The Human Right to Water Bill in California

AN IMPLEMENTATION FRAMEWORK FOR STATE AGENCIES

May 2013

International Human Rights Law Clinic
University of California, Berkeley, School of Law
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The International Human Rights Law Clinic (IHRLC) designs and implements innovative human rights projects to advance the struggle for justice on behalf of individuals and marginalized communities through advocacy, research, and policy development. The IHRLC employs an interdisciplinary model that leverages the intellectual capital of the university to provide innovative solutions to emerging human rights issues. The IHRLC develops collaborative partnerships with researchers, scholars, and human rights activists worldwide. Students are integral to all phases of the IHRLC’s work and acquire unparalleled experience generating knowledge and employing strategies to address the most urgent human rights issues of our day. For more information, please visit www.humanrightsclinic.org.
Foreword

As United Nations Special Rapporteur on the human right to safe drinking water and sanitation appointed by the Human Rights Council, I am pleased to support this effort to advance the robust implementation of AB 685, California’s Human Right to Water Bill. AB 685 affirms California’s commitment to ensuring affordable, accessible, acceptable and safe water sufficient to protect the health and dignity of all its residents.

Over the last century, California has pioneered progressive water policies, designed innovative responses to water needs, and proactively regulated water quality and affordability so that most residents enjoy safe drinking water and sanitation. However, during my official mission to the United States in February and March 2011, I met with state and local authorities, civil society organizations, and community members who described serious challenges to access to safe drinking water. Regrettably, these challenges often disproportionately impact marginalized groups and individuals, such as the people living in poverty, communities of color, homeless people, indigenous peoples, and residents of unincorporated areas.

With the passage of AB 685 in 2012, California became one of the first states in the United States to recognize the human right to water. California now has a comprehensive law guaranteeing the right to safe, affordable water without discrimination, prioritizing water for personal and domestic use and delineating the responsibilities of public officials at the state level. AB 685 specifically charges relevant California agencies with fulfillment of the law’s mandate by considering the human right to water in policy, programming, and budgetary activities.

This guidance document integrates international human rights law as well as California law and policy, offering an important roadmap for state agencies as they implement AB 685. The International Human Rights Law Clinic at UC Berkeley School of Law is well-positioned to bridge the worlds of international law and local policy to address the harsh realities faced by many Californians.

Through the vigorous implementation of AB 685 and a sustained commitment to its objective of universal access to safe water, California can continue to lead the United States in water policy. California has an understanding of the water challenges before it and the legal tools to address them, and now begins the hard work of bringing about real and sustainable solutions.

Catarina de Albuquerque
United Nations Special Rapporteur on the human right to safe drinking water and sanitation
Executive Summary

On September 25, 2012, California Governor Jerry Brown signed into law Assembly Bill 685 (AB 685) to ensure universal access to clean water. The bill statutorily recognizes that "every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes." AB 685 places the human right to water at the center of state policy and underscores the role of state agencies in addressing the human impact of unsafe water. The purpose of this document is to guide state agencies in efforts to implement the historic human right to water bill.

AB 685 requires state agencies to consider the human right to water when "revising, adopting, or establishing policies, regulations, and grant criteria" that impact water used for domestic purposes. This document frames the obligations of relevant agencies under AB 685 by defining three key aspects of the legislation: (i) the duty to consider, (ii) the human right to water, and (iii) the basic principles that should guide implementation. The resulting framework should shape agency efforts to implement AB 685, and lays the foundation for the Governor’s office to issue a guidance directive to state agencies on the legislation.

The document examines AB 685 in context by providing a history of California water policy and an overview of the multiple barriers that hinder access to safe water for California’s disadvantaged populations. AB 685 builds on the legacy of water law and policy in California to address the most pressing water issues facing the state’s underserved communities. Over the last century, California has responded to water safety and access problems with strong legislative and institutional initiatives. Today, disadvantaged rural and urban communities still face water contamination, infrastructure deficiencies, and financial barriers to sustainable solutions.

AB 685 reaffirms the state’s long-standing commitment to universal access and offers state agencies a roadmap for addressing the state’s current water challenges.

Introduction

By signing AB 685 into law on September 25, 2012, California became the first state in the nation to legally recognize the human right to water. AB 685 statutorily recognizes that "every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes." Under AB 685, all relevant state agencies have an ongoing obligation to consider the human right to water in executing policy, budgetary, and programmatic duties. This document draws on state law and international standards to define when state agencies should consider the human right to water, what factors they should consider, and how they should advance the right.

Governor Brown has stated, “Clean drinking water is a basic human right... Protecting the water we drink is an absolutely crucial duty of state government.” However, millions of Californians—many poor and living in marginalized communities—do not have access to clean, safe, and affordable water. This document provides a common framework to guide efforts by state agencies to achieve the goal of universal access to clean and affordable water. First, the document examines AB 685 in context through a survey of the history of California water policy and an overview of the multiple barriers that hinder access to safe water by California residents. The document then uses relevant case law to define the duty of state agencies to consider the human right to water. With the meaning of to consider in focus, the document looks to international human rights standards to define the substantive standards agencies should consider and the process agencies should use to advance the human right to water.

The framework outlined in this document should inform agency implementation efforts and serve as a foundation for a guidance directive on AB 685 issued by the Governor's Office.

California’s Water Legacy

The history of California water policy includes law-making efforts to protect drinking water for the benefit of all Californians by ensuring quality, increasing access, and promoting affordability. In 1968, the state constitution was amended to affirm that water should be conserved for the “interest of the people and public welfare.” Two decades later, California water regulations codified the “use of water for domestic purposes is the highest use of water.” To ensure water quality, California began to regulate the disposal of wastes into water in 1968. Stronger protections were later enacted in the 1970s and 1980s to eliminate toxic chemicals in drinking water that may cause cancer, birth defects, and other chronic diseases. California also established a system to warn residents of possible chemical exposure in drinking water.

California law also regulates the cost of water, protects marginalized groups, such as agricultural workers, and provides funding to facilitate access to water during emergencies and by disadvantaged communities. For more than twenty years, California law has guaranteed that “[e]very citizen of California has the right to pure and safe drinking water.” Recent laws and policies further prioritize equal access to safe and clean drinking water for California’s disadvantaged populations.
Over the last century, California has tasked a network of departments and agencies with monitoring and enforcing standards related to water quality, accessibility, affordability, and adequacy. In the early twentieth century, the first pollution control agencies were created to mitigate outbreaks of widespread waterborne diseases. Since the 1950s, DWR has managed and protected water through planning and conservation efforts and the State Water Board has administered water rights and regulated water quality. Other departments, such as CDPH, were integrated into the network of water governance agencies to address water-related health issues. CDPH is responsible for enforcing both the federal and state safe drinking-water acts that establish “maximum levels of contaminants” (MCLs) harmful to human health. To ensure water affordability, the California Public Utilities Commission (CPUC) regulates privately owned service providers, including water companies. While the goal of these departments and agencies is to ensure water quality, accessibility, and affordability, some have argued that the diffuse nature of California’s water regulatory regime complicates the public’s access to relevant agencies and hinders effective enforcement.

AB 685 is the most recent of a series of measures California has enacted to ensure safe water for its residents and the strongest articulation of the state’s commitment to quality and affordable drinking water.

B. Water Challenges

Despite this history of proactive water policies, California residents still face formidable water challenges. Disadvantaged communities—including impoverished unincorporated communities—and neighboring water systems suffer from widespread water contamination. Over 21 million Californians live in 682 urban and rural communities that rely on contaminated groundwater as the primary source of drinking water. Bacteria, disinfectant byproducts, hazardous waste from pesticide processing plants, fracking fluids, agro-industrial contaminants including nitrate and arsenic, and other water contaminants undermine the safety of California’s water supplies. For example, a 2012 report by UC Davis found that nitrate leaching from agriculture is responsible for 96 percent of the current groundwater contamination in four California counties with the largest agricultural production in the nation. Bacterial and chemical contaminants can result in dangerous and costly health impacts, such as gastrointestinal diseases, infections, hormone disruption, birth defects, and miscarriages. Dilapidated and corroded infrastructures increase the risk of water contamination. Even if aging infrastructures are replaced, “the most expensive new pipes are only as good as the water flowing through them.”

1. CONTAMINATION

Over 21 million Californians live in 682 urban and rural communities that rely on contaminated groundwater as the primary source of drinking water. Bacteria, disinfectant byproducts, hazardous waste from pesticide processing plants, fracking fluids, agro-industrial contaminants including nitrate and arsenic, and other water contaminants undermine the safety of California’s water supplies. For example, a 2012 report by UC Davis found that nitrate leaching from agriculture is responsible for 96 percent of the current groundwater contamination in four California counties with the largest agricultural production in the nation. Bacterial and chemical contaminants can result in dangerous and costly health impacts, such as gastrointestinal diseases, infections, hormone disruption, birth defects, and miscarriages. Dilapidated and corroded infrastructures increase the risk of water contamination. Even if aging infrastructures are replaced, “the most expensive new pipes are only as good as the water flowing through them.”

2. INADEQUATE INFRASTRUCTURE

A lack of adequate water infrastructure impacts water quality and access for California communities. Administrators believe it is difficult for affected communities to implement sustainable solutions that address infrastructure problems. California has state and federal funds available for communities to update or install adequate water infrastructure, although some disadvantaged communities, such as non-federally recognized tribal communities, are ineligible to apply. Few disadvantaged communities have successfully navigated the complex application process to obtain funding for infrastructure improvements or connections to neighboring water systems. Current funding criteria require communities to have the technical, financial, and managerial capacity to carry out a proposed project. State agencies often reject proposals from communities with urgent water needs for not having “shovel-ready” projects. Despite widespread contamination of drinking water, California has failed to spend $455 million in federal safe-drinking-water funds to improve treatment systems and other facilities in small, rural communities.

3. PROHIBITIVE COSTS

Financial costs impede Californians without access to clean water from pursuing community solutions and securing safe water for individual households. Long-term solutions to water contamination—constructing a water treatment facility or connecting to a nearby water district—are too costly for many disadvantaged communities. The feasibility study required to install a water treatment facility or to connect to an existing water district costs up to $500,000. Small, rural communities often cannot reach the economies of scale to pay the water rates or finance the bonds necessary to construct and operate or maintain modern water systems. For example, one Central Valley community was forced to shut down a newly updated water treatment facility because the 400 to 600 low-income residents were unable to pay the rates necessary to cover the cost of operation and maintenance.

Many Californians are forced to choose between drinking contaminated water and expending scarce resources to pay for clean water. Purchasing bottled water is a short-term and costly alternative for many California households without access to clean water. In some communities with contaminated water, up to 95 percent of residents purchase bottled or purified water. In the Central Valley, some households devote approximately 20 percent of their annual median income of $14,000 to pay for water and sanitation services and to purchase bottled water.

4. BARRIERS TO ACCESS IN PUBLIC SPACES

Significant barriers to water access exist for marginalized and neglected groups in certain contexts. Public facilities, such as parks, schools, and other public buildings, provide important points of access, in particular for marginalized groups. Closing or limiting the hours of public restrooms and capping drinking fountains in parks and other public areas obstruct what is often the only source of water for homeless persons. Limited access can lead to health problems and contact with law enforcement as this population seeks to secure alternative sources of water and sanitation. Many public schools do not have enough drinking fountains to provide adequate water to the students they serve or are unable to properly maintain existing fountains. Public schools in some impoverished areas do not have access to clean water for students and instead use limited resources to purchase safe drinking water for children.

The Duty to Consider

The human right to water is more than just a declaration in statute. AB 685 creates an ongoing obligation for state agencies to consider the human right to water in every relevant agency decision and activity. The duty to consider cannot be fulfilled through a single administrative action by a state agency. The bill’s legislative intent was “to create a state policy priority and direct state agencies to explicitly consider the human right to water within their relevant administrative processes, measures and actions.” AB 685 identifies a specific list of factors—safety, affordability, and accessibility—that agencies must consider when revising, adopting, or establishing policies, regulations, and grant criteria related to domestic water use.

The California Water Code now requires all relevant state agencies, specifically DWR, the State Water Board, and CDPH, to “consider” how state actions impact the human right to water. While the bill highlights those agencies that are most directly charged with water governance, the list of agencies appearing in the code is not exhaustive. Other agencies that play an important role in ensuring universal access to clean and affordable water and may fall within AB 685’s mandate include: the California Environmental Protection Agency (Cal/EPA), California Health and Human Services (CHHS), California Department of Pesticide Regulation (DPR), California Delta Protection Commission (Delta Commission), California Public Utilities Commission (CPUC), California Department of Conservation (DOC), and the Division of Occupational Safety and Health (Cal/OSHA).

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To fulfill the directive “to consider,” agencies must satisfy the following criteria according to relevant case law:58

» First, when considering a range of policies or regulations, agencies must give preference and adopt policies that advance the human right to water. A lack of information does not allow an agency to disregard potential detrimental effects of an agency action on drinking water.60

» Second, agencies must refrain from adopting policies or regulations that run contrary to securing universal access to safe drinking water.60 Agencies should show that relevant factors were weighed during the decision-making process.61 Agencies should not disregard the impact of decisions on the safety, affordability, or accessibility of water.62

» Third, agencies must note in the record the impact of the agency’s actions on access to safe and affordable drinking water. Explicit reference to AB 685 and an explanation of a decision’s potential impact on the quality, affordability, and accessibility of drinking water constitutes sufficient consideration under applicable California case law.63

Ultimately, the courts have jurisdiction to determine whether an agency has adequately considered the human right to water in accordance with AB 685. The duty to consider the human right to water will be triggered at different junctures depending on the nature and scope of an agency’s responsibilities. However, it is possible to anticipate aspects of agency decision-making that require consideration of AB 685. Agencies should consider the human right to water when planning priorities and initiatives; developing an approach to public participation; providing public access to information about water quality, accessibility, and affordability; reporting on agency actions that impact domestic water use; and determining loans and grant criteria for water infrastructure improvement.

Defining the Human Right to Water

The state policy objectives outlined in AB 685 closely mirror the definition of the human right to water developed by the international community over the last decade. Under the international definition, everyone has the right to sufficient, safe, acceptable, accessible, and affordable water.64 Like AB 685, international standards prioritize water for personal and domestic uses, such as drinking, cooking and basic hygiene, over industry and agricultural uses.65 International standards also recognize the crucial role of government in ensuring universal access to safe water.66

The international standards of the human right to water define the substantive factors—quality, quantity, affordability, and accessibility—agencies should consider under AB 685. Global standards provide a common framework for state agencies to work towards a common end—universal access to clean, safe, and affordable water. The international standards underscore the human impacts of California’s most pressing water challenges and emphasize improving access to safe drinking water for underserved communities through non-discrimination, public participation, and accountability. These standards should be referenced when planning programmatic activities, conducting the decision-making process, and weighing competing demands on limited resources.67 The components of the human right to water are explored below with a focus on those aspects most relevant to the California context.

A. Quality

The human right to water requires water to be safe and clean.68 Under international standards, governments must refrain from contamination and adopt effective measures to limit contamination by third parties.69 To meet a standard of good quality, water must not pose a threat to human health.70 Water therefore must not contain organic or chemical contaminants that can cause illness or disease.71 The impact of consumption of contaminated water is cumulative over a lifetime and may depend on different health sensitivities at various life stages.72 Clean water is safe for consumption by people of all ages, including infants and children, the elderly, and pregnant women, without exposure to any significant risk to the mother’s health or the health of the unborn child. Apart from the safety requirements, in assessing quality and acceptability, cultural and religious customs or requirements must be respected.73 Water must also be of an acceptable color, odor, and taste.74

B. Quantity

Everyone is entitled to sufficient and reliable sources of water for personal and domestic uses.75 International standards indicate that personal and domestic uses include water for drinking, sanitation, and food preparation.76 Under this standard, water must be available in quantities necessary to meet an acceptable standard of living, taking into account individual circumstances and needs, such as health issues or work conditions.77 Sufficient amounts of water should be available in various contexts, including home, school, and work.78 In the allocation of water, personal and domestic uses should be prioritized over other uses, such as agriculture and industry.79

C. Accessibility

The human right to water requires physical access to adequate, safe, and acceptable water.80 Water services must be accessible to households, health and public institutions, and workplaces.81 Moreover, access to water for schools currently without adequate safe drinking water should be addressed as a matter of urgency.82 Everyone, regardless of age or disabilities, should have access to clean water.83 Gaining access to water should not require disproportionate burdens on the time and resources of individuals.84 Governments should facilitate access to water, especially for those who have limited alternative sources, such as homeless persons. International standards do not prescribe a preferred model of water service systems—both private and public providers may satisfy international standards—but do require that water services are affordable for all, including low-income residents.85

D. Affordability

Clean water should be affordable for all. Affordability means that direct and indirect costs related to water, including both connection and delivery costs, must not pose a barrier to access.86 Water costs should not compromise the ability to pay for other essential items, such as food, housing, and healthcare.87 International standards generally do not require water to be provided free of charge, but aim to ensure that no one is deprived of water because of inability to pay.88 In the case of people living in extreme poverty and homelessness, affordability may mean that safe drinking water should be provided for free.89 Affordability is relative and the maximum cost of basic water service depends on individual income.90 International standards indicate that total expenditures on water and sanitation services together with any needed alternative source of clean water should not exceed 3 to 5 percent of household income.91

Guiding Human Rights Principles

International human rights standards define both what (the substantive factors) agencies should consider and how (the process) agencies should advance the human right to water. Human rights principles aim to (a) prevent discrimination and neglect, (b) expand opportunities for meaningful public participation, and (c) ensure accountability through effective water regulations and policies. These principles summon California agencies to engage in responsive government decision-making and targeted programming that address the problems faced by disadvantaged and marginalized communities. Human rights principles also foster a comprehensive approach to policymaking by focusing on underlying causes and systemic solutions in addition to individual remedies.92
A. Non-discrimination and Equality

Non-discrimination is a core principle of human rights and critical to the implementation of AB 685. Agencies must ensure that all Californians, including vulnerable and marginalized individuals, groups, and communities in rural, tribal, and urban areas, enjoy the human right to water. By employing fair and inclusive practices that guard against discrimination and neglect, state agencies can make progress towards this goal.

International law explicitly prohibits discrimination based on race, ethnicity, language, sex, gender, economic and social status, citizenship, nationality, age, and disabilities in addition to other protected categories not explicitly listed. Under international standards, discrimination can exist in multiple forms and can be direct or indirect in nature, involving policies or practices that are facially neutral but have a disproportionate impact on a particular group. A human rights approach not only addresses the immediate barriers to clean water but the root causes underlying lack of access.

In California, members of disadvantaged groups may face multiple forms of discrimination that impact access to safe water. For example, low-income unincorporated communities of color have been subject to zoning laws that limit residents’ ability to participate in decisions about water planning and infrastructure investments. Non-English speaking Californians have limited access to information about water quality and decision-making because agencies do not translate into multiple languages public notices of meetings, warnings about water quality, and agency documents. Certain practices, such as capping drinking fountains in public areas with homeless encampments, can effectively bar a group from accessing drinking water. A proactive, non-discriminatory approach may necessitate greater resource allocation for identified groups that have faced historic discrimination. CDPH, DWR, and the State Water Board currently have funding or other programs that impact the human right to water. When revising funding criteria and reviewing applications for assistance, these agencies should ensure that disadvantaged communities have effective access to state support.

B. Meaningful Public Participation

A human rights approach to public participation calls for full and equal access to information concerning water, water services and the environment, held by public authorities or third parties as well as opportunities for community members to actively participate at all levels of decision-making. Through concerted efforts to facilitate public participation, agencies can ensure that their policies and initiatives meet the needs of the communities they serve and achieve policy objectives. Existing regulations already require some agencies to ensure public participation. When revising established criteria, agencies should ensure that the policy advances the human right to water. For example, Cal/EPA should ensure public participation when developing, adopting, and implementing environmental regulations.

In applying the principle of non-discrimination, agencies should consider ways to prevent discrimination and address its impact. First, all relevant agencies should review policies and practices with an eye to identifying multiple and interrelated grounds of discrimination and the impact on Californians. For example, CDPH, DWR, and the State Water Board should identify those disadvantaged communities that do not currently have access or are at risk of losing access to safe water and revise policies and practices to address their needs. Second, agencies should involve vulnerable groups and marginalized communities in their planning and programming. For example, DWR should identify disadvantaged groups struggling to access safe and affordable water and engage these groups in efforts to formulate the 2013 California Water Plan Update. Third, agencies should facilitate access to clean water by disadvantaged communities through budgetary allocations and increased access to funding for infrastructure improvements. A proactive non-discriminatory approach may necessitate greater resource allocation for identified groups that have faced historic discrimination. CDPH, DWR, and the State Water Board currently have funding or other programs that impact the human right to water. When revising funding criteria and reviewing applications for assistance, these agencies should ensure that disadvantaged communities have effective access to state support.

Moreover, agencies should account for language barriers that can prevent meaningful public participation. California has the largest population of immigrants in the country and more than 43 percent of Californians speak a language other than English at home. Translation services are necessary to facilitate meaningful participation for many Californians. Agencies should take advantage of technological advances, such as digital radio-frequency technology that can offer simultaneous translation services, to encourage engagement by California’s diverse populations.

A key component of public participation is transparency and access to information about agency responsibilities, initiatives, and activities. In particular, the public’s access to accurate, comprehensive, and up-to-date information on water quality is critical to understanding and addressing the state’s water challenges. Information about water quality and safety should be made physically and electronically accessible to California’s diverse communities in relevant languages. For instance, while CDPH’s Drinking Water Program posts on-line information regarding water treatment, monitoring schedules, and funding opportunities, this information is only available in English and the data is not readily accessible by individuals who lack internet access. Agencies should also inform and educate communities about agency activities undertaken to further the human right to water and establish monitoring efforts to measure the agency’s progress towards AB 685 implementation.

Cal/EPA has undertaken several initiatives to improve public participation. For example, the agency displays on its website documents related to its Environmental Justice (EJ) Program in both English and Spanish. The EJ Program’s 2004 and 2005 Action Plan also proposes improving community participation by conducting stakeholder meetings and workshops, updating the website regularly to provide easy access to information, and creating a stakeholder forum to receive ongoing feedback. State agencies should undertake similar activities to ensure public participation and advance the human right to water.

C. Accountability

Accountability is the means by which individuals and communities take ownership of their rights and ensure that the government, as the primary duty-bearer, fulfills its obligations. In the context of the human right to water, the principle of accountability requires effective monitoring bodies, administrative and judicial remedies, and good governance. Although AB 685 does not create a justiciable right by which individuals can claim access to clean water, the legislation does underscore the importance of California’s robust water regulatory regime and highlights the impact of implementation gaps. Ultimately, the successful implementation of the human right to water, especially in communities impacted by water contamination, depends on the effectiveness of accountability mechanisms.

Existing water policy in California establishes standards for water quality, affordability, and accessibility and provides for remedies where those standards are not met. AB 685 urges state agencies to address any barriers to full implementation of
these laws and policies. Possible impediments to effective accountability are numerous, and notable challenges include the failure to detect water contaminants and issue violations by CDPH; the backlog of cases involving violations of water quality standards; the waiver of quality water standards in communities affected by unsafe levels of contaminants by regional water boards; and the slow distribution of financial assistance to enable compliance with safe water standards. To be effective, it is critical that accountability mechanisms are "independent and shielded from political interference and capture by specific groups or politicians." The neutral enforcement of such policies is particularly important in the Central Valley where the agricultural industry exerts enormous political and economic power.

Strong accountability mechanisms not only provide redress for past wrongs, but are forward looking to ensure that state institutions are responsive to the needs of all communities. Good governance, transparency, meaningful public participation as well as strong redress mechanisms are necessary for effective accountability. State agencies can advance the human right to water for all Californians, including the poorest and those living in disadvantaged communities, by effectively monitoring and enforcing current policies as well as strengthening those policies to meet human right standards.

Conclusion

AB 685 renews California’s commitment to universal access to clean water by making the human right to water a centerpiece of state policy. In joining the global effort to address water challenges as a human rights issue, California has recognized the human impact of contaminated drinking water and prioritized removing barriers to access faced by underserved communities. AB 685 represents an important step toward implementing sustained and comprehensive solutions for California’s numerous water challenges.

This document provides a common framework to guide efforts by state agencies to achieve universal access to clean water in the state. The framework defines key aspects of the legislation, including when state agencies should consider the human right to water, what factors they should consider, and how they should advance the right. AB 685 implementation will be an on-going and dynamic process and additional agency-specific guidance from the Governor’s Office is needed to ensure an effective and coordinated approach to implementation. The Governor’s Office should employ the framework outlined in this document to develop and issue guidelines to all agencies with responsibilities that impact the quality, affordability, and accessibility of water used for domestic purposes.

AB 685 also provides an opportunity for California state agencies to deepen their engagement with communities facing water challenges. Meaningful community participation can enhance the legitimacy and effectiveness of planning, empower marginalized communities, promote sustainable solutions, and improve accountability. AB 685’s sponsors and underserved communities throughout California stand ready to partner with state agencies to realize the human right to water.

Resource Guide

U.S.-Focused Resources


International Resources


Notes

1 AB 685, ch. 524, 2012 Cal. Stat. 91 (codified at Cal. Water Code § 106.3 (West 2012)).


3 AB 685 is the United States’ first state law to explicitly recognize the human right to water.

4 Cal. Water Code § 106.3(A) (West 2012).

5 Our analysis recognize that AB 685 is not intended to address the duties or responsibilities of existing public water systems, impact water supplies for new developments, or require new expenditures to improve water infrastructure. Cal. Water Code § 106.3(c)(1) (West 2012).


7 Cal. Water Code § 106.3(A) (West 2012).

8 Cal. Water Code § 106.3(A) (West 2012).


10 Id.


13 Communities in the Tulare Lake Basin and Salinas Valley are among the poorest in California and do not have the financial or technical capacity to address contamination by nitrate and other contaminants of community drinking water. See generally Thomas Harter, et al., Addressing Nitrate in California’s Drinking Water: With a Focus on Tulare Lake Basin and Salinas Valley Groundwater, (University of California, Davis, Center for Watershed Sciences, Report for the SWRCB S1X2 1 Report to the Legislature, January 2012), available at http://www.cowater.ucdavis.edu/tulare/notes/reports/2012_Harter_TulareLakeBasinAndSalinasValleyGroundwater.pdf (hereinafter UC Davis Nitrate Report).


16 The State Water Resources Control Board adopted Resolution No. 68–16 on Oct. 28, 1968, commonly referred to as the “anti-fracking policy.”


19 Cal. Const. art. XIIIID, § 6 (West 2012); see also Howard Jarvis Taxpayers Ass’n v. City of Roseville, 97 Cal. App. 4th 637, 647-659 (2002). “To show the section 6(b) fee or charge must reasonably represent the cost of providing service.”

21 Employers must provide agricultural workers a continuous and sufficient supply of portable drinking water—one quart per employee per hour—for the entire shift. See Hear Health Protection, 8 Cal.OSHA § 3395(c) (2010).


33 See Camille Pannu, Drinking Water and Exclusion: A Case Study from California’s Central Valley, 100 Calif. L. Rev. 223, 245 (2012) [hereinafter Pannu].

34 Unincorporated communities are defined as disadvantaged if they lack basic infrastructure, including but not limited to, streets, sidewalks, storm drainage, clean drinking water, and adequate sewer service. Cal. Gov’t Code §§ 56021, 56063 (2010). See also 8 Cal.OSHA § 3395(c) (2010); Cal. Edu. Code § 3670 (West 2012).


38 See UC Davis Nitrate Report, supra note 14, at 2-3. The UC Davis Nitrate report concluded that half of the 2.6 million people
living in Salinas Valley and Fresno, Tulare, Kings, and Kern counties rely on drinking water with nitrate levels that exceed state standards.

38 Pannu, supra note 33, at 23-44.
39 Id. at 237.
40 Ross Frimus & Laurel Firestone, Implementing the human right to water in California’s Central Valley building a democratic voice through community engagement in water policy decision making, 47 William & Mary L. Rev. 495, 534 (Spring 2011).
41 UN Report, supra note 35, at 48.
42 Id. at 68.
43 The most common infrastructures issues facing the non-federally recognized Winnemem Wintu Tribe, particularly their unmet need, for financial assistance to improve access to water.
44 For example, the community of Monson in Tulare County attempted to connect to a nearby water district, but state agencies required the community to establish its own water system to qualify for public funding. See Mark Grossi, Impoverished rural monson of Monson getting water, The Fresno Bee, Sept. 16, 2012, http://www.thefresnobee.com/2012/09/16/2994243/rotary-rector-california-department-of-public-health-partnering-water-systems-supra-testing-filtration-for-arsenic-tainted-water-flows-from-taps-of-rural-political-communities-that-rely-on-contaminated-groundwater-superintendent-deshawd-3214421175064.html [hereinafter Grossi].
45 Id. at 474-9 (196).
46 Likewise, when the plant began operating, the water rates skyrocketed. The plant is a treatment plant for arsenic-tainted water. However, when the plant began operating, the water rates skyrocketed. The plant did not have enough water fountains for the number of students and (2) water fountains were poorly maintained. Cal. Dept. of Educ., Drinking Water for Students in Schools, http://www.cdea.ca.gov/ed/dwbc/ncf/ in_wat2014_1.html. California requires one water fountain per 150 people on a school campus. In 1999, the Superintendent of Public Instruction found that this ratio inadequate; no action has been taken to remedy this issue. “Water in Schools, Who’s Currently Required?” (Apr. 13, 2013), http://www.waterinschools.org/whatsrequired.
47 As a general rule as of July 1, 2011, school districts shall provide students access to free, clean drinking water during meal times. Cal. Educ. Code § 6086 (Wet 2012). The California Department of Education encourages a proactive approach to expanding access to water for students. Cal. Dept. of Educ., Drinking Water for Students in Schools, http://www.cdea.ca.gov/ed/dwbc/ncf/ in_wat2014_1.html. In 2012, the Central Valley at least twelve schools with a total of 1000 students are in unincorporated areas that rely on contaminated groundwater. Julie Scott, Nitrate Contamination Spreading in California, Westmo, May 13, 2010, https://californiahotspots/outside-contamination-getting-california-communities. Students at Stoney Corn External in Salinas, California are not able to drink the water from the school’s drinking fountains due to nitrate contamination and the school budgets up to $500 a month to buy bottled water for its students. See The Problem is Clear, supra note 47.
50 Cal. Water Code § 106.3(b) (2012).
51 AB 685 legislative history has no indication that the legislature’s intent was to limit AB 685’s applicability to a defined group of agencies; rather it emphasizes that AB 685 is applicable to any event that agencies do not sufficiently consider. See generally, Haavas v. Mercy Am. River Hosp., 31 Cal. 4th 709, 717 (2003) (holding that the word “including” in a statute “ordinarily a term of enlargement rather than limitation.”). See also Samantar v. Yousuf, 131 S.Ct. 2297, 2307 (2011) (“[Un]clude can signal that the last that follows is meant to be illustrative rather than exhaustive.”)
52 A survey of relevant case law provides an understanding of what activities state agencies should undertake to fulfill the legislative directive “to consider.” See generally Cal. Water Code § 106.3(b), State Water Resources Control Bd., 35 Cal. 4th 613, 625 (2005) (explaining that taking into consideration means “to take into account various factors,” including those specified in a legislation); see also Merit Ve-
supra

access to safe water further strains individual and community
systems are less likely to allow these communities to connect to a
levels of poverty in the low-income communities, neighboring water

resources, http://www.waterplan.water.ca.gov/ (last visited Apr.

Kevin Johnson, Mayor, Sacramento (Jan. 23, 2012).

teur on the human right to safe drinking water and sanitation, to


tional Covenant on Economic, Social and Cultural Rights)

General Comment No. 20: Non-discrimination in the

more grounds of discrimination. U.N. Comm. on Econ., Soc., &

De facto

De jure
criminatory language or practices found directly in laws and poli-

See Capacity Development Program, California Department

of Public Health, http://www.cdph.ca.gov/Cert/certcf/Druck-

noeuter/Pages/DDWFiles.aspx (last visited Apr. 21, 2013); Funding


tCF/Drucknoeuter/Pages/DDWFlndng.aspx (last visited Apr. 21, 2013); Funding

Financial Assistance Programs – Grants and Loans, State Water Resources

Control Board, http://www.waterboards.ca.gov/waterัท-

wateprogram/team_states (last visited Apr. 21, 2013).

General Comment No. 15, supra note 64, ¶ 48.

Cal. Pub. Res. Code § 71110 (2012); see generally,

Inventory of Public Participation with Cal/EPa, California En-


Thirsty for Justice (explaining “Many pub-
ic state level policy meetings and hearings are held in the State
Capitol and other high-security buildings. Visitors must obtain a
visitor pass, pass through a metal detector, and may be required to
show a driver’s license, which can exclude members of immigrant
communities who cannot obtain California drivers’ licenses. CAL-
FED meetings are held in a high-security federal building shared by
the Immigration and Naturalization Service”).

California, United States Census Bureau (2010); Yuchi
 Handyak, 43% in state speak other than English at home, SF Gate
(Sep. 23, 2008), http://www.sfgate.com/news/article/43-in-
state-speak-other-than-English-at-home-3193867.php

For instance, the Fresno Metro Ministry, a Central Valley
community-based organization, uses digital radio frequency to al-
low Spanish-speakers to simultaneously participate in environmen-
tal health discussions. The use of this technology has ensured bet-
ter public participation during these public meetings. See Theory
for Justice, supra note 109.

Public Drinking Water System, California Department

of Public Health, http://www.cdph.ca.gov/certcf/drunknoeu-
ter/Pages/default.aspx (last visited April 19, 2013).

Environmental Justice Program Home Page, California En-
environjustice (last visited Apr. 19, 2013).

Examples of tools listed include: conducting stakeholder
meetings and workshops, updating the website regularly to provide
easy access information, and creating a stakeholder forum to receive
ongoing feedback. Environmental Justice Action Plan, California
Environmental Protection Agency, (Oct. 2004), available at
http://www.cdew.ca.gov/envjustice/ActionPlan/Documents/
October2004/ActionPlan.pdf. See also Inventory of Public Participation,
supra note 106.

On the Right Track, supra note 66.


See Communities that Rely on Contaminated Groundwater, supra note 35 at 13, 74.

As of January 2013, there was a backlog of 4,116 Mandatory
Minimum Penalties (MMP) cases where a penalty had not been
assessed. California Water Boards’ Annual Performance Report – Fiscal Year 2012-13, California Environmental Protection

See In the Matter of the Petitions of Ocean Mist Farms and
RC Farms; Grower-Shipper Association of Central California,
Grower-Shipper Association of Santa Barbara and San Luis
Obispo Counties, and Western Growers, Order WQ 2012-0012,
SWRCB/OCC File A-2209()-().

See Evaluating the Potential Transfer of Drinking Water Ac-


General Comment No. 35, supra note 64, at ¶ 51.
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