

# THE LANGUAGE OF WATER: CALIFORNIA'S WATER LEXICON EXPANDS

by DIANE KINDERMANN HENDERSON

Shakespeare had his own secret language buried in his plays, by which he included implicit instructions for the actors. Victorians had their language of flowers, encrypted in small nosegays to express emotions not allowed to be spoken in Victorian society. Californians have our own special language of water, allowing us to manipulate a scarce resource with enough explicit and implicit legal, technical, and political instructions to badger Macbeth, and ample emotions to support a Victorian florist on Valentine's day.

Three important concepts in the 2014 California water lexicon are examined in this article: water conservation, curtailment, and groundwater regulation. These concepts are not entirely new, but their legal, technical, and political applications have evolved in significant new ways as a result of the drought.

## Water Conservation: 20x2020: "Much Ado About Something"

California's thirst for adequate water

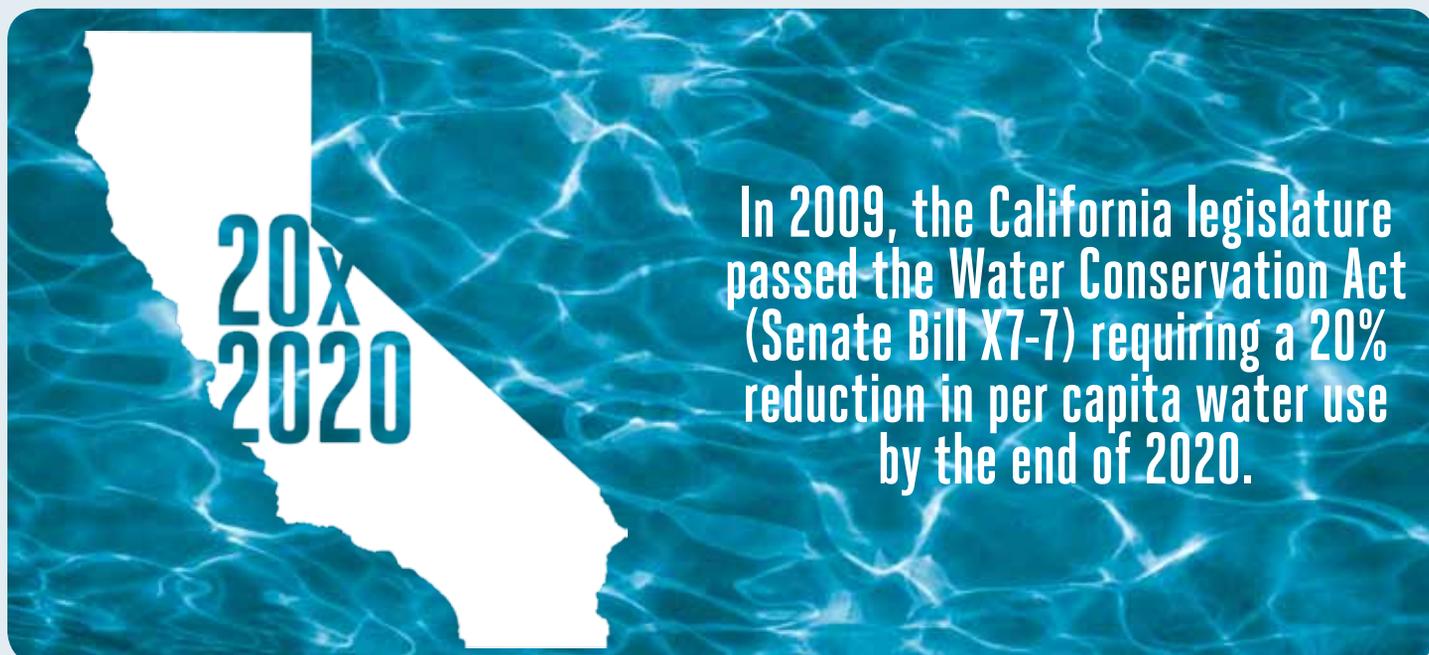
supplies has shaped its own history and landscape. In the 1980s, water conservation existed only in general public policy terms with little legal or technical back up. The state legislature and local government followed by creating legal and technical frameworks to identify and implement specific water conservation efforts. The 2014 water crisis accelerated implementation and enforcement of conservation efforts at an unprecedented level. Two facets of the state water conservation prism are examined, followed by a survey of current local potable water conservation efforts.

### 20x2020: Statewide Guidance

In 2009, the California legislature passed the Water Conservation Act (Senate Bill X7-7) requiring a 20% reduction in per capita water use by the end of 2020. The associated 20x2020 Water Conservation Plan (20x2020 Plan) sets forth a statewide roadmap to maximize the state's urban water efficiency and conservation opportunities to the year 2020 and beyond. It identifies

urban water conservation as the ultimate water management strategy to match supply and demand. The 20x2020 Plan includes a range of strategies to achieve the 20% per capita reduction in urban water demand by 2020. Strategies include incentivizing water agencies to promote water conservation and creating evaluation and enforcement mechanisms.

Water conservation is affected primarily through Civil Code sections 1101.1 through 1101.8, which were amended in January 2014. They require non-compliant fixtures to be replaced with water-conserving fixtures during alterations or improvements of single-family residences, multi-family, and commercial properties. Additional water conservation fixture requirements will go into effect in 2017 and 2019. Many local jurisdictions have enacted local ordinances or policies to comply with these requirements. The California Green Building Standards Code (Green Building Code) includes requirements for water-conserving fixtures designed to reduce potable water demand by at



least 20%, in keeping with the 20x2020 Plan. Various other measures help reduce climate change-related impacts at the project level.

In January 2014, Governor Brown released the final “California Water Action Plan” (2014 Plan). The 2014 Plan meets three water supply objectives: reliability, restoration, and resilience. The 2014 Plan is designed to complement, not replace, local programs. Conservation and efficiency efforts are at the top of the list and the 2014 Plan will ensure expanded conservation and efficiency efforts.

### **Local Guidance**

The bulk of water conservation work is done at the local level with many local governments adopting regulations or ordinances mandating water conservation and efficiency. Many of California’s approximately 3,000 water providers have taken similar action, but actions are varied.

Civil Code Section 1101.8 permits local governments and retail water suppliers to enact ordinances or adopt regulations that promote compliance with or exceed water savings targets established in Section 1101.1. To date, many cities and counties have enacted ordinances regarding water conservation and efficiency and are enforcing them in this 2014 water emergency.

*City and County of San Francisco:* The City and County of San Francisco first adopted a Residential Water Conservation Ordinance in 1992, amended in 2009. For example, owners of most residential buildings must obtain a certificate of compliance prior to transfer of title as result of a sale. Certification requires low-flow showerheads, faucets and faucet aerators, efficient toilets, and leak detection and repair, among other criteria. These mirror Civil Code Section 1101.3(c)’s standards.

*City of Sacramento:* The City of Sacramento’s Water Conservation Ordinance (WCO) of 2009 addresses outdoor water conservation and limits the days and times when outdoor watering can occur. Because of current drought conditions, the city has adopted a Stage 2 Water Shortage Contingency plan, which further limits outdoor watering.

On October 29, 2013, Sacramento adopted its Water Conservation Plan (WCP). The WCP provides a comprehensive approach to guide

the city’s water conservation efforts, including how water conservation in lieu of additional infrastructure can meet a significant portion of the city’s future water demand.

*City of Petaluma:* The City of Petaluma’s Water Conservation Regulations Ordinance requires that all new construction and existing customers use water as efficiently as possible. New development standards, landscape water use efficiency standards, and regulations prohibiting water waste are included. New development standards

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for new single-family and multi-family residential dwellings mandate the use of approved high-efficiency toilets, fixtures with maximum gallon-per-minute (gpm) requirements, and dishwashers with the EPA’s Energy Star label. Multi-family units must each be separately metered or sub-metered.

Also, vehicle wash facilities must reuse a minimum of 50% of water from previous vehicle rinses. Other requirements apply to facilities using reverse osmosis or offering self-service vehicle wash facilities. Similar to other

local ordinances, much attention is paid to outdoor water use. Extensive efficiency standards apply to new and renovated residential, commercial, industrial, and institutional landscape projects.

Finally, the Petaluma ordinance prohibits water waste. Non-essential water uses are prohibited, including washing sidewalks without a hose equipped with a shut-off nozzle, irrigation that allows runoff or over-spray, and using water for non-recycling water features. The water waste portion also requires covers on all outdoor swimming pools and spas. Violations of the ordinance may result in penalties, fees, and additional charges.

*City of Los Angeles:* In 2009, the City of Los Angeles adopted water efficiency requirements for new development and renovation of existing buildings (Ordinance No.180822) to reduce water consumption over time, thereby seeking to minimize the effects of any water shortage. The ordinance requires water-efficient plumbing fixtures including toilets, faucets, showerheads, and dishwashers. Flow restrictions are more stringent than those required under Civil Code Section 1101.1 and apply to both residential and commercial development and renovation.

Los Angeles subsequently adopted the Emergency Water Conservation Plan in 2010 (2010 Plan) (Ordinance No. 181288). Phase I of the 2010 Plan prohibits many activities, including using a water hose to wash paved areas without use of a department-approved, water-conserving spray cleaning device; serving drinking water in restaurants, unless requested; irrigating during rain; and irrigating in a manner that allows excess water runoff. Phase II includes landscape irrigation restrictions based on address and maximum watering times. Phase III limits landscape watering to once per week, prohibits vehicle washing other than at a commercial facility, and prohibits filling residential swimming pools or spas with potable water. Phase IV prohibits all landscape irrigation. Phase V does not specify prohibitions, but authorizes additional restrictions based on the water supply. Los Angeles is currently enforcing Phase II restrictions.

### **Water Provider Response**

California includes approximately 3,000 water providers, including cities, corporations, and farm districts. Some

providers have significant amounts of stored water, while some have none. As might be expected, responses to drought conditions have varied greatly across the state. Some request voluntary conservation, while others mandate restrictions. Below are just a handful of the agencies and their responses.

*Bella Vista Water District (Shasta County):* The Bella Vista Water District adopted Resolution 14-04, declaring that rural, residential, commercial, and public/institutional customers would receive a baseline water allocation, as well as a quantity equal to a percentage of historical use. Agriculture and aquaculture customers that also serve as a residence (family dwelling) would also receive a water allocation, though agriculture and aquaculture customers that do not serve as a residence would receive a zero allotment. Penalties for excess use are included.

The District may grant new service requests only if there is available water, and service is conditioned on water being used primarily for internal household purposes and subject to allotments. All District customers are subject to prohibitions on outdoor watering, no filling of new ponds or new lakes, and no car washing without hose-end shut-off nozzles.

*Bonanza Springs Water System (Lake County):* The Bonanza Springs Water System serves 178 connections in Lake County. In March 2014, the Lake County Board of Supervisors adopted an ordinance in response to emergency water supply conditions of the Bonanza Springs Water System (Ordinance No. 3003), imposing hefty surcharges for water use in excess of 900 cubic feet per month per connection, with additional surcharges for use exceeding 1,110 cubic feet. Furthermore, the administrator is authorized to discontinue water service or install a water restrictor device at the water meter for any customer determined to be in willful and continuous violation of the ordinance. While some other water providers reserve the right to allow new connections only if sufficient supplies exist, the Bonanza Springs ordinance

declares that no new service connections will be allowed for the duration of the ordinance's effectiveness.

*Montecito Water District (Santa Barbara County):* The Montecito Water District serves approximately 4,500 connections in the southern coastal portion of Santa Barbara County, receiving roughly one-third of its water supplies from the State Water Project. In February 2014, the District declared a water shortage emergency and placed several restrictions on water use (Ordinance No. 92), including discontinuing the processing of all applications for new water service or increases in size of existing service. While the water level of existing pools may be maintained, water will not be available for new private or public swimming pools, ponds, or major water features. Other restrictions include serving water to restaurant customers only upon request, offering hotel guests the option to forego new linens each day, vehicle washing at commercial facilities or with a bucket and hose with a hand-operated shut-off nozzle, and prohibition of washing hard surfaces. The overall goal of the restrictions is a minimum 30% reduction in district-wide water use.

*Carlsbad Municipal Water District (San Diego County):* In January 2009, the Carlsbad Municipal Water District enacted several water conservation measures to be in effect at all times, including prohibition on washing of hard surfaces, prohibiting runoff or overspray from irrigation, and serving water to restaurant patrons only upon request (Ordinance No. 44).

The ordinance also established four drought-response levels and action to be taken under each scenario. Under Level 1, conservation is targeted at 10%, and irrigation watering is limited to specific hours daily. Level 2 asks customers to reduce water use by 20%, and limits the number of days per week for irrigation watering. Level 3 seeks to reduce water consumption by up to 40%, places additional limits on irrigation watering, and prohibits filling ornamental lakes or ponds unless necessary to sustain aquatic life. Under Level 3, no new potable water

service shall be provided. Level 4 demands reduction greater than 40% and prohibits landscape irrigation except crops and landscape products of commercial growers and nurseries. Level 4 also permits flow-restricting devices for customers that have repeatedly violated the ordinance.

Following the Governor's January 2014 Drought Proclamation, the District declared a Drought Response Level 1, urging customers to reduce water use by 10%.

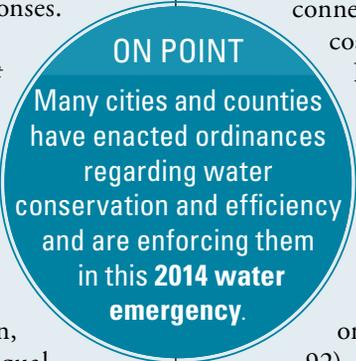
*Other Water Providers:* Water provider response to current drought conditions runs the gamut from mandatory reductions to asking customers to voluntarily reduce water waste. The providers with the most aggressive responses appear to be those that rely on the State Water Project or the Central Valley Project for the majority of their supplies. Water providers with more relaxed responses seem to be those with extensive local storage capacity.

**State Action:** The State Water Resources Control Board met on June 17, 2014, and its staff report was clarion: here, in the midst of the worst drought in a generation, state residents have not done enough to reduce their water uses, falling short of the 20% target set by Governor Brown in his January Drought Proclamation, and falling short of progress towards the 20x2020 Plan target. Nevertheless, California did cut its water use 5% compared to the same period the preceding three years. The need for more statewide conservation measures was confirmed, while recognizing that conservation targets need to be tailored to each region since there are climate variations throughout California.

The lack of water conservation mandates at the state level has led to diverse conservation efforts by water suppliers and local governments. Governor's Brown's call for a 20% reduction is uniformly acknowledged, but more measures are needed since conservation efforts yield mixed results in different regions of the state.

**Curtailment: "As You Won't Like It"**

Article X Section 2 of the California Constitution and Water Code section 100 mandate that the Board prevent waste and unreasonable use of the state's water supplies. Accordingly, the Board has been anointed with specific emergency



powers this year to address the drought. In lockstep with increased conservation efforts, the Board has exercised powers in Water Code sections 275 and 1058.5 to adopt emergency regulations that curtail over 4,000 junior water rights in the Central Valley, requiring those users to cease their diversions from hundreds of streams and tributaries. Cal. Code Regs. tit. 23, §§ 877-879.2 (2014). The goal is to preserve senior water rights in addition to protecting wildlife and habitat resources. The restrictions are intended to protect some of the last remaining natural salmon and steelhead populations as flows decline in the summer. Curtailments could be lifted when the fish migration pattern ends. Some senior riparian water rights elsewhere in California may be curtailed as well. Even though older water rights by law generally are superior, they do not guarantee water. Recent legislation also allows the Board to enforce its emergency regulations through cease-and-desist orders and fines.

Therefore, curtailment is another emerging term in the water lexicon, hidden in the story of the 2014 drought and an emotional challenge for water rights holders, formerly confident that their rights were secure.

### **Groundwater Regulation: "All's Well That Ends Well"**

The third term in our drought drama is "groundwater regulation." In general, existing law relating to extraction and use allows the regulation of groundwater flowing in subterranean streams, but not the regulation of percolating groundwater, which is a predominant condition in California. The right to use groundwater falls in one of three categories: overlying rights, appropriative rights, or prescriptive rights. This article focuses on overlying rights, which are rights of an owner of land overlying groundwater to drill a well and pump groundwater for use on the land within the basin or watershed. *California Water Serv. Co. v. Edward Sidebotham & Sons*, 224 Cal. App. 2d 715, 725 (1964).

Unless the basin has been adjudicated, or other local regulations apply, no discretionary permit is required to produce the groundwater, making groundwater akin to the last wild stallion in California. Most local governments require a well drilling permit, but it

is ministerial and not discretionary. Even before the 2014 Drought Proclamation, however, environmental groups threatened litigation against several counties, claiming that the issuance of well drilling permits should be discretionary and subject to review under the California Environmental Quality Act (CEQA) PRC Section 21000 et seq. For example, in January 2014, environmental groups sued Stanislaus County and permit holders demanding that the County revoke permits for two hundred irrigation wells approved during the prior five months. The petitioners alleged that CEQA analyses should have been performed because well permits are discretionary actions that could result in an impact to the environment.

Consistent with Drought Proclamation instructions, the California Legislature is formalizing efforts toward groundwater extraction regulation in California for the first time. Senate Bill 1168 (the "Sustainable Groundwater Management Act") has been described as an assault on the management of California groundwater. The following provisions would apply to all groundwater basins and sub-basins in the state:

- All groundwater basins and sub-basins would be managed sustainably by local entities pursuant to an adopted sustainable groundwater management plan.
- Local entities must develop, adopt, and implement a sustainable groundwater management plan in high and medium priority groundwater basins and sub-basins.
- Upon a finding of compelling state interest, the state would have recourse to cause a sustainable groundwater management plan to be developed, adopted, and implemented where local interests either cannot or will not do so themselves.

In May 2014, SB 1168 was passed by the Senate and forwarded to the Assembly.

In October 2013, the Board issued a draft of its "Groundwater Workplan Concept Paper" (Groundwater Workplan) supporting groundwater regulation. The Board's Groundwater Workplan aligns its current groundwater protection efforts with ongoing actions of other entities having groundwater management responsibilities, and potential actions the

Board can pursue. Population growth and more intensive land use will place increased demands on the state's water supply. Concurrently, surface water runoff is projected to decline due to the effects of climate change. These factors point to an increased reliance on groundwater, yet many of California's aquifers are already experiencing contamination and overdraft. Varying physical and institutional characteristics of California's groundwater basins limit a "one-size-fits-all" solution. The workplan aims to promote collaboration and cooperation among local, regional, and state agencies to help promote more effective groundwater management over the long term.

Thus, groundwater is losing its wild-stallion status, with the legislature, the board, and litigious environmental groups pursuing stricter controls over groundwater extraction and usage.

### **Conclusion**

The language of water in California will continue to evolve to insure adequate surface water and groundwater supplies for people, species, natural resources, and the environment. Water conservation, curtailment, and groundwater regulation are a small part of the new lexicon. The law, new technology, and politics will continue to grace the water stage with explicit and implicit instructions; and resulting emotions can still be hidden in nosebags, created of course with drought-tolerant blooms.



***Diane Kindermann Henderson***  
*practices environmental, land use, and real estate law at Abbott & Kindermann, LLP located in Sacramento and St. Helena, California. She can be reached at [dkindermann@aklandlaw.com](mailto:dkindermann@aklandlaw.com).*

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