

International Municipal Lawyers Association
2015 Annual Conference
Las Vegas, Nevada

Work Session II

Today's Water Wars
Water Rights and Water Quality – From East Coast to West Coast
(October 4, 2015)

PRESENTED BY

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Trends Shaping Municipal Growth

Interesting time to be discussing …

water rights and ***water quality***
in relation to

water supply

needed for municipal growth and planning functions …

Trends Shaping Municipal Growth







- CA economy showing positive momentum:
  - Job growth up & unemployment rates down
  - Construction starts projected to increase (2015-2018)
  - Home prices improving

  (Governor's 2015-2016 Budget; Department of Finance Economic Forecast; UCLA Anderson Forecast; University of the Pacific Forecast)

- In "normal" economic markets, builders build …

Trends Shaping Municipal Growth ("The Perfect Non-Storm")

- Multi-year drought conditions
- Governor's 2014/2015 Declarations of Drought Emergency
- 2013/2014/2015 – Driest period on record
- 2014 – Hottest year on record
- 2014/2015 State Board water right curtailment orders
- 2015 Executive Order and State Board's statewide emergency conservation regulations

Trends Shaping Municipal Growth (Got Water?)



Trends Shaping Municipal Growth (Got Water?)



BUSINESS

In the continuing drought, can Orange County keep building?

May 3, 2015 | Updated 1:30 p.m.

PLANETIZEN

California Drought Watch: Residential Builders Fear Moratoriums

May 5, 2015, 11am PDT IRVIN DAWID

Trends Shaping Municipal Growth (Got Water?)

The San Diego Union-Tribune

DROUGHT

Why drought doesn't dry up home building

Turning off California's growing economy is politically and legally infeasible

June 14, 2015

CBS Sacramento

Local

Natomas Ready To Start Building As Drought Worries Hang Over Growth

March 31, 2015 10:43 PM

Trends Shaping Municipal Growth (Got Water?)

SACRAMENTO BUSINESS JOURNAL

COVER STORY

Will California's drought kill a budding building boom?

Builders stress increased efficiency; critics say better planning is needed

May 29, 2015, 3:00am PDT

This debate plays out over and over as California's water crisis drags on: A city approves a new housing plan. Then critics ask: How can we allow more development in a drought?

Homebuilders and water agencies say even in the driest period in modern state history, there's an adequate supply for residential construction. New homes account for only a sliver of water demand and are designed to use far less water than existing houses, they say.

Trends Shaping Municipal Growth

- How does CA “deal” with this paradigm?
- State has an array of water supply planning laws
- Examples:
  - Urban Water Management Plans (Water Code)
  - Water Supply Assessments (Water Code & Public Resources Code)
  - Written Verifications (Government Code)
  - California Environmental Quality Act (Public Resources Code)
  - Integrated Regional Water Management Planning Act (Water Code)
  - General Planning Laws and Process (Government Code)

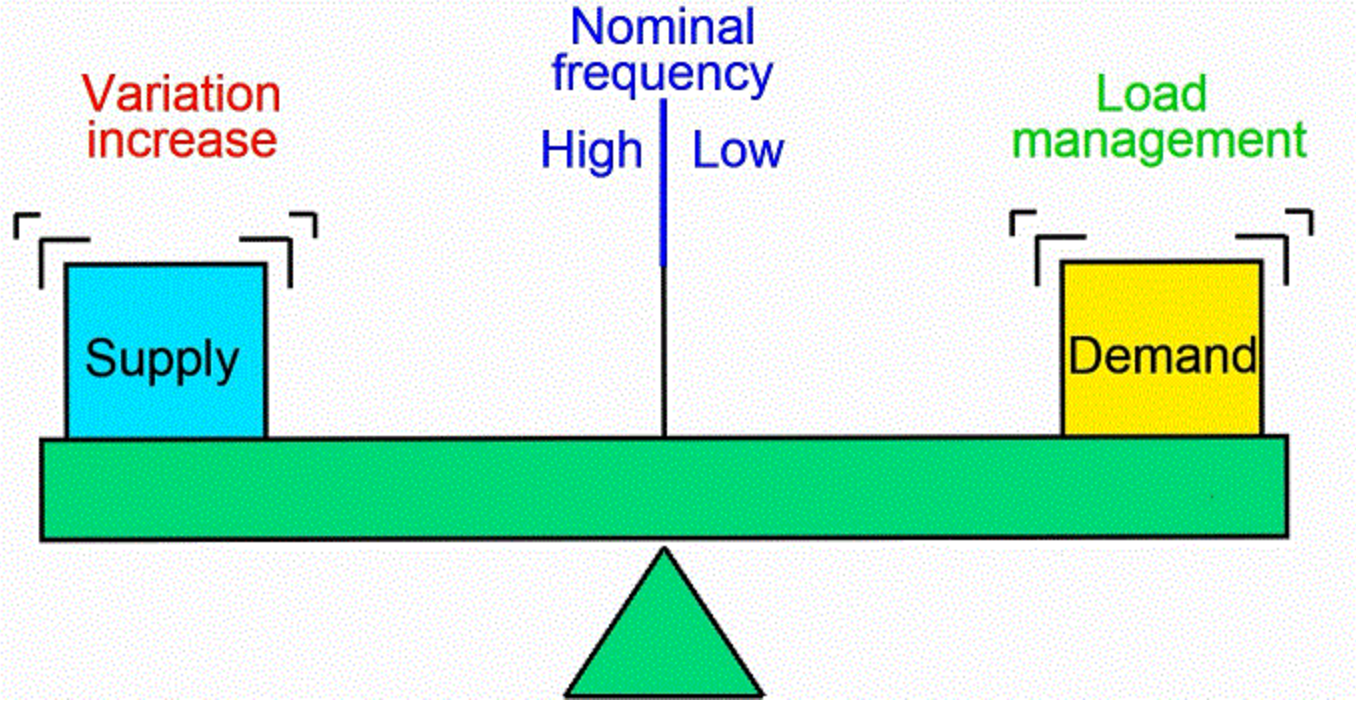
CA Water Supply Planning Statutes

Generally speaking …

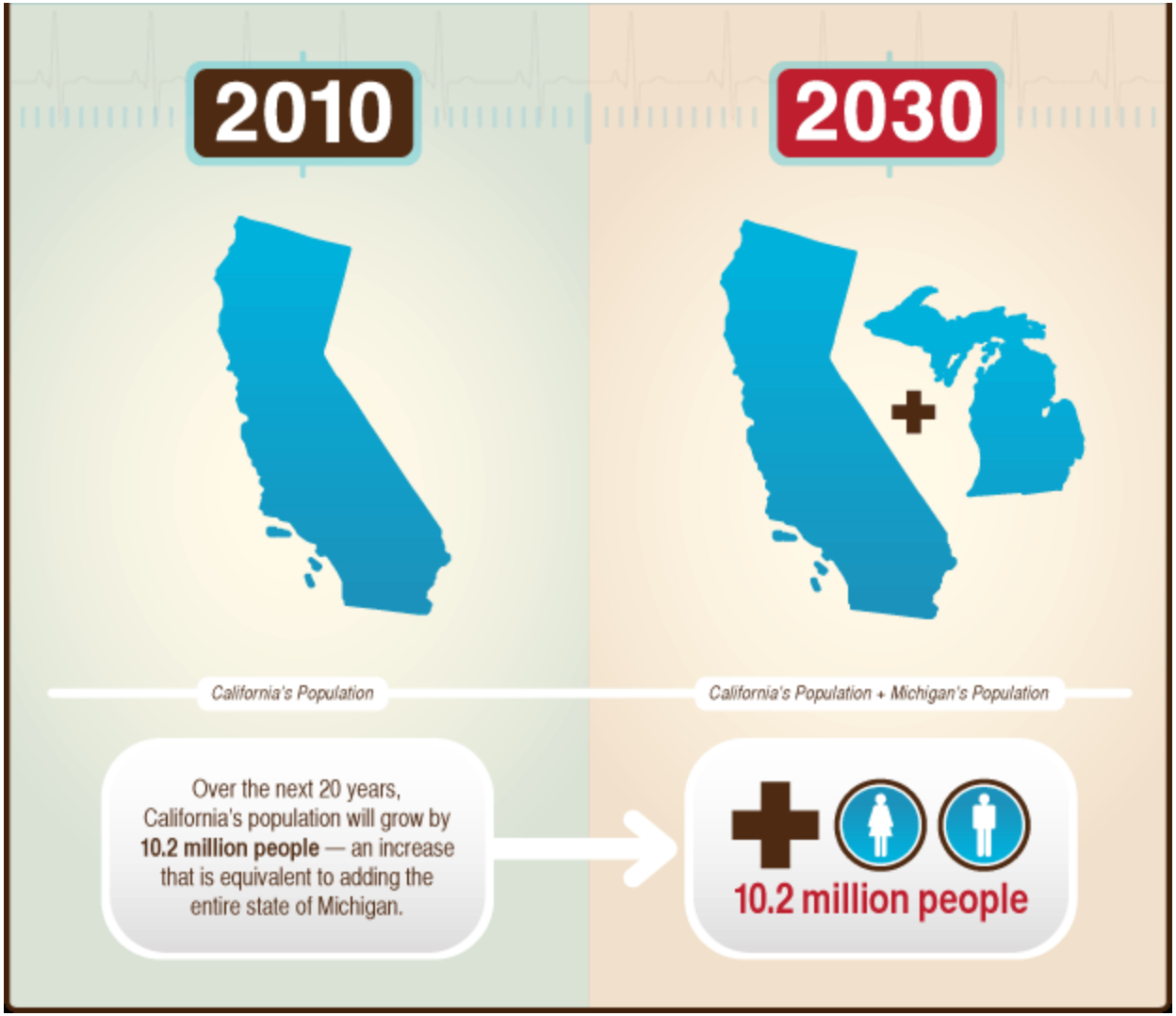
- Require an evaluation of whether a water supplier's total projected water supplies during normal, single-dry, and multiple-year periods over a 20-year projection are sufficient to meet demands of existing and planned future uses

- Often in the context of demands associated with a specifically proposed project

CA Water Supply Planning Statutes



"Demand Side"


2010
2030
California's Population
California's Population + Michigan's Population
Over the next 20 years, California's population will grow by **10.2 million people** — an increase that is equivalent to adding the entire state of Michigan.
10.2 million people

"Supply Side"

U.S.

NASA: California Has One Year of Water Left

BY ZOË SCHLANGER 3/13/15 AT 1:18 PM



Uvas Reservoir, Santa Clara County, California. DON DEBOLD/FLICKR

FILED UNDER: U.S., Drought, California

Plagued by prolonged drought, California now has only enough water to get it through the next year, according to NASA.

"Supply Side"
(State Water Project)



SWP Supplies Becoming Less Reliable

- Various factors reducing the availability and reliability of SWP supplies, such as:
  - Bay Delta ecosystem
    - FWS BiOp for delta smelt – "Jeopardy" finding
    - NMFS BiOp for anadromous salmon – "Jeopardy" finding
    - RPAs imposed unprecedented water supply restrictions
    - Upheld by Ninth Circuit
  - Other legal challenges
  - Drought
  - Water quality issues and regulations
  - Incomplete infrastructure
  - Climate change impacts

State Water Project Table A Allocations 20-Year History

- 2015 – 20%

- 2014 – ***5% allocation*** *(started at unprecedented 0%)*

- 2013 – 35%
- 2012 – 65%
- 2011 – 80%
- 2010 – 45%
- 2009 – 40%
- 2008 – 35%
- 2007 – 60%
- 2006 – 100%
- 2005 – 90%
- 2004 – 65%

2003 – 90%
2002 – 70%
2001 – 39%
2000 – 90%
1999 – 100%
1998 – 100%
1997 – 100%
1996 – 100%
1995 – 100%

"Supply Side"
(Colorado River System)



Colorado River Supplies Less Reliable

- Various factors are reducing the availability and reliability of Colorado River supplies, such as:
  - System susceptible to prolonged drought conditions
  - Endangered species restrictions
  - Legal challenges
  - Water quality constraints
  - Climate change impacts
  - Water use by Arizona/Nevada and other states
- Hydrologists forecast ongoing shortfalls

Groundwater Supplies Also at Issue

- 2014-2015 DWR Reports
  - Groundwater levels in CA have reached all-time historic lows
  - Groundwater levels have decreased substantially since 2010
- New adjudications filed in some areas of the state
- Prior judgments being examined
- Groundwater quality issues
- Climate change issues
- New Sustainable Groundwater Management Act

The Stage Is Set …

- What does all of this mean for municipal water supply planning, analyses, and projected growth?
  - Real Effects (i.e., published reports and documentation)
  - Public Perception
  - Perception of elected Boards/Councils
  - Perception of “land use agency” vs. “water agency”
  - Litigation Perspective

Defensibility of Water Supply Planning Documents

- *Sonoma County Water Coalition v. Sonoma County Water Agency* (2010) 189 Cal.App.4th 33
  - Challenge against legal sufficiency of a wholesale Urban Water Management Plan (UWMP)
  - Trial court invalidated the UWMP
  - Court of Appeal reversed

Defensibility of Water Supply Planning Documents

- Court of Appeal explained:
  - "Our role ... is to ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute."
  - "A court's task is not to weigh conflicting evidence and determine who has the better argument … ."
  - "Our review for substantial evidence applies a deferential standard that is satisfied if the record contains relevant information that a reasonable mind might accept as sufficient to support the conclusion reached."

Defensibility of Water Supply Planning Documents

- *Trial court rejected certain assumptions* made in the UWMP regarding projected expansion of the agency's water supplies
- UWMP assumptions (examples):
  - ESA listings would not reduce agency water supplies and NMFS consultation would be successfully completed;
  - Necessary FERC licenses would be obtained for Russian River diversions;
  - The agency would be able to construct and operate necessary infrastructure and facilities; and
  - The agency would obtain necessary water right permits from the SWRCB to increase River diversions

Defensibility of Water Supply Planning Documents

- Court of Appeal disagreed:
  - "[S]ome level of uncertainty is a permanent, inherent feature of modern water management. It arises from a wide range of scientific and legal regulatory factors that cannot be avoided. Water management is subject to the vagaries of climate, competing demands from agricultural, industrial and residential uses, environmental constraints, and overlapping regulatory regimes at both the federal and state levels."

"Take Away" from the Sonoma County Case

- "The issue … is not whether alternative assumptions would have been more reasonable, or perhaps even more reasonable than those made, but whether the assumptions that were made are supported by substantial evidence."
- ***BOTTOM LINE***: The court cannot defer to technical, scientific, or legal matters that are not reflected in the water supply analysis or elsewhere in the administrative record
- Building the record is critical
- Examples:
  - ***Water rights issues***; ***Water quality issues***
  - How do those issues affect available supplies short & long-term?

"Take Away" from the Sonoma County Case

- ***Fruit of the Poisonous Tree:***
  - "If an UWMP is inadequate, the public and the various governmental entities that rely on the UWMP may be seriously misled by it … and the consequences to those who relied on the UWMP, as well as those who share a water supply with them, could be severe." (*Sonoma County*, 189 Cal.App.4th at 61-62.)
  - In other words, must be very careful in preparing ***project-specific*** analyses that incorporate or otherwise rely upon information contained in ***planning-level*** documents that have been legally challenged or overturned.
  - Disclose, analyze … disclose, analyze … discuss, discuss, discuss.

Water Supply Analyses
Sweat the Details

- Now – more than ever before – courts will invalidate a development project or planning document for failing to adequately address water quality or water supply issues



- Courts may or may not get it right, but the issues present substantial risks to municipal growth and planning functions

Water Supply Analyses Sweat the Details

- *Friends of the Santa Clara River v. Castaic Lake Water Agency* (2004) 123 Cal.App.4th 1
  - Challenge to an Urban Water Management Plan
  - Court of Appeal held the UWMP did not adequately describe availability of groundwater due to perchlorate contamination
- *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412
  - Proposed project of 22,000 residential units, schools, parks, office and commercial uses
  - California Supreme Court concluded the water supply analysis failed to adequately identify and explain water rights and water supply available to serve the long-term phases of the project

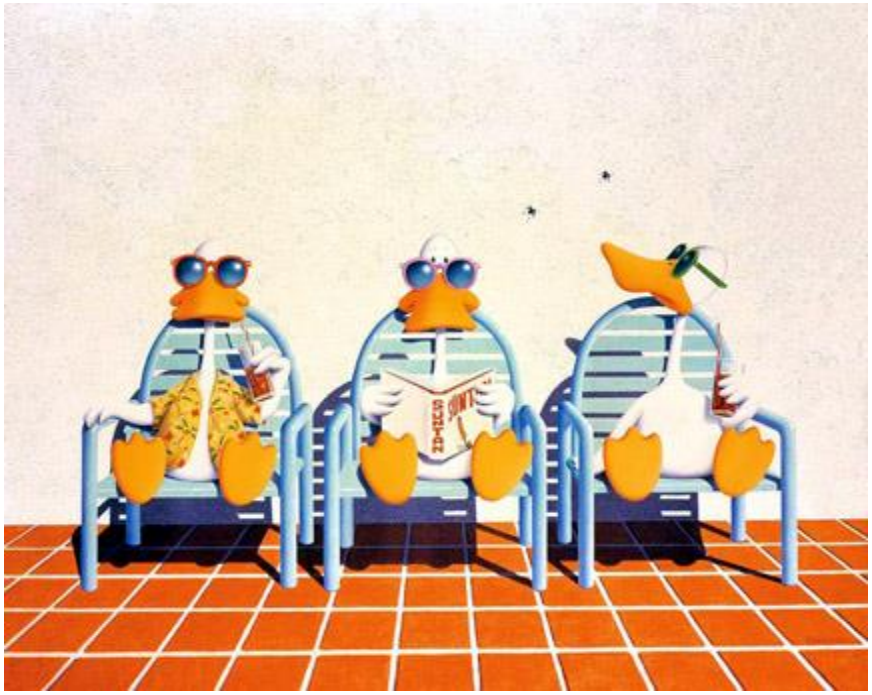
Water Supply Analyses Sweat the Details

- *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48
  - Proposed project of 5,190 residential units and related commercial, retail, office, and public uses
  - Court of Appeal rejected the project because the EIR did not provide a "good faith analysis" or "full disclosure" of relevant information related to water supply and water rights issues
- *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260
  - Proposed project of 1,380 residential units and related uses
  - Court of Appeal concluded that potential uncertainties related to imported water supplies were not adequately analyzed

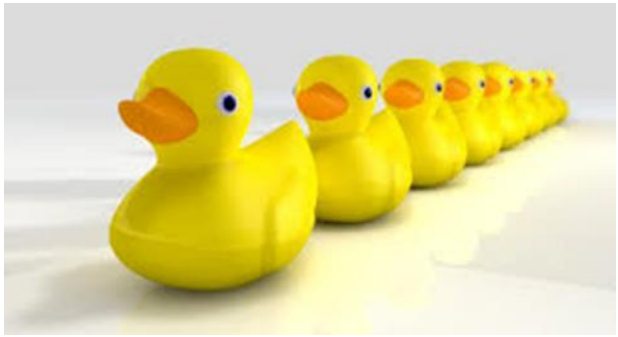
The Stage Is Set …

- In light of water quality, water right, and drought constraints, can sufficient water supply exist for municipal growth and planning functions?
- ***Yes! But analyze carefully …***
  - What type of document is being prepared?
  - What type and timing of the project?
  - What region/location of the project?
  - What water supplies are at issue?
  - What issues affect the supplies at issue? (legal/factual/practical)

Municipal Growth & Water Supply Issues



Municipal Growth & Water Supply Issues



Thank You for Attending

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