



KAHN, SOARES & CONWAY, LLP

MEMORANDUM

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Re: Groundwater Legislation (SB 1168, SB 1319 and AB 1739)

THIS MEMORANDUM IS INTENDED TO PROVIDE A SUMMARY OF THE ABOVE REFERENCED LEGISLATION AND DOES NOT CONSTITUTE LEGAL ADVICE.

A. Introduction

On August 29, 2014, the California Legislature passed a legislative package aimed at comprehensively regulating groundwater in California known as the Sustainable Groundwater Management Act ("**Act**"). The Act will bring the greatest change to water rights in California since 1914. The legislation is comprised of three (3) pieces of legislation: (i) SB 1168, which sets the groundwork for the Act; (ii) AB 1739, which provides the enforcement mechanism for the Act; and (iii) SB 1319, which provides "clean up" language to the Act. Governor Brown signed the legislation on September 16, 2014, making the Act effective January 1, 2015.

The Act is intended to provide for local management of groundwater basins. There are 515 alluvial groundwater basins and subbasins ("**Basin**" and collectively, "**Basins**") in California as defined in the Department of Water Resources ("**Department**") Bulletin 118. The Act requires the Department to prioritize the Basins as high-priority, medium-priority, low-priority or very low-priority using the California Statewide Groundwater Elevation Monitoring system ("**CASGEM**") by January 31, 2015. The Act does not require compliance with the Act from Basins defined as low and very low-priority, however, high and medium-priority Basins must meet deadlines established by the Act to maintain local control of such Basins. If a Basin fails to timely meet the statutory deadlines, the Act authorizes the State Water Resources Control Board ("**Board**") to control groundwater management in that Basin.

The Act states it will not alter, establish or determine groundwater or surface water rights, but rather govern how those rights are exercised. However, no extractions of groundwater between January 1, 2015 and the date of the adoption of a groundwater sustainability plan, whichever is sooner, may be used as evidence of, or to establish or defend against, any claim of prescription.

The legislation was written in only a matter of weeks, and is full of ambiguous terms and uncertainties as to the groundwater management process. This will result in extensive litigation and further "clean up" legislation. The Act also gives state government significant authority in monitoring the extraction of groundwater and imposition of fees. While the unintended consequences of the Act

are unknown, it is important to become familiar with the Act so we are prepared to act when the opportunity to affect the implementation of the Act arises.

B. Groundwater Sustainability Agency

A groundwater sustainability agency (“**GSA**”) may be formed by one (1) local agency or a combination of local agencies overlying a groundwater basin. If the GSA is formed by a combination of local agencies, the local agencies must enter into either a joint powers agreement, memorandum of agreement or other legal agreement. Besides the few local agencies given exclusive management authority in the Act as the GSA for certain Basins, there is no indication in the Act of who these local agencies are or how they are formed.

If a portion of a groundwater basin is excluded from the boundaries or otherwise not within a management area of a GSA, the county in which the unmanaged area lies is presumed the default groundwater sustainability agency for such area.

Powers of the Groundwater Sustainability Agency

The Act gives a GSA broad power to adopt rules, regulations, ordinances and regulations and take any action it deems necessary to carry out the Act. This includes investigations to:

- Determine the need for groundwater management;
- Prepare and adopt a groundwater sustainability plan (“**GSP**”) and implement rules and regulations;
- Propose and collect fees; and
- Monitor compliance and enforcement.

The GSA may investigate surface waters, groundwater waters, and surface and groundwater rights. The GSA may also inspect the property or facilities of a person or entity in its management area to determine whether that person or entity is in compliance with the Act.

A GSA may also:

- Require registration of wells within its management area;
- Require every well in the management area be measured by a water measuring device, at the expense of the well owner;
- Require a well owner or operator to file an annual statement setting forth the total extraction of groundwater from that well for the previous year;
- Acquire, hold, use, enjoy, sell, let and dispose of real and personal property including lands and water rights and construct, maintain, alter and operate any works or improvements within or outside the GSA as necessary and proper to carry out the Act;

- Appropriate, acquire, import, conserve and store surface water and groundwater and surface and groundwater rights as necessary and proper to carry out the Act;
- Establish a program for voluntary following of agricultural lands;
- Perform acts necessary to enable the GSA to purchase, transfer, deliver or exchange water or water rights; and
- Transport, reclaim, purify, desalinate, treat or otherwise manage and control polluted water and wastewater.

A GSA has the additional authority to regulate groundwater extractions by:

- Imposing spacing requirements on new wells and imposing reasonable operating restrictions on existing wells to minimize well interference;
- Controlling groundwater extractions by regulating, limiting or suspending extractions from individual wells or in the aggregate, construction of new wells, enlargement of existing wells, reactivation of abandoned wells or establishing groundwater extraction allocations; and
- Authorizing temporary and permanent transfers of groundwater extraction allocations; and establishing rules to allow unused groundwater extraction allocations to be carried over one year to another and voluntarily transferred.

Any limitation on groundwater extractions by a GSA, however, shall not be construed to be a final determination of rights to extract groundwater from the basin.

C. Groundwater Sustainability Plan

Each GSA must adopt a GSP, acceptable to the Department, by the deadlines outlined in the Act. By January 1, 2016, the Department shall adopt regulations for evaluating a GSP, evaluating an alternative plan to a GSP and implementation of a GSP, coordination agreements and alternative plans. These regulations will identify necessary GSP and alternative plan components and appropriate methodologies and assumptions for baseline conditions. These regulations are considered emergency regulations, and as such are not subject to review by the Office of Administrative Law and remain in effect until the Department decides to revise them.

A GSP may be a single plan covering an entire basin implemented by one (1) GSA, one (1) plan covering an entire basin implemented by multiple GSAs, or multiple plans implemented by multiple GSAs through a coordination agreement covering an entire basin. The GSPs must include details of the groundwater basin, water supply of the basin, including any groundwater-surface water interaction, and measurable objectives in increments of five (5) years to achieve the sustainability goal in the basin within twenty (20) years of the adoption of the GSP. The GSP must outline objectives and measures that will meet the “planning and implementation horizon,” which is a fifty (50) year period over which a GSA determines plans and measures will be implemented in a basin to ensure the basin is operated within its sustainable yield.

The GSP may also address any “undesirable results” that occurred before, and have not been corrected by, January 1, 2015. Undesirable results include:

- Chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply if continued over the planning and implementation horizon;
- Significant and unreasonable reduction in groundwater storage;
- Significant and unreasonable seawater intrusion;
- Significant and unreasonable degraded water quality;
- Significant and unreasonable land subsidence that substantially interferes with surface land uses; and
- Surface water depletions that have significant and unreasonable adverse impacts on beneficial use of the surface water.

The California Environmental Quality Act (“**CEQA**”) does not apply to the preparation and adoption of a GSP. However, any implementation actions taken pursuant to an adopted GSP are subject to CEQA, effectively requiring CEQA compliance.

After adoption of a GSP, the GSA submits the GSP to the Department for review and approval. If multiple GSAs create multiple GSPs for a single basin, the GSPs cannot be submitted to the Department until the entire basin is covered by GSPs. Once submitted, the Department will post the GSP or GSPs to their website for public comment, and Department has two (2) years to issue an assessment of the GSP or GSPs. This assessment may include advising the GSA or GSAs of deficiencies in the GSP or approval of the GSP.

Alternative Plans

If a local agency believes it can implement an alternative plan to the GSA and GSP process that will satisfy the conditions established by the Department, the local agency may submit the alternative to the Department for evaluation and assessment by January 1, 2017 and every five (5) years thereafter. An alternative plan may be a plan developed pursuant to any law authorizing groundwater management, management pursuant to an adjudication action or an analysis of basin conditions that demonstrates the Basin has operated within its sustainable yield for ten (10) years or more.

Continuing Review

At least every five (5) years after the initial submission of a GSP or alternative plan, the Department shall review the GSP or alternative plan and the implementation of the GSP or alternative plan, including the progress toward achieving the sustainability goal for the Basin.

Fees

A GSA may, after at least one (1) public hearing, impose fees on the owners or operators of wells either through an ordinance or resolution. The fees may include, but are not limited to: (i) permit fees and fees on groundwater extraction or other regulated activity; (ii) funding the cost of a groundwater sustainability program; and (iii) funding investigations, inspections, compliance assistance, enforcement, and program administration. A GSA may also adopt a resolution requesting collection of fees in the same manner as ordinary municipal ad valorem taxes.

Once a GSA adopts a GSP, the GSA may impose fees on the owners or operators of wells for the extraction of groundwater to fund the costs of groundwater management including, but not limited to: (i) administration, operation and maintenance; (ii) acquisition of lands, facilities and services; (iii) supply, production, treatment or distribution of water; and (iv) other activities “necessary or convenient” to implement the GSP. Fees on the extraction of groundwater must be adopted in accordance with subdivisions (a) and (b) of Section 6 of Article XIII D of the California Constitution.

If an owner or operator of a well subject to a fee does not pay, the GSA may bring a suit against the owner or operator for the collection of the delinquent fee, plus interest or penalties imposed. The GSA action may include attachment against the property of the owner or operator, or any other civil remedy available. The GSA may also, after a public hearing, order the owner or operator to cease groundwater extractions until all fees are paid.

Nothing in the Act affects or interferes with a GSA’s authority to levy and collect taxes, assessments, charges or tolls as otherwise provided by law.

Penalties

A person who extracts groundwater in excess of any rule, regulation, ordinance or resolution adopted by a GSA is subject to a civil penalty not exceeding five hundred dollars (\$500) per acre-foot extracted in excess of the person’s allotted amount. If the person fails to comply within thirty (30) days of receiving notification of the violation, he or she is subject to a civil penalty not to exceed one thousand dollars (\$1,000) plus one hundred dollars (\$100) for each additional day the violation continues.

D. State Backstop

The Act allows the Board to designate a groundwater basin as probationary if:

- By July 1, 2017, a GSA is or GSAs are not designated for the entire basin;
- By July 1, 2017, a local agency has not submitted an alternative plan that has been approved or is pending approval by the Department;
- By January 31, 2020, a GSA has or GSAs have not adopted a GSP or GSPs or the Department has not approved an alternative plan for an entire Basin categorized as high or medium-priority and in a condition of long term overdraft;
- After January 31, 2020, the Department, in consultation with the Board, determines a GSP for a Basin categorized as high or medium-priority is inadequate or a GSP is not being implemented in a manner that will likely achieve the sustainability goal;
- By January 31, 2022, a GSA has or GSAs have not adopted a GSP or GSPs or the Department has not approved an alternative plan for an entire Basin categorized as high or medium-priority;
- After January 31, 2022: (i) the Department, in consultation with the Board, determines a GSP is inadequate or a GSP is not being implemented in a manner that will likely achieve the sustainability goal and (ii) the Board determines the Basin is in a condition or long-term overdraft or in a condition where groundwater extractions result in significant depletions of interconnected surface waters.

- After January 31, 2025: (i) the Department, in consultation with the Board, determines a GSP is inadequate or a GSP is not being implemented in a manner that will likely achieve the sustainability goal and (ii) the Board determines the Basin is in a condition where groundwater extractions result in significant depletions of interconnected surface waters.

If the Department changes the priority of a Basin from very low or low to medium or high, the Basin will have two (2) years from the date of the change of the priority to form a GSA and five (5) years to adopt a GSP or receive approval or an alternative management plan in order to avoid probationary status.

If designated as probationary, the local agency or GSA has 180 days to correct any deficiency. The Board may provide additional time to remedy the deficiency if it finds the local agency or GSA is making substantial progress toward remedying the deficiency.

If the Board finds litigation prevented the formation of a GSA or prevented a GSP from being implemented, the Board shall not designate a Basin as probationary for the period of time equal to the delay caused by the litigation. The Board is also directed to exclude from probationary status any portion of a basin or sub-basin for which a GSA demonstrates compliance with the sustainability goal.

If the Board designates a Basin, or portion of a Basin, as probationary, the Board, after notice and a public hearing, may adopt an interim plan for the Basin. The interim plan must: (i) identify the actions necessary to correct a condition of long-term overdraft or a condition where groundwater extractions result in a significant depletion of interconnected surface waters; (ii) set a time schedule for the actions to be taken; and (iii) a description of the monitoring to be undertaken to determine effectiveness of the interim plan. The Act does not require the Board to create its plan in compliance with the regulations promulgated by the Department governing the elements a GSA must include in its GSP. Thus, the Board's interim plan may be completely its own design.

The Board's interim plan must be consistent with water right priorities, but may include: (i) restrictions on groundwater pumping; (ii) a physical solution; and (iii) principals and guidelines for the administration of rights to surface waters connected to the basin.

The Board's interim plan will remain in effect until the Board determines either: (i) a GSP adopted by a GSA for the entire basin or portion thereof is adequate; or (ii) an adjudication action filed by a person authorized to file the petition by a judicial order or decree is adequate. The Board may decline to rescind an interim plan if the Board determines adequate assurances have not been provided that the GSP or judicial order or decree for adjudication will be implemented.

The Board may set fees to recover the costs of administering its interim plan including costs in connections with investigations, facilitation, monitoring, hearings, enforcement and administrative costs. There is no limitation on the amount of fees that may be imposed in the Act.

E. Concerns

The Act was written and passed by the Legislature in a manner of weeks. Further, there were no legislative policy hearings on the final versions of the legislation. This rushed, inadequate process creates numerous concerns including:

- There are multiple areas in the Act that discuss connectivity of groundwater and surface water. Without a reliable source of surface water, basins must rely on groundwater. This connectivity

language may allow groundwater to be taken from agriculture and dedicated to environmental or other uses.

- The Act exempts already adjudicated basins, but is unclear about basins that enter into the adjudication process after the Act passes. Adjudication is the only guarantee of certainty of groundwater rights and may be the best option for many basins. Without certainty or a streamlined process making adjudication possible, Basins will be forced to move forward with a GSP and the uncertainties that come with the Act.
- The words “sustainable” and “sustainability” are found throughout the Act, but are not defined, and, have never been defined by the courts. These words leave the laws open to expansive litigation that could lead to local agencies missing deadlines or deciding not to take action, leaving room for the Board to take control of Basins.
- The Act creates uncertainty in future groundwater rights. This will likely lead to lowered property values and increased difficulties for the extension of agricultural loans and lines of credit.
- Groundwater recharge has not been identified as a beneficial use of water in the Act. It may be difficult to effective recharge of Basins if recharge is not a beneficial use.
- The Act is vague and ambiguous as to the entities that will be permitted to participate in or as the GSAs. These ambiguities may lead to agriculture and other stakeholders being left out of the process of forming GSAs and management of the groundwater basin.
- Federally reserved water rights to groundwater, which includes tribal water rights, are required to be respected in full. This appears to allow those with federally reserved rights to continue extracting groundwater without regulation, adjudication order or judgment of the State Water Board. It will be difficult for a GSA to meet sustainability goals required by the Act if they cannot enforce a GSP across the entire basin.
- An individual’s groundwater extraction data is not confidential. Personal information, as defined by the Act only covers information that describes or identifies an individual, such as the individual’s name and address. It does not protect the location of the individual’s wells, amount of groundwater extracted, condition of wells or quality of groundwater, or any other information pertaining to the individual’s groundwater use.

F. Future Actions

In the next two (2) years those in medium and high priority Basins must begin forming a local agency or local agencies to qualify as the GSA or GSAs for the Basin. The local agency or agencies will then need to analyze the regulations to be promulgated by the Department to prepare a GSP or GSPs so the Board cannot intervene in local management of groundwater. Because of the ambiguities in the Act and infringement of property rights, litigation is expected to commence, which may delay and possibly halt the formation of GSAs and GSPs.

Steps can also be taken legislatively through cleanup legislation that will be negotiated to address the concerns listed above. There may also be opportunities to work with the Department in developing the regulations that will govern what must be included in a GSP and how the GSP will be implemented.

In conclusion, the Act leaves many questions and few certainties. Its progress will need to be continuously monitored so that all affected can be ready to take action when necessary to comply and effect change when the opportunity arises.