

# 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*

# **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

## Contents

Foreword.....	I
Executive Summary.....	2
Introduction.....	3
California’s Water Legacy.....	3
The Duty to Consider.....	5
Defining The Human Right To Water.....	6
Guiding Human Rights Principles.....	7
Conclusion.....	10
Resource Guide.....	11
Notes.....	13
Authors & Acknowledgements.....	19

### **INTERNATIONAL HUMAN RIGHTS LAW CLINIC, UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW**

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](http://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 (Eng) to ensure universal access to clean water.<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> 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 to the realization of the human right to water in the state. California has a long history of prioritizing water for domestic purposes and regulating water affordability and quality. Despite this legacy, millions of Californians—many poor and living in marginalized communities—do not have access to clean, safe, and affordable water.<sup>6</sup> AB 685 aims to remove barriers to access by requiring—effective January 1, 2013—all relevant state agencies to consider the human right to water in executing policy, budgetary, and programmatic duties.<sup>7</sup> While the legislation specifically refers to the Department of Water Resources (DWR), the State Water Resources Control Board (State Water Board), and the California Department of Public Health (CDPH), all

agencies engaged in activities that impact water quality, affordability or accessibility are obligated to comply with AB 685.<sup>8</sup>

International human rights standards define both *what* (the substantive standards) agencies should consider and *how* (the process) agencies should advance the human right to water. International law provides an authoritative definition of components of the human right to water—quality, quantity, accessibility, and availability—that closely mirrors the policy objectives outlined in AB 685. Human rights principles also guide the implementation process by calling on state agencies to guard against discriminatory practices and policies, foster meaningful public participation, and ensure effective accountability mechanisms. These principles are central to good governance and should steer efforts by state agencies to address the water challenges facing disadvantaged communities in urban, peri-urban, tribal, rural, and unincorporated areas.

Implementation of AB 685 will be an ongoing and dynamic process. Under AB 685 and the implementation framework outlined above, relevant state agencies should:

- » *Ensure that the policy goals established by AB 685—safe, clean, affordable and accessible water adequate for domestic uses—are reflected in agency planning;*
- » *Give preference to policies that advance AB 685 and refrain from taking actions that adversely impact the human right to water;*
- » *Report on actions undertaken to promote AB 685 and make information relevant to the human right to water available to the public;*
- » *Foster meaningful opportunities for public participation in agency decision-making by California’s diverse population;*
- » *Facilitate access by rural and urban disadvantaged communities to state funds for water infrastructure improvements; and*
- » *Ensure the effectiveness of accountability mechanisms protecting access to clean and affordable water.*

## Introduction

By signing AB 685 into law on September 25, 2012,<sup>9</sup> 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.”<sup>10</sup> 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.<sup>11</sup> 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.”<sup>12</sup> However, millions of Californians—many poor and living in marginalized communities—do not have access to clean, safe, and affordable water.<sup>13</sup> 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

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.<sup>14</sup> AB 685 reaffirms the state’s long-standing commitment to universal access and offers state agencies a road map for addressing the state’s current water challenges.

### A. Water Policy History in California

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 1928, the state constitution was amended to affirm that water should be conserved for the “interest of the people and public welfare.”<sup>15</sup> Two decades later, California water regulations codified that “the use of water for domestic purposes is the highest use of water.”<sup>16</sup> To ensure water quality, California began to regulate the disposal of wastes into water in 1968.<sup>17</sup> 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.<sup>18</sup> California also established a system to warn residents of possible chemical exposure in drinking water.<sup>19</sup> California law also regulates the cost of water,<sup>20</sup> protects marginalized groups, such as agricultural workers,<sup>21</sup> and provides funding to facilitate access to water during emergencies<sup>22</sup> and by disadvantaged communities.<sup>23</sup> For more than twenty years, California law has guaranteed that “[e]very citizen of California has the right to pure and safe drinking water.”<sup>24</sup> Recent laws and policies further prioritize equal access to safe and clean drinking water for California’s disadvantaged populations.<sup>25</sup>

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 water-borne diseases.<sup>26</sup> Since the 1950s, DWR<sup>27</sup> has managed and protected water through planning and conservation efforts<sup>28</sup> and the State Water Board has administered water rights and regulated water quality.<sup>29</sup> Other departments, such as CDPH, were integrated into the network of water governance agencies to address water-related health issues.<sup>30</sup> 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.<sup>31</sup> To ensure water affordability, the California Public Utilities Commission (CPUC) regulates privately owned service providers, including water companies.<sup>32</sup> 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.<sup>33</sup>

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<sup>34</sup>—disproportionately bear the health and financial impacts of precarious or inadequate access to safe water. Under AB 685, state agencies should identify those populations facing water challenges, prioritize securing their access to clean water, and address the underlying causes to ensure fulfillment of the human right to water.

### 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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> Bacterial and chemical contaminants can result in dangerous and costly health impacts, such as gastrointestinal diseases, infections, hormone disruption, birth defects, and miscarriages.<sup>38</sup> Dilapidated and corroded infrastructures increase the risk of water contamination.<sup>39</sup> Even if aging infrastructures are replaced, “the most expensive new pipes are only as good as the water flowing through them.”<sup>40</sup>

### 2. INADEQUATE INFRASTRUCTURE

A lack of adequate water infrastructure impacts water quality and access for California communities. Administrative barriers make it difficult for affected communities to implement sustainable solutions that address infrastructure problems.<sup>41</sup> 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.<sup>42</sup> Few disadvantaged communities have successfully navigated the complex application process to obtain funding for infrastructure improvements or connections to neighboring water systems.<sup>43</sup> 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.<sup>44</sup> Despite widespread contamination of drinking water, California has failed to spend \$455 million in federal safe-drinking-water funds to improve treat-

ment systems and other facilities in small, rural communities.<sup>45</sup>

### 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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup>

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.<sup>49</sup> 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.<sup>50</sup>

### 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.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup>

## 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.”<sup>54</sup> 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.<sup>55</sup>

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.<sup>56</sup> 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.<sup>57</sup> Other agencies that play an important role in ensuring universal access to safe 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).

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

- » *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.<sup>59</sup>
- » *Second, agencies must refrain from adopting policies or regulations that run contrary to securing universal access to safe drinking water.*<sup>60</sup> Agencies should show that relevant factors were weighed during the decision-making process.<sup>61</sup> Agencies should not disregard the impact of decisions on the safety, affordability, or accessibility of water.<sup>62</sup>
- » *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.<sup>63</sup>

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.<sup>64</sup> Like AB 685, international standards prioritize water for personal and domestic uses, such as drinking, cooking and basic hygiene, over industry and agricultural uses.<sup>65</sup> International standards also recognize the crucial role of government in ensuring universal access to safe water.<sup>66</sup>

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.<sup>67</sup> 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.<sup>68</sup> Under international standards, governments must refrain from contamination and adopt effective measures to limit contamination by third parties.<sup>69</sup> To meet a standard of good quality, water must not pose a threat to human health.<sup>70</sup> Water therefore must not contain organic or chemical contaminants that can cause illness or

disease.<sup>71</sup> The impact of consumption of contaminated water is cumulative over a lifetime and may depend on different health sensitivities at various life stages.<sup>72</sup> 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.<sup>73</sup> Water must also be of an acceptable color, odor, and taste.<sup>74</sup>

### B. Quantity

Everyone is entitled to sufficient and reliable sources of water for personal and domestic uses.<sup>75</sup> International standards indicate that personal and domestic uses include water for drinking, sanitation, and food preparation.<sup>76</sup> Under this standard, water must be available in quantities necessary to meet an acceptable standard of living,<sup>77</sup> taking into account individual circumstances and needs, such as health issues or work conditions.<sup>78</sup> Sufficient amounts of water should be available in various contexts, including home, school, and work.<sup>79</sup> In the allocation of water, personal and domestic use should be prioritized over other uses, such as agriculture and industry.<sup>80</sup>

### C. Accessibility

The human right to water requires physical access to adequate, safe, and acceptable water.<sup>81</sup> Water services must be accessible to households, health and public institutions, and workplaces.<sup>82</sup> Moreover, access to water for schools currently without adequate safe drinking water should be addressed as a matter of urgency.<sup>83</sup> Everyone, regardless of age or disabilities, should have access to clean water.<sup>84</sup> Gaining access to water should not require disproportionate burdens on the time and resources of individuals.<sup>85</sup> 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—<sup>86</sup>, but do require that water services are affordable for all, including low-income residents.<sup>87</sup>

### 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.<sup>88</sup> Water costs should not compromise the ability to pay for other essential items, such as food, housing, and healthcare.<sup>89</sup> 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.<sup>90</sup> In the case of people living in extreme poverty and homelessness, affordability may mean that safe drinking water should be provided for free.<sup>91</sup> Affordability is relative and the maximum cost of basic water service depends on individual income.<sup>92</sup> 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.<sup>93</sup>

## Guiding Human Rights Principles

International human rights standards define both *what* (the substantive standards) 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.<sup>94</sup>

## 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.<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup> 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 forms.<sup>98</sup> Certain practices, such as capping drinking fountains in public areas with homeless encampments, can effectively bar a group from accessing drinking water.<sup>99</sup>

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 Cali-

fornia residents. 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.<sup>100</sup> Third, agencies should facilitate access to clean water by disadvantaged communities<sup>101</sup> through budgetary allocations and increased access to funding for infrastructure improvements.<sup>102</sup> A proactive non-discriminatory approach may necessitate greater resource allocation for identified groups that have faced historic discrimination.<sup>103</sup> CDPH, DWR, and the State Water Board currently have funding or other programs that impact the human right to water.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> Similarly, DWR must "provide outreach to disadvantaged

communities to promote access and participation in the public comment meetings."<sup>107</sup> These existing approaches can be harmonized with the goals of AB 685 to ensure public participation in the realization of the human right to water.

Agencies should also consider the human right to water when adopting new measures that foster public participation and engagement in water governance. By notifying residents of hearings in a timely manner and holding meetings in locations accessible to affected communities, agencies create opportunities for individuals to provide meaningful input. For instance, as a part of its Environmental Monitoring Branch, DPR should hold meetings in communities affected by water contamination to facilitate community input and public access to information about water quality and pollution prevention strategies.<sup>108</sup> Formalities, such as holding meetings in high-security government buildings or the use of "acronyms and technical terms," can discourage participation by disadvantaged residents.<sup>109</sup>

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.<sup>110</sup> 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.<sup>111</sup>

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.<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup> 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.<sup>116</sup> 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;<sup>117</sup> the backlog of cases involving violations of water quality standards;<sup>118</sup> the waiver of quality water standards in communities affected by unsafe levels of contaminants by regional water boards;<sup>119</sup> and the slow distribution of financial assistance to enable compliance with safe water standards.<sup>120</sup> To be effective, it is critical that accountability mechanisms are “independent and shielded from political interference and capture by specific groups or politicians.”<sup>121</sup> 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 rights 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

Letter from Catarina de Albuquerque, U.N. Special Rapporteur on the human right to safe drinking water and sanitation, to Sacramento Mayor Kevin Johnson (Jan. 23, 2012) available at <http://www.scribd.com/doc/80310395/Letter-to-Mayor-Johnson-from-UN>.

Carolina Balazs et al., *Social Disparities in Nitrate Contaminated Water in California’s San Joaquin Valley*, 119 ENVTL. HEALTH PERSP. 1273 (2011).

Rachel Butts & Steven Gasteyer, *More Cost per Drop: Water Rates, Structural Inequality, and Race in the United States – The Case of Michigan*, 13 Env’tl. Prac. 386 (2011).

COLUMBIA LAW SCHOOL, HUMAN RIGHTS INSTITUTE, BRINGING HUMAN RIGHTS HOME: HOW STATE AND LOCAL GOVERNMENTS CAN USE HUMAN RIGHTS TO ADVANCE LOCAL POLICY (Dec. 2012), available at <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/Bringing%20Human%20Rights%20Home.pdf>.

JOHN E. CROMWELL III ET AL., BEST PRACTICES IN CUSTOMER PAYMENT ASSISTANCE PROGRAMS, ENVIRONMENTAL PROTECTION AGENCY AND WATER RESEARCH FOUNDATION, (2010), available at <http://www.waterrf.org/PublicReportLibrary/4004.pdf>.

LAUREL FIRESTONE, GUIDE TO COMMUNITY DRINKING WATER ADVOCACY, COMMUNITY WATER CENTER (2009), available at [http://www.communitywatercenter.org/files/CWC\\_eng\\_selfprint\\_1.pdf](http://www.communitywatercenter.org/files/CWC_eng_selfprint_1.pdf).

ROSE FRANCIS, COMMUNITY WATER CENTER & SAFE WATER ALLIANCE, THE LEGAL IMPLICATIONS OF AB 685 (ENG), CALIFORNIA’S HUMAN RIGHT TO WATER BILL (2012), available at <http://uulmca.org/documents/water/AB685LegalReport1.pdf>.

Rose Francis & 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 WILLAMETTE L. REV. 495 (2011), available at [http://www.waterlawsymposium.com/sites/default/files/Willamette Law Review Article on CWC.pdf](http://www.waterlawsymposium.com/sites/default/files/Willamette%20Law%20Review%20Article%20on%20CWC.pdf).

Eric L. Garner and Lucas I. Quass, *California’s New Basic Human Right to Water Will Frame Future Policy Debates*, WATER LAW & POLICY MONITOR, WLPM No. 7, Mar. 13, 2013 available at <http://www.bbklaw.com/88E17A/assets/files/Documents/BBK-RIV-Garner-Quass-RighttoWater.pdf>.

GEORGETOWN LAW HUMAN RIGHTS INSTITUTE FACT-FINDING PRACTICUM, TAPPED OUT: THREATS TO THE HUMAN RIGHT TO WATER IN THE URBAN UNITED STATES (2013), available at <http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/upload/HumanRightsFinal2013.pdf>.

PACIFIC INSTITUTE, THE HUMAN COSTS OF NITRATE-CONTAMINATED DRINKING WATER IN THE SAN JOAQUIN VALLEY (2011), available at [http://www.pacinst.org/reports/nitrate\\_contamination/nitrate\\_contamination.pdf](http://www.pacinst.org/reports/nitrate_contamination/nitrate_contamination.pdf).

Camille Pannu, *Drinking Water and Exclusion: A Case Study from California's Central Valley*, 100 Calif. L. Rev. 223, 242-44 (2012), available at <http://www.californialawreview.org/assets/pdfs/100-1/05-Pannu.pdf>.

STATE WATER RESOURCES CONTROL BOARD, RECOMMENDATIONS ADDRESSING NITRATE IN GROUNDWATER (2013), available at [http://www.waterboards.ca.gov/water\\_issues/programs/nitrate\\_project/docs/nitrate\\_rpt.pdf](http://www.waterboards.ca.gov/water_issues/programs/nitrate_project/docs/nitrate_rpt.pdf).

UNIVERSITY OF CALIFORNIA, DAVIS, CENTER FOR WATERSHED SCIENCES, ADDRESSING NITRATE IN CALIFORNIA'S DRINKING WATER (2012), available at <http://groundwaternitrate.ucdavis.edu/files/138956.pdf>.

## International Resources

Catarina de Albuquerque with Virginia Roaf, *On the Right Track: Good practices in realising the rights to water and sanitation*, (2012), available at [http://www.ohchr.org/Documents/Issues/Water/BookonGoodPractices\\_en.pdf](http://www.ohchr.org/Documents/Issues/Water/BookonGoodPractices_en.pdf).

Centre on Housing Rights and Evictions, *Manual on the Right to Water and Sanitation* (2008), available at [http://www.cohre.org/sites/default/files/manual\\_on\\_the\\_right\\_to\\_water\\_and\\_sanitation\\_2008.pdf](http://www.cohre.org/sites/default/files/manual_on_the_right_to_water_and_sanitation_2008.pdf).

Centre on Housing Rights and Evictions, *Operational Guidelines for Implementing Rights Based Approaches to Water and Sanitation Programming* (2008), available at [http://www.cohre.org/sites/default/files/rights\\_based\\_approach\\_to\\_watsan\\_programming\\_08\\_04\\_08.pdf](http://www.cohre.org/sites/default/files/rights_based_approach_to_watsan_programming_08_04_08.pdf).

The Human Right to Water and Sanitation, General Assembly. Res. 64/292, U.N. Doc. A/RES/64/292 (Aug. 3, 2010), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/64/292](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/292).

Human Rights and Access to Safe Drinking Water and Sanitation, Human Rights Council Res. 15/9, U.N. Doc. A/HRC/RES/15/9 (Oct. 6, 2010), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/166/33/PDF/G1016633.pdf?OpenElement>.

Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation*, U.N. Doc. HR/PUB/12/5 (2012), available at [http://www.ohchr.org/Documents/Publications/Human\\_rights\\_indicators\\_en.pdf](http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf).

SPECIAL RAPPORTEUR ON THE HUMAN RIGHT TO SAFE DRINKING WATER AND SANITATION, FREQUENTLY ASKED QUESTIONS, available at [http://www.ohchr.org/Documents/Issues/Water/FAQWater\\_en.pdf](http://www.ohchr.org/Documents/Issues/Water/FAQWater_en.pdf).

Special Rapporteur on the human right to safe drinking water and sanitation, *Mission to the United States of America*, U.N. Doc. A/HRC/18/33/Add.4 (Aug. 2, 2011) (by Catarina de Albuquerque), available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4_en.pdf).

INGA T. WINKLER, THE HUMAN RIGHT TO WATER: SIGNIFICANCE, LEGAL STATUS AND IMPLICATIONS FOR WATER ALLOCATION (2012).

## Notes

1 AB 685, ch. 524, 2012 Cal. Stat. 91 (Codified at CAL. WATER CODE § 106.3 (West 2012)).

2 CAL. WATER CODE § 106.3(A) (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(b) (West 2012).

5 Our analysis recognizes that AB 685 is not intended to affect the duties or responsibilities of existing public water systems, impact water supplies for new developments, or require new expenditures in water infrastructure. CAL. WATER CODE § 106.3(c)-(e) (West 2012).

6 The drinking water of millions of Californians is contaminated in violation of state standards. See *AB 685 Before the S. Rules Comm. S. Floor Analyses*, 2011-2012 Legis. Sess. Third Reading (Aug. 22, 2011) (arguments in support).

7 CAL. WATER CODE § 106.3(a) (West 2012).

8 CAL. WATER CODE § 106.3(b) (West 2012).

9 CAL. WATER CODE § 106.3 (West 2012).

10 CAL. WATER CODE § 106.3(a) (West 2012).

11 *Id.*

12 Governor Brown Signs Legislation to Bring Clean Drinking Water to Californians, available at: <http://gov.ca.gov/news.php?id=17262>.

13 See *AB 685 Before the S. Rules Comm. S. Floor Analyses*, 2011-2012 Legis. Sess. Third Reading (Aug. 22, 2011) (arguments in support).

14 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 SBX2 1 Report to the Legislature, January 2012), available at <http://groundwaternitrate.ucdavis.edu> [hereinafter UC Davis Nitrate Report].

15 CAL. CONST. art. XIV, § 3 (1928) (*superseded by* CAL. CONST. art. X, § 2 (1976); *codified at* CAL. WATER CODE § 100 (West 2012)).

16 CAL. WATER CODE § 106 (codified in 1943) (West 2012).

17 The State Water Resources Control Board adopted Resolution No. 68-16 on Oct. 28, 1968, commonly referred to as the "antidegradation policy."

18 See Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f (2006); CAL. HEALTH & SAFETY CODE §§ 25249.5-.13 (West 2012).

19 CAL. HEALTH & SAFETY CODE § 25249.6 (West 2012).

20 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) ("In short, 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 potable drinking water—one quart per employee per hour—for the entire shift. See Heat Illness Prevention, 8 Cal. OSHA § 3395(c) (2010).

22 See CAL. PUB. RES. CODE § 75021 (2006) (West 2012).

23 See CAL. HEALTH AND SAFETY CODE § 116760.39 (West 2012).

24 CAL. HEALTH AND SAFETY CODE § 116270(a) (the language was adopted in 1989 with the passage of AB 21) (West 2012).

25 See, e.g., 8 Cal. OSHA § 3395(c) (2010); CAL. EDU. CODE § 38086 (West 2012).

26 See CHESTER G. GILLESPIE & MALCA CHALL, ORIGINS AND EARLY YEARS OF THE BUREAU OF SANITARY ENGINEERING, 1 (1971).

27 CAL. WATER CODE § 120 (West 2012).

28 See, e.g., CAL. WATER CODE § 10004(b)(1) (West 2012).

29 See Clean Water Act (CWA), 33 U.S.C. § 1361 (2006); CAL. WATER CODE § 13001 (West 2012).

30 See 42 U.S.C. § 300f (2006); CAL. HEALTH & SAFETY CODE §§ 25249.5-.13, 116270 (West 2012).

31 CAL. HEALTH & SAFETY CODE § 116275(c)(1) (West 2012).

32 See CAL. PUB. UTIL. CODE §§ 701, 702, 451 (2008) (West 2012).

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. See CAL. GOV. CODE §§ 56033.5, 56045 (West 2012).

35 See generally, *Communities that Rely on Contaminated Groundwater (Draft)*, STATE WATER RESOURCES CONTROL BOARD (Feb. 2012), available at [http://www.swrcb.ca.gov/gama/ab2222/docs/cmntes\\_rely\\_gw.pdf](http://www.swrcb.ca.gov/gama/ab2222/docs/cmntes_rely_gw.pdf) [hereinafter COMMUNITIES THAT RELY ON CONTAMINATED GROUNDWATER]. See also U.N. Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, *Mission to the United States of America*, ¶ 37, U.N. Doc. A/HRC/18/33/Add.4 (Aug. 2, 2011) (by Catarina de Albuquerque) [hereinafter UN Report].

36 See MICHAEL KIPARSKY & JAYNI FOLEY HEIN, CTR. FOR LAW, ENERGY, AND THE ENV'T, REGULATION OF HYDRAULIC FRACTURING IN CALIFORNIA: A WASTEWATER AND WATER QUALITY PERSPECTIVE, 14 (2013), [http://www.law.berkeley.edu/files/ccelp/Wheeler\\_HydraulicFracturing\\_April2013.pdf](http://www.law.berkeley.edu/files/ccelp/Wheeler_HydraulicFracturing_April2013.pdf). See UN Report, *supra* note 35, at ¶ 37. See generally Carolina Balazs, et al., *Environmental Justice Challenges in Small-Scale Water Systems in California's San Joaquin Valley: The Case of Nitrate and Arsenic*, 23(5) EPIDEMIOLOGY 1 (Sept. 2012).

37 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 242-44.

39 *Id.* at 237.

40 Rose Francis & 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 WILLAMETTE L. REV. 495, 514 (Spring 2011).

41 UN Report, *supra* note 35, at ¶ 48.

42 *Id.* at ¶ 68. The report discusses infrastructure issues facing the non-federally recognized Winnemen Wintu Tribe, particularly their ineligibility, based on their tribal status, for financial assistance to improve access to water.

43 For example, the community of Monson in Tulare County attempted to connect residents 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 town of Monson getting water filters*, THE FRESNO BEE, Sept. 16, 2012, <http://www.fresnobee.com/2012/09/16/2994243/rotary-buys-water-filters-for.html> [hereinafter Grossi]. See also COMMUNITIES THAT RELY ON CONTAMINATED GROUNDWATER, *supra* note 35, at 90 (finding that of the 682 communities that rely on contaminated groundwater, 516 are currently receiving or are actively seeking state funding to address drinking water quality issues).

44 Grossi, *supra* note 43 (suggesting that funding and grant policies effectively exclude communities with the most immediate water quality needs.). See also STATE WATER RESOURCES CONTROL BD., FACTSHEET: ECONOMIC STIMULUS FUNDING, 2, May 2011 (requiring that projects receiving funding through the Clean Water State Revolving Fund show that they have the “technical, financial, and managerial experience to ensure project completion, wise financial decisions, and loan payback capability.”).

45 Letter from Jared Blumenfeld, Regional Administrator, United States Environmental Protection Agency, to Ron Chapman, Director, California Department of Public Health (Apr. 19, 2013) (on file with author).

46 See Mark Grossi, *Tainted water flows from taps of rural Valley homes*, THE FRESNO BEE, Oct. 1, 2011, [http://www.fresnobee.com/2011/10/01/2554048\\_p3/tainted-water-flows-from-taps.html](http://www.fresnobee.com/2011/10/01/2554048_p3/tainted-water-flows-from-taps.html). [hereinafter *Tainted Water*].

47 See generally Pannu, *supra* note 33, at 238. In Lanare, the local community received \$1.3 million in federal money to construct a treatment plant for arsenic-tainted water. However, when the system began operating, the water rates skyrocketed. The plant currently sits unused because Lanare residents could not afford operation costs. See Patricia Leigh Brown, *The Problem is Clear: The Water is Filthy*, N.Y. Times, Nov. 13, 2012, available at <http://www.nytimes.com/2012/11/14/us/tainted-water-in-california-farmworker-communities.html?pagewanted=all> [hereinafter *The Problem is Clear*].

48 See Declaration of Betsy Lichti in support of petition for appointment of receiver, In Re: Lanare Community Service District (July 14, 2010).

49 *Tainted Water*, *supra* note 46.

50 UN Report, *supra* note 35, at ¶ 39.

51 See *id.* at ¶¶ 56, 94(i); Letter from Catarina de Albuquerque, Special Rapporteur, U.N. Special Rapporteur on the human right to safe drinking water and sanitation, to Kevin Johnson, Mayor, Sacramento (Jan. 23, 2012).

52 In 2009, California Project LEAN surveyed more than 200 school districts to determine the availability of clean drinking water in California schools. The survey revealed two main reasons students did not have access to free and clean water: (1) schools did not have enough water fountains for the number of students and (2) water fountains were poorly maintained. CAL. DEPT. OF EDU., *Drinking Water for Students in Schools*, <http://www.cde.ca.gov/ls/nu/he/water.asp>. California requires one water fountain per 150 people on a school campus. In 1999, the Superintendent of Public Instruction found this ratio inadequate; no action has been taken to remedy this issue. *Water in Schools, What's Currently Required?* (April 13, 2013), <http://www.waterinschools.org/whatsrequired.shtml>.

53 As a general rule as of July 1, 2011, school districts shall provide students access to free, clean drinking water during meal times. CAL. EDU. CODE § 38086 (West 2012). The California Department of Education encourages a proactive approach to expanding access to water for students. CAL. DEPT. OF EDU., *Drinking Water for Students in Schools*, <http://www.cde.ca.gov/ls/nu/he/water.asp> (last reviewed Jul. 2012). In the Central Valley, at least twelve schools with a total of 3000 students are in unincorporated areas that rely on contaminated groundwater. Julia Scott, *Nitrate Contamination Spreading in California Communities*, CAL. WATCH, May 13, 2010, <http://californiawatch.org/nitrate-contamination-spreading-california-communities>. Students at Stone Corral Elementary in Seville, California are not allowed 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.

54 Legislative Intent—Assem. Bill No. 685, ASSEM. J. 6817 (2011-2012 Reg. Sess.) [hereinafter Legislative Intent].

55 CAL. WATER CODE § 106.3(b) (West 2012).

56 CAL. WATER CODE § 106.3(b) (West 2012).

57 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 all relevant state agencies. See Legislative Intent, *supra* note 54. See generally, Hassan v. Mercy Am. River Hosp., 31 Cal. 4th 709, 717 (2003) (holding that the word “including” in a statute is “ordinarily a term of enlargement rather than limitation.”). See also Samantar v. Yousuf, 130 S.Ct. 2278, 2287 (2010) (“[I]nclude’ can signal that the list that follows is meant to be illustrative rather than exhaustive.”).

58 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 City of Burbank v. State Water Res. Control Bd., 35 Cal. 4th 613, 625 (2005) (explaining that taking into consideration means “to take into account various factors,” including those specified in legislation); see also Motor Ve-

hicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (holding “[A]n agency rule would be arbitrary and capricious if the agency has... entirely failed to consider an important aspect of the problem.”); City of Arcadia v. State Water Res. Control Bd., 191 Cal. App. 4th 156, 177-78 (2010) (holding that the Board sufficiently considered section 13241 because its plan did “contain an express reference to section 13241 and the staff report did discuss the potential for economic impacts,” of the quality control plan); San Joaquin River Exch. Contractors Water Auth. v. State Water Res. Control Bd., 183 Cal. App. 4th 1110, 1120 (2010) (explaining that the board adequately considered factors in Water Code section 13241 by developing amendments based on “technical studies which effectively considered the factors that the board is required to consider . . .”).

59 See Boehm v. Superior Court, 178 Cal. App. 3d 494, 503 (1986) (finding that the county did not sufficiently consider General Assistance recipients' need for an allowance to cover clothing, transportation and medical care because the County did not produce a study that “demonstrated that clothing, essential transportation and medical care was being provided by any other program available to GA recipients . . .”).

60 See Motor Vehicle, 463 U.S. at 43 (“Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”). See also WATER RES. CONTROL BD., WATER QUALITY CONTROL PLAN FOR SALINITY: SAN FRANCISCO BAY/SACRAMENTO-SAN JOAQUIN DELTA ESTUARY 6-1 (1991).

61 See Burbank, 35 Cal. 4th at 625 (explaining that taking into consideration means “to take into account various factors,” including those in a specified in legislation).

62 See Arcadia, 191 Cal. App. 4th at 177.

63 *Id.* at 177-78 (holding, the agency sufficiently considered Water Code Section 13241 because the agency's plan “contain[ed] an express reference to section 13241 and the staff report [ ] discuss[ed] the potential for economic impacts,” of the quality control plan as required by the statute). See also San Joaquin River, 183 Cal. App. 4th at 1120.

64 Comm. on Econ., Soc., & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15* (2002): *The Right to Water* (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 2, 29th Sess., 2002, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter *General Comment No. 15*].

65 *Id.* at ¶ 2.

66 See CATARINA DE ALBUQUERQUE, ON THE RIGHT TRACK: GOOD PRACTICES IN REALIZING THE RIGHTS TO WATER AND SANITATION 31 (2012), available at [http://www.ohchr.org/Documents/Issues/Water/BookonGoodPractices\\_en.pdf](http://www.ohchr.org/Documents/Issues/Water/BookonGoodPractices_en.pdf) [hereinafter ON THE RIGHT TRACK]; Int'l Council on Human Rights Policy, Local Government and Human Rights: Doing Good Service (2005)

at 15-16, available at [http://www.ichrp.org/files/reports/11/124\\_report.pdf](http://www.ichrp.org/files/reports/11/124_report.pdf).

67 Office of the U.N. High Comm'r for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, at 12 UN Doc. HR/PUB/06/8 (2006).

68 CAL. WATER CODE § 106.3(a) (West 2012).

69 *General Comment No. 15*, *supra* note 64, at ¶ 23.

70 *Id.* at ¶ 12.

71 *Id.*

72 World Health Organization, *Guidelines for Drinking-water Quality 1* (4th ed. 2011).

73 U.N. High Comm'r for Human Rights, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the United Nations High Commissioner for Human Rights and the Secretary-General: Report of the United Nations High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation Under International Human Rights Instruments*, ¶ 16 U.N. Doc. A/HRC/6/3 (Aug. 16, 2007) [hereinafter UNHCHR Report on Equitable Access].

74 *General Comment No. 15*, *supra* note 64, at ¶ 12 (b).

75 Water has to be guaranteed for the purpose of drinking as it is a basic necessity for survival. See INGA T. WINKLER, THE HUMAN RIGHT TO WATER: SIGNIFICANCE, LEGAL STATUS AND IMPLICATIONS FOR WATER ALLOCATION 133 (2012) [hereinafter WINKLER]. Similarly, AB 685 identifies human consumption of water as a priority. See CAL. WATER CODE § 106.3(a).

76 See *General Comment No. 15*, *supra* note 64, at ¶ 2.

77 See WINKLER, *supra* note 75, at 133.

78 *Id.* at 131.

79 See *General Comment No. 15*, *supra* note 64, at ¶ 12 (c)(i); WINKLER, *supra* note 75, at 135.

80 WINKLER, *supra* note 75, at 129.

81 See *General Comment No. 15*, *supra* note 64, at ¶ 12 (c)(i).

82 *Id.* See WINKLER, *supra* note 75, at 135.

83 *General Comment No. 15*, *supra* note 64, at ¶ 16 (b).

84 WINKLER, *supra* note 75, at 136.

85 *Id.* at 135.

86 UNHCHR Report on Equitable Access, *supra* note 73, at ¶ 29.

87 WINKLER, *supra* note 75, at 139.

88 UNHCHR Report on Equitable Access, *supra* note 73, at ¶ 28.

89 *General Comment No. 15*, *supra* note 64, at ¶ 12 (c)(ii).

90 *Id.* at ¶ 15.

91 *Id.* at ¶ 15. UNHCHR Report on Equitable Access, *supra* note 73, at ¶ 28. The legislative history suggests that AB 685 does not impose a new obligation on the state to “provide water service or to pay for water for those unable to afford it....” The purpose of AB 685 is to assist “rural and disadvantaged communities” in overcoming the lack of access to clean drinking water. See Legislative Intent, *supra* note 54.

92 WINKLER, *supra* note 75, at 138.

93 *Id.* at 137 (explaining “the UNDP *Human Development Report 2006* assumes that 3 percent of household income is an appropriate benchmark; whereas the Camdessus Report speaks of 5 per cent. In fact, as a rule of thumb, 2 to 5 per cent of household income seems to have crystallized as a common indicator within the water community.”). U.S. affordability criteria indicate that the cost of water should not exceed 1.5% of household income. See Nat’l Drinking Water Advisory Council, *Recommendations of the National Drinking Water Advisory Council to U.S. EPA on Its National Small Systems Affordability Criteria* 138 (2003).

94 Columbia Law School, Human Rights Institute, *Bringing Human Rights Home: How State and Local Governments Can Use Human Rights to Advance Local Policy* 4 (Dec. 2012).

95 All of the human rights treaties which discuss non-discrimination and equality detail a comparable list of prohibited grounds of discrimination. However, authoritative bodies have interpreted the term “or other status” in a treaty to indicate that these enumerated grounds are merely illustrative. MAGDALENA SEPULVEDA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 391 (Intersentia, 2003).

96 International standards address multiple forms of discrimination, including: (a) *De jure* discrimination which is defined as discriminatory language or practices found directly in laws and policies; (b) *De facto* discrimination which is defined as discrimination that occurs only in practice; and (c) Indirect discrimination which refers to laws, policies or practices which appear neutral, but have a disproportionate impact on certain individuals based on one or more grounds of discrimination. U.N. Comm. on Econ., Soc., & Cultural Rights, *General Comment No. 20: Non-discrimination in the economic, social and cultural rights (Arts. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 38, 42nd Sess., 2009, U.N. Doc. E/C.12/GC/20 (Jul. 2, 2009).

97 Pannu, *supra* note 33, at 232. There are 450 unincorporated communities in the Central Valley that are not part of a municipality, 220 of which are disadvantaged and low-income. See generally Pannu, *supra* note 33, at 231 and *Community Equity Initiative*, CAL. RURAL LEGAL ASSISTANCE, INC., <http://www.crla.org/community-equity-initiative> (last visited Apr. 13, 2013). Given the higher levels of poverty in the low-income communities, neighboring water systems are less likely to allow these communities to connect to a supply of safe drinking water. The extra costs associated with lack of access to safe water further strains individual and community budgets. Pannu, *supra* note 33, at 234.

98 Pacific Institute, *The Human Costs of Nitrate-contaminated Drinking Water in the San Joaquin Valley*, 33 (2011).

99 Letter from Catarina de Albuquerque, U.N. Special Rapporteur on the human right to safe drinking water and sanitation, to Kevin Johnson, Mayor, Sacramento (Jan. 23, 2012).

100 See generally, *California Water Plan*, DEPARTMENT OF WATER RESOURCES, <http://www.waterplan.water.ca.gov/> (last visited Apr. 21, 2013).

101 *General Comment No. 15, supra* note 64, at ¶ 16.

102 The Clean Water State Revolving Fund is designed to finance water quality projects through low-interest loans. The State Water Board has been providing low-interest loans from the revolving fund since 1987. See STATE WATER RESOURCES CONTROL BOARD, FACTSHEET: ECONOMIC STIMULUS FUNDING, 2, May 2011.

103 WINKLER, *supra* note 75, at 113.

104 See *Capacity Development Program*, CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, <http://www.cdph.ca.gov/certlic/drinkingwater/Pages/TME.aspx> (last visited Apr. 21, 2013); *Funding Opportunities for Public Water Systems*, CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, <http://www.cdph.ca.gov/certlic/drinkingwater/Pages/DWPFunding.aspx> (last visited Apr. 21, 2013); *Funding, DEPARTMENT OF WATER RESOURCES*, <http://www.water.ca.gov/nav/nav.cfm?loc=t&id=103> (last visited Apr. 21, 2013); *Financial Assistance Programs – Grants and Loans*, STATE WATER RESOURCES CONTROL BOARD, [http://www.waterboards.ca.gov/water\\_issues/programs/grants\\_loans/](http://www.waterboards.ca.gov/water_issues/programs/grants_loans/) (last visited Apr. 21, 2013).

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

106 CAL. PUB. RES. CODE § 71110 (West 2012); see generally, *Inventory of Public Participation with Cal/EPA*, CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, (Feb. 2005), <http://www.calepa.ca.gov/envjustice/ActionPlan/PhaseI/February2005/PPInventory.pdf> [hereinafter *Inventory of Public Participation*].

107 CAL. WATER CODE § 10541 (West 2012).

108 *Environmental Monitoring Branch*, CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION, <http://www.cdpr.ca.gov/docs/specproj/index.htm> (last visited April 19, 2013).

109 ENVIRONMENTAL JUSTICE COALITION FOR WATER, THIRSTY FOR JUSTICE: A PEOPLE’S BLUEPRINT FOR CALIFORNIA WATER 63-64 (2005), available at <http://www.ejcw.org/Thirsty%20for%20Justice.pdf> [hereinafter *Thirsty for Justice*] (explaining “Many public 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. CALFED meetings are held in a high-security federal building shared by the Immigration and Naturalization Service.”).

110 *California*, UNITED STATES CENSUS BUREAU (2010); Tyche Hendricks, 43% in state speak other than English at home, SF GATE (Sept. 23, 2008), <http://www.sfgate.com/news/article/43-in-state-speak-other-than-English-at-home-3193867.php>.

111 For instance, the Fresno Metro Ministry, a Central Valley community-based organization, uses digital radio frequency to allow Spanish-speakers to simultaneously participate in environmental health discussions. The use of this technology has ensured better public participation during these public meetings. See THIRSTY FOR JUSTICE, *supra* note 109.

112 *Public Drinking Water Systems*, CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, <http://www.cdph.ca.gov/certlic/drinkingwater/Pages/default.aspx> (last visited April 19, 2013).

113 *Environmental Justice Program Home Page*, CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, <http://www.calepa.ca.gov/envjustice/> (last visited April 19, 2013).

114 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.calepa.ca.gov/envjustice/ActionPlan/Documents/October2004/ActionPlan.pdf>. See also *Inventory of Public Participation, supra* note 106.

115 See generally, ON THE RIGHT TRACK, *supra* note 66.

116 See CAL. HEALTH & SAFETY CODE §§ 25249.5–.13 (West 2012). See CAL. WATER CODE § 13001 (West 2012). CAL. HEALTH & SAFETY CODE § 116275(c)(1) (West 2012). See CAL. PUB. UTIL. CODE §§ 701, 702, 451 (2008).

117 See COMMUNITIES THAT RELY ON CONTAMINATED GROUNDWATER, *supra* note 35, at 13, 74.

118 As of January 2013, there was a backlog of 4,116 Mandatory Minimum Penalties (MMP) cases where a penalty had not been assessed. See *California Water Boards’ Annual Performance Report-Fiscal Year 2012-13*, CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, available at [http://www.waterboards.ca.gov/about\\_us/performance\\_report\\_1213/enforce/31162\\_npdes\\_ww\\_violations.shtml](http://www.waterboards.ca.gov/about_us/performance_report_1213/enforce/31162_npdes_ww_violations.shtml).

119 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(c)-(d).

120 See *Evaluating the Potential Transfer of Drinking Water Activities from DPH to SWRCB*, LEGISLATIVE ANALYST’S OFFICE, 4 (Apr. 15, 2013), available at <http://www.lao.ca.gov/handouts/health/2013/Drinking-Water-Evaluation-041513.pdf>.

121 *General Comment No. 15, supra* note 64, at ¶ 51.

## Authors & Acknowledgments

**AUTHORS** Angélica Salceda '13  
Kimya Saied '14  
Christine Zülów LL.M '13

The authors are J.D. and LL.M candidates at the University of California, Berkeley School of Law. They conducted this work as interns in the school's International Human Rights Law Clinic during the spring 2013 semester. Clinic interns Katherine Adamides '14, Theresa Cheng '14, and Emily Puhl '14 also contributed to the background research for this document during the fall 2012 semester.

**EDITORS** Roxanna Altholz  
Assistant Clinical Professor of Law and Associate Director,  
International Human Rights Law Clinic  
University of California, Berkeley, School of Law

Allison Davenport  
Clinical Instructor  
International Human Rights Law Clinic  
University of California, Berkeley, School of Law

**DESIGN** Jacqueline Freeman, Los Angeles, CA

**COVER PHOTO** Angélica Salceda (2013)

**ACKNOWLEDGMENTS** The authors express their appreciation to Dr. Inga Winkler, Legal Adviser to the United Nations Special Rapporteur on the human right to safe drinking water and sanitation, for her expert guidance. The authors also thank the sponsors of AB 685, the Safe Water Alliance (SWA), a coalition of faith-based, environmental justice, tribal, consumer, and public health advocates that represent communities across California. SWA members shared invaluable insights regarding current law and policy as well as the serious water challenges facing many California communities. We hope this document contributes to SWA's vision of universal access to safe and affordable water in California.

We also thank Dean Christopher Edley, Jr., for his commitment to clinical education and support for the project. We are grateful to the individual donors to the International Human Rights Law Clinic without whom this work would not be possible.



# BerkeleyLaw

UNIVERSITY OF CALIFORNIA

---

## International Human Rights Law Clinic

International Human Rights Law Clinic  
University of California, Berkeley  
School of Law  
396 Simon Hall  
Berkeley, CA 94720-7200  
PHONE: (510) 643-4800  
[humanrightsclinic.org](http://humanrightsclinic.org)

ISBN 978-1-938722-02-8

