

Sustainable Groundwater Management Act: AN OVERVIEW OF KEY PROVISIONS

The Sustainable Groundwater Management Act (“Act”) recently passed by the Legislature fundamentally changes management of California’s groundwater basins.¹ The Act permits the election of groundwater sustainability agencies (“GSA”) for all basins and requires the adoption of groundwater sustainability plans (“Plan”) for basins designated as medium- or high-priority by the Department of Water Resources (“DWR”). Plans must be developed to eliminate overdraft conditions in aquifers and to return them to a condition that assures their long-term sustainability within twenty years of Plan implementation. The Act’s key provisions are as follows:

Affected Basins

Medium- and High-Priority Basins: The Act applies to all groundwater basins in the state, but contains special requirements for basins or sub-basins that DWR designates as medium- or high-priority basins.² Under the Act, DWR must rank each of the basins or sub-basins identified in its Bulletin 118 as either a very low-, low-, medium-, or high-priority basin based on the threat to the basin’s integrity.³ DWR is required to complete its initial ranking by January 31, 2015.⁴

Prioritization Factors: In establishing these rankings, DWR must consider many of the same factors considered in ranking basins under the California Statewide Groundwater Elevation Monitoring (“CASGEM”) program.⁵ The only distinction is that, under the Act, DWR must also consider adverse impacts on local habitat and local streamflows. The factors for consideration are as follows:

- Overlying population;
- Projected growth of overlying population;
- Public supply wells;
- Total number of wells;
- Overlying irrigated acreage;
- Reliance on groundwater as the primary source of water;
- Impacts on the groundwater, including overdraft, subsidence, saline intrusion, and other water quality degradation; and
- Any other information determined to be relevant, including adverse impacts on local habitat and local streamflows.⁶
- On December 15, 2014, DWR announced that the basin prioritization finalized in June 2014 under the CASGEM program will be the initial prioritization required by the Act when it goes into effect on Jan. 1, 2015. A basin’s initial prioritization under the Act may change in the future any time DWR updates its Bulletin 118 alluvial groundwater basin boundaries. The next update of Bulletin 118 is expected in 2016.

Exempt Basins: The Act does not require the development of a Plan for basins that DWR ranks as low- or very low-priority basins; Plans are voluntary for these basins.⁷ Further, the Act’s planning

requirements do not apply to adjudicated groundwater basins that are managed by the courts.⁸ Adjudicated basins, however, are still required to comply with certain reporting requirements.⁹ Existing AB 3030 groundwater management plans in medium- and high-priority basins must be replaced or augmented in order to comply with the requirements for a Plan under the Act.¹⁰

Groundwater Sustainability Agencies

Deadline for Designation of GSAs: The Act permits the election of a GSA for any basin, but requires that a GSA be identified for all medium- and high-priority groundwater basins by June 30, 2017, or within two years from the date of reprioritization of a basin as medium- or high-priority.¹¹ Counties will be presumed to be the GSA for all unmanaged basins.¹² However, the county may decline this responsibility.¹³

Expanded Powers: The Act significantly expands the powers of local agencies acting as GSAs, including authorizing the GSA to:

- Adopt rules, regulations, ordinances, and resolutions;¹⁴
- Conduct investigations of water rights;¹⁵
- Require well registration;¹⁶
- Require well operators to measure and report extractions;¹⁷
- Require reporting of diversions of surface water to storage;¹⁸
- Acquire property and water rights;¹⁹
- Reclaim water;²⁰
- Impose well spacing requirements;²¹
- Regulate groundwater extractions, including limiting or prohibiting groundwater production;²²
- Impose fees and assessments;²³ and
- Undertake enforcement actions for noncompliance.²⁴

No Permit Authority: Although the Act also allows GSAs to request that counties provide well construction applications for the GSA's consideration and comment, counties maintain well permitting authority. GSAs are not authorized to issue well construction permits unless that power is delegated to them from the county.²⁵

Groundwater Sustainability Plans

Deadline for Adoption of a Plan: The Act requires GSAs for all medium- and high-priority basins to adopt a Plan, or an alternative that complies with the Act, by January 31, 2022.²⁶ For basins subject to critical overdraft conditions, the Plan must be adopted by January 31, 2020.²⁷

Plan Requirements: The principal goal of the Act is to ensure that all basins are sustainably managed to avoid undesirable results, which are defined as follows:²⁸

- Chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply;
- Significant and unreasonable reduction of groundwater storage;
- Significant and unreasonable seawater intrusion;
- Significant and unreasonable degraded water quality, including the migration of contaminant plumes that impair water supplies;

- Significant and unreasonable land subsidence that substantially interferes with surface land uses; and/or
- Surface water depletions that have significant and unreasonable adverse impacts on beneficial uses of surface water.²⁹

Accordingly, Plans must include long-term planning goals, measurable objectives and interim milestones in increments of five years that are designed to achieve the basin’s sustainability goal within twenty years of Plan implementation.³⁰ The Act provides a list of additional required components, many of which are similar to the current requirements for “AB 3030” or groundwater management plans.³¹

Coordination Requirement: Other provisions of the new law require coordination between land use planning agencies and GSAs.³² Prior to the adoption or substantial amendment of a general plan, the land planning agency is required to review and consider a Plan and to refer a proposed action to adopt or substantially amend a general plan to any local GSA for review.³³ As part of this process, a GSA is required to provide the local land planning agency with the anticipated effects of a proposed action to adopt or substantially amend a general plan on the implementation of the Plan.³⁴

DWR Review: Upon adoption of a Plan, the designated GSA must submit the Plan for DWR review.³⁵ The Act gives DWR until June 1, 2016 to develop regulations for evaluating Plans.³⁶ Upon completion of its review of a Plan, DWR has the power to request changes to the Plan in order to address deficiencies.³⁷ DWR is required to re-evaluate Plans every five years to ensure continued compliance and sufficiency.³⁸ After adoption of a Plan, the GSA must submit to DWR an annual compliance report containing basin groundwater data, including elevation, aggregate extraction, water usage and any changes in groundwater storage to monitor progress toward this sustainability goal.³⁹

Validation Action: The Act authorizes GSAs to file a validation action 180 days after the adoption of a Plan.⁴⁰

No Effect on Water Rights

The Act expresses the legislature’s intention that neither the Act, nor the actions of a GSA, nor any Plan developed pursuant to the Act shall have any effect on a landowner’s water rights.⁴¹

State Intervention

Limited State Intervention: In addition to imposing a number of new requirements on local agencies related to groundwater management, the Act also provides for state intervention – a “backstop” – when local agencies are unwilling or unable to manage their groundwater basin.

Probationary Basins: Specifically, the Act authorizes California’s State Water Resources Control Board (“SWRCB”) to designate certain medium- and high-priority basins as probationary basins if prescribed local management requirements are not met.

SWRCB is authorized to designate **medium- and high-priority basins subject to critical conditions of overdraft** if (1) no local agency has been designated as the GSA by June 2017; or (2) the agency designated as the GSA fails to prepare and adopt an adequate Plan by January 31, 2020.⁴²

SWRCB is authorized to designate **all other medium- and high-priority basins** as probationary basins if (1) no local agency has been designated as the GSA by June 2017; or (2) the agency designated as the GSA fails to prepare and adopt a Plan by January 31, 2022; or (3) the Plan is inadequate and the basin is either in a condition of long-term overdraft or groundwater extractions are resulting in a significant depletion of interconnected surface waters.⁴³

Interim Plans: For those basins designated as probationary basins, the Act authorizes the SWRCB to remove groundwater authority from local agencies and to adopt and implement an interim plan.⁴⁴ Interim plans must identify actions to bring a basin into balance, deadlines, and a description of the plan's monitoring components.⁴⁵ The Act also allows interim plans to incorporate restrictions on groundwater extractions and principles and guidelines for the administration of surface water rights that are connected to the basin.⁴⁶ A GSA that subsequently adopts a Plan may petition the SWRCB for a finding that the GSA's Plan is adequate, and for rescission of the interim plan.⁴⁷ The filing of a judicial order or decree entered in an adjudication action may also be sufficient to rescind an interim plan.⁴⁸

Practical Application and Challenges

In practice, compliance with the Act will be challenging for many local agencies, particularly in terms of determining which local agency should be designated as the basin's GSA and in collaborating with all stakeholders to develop a Plan, if required.

Challenges in Designating GSA: In many basins, there may be conflict over which of several existing local agencies should be the designated GSA. Fortunately, the Act permits the creation of a new entity as GSA and "sharing" of basin governance pursuant to a joint powers agreement, memorandum of agreement, or other legal agreement. The Act also allows a basin to be managed by several separate, but coordinated, Plans developed by different GSAs. However, in each circumstance, agreement between local agencies and stakeholders will be necessary to navigate such potential conflicts.

Challenges in Implementing GSA Powers and Developing a Plan: Another significant potential challenge will be developing the political consensus needed to make hard choices about groundwater use and management in order to sustainably management local groundwater basins, including developing an effective Plan. The intent of the legislation is to provide local governing boards with the authority to manage groundwater for their own long-term self-interest; however, allocating the burden of cutbacks in groundwater extractions, as well as responsibility for payment of pump assessments to fund necessary basin replenishment and other management objectives – including, for example, the acquisition of supplemental supplies – is likely to result in conflicts between stakeholders.

Under the common law, senior priority water rights holders are generally not required to reduce extractions or incur significant expense for the benefit of lower-priority water rights holders.⁴⁹ Therefore, significant conflicts may arise in the exercise of a GSA's powers under the Act, including development of a Plan, where water rights priorities are contested or the equities of a proposed management action are disputed. The likelihood for these problems warrants significant stakeholder and public outreach at the outset of any GSA planning process. If a negotiated agreement cannot be reached to resolve such conflicts, the basin may be subject to SWRCB intervention or a groundwater adjudication.

Groundwater Adjudications: Groundwater adjudications may be the inevitable result for basins in which conflicts on these issues persist. Once complete, the judgment entered in a groundwater adjudication generally provides valuable legal certainty and an efficient means of basin management. Unfortunately, as a result of a lack of judicial procedures specifically tailored to the complexities of groundwater adjudications, which involve complex technical and legal issues, groundwater adjudications often take far too long (sometimes decades) and cost too much. A conceptual procedure to streamline groundwater adjudications was considered for inclusion in the Act, but was excluded because of inadequate time to address the complexities of such a process. Efforts are under way to develop legislation to establish a streamlined adjudication procedure for the legislature’s consideration in 2015. Such a result could be highly beneficial to cost-effectively resolve groundwater disputes and implement comprehensive management in a timely manner.

¹ The Act is composed of three separate bills: Senate Bill 1168 (Pavley), Senate Bill 1319 (Pavley), and Assembly Bill 1739 (Dickinson). Together, these three bills establish the Sustainable Groundwater Management Act.

² Water Code § 10722.4.

³ Water Code § 10722.4.

⁴ Water Code § 10722.4(b).

⁵ CASGEM information is available at

http://www.water.ca.gov/groundwater/casgem/pdfs/lists/StatewidePriority_Abridged_05262014.pdf.

⁶ Water Code § 10933(b).

⁷ Water Code § 10720.7(b). Although not mandatory, the Act encourages and authorizes basins designated as low- and very low-priority basins to be managed by a Plan pursuant to the Act.

⁸ Water Code §10720.8(a)-(d).

⁹ Water Code § 10720.8(f).

¹⁰ Water Code §§ 10750 *et seq.*; 10750.1(a).

¹¹ Water Code §§ 10735.2(a)(1); 10722.4(d).

¹² Water Code § 10724(a).

¹³ Water Code § 10724(b).

¹⁴ Water Code § 10725.2(b).

¹⁵ Water Code § 10725.4(a).

¹⁶ Water Code § 10725.6.

¹⁷ Water Code § 10725.8(a), (c).

¹⁸ Water Code § 10726.

¹⁹ Water Code § 10726.2(a),(b),(d).

²⁰ Water Code § 10726.2(e).

²¹ Water Code § 10726.4(a)(1).

²² Water Code § 10726.4(a)(2).

²³ Water Code §§ 10735.2(a), 10730.2.

²⁴ Water Code § 10732.

²⁵ Water Code § 10726.4(b).

²⁶ Water Code §§ 10720.7(a)(2), 10733.

²⁷ Water Code § 10720.7(a)(1).

²⁸ Water Code § 10721(u), (v).

²⁹ Water Code § 10721(w). Although a GSA may choose to include previously occurring undesirable results, the Act does not require Plans to address undesirable results that occurred before, and have not been corrected by, January 1, 2015. (Water Code § 10727.2(b)(4).)

³⁰ Water Code § 10727.2(b)(1). The Act uses the term sustainability goal, defined as “implementation of measures targeted to ensure that the applicable basin is operated within its sustainable yield.” (Water Code § 10721(t).) A

basin's sustainable yield is calculated as "the maximum quantity of water. . . that can be withdrawn annually from a groundwater supply without causing an undesirable result." (Water Code § 10721(v).)

³¹ Water Code §§ 10727 *et seq.* See tab 7 for a comparison of requirements for AB 3030 plans and Groundwater Sustainability Plans.

³² Government Code § 65352.5.

³³ Government Code §§ 65350.5, 65352. It should be noted, however, that this provision of the law is discretionary, not mandatory. (Government Code § 65352(c).)

³⁴ Government Code § 65352.5(d)(3).

³⁵ Water Code §§ 10733.4(a), 10733(a).

³⁶ Water Code § 10733.2(a)(1).

³⁷ Water Code § 10733.4(d).

³⁸ Water Code § 10733.8.

³⁹ Water Code § 10728.

⁴⁰ Water Code § 10726.6(a).

⁴¹ Water Code §§ 10720.5(b), 10726.4(a)(2), 10726.8(b), 10735.8(h); see also §§ 5205, 5207, 10720.5(a), 10736.4.

⁴² Water Code § 10735.2(a)(1)-(3).

⁴³ Water Code § 10735.2(a)(1), (4)-(5).

⁴⁴ Water Code § 10735.8(a).

⁴⁵ Water Code § 10735.8(b).

⁴⁶ Water Code § 10735.8(c).

⁴⁷ Water Code § 10735.8(g)(1)(A), (2), (4).

⁴⁸ Water Code § 10735.8(g)(1)(B), (2), (4).

⁴⁹ *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240-49.