



Understanding California Water Law and Policy

THE PUBLIC PROCESS LAWS

When a major decision related to water needs to be made, there are many federal and state laws that must be followed. For the California public the most important ones are:

- **The National Environmental Policy Act (NEPA), and**
- **The California Environmental Quality Act (CEQA)**

These laws usually require a series of comment periods (or just one for less-significant projects) and sometimes public hearings. These are not only great organizing opportunities but also an opportunity to build your alliances and set up campaigns and lawsuits.

Organizations and people can't litigate a project if they do not comment (i.e. establish standing). Often these public comments periods also trigger other related regulatory processes and environmental reviews.



The CEQA and NEPA process often require:

- A **scoping process** to solicit comments prior to preparation of an EIS or EIR, provides an opportunity for the public, Tribes, other governmental agencies, individuals and impacted user groups to identify possible issues for review. This “scoping period” usually is about 30 days and can include a public hearing. Issues that are not brought up in scoping are often never addressed. The latest tactic by government agencies to avoid having to hear from an upset public is to schedule informational meetings instead of a scoping hearing. In this case, the agencies/applicants have “stations” to talk to various experts but not an opportunity to address all participants in the meeting during a formal public hearing. This is a great opportunity to grab the microphone and speak your mind!
- A **DEIS or EA** (Draft Environmental Impact Statement or Environmental Assessment under NEPA) or DEIR (Draft Environmental Impact Report DEIR under CEQA). Both of these processes usually require a 60-90 day comment period. Under CEQA some agencies such as the water boards or CalFire don’t prepare an EIR but instead a Substitute Environmental Document (SED) or a private land Timber Harvest Plan (THP), respectively. Both are considered the same as an EIR and generally must still comply with CEQA. An example would be the updates to the Bay Delta Plan that just occurred to deal with flows. Comment periods are similar for the SED or THP process.
- Decision Notice/Finding of No Significant Impact (FONSI)



When dealing with NEPA or CEQA, it's good to work in diverse alliances. This is because different people, Tribes and organizations are impacted in different ways. If you do not comment on a CEQA or NEPA document you will not retain "standing". Standing is needed to litigate. It is important to show that you use the resource in order to get standing. If you will suffer impacts related to recreational opportunities, subsistence, or economic opportunities bring them up to establish standing when you comment.

Major federal actions usually invoke Tribal Trust responsibilities for federally recognized Tribes. California's new law AB52 also invokes Tribal consultation for state and local projects. Federally recognized Tribes have the best standing and the best water and fishing rights in most cases. However, because the government is supposed to be a trustee they do not always need to engage in NEPA or CEQA to litigate. Agencies are supposed to consult with impacted Tribes as part of these processes, but they often do not. This is why it is important to birddog agencies.



In order to find out about these projects you can:

- Check the federal register notices. These are legally required in NEPA <https://www.federalregister.gov/>
- File with FERC to be on a project mailing list. You will need to find out your project number to do this. <https://www.ferc.gov/>
- Follow local and state water boards or pesticide regulators, and forest managers webpages for comment opportunities, or sign up for issue specific mailing lists. California Water Boards: <https://www.waterboards.ca.gov/>
Department of Water Resources: <https://water.ca.gov/>
- Get google alerts or do google searches for the area or project you are interested in <https://www.google.com/alerts>. For instance, sign up for an alert on Westlands Water District or the Klamath River.
- Sign up on the mailing list at public hearings. For instance, water boards have a 401 permit mailing list and the Delta Conveyance Project has a public mailing list.
- Check the CEQANet website for listings of current CEQA document notices on exemptions, Initial Study/Negative Declarations, scoping notices, EIR's and Notices of Determination. See <https://ceqanet.opr.ca.gov/Search/Navigate>
- Check the bulletin board at your County Clerk's Office for important notices about CEQA projects, THP's, etc. Approval of any project under CEQA at any level (exempt, Negative Declaration and EIR) must be posted at the respective County Clerk's Office for public view.


Many other laws come into play with NEPA and CEQA

- **The Endangered Species Act (ESA).** There is the federal ESA as well as the California ESA, known as CESA. This law is triggered when a project affects the habitat of a species present that is listed as endangered or threatened. It also identifies habitat that is critical for the species' survival, and requires government agencies develop a recovery plan for the listed species.
- NEPA is now sometimes invoked in conjunction with Biological Assessments and Biological Opinions. This helps to bring up issues outside of the realm of the ESA such as Tribal Trust, Water Quality or non-listed species because NEPA requires disclosure.
- During NEPA (and sometimes CEQA) the action agency must consult with the National Marine Fisheries Service (NMFS) or the National Oceanic and Atmospheric Administration (NOAA) to develop and issue a Biological Opinion or Finding of No Significant Impact.

For instance, the Bureau of Reclamation (BOR) or Federal Energy Regulatory Commission (FERC) are often the federal action agencies that create proposals related to decisions about fish, and they consult with NOAA fisheries when they propose a project.

In some cases, the action agency will write a document called a Biological Assessment and give it to NOAA or NMFS. If they decide it has a significant impact on a listed species, they can add reasonable and prudent actions to protect the species in their Biological Opinion (BO). The California Department of Fish and Wildlife is responsible for administering CESA. Sometimes they issue a separate state permit and sometimes they use federal BO and make a consistency determination.

It's important to note that a Biological Opinion or Finding of No Significant Impact can be affected by politics, the needs of

- **The Clean Water Act (CWA).**
 - This is a federal law, administered by the states and some Tribes, as approved by the U.S. Environmental Protection Agency. The exception is NPDES (Point source) permits, which are federally required but still handled by states. The majority of pollution in the West is nonpoint pollution, which generally means it does not come out a pipe, and therefore only regulated by state law such as the Porter-Cologne Act. California has many Clean Water related laws and does regulate nonpoint pollution in theory.
 - The Clean Water Act requires the establishment of beneficial uses (such as water supply, cold water fisheries, water contact recreation), and a 303 (d) impairment list (an impairment can be things like nitrates, agricultural chemicals, sediment and toxic algae), and the establishment of TMDLs. California law protects high quality waters and has anti-degradation laws that further protect waters. These laws and CEQA makes it way easier to influence California water quality regulation than in a state like Oregon.
 - Non-Point Pollution is the major source of pollution in the west and California is supposed to regulate through General Permits, prohibitions, Waste discharge permits or waivers. As explained above non point usually just means dispersed rather than coming from a direct pipe, though there are cases where feedlots are considered point sources.
 - Point source pollution needs to have a NPDES permit under the federal Clean Water Act, but the state handles the permitting. Wastewater treatment plants, polluted interbasin transfers, and factories with pipes that discharge to water are examples of where an NPDES permit is needed.
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- **Clean Water Act 404 or 401 certifications.** CWA 404 and 401 certifications are dredge and fill or water quality permits, respectively, for major actions in waterways. A 404 permit goes through the Army Corp of Engineers (federal) and a 401 permit usually goes through the state agency that is in charge of the Clean Water Act. Pipelines and dams are some of the actions subject to these laws. Laws and case law related to state 401 certifications are currently changing fairly quickly as the federal government tries to claim that state power to protect clean water under these permits is federally preempted, and to make laws that support this position.



California state law laws

California has many water quality laws and its own ESA.

- **California's ESA (CESA)**

CESA is pretty weak and hard to navigate beyond its control of fishing and funding for the public. The same is true with most of California's Fish and Game codes that are protective of fisheries. These codes do not have citizen's enforcement provisions like many other environmental laws.

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Who administers the California's water laws?

California has an EPA office, however most of the water laws are administered by the state and California has its own water quality laws that are stronger than that federal laws.. Many pollution control plans need to be approved by the EPA but are written by the state. Tribes also have their own EPA sometimes. Water rights and pollution are controlled by different agencies.

- **State Water Resources Control Board**

The State Resources Control Board (SWRCB) regulates water rights and water quality in California. They have a five member board that is appointed by the governor and confirmed by the State Senate.

California has pretty good water quality laws though they are often not enforced except by advocates. The SWRCB controls 401 certifications, policy, statewide toxins standards and all water related decisions, including flows as flows are controlled under water rights and are just now being regulated under water quality control plans. The SWRCB also is in charge of the 303 (d) impairment list (the list of a water bodies pollutants) and has to approve all Water Quality Control and Basin Plans, ag permits and waivers created by Regional Water Quality Control Boards (RWQCB). Regional Boards are also responsible for Total Maximum Daily Load, or pollution control plans) and their implementation. TMDLs are required for most 303 (d) listings and their purpose is to help watersheds come into compliance with water quality standards and reduce pollution. RWQCB decisions are appealable to the SWRCB and sometimes SWRCB decisions are appealable to the Environmental Protection Agency (EPA)



- ❖ **Regional Water Quality Control Boards (RWQCB):** California has a system of nine regional water quality control boards that are under the jurisdiction of the SWRCB. Members are appointed by the Governor and confirmed by the State Senate. Rivers draining into the Pacific Ocean from the Oregon border to Sonoma County are under the jurisdiction of the North Coast RWQCB. The NCRWQCB makes decisions such as establishing beneficial uses of water and agricultural discharge permitting. They also draft TMDL and 303 (d) lists, establishing basin plans and beneficial uses and do triennial reviews to establish priorities and emerging issues. Currently establishing Tribal beneficial uses, the establishment of ag. waivers, waste discharge requirements, and establishing flow criteria, regulating cannabis, and the implementation of TMDLs are some of the most significant decisions the board is making related to local watersheds. Some of the NCRWQCB's major decisions must be approved by the SWRCB and USEPA such as establishment of water quality objectives. Usually there are CEQA Substitute Environmental Document (SED) processes at the RWQCB level and sometimes hearings to approve actions at the SWRCB, depending on the issue. There are often comment periods and hearings even when CEQA is not invoked. These are all opportunities to influence actions.



- **Water Rights Administered are the SWRCB, Division of Water Rights**

California has good water quality laws but pretty bad water rights laws and poor enforcement of their laws. California does have wording in the constitution regarding public trust and reasonable use for water rights. However “paper water”, water rights beyond the water that actually exists, is a huge issue in California as are unregulated riparian (streamside) rights. Pre-1914 water rights are stronger than other water rights . It is hard to challenge them.

The Bureau of Reclamation holds the state water rights for its contractors such as Westlands, rather than the farmers having their own water rights. However, the SWRCB does have jurisdiction over the Bureau of Reclamation. The California Department of Water Resources holds the water rights to the California State Water Project for its contractors in a similar manner to BOR. The state and federal overlap related to water rights in this situation can be pretty confusing but ultimately the state controls water rights.

Tribal water rights struggles have rarely played out in California. Water rights are first in line, so theoretically Tribes come first for water rights. This is well established on the federal level. California’s lack of Treaties and rancherias system complicates Tribal water rights in California. However, AguaCaliente’s recent groundwater right decision in the Coachella Valley is changing this.

Groundwater is currently not regulated in California but a new law to regulate groundwater is being phased in. Groundwater is supposed to be regulated if there is a hydrological connection with surface water. Agua Caliente specifically applies to Tribal rights to groundwater and is groundbreaking in that way as most Tribal water rights cases have been specific to surface water.

Adjudications

A river system or groundwater basin can be adjudicated, not adjudicated, or partially adjudicated. An adjudication establishes who has priority water rights for specific volumes of water, but it can take decades to complete.

The major opportunities to file protests on water rights through the SWRCB is when there is a new water rights application, or for a change of diversion petition. If water right protests are not resolved administratively, a water rights hearing is held. These hearings can be extensive, such as with the change in point of diversion hearing for the Twin Tunnels, which had both an environmental and water rights holders process which included multi-day hearings that have lasted for three years. Even after three years this process was not completed. This is another place where having lawyers and a lot of collaborators (that you trust!) are important. Fishermen and Tribes are usually able to participate as expert witnesses in their hearings even when they do not have water rights.



The Decision is Made, What Now?

A NEPA decision for a major federal action is called a Record of Decision (ROD) It often comes out at the same time as a Final EIS but not always. A CEQA decision is usually the Final EIR and Notice of Determination. As stated before, California agencies often do a Supplemental Environmental Document (SED) instead of an EIR. These still involve public comment. More information about types of CEQA documents can be found at. <https://calrecycle.ca.gov/SWFacilities/Permitting/CEQA/Documents/EIR/Types>

The NEPA decision triggers a period to file appeals if the federal agency has administrative appeal processes such as the Forest Service and BLM. After a decision on the appeal, litigation is possible. Endangered Species Act and Clean Water Act lawsuits require a 60 day notice to litigate.

Under CEQA there is a strict 30-35 day deadline to file litigation after a Notice of Determination or Categorical Exemption is filed.



When a lawsuit is filed, you have to decide whether to file for a temporary restraining order (TRO) and or an Injunction. **It is not uncommon for a bad project to move forward during a lawsuit if there is no injunction or TRO.** Working in coalitions becomes even more important at this point because direct action can hold a project off while an injunction is being sought, also harm and the ability to win on merit must be shown to win a TRO.

Litigation can be very expensive, even with free attorneys. Filing fees, administrative record costs, court costs and expert witness testimony can be prohibitively expensive. In some cases, if you lose the lawsuit, you may also be liable for the defendants' costs. You can also be subject to discovery or being deposed if you are part of a lawsuit, which can infringe on your privacy in unexpected ways. This is why it is better to file lawsuits with trusted organizations and coalitions, and to make sure you have knowledgeable representation. Please make sure you have consulted with several knowledgeable attorneys about the possible repercussions and how to invoke attorney client privilege before filing any litigation.



- **Case Law -**

Reading a law or learning about it is not always the way to figure all of this out as the interpretation of the law changes all the time. That is why it is important to know the latest decisions and the setup of the state and federal courts. The federal and state courts all have the following structure. Any decisions made by the circuit court or Supreme Court are precedential and will decide future cases. A decision proceeds to the next court if a decision is appealed and the next court accepts the case. If the court does not accept the case the previous ruling stands.

The federal (state) court structure is as follows:

1. District courts (County Superior Court)
2. Circuit courts, We are in the federal 9th circuit (state is court of appeals)
3. Supreme Court (same for state).

It is important to not create bad case law and this should always be considered when filing appeals beyond the district court systems.




Some of the case law that is rapidly changing and applies to this region is related to:

- ❖ 401 case law
- ❖ Ag waiver case law-California
- ❖ Biological Opinion and NEPA case law
- ❖ Tribal Trust and Rights case law
- ❖

We also are now seeing a Federal/states' rights legal preemption struggle occur in several areas: the denial of Oregon permits for the Pacific Connector Pipeline and approval of the FERC application and BOR's push for enlargement of Shasta Dam while California denies permits and asked for Wild and Scenic river protection. This state and federal struggle is also playing out in flow and ESA based litigation related to the Shasta Dam and flow and Biological Opinion decisions related to the Central Valley water project. In the past the states have retained clean water and water rights authority in the court system.



Some Important Case Law

- *Environmental Law Foundation v. State Water Resources Control Board*
 - *United States v. Adair 1 and 2*
 - *Yurok Tribe v. Bureau of Reclamation: Biological Opinion Lawsuit on the Klamath*
 - *Central Valley Biological Opinion and Contract renewals NEPA: Forces Fish Passage at Shasta Dam*
 - *Agua Caliente v. Coachella Water District*
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How does it all work? Every Tool in the Toolbox

Knowing how the law and public opportunities for comment are important whether you are a community organizer, fishermen, or a lawyer. All tactics are needed in the fight for the salmon and water

In the Klamath River dams FERC process advocacy, corporate campaigning, the law, settlement negotiations, and science were all used to advocate to get the dams out.



Klamath Dams Legal framework:

- **FERC, NEPA and Tribal Trust** - Dam are only relicensed roughly every 50 years and therefore most environmental laws do not apply until then. The FERC process averages about 10 years but can go much longer. In the Klamath, the NEPA process for the relicensing of 5 Klamath River dams began with pre-scoping in 2004 and is ongoing. Because the Klamath River has four federally recognized Tribes, two of which have established fishing rights, Tribal consultation came into play at the beginning of the FERC process. Because the Klamath is extremely important to commercial fishing in two states, ocean and fisheries managers have also been very involved.
- **ESA and required Fish Passage under the Federal Power Act:** The requirement for fish passage at some FERC regulated dams led to a science battle in the Klamath that included a hearing with findings from a judge that spring chinook salmon once used the entire Upper Klamath basin. The Karuk Tribe (and partners) have also petitioned for ESA listings for spring chinook salmon and have done extensive genetic work to support this petition. A ruling on the petition has not yet happened.
- **The Clean Water Act and 401 Certification (this is where CEQA came in for California)**
 1. Klamath River 303 (d) Impairments and TMDL,
 2. Advocacy to add Impairments led to California's first Toxic Algae 303 (d) listing,
 3. Toxic algae studies and proving that water quality problems could not be solved without dam removal lead to the state not agreeing for the 401 certification during the CEQA process,
 4. Now the state is doing CEQA for the 401 permit to take the dams out.

Important Websites:

Federal Register: <https://www.federalregister.gov/>

North Coast Regional Water Board: <https://www.waterboards.ca.gov/northcoast/>

State Water Board: <https://www.waterboards.ca.gov/>

Bureau of Reclamation, Mid Pacific Region: <https://www.usbr.gov/mp/>

California Department of Water Resources <https://water.ca.gov/>

Ocean Protection Council: <http://www.opc.ca.gov/>

California Air Resources Board <https://ww2.arb.ca.gov/homepage>

Governor's Office: <https://www.gov.ca.gov/>





For more information or to follow these processes and current case law contact Save California Salmon at regina@californiasalmon.org or follow us on facebook at Save California Salmon, on Twitter @Calisalmon or on instagram at @californiarivers.