

Assembly Day 1

Session One: Updating California Water Laws in the Face of Droughts/Climate Change

Q&A:

1. Irrespective of climate change, we have seen estimates of water rights exceeding availability or being over-allocated by 5 times, or even by 8 times. Do you have any update or comment on that over-allocation?
2. General fund funding for the Water Board's Division of Water Rights was ended under Governor Schwarzenegger. Have you considered the Water Board's funding issues?
3. Who and/or what does your working group understand to be the primary barrier(s) to adopting these recommended reforms? What do you believe is an example of a legal and/or political strategy to address these barriers to reform to CA water law?
4. Should lawyers be allowed to define "legal terms?"
5. Such a detailed report! Thank you. What is the next steps with regards to the review and approval process with the group's recommendations?
6. Has your group read of the recent discovery of the NY State Archivist of the 1828 "Habeas Corpus" action of Soujourner Truth to secure freedom for her son? In New York it was Habeas Corpus and in Alabama it was a property transaction. We had the opportunity then to avoid the Civil War.
7. Will you make recordings of these sessions available to registrants?
 - a. Answer: Yes, the recording of these sessions will be available on our website at pcl.org/registantinfo a day after the webinar.
8. An issue of "money" vs. "values?" The human race is just realizing that fossil fuel left in the ground is far more "valuable" than oil or gas extracted for any "use."
9. Do you envision the Fish and Game Code section 5937 language regarding temperature as being applicable to federal dams as well? What would that process look like?
10. Could you please address the inherent racism of 'first in time, first in right?'. When those early rights were established, no one but white men could claim them.
11. Would any circumstances justify a "Monterey" approach to shortages?
12. Did you consider rights for the river or rights for wetlands?
13. On over-allocation...what about looking at State Water Project as an example? Is it reasonable to for water right holders to receive most of their contracted water in any year? The fact that there are contracts for roughly 4.4 MAF every year creates tremendous political pressure to divert water and (probably) is an unrealistic expectation.
14. Does the California AG actually recognize the plain meaning of the Reclamation Act?
15. I am surprised there is no recommendation related to Water Code, Section 1241...the 5-year forfeiture period for unused water. Doesn't this statute create a perverse incentive to use water? Should this be looked at?
16. Have any of you read Hudson Valley Water Co. v McCarter?
17. Thank you for this thoughtful and practical approach to a hot button issue in which there is frequently more heat than light. That is not to diminish, as Dennis noted, how hard it would be

to even pass these. There are clearly scores of recommendations that you considered and that emerge frequently. Can you illuminate a bit of how you chose these other than requiring unanimity?

18. In light of projected years of drought and global warming, what is being considered for allocating water to saving for a time when the recourse is dangerously scarce? Also, what can be done to monitor useage and enforce that water will not be over-harvested by allocated users?
19. How will instream flow needs for the Delta be determined if Delta smelt and Longfin smelt go extinct?
20. On "rights of rivers," John Muir and William Frederick Bade were "going too far" for both the Sierra Club and the Cristian Church for including all living beings in the "moral community." Maybe now?
21. I hear Clifford Lee's argument, but doesn't that keep the focus on diversion rather than preservation. i.e. Asking water rights holders to take less is in fact asking for "a diversion of a diversion."?
22. How does the Public Trust Doctrine influence the recommendations made?
23. Does the State monitor local government decisions for compliance to State Water Law? What mechanism does the State have for enforcing said law at the local level? How is State water policy integrated into local codes?

Chat Log:

pcl.org/registantinfo

<https://www.pcl.org/media/2022/02/Updating-California-Water-Laws-to-Address-with-Drought-and-Climate-Change.pdf>

I don't seem to be able to save the chat. Can you tell me how?

We will be saving the chat and it will be available at <http://www.pcl.org/registantinfo> after the webinar ends.

If there's a specific portion of the chat you want to copy, like the URL for the report, you can highlight the text in the chat, press control c, then paste into a document by pressing control v

Please repost the report URL. Thank you.

I tried that and it doesn't work. Usually does, but not in this case.

<https://www.pcl.org/media/2022/02/Updating-California-Water-Laws-to-Address-with-Drought-and-Climate-Change.pdf>

You can also highlight it and right click to copy it if ctrl+c doesn't work.

The chat, Q&A, and any documents that are shared will be available at <http://www.pcl.org/registantinfo> after the webinar ends. The recording of this webinar will also be available there a day after the webinar.

In 2019, California Water Research collaborated with the One Water Network of environmental groups to recommend that the Newsom administration fund the Water Board to staff up and determine

instream flow needs. Planning and Conservation League is a member of the One Water Network of environmental groups. <https://cah2oresearch.com/2019/10/14/climate-change-and-instream-flows/>

Jennifer, you may hear from someone who says section 5937 goes back to the 19th century, but as to flows I think you are right, it's a 20th century requirement. Section 5937 stems from an 1870 statute, requiring that dams have fishways, codified in the Penal Code in 1872, with several amendments over the years and now codified in Chapter 3, beginning with section 5900, of Division 6 of Part 1 of the Fish and Game Code.

1. The language referring to allowing water to pass through a fishway was added in a 1915 amendment. Section 5937 stems from an 1870 statute, requiring that dams have fishways, codified in the Penal Code in 1872. The language referring to allowing water to pass through a fishway was added in a 1915 amendment, and the language requiring water to pass even if there is no fishway was added in 1937.

General fund funding for the Water Rights Division of the State Water Resources Control Board was ended under Governor Schwarzenegger.

Actually, it was the Legislature that backed out the State Water Board's General Fund support, to be replaced by fee revenues, and Governor Davis agreed to it, in 2003. Also, the State Water Board continues to get General Fund support, it's just that fee revenues are the primary source of funding for the water rights program.

One problem is that holders of riparian and pre-1914 rights don't pay fees. The State Water Board relies on General Fund support to regulate those diverters (as authorized under the public trust and reasonableness doctrines)

Brief clarification of riparian rights please?

re riparian rights, see pp. 11-13 of the report <https://www.pcl.org/media/2022/02/Updating-California-Water-Laws-to-Address-with-Drought-and-Climate-Change.pdf>

History is in *N. Cal. Water Ass'n v. State Water Res. Control Bd.*, 20 Cal.App.5th 1204 (Cal. Ct. App. 2018)

"In its analysis of the fiscal year 2003-2004 budget bill, the Legislative Analyst's Office (LAO) recommended that general fund support for the water rights program be fully replaced with 'a new annual compliance fee assessed on all water rights holders under the board's jurisdiction.' The Board opposed the LAO's recommendation, arguing that the LAO's analysis incorrectly assumed that all water right actions benefit ... the regulated community (water right permit and license holders)" and failed to take into account water-right holders outside of the Board's jurisdiction who also benefit from the Division's activities but would not be assessed a fee (i.e., RPP right holders)

The public school folks managed to lock in their percentage of the general fund. Is there any other way to lock in general funding for water rights and public trust protection provided during the current budget surplus situation?

What about trying to get a west coast federal funding for state staffing to address temperature and sediment, fish migration barriers and instream flow objectives development and implementation?

I agree the amount of return flow use is a huge hole in the overallocation analyses we have seen so far. Consumptive use models that rely on remote sensing and incorporate meteorological data may provide a better idea of ag water use amounts.

For a different take on overallocation, please see <http://calsport.org/news/wp-content/uploads/CSPA-response-Draft-Water-Portfolio-020620.pdf>

But your report didn't address this.

It isn't just who gets supply now. It is about how that initial wealth allocation keeps compounding.

In 2010, pursuant to the 2009 Delta Reform Act (Water Code section 85087), the Water Board sent a report to the legislature estimating that comprehensively determining instream flows for 100 priority streams outside the Delta and its watersheds would cost \$107 million. The Water Board has been collaboratively developing analytical tools for assessing instream flow needs that may reduce the costs.

Relying on consumptive use will not help determine water diversions in real-time, which is one of the recommendations from the panel.

Your calsports link doesn't appear to work

Although a new appropriation cannot be established to leave water in the stream, an existing appropriation for other uses (e.g., irrigation or domestic use) can be changed to an instream flow right under section 1707 of the Water Code. The right is held by a person or entity (such as a government agency or NGO), not the river itself.

Hey, that was the question I said I wouldn't ask! Ask the one I did. :-)

Beer is on me.

I hear Clifford Lee's argument, but doesn't that keep the focus on diversion rather than preservation. i.e. Asking water rights holders to take less is in fact asking for "a diversion of a diversion."

We need someone to propose a solution to the question of how to fund the expansion of State Board staffing and contract assistance in the development of instream flow objectives and implementing them.

Normally on zoom can copy and save chats, I don't see how to do that under today's format

Some of these other issues were addressed by the Commission to Review California Water Rights Law convened under the first term of Governor Brown during the 1976-77 drought. The report was published in 1978 and is available here:

https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1425&context=caldocs_agencies

Yes, unfortunately the audience cannot save the chat with our version of Zoom. We will be saving the chat and posting it on pcl.org/registantinfo after the webinar ends for you to view it there.

Thank you all for participating. We look forward to working with you to move good ideas forward.

Session Two: Getting to Carbon Neutral: What is the True Cost?

Q&A:

1. Many of these issues depend on what is "officially" recognized as an "acceptable level of poverty." It doesn't "just happen." Is there any initiative to reduce that "acceptable level?"
2. Has Brightline read Prof. Joseph Sax's analysis of Constitutional threats of "slumlordism?" Could be useful in thinking about SRO preservation.....
3. Wow! Great points on "Where accountability is located." Hasn't "location" been "decoupled" in digital times? Your analysis helps us get back to "reality."....
 - a. Answer: This is a really interesting point I think about a lot, especially during the pandemic and remote work - so much of development history and community organizing is rooted in a sense of place, so I don't think location will ever be completely decoupled - but the lines of accountability continue to shift.
4. Doesn't California have a Common Law Public Trust Doctrine that is recognized under Federal Law?
5. What about a broader recognition of common sense?
6. How could other communities or counties get authority to implement indirect source rules?

Chat Log:

So nice to hear your activist and EJ supportive perspectives as a relatively new leader at BAAQMD

DWR's climate scientists have said that unprecedented flooding is likely to come to California. See <https://cah2oresearch.com/2021/11/22/we-need-to-plan-for-unprecedented-flooding-in-california/pcl.org/assembly>