
June 11, 2019

TO: Members, Assembly Committee on Environmental Safety and Toxic Materials

**SUBJECT: SB 1 (ATKINS) CALIFORNIA ENVIRONMENTAL, PUBLIC HEALTH, AND WORKERS DEFENSE ACT OF 2019**
**HEARING SCHEDULED – JUNE 18, 2019**
**OPPOSE/JOB KILLER – AS AMENDED MAY 21, 2019**

The California Chamber of Commerce and the organizations listed respectfully **OPPOSE SB 1 (Atkins),** which the Chamber has labeled as a **JOB KILLER**. Our opposition to the bill is **not** with the Author's intent to protect California's air, water, biodiversity and citizens from any federal changes that undermine the state's existing standards. Our criticism is focused solely on the significant and entirely avoidable negative consequences resulting from language in the bill that:

- substantially threatens water supply reliability for millions of Californians;
- forces state agencies to review irrelevant federal laws, regulations and guidelines;

- instigates costly litigation through the creation of brand new private right of actions;
- removes basic due process for everyone by waiving Administrative Procedure Act safeguards; and
- automatically integrates federal baseline standards into California law without agency review.

This coalition has proposed reasonable amendments that preserve all goals in the bill, avoid all identified negative impacts, and removes all industry opposition. Unfortunately, these amendments have not been taken. While we appreciate some of the amendments taken to address our concerns, the majority and most significant problems of the bill remain unresolved.

This letter outlines in detail these remaining issues.

1. **Undermines the State Water Project, Central Valley Project and Voluntary Agreements by removing DFW's ability to apply new science & adaptive management, thereby dismantling years of negotiations.**

**SB 1** threatens to undermine current state efforts to utilize science-based decision making to manage and provide reliable water supplies for California and protect, restore, and enhance the ecosystems of the Bay-Delta and its tributaries. As drafted, the bill handcuffs the California Department of Fish and Wildlife (DFW) from being able to apply new science, new adaptive management practices and or consider new on the ground conditions when issuing Biological Opinions (BiOps), Incidental Take Permits or Incidental Take Statements pursuant to the Endangered Species Act by effectively freezing all permits to the January 19, 2017 date certain. In many cases, these permits rely on decades old science and now outdated on the ground conditions.

**SB 1's** rigid approach to water management is counterproductive to the historic suite of integrated actions under the voluntary plan envisioned by the Brown and Newsom administrations. Voluntary agreements are essential to advancing a comprehensive approach of flow and non-flow measures to provide reliable water supplies for all of California**. SB 1** prevents their full implementation by preventing DFW from allowing any changes to the BiOps or incidental take permits that may be included in the voluntary agreements.

The May 21st amendments introducing a Savings Clause to protect the voluntary agreement **"process"** misunderstands our opposition and fails to address our concern.

   a. **Voluntary agreements are vital to replacing the old and outdated unimpaired flows approach.**

For several decades now, more than 1 million acre-feet has been dedicated to Delta outflow through the water quality control plan (State Water Board D-1641) and Biological Opinions under what is now considered an outdated unimpaired flows approach to water management. During this same time, fish in the Delta have declined and water supply reliability has been reduced, thus defying the state's goals of improving water supply reliability and ecosystem enhancement.

Governor Newsom and his Administration has led a coalition of federal, state and local agencies, conservation groups and other stakeholders to develop a collaborative approach to enhance fish and wildlife habitat throughout California and provide reliable water supplies to communities. California Public water agencies that deliver water to approximately 75 percent of all Californians and some of the state's most productive farmland and wildlife refuges have been negotiating voluntary agreements to provide water, money, and non-flow measures, including habitat restoration managed through a collaborative science-based approach to support environmental objectives through a broad set of tools, while protecting water supply reliability and improve the health of California waterways. Voluntary agreements are essential for this new approach to work – yet **SB 1** would dismantle years of progress toward adaptive management of California's water resources.

**b. Voluntary Agreements are enforceable by law.**

Voluntary agreements are legally enforceable instruments under the specified terms consistent with the State Water Board's responsibilities, with each voluntary agreement having a minimum 15-year term.[1] Updating California's water management through voluntary agreements is essential to advancing a comprehensive approach of flow and non-flow measures to improve the health of the rivers and to provide reliable water supplies for years to come. California state agencies need to be able to apply the most up-to-date science and management practices to effectively implement years of negotiated voluntary agreements.

**SB 1** directly impacts and undermines this entire process by arbitrarily and unnecessarily defining "baseline federal standards" to include any incidental take permits, incidental take statements, or biological opinions in effect as of January 19, 2017. If certain provisions in **SB 1** are triggered, it would lock in the current BiOps issued by NOAA's National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) on the long-term operations of the State Water Project (SWP) and Central Valley Project (CVP), which include Reasonable and Prudent Alternatives (RPAs) designed to alleviate jeopardy of listed species and adverse modification of critical habitat. The U.S. Bureau of Reclamation (Bureau), NMFS and the Department of Water Resources annually review the BiOps to determine the efficacy of the prior years' water operations and regulatory actions prescribed by their respective RPAs, with the goal of developing lessons learned, incorporating new science, and making appropriate scientifically justified adjustments to the RPAs or their implementation to support real-time decision making for the next water year.

If changes need to be made, the Bureau holds public hearings to gain input from stakeholders to ensure all parties are aware of the proposed changes and can offer input into how the system should be operated. As we have seen in these past years of drought, and considering climate change predictions, flexibility in management is essential. This flexibility has also fostered new and innovative collaborative efforts between farmers and researchers to help restore species populations, such as salmon and delta smelt, by creating improved habitat on winter flood plains normally farmed during the spring and summer months. These projects aim to improve water supplies, flood control and the estuary's struggling ecosystem by improving infrastructure, flood capacity and habitat throughout the Yolo Bypass and other sections of the Delta. Flexibility in the BiOps is needed to continue to allow and encourage this type of innovation and adaptation to changing conditions and improved science.

**SB 1** would substantially disrupt the Bureau's ability to timely review BiOps, hold public hearings, and employ its discretion to effectively manage water operations in the CVP by attempting to force, in violation of the United States Constitution Supremacy Clause, the California Endangered Species Act provisions into Section 8 of the Federal Reclamation Act of 1902. Inevitably this would create unnecessary litigation.

Our coalition has proposed amendments that are consistent with the purpose of the bill, to use modern science to protect and help improve fish and wildlife in California, while not jeopardizing years of work aimed at better managing and delivering water throughout California.

**2. SB 1's overly broad mandate will have significant fiscal impacts to California agencies.**

If the intent of **SB 1** is to preserve the status quo in California by compelling our state agencies to counteract any federal rollbacks, the present language is too vague and overly broad. The bill should be limited to only circumstances where there is a direct relationship between California and federal environmental laws. California state agencies have *existing* authority to promulgate regulations that exceed federal standards and, with few exceptions, the vast majority of California's environmental and labor regulations already go well beyond federal standards. Indeed, California environmental and labor laws and regulations are some of the most protective standards in the nation. Where California laws already exceed federal standards, or where California law does not rely or reference federal standards, any rollbacks to those federal standards have *no practical effect* on California's human health or the environment. State agencies should focus their limited resources analyzing only federal standards that actually impact state laws and regulations.

[1] https://water.ca.gov/-/media/DWR-Website/Web-Pages/Blogs/Voluntary-Settlement-Agreement-Meeting-Materials-Dec-12-2018-DWR-CDFW-CNRA.pdf

For example, the U.S. Environmental Protection Agency's (EPA) decision to withdraw its 2016 oil and gas industry information requests has had no direct impact on California's environmental laws or regulations. Existing California regulations under "the Greenhouse Gas Emission Standards for Crude Oil and Natural Gas Facilities" *exceed* these withdrawn federal standards. The California Air Resources Board (CARB) already regulates onshore and offshore crude oil or natural gas production, separation, storage, processing and transmission facilities to meet specific performance standards, control strategies, and comprehensive leak detection and repairs requirements. Accordingly, the US EPA's decision to roll back federal standards has had no impact on California regulated entities who are required to take actions to limit intentional and unintentional emissions from equipment and operations.

**SB 1** will have significant fiscal impacts to California state agencies, estimated to be in the tens of millions of dollars annually. Amending the bill to focus state agency review on only federal laws and regulations that are directly referenced or relied upon under California law would reduce unnecessary costs to state agencies and provide the regulated community with more regulatory certainty. **SB 1** would achieve its goal of preventing federal rollbacks from negatively impacting California's environmental and labor laws at lower cost to agencies and with more regulatory certainty for businesses.

The fiscal impact of **SB 1** will be considerable on each state agency referenced in this bill. In the Senate Committee on Appropriations analysis, the Committee determined that the annual costs to state agencies would be "likely significant." If the Assembly Appropriations analysis from SB 49 is any guidepost, costs to state agencies will be in the tens of millions of dollars per agency.

3. **"Less Protective" is an equally ambiguous standard subjecting state and local agencies and regulated entities to unnecessary litigation over future, unknown laws and regulations not subject to public notice and comment and with limited legislative oversight.**

**SB 1** attempts to lock in place federal standards "in existence" at a date certain if any changes to federal standards are "less protective." As "less protective" is undefined, open to numerous interpretations in the environmental context, and equally ambiguous to the former "less stringent" standard recently amended out of the bill, **SB 1** will bring significant unintended consequences.

For example, California is currently working to revise its version of the Total Coliform Rule in response to the new Federal Revised Total Coliform Rule, which became effective under federal law on April 1, 2016. The U.S. EPA spent many years developing an *e. coli* standard to replace the fecal coliform standard. The change is a more appropriate standard, as it is measuring the constituent that actually threatens public health, rather than a surrogate that may or may not threaten health.

Another example is if **SB 1** had been in place when the *e. coli* standard was adopted, California could have been prohibited from adopting the improved standard that was just as protective of the environment and public health, but that simply created a more accurate measurement of water quality impairments. Whether this standard is "less protective" under **SB 1** would be a discretionary decision left entirely up to the agency with *no* notice and comment opportunity for the public, no OAL review and very limited legislative oversight. Rushing to place federal environmental or labor laws into California law without any notice, without any stakeholder input, and without any opportunities for change, risks changing standards contrary to more developed science or otherwise incorrectly.

Finally, **SB 1** could undermine negotiations on improvements to manage the water delivery system and fisheries in the Delta have that have been ongoing for years. The ambiguous "less protective" standard would inject significant regulatory uncertainty in these negotiations and subject state agencies to costly new litigation. Under **SB 1**, negotiations about a potential increase in allowed incidental take of salmon at the water pumps in exchange for restrictions on ammonia discharges from publicly owned treatment works could be prohibited because an increased incidental take allowance could be viewed as backsliding against current Endangered Species Act take restrictions. **SB 1** risks precluding an improvement in overall Delta management as interested stakeholders sue the California Department of Fish and Wildlife, arguing over the agency's "less protective" determinations.

These practical implications and consequences should be given serious consideration, especially given the broad language used in the bill and proposed amendments that address these concerns.

4. **SB 1 subjects state and local agencies to lawsuits, including when reasonable persons can differ as to whether a standard/requirement is "less protective" than existing federal law, and encourages such lawsuits through a one-sided attorneys' fees provision and the vague/ambiguous language of the bill.**

**SB 1** will likely instigate a wave of new litigation because anyone can now bring a writ of mandate to compel a state or local agency to perform an act required by, or to review a state or local agency's action for compliance with, any of the laws subject to **SB 1**. The anticipated prevalence of unnecessary prospective litigation is greatly amplified by:

- The vague, ambiguous, and broad language of the bill. For example:
    - The use of a specific date – i.e., January 19, 2017 – to set complex environmental standards is inconsistent with the nature of laws and science, which evolve and are modified, amended, and clarified over time.
    - The determination of which rule or standard is more or less "protective" will likely lead to a difference of opinion - and thus litigation - because stakeholders frequently disagree on scientific applications and approaches depending on their specific interests. One merely needs to point to the disagreements regarding the science as applied to the California WaterFix project as an example. While some view flows as the environmentally superior guiding principle, others believe that there are reasonably prudent alternatives that, together, yield greater environmental protection (even if flows are reduced). The other example noted above regarding whether or not the e-coli standard is more protective than the fecal coliform standard highlights why, had **SB 1** been in place before the federal standard went into effect, litigation would have been a virtual certainty.
- To guard against any potential changes to federal citizen suit provisions, **SB 1** would allow for recovery of attorneys' fees pursuant to Code of Civil Procedure Section 1021.5 and expert fees pursuant to Code of Civil Procedure Section 1033 to enforce any standards promulgated pursuant to this bill. Similarly, the ambiguity as to what constitutes "less protective" under the bill will inevitably instigate lawsuits challenging agency determinations and inevitably force other stakeholders to intervene.
- There are no set timelines for compliance; yet, the litigation provision goes into effect immediately.
- **SB 1** requires the state agencies to analyze and promulgate a list of federal changes, and then conduct emergency rulemaking, etc. in response. This process alone will expose state agencies to litigation *regardless* of whether there is a change at the federal level. This is especially true given no notice or comment is provided for any standards adopted pursuant to the bill.
- **SB 1** also fails to address how a regulated entity will comply with any newly adopted laws or regulations adopted by state or local agencies that once were federal-only requirements. Entities should not be subject to entirely new procedural reporting processes under state law.

5. **SB 1 violates the "single subject" requirement of the California Constitution by including three comprehensive federal labor standards and worker protection statutes into a bill already addressing complex federal environmental laws and regulations.**

Any one of the federal environmental laws referenced under **SB 1** could be an expansive bill on its own. **SB 1** combines three complex federal environmental laws and their respective regulations into a single bill and then takes the extraordinary step of also including the Federal Labor Standards Act of 1938, the Federal Occupational Safety and Health Act of 1970, and the Federal Coal Mine Health and Safety Act of 1969, and all regulations and even guidelines.

Under the California Constitution, "[a] statute shall embrace but one subject, which shall be expressed in its title." (Cal. Const. art. IV, § 9.) This constitutional provision protects against several proposals being combined into a single bill so that legislators, by combining their votes, obtain a majority for a measure. which is contrary to the single-subject rule. (See, e.g. *Harbor v. Deukmejian* (1987) 43 Cal. 3d 1078, 1096) At a minimum, **SB 1** clearly deals with more than one subject by including the federal Fair Labor Standards Act of 1938, the federal Occupational Safety and Health Act of 1970, and the Federal Coal Mine Health and Safety Act of 1969 into a bill addressing a myriad of complex federal environmental laws and regulations, including the Clean Water Act, Clean Air Act, and the Endangered Species Act.

Like in *Deukmejian,* where the California Supreme Court found a single subject violation because that bill's provisions were only "minimally germane" through an excessively general topic like "public welfare," **SB 1** runs afoul of this same standard. **SB 1** joins numerous unrelated labor laws and regulations with environmental laws and regulations under the same excessively general guise of "public welfare."

6. **Rulemaking pursuant to SB 1 will be permanent and without any notice and comment to NGOs, businesses, and the public by circumventing the California Administrative Procedure Act.**

**SB 1** allows state agencies promulgating regulations to completely bypass the notice and comment procedures of the APA in direct violation of procedural due process protections that are the bedrock of the California Constitution. Given the courts' deference to agency decisions on matters within the scope of their expertise and in the absence of an administrative record, the Legislature is providing the agencies authority to conduct formal rulemaking without any legislative, public or OAL notice, comment or oversight. While **SB 1** sunsets 2025, any rules adopted pursuant to the bill <u>are permanent.</u> It is vital that any rules promulgated by California state agencies pursuant to **SB 1** do so consistent with the Administrative Procedure Act (APA). **SB 1** extremely complicated and all-encompassing to allow state agencies to integrate complex federal environmental and labor laws into California law without public notice and comment from NGOs, regulated entities, the public and even other state and local agencies. If an agency makes a mistake, exceeds its authority, abuses its discretion, misinterprets a federal standard, or causes other unforeseen issues when promulgating rules, all of these stakeholders should be able to provide meaningful comment during the administrative rulemaking process. As currently drafted, **SB 1** provides no other remedy other than litigation.

7. **New amendments allow federal baseline standards to automatically be integrated into California law without any state agency oversight or rulemaking.**

Recent amendments to **SB 1** substantially change citizen suit provisions in the bill such that federal baseline standards are <u>now automatically deemed state standards</u> <u>without *any* state agency review.</u>

> **120041.(e)(1)**
> *"[a] federal baseline standard for which there is no analogous state standard that is more protective of public health and safety, the environment, natural resources, or worker health and safety <u>is deemed to be a state standard</u>, a violation of which constitutes a violation of the state analogue statute."*

In other words, even a minor change to a federal citizen suit provision would allow citizens to make a determination as to whether or not the federal baseline standard is more or less protective and then this new section automatically deems these federal baseline standards to be new state standards – again, without any relevant state agency review or rulemaking. This is dangerous public policy that would allow citizens to circumvent the relevant state agencies and create new environmental and labor standards without public accountability. Such a process is both unprecedented and unconstitutional, and will inevitably bring significant and costly litigation from all stakeholders.

For all of these reasons, we **OPPOSE SB 1 (Atkins)**.

Sincerely,

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California Chamber of Commerce

African American Farmers of California, Will Scott, Jr.
Almond Alliance, Elaine Trevino
American Coatings Association, Lauren De Valencia y Sanchez
American Pistachio Growers, Richard Matoian
Agricultural Council of California, Tricia Geringer
Agricultural Energy Consumers Association, Michael Boccadoro
Association of California Water Agencies, Kristopher M. Anderson
Auto Care Association, Aaron Lowe
Brea Chamber of Commerce, Heidi L. Gallegos
Building Owners and Managers Association, Matthew Hargrove
California Agricultural Aircraft Association, Terry Gage
California Association of Realtors, Jelisaveta Gavric
California Association of Winegrape Growers, Michael Miller
California Building Industry Association, Nick Cammarota
California Business Properties Association, Matthew Hargrove
California Chamber of Commerce, Adam J. Regele
California Citrus Mutual, Casey Creamer
California Grain and Feed Association, Chris Zanobini
California Construction and Industrial Materials Association, Adam Harper
California Cotton Ginners and Growers Association, Inc., Roger Isom
California Farm Bureau Federation, Noelle Cremers
California Forestry Association, Kirstin Kolpitcke
California Fresh Fruit Association, George Radanovich
California Independent Petroleum Association, P. Anthony Thomas
California League of Food Producers, Trudi Hughes
California Licensed Foresters Association, Harlan Tranmer
California Manufacturers & Technology Association, Dawn Koepke
California Metals Coalition, James Simonelli
California Paint Council, Lauren De Valencia y Sanchez
California Restaurant Association, Matt Sutton
Camarillo Chamber of Commerce, Gary Cushing
Chemical Industry Council of California, Tom Jacob
CAWA – Representing the Automotive Parts Industry, Rodney Perini
Construction Employers' Association, Traci Stevens
Family Business Association of California, Robert Rivinius
Far West Equipment Dealers Association, Joani Woelfel
Forest Landowners of California, Val Parik
Greater Coachella Valley Chamber of Commerce, Patrick Swarthout
Greater Conejo Valley Chamber of Commerce, Adam Haverstock
Greater San Fernando Valley Chamber, Nancy H. Vanyek
Household & Commercial Products Association, Allyson Azar
International Council of Shopping Centers, Matthew Hargrove
Kern County Hispanic Chamber of Commerce, Jay Tamsi
Murrieta/Wildomar Chamber of Commerce, Patrick Ellis
NAIOP, Matthew Hargrove
National Federation of Independent Business, Shawn Lewis
Nisei Farmers League, Manuel Cunha, Jr.
North of the River Chamber, Jennifer Pitcher
Northern California Water Association, Adam W. Robin
Orange County Business Council, Alicia Berhow
San Gabriel Valley Economic Partnership, William Manis

Oxnard Chamber of Commerce, Nancy Lindholm
Santa Maria Chamber of Commerce, Glenn Morris
Southern California Water Coalition, Charles Wilson
Southwest California Legislative Council, Gene Wunderlich
Torrance Area Chamber of Commerce, Donna Duperron
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West Coast Lumber & Building Material Association, Ken Dunham
Western Agricultural Processors Association, Roger Isom
Western Growers Association, Gail Delihant
Western Independent Refiners Association, Craig Moyer
Western Plant Health Association, Renee Pinel
Western Wood Preservers Institute, Kathy Lynch
Western States Petroleum Association, Shant Apekian

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