

Water Rights 101

Office of Chief Counsel
STATE WATER RESOURCES CONTROL
BOARD

Mission Statement

STATE WATER RESOURCES CONTROL BOARD
REGIONAL WATER QUALITY CONTROL BOARDS

“To preserve, enhance and restore the quality of California’s water resources, and ensure their proper allocation and efficient use for the benefit of present and future generations.”

Mission Statement

STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

“To establish and maintain a stable system of water rights in California to best develop, conserve and utilize in the public interest the water resources of the state while protecting vested rights, water quality and the environment.”

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Authority of the State Water Resources Control Board

- Constitutional: Article X, §2.
- Statutory: California Water Code.
- Regulatory: California Code of Regulations, title 23.
- Judicial decisions.

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Relationship Between Water Quality and Water Rights

- Quantity affects quality.
- Allocation and efficient use of water can be influenced by water quality standards.

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Jargon

- Note that water rights and water quality use the same words with different meanings.
 - Beneficial use(s)
 - Groundwater

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How the SWRCB Administers Water Rights

- Determines who may divert and use water and the conditions under which they may do so.
 - Processes applications to appropriate unappropriated water.

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How the SWRCB Administers Water Rights

- Processes petitions to change point of diversion, place of use, or purpose of use
 - Permanent changes
 - Temporary transfers
 - Long term transfers

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How the SWRCB Administers Water Rights

- Processes petitions to change point of diversion, place of use, or purpose of use
 - Temporary urgency changes
 - §1707 transfers
 - §1211 treated waste water discharges

How the SWRCB Administers Water Rights

- Resolves complaints.
 - Unauthorized diversions.
 - Interference with prior rights.
 - Violation of term or condition of permit or license.
 - Waste or unreasonable use of water.
 - Injury to public trust resources.

How the SWRCB Administers Water Rights

- Takes enforcement action.
 - Cease and desist orders
 - (Water Code §§1831-1836).
 - Revocation of permits or licenses
 - (Water Code §§1410-1410.2; §§1675-1675.2).
 - Administrative civil liability
 - (Water Code §1055).
 - Injunctive relief (Water Code §1052).

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How the SWRCB Administers Water Rights

- May file statutory adjudications (Water Code §§ 2500-2900).
- Conducts court references (Water Code §§ 2000-2076).
- Conducts groundwater adjudications to protect water quality (Water Code §§ 2100-2102).

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How may the Regional Boards get involved with water rights?

- SWRCB required to consider water quality control plans in deciding whether to approve applications and may impose conditions necessary to carry out the plans. (Water Code § 1258).
 - Ensure that appropriations are consistent with water quality control plans and TMDLs.
 - Protect “beneficial uses.”

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How may the Regional Boards get involved with water rights?

- SWRCB required to consider the public interest, public trust, and reasonableness in deciding whether to approve applications and may impose conditions necessary to implement these interests.
 - Ensure that appropriations are consistent with water quality issues (including minimum streamflows).
 - Protect “beneficial uses.”

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How may the Regional Boards get involved with water rights?

- Protest an application.
- Protest petitions for change.
- File a complaint.

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How may the Regional Boards get involved with water rights?

- Participate in 401 certifications of hydro and other projects.
- Comment on CEQA documents regarding proposed projects.

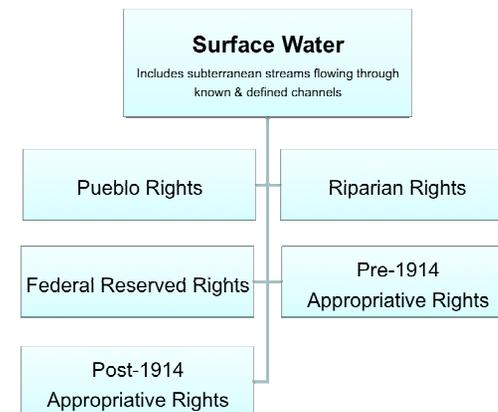
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General Principles

- All water belongs to the people of the state.
- Water rights are a right to the use of water.
- Water use must be reasonable and beneficial.

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Water Rights



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Why should you care what type of right it is?

- The SWRCB does not have permitting authority over all types of water rights.
- Type of right determines enforcement venue: SWRCB or court.

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Components of a Water Right

- Holder of the right
- Source of water
- Priority of water right
- Amount of water
- Point of diversion

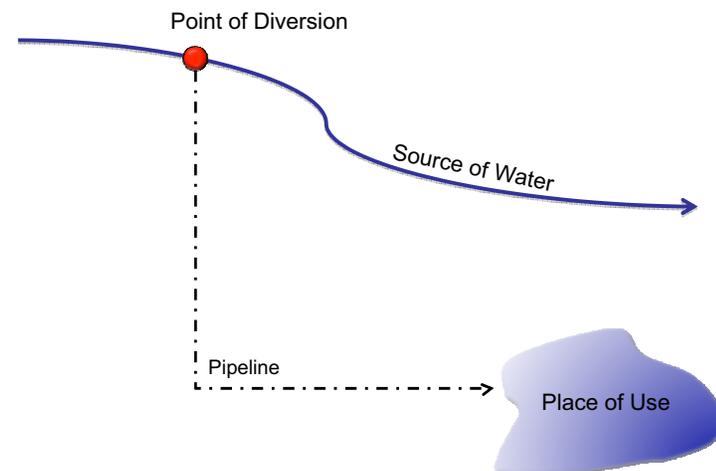
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Components of a Water Right

- Place of use
- Purpose of use
- Season of diversion
- Conditions in the permit/license

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Point of Diversion & Place of Use



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Riparian Rights

- Apply to the natural flow only.
- The parcel of land must at some point be contiguous to the source stream or overlie the subterranean stream.
- For use only on the portion of the riparian parcel within the watershed of the source stream.

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Riparian Rights

- Limited to smallest legal tract in the chain of title.
- Unless preserved, a parcel severed from contiguity by conveyance loses the riparian right, and it cannot be re-established.
- The right does not extend to seasonal storage of water.

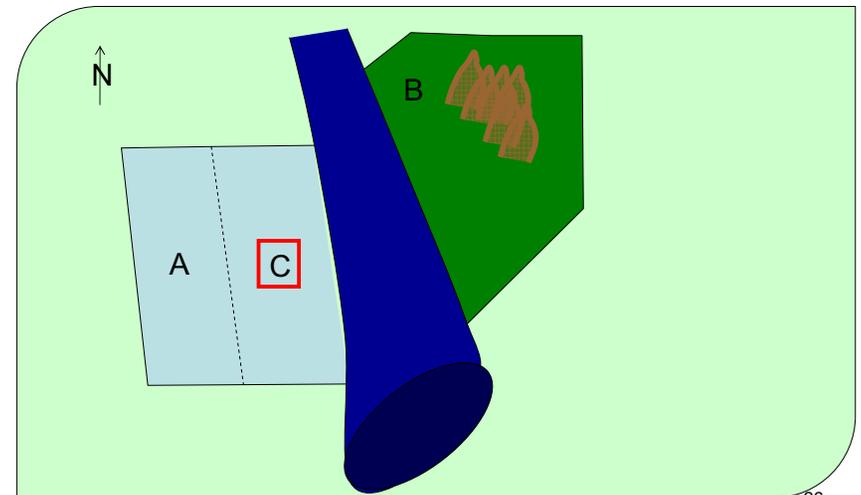
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Riparian Rights

- The right does not depend upon actual diversion of water for its existence and is not lost by nonuse of water.
- The right is limited to the amount which can be reasonably and beneficially used on the riparian parcel. Unless adjudicated, the right is not quantified.
- Riparian rights are correlative, there is no priority system.

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Riparian Rights



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Appropriative Rights

- For diversion of water on parcels that do not abut a stream.
- For storage of water on any parcel.

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Appropriative Rights

- “First in Time -- First in Right.”
- Cannot be increased.
- Can be lost by nonuse.

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Pre-1914 Appropriative Rights

- Apply to surface water and to subterranean streams flowing through known and definite channels.
- Not subject to a statutory permit system.

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Pre-1914 Appropriative Rights

- Two methods of appropriation:
 - Common Law
 - Compliance with Civil Code §§1410-1422

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Pre-1914 Appropriative Rights

- Quantity is the amount put to reasonable beneficial use.
- Priority of right relates back to date of posting notice or other acts indicating an intention to divert and use water.
- Doctrine of progressive development.

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Pre-1914 Appropriative Rights

- Can be lost by nonuse.
- Subject to standards of reasonableness regarding method of diversion and amount used.

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Post-1914 Appropriative Rights

- APPLICATION:
 - Request for a permit to divert and use water.
- PERMIT:
 - Authorization for the diversion and use of water.
- LICENSE:
 - Confirms the diversion and use of water authorized by the permit.

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Post-1914 Appropriative Rights

- Apply to surface water and to subterranean streams flowing through known and definite channels.
- Subject to a statutory permit system administered and enforced by the State Water Resources Control Board.
- Statutory method is exclusive method of appropriation.

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Post-1914 Appropriative Rights

- Priority date is the date an application to appropriate water is filed with the SWRCB.
- Quantity is the amount put to beneficial use, but cannot exceed the amount specified in the Permit or License.

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Federal Reserved Rights

- Created by federal law to serve the water needs of lands withdrawn from the public domain to establish federal reservations.

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Federal Reserved Rights

- Water use limited to primary purpose(s) of the reservation.
- Water used to serve secondary purpose(s) must be acquired pursuant to state water law.

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Federal Reserved Rights

- Priority is the effective date of the reservation.
- Includes surface and groundwater.

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Pueblo Rights

- Right recognized by the California courts in the municipal successor to Mexican pueblo.
- Only two have been recognized
 - Los Angeles
 - San Diego.

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Pueblo Rights

- Highest priority water right in California.
- Attaches to surface flow, including tributaries, and tributary groundwater of streams within the historic boundaries of the pueblo.

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Pueblo Rights

- Quantity is determined by present municipal needs, and grows over time.
- Cannot be lost by non-use or prescription.

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Prescriptive Rights

- Obtained by satisfying the elements applicable to acquiring real property by adverse possession (“squatter’s rights”).
- Cannot prescript against the state.

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Prescriptive Rights

- Cannot obtain an appropriative right by prescription, must comply with SWRCB's procedures set forth in the Water Code.

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Adjudicated (Decreed) Rights

- Determination by a court of a water right.
- Set forth in a judgment and decree.
- Must have a basis of right.
- Watermasters often administer decrees in adjudicated areas.

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Groundwater Appropriation Method



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Groundwater

- Groundwater is presumed to be percolating groundwater.
- Person claiming groundwater is a subterranean stream must prove it.

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Physical Characteristics of Subterranean Streams

- A subsurface channel must be present.
- The channel must have impermeable bed and banks relative to the material filling the channel.

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Physical Characteristics of Subterranean Streams

- The course of the channel must be known, or capable of being determined by reasonable inference.
- Groundwater must be flowing in the channel.

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Physical Characteristics of Percolating Groundwater

- Groundwater not flowing as a subterranean stream.

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Groundwater Rights

- Subterranean Streams
 - Riparian rights attach to parcels that overlie the subterranean stream.
 - Appropriative rights acquired through SWRCB permit process.

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Groundwater Rights

- Percolating Groundwater
 - Overlying rights attach to parcels that overlie the groundwater basin.
 - Appropriative rights acquired by pumping the water and putting it to reasonable, beneficial use on non-overlying parcels.

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Public Trust Doctrine

- Originated in Roman law and traditionally asserted to protect public rights regarding commerce, navigation, and fisheries in navigable waters.
- California Supreme Court expanded the public trust doctrine to protect a wide variety of environmental and recreational resources.
(National Audubon Society v. Superior Court)

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Public Trust Doctrine

- SWRCB required to consider the impact of water appropriations upon public trust resources.
- Harm to public trust resources should be avoided or mitigated if feasible.
- In some cases, the public interest served by water diversions may outweigh harm to public trust resources.

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Public Trust Doctrine

- Both the SWRCB and the courts have the authority to reconsider past water allocations in light of the impact of those allocations on public trust resources.
- SWRCB includes Standard Permit Term 12 in water rights permits and licenses to put people on notice of the SWRCB's continuing authority under the public trust doctrine.

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Reasonableness Doctrine

- Prohibits waste, unreasonable use, unreasonable method of use and unreasonable method of diversion of water.

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Reasonableness Doctrine

- Constitutional and statutory authority (California Constitution Article X, §2; Water Code §§ 100, 275).
- Applies to all uses of all waters of the state and is a limitation on every water right and every method of diversion.

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Reasonableness Doctrine

- SWRCB and the courts have the authority to conduct proceedings to adjudicate issues regarding waste and unreasonable use.
- Reasonableness depends on totality of circumstances and can vary over time.
- Proposed use or method of diversion may be unreasonable based on its impact to fish, wildlife, or other instream beneficial use.

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Reasonableness Doctrine

- SWRCB includes Standard Permit Term 12 in water rights permits and licenses to put people on notice of the SWRCB's continuing authority under the reasonableness doctrine.

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Procedure for Processing Applications

- Application filed.
Note: there are distinctions between “minor” projects (direct diversion of 3 cfs or less, diversion to storage of 200 afa or less) and “major” projects (direct diversion greater than 3 cfs, diversion to storage greater than 200 afa) that affect timelines and procedures.

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Procedure for Processing Applications

- Public notice given to interested persons. Includes instructions for filing protest (pay attention to deadlines: 40 days for minor project, 60 days for major project).
- Protests filed.
- Protest resolution. If protests are not resolved then a field investigation (minor projects) or a hearing (major projects) is required.

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Procedure for Processing Applications

- Note: CEQA compliance proceeds on a parallel track with application processing.
- Field investigation/hearing.
- Decision adopted.
- Permit issued.

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Procedure for Processing Applications

- Petitions for reconsideration may be filed.
- Order on reconsideration adopted.
- Petition for writ of mandate may be filed.

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Other Procedures

- Complaints
 - Regional Boards may file complaints against permittees and licensees alleging violation of terms and conditions in permit/license.
 - Regional Boards may file complaints alleging violations of the public trust doctrine, reasonableness doctrine, or unauthorized diversions.
 - Regional Boards must make the case!

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Other Procedures Change Petitions

- Petitions for change (filed by water right holder).
 - Permanent change of point of diversion, place of use, purpose of use (§§ 1700- 1706). Includes changes in point of discharge from waste water treatment plants (§ 1212).
 - Regional Boards may protest.
 - SWRCB must find that proposed change will not injure any legal user of water.

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Other Procedures Temporary Transfers

- Temporary transfers (§§ 1725-1732).
 - Duration of transfer is one year or less.
 - Transfer would only involve the amount of water that would have been consumptively used or stored in the absence of the proposed change.

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Other Procedures Temporary Transfers

- Exempt from CEQA.
- Regional Boards may comment.

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Other Procedures

- Regional Boards may not propose conditions to mitigate effects on fish, wildlife, or other instream beneficial uses caused by factors other than the proposed temporary change.
- SWRCB must find that:
 - Proposed change would not injure any legal user of water, and
 - Proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses.

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Other Procedures

- Standard of review is “preponderance of evidence.”
- Automatic reversion following expiration.

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Other Procedures Long-Term Transfers

- Long-term transfers (§§ 1735-1737).
 - Duration of transfer is more than one year.
 - Regional Boards may protest.

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Other Procedures Long-Term Transfers

- SWRCB must find that:
 - Proposed change would not result in substantial injury to any legal user of water, and
 - Proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses.
- Automatic reversion following expiration.

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Other Procedures Temporary Urgency Changes

- Temporary urgency changes (§§ 1435-1442).
 - Effective for a maximum of 180 days.
 - May be renewed.
 - Regional Boards may file an objection.
 - CEQA applies.

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Other Procedures Temporary Urgency Changes

- SWRCB must find:
 - There is an urgent need to make the proposed change,
 - Proposed change would not injure any legal user of water,

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Other Procedures Temporary Urgency Changes

- Proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses, and
- Proposed change is in the public interest.

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Other Procedures

- Change for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water (§1707).
 - Follow procedures set forth for permanent changes, temporary transfers, and temporary urgency changes.

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Other Procedures

- SWRCB must find that:
 - Proposed change will not increase the amount of water the person is entitled to use.
 - Proposed change will not unreasonably affect any legal user of water.

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Other Procedures Petition for Extension of Time

- Petitions for extension of time.
 - Permit contains dates for beginning and completing construction, and putting water to beneficial use.
 - Due diligence required.

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Other Procedures Petition for Extension of Time

- Good cause for delay required.
 - Caused by obstacles which could not be reasonably avoided.
 - Conditions incident to the person are not good cause.
 - Conditions incident to the enterprise can be good cause.

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Other Procedures Petition for Extension of Time

- Must show that satisfactory progress will be made if time extension granted.
- Regional Boards may file protest.
 - Focus of protest must be on harm resulting from the part of the project still to be completed.

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Protests

- Requirements set forth at Water Code §§1330-1335 and California Code of Regulations, title 23, §745.

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Protests

- Regional Boards likely to protest in accordance with §745, subdivision (c): the proposed appropriation would not best conserve the public interest or public trust uses, or the proposed appropriation would have an adverse environmental impact.
- If filing protest pursuant to §745(c), protest must be accompanied by a statement of facts supporting the allegation.

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Protests

- Protest should state grounds for withdrawing the protest.
- If protest not resolved, a hearing/field investigation must be held.
- Unresolved protests form the basis of issues noticed for hearing.

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Protests: What to Remember

- 1. Must have link to project.
- 2. Must have supporting evidence.

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Protests: What to Remember

- If you are the protestant:
 1. Make sure your protest has a link to the project.
 2. Take protest resolution seriously.
 3. Back it up with evidence.
 4. Withdraw if do not intend to pursue.

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Fully Appropriated Streams

- Declaration adopted by the SWRCB.
 - Based on finding that supply of water in stream system is being fully applied to beneficial uses.
 - Based on determination in previous water right decision that no water remains available for appropriation.

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Fully Appropriated Streams

- Declaration may be revoked or revised.
 - Upon motion of SWRCB.
 - By petition of any interested person.
 - Requires a hearing.
 - Need to have hydrologic/water use data to support claim.

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Fully Appropriated Streams

- Stream systems may be added.
 - Need finding that water is being fully applied to beneficial uses.
 - Based on determination in previous water right decision.

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Fully Appropriated Streams

- Applies to pending and future applications.
- Does not apply to change petitions.
- See Water Code §§ 1205-1207 and Cal. Code of Regs., tit. 23, §§ 870-874.

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Other Activities within Division of Water Rights

- Water Quality Planning
 - Bay Delta Plan
 - AB2121 Policy (to protect streamflow in North Coastal California)

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Other Activities within Division of Water Rights

- Water Quality Certification
 - FERC projects
 - Corps of Engineers projects that involve water diversions

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Closing Thoughts

- If the source of the impairment is related to a specific diversion, it may be possible to use the water right process to improve water quality.
- If an entire watershed is in trouble, an amendment to the FAS Declaration or conducting an adjudication may also be appropriate.

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Closing Thoughts

- If a Regional Board decides to file a protest, objection, or complaint it must provide evidence supporting its position.
- Remember differences in jargon and mission.