] This ratchets down to 52.5 gallons per capita per day on January 1, 2025 and then to 50 gallons per capita per day on January 1, 2030.

The DWR will recommend standards for *outdoor* residential water use no later than October 1, 2021. The standards will apply to irrigable lands and include provisions for swimming pools, spas, and other water features. The DWR will also recommend standards for the outdoor irrigation of landscape areas with dedicated irrigation meters, or other means of calculating outdoor irrigation use in connection with CII water use, no later than October 1, 2021.

Performance Measures for CII Water Use

By October 1, 2021, the DWR will recommend performance measures for CII water use, based in part on input from CII water users. [25] Performance measures are actions to be taken by urban retail water suppliers to increase the efficiency of CII water users. [26]

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Also by October 1, 2021, the DWR and the State Board will recommend appropriate variances for unique water uses such as evaporative coolers, livestock, fluctuations in seasonal populations, landscaped areas irrigated with recycled water having high levels of total dissolved solids, soil compaction and dust control, pond and lake supplements to sustain wildlife, fire protection, or commercial or noncommercial agricultural use. [27] The DWR also will recommend a threshold of significance for each recommended variance. An urban retail water supplier must request and receive State Board approval before including a variance in its urban water use objective. [28]

Small Water Suppliers, Rural Communities, and Agricultural Water Suppliers

AB 1668 also contains provisions to identify small water suppliers and rural communities that may be vulnerable to water shortage in times of drought. The DWR will propose recommendations regarding the implementation of countywide drought and water shortage contingency plans for small water suppliers and rural communities by January 1, 2020. [29]

AB 1668 changes existing law regarding agricultural water management plans. [30] An “agricultural water supplier” is defined as a publicly or privately owned water supplier that provides water to 10,000 or more irrigated acres, excluding recycled water. [31] Agricultural water suppliers must now quantify the efficiency of agricultural water use within their service area and include annual water budgets in their water management plans, based on inflow and outflow components for their service area. [32]Based on the water budgets, plans must now identify water management objectives focused on improving water system efficiency. An agricultural water supplier must also identify, prioritize, and implement actions to reduce water loss, improve water system management, and meet other water management objectives identified in the plan. [33] Finally, agricultural water suppliers must develop drought plans for periods of limited water supply. [34]

KEY EXEMPTIONS

Notably, large water consumers in some sectors of the economy are exempt from the new legislation. Both bills hold that “process water” [35] is not subject to performance measures. Process water is defined as water used by industrial water users for producing a product, as well as water used to cool machinery or buildings used in the manufacturing process. Process water also includes water used in control rooms, data centers, laboratories, clean rooms, and other industrial facilities. [36]

Commercial data centers will be exempt from performance measures for their use of water to cool machinery, as both bills specifically carve out this type of water use. [37] Additionally, existing law holds that an urban retail water supplier that has a substantial percentage of industrial water use in its service area may exclude process water from the calculation of gross water use to avoid a disproportionate burden on another customer sector. [38]

Anticipated Impacts

The new laws may significantly impact commercial and industrial operations that irrigate outdoor landscape areas. The DWR will recommend standards and performance measures pertaining to the irrigation of outdoor landscapes by commercial, industrial, and institutional water users by October 1, 2021. The standards and performance measures could mandate a reduction in water use to meet the objectives. Critically, an opportunity exists for stakeholders to participate in developing CII water use best management practices and performance measures before the DWR and the State Board make their recommendations. The DWR and the State Board have not yet begun to solicit public participation regarding CII water use, but large urban outdoor water users, such as golf courses, parks, public gardens, and academic institutions with large campuses should participate in

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the public comment period once it is announced.

Agricultural water suppliers will be pushed to improve water system efficiency by preparing an annual water budget. It is not clear who will fund the preparation of these budgets, but as urban water suppliers may recover their costs in preparing similar budgets by increasing their rates, potentially agricultural water suppliers could do the same. [39] Farmers, ranchers, and vineyards already facing water shortages will face new restrictions on their water uses and may be asked to shoulder the costs of preparing these budgets to boot.

CONCLUSION

California's new plan for putting urban and agricultural water suppliers on a “water budget” is certain to impact both commercial and agricultural industries. Most of the changes required by the bills will not take effect until at least 2021, when the DWR and the State Board recommend additional water use standards. In the interim, opportunities will emerge for stakeholders to provide feedback to both the DWR and the State Board regarding what the new standards should entail. We will continue to provide updates and are available to answer any questions about the new bills and their anticipated impacts.

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[1] Assemb.Floor Analysis 2017-2018 Leg.-2917, at 4 (Cal. 2018).

[2] *See* CAL. WATER BDS., WATER EFFICIENCY LEGISLATION WILL MAKE CALIFORNIA MORE RESILIENT TO IMPACTS OF FUTURE DROUGHTS, FACT SHEET 1 (2018), https://www.waterboards.ca.gov/publications_forms/publications/factsheets/docs/water_efficiency_bill_factsheet.pdf.

[3] *See* S.B. 606, 2017-2018 Leg. (Cal. 2018); Assemb. B. 1668, 2017-2018 Leg. (Cal. 2018).

[4] *See* Assemb. B. 1668, 2017-2018 Leg. § 7 (Cal. 2018); S.B. 606, 2017-2018 Leg. (Cal. 2018).

[5] S.B. 606, 2017-2018 Leg. § 5 (Cal. 2018).

[6] *Id.*; Assemb. B. 1668, 2017-2018 Leg. § 4 (Cal. 2018).

[7] S.B. 606, 2017-2018 Leg. § 8 (Cal. 2018).

[8] *Id.*

[9] See Assemb. B. 1668, 2017-2018 Leg. § 7 (Cal. 2018) (describing standards for calculating aggregate amounts).

[10] S.B. 606, 2017-2018 Leg. § 8 (Cal. 2018).

[11] *Id.* § 10.

[12] S.B. 606, 2017-2018 Leg. § 11 (Cal. 2018).

[13] *Id.*

[14] Assemb. B. 1668, 2017-2018 Leg. § 3.

[15] *Id.*

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[16] *See generally* Ryan Sabalow & Dale Kasler, *No, Californians, you won't be fined $1,000 if you shower and do laundry the same day*, SACRAMENTO BEE (June 6, 2018).

[17] *See* CAL. WATER CODE § 375-78 (West 2018).

[18] *See* CAL. WATER CODE § 10610-56 (West 2018).

[19] S.B. 606, 2017-2018 Leg. § 24 (Cal. 2018).

[20] *Id.* § 28; CAL. WATER BDS., FACT SHEET, *supra* note 2, at 2.

[21] S.B. 606, 2017-2018 Leg. § 36 (Cal. 2018).

[22] Assemb. B. 1668, 2017-2018 Leg. § 7 (Cal. 2018).

[23] *Id.* § 8.

[24] CAL. WATER CODE § 10608.20 (West 2018)

[25] Assemb. B. 1668, 2017-2018 Leg. § 8 (Cal. 2018)

[26] *Id.* § 4.

[27] *Id.* § 7.

[28] *Id.* § 7. Also by October 1, 2021, DWR will recommend guidelines and methodologies that identify how urban retail water suppliers should calculate their urban water use objective, addressing the existence of irrigable land, population, landscape use, precipitation, climate data, changes to landscape area and population, and accuracy levels for supporting data. *Id.*

[29] Assemb. B. 1668, 2017-2018 Leg. § 8 (Cal. 2018).

[30] CAL. WATER CODE § 10820 et seq. already provides that agricultural water suppliers must create water management plans. While § 10853 holds that agricultural water suppliers that supply less that 25,000 irrigated acres do not need to comply with the water management requirements listed in the chapter unless sufficient funding has been provided to them for purposes of creating a water management plan, it is not clear from the new law who will ultimately be responsible for the costs of complying with the new standards. *See* CAL. WATER CODE § 10853; Assemb. B. 1668, 2017-2018 Leg. § 8 (Cal. 2018).

[31] CAL. WATER CODE § 10608.12 (West 2018).

[32] Assemb. B. 1668, 2017-2018 Leg. § 15 (Cal. 2018).

[33] *Id.*

[34] *Id.* § 16.

[35] *Id.* § 4; S.B. 606, 2017-2018 Leg. § 5 (Cal. 2018).

[36] *Id.*

[37] *Id.*

[38] CAL. WATER CODE § 10608.24(e) (West 2018).

[39] *See* S.B. 606, 2017-2018 § 45; *see also, supra* note 30.

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