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A T T O R N E Y S A T L A W

MEMORANDUM

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

Introduction

Unlike almost all other states in the arid West, California has never had a comprehensive system for the regulation of groundwater. Instead, a body of common law has developed (with only modest statutory augmentation) that governs the extraction and use of groundwater. Groundwater “management” has generally been in the form of AB 3030/SB 1938 plans developed by local agencies that focused primarily on information gathering. For the most part, farmers and other groundwater users have “pumped at will” without having to obtain rigorous governmental approvals.

Over the past few decades, increased urban demands, shifts to more water intensive crops, and significant new environmental restrictions on the availability of surface water have resulted in much greater groundwater use, particularly in the Central Valley. The result has been chronic overdraft and a dramatic increase in subsidence (the permanent loss of below ground storage capacity) in many basins and sub-basins. Virtually everyone agrees that the status quo is not sustainable, and that something must be done to reverse the decline of groundwater resources throughout the State.

On August 29, 2014, the California Legislature (with substantial encouragement from the Brown Administration) passed comprehensive groundwater legislation that will, for the first time in the State’s history, allow true regulation of groundwater. That legislation was contained in three bills: SB 1168, SB 1319 and AB 1739. Collectively, those three bills enacted the “Sustainable Groundwater Management Act” (the “SGMA”). Governor Brown signed the legislation on September 16, 2014, making it effective on January 1, 2015.

The bills were developed over just a few months in a process that can only be described as chaotic. The organization of the bills is confused, and many of the provisions are ambiguous. A substantial amount of litigation can be expected, and unintended consequences are inevitable. Nevertheless, the SGMA will govern groundwater in the State when it becomes effective next year.

Overview

Combined, the three bills that contain the SGMA are over 100 pages in length. They are laden with details, some of which are outlined later in this memorandum. However, the basic structure of the SGMA is as follows:

- Each groundwater basin or sub-basin (that is, each geologically distinct supply of groundwater) will be regulated separately. 127 groundwater basins or sub-basins designated as ‘high’ or ‘medium’ priority by the Department of Water Resources will be required to comply with the SGMA. Regulation will be optional for the ‘low’ and ‘very low’ priority basins, at least for now.
- Existing local agencies (such as water districts) overlying each basin or sub-basin will be given both the mandate and a broad array of tools to regulate groundwater in their basin or sub-basin. Those tools will include the ability to limit extractions and to impose fees related to groundwater use.
- The goal of regulation will be to achieve “sustainability” for the basin or sub-basin. Broad parameters for that goal are included in the legislation, but it will be defined more precisely by the local agencies based on local circumstances. Generally, “sustainability” means bringing the basin or sub-basin into balance by eliminating overdraft.
- For portions of regulated basins not served by existing local agencies, the county within which the basin is located will be the default regulation entity unless landowners quickly form a new local agency for that purpose.
- For basins or sub-basins covered by multiple local agencies, those agencies will either have to coordinate their individual plans for a single basin or sub-basin, or will be required to come together in a joint powers authority or other vehicle to develop a single plan for the basin or sub-basin.
- For basins or sub-basins in which regulation is mandatory, deadlines will be established for local agencies to assume the groundwater regulation role (July 1, 2017) and to adopt a “groundwater sustainability plan” (January 31, 2020 for some, January 31, 2022 for others). If those deadlines are missed, or if the DWR determines that a plan is not adequate or achieving the sustainability goal, the State Water Resources Control Board will have the ability to step in and impose its own “interim” plan until an acceptable local plan is in place.
- Groundwater sustainability plans and progress towards meeting the sustainability goal will be evaluated every five years.
- Plans will not establish or determine groundwater rights. They will simply govern how those rights are exercised.

- Metering and reports of groundwater use will likely be required from each groundwater user.

Pumping Restrictions, Fees and Recognition of Water Rights

The legislation allows, but does not mandate, groundwater pumping restrictions. Similarly, it authorizes, but does not require, the imposition of groundwater fees. However, the goal of the legislation is to achieve “sustainability,” meaning that the affected basin or sub-basin must be brought into balance. In many basins and sub-basins, it is difficult to envision achieving the required sustainability goal without significant limitations on pumping. Additionally, the development and implementation of groundwater plans will be expensive, so new fees are inevitable.

With only a few minor exceptions, there is nothing in the legislation that recognizes historical use or that “grandfathers” existing wells. Those concepts can be relevant in adjudication actions (which may become more commonplace if groundwater management under the SGMA becomes too cumbersome or burdensome), but they are largely irrelevant under the new legislation. It is important to remember that the SGMA does not establish, determine or confirm water rights, all of which are in theory left intact by the new law. Instead, the SGMA simply regulates the exercise of those rights, much like zoning laws regulate the exercise of real property rights. An adjudication, on the other hand, would establish or determine rights.

Details¹

Following is a more detailed outline of key provisions of the SGMA:

General Intent

The stated intent of the SGMA includes “To provide local groundwater agencies with the authority and technical and financial assistance necessary to sustainably manage groundwater” [Section 10720(d)].

Definitions

The SGMA contains a number of important definitions [Section 10721]. Among the most important are:

- “Sustainable groundwater management” means management and use of groundwater in a manner that can be maintained during the planning and implementation horizon without causing undesirable results.

¹ Code references are to new provisions of the Water Code unless otherwise indicated.

- “Undesirable results” means any of the following effects caused by groundwater conditions occurring throughout the basin:
 - Chronic lowering of groundwater levels, but excluding overdraft during a drought if it is otherwise managed;
 - Significant and unreasonable reductions in groundwater storage;
 - Significant and unreasonable seawater intrusion;
 - Significant and unreasonable degradation of water quality;
 - Significant and unreasonable land subsidence; and
 - Surface water depletions that have significant and unreasonable adverse impacts on beneficial uses.

Basin Boundaries

Basins and sub-basins are presumed to be as identified in Department of Water Resources Bulletin 118 [Section 10722]. A process is provided to amend basin boundaries through DWR, which would be heard by the Water Commission [Section 10722.2].

Establishing Groundwater Sustainability Agencies (“GSAs”)

A local agency or combination of local agencies may elect to be a GSA for a basin or sub-basin upon holding a noticed public hearing and thereafter submits a notice to DWR [Section 10723]. A combination of local agencies may form a GSA through a joint powers agreement, memorandum of understanding or “other legal agreement,” and water companies regulated by the Public Utilities Commission may be permitted to participate [Section 10723.6].

For portions of basins or sub-basins not covered by a local agency, the counties are presumed to be the GSA for those areas unless the landowners can hurriedly form a new local agency by the deadline for designating a GSA. If no new agency is formed and the county does not wish to or does not notify DWR, those areas will be subject to new reporting of extractions under Section 5200 (see below) [Section 10724].

GSA Powers and Authorities

A GSA has the powers listed in the SGMA if it adopts and submits to DWR a groundwater sustainability plan (a “GSP”) in accordance with the new law [Section 10725]. Those powers are similar to the broad powers generally given to local agencies, but also include a number of specific authorities unique to GSAs [Sections 10723-10726.2]:

- GSAs may conduct investigations to monitor compliance and enforcement and seek inspection warrants pursuant to the Code of Civil Procedure [Section 10725.4].

- GSAs may require registration of wells, installation of meters and reporting of pumping through a GSP, or may use other methods to determine groundwater extractions [Sections 10725.6 and 10725.8].
- GSAs may provide for voluntary fallowing of agricultural lands [Section 10726.2(c)].
- Regarding banking programs, diversions to underground storage must be reported to the GSA and the GSA cannot alter a conjunctive use or storage program unless it finds it interferes with implementation of a GSP [Sections 10726 and 10726.2(b)].
- GSAs may impose spacing requirements on new wells.
- GSAs may control extractions through extraction allocations, provided such allocations are not a final determination of extraction rights.
- With extraction allocations, GSAs can authorize (i) permanent and temporary transfers within the GSA’s boundaries and (ii) carryover from one year to the other in the basin [Section 10726.4(a)].
- GSAs may bring validation actions; judicial actions challenging determinations must be commenced in 180 days [Section 10726.6].
- State or local agencies are subject to fees for extracting groundwater (see below), but a GSA cannot impose other requirements on state agencies [Sections 10726.8(d) and (e)].
- GSAs may impose a variety of fees; see below.

Groundwater Sustainability Plans (“GSPs”)

Under the SGMA, a GSP can be a single plan developed by one or more GSAs, or multiple coordinated plans within a basin or sub-basin by multiple GSAs [Section 10727]. The basic components of a GSP are very similar to the current AB 3030 plan requirements [Sections 10727.2 and .4]. If there are multiple plans, a “coordination agreement” between the GSAs is required.

A GSP is to include interim milestones in five year increments to achieve the long term “sustainability goal,” which is to achieve “sustainable groundwater management” within 20 years of implementation of the GSP. DWR may grant extensions of up to five years (and a second extension) upon showing good cause [Section 10727.2(b)].

There are requirements for coordinating and consulting with various interests and agencies before a GSP is adopted or amended after a noticed public hearing. There are also annual reporting requirements once a GSP is adopted [Sections 10727.6-10728.4].

A CEQA exception is provided for preparation and adoption of a GSP, but not for designation/formation of a GSA or for implementation of a GSP [Section 10728.6]. Thus, CEQA compliance is effectively required.

Technical Assistance

DWR is to provide technical assistance to GSAs on request and by January 1, 2017 prepare “best management practices” for sustainable management of groundwater [Section 10729].

GSA Financial and Fee Authority

GSAs are authorized to impose “regulatory fees” to fund preparation and enforcement of GSPs following noticed public hearings. Those fees may be imposed as permit fees, as fees on groundwater extractions, or as fees on other regulated activities [Section 10730]. It is apparently the intent that those fees are not subject to protest or approval by landowners.

In addition, “service fees” may be charged to fund (i) GSA administration and (ii) the acquisition of lands, other property or water. Service fees will generally be based on the volume of groundwater pumped, and may be increased or tiered based on the volume pumped or the year production commenced. Those fees are to be adopted under Section 6 of Article XIID of the California Constitution, meaning they are subject to the “majority protest” provisions of Proposition 218 [Section 10730.2].

Prior to the adoption of its GSP, a GSA may impose the above fees through its existing AB 3030 plan [Section 10730.2(b)].

GSAs are also authorized to establish when fees are due and to impose late fees and collection costs. GSAs are also authorized to conduct investigations where there are questions concerning reported extractions [Sections 10730.6 and 10731].

GSA Enforcement Powers

GSAs are empowered to impose penalties of up to \$500 per acre foot for extractions in excess of that authorized and \$1000 plus \$100 per day for other violations of the GSA’s rules or ordinances [Section 10732]. GSAs are not authorized to issue cease and desist orders, nor are they entitled to recover attorneys’ fees if they have to sue to collect fees or penalties.

State Evaluation and Assessment

DWR is to promulgate regulations by June 1, 2016 for evaluating GSPs, which must include a baseline for measuring water supply reliability based on historic average deliveries [Section 10733.2]. DWR is to evaluate GSPs but, but only when the “entire basin” is covered by a plan or multiple plans. An alternative process is provided where it can be demonstrated a basin has been operated within its sustainable yield over at least the last ten years [Section 10733.6].

State Intervention

The SGMA allows the State Water Resources Control Board to designate a basin or sub-basin as “probationary” if:

- GSA(s) are not designated by July 1, 2017 for the entire basin;
- GSP(s) are not adopted for the entire basin by January 31, 2020 (or 2022 for low and very low priority basins designated as “high” or “medium” priority but not in long-term overdraft);
- After January 31, 2020 (or 2022 for certain basins), DWR in consultation with the SWRCB determines the GSP is inadequate or is not being implemented to achieve the sustainability goal. [Section 10735.2(a)].

Extensions of those deadlines may be available if litigation challenging the formation of a GSA prevents formation, adoption of a GSP or implementation [Section 10735.2(d)]. Delays caused by other lawsuits will not support extensions.

The SWRCB is to exclude from probationary status any portion of a basin or sub-basin for which a GSA “demonstrates compliance with the sustainability goal” [Section 10735.2(e)]. It is not clear what is intended by “compliance with the sustainability goal.” If it equates to bringing the basin into balance, the exclusion may be meaningless, as balance will not be achieved until a workable GSP is in place, and the exclusion from probationary status is only relevant if no GSP is in place. If it means making good faith progress towards balance,” it could provide protection for portions of a basin acting in good faith.

If the SWRCB designates a basin as probationary, after a noticed public hearing it may adopt an “interim plan” of the SWRCB’s own design for the entire basin, including actions necessary to correct a condition of long term overdraft or significant depletions of interconnected surface waters. Interim plans may include restrictions on groundwater extractions and “physical solutions,” but are to be consistent with water right priorities and subject to the Constitution

Interim plans may remain in effect until one or more GSAs adopt compliant GSPs for the entire basin or sub-basin. Absent local action, interim plans are permanent. In effect, the consequence of a basin being probationary is that the SWRCB assumes control of the basin. Interim plans may include fees, and the SWRCB had cease and desist power to enforce any element of an interim plan.

Other Provisions

Other important features of the SGMA include:

- Metering and reporting of extractions will likely be required in most basins. Extraction records will be public information. Personal information (such as name, address and phone number) included in extraction reports provided by landowners will generally not be subject to disclosure [Section 10730.8(b)].
- There are various changes to the Government Code dealing with planning functions of cities and counties, generally providing that the planning function will consider, among a long list of other matters, GSPs and SWRCB interim plans, and providing for interaction of GSAs and planning agencies. However, the legislation is clear that it is the intent of the Legislature “to recognize and preserve the authority of cities and counties to manage groundwater pursuant to their police powers” and a GSP shall not “be interpreted as superseding the land use authority of cities and counties” [Section 10726.8(f)]. As a result, county groundwater ordinances can “trump” GSPs, setting up conflict between GSAs and counties.
- A new Part 5.2 is added to the Water Code to provide for reporting extractions directly to the SWRCB for probationary basins and basins without a GSA [Sections 5200 et seq.]. The requirement would become effective 90 days after the SWRCB designates a basin as probationary, and on July 1, 2017 in a basin not in a GSA where the county has not assumed responsibility. The requirement does not apply to “de minimis” pumpers (less than 2 acre feet per year). Filing of these reports does not establish a right to use water, and a statute of limitations does not operate in favor of a person who is required to file a report until it is filed [Sections 5205 and 5207]. The SWRCB can waive the reporting requirement for a portion of a basin it determines is adequately managed [Section 10735.2(c)].
- Existing AB 3030 is amended to provide that, commencing January 1, 2015, no new plans shall be adopted (except for low or very low priority basins), but existing plans remain in place until a GSP is adopted.
- Tribal interests were able to add language requiring that adjudications, GSAs and the SWRCB are to “respect federal reserved water rights to groundwater.” It has never been clear that such reserved rights exist, so the SGMA may now be interpreted to have confirmed their existence.
- There is a “tolling” provision providing that extraction of groundwater between January 1, 2015 and the date of adoption of a GSP cannot be used to establish or defend against a claim of prescription [Section 10720.5(a)].
- The legislation provides: “Nothing in this part, or in any groundwater management plan adopted pursuant to this part, determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights” [Section 10720.5(b)]. Similar language is at Section 10726.8(b).

- The basic requirement is that all basins designated high or medium priority by DWR as basins that are subject to critical condition of overdraft shall be managed under GSPs by January 31, 2020 (and if not designated as in critical condition of overdraft, then by January 31, 2022) [Sections 10720.7(a)(1) and (2)].
- Generally, adjudicated basins and the Antelope Valley are exempted, provided their watermasters file certain reports and information with DWR [Section 10720.8].

Next Steps

Local agencies will likely spend the next 12-24 months determining which of them will be GSAs and begin the planning process in earnest in mid to late 2016 or early 2017. Developing those plans will be a very significant (and expensive) undertaking, likely taking two or three years and involving multiple public hearings. As noted above, plans will have to be adopted by the end of January 2020 for the basins and sub-basins deemed to be in the greatest distress, to be effective no later than January 31, 2020. New fees, restrictions on pumping, and a multitude of other measures would likely become effective then in those basins and sub-basins.

Lawsuits could derail that timing. As noted above, the bills are lengthy and thus contain significant details, many of which could lead to litigation by environmental groups, disgruntled landowners, and/or others. Some are fearful that litigation will result in local agencies missing deadlines or become so onerous that local agencies will back away from the planning process. In either case, the SWRCB could step in.

There is also concern that, if the bills spawn too much litigation in connection with the planning process, they will have the effect of triggering basin adjudications (typically very lengthy and expensive court proceedings in which the rights of all parties in the basin are determined). Parties may simply elect to adjudicate rights rather than endure years of procedural litigation related to plans. Protracted litigation of one kind or another is likely in many basins or sub-basins.
