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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

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**Bill No:** AB 1254                      **Hearing Date:** July 11, 2017  
**Author:** Wood  
**Version:** March 21, 2017  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** SJ

**Subject:** *Production or Cultivation of a Controlled Substance: Civil and Criminal Penalties*

## HISTORY

**Source:** California District Attorneys Association

**Prior Legislation:** Proposition 64, passed by voters on November 8, 2016  
SB 837 (Committee on Budget and Fiscal Review) Ch. 32, Stats. 2016  
SB 643 (McGuire) Ch. 719, Stats. 2015  
AB 2284 (Chesbro) Ch. 390, Stats. 2012

**Support:** California Association of Professional Scientists; San Diego County District Attorney's Office; Rural County Representatives of California; Yuba County Board of Supervisors; Yuba County District Attorney's Office

**Opposition:** American Civil Liberties Union of California (unless amended)

**Assembly Floor Vote:** 76 - 0

## PURPOSE

*The purposes of this bill are to authorize the imposition of a civil penalty for each day that a person violates any of several code sections related to the cultivation of a controlled substance and to create a misdemeanor for the unlicensed diversion or use of water for cannabis cultivation.*

*Existing law* establishes civil penalties for environmental damage to natural resources in connection with the production or cultivation of a controlled substance on specified lands, or while trespassing on public or private land in connection with the production or cultivation of a controlled substance. Penalties range from \$8,000 to \$40,000 for each violation. (Fish & G. Code, § 12025, subd. (a)(1).)

*Existing law* establishes civil penalties for environmental damage to natural resources in connection with the production or cultivation of a controlled substance on land that a person owns, leases, or otherwise uses or occupies with the consent of the landowner. Penalties range from \$8,000 to \$40,000 for each violation. Each day that a violation occurs or continues to occur constitutes a separate violation. (Fish & G. Code, § 12025, subs. (b)(1) & (b)(2).)

*Existing law* prohibits an entity from substantially diverting or obstructing the natural flow of, or substantially changing or using any material from the bed, channel, or bank of, any river, stream,

or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake, except as specified. A civil penalty of not more than \$25,000 may be assessed for each violation. A civil action shall be brought by the Attorney General upon complaint by the department, or by the district attorney or city attorney in the name of the people of the State of California. (Fish & G. Code, §§ 1602, subd. (a) & 1615, subds. (a) & (d).)

*Existing law* provides that all water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is public water of the State. (Wat. Code § 1201.)

*Existing law* provides that liability may be imposed for the diversion or use of water for cannabis cultivation for which a license is required, but has not been obtained. Civil liability may be imposed by the superior court, and the Attorney General, upon the request of the board, shall petition the superior court to impose, assess, and recover those sums. (Wat. Code, § 1847, subds. (b)(4) & (c).)

*Existing law* provides that a person or entity that engages in the unlicensed diversion or use of water for cannabis cultivation may be liable for civil penalties in an amount not to exceed the sum of the following:

- (a) \$500, plus \$250 for each additional day on which the violation continues if the person fails to correct the violation within 30 days after the board has called the violation to the attention of that person.
- (b) \$2,500 for each acre-foot of water diverted or used in violation of the applicable requirement. (Wat. Code, § 1847, subd. (a).)

*Existing law* requires the Water Quality Control Board, in consultation with the Department of Fish and Wildlife, to adopt principles and guidelines for diversion and use of water for cannabis cultivation in areas where cannabis cultivation may have the potential to substantially affect instream flows. The principles and guidelines adopted under this section may include, but are not limited to, instream flow objectives, limits on diversions, and elimination of barriers to fish passage. A diversion for cannabis cultivation is subject to both the interim principles and guidelines and the interim requirements in the period before final principles and guidelines are adopted by the board. (Wat. Code, § 13149, subds. (a)(1)(A) & (b)(4).)

*Existing law* provides that every person who feloniously steals, takes, carries, leads, or drives away the personal property of another, or who fraudulently appropriates property which has been entrusted to him or her, or who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. (Pen. Code, § 484, subd. (a).)

*Existing law* defines grand theft as theft in cases where the value of the money, labor, or real or personal property taken exceeds \$950, except as otherwise provided. Theft in other cases is petty theft. (Pen. Code, §§ 487, subd. (a) & 488.)

*Existing law* provides that every person who, without authority of the owner or managing agent, and with intent to defraud, takes water from any canal, ditch, flume, or reservoir used for the purpose of holding or conveying water for manufacturing, agricultural, mining, irrigating, generation of power, or domestic uses, is guilty of a misdemeanor. If the total retail value of all the water taken is more than \$950, or if the defendant has prior conviction under this section, then the violation is punishable by imprisonment in a county jail for not more than one year, or in the state prison. (Pen. Code, § 592.)

*Existing law* provides that any person who, with the intent to obtain for himself or herself utility services without paying the full lawful charge, or with intent to enable another person to do so, or with intent to deprive any utility of any part of the full lawful charge for utility services it provides, commits, authorizes, solicits, aids, or abets the diversion of a utility service or causes the diversion of a utility service is guilty of a misdemeanor. (Pen. Code, § 498, subd. (b)(1).)

*Existing law*, the Medical Cannabis Regulation and Safety Act (MCRSA), regulates medical cannabis in California, including its cultivation, transportation, storage, distribution, and sale. (Bus. & Prof. Code §§ 19300 *et seq.*)

*Existing law*, the Adult Use of Marijuana Act (AUMA), permits adults 21 years of age or older to legally grow, possess, and use cannabis for non-medical purposes, as specified. Establishes the framework for licensing and regulation of cannabis cultivation. (Bus. & Prof. Code §§ 26000 *et seq.*)

*This bill* provides that each day a person causes environmental damage to natural resources in connection with the production or cultivation of a controlled substance on specified lands, or while trespassing on public or private land in connection with the production or cultivation of a controlled substance, constitutes a separate violation.

*This bill* provides that a person or entity who diverts or uses water for cannabis cultivation for which a license is required, but has not been obtained, is guilty of a misdemeanor punishable as follows:

- a) For the first violation by a fine not to exceed \$1,000, or imprisonment in a county jail for not more than six months, or by both that fine and imprisonment.
- b) For any second or subsequent violation, or for a violation that occurs during a period for which the Governor has issued a proclamation of a state of emergency, as specified, based on drought conditions, by a fine not to exceed \$5,000, or imprisonment in a county jail for not more than one year, or by both that fine and imprisonment.

*This bill* provides that enforcement pursuant to this subdivision does not preclude enforcement of authorized civil penalties.

## COMMENTS

### 1. Need for This Bill

According to the author:

Currently, lawful cannabis cultivators who violate environmental laws can be penalized on a per day, per violation basis. However, current law does not specify that unlawful cannabis cultivators (“trespass or illegal growers”), who violate the same environmental laws, can be assessed on a per day, per violation basis. Additionally, current law outlines penalties including possible criminal prosecution for the theft of water from various conveyance or storage methods, but the theft of water from a river is not included in statute.

### 2. Water Diversion for Cannabis Cultivation

Several studies have demonstrated the potential for cannabis cultivation to have negative consequences on public resources, such as water, plants, and animals, including developing salmon. For example, two recent studies detail the impacts on California rivers as a result of water diversions for cannabis operations and other practices associated with cannabis cultivation. (See Carrah et. al, *High Time for Conservation: Adding the Environment to the Debate on Marijuana Liberalization* (2015)

<<https://academic.oup.com/bioscience/article/65/8/822/240374/High-Time-for-Conservation-Adding-the-Environment>> [as of Jul. 4, 2017] and Bauer et. al, *Impacts of Surface Water Diversions for Marijuana Cultivation on Aquatic Habitat in Four Northwestern California Watersheds* (2015) <<http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0120016>> [as of Jul. 4, 2017].).

More than one state agency is tasked with regulating the environmental impacts of cannabis cultivation. The State Water Resources Control Board regulates the environmental impacts of cannabis cultivation on water quality, and the Department of Fish and Wildlife regulates the environmental impacts of cannabis cultivation on public resources such as wildlife.

### 3. Prosecuting Water Diversion

The proponents of this bill assert that the diversion of river water, particularly for cannabis cultivation, has increasingly become a problem. The proponents further state that a person cannot be prosecuted for the diversion of river water under the Penal Code. Penal Code section 592 addresses theft of water from various storage apparatuses such as a reservoir or canal. This section requires that the water have an owner (i.e., someone has a personal property right in the water) and that the water being stored is done for the purpose of specified industrial or domestic uses. Penal Code section 498 addresses theft of water from a utility service (i.e., theft of privately owned water). Penal Code section 484 *et seq.* addresses the various types of larceny. All of the theft statutes require that the “the personal property of another” be taken in some manner that the code specifies is unlawful.

As demonstrated in *People v. Davis* (2016) 3 Cal.App.5th 708, prosecuting theft of public sources of water presents challenges. In the *Davis* case, the defendant had unlawfully diverted water from a stream to irrigate a marijuana field. The defendant was prosecuted and convicted of

two misdemeanors, diverting the natural course of a stream (Fish & G. Code, § 1602) and petty theft (of water) (Pen. Code § 488). On appeal, the defendant argued that “there cannot be a theft in this case as a matter of law because...the State of California has only a regulatory interest in use of these public waters that otherwise are not personalty that can be the subject of a larceny.” The appellate court agreed with the defendant and reversed his conviction for petty theft, holding that “there cannot be simple larceny of uncaptured flowing water.” In reaching its conclusion, the Court reasoned:

As an essential element of larceny, there must be personal property that is subject to ownership. (2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Property, § 17, p. 41.)

...Water is a resource for which “[o]wnership ... is vested [collectively] in the state’s residents ... .” (*Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 888). “Hence, the cases do not speak of the ownership of water, but only of the right to its use.” (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 100.) The public trust doctrine (dating to Roman law) rests on the need for the public’s unfettered access to a “ ‘gift[] of nature’s bounty’ ” like water, such that private property rights are not recognized in the resource; “ ‘the rule of water law [is] that one does not own a property right in water in the same way [one] owns [a] watch or ... shoes, but ... only [a] usufruct—an interest that incorporates the needs of others.’ ” (*Zack’s, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1175–1176; cf. *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 436 [public trust applies to diversions from nonnavigable tributaries of navigable waters].) Indeed, a resource subject to a public trust is considered *inalienable*, such that the state could not grant a property right in it: “ ‘The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust [in] which they are held, therefore, is governmental and cannot be alienated ... .’ ” (*National Audubon, supra*, 33 Cal.3d at p. 438.)

*State of California* makes clear that the state in its role as public trustee does not have *any proprietary ownership* of public waters, beyond any riparian or appropriative rights it might acquire as a property owner. (*State of California, supra*, 78 Cal.App.4th at pp. 1022, 1030 & fn. 16 [state does not own groundwater for purposes of exclusionary clause in insurance policy].)

A characterization of a state as a “trustee” is merely a legal fiction of the 19th century expressing the state’s police power over its resources. (*People v. Brady* (1991) 234 Cal.App.3d 954, 958.) In actuality, these resources do not have any owner until lawfully captured, at which point they become the personal property of the captor. (*Ibid.* [wild creatures are not subject to private ownership]; *Siskiyou County Farm Bureau v. Department of Fish & Wildlife* (2015) 237 Cal.App.4th 411, 447 [water belongs “to the people” and does not become property of any individual user unless lawfully captured]; *State of California, supra*, 78 Cal.App.4th at p. 1026 [“The People[’s]” ownership of water does not authorize individual Californians to take water without right]; *Fullerton v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 590, 598 (Fullerton) [no private property interest in corpus of flowing water]; see *Strawberry Water Co. v. Paulsen* (Ct.App. 2008) 220 Ariz. 401, 407 [no right of ownership in water until

lawful withdrawal from common supply] (*Strawberry Water Co.*); *Clark v. State* (1917) 1917 OK CR 206 [running water often compared “to wild animals, birds, and fishes, which, before capture and confinement, belong to no one, but after capture belong to [those] who capture[] them”].) If the captor releases the water, “the water becomes again nobody’s property.” (*Strawberry Water Co., supra*, 207 P.3d at p. 660.)

*Davis* makes clear that the state does not have a personal property interest in public waters, and therefore, there cannot be a theft of public water. However, civil remedies are available. For example, Fish and Game Code section 1602 prohibits “an entity from substantially diverting or obstructing the natural flow of, or substantially changing or using any material from the bed, channel, or bank of, **any river, stream,** or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake, except as specified.” A civil penalty of \$25,000 may be assessed for each violation. (Fish & G. Code, § 1615, subd. (a).) A civil action shall be brought by the Attorney General upon complaint by the department, or by the district attorney or city attorney in the name of the people of the State of California. (Fish & G. Code, § 1602, subd. (d).)

In addition, Water Code section 1847, subdivision (b)(4) provides that liability may be imposed for the “diversion or use of water for cannabis cultivation for which a license is required, but has not been obtained.” Civil penalties may be imposed in an amount not to exceed the sum of the following: (1) \$500, plus \$250 for each additional day on which the violation continues if the person fails to correct the violation within 30 days after the board has called the violation to the attention of that person; and (2) \$2,500 for each acre-foot of water diverted or used in violation of the applicable requirement. (Wat. Code, § 1847, subd. (a).) Civil liability may be imposed by the superior court, and the Attorney General, upon the request of the board, shall petition the superior court to impose, assess, and recover those sums. (Wat. Code, § 1847, subd. (c).)

This bill amends the Water Code to include a provision creating a new misdemeanor for the unlicensed diversion or use of water for cannabis cultivation. It would be punishable as follows:

- a) For the first violation by a fine not to exceed \$1,000, or imprisonment in a county jail for not more than six months, or by both that fine and imprisonment.
- b) For any second or subsequent violation, or for a violation that occurs during a period for which the Governor has issued a proclamation of a state of emergency, as specified, based on drought conditions, by a fine not to exceed \$5,000, or imprisonment in a county jail for not more than one year, or by both that fine and imprisonment.

It is unclear how the conduct criminalized in this bill (i.e., diversion, or theft of water) is different from the conduct in the *Davis* case which the court found could not be prosecuted criminally. It may be more appropriate to increase the civil penalties associated with violations, and to make clear that local prosecutors, city attorneys, and county counsel, in addition to the Attorney General, may enforce the provision of the Water Code prohibiting the unlicensed diversion or use of water for cannabis cultivation.

#### 4. Argument in Support

The California District Attorneys Association, the bill's sponsor, writes:

Fish and Game Code section 12025 provides for a civil cause of action as well as enhanced civil penalties for violations of various environmental laws in connection with cultivation of a controlled substance. In most cases, this substance is cannabis, though it can also relate to opium poppies. These civil penalties can be significant, ranging from \$8,000 to \$40,000 per violation, and they greatly enhance the ability to prosecute – and deter – environmental violations connected to controlled substance cultivation.

Current law explicitly provides that violations may be penalized “per day” of violation when such violations occur on the land the violator owns, leases, or otherwise permissively uses. (FGC 12025(b)(2).) This can result in significant penalties and, ultimately, deterrence. Oddly, however, current law is silent as to whether violations are “per day” when the cannabis cultivation is done without permission – i.e. in a “trespass grow” situation. (FGC 12025(a).) Statutory construction principles dictate that if the legislature provided for something in one subdivision, but left it out in another, courts should interpret such omission as intentional. Therefore, per-day penalties are not available in trespass grow situations.

Thanks to this anomaly in the Fish and Game Code, otherwise-lawful cultivators are penalized more than those cultivating in a trespass context. It limits penalties to prosecutors in trespass situations, and arguably incentivizes cultivation in a trespass context, since trespass growers are not currently subject to the per-day penalty in FGC 12025. This should not be the case, and the issue is of increasing importance given the recent passage of commercial medical marijuana (MMRSA) and legalization of recreational marijuana (AUMA).

In addition to those environmental violations, criminal theft of water from a river is not adequately addressed under the Penal Code.

Penal Code section 592, as currently written, addresses theft of water from various conveyance or storage methods, but does not address the theft of water from a river. Penal Code section 498 addresses the theft of water from a utility service and is intended to apply to household water service.

Both Butte and Yuba Counties have encountered the diversion (theft) of river water in the last year by individuals who do not hold water rights. Butte's case is currently under appeal with the 3rd District Court of Appeal. Yuba's case was dismissed by the trial judge after equating river water with ocean water, and is currently under local appeal....

In the Yuba case, a Nevada County marijuana cultivator repeatedly drew Yuba River water into a 500 gallon holding tank in the bed of his pickup truck from a gas-powered pump. He then drove from the river bank back to his alleged grow site. In other cases, individuals are filling water trucks with river water and

driving them to other parts of the state where they can sell the water for \$7,000 or more per truck load.

This growing problem demands a legislative response, and AB 1254 will put appropriate and effective penalties in place.

## 5. Argument in Opposition

The American Civil Liberties Union of California writes:

Current law provides adequate disincentives to [diversion or use of water for cannabis cultivation without a license]. By creating a new misdemeanor, this bill undermines the voter-approved Adult Use of Marijuana Act (AUMA) and may exacerbate racial disparities in marijuana enforcement.

AB 1254 seeks to make unlicensed diversion or use of water for cannabis cultivation a misdemeanor subject to certain criminal penalties. While regulating water use and cannabis cultivation are laudable goals, unlicensed water use for cannabis cultivation is already prohibited. Violations can result in substantial civil fines. These existing penalties are sufficient to deter the targeted conduct....

Criminal penalties for unlicensed water use for cannabis cultivation will do little to prevent such conduct, but it may increase misdemeanor prosecutions. We are concerned about the racial disparities that have historically plagued implementation of criminal laws regarding marijuana and believe that extending misdemeanor prosecutions to this conduct would inevitably target communities of color.

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