

Water 101 Workshop

Legal & Institutional Management Framework

Peter J. Kiel

pjk@eslawfirm.com



2600 CAPITOL AVE, SUITE 400, SACRAMENTO, CA 95816
ESLAWFIRM.COM • (916) 447-2166

Topics to be Covered

- **Summary of Governing Laws**
 - *Major conflicts*
 - *Emerging areas of law*
- **Water Management Institutions and Stakeholder Groups**
 - *Emphasis on agencies with evolving roles*
- **How Crisis and Opportunity May Affect Laws and Institutions**
 - *Drought, fire, flood (and cannabis)*
- **Q&A**

Summary of Governing Laws

Clean Water Act

- Prohibits the discharge of pollutants into the “waters of the United States” without a “Section 404” permit or National Pollutant Discharge Elimination System “NPDES” permit

NPDES Permits – discharge through a “point source” (pipe, ditch, etc.)

- CA has delegated authority to implement the NPDES program as state program
 - NPDES Permit is combined with State’s Waste Discharge Requirement

Section 404

- Regulates the discharge of dredged and fill material “into waters of the United States,” including wetlands
- Administration and enforcement authority shared by U.S. Army Corps of Engineers and EPA

Safe Drinking Water Act

- Authorizes EPA to set water quality standards for drinking water
- EPA regulations contain legally enforceable standards for certain contaminants
- Regulatory and oversight authority over “public water systems” and drinking water is delegated by EPA to the SWRCB, Division of Drinking Water
- A “public water system” is a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals.
 - Over 7,500 public water systems in CA; generally overseen by counties
 - All public water system applications must include technical report to SWRCB (SB 1263)

REGULATION OF DRINKING WATER

Until July 2014, the regulation of drinking water was primarily the responsibility of CDPH. This responsibility has now been transferred to the State Water Resources Control Board (State Water Board), which receives the majority of its statutory authority from the California H&S Code. However, the regulation of water supply, water quality, and the various types of water systems that serve drinking water remains fragmented in California. There are several state agencies that have a role in regulating certain types of PWS, including PWS formation, design, construction, and how they operate, including the rates that they can charge their customers. Along with the regulation of drinking water, the State Water Board and the Regional Water Quality Control Boards (Regional Water Boards; collectively the “Water Board”) are responsible for protecting the waters of the state, including drinking water sources, both surface water and groundwater supplies. The Department of Pesticide Regulation is responsible for ensuring that pesticides do not pollute groundwater. In addition to the State Water Board’s role in ensuring that drinking water standards are protective of public health, the Office of Environmental Health Hazard Assessment (OEHHA) is responsible for providing the State Water Board with health-based risk assessments for contaminants – these assessments are used to develop primary drinking water standards. The California Public Utilities Commission shares regulatory responsibility for ensuring the quality of water supplied by investor-owned water utilities subject to its jurisdiction. The principal federal agency involved in drinking water regulation is the U.S. Environmental Protection Agency (USEPA). USEPA is responsible for implementing federal drinking water law, setting national drinking water requirements, and overseeing the State Water Board’s enforcement of the federal law.

Safe Drinking Water Plan for California (SWRCB 2015)

Porter-Cologne Water Quality Control Act

- Grants the State Water Resources Control Board authority over State water quality policy
- Establishes nine Regional Water Quality Control Boards to oversee regional water quality
- Regional Boards establish regional water quality control plans, issue NPDES permits, & issue Water Quality Certificates (pursuant to § 401 of CWA as condition of 404 permit)

Federal Endangered Species Act

- Governs listing of endangered and threatened species and designation of critical habitat

Section 7 federal action consultation and no jeopardy standard

- Federal agencies shall "conserve" threatened and endangered species
- Federal agencies shall "consult" with USFWS or NMFS to ensure discretionary actions will not likely jeopardize the continued existence of listed species or adversely modify critical habitat
- If the action would cause "jeopardy," the agency must develop "reasonable and prudent alternatives" to the proposed action

Section 9 "take" prohibition

Section 10 Incidental take permits for non-federal actions

California Endangered Species Act

- Similar to Federal ESA and administered by the Dept. of Fish & Wildlife (DFW)
- Requires state agencies to consult with DFW to ensure that their actions will not jeopardize listed species
- Consistency Determination
- Section 2081 Incidental Take Permit
- State-only listed species

Delta Reform Act of 2009

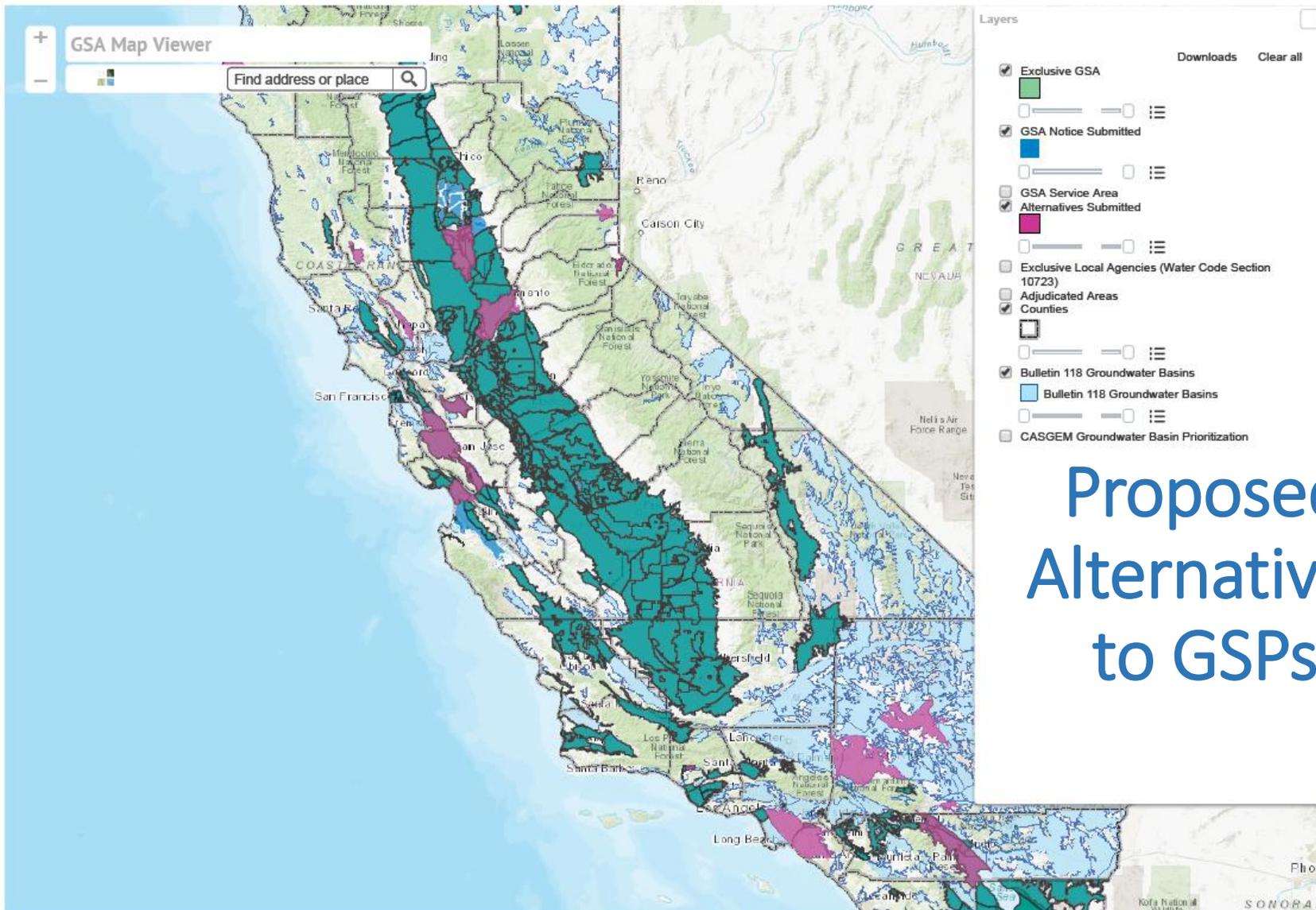
- Established Delta Stewardship Council (Council), Delta Watermaster position, Delta Independent Science Board and Delta Science Program
- Requires Council to develop Delta Plan to achieve “coequal goals” of reliable water & ecosystem restoration
- The Delta Plan = long-term management plan containing regulatory policies and nonregulatory recommendations for “covered” government actions

Sustainable Groundwater Management Act (SGMA)

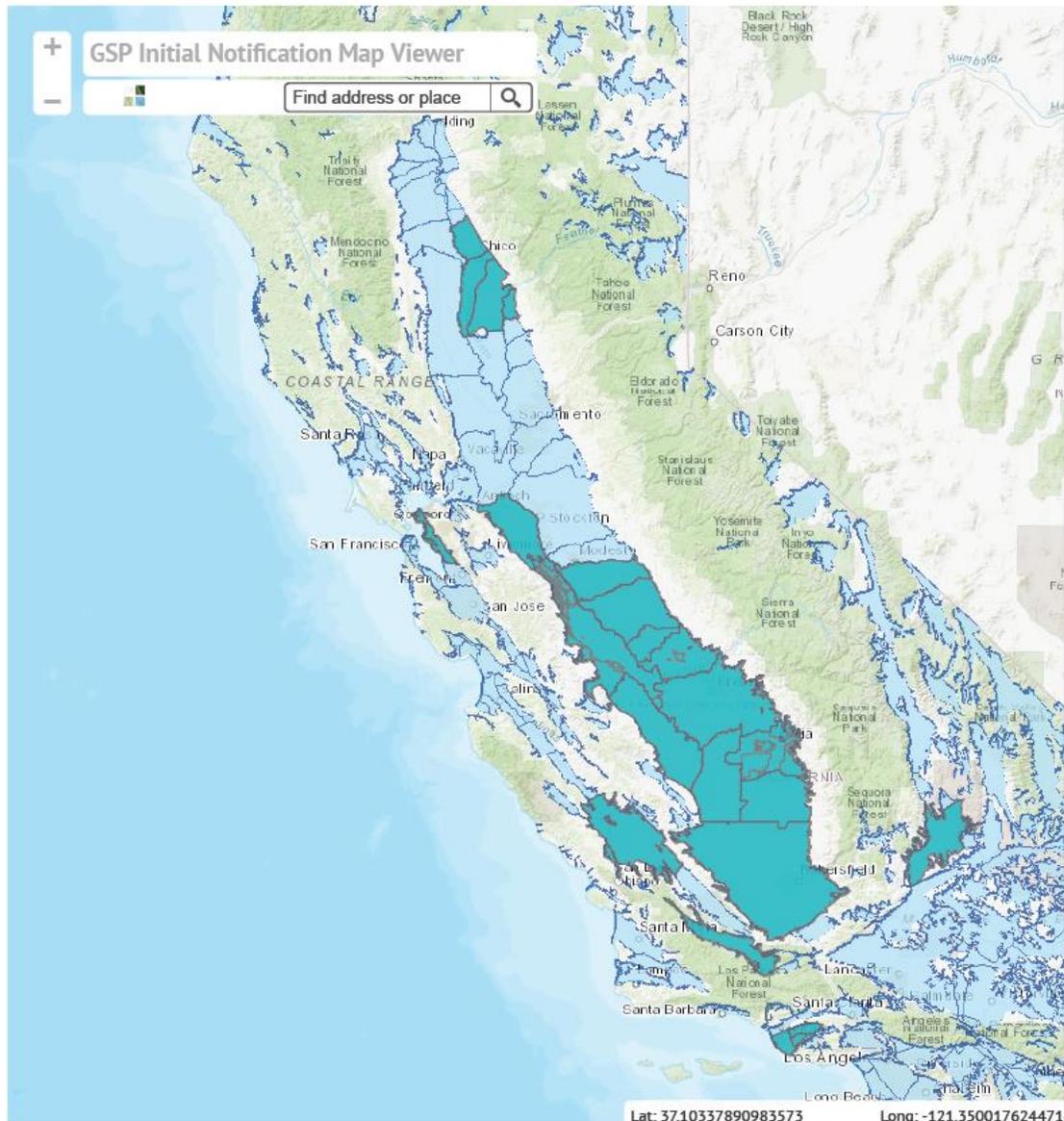
- Groundwater Sustainability Agencies (GSAs) must be formed by 7/1/2017 for all medium and high priority basins
- Groundwater Sustainability Plans (GSPs) due by 2020 or 2022
- GSPs are to achieve sustainability within 20 years
- State will "backstop" implementation
 - DWR will review plans
 - SWRCB has authority to impose management measures (unmanaged and "probationary" basins)

Key Issues for SGMA Implementation

- Approval of alternative plans
 - Existing management programs that are working can apply to DWR
 - Must be the "functional equivalent" of plans under SGMA
- State intervention
- Revision of basin priorities
 - Surface water-groundwater connections
- Groundwater Sustainability Plans
- Basin adjudications



Proposed Alternatives to GSPs



Submitted GSPs

Other Important California Laws

- CEQA
- Public Trust Doctrine
- Article X, Section 2 of California Constitution
- Fish and Game Code 5937
- Cap and Trade



Water Management Institutions and Stakeholder Groups

California Department of Water Resources

- Mission: “To manage the water resources of California in cooperation with other agencies, to benefit the State’s people, and to protect, restore, and enhance the natural and human environments”
- Operates & maintains the State Water Project (SWP), which delivers water to 29 water agencies pursuant to long-term contracts
- Regional flood control
- Groundwater monitoring and SGMA implementation
- Grant distribution

DWR—Division of Safety of Dams

- DSOD reviews and approves plans and specifications for the design of jurisdictional dams and conducts annual inspections of dams



California Water Commission

- 9-member Commission advises DWR and approves DWR's proposed rules and regulations
- Responsible for selecting water storage projects for funding under Proposition 1
- Annual review of State Water Project
- Small water systems and disadvantaged communities

State Water Resources Control Board and Regional Boards

- State Water Resources Control Board (SWRCB) is 5-member board with water quality and water right functions
 - Solely responsible for issuing surface water right permits
 - Water right investigation and enforcement
 - Public trust and reasonable and beneficial use policy and regulation
 - Statewide water quality policy
 - Statewide drinking water quality and public water systems
 - Reviews challenges to Regional Board actions

Regional Water Quality Control Boards

- Nine RWQCBs organized by hydrologic regions
 - 9-member boards
- Establish water quality control plans and standards, issue waste discharge requirements and determine compliance with applicable laws
 - Increasing regulation of land use

- Region 1: North Coast
- Region 2: San Francisco Bay
- Region 3: Central Coast
- Region 4: Los Angeles
- Region 5: Central Valley
- Region 6: Lahontan
- Region 7: Colorado River Basin
- Region 8: Santa Ana
- Region 9: San Diego



Federal Agencies

U.S. Bureau of Reclamation

- Manages & operates the Central Valley Project (CVP)
- Contracts with water districts and utilities for delivery of water

U.S. Army Corps of Engineers

- Primary authority to implement the Federal Clean Water Act § 404

USEPA

- Regulatory authority to oversee Federal Clean Water Act

State and Federal Fish and Wildlife Agencies

National Marine Fisheries Service

- Implements Federal Endangered Species Act (ESA) for marine and anadromous (salmonids) species

U.S. Fish & Wildlife Service

- Implements ESA for all land and freshwater species

California Department of Fish and Wildlife

- Implements the California Endangered Species Act (CESA)
- Other regulatory programs (CEQA, timber, streambed alteration, cannabis)

Delta State Agencies

Delta Stewardship Council

- 7-member Council created in 2009 to achieve the coequal goals of “providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem”
- Responsible for adopting a legally enforceable Delta Plan (adopted in May 2013)

Delta Conservancy

- 11-member board created in 2009 to implement ecosystem restoration projects in the Delta

Water Service Providers

Local and regional water districts

- Approximately 1,300 special districts provide water service in California (e.g., community services, county water, municipal water, irrigation, and other districts)
- SGMA has led to formation of new districts to serve as Groundwater Sustainability Agencies

Investor-owned utilities

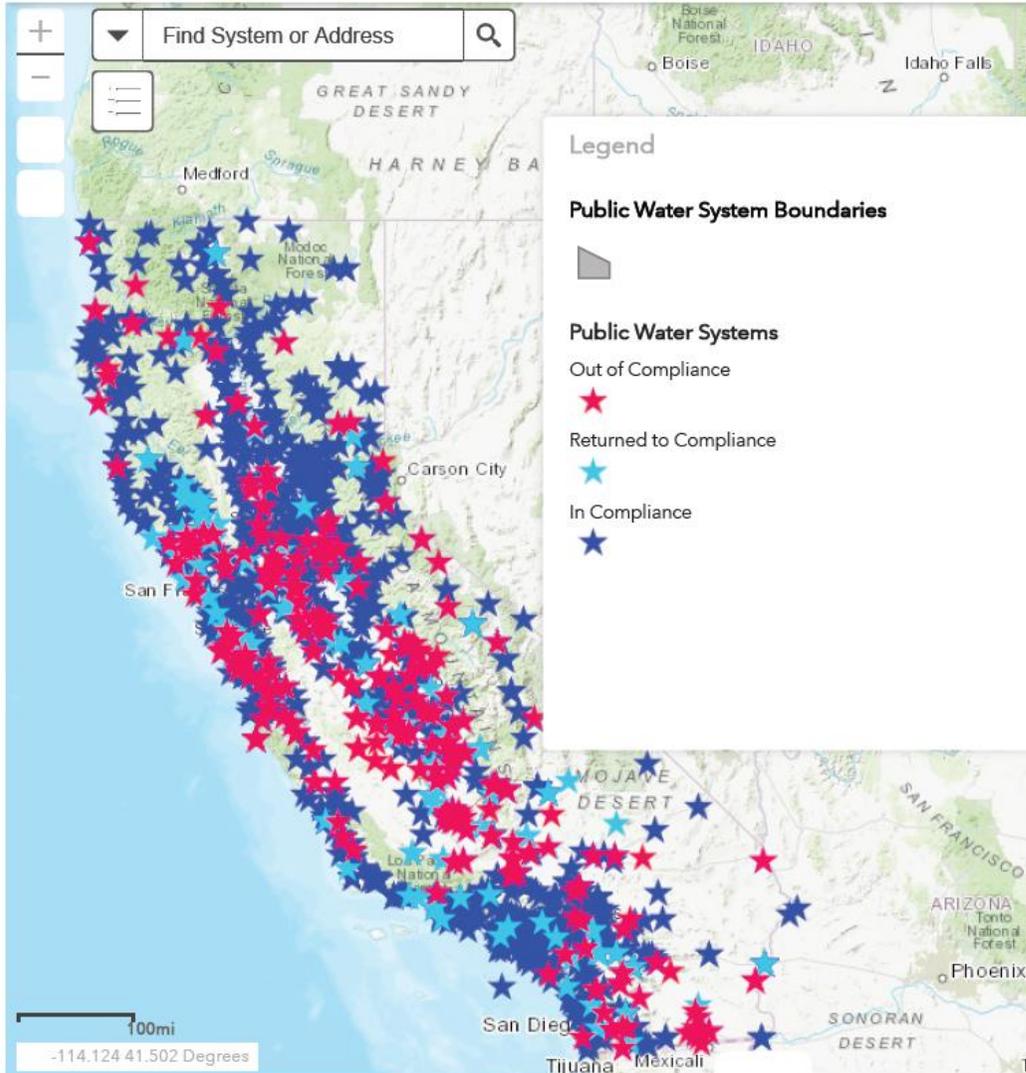
- Regulated by California Public Utilities Commission

Public water systems

- Over 7,500 drinking water providers



Exceedance/Compliance Status of Public Water Systems



Exceedance/ Compliance Status of Public Water Systems

Other Water Management and Institutions Stakeholders

Water Contractor/User Associations

Joint Powers Authorities

Think Tanks

Environmental Organizations

Tribes

Agricultural Associations

Industrial Associations

How Crisis, Opportunity and Trends May Affect Laws and Institutions

Crisis and Regulatory Opportunity

Drought

- Permanent conservation rules
- Public trust and reasonable use regulations
 - Water diversion and use data collection
 - Minimum streamflow standards, groundwater regulation, and water right curtailments

Fire

- Better integration of forest management and water supply?

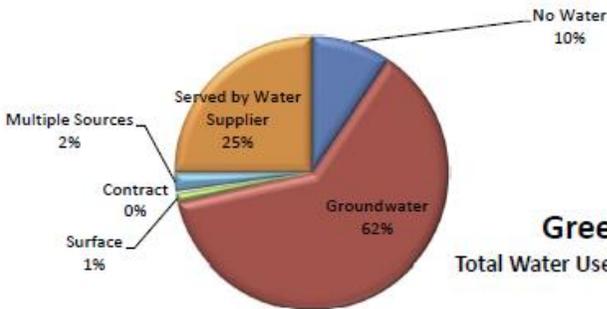
Lake Oroville

- Changes in law regarding dam safety standards and inspections
- Reorganization of DSOD (and other changes at DWR and SWRCB?)

Russian River Tributaries Reporting

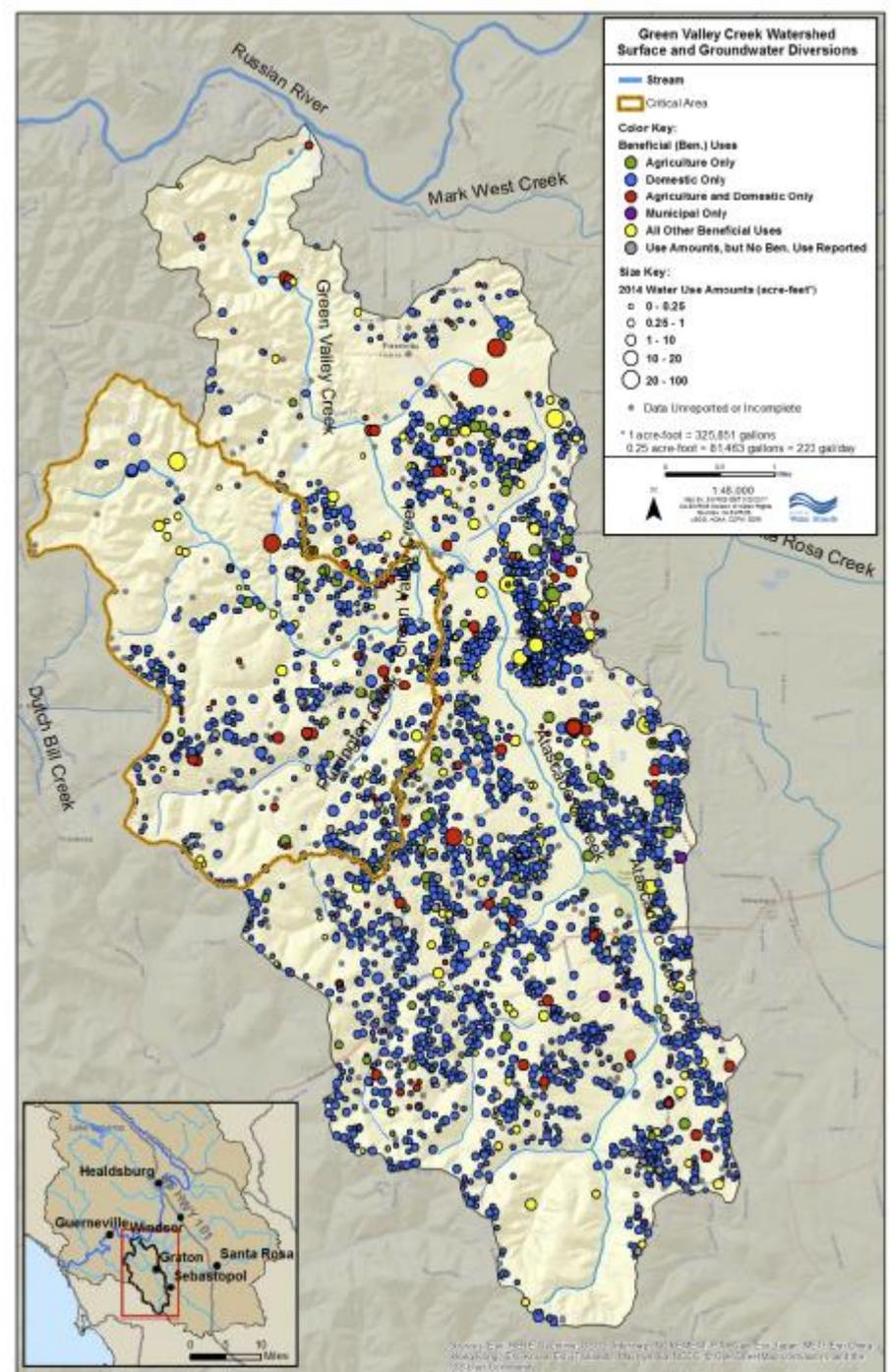
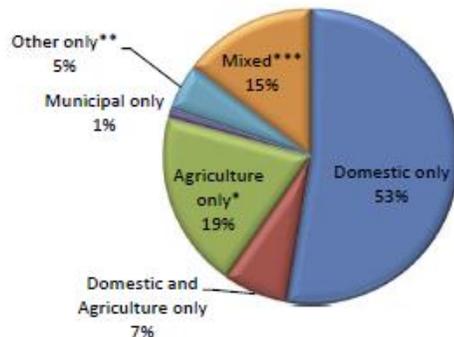
Green Valley Creek Watershed

Total Reporting Parcels = 5,439



Green Valley Creek Watershed

Total Water Use in 2014 = 583,356,710 gallons (1,790 acre-ft)



- Drought + endangered species (coho) + non-regulated streams + many users + Article X Section 2/public trust = data + future regulation (SGMA, minimum flows,...)

Crisis and Regulatory Opportunity (cont.)

Cannabis

- New SWRCB and DFW staff for permitting and enforcement
- DFW expansion of Streambed Alteration Agreement authority
- Minimum instream flow standards

Delta Fix

- Ownership and apportionment of benefits
- If not the tunnel(s), then what?

Carbon Market

- Driver for changes in land and water use

Questions?

Peter J. Kiel

pjk@eslawfirm.com

The logo for ESLAWFIRM features a stylized wave graphic. The top part of the wave is orange, and the bottom part is blue. The text 'ELLISON SCHNEIDER HARRIS DONLAN' is positioned below the wave.

ELLISON
SCHNEIDER
HARRIS DONLAN

2600 CAPITOL AVE, SUITE 400, SACRAMENTO, CA 95816

ESLAWFIRM.COM • (916) 447-2166