

## 6 GOVERNANCE

### 6.1 Overview

In adopting SGMA, the Legislature made clear that nothing in SGMA “determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights.”<sup>1</sup> In other words, the Legislature intended that actions undertaken in accordance with SGMA respect common law water rights.

Water rights are property rights, protected as such under the California Constitution.<sup>2</sup> The right to use groundwater, including groundwater from the Westside Subbasin, is limited to the amount that can be beneficially used and not wasted.<sup>3</sup> Article X, section 2 of the California Constitution declares that the “general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable . . . The right to water or to the use or flow of water . . . shall be limited to such water as shall be reasonably required for the beneficial use to be served . . . .”

The groundwater within the Westside Subbasin is overlain by vast acreage with appurtenant, overlying water rights, which allow owners of land overlying a groundwater basin to extract groundwater for use on their overlying land. The groundwater also is subject to appropriations; use of groundwater on non-overlying land, such as for domestic and off-basin uses. Collectively, groundwater withdrawals over the past 50 plus years, within the Subbasin and contiguous adjacent areas, reflect a cycle of depletion and recovery dependent upon the quantity of available surface water supplies. However, recovery in groundwater levels has not been complete and over time the Subbasin has experienced undesirable results, primarily in the form of land subsidence.

Under California common law, groundwater users, neither individually nor collectively, have the right to lower groundwater levels in a manner that causes undesirable results, including land subsidence. Prior to the adoption of SGMA and in the absence of regulatory oversight, where there has been overdraft, the courts have adjudicated water rights and approved or, in some cases, imposed physical solutions to provide for the coordinated management of all groundwater rights in a common supply in order to avoid undesirable results.<sup>4</sup> These physical solutions establish management regimes that enable the expression and use of water rights in a manner that enhances the efficient use of water in accordance with the California Constitution.<sup>5</sup>

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<sup>1</sup> Wat. Code, § 10720.5.

<sup>2</sup> *State of California v. Riverside Superior Court* (2000) 78 Cal.App.4th 1019, 1025.

<sup>3</sup> *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 372; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal. 4th 1224, 1242.

<sup>4</sup> See *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287-88.

<sup>5</sup> The courts have sustained groundwater management strategies that establish physical solutions which concurrently maximize beneficial use, respect common law water rights and avoid causing undesirable results.

While SGMA did not modify common law water rights, it vested the principal responsibility for developing and administering a management plan for groundwater basins to GSAs, each of which is either an agency or comprised of agencies local to the subject groundwater basin.<sup>6</sup>

The question of how a GSA's authority is wielded is of critical importance to the efficacy of the GSP. In the end, groundwater management under SGMA must be consistent with Article X, section 2 of the California Constitution and it must be sufficiently adaptive to respond to the challenges and opportunities that may arise over time.

This GSP establishes the objective of maximizing the beneficial use of water within the Westside Subbasin, without causing undesirable results. The powers of a GSA are set forth in SGMA. This GSP meets the requirements of SGMA and vests the management authority in a GSA as provided in this Chapter.

## 6.2 Powers of the GSAs

1. **In General.** The District serves as the GSA for the portion of the Westside Subbasin that is within District's jurisdictional boundary. The County of Fresno (Fresno County) serves as the GSA for the portion of the Westside Subbasin that is within Fresno County but outside the District's jurisdictional boundary. Each GSA shall have and may exercise the express powers set forth under SGMA and shall perform the duties as provided in this GSP as it may be amended by the GSA, in accordance with applicable law. It is essential that this GSP allow each GSA the maximum flexibility and adaptability, so that the GSP and implementing regulations can be amended and improved to address changes in circumstances and to account for advances in data gathering, analysis, technology, as well as emerging institutional and economic opportunities. Toward this end, each GSA expressly reserves all power and authority to implement and amend the GSP as a physical solution as may be necessary, proper, and convenient over time to achieve its objective of maximizing the reasonable and beneficial use of water without causing undesirable results. The enumeration of the powers and authorities set forth herein is not a limitation on any power or authority of each GSA arising under applicable law.
2. **Coordination.** The District and Fresno County shall coordinate to implement the GSP pursuant to the 2016 Memorandum of Understanding (MOU) (Appendix D) or as may be amended.
3. **Rules and Regulations.** Each GSA may make, adopt, and amend, after public hearing, appropriate rules and regulations to conduct its affairs, including, but not limited to, meeting schedules and procedures, and to sustainably manage the Subbasin. Copies shall be maintained on each GSA's website.
4. **Committees.** In addition to the formation of the Advisory Committee and Technical Advisory Committee expressly authorized below, the District and Fresno County may, periodically and at their discretion, coordinate to establish committees to act solely in an advisory role by providing advice and recommendations. Any committee established under this GSP shall be chaired by a representative from one of the GSAs.

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<sup>6</sup> The declared legislative intent in the adoption of SGMA is set forth in Water Code section 10720.1 and includes the directive to provide local management of groundwater in accordance with California water rights law.

## 5. Specific Powers

- (a) Allocation. In close coordination, the GSAs may establish an allocation program and establish terms and conditions on the use of that allocation from time to time, including, but not limited to, eligibility, quantity of allocation, method of delivery, banking, transfer, reporting, and monitoring.
- (b) Replenishment. Each GSA may arrange for, conduct, authorize, and control replenishment by any reasonable means in accordance with applicable law, including, but not limited to, spreading, percolation injection and in-lieu recharge of non-native, imported, foreign, and developed water (“supplemental water”).
- (c) Groundwater Storage. The Westside Subbasin has a substantial amount of available groundwater storage capacity that may be used for storage and conjunctive use of supplemental water in coordination with native groundwater and return flows from foreign, non-native, and imported water. It is essential that the use of this groundwater storage capacity be undertaken only under the control and regulation of a GSA, to protect the integrity of all water held in storage and the sustainable yield of the Westside Subbasin.
  - i. Use of Available Groundwater Storage Capacity. No person may make use of the groundwater storage capacity in the Westside Subbasin for the storage and conjunctive use of supplemental water except pursuant to written agreement with a GSA or as may be authorized by a GSA through the adoption of duly authorized rules and regulations.
  - ii. Uniform Rules and Regulations. In close coordination, the GSAs may adopt uniformly applicable rules and a standard form of agreement for storage of supplemental water provided that the performance of any agreement will not cause undesirable results.
  - iii. Abandonment. Any supplemental water recharged or stored in the Westside Subbasin done without a GSA storage agreement or as authorized by adopted rules and regulations, shall be deemed abandoned and not classified as stored water.
  - iv. Priority in Allocation. In the allocation of storage capacity, the needs, use, and requirements of the lands overlying the Westside Subbasin shall have priority and preference over storage for the purpose of export for use on non-overlying lands.
- (d) Transfers. The right of persons or entities to transfer water, credits, allocations, stored water, and any other entitlement authorized by or arising under this GSP, including any rules, regulations, and conditions thereon, is subject to prior approval of one or both GSA(s) as may be provided under the GSP and adopted rules and regulations.<sup>7</sup>
- (e) Conjunctive Use. In close coordination, the GSAs may adopt specific incentives and mandates, pursuant to adopted rules and regulations that encourage and, where necessary, require the

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<sup>7</sup> Overlying water rights are generally not transferable under common law and overlying owners do not have the right to store unpumped groundwater for use in future years. The allocations arising under this GSP are only as authorized hereunder in furtherance of the physical solution as embodied in the GSP and its implementing regulations.

- use of surface water in-lieu of groundwater to avoid undesirable results and to optimize the beneficial use of groundwater.
- (f) Accounting. The District shall calculate additions, extractions, and losses to the Westside Subbasin and maintain an annual account of all replenished water, stored water, transferred water allocations, and produced groundwater. The District shall provide annually a summary of the annual account information to Fresno County.
- (g) Federal Reserved Rights. Nothing herein, express or implied, shall be construed as a limitation on the origin, scope, or exercise of federal reserved rights to groundwater in the Westside Subbasin, whatever they may be.
6. **Variations**. Any person or entity desiring relief (excuse from compliance) from any portion of the GSP, program, policy, rule, regulation, or project (collectively “measure”) may request a variance from the GSA implementing the GSP for their portion of the Westside Subbasin. In close coordination, the GSAs will prepare a form for the submittal of a request for a variance and make it available to the public following the adoption of the GSP. Any request for variance filed must be submitted in writing to the appropriate GSA and shall (1) identify the specific GSP measure that is the subject of the request, (2) the reason(s) for the requested variance, (3) whether the requested variance is necessary to avoid substantial physical or economic harm and an explanation thereof, and (4) a statement of the requested relief. Except in the event of an emergency,<sup>8</sup> any technical request for a variance will be considered by the Technical Advisory Committee (“TAC”) prior to consideration by the appropriate GSA. Non-technical requests will be considered directly by the appropriate GSA. Each GSA must consult with the other GSA representative for the Westside Subbasin prior to its consideration of a variance. Either GSA will only grant a variance if it finds that to do so would (1) not undermine effective implementation of the GSP, including, but not limited to, causing or contributing to an undesirable result in any portion of the Subbasin, (2) not cause material harm to others who have rights to use groundwater within the Westside Subbasin, and (3) only authorize actions that are reasonably necessary and narrowly tailored to avoid unreasonable physical and economic harm to the groundwater user.
7. **Appeals**. Within the District’s portion of the Westside Subbasin, any person aggrieved by an action of District staff to implement the GSP and/or pursuant to an implementing measures may submit a written appeal to the District Board. An appeal must include each of the following: (i) name and address of the appellant, (ii) brief description of the project (if applicable), (iii) the specific decision which appellant appeals, (iv) the date on which the decision was made, (v) the basis or bases for the appeal, (vi) the specific action which appellant requests be taken on appeal, and (vii) all information appellant relies upon to support appellant’s appeal. Except in the event of an emergency,<sup>9</sup> any technical request for a variance will be considered by the TAC prior to consideration by the appropriate GSA. Non-technical requests will be considered directly by the appropriate GSA. The District may reconsider a prior decision, if there is new material information

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<sup>8</sup> A sudden, unexpected perilous condition as determined by a GSA.

<sup>9</sup> A sudden, unexpected perilous condition.

that was not reasonably available to the appellant at the time of the decision. Decisions of the District's Board shall be final.

### 6.2.1 Advisory Committee

The District's Board will establish an Advisory Committee (AC) that in the discretion of the District's Board will be comprised of between eight and eleven representatives from stakeholder groups within the Westside Subbasin, which shall include one representative from the County of Fresno Department of Public Works and Planning, as designated by its Director. The purpose of the AC is creating an advisory body that increases effective collaboration and communication between and among interested parties by: providing advice and recommendations to the GSAs, including but not limited to, advice as to methods in which the GSAs may improve the GSP or its implementation. The AC will be chaired by a member of the District's Board and subject to the Brown Act.

- (a) Appointment. The District's Board in its discretion will appoint and the AC will maintain from eight to eleven members, with the exception of the County of Fresno appointment, which shall be designated by the Director of the Department of Public Works and Planning.
- (b) Qualifications. A minimum of 60 percent of its members shall be active agricultural groundwater producers with at least one each from domestic groundwater users, Fresno County GSA representative, disadvantaged communities, and non-governmental organizations, if an application is submitted.
- (c) Scope and Authority. The AC's duties and authority shall be limited to that expressly set forth in this GSP and implementing regulations. The AC's recommendations, if any, shall be transmitted to the appropriate GSA(s) for consideration and potential action.
- (d) Offices and Records. The AC's records shall be maintained at the District's Fresno office. The AC's records shall be available for inspection by any person during regular business hours.
- (e) Meetings. Regular meetings of the AC shall be held when needed, at a convenient time and location, as determined by the chair of the AC or resolution of the District's Board. The Agenda and all available materials pertaining to agenda items shall be posted and made available in compliance with the Brown Act and District standard procedures. The AC members shall be provided an opportunity to propose and comment on agenda items.
- (f) Special Meetings. Special meetings of the AC may be called at any time at the discretion of the Chair, by written notice in compliance with the Brown Act.
- (g) Adjournment. Any meeting of the AC may be adjourned to a time and place specified in the Order of Adjournment.
- (h) Open Meetings. All AC meetings shall be open to all members of the public.

### 6.2.2 Technical Advisory Committee

The District's Board will establish a Technical Advisory Committee (TAC). The TAC shall function *solely* in an advisory role. The TAC shall function as an *independent* body of experts that can provide transparent, credible, and timely advice to the GSAs, as the GSAs may deem appropriate, in their discretion, from time to time. The TAC will meet as required to perform the following actions: (i) review of proposed and existing GSP programs and projects; (ii) requests arising from persons seeking specific approvals pursuant to the GSP or relief from its requirements (i.e., variances), including the rules and regulations adopted by the

GSAs; (iii) appeals regarding District staff actions in support of GSP implementation or complaints regarding the actions of third parties authorized thereunder; and (iv) evaluating the boundary condition and potential impacts of groundwater use in contiguous basins on inflow into the Westside Subbasin.

- (a) Appointment. The District's Board in its discretion will appoint five to nine members to the TAC, including at least one representative from the County of Fresno Department of Public Works and Planning, as designated by its Director. The TAC will be chaired by a member of the District's Board.
- (b) Qualifications. Each member shall hold a bachelor's or advanced degree or higher in a field related to groundwater, engineering, hydrology and/or at least five years of relevant professional experience.
- (c) Scope and Authority. The TAC's duties and authority shall be limited to that expressly set forth herein. Upon completing its evaluation of any subject matter within the scope of its authority, the TAC's recommendations shall be transmitted to the appropriate GSA(s) for consideration and potential action.
- (d) Offices and Records. The TAC's records shall be maintained at the District's Fresno office. The TAC's records shall be available for inspection by any person during regular business hours.
- (e) Meetings. Regular meetings of the TAC shall be scheduled when needed, at a convenient time and location, as may be determined by the chair of the TAC or resolution of the District's Board. The Agenda and all available materials pertaining to agenda items shall be posted and made available in compliance with the Brown Act and District standard procedures. The AC members shall be provided an opportunity to propose and comment on agenda items.
- (f) Special Meetings. Special meetings of the TAC may be called at any time at the discretion of the Chair, by written notice in compliance with the Brown Act.
- (g) Adjournment. Any meeting of the TAC may be adjourned to a time and place specified in the Order of Adjournment.
- (h) Open Meetings. All TAC meetings shall be open to all members of the public.
- (i) Variance. An application for a variance involving a technical issue generally will be reviewed at the first regularly scheduled TAC meeting. The Board of Directors will consider the variance within ninety (90) days from the date the appropriate GSA determines the application is complete and provides notice thereof, provided that staff and/or TAC members may for reasonable cause continue consideration of the application to a future date to ensure a fair evaluation of the application. The TAC's consideration of a variance application is *advisory* only.
- (j) Appeals. Except in the event of an emergency, an appeal will be reviewed at the first regularly scheduled TAC meeting and the Board within ninety (90) days from the date of a GSA's receipt of an appeal. The TAC's consideration of an appeal is *advisory* only.