

# ENVIRONMENTAL LAW

CALIFORNIA  
LAWYERS  
ASSOCIATION



## Intro to Environmental Law Series

- Air Quality Law 101 – August 17, 2021
- Water Law 101 – September 2, 2021
- CEQA 101 – September, date TBD
- Navigating the Yosemite Conference – October, date TBD
- 30<sup>th</sup> Annual Environmental Law Conference at Yosemite – October 14-17, 2021



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### **California Lawyers Association (CLA)**

- Nonprofit, voluntary organization dedicated to the professional advancement of attorneys practicing in the state of California

### **California Young Lawyers Association (CYLA)**

- Represents all lawyers in California in their first 8 years of practice
- Mission is to advance practical skills, leadership and pro bono opportunities, networking, and support to meet the unique needs of California's diverse community of new lawyers

### **Environmental Law Section (ELS)**

- Mission is to advance the quality, breadth, and availability of information and services related to environmental, natural resources, land use, and energy law, and to enhance the profession by cultivating a well-informed, collegial, and diverse group of lawyers and law students throughout the state

# Intro to Environmental Law Series

## Water Law 101



**Moderator:**

Christopher R. Guillen, Associate, Brownstein Hyatt Farber Schreck, LLP

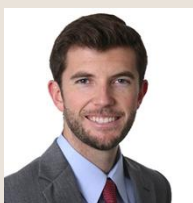


**Speakers:**

Kaitlin S. Harr, Attorney, Kronick Moskowitz Tiedemann & Girard



Staley Prom, Legal Associate, Surfrider Foundation



Miles P. Hogan, Assistant City Attorney, City of Ventura

# AGENDA

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- **PROCEDURAL & SUBSTANTIVE BASICS**
- **WORK EXAMPLES**
- **OPPORTUNITIES**
- **RESOURCES**
- **WAYS TO GET INVOLVED**
- **QUESTIONS & DISCUSSION**

# PROCEDURAL & SUBSTANTIVE BASICS

## California Water Rights

- Hybrid system of water rights
- Usufructuary – right to *use*, resource owned by people California
- Two Types
  - Surface Water – lakes, streams, etc.
    - Riparian
    - Appropriative
      - Pre-1914
      - Post-1914
  - Groundwater – everything that isn't surface water
    - Overlying
    - Appropriative

Existing Federal and State  
Storage and Conveyance Systems in California



# Surface Water

- **Riparian** – land adjacent to a waterway
  - No fixed quantity – “Reasonable use”
  - Correlative – equal share among other riparian users
  - Right to use natural flow of waterway; no long term storage
  - Conveyed in deed
  - Not lost for non-use
- **Appropriative** – diverting water for beneficial use
  - Fixed quantity
  - First in time, first in right; Rule of Priority
  - Pre-1914 – grandfathered in
  - Post-1914 – State Water Board permit



Photo Credit: [www.science.org](http://www.science.org)



# Groundwater - SGMA

- **Sustainable Groundwater Management Act (SGMA) of 2014**
  - Sustainable Yield; Undesirable Result
  - Basin designations
  - Groundwater Sustainability Agencies (GSAs)
  - Groundwater Sustainability Plans (GSPs)

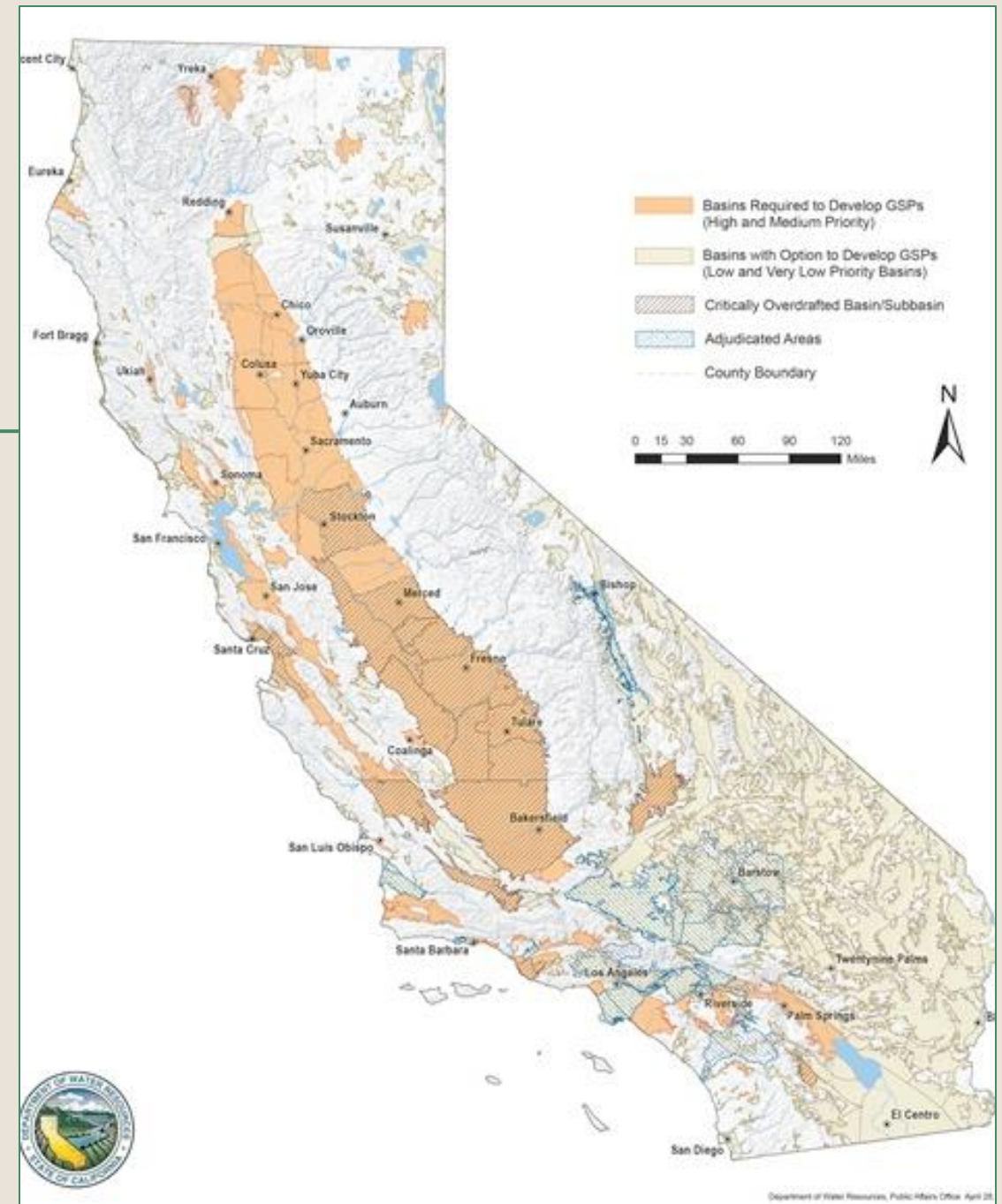


Photo Credit: [www.water.ca.gov](http://www.water.ca.gov)

# Groundwater

- **Types of Rights**
  - Overlying
  - Appropriative
  - Reasonable amount for beneficial use

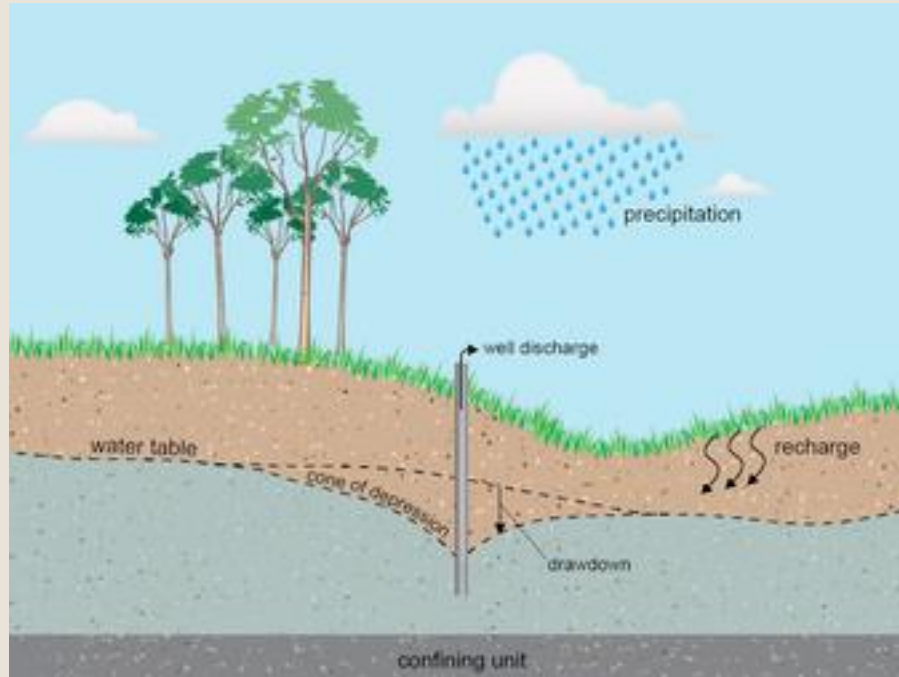


Photo Credit: [www.usgs.gov](http://www.usgs.gov)



Photo Credit: [www.usgs.gov](http://www.usgs.gov)



# Water Rights – Emerging Trends

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- **Comprehensive Groundwater Adjudications**
- **Public Trust Doctrine**
  - Requires the state to hold in trust designated resources for the benefit of the people
  - Traditional commerce, navigation and fishing + wildlife habitat
- **Human Right to Water** (Water Code section 106.3)
  - “Every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.”

# WATER LAW - AN ENGO PERSPECTIVE

Protecting clean water quality



**SURFRIDER**  
FOUNDATION®

**Clean Water**



# CLEAN WATER ACT

**Purpose:** To restore and maintain the chemical, physical, and biological integrity of the Nation's waters.



# PROCEDURAL & SUBSTANTIVE BASICS

## Water Quality & The Clean Water Act

**33 U.S.C. § 1251 et seq.**- CWA does many things including: establish a framework for identifying and cleaning up polluted waters (§ 303), provide state and tribal authority to protect clean water from federally permitted activities (§ 401 water quality certification), and establish a program to regulate dredge and fill in U.S. waters (§ 404).

**Prohibits discharge of pollutants from point sources into navigable waters except in compliance with a permit - National Pollutant Discharge Elimination System (NPDES) permit (§ 402)**

- **Pollutant** – broadly defined
- **Point sources** – discrete conveyance like pipe or man-made ditch
- **Navigable waters** – “Waters of the U.S.”, subject to regulation (EPA & Dept of Army). Determines scope of CWA jurisdiction. WOTUS definition disputed for decades. Addressed in U.S. Supreme Court decisions. Regulatory changes in past Administrations (subject to dozens of lawsuits).
- **Citizen suits** (33 U.S.C. § 1365)



# BEACH ACT



**Beaches and Environmental Assessment and Coastal Health (BEACH) Act, 33 U.S.C. § 1313 et seq.** – 2000 amendment to CWA. Establishes federal grant program for state, territory, tribal, and local government water quality monitoring and public notification programs for coastal recreational waters.

- Important for protecting public health of coastal recreational users.
- 2021 – EPA announced \$9+ million in grant funding
- EPA Guidelines (2014)





# PROCEDURAL & SUBSTANTIVE BASICS

## Water Service Provider Legal Counsel

### Privately Owned Water Companies

#### Examples:

- California American Water
- Golden State Water Company
- Mutual Water Companies

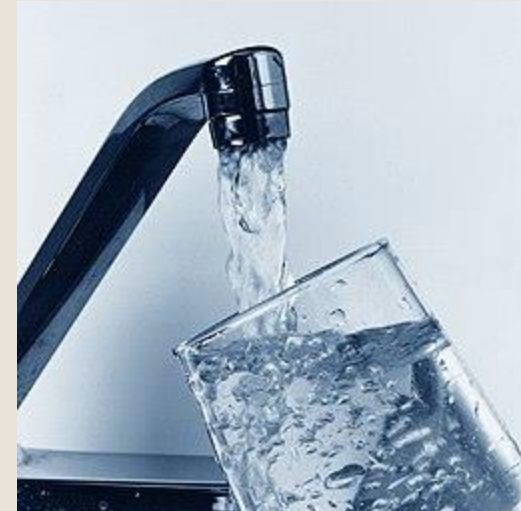
*Regulated by the California Public Utilities Commission*

### Public Water Suppliers

#### Examples:

- Cities – Los Angeles Department of Water & Power
- County Waterworks Districts
- Municipal Water Districts
- Community Services Districts
- Wholesale Water Providers

*Regulated by the State Water Resources Control Board, its Division of Drinking Water (formerly in California Department of Public Health), and Regional Water Quality Control Boards*



# Water Supply Planning and Regulation

## Urban Water Management Plans (UWMPs)

- Prepared every five years by every urban water supplier that either provides over 3,000 acre-feet of water annually or serves more than 3,000 urban connections
- Support long-term resource planning to ensure that adequate water supplies are available to meet existing and future water needs
  - Assess the reliability of water sources over a 20-year planning time frame
  - Describe demand management measures and water shortage contingency plans
  - Report progress toward meeting a targeted 20 percent reduction in per-capita (per-person) urban water consumption by the year 2020
  - Discuss the use and planned use of recycled water
- Requirements in California Water Code, §§10610-10656 and §10608; Department of Water Resources (DWR) Guidebook

<https://water.ca.gov/Programs/Water-Use-And-Efficiency/Urban-Water-Use-Efficiency/Urban-Water-Management-Plans>

# Water Supply Planning and Regulation

## Water Shortage Contingency Plans & Water Shortage Regulations

- Prepared every five years by urban water suppliers; 6 stages; California Water Code, §10632
- California Water Code, §§350-359

## Model Water Efficient Landscape Ordinance (MWELO)

- Governs new development and retrofitted landscape water efficiency standards
- Report to the Department of Water Resources (DWR)

## Water Conservation Regulations

- 2018 Water Conservation Legislation - AB 1668(Friedman) and SB 606(Hertzberg)
- Conservation as a California way of life

## Long Term Planning & Capital Improvement Program

- Pipelines, wells, treatment plants, new supply sources, water quality

## Development – Water Supply Assessments & Water Supply Verification

- Senate Bill (SB) 610, Water Code §§10910, *et seq.*
- Senate Bill (SB) 221, Govt. Code §§65867.5, 66473.7

<https://water.ca.gov/Programs/Water-Use-And-Efficiency>



# Water Rates

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**Proposition 218** (Article XIII D, sec. 6 of the California Constitution) sets **Procedural** and **Substantive** requirements on Adopting Municipal Water Rates.

## **Procedural Requirements:**

- Identify parcels subject to the charge.
- Calculate the amount of the charge to be imposed.

**Provide written notice** to all record owners of parcels upon which the charge will be imposed including:

- The amount,
- The basis upon which the amount was calculated,
- The reason for the charge,
- The date, time, and location of a public hearing on the charge.

**Hold a public hearing** no less than 45 days from mailing the notice.

- Consider all protests to the charge.
- If a majority of owners protest the charge, the agency shall not adopt it.

# Water Rates

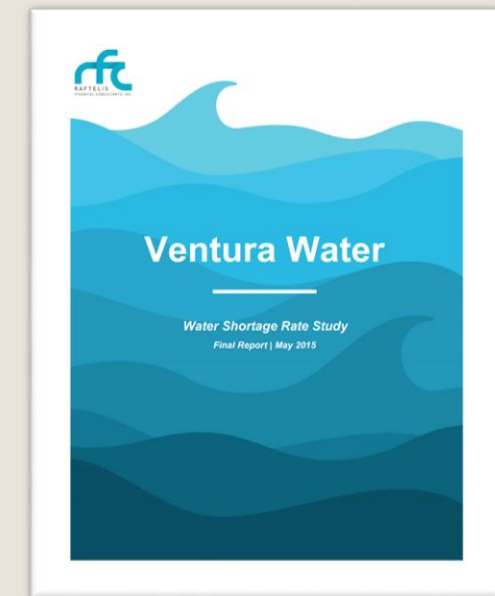
**Proposition 218** (Article XIII D, sec. 6 of the California Constitution) sets **Procedural** and **Substantive** requirements on Adopting Municipal Water Rates.

## Substantive Requirements:

- Revenues cannot exceed the funds required to provide the service.
- Revenues cannot be used for any purpose other than to pay for the service for which it was charged.
- The amount of the fee charged any individual parcel cannot exceed the proportional cost of providing service to that parcel.

## Proposition 218 Omnibus Implementation Act:

- Govt. Code §§53750 – 53758
- Procedures and parameters to comply



**Task:** Set rates proportional to the cost of providing all services, allocated reasonably amongst grouped rate payers, based on a cost-of-service study utilizing reliable data.



# Water Service & Customer Protections

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## Water Shutoff Protection Act:

- SB 998 (Dodd, 2018)
- Requires certain actions related to discontinuation of water service due to nonpayment by “urban and community water systems” (defined by the Act as public water systems that supply water to more than 200 service connections)

[https://www.waterboards.ca.gov/water\\_issues/programs/conservation\\_portal/assistance/docs/SB\\_998\\_FAQs\\_1.10.20.pdf](https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/assistance/docs/SB_998_FAQs_1.10.20.pdf)

## COVID-19 Pandemic:

- Governor Newsom issued Executive Order suspending public water systems’ ability to disconnect water service to residences and critical infrastructure sector small businesses
- Expires September 30, 2021
- California Water and Wastewater Arrearage Payment Program

[https://www.waterboards.ca.gov/resources/covid-19\\_updates/](https://www.waterboards.ca.gov/resources/covid-19_updates/)

# WORK EXAMPLES

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## Practice Example - Due Diligence Water Rights Analysis

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- Who? Landowners, developers, farmers/ranchers, etc.
- Example: Analysis of Riparian right for landowner client
- Determine existence of water right, strength of water right, identify potential challenges
  - 1. Obtain chain of title
  - 2. Start with original land patent
  - 3. Trace conveyances of land over time to present day
- Things to look for

# U.S. Steel Clean Water Act Case

Surfrider v. U.S. Steel (stayed)

U.S. and state of Indiana v. U.S. Steel (Surfrider has intervened)

Surfrider filed suit after U.S. Steel hexavalent chromium spill, and other continuing violations, right next to one of the Great Lakes region's most popular surf spots.



# Hawaii Wildlife Fund v. County of Maui

Surfrider and co-plaintiffs, rep'd by Earthjustice, filed suit for wastewater injections without an NPDES permit. Wastewater injected into groundwater, and pollutants reach nearby Pacific Ocean.

U.S. Supreme Court – April 2020 opinion creates test for discharges that are the “functional equivalent” of direct discharges. Ct. said time & distance a pollutant travels will be most important in most cases.

In July, U.S. Dist. Court (HI Dist) ruled for Surfrider and-co-plaintiffs. Held Maui County is required to get NPDES permit.





February 2016

Ventura Water Reclamation  
Facility (VWRF)

Santa Clara River  
Estuary (SCRE)

# Key Estuary Species

**Southern California Steelhead**  
(Federally Endangered)



**Tidewater Goby**  
(Federally Endangered)



**California Least Tern**  
(Federally/State Endangered  
& CA Fully Protected)



**Western Snowy Plover**  
(Federally Threatened & CA  
Species of Special Concern)



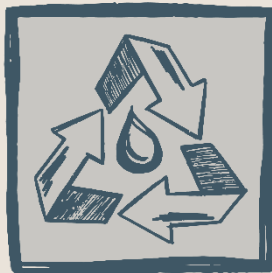


## REQUIREMENTS



*Meets regulatory mandate:*

**Estuary  
diversion**



*Meets regulatory mandate:*

**Reclamation  
use**



## ADDITIONAL NEEDS



**Improve  
water quality**



**Achieves local  
water supply  
reliability**





# Water Resource Net Zero Policy

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## Water Neutral Policy

- Applies to new or intensified development
- Options:
  - Dedicate Water Rights
  - Implement Extraordinary Conservation Measures
  - Pay a Fee
- Fee Proceeds to Develop New Water Supplies

<https://www.cityofventura.ca.gov/905/Net-Zero>

## Resources:

Jennifer Harder, “Demand Offsets: Water Neutral Development in California,” McGeorge Law Review, Vol. 46, No. 1, 2014, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2600288](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600288)

# OPPORTUNITIES

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- Counsel for Tribes
- In-house counsel at government agencies:
  - U.S. Environmental Protection Agency (EPA)
  - California State Water Resources Control Board (SWRCB)
    - Office of Chief Counsel (OCC) or Office of Enforcement (OE)
  - California Department of Water Resources (DWR)
- Counsel for Non-Governmental Organizations (NGOs) advocating for communities impacted by water quality impairment
  - Surfrider
  - Heal the Bay
  - Waterkeepers
  - Community Water Center
- Representing businesses and other entities subject to local and state regulations
- Academic or Policy work



## RESOURCES

- Water Education Foundation, <https://www.watereducation.org/>
- Sustainable Groundwater Management Act, <https://sgma.water.ca.gov/portal/>
- SGMA GSA Viewer, <https://sgma.water.ca.gov/webgis/index.jsp?appid=gasmaster&rz=true>
- Water Rights, [https://www.waterboards.ca.gov/waterrights/board\\_info/water\\_rights\\_process.html](https://www.waterboards.ca.gov/waterrights/board_info/water_rights_process.html)
- The California Water System, <https://water.ca.gov/water-basics/the-california-water-system>
- EPA Clean Water Act webpage - <https://www.epa.gov/laws-regulations/summary-clean-water-act>
- Surfrider's Beachapedia Clean Water webpage - [http://beachapedia.org/Category:Clean\\_Water](http://beachapedia.org/Category:Clean_Water)
- Surfrider's Coastal Blog (select Clean Water tab) - <https://www.surfrider.org/coastal-blog>
- Public Policy Institute of California, <https://www.ppic.org/water/>
- USGS California Water Science Center, <https://www.usgs.gov/centers/ca-water>
- California Water Law Symposium, <https://www.waterlawsymposium.org/>
- California Water Law Journal, <https://waterlawjournal.com/>
- Mavens Notebook, <https://mavensnotebook.com/>
- Several great California University/College Water Centers

## WAYS TO GET INVOLVED

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- Join CLA, CYLA, or one of the Sections once you graduate and are admitted to the Bar
- Attend webinars and in-person events (e.g., Yosemite Conference, Diversity Conference, 101 Series, Annual Meeting)
- Earn MCLE credit through online videos or self-study materials
- Submit an article for our eNews or other Section publications
- Watch CYLA's 10 Minute Mentor videos on YouTube
- Participate in Student Negotiation and Writing Competitions
- Attend our Book Club
- Apply for Summer Fellowships

## Diversity & Inclusion Fellowship for Law Students

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For more information about the *Environmental Law Diversity & Inclusion Fellowship* and to apply please visit: <https://calawyers.org/section/environmental-law/fellowships/>



## QUESTIONS & DISCUSSION

THANK YOU!

**CYLA:** [cyla@calawyers.org](mailto:cyla@calawyers.org)

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