Information Drought: Bringing Knowledge About Groundwater to the Surface in California Water Policy

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INTRODUCTION

Is water a private commodity or is it a public resource? In California, the answer to this question often depends on the location of the water. Despite the hydrologic interconnectivity of water,[1] the State makes a legal distinction between water above the surface and water in the ground—the former of which is treated as a public resource subject to the State's permitting system while the latter is largely a free-for-all commodity available to overlying landowners with a drill and pump.[2] This legal fiction has led to the classic tragedy of the commons,[3] where various private actors, acting rationally in their own self-interests, are unsustainably depleting the State's groundwater resources.[4] Water scarcity caused by the ongoing 2012–2015 drought and separate water contamination issues caused by industrial agricultural practices have further exacerbated the unsustainability of groundwater under-regulation.[5] These issues have recently boiled to the surface in disputes that highlight the problem of treating groundwater as a private commodity.[6] However, the fight is not just

[1] *See Water Interaction, Groundwater Information Center*, CAL. DEP'T OF WATER RES., http://www.water.ca.gov/groundwater/groundwater_basics/gw_sw_interaction.cfm (last visited April 5, 2015). ("Groundwater and surface water are essentially one resource, physically connected by the hydrologic cycle . . . and functionally inter-dependent").

[2] CAL. WATER CODE § 1200 (2014); *See* ARTHUR L. LITTLEWORTH & ERIC L. GARNER, California Water II 71 (2d ed. 2007).

[3] *See generally* Garret Hardin, *The Tragedy of the Commons*, 162 Science 1243 (coining the phrase, "the tragedy of the commons"—that is, when rapid population growth exceeds available resources to support such growth).

[4] *See* Caitrin Chappelle et al., *Just the Facts: Reforming California's Groundwater Management*, PUB. POLICY INST. OF CAL. (Sept. 2014), http://www.ppic.org/main/publication_show.asp?i=1106 (explaining that the regulatory gap in groundwater use has resulted in excessive pumping and overdraft).

[5] *See* Ellen Hanak et al., *Just the Facts: California's Latest Drought*, PUB. POLICY INST. OF CAL. (Feb. 2014), http://www.ppic.org/main/publication_show.asp?i=1087; *see also* U.C. DAVIS, CTR. FOR WATERSHED SCIENCES, ADDRESSING NITRATE IN CALIFORNIA'S DRINKING WATER: WITH A FOCUS ON TULARE LAKE BASIN AND SALINAS VALLEY GROUNDWATER, 2 (Jan. 2012), http://groundwaternitrate.ucdavis.edu/files/138956.pdf [hereinafter U.C. DAVIS NITRATE REPORT].

[6] *See* discussion, *infra* Part I.B.

over groundwater—it is over the right to information about groundwater.

This paper explores and analyzes two issues related to groundwater information—issues which have arisen from the State's current treatment of groundwater as a private commodity. First, residential users whose households rely on well water are in some cases unable to learn whether, to what extent, and why their groundwater is contaminated. Second, a dated provision in California law prohibits the disclosure of critical information related to wells—information that can help scientists and water policymakers better understand and protect the State's groundwater resources.

Part I provides the background necessary to understand this information drought. Section A describes two prevalent water crises that are reshaping water policy in California: the ongoing 2012–2015 drought and nitrate contamination of groundwater. Section B tracks recent developments that affect groundwater management to illustrate how California is gradually moving toward recognizing groundwater as a public resource. Part II argues that access to information about groundwater is a crucial step in bringing groundwater under California's regulatory control. Section A provides two examples of the current struggle between private and public interests over information about groundwater. One example addresses issues concerning publicly unavailable information that results in subpar notification to water users of unsafe contamination levels in their drinking water. The second example involves a dated regulatory exemption that prohibits the disclosure of critical information related to wells—an exemption currently interpreted to restrict even objective geographic information systems ("GIS") maps derived from confidential "well logs." Section B argues for the resolution of these issues in favor of information disclosure. Subsections 1 and 2 analyze the notification issue and the Department of Water Resources ("DWR")'s interpretation of the well logs exemption under the California Public Records in favor of public disclosure. Subsection 3 advocates for the repeal of the well logs exemption. The final Part, concluding this paper, argues that these resolutions are necessary to help end the information drought and bring important groundwater information to the surface.

I. THE GROUNDWATER INFORMATION DROUGHT

California's information drought is the result of the interplay between physical water crises and governance crises. The water crises stem from the convergence of consecutive years of drought and increased nitrate contamination of groundwater primarily caused by California's multi-billion dollar agricultural industry.[7] The combination of water scarcity and contaminated groundwater has prompted the State to begin revising its

[7] Hanak et al., *supra* note 5; U.C. DAVIS NITRATE REPORT, *supra* note 5, at 2.

regulations in favor of greater public oversight and protection of this precious resource.[8] This governance overhaul, however, has not yet overcome the legacy of treating groundwater as a private, rather than public, resource.

A. Water Crises: Drought and Contamination

1. The Drought

California is presently experiencing one of the worst droughts on record, causing both surface water flows and groundwater levels to significantly drop below normal averages.[9] Upon finding that the drought presented "conditions of extreme peril to the safety of persons and property," Governor Brown proclaimed a State of Emergency in January 2014, directing state agencies to undertake all necessary means to prepare for consequences of the drought.[10] In response, the State promulgated emergency regulations in July 2014, authorizing broad surface water diversion curtailments when water is unavailable to satisfy existing water rights.[11] The drought has continued into the following year and on April 1, 2015, the Governor issued an executive order imposing statewide mandatory water reductions.[12]

Meanwhile, the unavailability of surface water has inevitably encouraged increased groundwater pumping to fill the void between decreased surface water resources and continued water supply needs.[13] The State's underregulation of groundwater made this possible by regulating only surface water allocations under the State's permitting system and leaving groundwater allocation to local agencies to regulate as (and if) they choose.[14] Underregulation has led to depleted groundwater basins throughout the State, leaving these basins unable to naturally replenish themselves in a manner that keeps pace with excessive water consumption.[15]

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[8] *See, e.g.*, Sustainable Groundwater Management Act, 2014 Cal. Stat. ch. 346 (codified at CAL. WATER CODE §§ 10720–10736.6 (2014)).

[9] Hanak et al., *supra* note 5.

[10] Press Release, Office of Governor Edmund G. Brown, Governor Brown Declares Drought State of Emergency (Jan. 17, 2014), *available at* http://gov.ca.gov/news.php?id=18379.

[11] *See* 23 C.C.R. § 875 (2014).

[12] Governor Edmund G. Brown, Executive Order B-29-15 (Apr. 1, 2015), *available at* http://gov.ca.gov/docs/4.1.15_Executive_Order.pdf.

[13] Chappelle et al., *supra* note 4; *see* STATE WATER RES. CONTROL BD., REPORT TO THE LEGISLATURE: COMMUNITIES THAT RELY ON A CONTAMINATED GROUNDWATER SOURCE FOR DRINKING WATER 7 (Jan. 2013), http://www.waterboards.ca.gov/gama/ab2222/docs/ab2222.pdf [hereinafter SWRCB 2013 REPORT TO LEGISLATURE].

[14] LITTLEWORTH & GARNER, *supra* note 2, at 71. The State recently enacted a series of legislation aimed at addressing this underregulation. *See* discussion, *infra* Part I.B.3.

[15] *See generally* CAL. DEP'T OF WATER RES., PUBLIC UPDATE FOR DROUGHT RESPONSE (Nov. 2014), http://www.water.ca.gov/waterconditions/docs/DWR_PublicUpdateforDroughtResponse_GroundwaterBasins.pdf.

In addition to the water scarcity problem, moreover, the State faces another pervasive water crisis: groundwater contamination.

2. The Nitrate Problem

California boasts the world's eighth largest economy.[16] Much of the State's economic success is attributed to its agricultural sector, which comprises over a quarter of the State's landmass[17] and produces billions of dollars in income each year —consistently ranking as the leading state in cash farm receipts.[18] Unfortunately, this "agricultural bounty that feeds the nation and the globe" comes at the expense of the State's available drinking water.[19] Decades of industrial farming methods, such as flood irrigation and the intensive application of animal waste and nitrogen-rich fertilizer to cropland, have caused nitrate, a byproduct of nitrogen, to percolate through the soil and into the groundwater below.[20]

Groundwater contamination is especially problematic in California, where approximately eighty-five percent of the State's public water systems—supplying water to over 30 million residents–depend at least partially on groundwater systems as a drinking water resource.[21] The State's reliance on groundwater will likely continue to increase as the effects of the drought and climate change minimize surface water availability.[22]

Nitrate contamination "pose[s] significant health risks at concentrations above the public health drinking water standard Maximum Contaminant Level (MCL) of 45 mg/L (as NO_3 [nitrate]);"[23] consequently, communities unable to properly treat or dilute contaminated water to safe levels may suffer disastrous

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[16] *California Once Again the World's 8th Largest Economy*, CTR. FOR CONTINUING STUDY OF THE CAL. ECON. (Jul. 2014), http://www.ccsce.com/PDF/Numbers-July-2014-CA-Economy-Rankings-2013.pdf.

[17] 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, 496 (2011).

[18] *See e.g.* U.S. DEP'T OF AGRIC., CALIFORNIA AGRICULTURAL STATISTICS, 2012 CROP YEAR 1 (2013), http://www.nass.usda.gov/Statistics_by_State/California/Publications/California_Ag_Statistics/Reports/2012cas-all.pdf.

[19] Francis & Firestone, *supra* note 17, at 495–96.

[20] *See id.* at 497 (describing the Central Valley's groundwater as a "toxic stew of nitrates, pesticides, and pesticide byproducts, many of which persists for decades, even after their use has been discontinued."); *see also* U.C. DAVIS NITRATE REPORT, *supra* note 5, at 2.

[21] SWRCB 2013 REPORT TO LEGISLATURE, *supra* note 13, at 7.

[22] *Id.*

[23] SWRCB, REPORT TO THE LEGISLATURE: RECOMMENDATIONS ADDRESSING NITRATE IN GROUNDWATER 11 (Feb. 2013) [hereinafter SWRCB 2013 RECOMMENDATIONS ADDRESSING NITRATE], *available at* http://www.swrcb.ca.gov/water_issues/programs/nitrate_project/docs/nitrate_rpt.pdf.

consequences.[24] Infants who drink nitrate-contaminated water may die due to the blood's inability to carry oxygen as a result of increased levels of nitrate in the body—a condition called "blue baby syndrome."[25] Ingestion of nitrate at unsafe levels has also "been linked to goitrogenic (anti-thyroid) actions on the thyroid gland. . ., fatigue and reduced cognitive functioning due to chronic hypoxia, maternal reproductive complications including spontaneous abortion, and a variety of carcinogenic outcomes deriving from N-nitrosamines formed via gastric nitrate conversion in the presence of amines."[26]

Disadvantaged communities, which tend to be low-income communities of color, disproportionately bear the brunt of nitrate-related health impacts, as they often do not have the financial resources to treat contaminated water or have access to alternative water sources.[27] For example, many families in Seville, a poor unincorporated community, have no choice but to pay nearly twenty percent of their annual median income to buy bottled water for drinking and cooking.[28] Families unable to afford bottled water make tremendously challenging trade-offs by foregoing other basic needs in order to purchase water for domestic use.[29] Ironically, low-level agricultural workers make up many of these families and households: farmworkers and their families, who contribute to the making of California's agricultural wealth, suffer disproportionately from the burdens of the industry's processes.[30]

Furthermore, groundwater, once contaminated or depleted, is not easily purified or replenished.[31] Unfortunately, removing nitrate from contaminated aquifers to safe drinking levels costs billions of dollars and takes decades to achieve.[32] Because nitrate contamination is projected to worsen well into the future, finding alternative water sources in the meantime for communities that rely solely on contaminated sources and controlling the spread of nitrate

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[24] SWRCB 2013 REPORT TO LEGISLATURE, *supra* note 13, at 7–8; *See also* U.C. DAVIS NITRATE REPORT, *supra* note 5, at 9.

[25] U.C. DAVIS NITRATE REPORT, *supra* note 5, at 9.

[26] *Id*.

[27] *See* SWRCB 2013 REPORT TO LEGISLATURE, *supra* note 13, at 7–8; *see also* U.N. Human Rights Council, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation on her mission to the United States of America*, ¶ 34–39, U.N. Doc. A/HRC/18/33/Add.4 (Aug. 2, 2011) (by Catarina de Albuquerque), http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4_en.pdf [hereinafter U.N. Special Report].

[28] U.N. Special Report, *supra* note 27, at ¶ 39 (noting that the community's median annual household income is $14,000, 20% of which is devoted toward each families' water and sanitation needs).

[29] *Id*.

[30] *See* Francis & Firestone, *supra* note 17, at 496–500 (explaining that the wastewater discharges from "irrigated crop farms, nurseries, and large-scale confined animal feeding operations . . . have transformed the groundwater below into a toxic stew of nitrates, pesticides, and pesticide byproducts. . . .").

[31] *See* U.C. DAVIS NITRATE REPORT, *supra* note 5, at 5.

[32] *Id*.

contamination will become increasingly critical.[33]

B. Developments in Water Governance and the Legacy of Underregulation

Groundwater quality is intimately connected to groundwater overdraft management.[34] Thus, the State's water crises can only be resolved by holistically addressing both scarcity and contamination issues. This may require characterizing all water within California, including groundwater, as a public resource in order to grant the State the necessary authority to comprehensively address the water management challenges. Archaically, however, California only recently passed its first statewide groundwater management program—the Sustainable Groundwater Management Act ("SGMA").[35] Prior to 2014, California remained the only Western state without any statewide groundwater regulation regime.[36] However, SGMA does not empower the State to directly regulate groundwater under its permitting system, but instead directs local agencies to sustainably manage their basins.[37] Thus, although there are signs of progress, California has not yet fully overcome its legacy of underregulation.

The State directly regulates surface water appropriations under its permitting system and manages allocations to prevent depleting the State's rivers, lakes, and streams.[38] Groundwater, on the other hand, is left to local agencies, which have historically failed to assert effective control over unsustainable practices of groundwater withdrawals.[39] Without having to obtain a State appropriation permit, individual users in agriculture-intensive regions such as the Central Valley and Central Coast have consistently withdrawn groundwater at higher rates than can naturally be replenished.[40] This unsustainable practice illustrates the legacy of treating groundwater as a private resource, controlled by private parties for private gain.

Importantly, however, California lawmakers and policymakers have recognized the need to change this archaic resource management regime. This

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[33] *See id.* at 2.

[34] Jay Lund & Thomas Harter, *California's groundwater problems and prospects*, CAL. WATERBLOG (Jan. 30, 2013), http://californiawaterblog.com/2013/01/30/californias-groundwater-problems-and-prospects/.

[35] Sustainable Groundwater Management Act, 2014 Cal. Stat. ch. 346 (codified at CAL. WATER CODE §§ 10720–10736.6 (2014)). SGMA will be further discussed *infra* Part I.B.3.

[36] Matt Weiser, *California poised to restrict groundwater pumping*, SACRAMENTO BEE (Sept. 15, 2014), http://www.sacbee.com/news/local/article2609723.html.

[37] See *infra* Part I.B.3 for a more detailed discussion about SGMA.

[38] CAL. WATER CODE § 1252 (2014). The system only requires permits from non-riparian users that began diverting surface or subsurface water after 1914. LITTLEWORTH & GARNER, *supra* note 2, at 32. Water diverters with riparian rights, a water use right given to owners of land "appurtenant" to a water source, and those who obtained water rights before 1914 are also exempt from obtaining permits. *Id.* at 31.

[39] *See* LITTLEWORTH & GARNER, *supra* note 2, at 71.

[40] *See* Chappelle et al., *supra* note 4.

Part outlines ways in which the State is transitioning toward recognizing groundwater as a public resource.

1. Assembly Bill 685: The Human Right to Water Bill

In 2012, California took a historic step toward rethinking the State's water policy by enacting Assembly Bill 685 ("A.B. 685"), the Human Right to Water Bill.[41] The Bill's author, Assemblymember Eng, notes that "[w]ater agencies are operating under a set of preferences, policies, and guidelines that occurred when water was very plentiful. However, it is time to really look at the reality water agencies face right now. California's water law system is an international disgrace."[42]

A.B. 685 adds section 106.3 to the Water Code.[43] Subsection (a) declares that "every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes."[44] Subsection (b) calls on "[a]ll relevant state agencies" including the State Water Resources Control Board ("State Water Board") to consider this state policy when making decisions that may have an impact on the human right to water.[45] Subsection (c) makes clear, however, that the new law does not "expand any obligation of the state to provide water or to require the expenditure of additional resources to develop water infrastructure" and limits state duties to those that exist in subsection (b).[46] Lastly, Subsection (e) restricts the reach of the statute from "infring[ing] on the rights or responsibilities of any public water system."[47]

A.B. 685 represents a hopeful step forward to better protecting the State's water resources. However, this was not the Legislature's first attempt at recognizing the human right to water. A similar bill, Assembly Bill 1242 ("A.B. 1242"), was introduced and approved by both legislative chambers in 2009, but vetoed by Governor Arnold Schwarzenegger.[48] A.B. 1242, in addition to recognizing a human right "to clean, affordable, and accessible water," included a provision requiring state agencies "to employ all reasonable means to

[41] 2012 Cal. Legis. Serv. Ch. 524, § 1 (A.B. 685) (West) (codified at CAL. WATER CODE § 106.3 (2014)).

[42] Alexander Louden, *California Takes Another Cookie From the Policy Jar: A Human Right to Water*, 17 U. DENV. WATER L. REV. 121, 121 (2013) (quoting Mike Eng at an Assembly Floor Session reading of A.B. 685, *available at* http://calchannel.granicus.com/MediaPlayer.php?view_id=7&clip_id=719 (begins at 00:30:25)).

[43] CAL. WATER CODE § 106.3 (2014).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Emily M. Thor, Comment, *The Human Right to Water in the United States: Why so Dangerous?*, 26 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 315, 326–27 (2013).

implement this state policy"—an obligation not provided by A.B. 685.[49]

What an agency must do to satisfy its duty under A.B. 685 is uncertain. One commentator suggests that the State discharges its duty under A.B. 685 when the human right to water is used as one factor to consider when balancing other water policies and doctrines such as the public trust doctrine and domestic use priority.[50] An implementation report prepared by UC Berkeley School of Law provides a stricter interpretation, reading A.B. 685 to suggest that the duty to consider requires agencies to (1) give preference to policies that advance the human right to water, (2) refrain from making decisions that interfere with the human right to water, and (3) note in the record the impact of agency action on the human right to water.[51]

Further, A.B. 685 does not require any substantive obligation on the State to actually provide water for its citizens.[52] What it likely mandates is a duty to consider equity when making water-related decisions. California already prioritizes water for domestic over agricultural uses.[53] Thus, A.B. 685 must have a greater meaning than simply serving as an affirmation of this priority. The report prepared by U.C. Berkeley, drawing from international human rights principles, provides a useful tool for agencies to guide their decisions toward achieving a human right to water in California. However, the statute itself does not necessarily require agencies to prefer policies that will advance the human right to safe and accessible drinking water, nor refrain from adopting policies that are contrary to the statute. Instead, the statute likely mandates a consideration of the disproportionate impacts on marginalized communities when making water-related decisions—a duty to consider equity. However, to be consistent with other mandates that require a similar duty to consider,[54] and as the U.C. Berkeley report recommends, AB 685 likely requires the agency to actually note in the record that they have indeed complied with its duty to consider. Thus, in theory, an agency can make a decision that leads to inequitable results so long as it noted in the record that it considered such impacts. This mandate not only applies to decisions related to water allocations. It is also triggered when agencies must decide whether to release records that

[49] *Id.* at 326–27 (quoting language from A.B. 1242). For an in-depth legislative and political history of both A.B. 1242 and A.B. 685, see *id.* at 326–29.

[50] Louden, *supra* note 42, at 132–33.

[51] U.C. BERKELEY, SCH. OF LAW, INT'L HUMAN RIGHTS LAW CLINIC, THE HUMAN RIGHT TO WATER BILL IN CALIFORNIA: AN IMPLEMENTATION FRAMEWORK FOR STATE AGENCIES 3 (May 2013), http://www.law.berkeley.edu/files/Water_Report_2013_Interactive_FINAL.pdf [hereinafter BERKELEY 2013 IMPLEMENTATION REPORT].

[52] CAL. WATER CODE § 106.3(c) (2014) (expressly stating that "any obligation of the state to provide water" is not expanded by the adoption of A.B. 685).

[53] *See Id.* § 106.

[54] *See e.g.,* Nat'l Audubon Soc'y v. Super. Ct., 33 Cal. 3d 419 (1983) (requiring agencies to consider the public trust doctrine when making water allocation decisions).

may similarly have an impact on the human right to water.[55]

2. Proposition 1: The Water Bond

On November 4, 2014, Californians overwhelmingly passed Proposition 1 ("Prop 1"), authorizing "$7.545 billion in general obligation bonds for state water supply infrastructure projects, including surface and groundwater storage, ecosystem and watershed protection and restoration, and drinking water protection."[56] Nearly ten percent of the total bond is expected to be reserved to aid disadvantaged communities in developing and improving local water infrastructure.[57] This set-aside includes safe drinking water and sanitation programs, groundwater sustainability projects, and technical assistance resources to help leverage federal funds.[58]

Environmental justice organizations remain hopeful that the water bond will alleviate some of the water stress experienced by the communities they serve throughout the State.[59] Some commentators warn, however, that Prop 1 should be seen as a first step, not the solution.[60] Only time will tell whether Prop 1 will actually result in improved clean water access to communities that bear the brunt of the State's water woes.[61]

3. Sustainable Groundwater Management Act of 2014

Other recent events suggest that California is moving toward recognizing

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[55] *See* discussion *infra* Part II.

[56] *See* Statement of Vote, November 4, 2014, General Election, 90, http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf (last visited April 11, 2015); *Prop 1: Water Bond. Funding for Water Quality, Supply Treatment, and Storage Projects, California General Election, Tuesday, November 4, 2014*, CAL. SEC'Y OF STATE, http://www.voterguide.sos.ca.gov/en/propositions/1/ (last visited Mar. 24, 2015).

[57] *Community Water Center Supports Prop 1 Water Bond, Fact Sheet*, CMTY. WATER CTR., https://d3n8a8pro7vhmx.cloudfront.net/communitywatercenter/pages/203/attachments/original/1415226983/Prop_One_11.05.14.pdf?1415226983 (last visited April 5, 2015).

[58] *Id*.

[59] *See, e.g.*, *id.* ("Thousands of communities throughout our state still lack safe, clean, and affordable water. Prop 1 plays a vital role in our efforts to implement the Human Right to Water in California.").

[60] *See* Peter H. Gleick, *The California Water Bond is a Beginning, Not an End: Here's What's Next*, HUFFINGTON POST (Nov. 15, 2014), http://www.huffingtonpost.com/peter-h-gleick/the-california-water-bond_b_6104908.html.

[61] At the state agency level, the State Water Board and its nine Regional Water Quality Control Boards ("Regional Boards") regulate water quality under a waste discharge system established by the Porter-Cologne Act. CAL. WATER CODE §§ 13050(e), 13260, 13263 (2014). Historically, the Regional Boards routinely issued discharge waivers to agricultural operations that generated non-point source pollution—i.e., agricultural runoff and wastewater. LITTLEWORTH & GARNER, *supra* note 2, at 202. But today, all new waivers must explicitly consider water quality impacts. CAL. WATER CODE § 13269 (2014).

groundwater as a public resource. For example, SGMA[62] institutes "a framework for sustainable, local groundwater management for the first time in California history. The legislation allows local agencies to tailor sustainable groundwater plans to their regional economic and environmental needs."[63] As a fail-safe, the State has the authority to step in to manage groundwater basins if a local agency fails to act or establish an adequate management plan.[64]

SGMA requires the formation of local groundwater sustainability agencies ("GSAs") to evaluate the conditions of their respective water basins and implement locally tailored management plans.[65] After the adoption of their respective management plans, GSAs have 20 years to achieve an identified long-term sustainability goal for the basin.[66] The Act further empowers GSAs with the authority, *inter alia*, to (1) require groundwater wells registration;[67] (2) measure and manage groundwater extractions;[68] (3) require reports and impose fees;[69] and (4) request basin boundary revisions, including creating new sub-basins.[70]

The State also has substantial responsibilities under SGMA. For instance, the California Department of Water Resources ("DWR") is tasked by SGMA to (1) designate basins as high, medium, low or very low priority;[71] (2) adopt regulations for basin boundary realignments;[72] (3) adopt regulations for evaluating adequacy of sustainability plans;[73] (4) publish a report approximating the water available for groundwater replenishment in the State;[74] and (5) publish on its website a best management practices for groundwater sustainability.[75]

To ensure compliance, the Act further empowers the State Water Board to intervene if a prioritized basin[76] does not form a GSA or if the GSA fails to

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[62] *See* CAL. WATER CODE §§ 10720–10736.6 (2014).

[63] Press Release, Office of Governor Edmund G. Brown, Governor Brown Signs Historic Groundwater Legislation (Sep. 16, 2014), *available at* http://gov.ca.gov/news.php?id=18701. *See generally* 2014 Cal. Stat. ch. 347 (A.B.1739), eff. Jan. 1, 2015; 2014 Cal. Stat. ch. 346 (S.B.1168), eff. Jan. 1, 2015; 2014 Cal. Stat. ch. 348 (S.B.1319), eff. Jan. 1, 2015. Detail on the bills can be found on http://leginfo.legislature.ca.gov.

[64] CAL. WATER CODE §§ 10735–10736.6 (2014).

[65] *Id.* §§ 10723, 10727 (2014).

[66] *Id.* § 10727.2(b)(1).

[67] *Id.* § 10725.6.

[68] *Id.* § 10725.8.

[69] *Id.* § 5202.

[70] *Id.* § 10722.2.

[71] *Id.* § 10722.4(a).

[72] *Id.* § 10722.2(b).

[73] *Id.* § 10733.2.

[74] *Id.* § 10729(c).

[75] *Id.* § 10729 (d)(1).

[76] State intervention under SGMA applies only to basins designated as "high-" or "medium-priority" pursuant to CAL. WATER CODE § 10933 (commonly known as Bulletin 118); *See* CAL. WATER CODE § 10720.7 (2014).

adopt an adequate sustainability plan by certain dates.[77] If DWR determines that a sustainability plan is inadequate, the GSA will have 180 days to correct the plan.[78] If it fails to do so, the State Water Board is authorized to form and implement an interim plan until the GSA reassumes responsibility with its own plan that satisfies DWR's adequacy standards.[79]

SGMA represents a historic move toward recognizing groundwater as a public resource. But it is just the first step. Although the State is beginning to assert its authority over its groundwater resources, the Act falls short of recognizing groundwater as an appropriative water right[80]—the labeling of which would bring it under the State's water permitting system. Thus, groundwater's legal status as a public resource post-SGMA—at least with regards to legally recognizing the hydrological interconnection between groundwater and surface water—remains in flux.

4. Recent Litigation: Is Groundwater a Public Resource?

Meanwhile, in the courts, environmental advocacy groups are pushing to bring groundwater pumping into the State's regulatory jurisdiction under the public trust doctrine.[81] Originally derived from common law, the public trust doctrine is the principle that all waters of the State are held in public trust for the common good by the government; as "trustee," the government has an obligation to protect theses public trust resources against exploitation or damage by private interests.[82] In California, all "navigable waters"[83] fall under the State's regulatory jurisdiction under the public trust doctrine, including non-navigable tributaries that cause harm to navigable waters from excessive water diversions.[84]

Under these principles, the Environmental Law Foundation ("ELF") and other conservation groups brought suit against the State Water Board and Siskiyou County in 2010 for allegedly approving excessive groundwater pumping of a local aquifer, which actively depleted the Scott River due to the hydrological

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[77] CAL. WATER CODE §§ 10735-10736 (2014).

[78] *Id.* §§ 10735.2(a)(3), 10735.4.

[79] *Id.* §§ 10735-10736.

[80] *Id.* § 10720.5.

[81] *See* Press Release, Env't Law Found., Court Rules Groundwater Protected As Public Trust (Jul. 16, 2014), http://www.envirolaw.org/documents/ScottOrderPressReleaseJuly2014.pdf.

[82] *See generally* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (advocating for the use of the Public Trust Doctrine as a citizen environmental advocacy tool of general application).

[83] CAL. HARB. & NAV. CODE § 100 (2014) ("Navigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of navigation and of such transportation.").

[84] Nat'l Audubon Soc'y v. Super. Ct., 33 Cal. 3d 419, 437 (1983) (extending the Public Trust Doctrine to non-navigable tributaries in Mono Lake to protect species harmed by water diversions).

interconnection of the groundwater and surface water systems.[85] On July 15, 2014, a Sacramento Superior Court judge ruled in favor of ELF, holding that "[i]f pumping groundwater impairs the public's right to use a navigable waterway for trust purposes, there is no sound reason in law or policy why the public trust doctrine should not apply."[86] The State Water Board has appealed this decision.

These current events illustrate the trajectory of groundwater's future. It seems that California is gradually beginning to recognize groundwater as a public resource. But the State is not quite there yet. As the following Part describes, California is headed toward the democratic control of groundwater. However, critical information about groundwater that increases government accountability and improves groundwater management is not publicly available—which serves as another topic of live debate.

II. BRINGING INFORMATION ABOUT GROUNDWATER TO THE SURFACE

The preceding Part explained why recognizing groundwater as a public resource is important in resolving the State's water crises. Equally important, however, is information necessary for effective groundwater management. Local agencies and water districts, environmental justice advocates, scientists, and academics, among others, need information about groundwater to better protect communities from hazards such as drinking water contamination. Yet a lot of this information is—unsurprisingly, given the history of the State's groundwater regime—kept private, demonstrating that groundwater remains very much under the control of private interests. This Part identifies two current situations in which the public lacks access to critical and seemingly public information related to groundwater management.

A. The Fight Over Groundwater Information

1. Notification Letters in the Central Coast

The Porter-Cologne Water Quality Control Act ("Porter-Cologne Act")[87] assigns primary responsibility of managing and controlling the State's water quality to the State Water Board and Regional Water Quality Control Boards

[85] Press Release, Env't Law Found., Fishing and Conservation Groups Sue Over Poor Water Management on Northern California's Scott River 1 (Jun. 24, 2010), http://www.envirolaw.org/documents/ScottPressRelease.pdf.

[86] Env't Law Found., et al. v. State Water Res. Control Bd., et al., Order After Hearing On Cross Motions For Judgment on the Pleadings, Case No. 34-2010-80000583 (Jul. 15, 2014), *available at* http://www.envirolaw.org/documents/ScottOrderonCrossMotions.pdf.

[87] CAL. WATER CODE §§ 13000–16104 (2014).

("Regional Boards").[88] It directs the State Water Board "to exercise its full power and jurisdiction to protect the quality of waters in the state" from, among others, agricultural and industrial operations.[89] The Porter-Cologne Act further recognizes the effectiveness of regional administration of state water quality programs.[90]

The Central Coast Region covers over 400,000 acres of irrigated land and around 3,000 agricultural operations, all of which discharge wastewater that can impair the region's surface water and groundwater.[91] Largely as a result of these operations, nitrate pollution of drinking water is a problem throughout the region.[92] Indeed, "tens of millions of pounds of nitrate leach into groundwater in the Salinas Valley alone each year" and "[h]undreds of drinking water wells serving thousands of people throughout the region have nitrate levels exceeding the drinking water standard."[93]

In 2012, the Central Coast Regional Water Quality Control Board ("Regional Board") issued Order No. R3-2012-0011 (commonly referred to as the "Ag Order"), superseding an existing conditional waiver of discharge requirements order.[94] The Ag Order establishes a groundwater monitoring program, which requires all growers in the region to monitor and test groundwater wells to document nitrate contamination in the Central Coast Region.[95]

Compliance with the Ag Order can occur in one of two ways: (1) the grower can individually monitor and test wells and liaison directly with the Regional Board; or (2) the grower can join a third-party monitoring group that tests wells on behalf of all its members.[96] Theoretically, allowing third-party monitoring groups will be more efficient and cost-effective than complying with the Order individually. Every such group must develop a work-plan to carry out its operations to be approved by the Executive Officer of the Regional Board.[97]

The Central Coast Groundwater Coalition ("CCGC") is a third party monitoring group.[98] CCGC has worked closely with the Regional Board to

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88 *Id.* §§ 13100–13826.9.

89 *Id.* § 13000.

90 *Id.*

91 CENT. COAST REG'L WATER QUALITY CONTROL BD., ORDER NO. R3-2012-0011, CONDITIONAL WAIVER OF WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES FROM IRRIGATED LANDS 1 (2012) (as modified by Order WQ-2013-0101), http://www.swrcb.ca.gov/centralcoast/water_issues/programs/ag_waivers/docs/ag_order/agorder_final_011014.pdf [hereinafter AG ORDER].

92 *Id.* at 2.

93 *Id.* at 2–3.

94 *See generally id.*

95 *Id.* at 13–32.

96 *Id.*

97 *Id.*

98 CENT. COAST GROUNDWATER COAL., http://www.centralcoastgc.org/ (last visited Mar. 23, 2015).

implement an acceptable work-plan that satisfies its obligations under the Ag Order.[99] The Regional Board Executive Officer has approved CCGC's work-plan, subject to certain terms and conditions.[100] One such condition includes notification procedure for informing water users that their water exceeds safe drinking water standards:

> Within 10 days of learning of the exceedance or projected exceedance of the drinking water standard, provide a copy of the template notification letter, list of members notified, and the date the member was notified to the Central Coast Water Board. Additionally, at that time, the Coalition must also provide the Central Coast Water Board with the names and contact information for any member not successfully notified by the Coalition. The Coalition must also provide copies of the individual notification letters sent to Coalition members informing them of the exceedance of the drinking water standards, upon request of the Central Coast Water Board.[101]

Essentially, the work-plan requires CCGC to send written notification to water users whenever their water exceeds the maximum contamination level ("MCL"), which is the highest level of contamination that may be present in water before it becomes unsafe to drink.[102] Copies of these letters are to be sent to the Regional Board upon request.[103] Under an individual monitoring program, however, when a grower finds an MCL exceedance, the Regional Board directly sends the notification letters to water users.[104] By placing the burden on growers to notify water users of potential health threats, however, the Regional Board allows growers to potentially circumvent reporting and information-sharing.

Consequently, CCGC tried to back out of its approved work-plan in July 2014.[105] Specifically, CCGC objected to the condition that it provide the

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[99] *See generally* Cent. Coast Groundwater Coal., *Central Coast Groundwater Coalition Work Plan for San Luis Obispo, Santa Barbara, and Ventura Counties* (Nov. 1, 2013), http://www.swrcb.ca.gov/centralcoast/water_issues/programs/ag_waivers/docs/groundwater/1finalccgc_workplan_110113.pdf (describing CCGC's work-plan in detail to comply with the Ag Order).

[100] *See* Letter from Kenneth A. Harris Jr., Interim Executive Officer, Cent. Coast Reg'l Water Quality Control Bd., to Parry Klassen, Executive Director, Cent. Coast Groundwater Coal. 2 (Dec. 17, 2013) (approving CCGC's work-plan), *available at* http://www.swrcb.ca.gov/centralcoast/water_issues/programs/ag_waivers/docs/groundwater/3ccgc_workplan_approval_121713.pdf.

[101] *Id*.

[102] *Id*.

[103] *Id*.

[104] CENT. COAST REG'L WATER QUALITY CONTROL BD., STAFF REPORT FOR REGULAR MEETING OF JULY 31 – AUGUST 1, 2014, IRRIGATED LANDS REGULATORY PROGRAM: WATER BOARD REVIEW OF CENTRAL COAST GROUNDWATER COALITION'S DRINKING WATER NOTIFICATION PROCESS (Jul. 17, 2014), http://www.waterboards.ca.gov/centralcoast/board_info/agendas/2014/july/item13/item13_stfrpt.pdf [hereinafter REGIONAL BOARD STAFF REPORT].

[105] Letter from Parry Klassen, Executive Director, Cent. Coast Groundwater Coal., to Kenneth A. Harris Jr., Interim Executive Officer, Cent. Coast Reg'l Water Quality Control Bd. (Jun. 10, 2014), *available at* http://www.waterboards.ca.gov/centralcoast/board_info/agendas/2014/july/

Regional Board with copies of notification letters sent to Coalition members for wells exceeding the MCL. CCGC argued that the Regional Board did not have the legal authority to request such information that would connect individual Coalition members to MCL exceedances identified by CCGC's monitoring program.[106] It may reasonably be projected that CCGC feared releasing the letters to the Regional Board would subject the letters to public disclosure under the Public Records Act.[107]

The Regional Board Staff disagreed, noting that the letters were necessary to maintain "a written record or evidentiary-level documentation regarding notification" to "independently evaluate compliance."[108] The Staff further reasoned that because it was the Regional Board's duty to "[p]rotect human health—through notification and well posting, and ultimately, the provision of replacement water," this responsibility could not be delegated to a third party no matter how well-intentioned that party may be.[109]

On July 3, 2014, California Rural Legal Assistance ("CRLA"),[110] a nonprofit legal aid organization that serves disadvantaged rural communities, sought discretionary review by the Regional Board of this issue, challenging CCGC's refusal to release copies of the notification letters and seeking to bring CCGC's notification procedure into alignment with the Regional Board's individual monitoring notification process.[111]

On November 13, 2014, the Regional Board ultimately decided that the notification procedures would remain as approved in the work-plan.[112] The Regional Board then ordered CCGC to bring copies of all notification letters to the quarterly CCGC/Water Board Coordination meetings for staff inspection.[113] However, whether this means that the copies of the notification letters will be made available to the public continues to be an open question.

item13/item13_att1.pdf.

[106] *Id.* at 6.

[107] CAL. GOV. CODE §§ 6250–6276.48 (2014). This paper will discuss the Public Records Act in depth *infra* Part II.B.

[108] REGIONAL BOARD STAFF REPORT, *supra* note 104, at 6–7.

[109] *Id.*

[110] CAL. RURAL LEGAL ASSISTANCE, http://www.crla.org/ (last visited Mar. 23, 2015).

[111] Letter from Pearl Kan, Attorney, Cal. Rural Legal Assistance, to Jean-Pierre Wolff, Chair, Cent. Coast Reg'l Water Quality Control Bd. (Jul. 3, 2014), *available at* http://www.waterboards.ca.gov/centralcoast/board_info/agendas/2014/july/item13/item13_att6.pdf.

[112] Letter from Kenneth A. Harris Jr., Interim Executive Officer, Cent. Coast Reg'l Water Quality Control Bd., to Parry Klassen, Executive Director, Cent. Coast Groundwater Coal.1 (Dec. 8, 2014) (approving CCGC's October 9, 2014 proposal), *available at* http://www.waterboards.ca.gov/centralcoast/water_issues/programs/ag_waivers/docs/groundwater/ccgc_%20supplemental_dwn_information_120814.pdf.

[113] *Id.* at 2.

2. Groundwater Well Logs Exemption

Every individual or entity that drills a well is required to file a well completion report with DWR.[114] Well completion reports—also known simply as "well logs"—contain information such as, *inter alia*, a general description of the well site, the type of well construction, geological well logs, and methods used to prevent the contamination of water aquifers.[115] Considering the hydrologic interconnectivity between water systems, well logs have vast potential to help scientists and policymakers better understand and safeguard the State's groundwater resources.[116] For example, scientists and researchers can use geological and construction data from well logs to create computer images visualizing the size and shape of groundwater-bearing geological material, and even track sources of contamination that pollute aquifers used for drinking water purposes.[117]

Unfortunately, California remains the only state in the Western United States that does not make well logs publicly available.[118] Under Water Code section 13752, well logs are exempt from public disclosure and are only available to certain agencies for governmental studies and to those who obtain written consent from the well owner.[119] This information is "regarded by some drillers as part of their stock in trade, and such drillers are reluctant to submit such information if it is made available to the public. It is believed that if such information is not open to public inspection, more complete and accurate information will be received."[120] This reasoning reflects the historic and increasingly antiquated view of groundwater resources as an unregulated private commodity.

Exacerbating the problem, DWR has interpreted section 13752 to protect not only well logs but also the data derived from well logs, such as well location maps created by government agencies. Agencies that request access to well logs to be used in studies currently sign a confidentiality agreement with DWR, which states the following:

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114 CAL. WATER CODE § 13751 (2014).

115 *Id.*

116 Tim Parker, *Senate Bill to Make Well Logs Publicly Available was Defeated*, 21 HYDRO VISIONS No. 3, 16 (Fall 2012), http://www.grac.org/fall12.pdf.

117 Tom Knudson, *The Public Eye: As drought persists, frustration mounts over secrecy of California's well drilling logs*, SACRAMENTO BEE (Jul. 6, 2014) (referencing image titled, "Mapping the Underworld), http://www.sacbee.com/news/politics-government/article2602975.html.

118 *Id.* This is unsurprising considering California's historic treatment of groundwater resources as a private commodity—a characterization that has been gradually shifting toward recognition as a public resource. See text *supra* accompanying notes 45–51. Other states make well logs publicly available online. Parker, *supra* note 116, at 16.

119 CAL. WATER CODE § 13752 (2014).

120 Parker, *supra* note 116, at 16 (quoting C.H. Purcell, Director of Public Works, May 21, 1951).

> Under California Water Code Section 13752, the agency named below requests permission from Department of Water Resources to inspect or copy, or for our authorized agent named below to inspect or copy, Well Completion Reports filed pursuant to Section 13751 to make a study.
>
> In accordance with Section 13752, information obtained from these reports shall be kept confidential and shall not be disseminated, published, or made available for inspection by the public. The information shall be used only for the purpose of conducting the study. Copies obtained shall be stamped **CONFIDENTIAL** and shall be kept in a restricted file accessible only to agency staff or the authorized agent for this study.[121]

DWR's interpretation of section 13752 is likely overly restrictive, and will be analyzed further in Section B.

The two issues of notification and the hyper-protection of well log data presented above illustrate the tension between the public's right of access to critical information related to governmental responsibilities concerning public welfare and private (often proprietary) interests. Further, this tension reveals the ambiguity of groundwater resource management in California—is it a private commodity or a public resource? If groundwater is truly a public resource, managed by a democratically elected government, all information related to maintaining governmental accountability should be publicly accessible. This next Part will analyze how these issues could be resolved in favor of access under the California Public Records Act, specifically in light of the Legislature and courts' current trajectory toward recognizing groundwater as a public resource.

B. Groundwater Management Meets the California Public Records Act

The California Public Records Act ("CPRA" or the "Act")[122] provides for broad public access to information that allows the public to monitor governmental activities and to "minimize secrecy in government."[123] "The fundamental precept of the CPRA is that governmental records shall be disclosed to the public, upon request, unless there is a specific reason not to do so."[124] The two issues described in Part II reveal two different modes of analysis under the CPRA. The notification letters issue concerns whether the letters even fall under the definition of a "public record" and are thus subject to public

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[121] DEP'T OF WATER RES., WELL COMPLETION REPORT RELEASE AGREEMENT—AGENCY STUDY (May 18, 2011), http://www.water.ca.gov/pubs/groundwater/well_completion_report_release_agreement-agency_study/wcr_request_agencystudy_20110518.pdf.

[122] CAL. GOV. CODE §§ 6250 –77 (2014).

[123] CBS, Inc. v. Block, 42 Cal. 3d 646, 651 (1986).

[124] CAL. ATTORNEY GENERAL'S OFFICE, SUMMARY OF THE CALIFORNIA PUBLIC RECORDS ACT, 2 (Aug. 2004), *available at* http://ag.ca.gov/publications/summary_public_records_act.pdf.

disclosure. The well logs issue, on the other hand, concerns the interpretation of public disclosure exemptions under the CPRA. This Part argues that both issues can and should be resolved in favor of public disclosure.

1. Public Disclosure of Notification Letters

The CPRA requires state agencies to make their public records available to the public.[125] Thus, copies of the notification letters must be made publicly accessible if the following elements are met: (1) the notification letters are characterized as "public records"; (2) no applicable exemption applies; and (3) the Regional Board is in actual or constructive possession of the notification letters.

a. The notification letters are "public records" under the CPRA

A "public record" is "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."[126] "This definition is intended to cover every conceivable kind of record that is involved in the governmental process[.]"[127] Courts have interpreted the definition of "public records" as requiring two separate (but related) elements for a writing to be considered a public record.[128] First, the writing must relate "to the conduct of the public's business."[129] Second, the writing must be "prepared, owned, used, or retained by" the government.[130]

i. The notification letters relate to the conduct of the public's business

To be considered a public record, a writing must relate "to the conduct of the public's business."[131] In other words, the writing must deal with an activity that is "public" in nature. An activity is "public" when it "pertain[s] to . . . or affect[s] . . . the people at large, or the community."[132] For example, the court in *San Gabriel Tribune v. Superior Court*, held that financial data produced by a private trash disposal company was subject to disclosure under the CPRA.[133]

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125 CAL. GOV. CODE § 6253 (2014).

126 *Id.* § 6252(e).

127 San Gabriel Tribune v. Super. Ct.,143 Cal. App. 3d 762, 774 (1983) (quoting Assembly Committee on Statewide Information Policy California Public Records Act of 1968. 1 Appendix to Journal of Assembly 7, Reg. Sess. (1970)) (internal quotation marks omitted).

128 Regents of Univ. of Cal. v. Super. Ct., 222 Cal. App. 4th 383, 399 (2013).

129 *Id.*

130 *Id.*

131 CAL. GOV. CODE § 6252(e) (2014).

132 Cal. State Univ. v. Super. Ct., 90 Cal. App. 4th 810, 825 (2001) (quoting Coldwell v. Board of Public Works, 187 Cal. 510, 520 (1921)).

133 San Gabriel Tribune v. Super. Ct., 143 Cal. App. 3d 762, 775 (1983).

There, the city had a contractual relationship with a private disposal company.[134] The contract terms provided for the delegation of the city's trash collecting duties to the private company and for city oversight of the company's operations.[135] During the course of its operations, the disposal company produced financial data, which the city used to approve a rate increase.[136] Finding that there was "no question that the Disposal Company [was] providing a service to the residents of the City" and that the City used the data in performing an official duty, the court compelled disclosure of the financial data under the CPRA.[137]

Similarly, in *Citizens for a Better Environment v. California Department of Food & Agriculture*, the court discussed how governmental conduct surrounding the enforcement of laws was public in nature.[138] At issue was whether certain preliminary records related to the enforcement of pesticide use laws were subject to disclosure under the CPRA.[139] The court explained the nature of the requested records:

> [T]he factual matters in the preliminary documents concern the conduct of county officials in enforcing the pesticide use laws and the conduct of state officials in the investigation and supervision of that task. It is simply incontestible [sic] that these are *grave public matters* in which the public has a substantial interest in disclosure. The records sought to be disclosed strongly illuminate the conduct of pesticide use law enforcement.[140]

Conversely, if the "core function" of a writing is private, it does not constitute a public record under the CPRA.[141] For example, in *Coronado Police Officers Association v. Carroll*, the public defender created, used, and retained a database that contained information from client files.[142] Finding that the database was not a public record, the court reasoned that the database's core function—to support the public defender's office in representing indigent criminal defendants—was a

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134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 Citizens for a Better Env't v. Cal. Dep't of Food & Agric., 171 Cal. App. 3d 704, 715 (1985).

139 *Id.*

140 *Id.* (emphasis added). Other examples of records courts have held were related to the public's business include privately held documents about a state university's venture capital investments, *see* Regents of Univ. of Cal. v. Super. Ct., 222 Cal. App. 4th 383, 398–99 (2013) (finding that the information was related to the public's business but ultimately not public records because the university did not prepare, own, use, or retain the information); records pertaining to the identities of individuals who purchased luxury suites in a public sports arena operated by a state university, *see* Cal. State Univ. v. Super. Ct., 90 Cal. App. 4th 810, 825 (2001); and letters about the appointment of a public official, *see* Braun v. City of Taft, 154 Cal. App. 3d 332, 340 (1984).

141 Coronado Police Officers Ass'n v. Carroll, 106 Cal. App. 4th 1001, 1006 (2003).

142 *Id.* at 1106–07.

private function.[143] Public defenders serve an "essentially private function, adversarial to and independent of the state."[144]

Additionally, "purely personal information . . . [such as] . . . the shopping list phoned from home, [or] the letter to a public officer from a friend which is totally void of reference to governmental activities" do not relate to "the conduct of the public's business" and are exempt from the definition of "public records."[145]

Ample evidence suggests that the notification letters relate to the conduct of the public's business. The core function of the letters—to notify water users of exceeding contamination levels in their water supply—stems from water quality obligations set out by the public's business of addressing nitrate contamination of water wells. This is an activity that is undoubtedly "public" in nature because it significantly pertains to and affects the community's access to drinkable water.[146] Moreover, unlike a public defender's office,[147] CCGC is not serving a private role. CCGC is instead, like the private disposal company in *San Gabriel Tribune*,[148] carrying out a delegated public responsibility that would otherwise be performed by the Regional Board.[149] And finally, the nature of the letters illuminates the government's conduct in actually monitoring compliance with the Ag Order. The public has a "substantial interest in disclosure" of such information.[150] For these reasons, a court is likely to find that the notification letters relate to the conduct of the public's business.

ii. The Regional Board likely "owns" the notification letters

In addition to relating to the conduct of the public's business, the writing must be "prepared, owned, used, or retained by" the public entity.[151] Although these words are not statutorily defined, the following cases may shed some light as to how these terms may be applied to the Regional Board's ownership of notification letters.

In *Regents*, the court held that although related to the conduct of the public's business, financial investment information pertaining to investments made by

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143 *Id.*

144 *Id.* at 1007 (citing Polk County v. Dodson, 454 U.S. 312, 318–19 (1981)).

145 San Gabriel Tribune v. Super. Ct., 143 Cal. App. 3d 762, 774 (1983).

146 Cal. State Univ. v. Super. Ct., 90 Cal. App. 4th 810, 825 (2001) (citing Coldwell v. Bd. of Pub. Works 187 Cal. 510, 520 (1921)) ("[T]he word 'public' means 'of, pertaining to, or affecting, the people at large or the community.").

147 *See* Coronado Police Officers Ass'n v. Carroll, 106 Cal. App. 4th 1001, 1006 (2003).

148 *San Gabriel Tribune*, 143 Cal. App. 3d at 775.

149 As is the case in the Regional Board's implementation of the individual monitoring program, *see* discussion *supra* Part II.A.1.

150 Citizens for a Better Env't v. Cal. Dep't of Food & Agric., 171 Cal. App. 3d 704, 715 (1985).

151 CAL. GOV. CODE § 6252(e) (2014).

the Regents held by private equity firms were not public records because the Regents did not prepare, own, use, or retain the information in the performance of any official duty.[152]

In *San Gabriel Tribune*, a city contracted with a private trash disposal company to handle trash collection.[153] During the course of its operations on behalf of the city, the private company generated financial information.[154] In finding that the financial information were public records, the court emphasized the degree of control the city had in overseeing the private company's performance:

> We conclude that the financial data that the City relied on in granting the rate increase constitutes a public record subject to public disclosure. The City has a contractual relationship with the Disposal Company. The City delegated its duty of trash collection to the Disposal Company but still retained the power and duty to monitor the Disposal Company's performance of its delegated duties, under the express terms of the contract. There is no question that the Disposal Company is providing a service to the residents of the City, by way of a contract made between it and the City. Assurances of confidentiality by the City to the Disposal Company that the date would remain private was not sufficient to convert what was a public record into a private record.[155]

The *Regents* decision suggests that although notification letters relate to public conduct in carrying out the Ag Order, the letters may not constitute public records because the Regional Board does not prepare, own, use, or retain the notification letters in the performance of its official duties. However, due to the degree of control the Regional Board has over CCGC's performance and compliance in notification letter procedures, the *Regents* decision may not be determinative. Indeed, unlike in *Regents*, where the University Regents had virtually no control over the financial investment held by the private equity firms,[156] the Regional Board has much greater control over the CCGC's actions here.

Instead, *San Gabriel Tribune* likely governs in determining whether the Regional Board has authority and ownership of the notification letters. Like the contractual agreement seen in *San Gabriel Tribune*,[157] the Regional Board has a contractual agreement with CCGC through the Board's work plan approval letters. The Regional Board delegated its duty of sending notification letters to

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152 Regents of Univ. of Cal. v. Super. Ct., 222 Cal. App. 4th 383, 399 (2013).

153 *San Gabriel Tribune*, 143 Cal. App. 3d at 775.

154 *Id.*

155 *Id.*

156 *Regents*, 222 Cal. App. 4th at 399.

157 *San Gabriel Tribune*, 143 Cal. App. 3d at 775.

CCGC "but still retained the power and duty to monitor [CCGC's] performance of its delegated duties, under the express terms of the [agreement]."[158] The Regional Board imposed significant oversight of these duties, as discussed *supra*, in Part II.

However, one distinguishing fact should be noted. In *San Gabriel Tribune*, the City actually *used* the financial information to approve a rate increase. But this distinction does not necessarily undercut the analogy because the court did not rely on the fact that the City used the information in characterizing it as "public."[159] It instead focused on the amount of control and oversight the City had on the private company's performance. That the City delegated a public duty was significant and can be read to suggest that the City in *San Gabriel Tribune* actually owned the records, through a form of agency, under the CPRA.

For the aforementioned reasons, the degree of control over CCGC's performance may suggest the Regional Board owns the notification letters and all other records produced in the course of CCGC performing its delegated duty. Further, the fact that the Regional Board owns the notification letters sent to growers in individual monitoring programs supports the idea that the duty to send notification letters is a governmental duty delegated to a private party. Therefore, the notification letters are likely "public records" under the CPRA.[160]

b. The notification letters are not exempt from disclosure

Once a record is characterized as a "public record," there is a rebuttable presumption that the record is disclosable.[161] This presumption can be overcome by demonstrating that an applicable exemption applies.[162] Exemptions, however, must be read narrowly according to the California Constitution.[163] The CRPA provides several specific exemptions,[164] none of which apply to the disclosure of information related to notifying the public of unsafe drinking water conditions. The Act also provides two more general exemptions. First, any record that is already exempt under another state or federal law (such as the attorney-client

158 *Id.*

159 *Id.* (relying on the fact that the City "still retained the power and duty to monitor the Disposal Company," rather than the City's use of the financial data supplied by the waste disposal company).

160 CAL. GOV. CODE § 6252(e) (2014).

161 Am. Civil Liberties Union of N. Cal. v. Super. Ct., 202 Cal. App. 4th 55, 85 (2011) ("[T]he PRA . . . create[s] a statutory presumption that all governmental records are available to any person.").

162 Int'l Fed'n of Prof'l & Technical Eng'rs, Local 21, AFL-CIO v. Sup. Ct., 42 Cal. 4th 319, 329 (2007).

163 Cnty. of Santa Clara v. Super. Ct., 170 Cal. App. 4th 1301, 1321 (2009) (citing CAL. CONST. art. I, § 3, subd. (b)(2), which requires narrow construction of statutes that "limit[] the right of access.").

164 *See* CAL. GOV. CODE § 6254 (2014).

privilege) is exempt under the CPRA.[165] Second, a "catch-all" exemption is provided for records that have a greater public interest value when left undisclosed:

> The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.[166]

This exemption "contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality."[167]

Courts routinely tip the balance in favor of disclosure when the information allows the public to better understand governmental processes and keep the government accountable for its actions.[168] In other words, public interest in disclosure is very high when information illuminates governmental favoritism.[169] *New York Times v. Superior Court* is illustrative of this concept.[170] There, in response to water shortages, a water district adopted a water rationing program.[171] A newspaper concerned about discriminatory enforcement of the program sought the names and addresses of customers who exceeded their water allocation.[172] The water district argued that releasing such information could expose customers to harassment, especially considering the emotional climate surrounding water use.[173] Finding that "a mere assertion of possible endangerment" did not "clearly outweigh" the public interest in disclosure, the court explained that disclosure would ensure governmental accountability:

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165 *Id.* § 6254(k).

166 *Id.* § 6255(a).

167 Michaelis, Montanari & Johnson v. Super. Ct., 38 Cal. 4th 1065, 1071 (2006).

168 *See, e.g.*, Sander v. State Bar of Cal., 58 Cal. 4th 300, 324 (2013) (determining public interest in State Bar admissions records is sufficient to mandate access to data).

169 *See, e.g.* Cal. State Univ. v. Super. Ct., 90 Cal. App. 4th 810, 833 (2001) (compelling disclosure of luxury suite holder names for State-operated sports arena because it would shed light on "whether any favoritism or advantage has been afforded certain individuals or entities"); CBS, Inc. v. Block, 42 Cal. 3d 646, 657 (1986) (releasing names of gun license holders because allows the public to monitor the government's administration of concealed weapons permits).

170 *See* New York Times Co. v. Super. Ct., 218 Cal. App. 3d 1579 (1990).

171 *Id.* at 1582.

172 *Id.*

173 *Id.* at 1585.

> The District should not be allowed to exercise absolute discretion, shielded from public accountability, in deciding which customer is a chronic water abuser. "In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." [Cite]. Disclosure of all who exceed their allocation will ensure that certain individuals do not receive special privileges from the District, or alternatively, are not subject to discriminatory treatment.[174]

The court also noted the importance of water resource preservation in California, particularly in times of drought. Finally, the court noted that the policy of the state was to "foster the beneficial use of water and discourage waste."[175]

Similarly, the court in *Citizens for a Better Environment v. Department of Food and Agriculture* noted the following with regard to records related to the enforcement of pesticide use laws:

> [T]he factual matters in the preliminary documents concern the conduct of county officials in enforcing the pesticide use laws and the conduct of state officials in the investigation and supervision of that task. It is simply incontestible [sic] that these are grave public matters in which the public has a substantial interest in disclosure. The records sought to be disclosed strongly illuminate the conduct of pesticide use law enforcement.[176]

Weighing the public's interest their ability to keep the government accountable in its enforcement actions against the public interest of "fostering robust agency debate," the court ordered disclosure of the factual information contained in the records. The court further allowed redaction of portions that fell under the preliminary drafts exemption under California Government Code section 6254 subdivision (a).[177]

Here, the notification letters are not exempt from disclosure. First, there are neither applicable specific exemptions under the CPRA, nor privileges or exemptions found in other statutes that might bar disclosure. Second, under the "catch-all" balancing test, the public interest in the disclosure of notification letters clearly outweighs the public interest in the nondisclosure of such letters due to favoritism concerns in enforcing the Ag Order. Like the water district in *New York Times*, the Regional Board "should not be allowed to exercise absolute discretion, shielded from public accountability, in deciding which" grower will be allowed to escape public scrutiny.[178] Specifically, membership to a larger (and more powerful) monitoring program should not determine whether

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174 *Id.* at 1585–86.

175 *Id.* at 1586.

176 Citizens for a Better Env't v. Dep't of Food and Agric., 171 Cal. App. 3d 704, 715 (1985).

177 *Id.* at 714–18.

178 New York Times Co. v. Super. Ct., 218 Cal. App. 3d 1579, 1585–86 (1990).

associated water users are being properly notified of contaminated sources.[179] Doing so discriminates against growers under individual monitoring programs. The Regional Board must make the notification letters available to verify governmental accountability to prevent the "arbitrary exercise of official power."[180] Just as "[d]isclosure of all who exceed [water] allocation will ensure that certain individuals do not receive special privileges from the" government,[181] disclosure of the notification letters will similarly illuminate and prevent governmental favoritism. The public has a "substantial interest in disclosure" of the notification letters as they "strongly illuminate the conduct of" water quality law enforcement.[182]

Moreover, multiple policy reasons may factor into the balancing of disclosure against nondisclosure. The Regional Board must consider the State's newly declared policy under A.B. 685 "that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes."[183] As described *supra*, A.B. 685 injects a consideration of equity into governmental decisions affecting access to water.[184] Thus, the question remains—is it fair to withhold these records if it might lead to greater uncertainty as to whether communities are properly notified of unsafe drinking water conditions? The public interest in ensuring safe drinking water should weigh heavily in this balancing process.

Further, the passage of the groundwater legislation[185] and the approval of Prop 1[186] both demonstrate that the people of the State are moving toward recognizing groundwater as a public resource. The closer the State moves toward making groundwater a public resource, the more transparent use and management of groundwater resources should be. All these factors should tip the balance in favor of public disclosure over nondisclosure of notification letters under the CPRA.

c. The notification letters are in the Regional Board's constructive possession

Even if a record can be characterized as a "public record," the CPRA only applies if the records are in the "*possession* of the agency."[187] "Possession"

[179] *Id.*

[180] *Id.* at 1585.

[181] *Id.* at 1585–86.

[182] Citizens for a Better Env't v. Dep't of Food and Agric., 171 Cal. App. 3d 704, 715 (1985).

[183] CAL. WATER CODE § 106.3(a) (2014).

[184] See *supra* text accompanying notes 40–54.

[185] See *supra* text accompanying notes 61–79.

[186] See *supra* text accompanying notes 55–60.

[187] Bd. of Pilot Comm'rs. v. Super. Ct., 218 Cal. App. 4th 577, 597–98 (2013) (quoting CAL. GOV. CODE § 6253(c) (2014)). Please note that demonstrating "possession" in this context does not necessarily demonstrate that a record is "retained" under section 6252 (defining "public records"). See Regents of Univ. of Cal. v. Sup. Ct., 222 Cal. App. 4th 383, 401–05 (2013).

includes "both actual and constructive possession."[188] A public entity has "constructive possession of records if it has the right to control the records, either directly or through another person."[189]

For example, in *Consolidated Irrigation District v. Superior Court*, the court held that a sub-consultant's files related to an environmental impact report were not in constructive possession of the city because the agreement between the general contractor and the city could not be read as giving the city control over sub-consultant files.[190] There, the contract between the city and the general contractor provided for city ownership of all documents prepared by the general contractor.[191] The court rejected an interpretation of this contract that would give the city ownership over materials prepared by a sub-consultant.[192] Although the city probably could have received the files upon request, the court explained that the "mere possibility of control does not establish . . . constructive possession."[193]

Here, the Regional Board has constructive possession over the notification letters because they have significant rights to control them. Unlike the city in *Consolidated*, the Regional Board's agreement with CCGC includes a provision that requires the release of copies of the notification letters when requested by the Regional Board.[194] In fact, the Regional Board invoked this authority on November 13, 2014 by ordering CCGC to bring copies of the notification letters to the Regional Board quarterly meetings.[195] This is not a "mere possibility of control," but rather a contractual mandate. Thus, the Regional Board has constructive possession over the notification letters. And for the foregoing reasons, the notification letters must be made available to the public under the CPRA.

2. Public Disclosure of Maps Derived From Confidential Well Logs

The CPRA expressly incorporates all disclosure exemptions provided under federal and state laws.[196] Water Code section 13752's prohibition against public disclosure of well logs is, thus, incorporated by reference and all well logs are exempt from disclosure. However, although well logs are clearly exempt, it is not entirely clear that maps or other data derived from well logs fall within the ambit of this exemption.

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188 *Bd. of Pilot Comm'rs.*, 218 Cal. App. 4th at 598.

189 *Id.*

190 Consolidated Irrigation Dist. v. Super. Ct., 205 Cal. App. 4th 697, 711 (2012).

191 *Id.*

192 *Id.*

193 *Id.*

194 Harris Jr., *supra* note 100, at 2.

195 See *supra* text accompanying notes 111–12.

196 CAL. GOV. CODE § 6254(k) (2014).

The exemption states that well completion "[r]eports . . . shall not be made available for inspection by the public, but shall be made available to governmental agencies for use in making studies."[197] The plain meaning of the prohibition's reach is unclear. Thus, DWR's broad interpretation must be scrutinized.

Since the State's policy favors public disclosure of all governmental files, all exemptions are narrowly interpreted.[198] For example, the CPRA exempts records related to "pending litigation to which the public agency is a party."[199] Courts have narrowly interpreted this seemingly broad exemption to exempt only records "*specifically* prepared for use in litigation."[200] This element of specificity should, thus, guide the interpretation of section 13752.

Section 13752 can be narrowly interpreted to bar only *specific* information from well logs while allowing disclosure of maps derived from such information. Often, maps such as GIS images display information exclusively on a macro, aggregate level. GIS maps of groundwater would similarly only reveal aggregate-level information related to the hydrology and geology of groundwater systems throughout the State as a whole, and would not necessarily reveal specific information that would impede on the privacy of individual well owners.

Moreover, the government will arguably be unable to justify the non-disclosure of such maps and images under the CPRA. After a CPRA request, the agency restricting or denying disclosure bears the burden of proving that an exemption applies.[201] Because only the agency knows the actual content of the records sought, agencies are required to provide the requesting party "adequate specificity" as to why the records would remain undisclosed to ensure a sufficient record for judicial review.[202] This can be accomplished through affidavits that "describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information."[203] Something more than "[c]onclusory or boilerplate assertions . . . recit[ing] statutory standards" is required.[204] Further, agencies cannot withhold nonexempt parts of a record simply because it might be "inextricably intertwined" with exempt sections of that record.[205] The agency must still

197 CAL. WATER CODE § 13752 (2014).

198 CAL. CONST. art. I, § 3, subd. (b)(2) (mandating narrow construction of exemptions to people's right of access); Am. Civil Liberties Union of N. Cal. v. Super. Ct., 202 Cal. App. 4th 55, 67 (2011).

199 CAL. GOV. CODE § 6254(b) (2014).

200 *See* Cnty. of Los Angeles v. Super. Ct., 211 Cal. App. 4th 57, 64 (2012) (emphasis added).

201 *Am. Civil Liberties Union of N. Cal.*, 202 Cal. App. 4th at 67.

202 *Id.* at 82 (citing Vaughn v. Rosen, 484 F.2d 820, 824 (D.C. Cir. 1973)).

203 *Id.* at 83.

204 *Id.*

205 *Id.* at 84.

provide an adequate explanation as to why certain parts are considered "inextricably intertwined" and cannot be segregated.[206]

Here, agencies in possession of maps derived from well logs must specifically prove how the maps fall under the section 13752 exemption from public disclosure. Agencies likely have to argue that the maps contain information considered to be "inextricably intertwined" with exempt well log information. However, agencies may be unable to specify individual parts of maps that are derived from well log information. For instance, a map created from well log information may display the location of concentrated groundwater in a particular region and may reveal the depth and volume of that groundwater concentration as indicated by different colors on the map. Under the CPRA, an agency attempting to withhold this map under the section 13752 exemption must show that specific well log information exists on the map. However, the aggregate nature of a GIS map makes it exceedingly difficult, if not impossible, to pinpoint exempt well log information on GIS maps. Thus, an agency will likely fail to demonstrate specificity adequate to justify nondisclosure under section 13752.

There is a growing judicial movement to read CPRA exemptions narrowly to allow disclosure of GIS maps. For example, in *Santa Clara v. Superior Court*, the court allowed public disclosure of a GIS basemap, which the county argued was protected by the United States Department of Homeland Security as "protected critical infrastructure information."[207] The court reasoned that the federal exemption was inapplicable by distinguishing information submitted to the federal government and information submitted by the county.[208] Because the county had submitted the information, the basemap was outside the scope of the federal exemption.[209] Further, under the CPRA's "catch-all" balancing analysis, the court noted that the mere assertion of a possible security threat that may arise from the basemap's disclosure did not clearly outweigh the public interest in accessing the basemap, as it would "contribute significantly to public understanding of government activities."[210] In an even more recent case, the California Supreme Court held that GIS-formatted databases fell outside the scope of the CPRA exemption for "computer software" including "computer mapping systems," although GIS mapping software itself fell within the exemption.[211]

These cases suggest a judicial willingness to recognize GIS maps created and in the possession of government agencies as disclosable public records. The public interest in disclosure appears to outweigh other concerns when

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206 *Id.* at 84–85.

207 Santa Clara v. Super. Ct., 170 Cal. App. 4th 1301, 1312 (2009).

208 *Id.* at 1319.

209 *Id.*

210 *Id.* at 1324, 1329.

211 Sierra Club v. Super. Ct., 57 Cal. 4th 157, 167–68 (2013).

determining whether to disclose GIS maps. Thus, in a balancing test under the public interest exemption, maps derived from well logs should be disclosed. Like the notification letters issue in the Central Coast, this issue involves the use of a record, in the form of maps, which can serve as a critical tool in addressing water quality issues. With A.B. 685's policy on universal clean water access, and the current trajectory of groundwater law and policy (toward recognition as a public resource), courts faced with the balancing of public interests concerning disclosure may increasingly allow the disclosure of maps and other data derived from well logs.

3. Looking Ahead: The Case For Repealing the Well-Logs Exemption

As California continues to assert more control over all of its water resources, it is becoming increasingly clear that information related to groundwater should be publicly disclosed. The well logs exemption has existed since mining activities in the late nineteenth century and has failed to meet contemporary societal needs. Since the Gold Rush, California's population has exponentially grown from around one million to over 38 million.[212] Water demand has accordingly risen, resulting in the increased need for safe, reliable, and affordable water supplies throughout the State. Several legislative efforts have attempted to repeal this exemption and allow public access to well logs, but to date all have failed.[213] As of March 2015, another legislative proposal currently sits in committee in an attempt to repeal the section 13752 exemption under the CPRA.[214]

Those opposed to repealing the exemption primarily point to the possibility of terrorist attacks on water wells.[215] However, this argument is weak. Historical evidence demonstrates that large-scale attacks on water systems are difficult to achieve, and there are areas and industries with much higher risk of a targeted attack than groundwater wells.[216] Further, all other western states have already made their well logs publicly accessible without an increase in terrorist attacks on groundwater wells.[217]

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[212] Albert G. Medvitz, *Urban growth squeezes agriculture*, CAL. AGRIC., May-Jun. 1998, at 8-9, *available at* http://californiaagriculture.ucanr.edu/landingpage.cfm?article=ca.v052n03p8&fulltext=yes; *State & County QuikFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/06000.html (last visited Mar. 24, 2015) (selected California).

[213] *See e.g.*, S.B. 263, 2011-12 Sess. (Cal. 2011); S.B. 1146, 2011-12 Sess. (Cal. 2012).

[214] *See* S.B. 20 2014-15 Sess. (Cal. 2015) (as referred to Senate Natural Resources & Water Committee), *available at* https://legiscan.com/CA/text/SB20/2015 (last visited March 17, 2015).

[215] SENATE RULES COMM., SENATE FLOOR ANALYSES, S.B. 1146, 2011-12 Sess., at 4-5 (Cal. 2012) [hereinafter S.B. 1146 SENATE FLOOR ANALYSES].

[216] Parker, *supra* note 116, at 17; *see generally* Peter H. Gleick, Water and terrorism, 8 Water Policy 481(recounting terrorist attacks on water dams and reservoirs), http://www2.pacinst.org/reports/water_terrorism.pdf (last visited Apr. 12, 2015).

[217] *Id.* at 16–18.

There are numerous benefits to making well logs publicly available: (1) informing farmers of the depth they may be able to drill new wells; (2) assisting academics in the production of maps and models without government sponsorship; (3) equipping community activists with better information to protect the drinking water supplies of disadvantaged communities; (4) creating further opportunities for collaboration between the government, academia, and private parties to better understand groundwater. The list of possible benefits goes on and on.[218] It seems clear that these potential benefits substantially outweigh the very low possibility of increased terrorism activity as a result of making well log information publicly accessible. If California is serious about addressing issues like nitrate contamination and groundwater overdraft, the State must begin facilitating a conversation between all relevant actors. Allowing public access to these records can initiate these critical discussions.

CONCLUSION

This paper analyzed two specific issues related to groundwater information: notification letters in the Central Coast and maps derived from confidential groundwater well logs, and argued that in both instances, the sought-after information should be made available and disclosed to the public under the California Public Records Act. It was suggested that under a balancing of public interests, new developments in groundwater policy—the movement toward treating it as a public resource—and the recognition of a human right to water clearly outweighed any public interest in keeping information related to groundwater undisclosed. This paper further advocated for the repeal of the groundwater well logs exemption to keep pace with contemporary developments in groundwater.

California is at a turning point in its water history. Although it is faced with difficult problems such as nitrate contamination and a historic drought, it is also presented with an opportunity to rethink and contemporize the way the State views water management law and policy. The status quo of treating water below the surface differently from water above should be and is being challenged both legislatively and judicially. These developments suggest that the State is moving toward recognizing groundwater as a public resource. Further, legislative declarations such as the human right to water demonstrate policy shifts that begin to inject a consideration of equity into water-related decisions. The principle of the human right to water seeks to protect disadvantaged communities who rely sometimes exclusively on groundwater as a source of drinking water. Mandating state agencies to consider this implication requires more government control over groundwater resources. However, in our democratic governance system, more government control requires increased

[218] *Id*. at 16–17; S.B. 1146 SENATE FLOOR ANALYSES, *supra* note 215, at 4.

transparency to improve accountability. Thus, as we experience an increase in governmental control of groundwater, we must also see an increase in publicly accessible information.

So, is water a private commodity or a public resource? We are in the midst of answering that question in California and it looks like we are heading toward choosing the latter.