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## **The Sustainable Groundwater Management Act How Private Landowners Will Be Affected**

The historic groundwater legislation of 2014<sup>1</sup> (“Legislation”) implements two primary changes in California law. First, the Legislation creates the Sustainable Groundwater Management Act (the “Act”), which requires the identification or creation of a Groundwater Sustainability Agency (“GSA”)<sup>2</sup> for all basins in the state,<sup>3</sup> and requires the development and implementation of a Groundwater Sustainability Plan (“Plan”)<sup>4</sup> for medium- and high-priority basins designated by the Department of Water Resources (“DWR”). Second, the Legislation amends the Government Code to require close coordination between land use planning agencies and GSAs in the adoption or amendment of any General Plan.<sup>5</sup> The Legislation presents several potential benefits and risks for landowners, land developers and agriculture.

### **Benefits for Cities and Counties**

- **Increased Certainty:** By far, the single most important potential benefit of the Legislation is increased certainty in the long run with respect to the availability of groundwater supplies to serve a landowner’s existing and projected demands – i.e., after management actions, including Plans, are implemented and have satisfied at least their initial planning objectives (2025 or later).
- **Respect for Water Rights:** Although the Legislation provides for the comprehensive regulation of all groundwater in the state for the first time in the state’s history, California’s existing water right system – a mix of both the riparian and appropriative right systems – is left intact. Landowners should be comforted by the fact that the Legislation consistently and repeatedly declares the legislature’s respect for overlying and other proprietary rights to groundwater.<sup>6</sup> In the event of litigation, these legislative declarations should aid private landowner claims.
- **Mandates Public Agency Action:** The political reality of requiring landowners to reduce their water use has stifled groundwater management in the past. The Legislation provides strong incentives for local agencies to develop Plans that meet the Act’s criteria, as determined by DWR, by a certain date, or face the prospect of the state’s intervention in management of the basin.<sup>7</sup> Whether local agencies can and will meet these mandates, especially in the absence of state funding, remains to be seen.

- **Technical Information:** To date, the lack of a technical understanding about our groundwater basins has led to mismanagement and, arguably, a waste of the resource. The Legislation will increase the quantity and availability of technical information about groundwater supplies, thereby improving the understanding about groundwater availability.<sup>8</sup> It also directs DWR to provide technical assistance to local agencies that request it, to develop and publish best management practices for the sustainable management of groundwater, and to adopt regulations for the evaluation and implementation of Plans.<sup>9</sup>
- **Open Process:** Landowners should welcome the Legislation's mandated open process for groundwater sustainability planning, particularly the directive to GSA's to consider the interests of overlying landowners.<sup>10</sup> While open processes are not new to water supply planning, the requirement that the GSA must encourage the "active involvement" of all stakeholders in the development and implementation of sustainable groundwater planning is a welcome addition. As a result, landowners should expect increased opportunities for participation in water supply planning processes. Of course, with this opportunity comes the obligation to participate in the development of any groundwater management activities authorized by the Act. For example, once adopted and validated, a landowner's ability to overturn a Plan or any element of the Plan that is inconsistent with the landowner's existing and future plans for development of the land may be legally impossible.<sup>11</sup> Therefore, any landowner that relies on groundwater within a priority basin should engage with the GSA and other stakeholders early and throughout the planning process.
- **Equitable Sharing of Financial Burden:** Often the first land developer bears the burden of solving groundwater issues, including developing a technical and scientific basis for future groundwater use, funding new and additional infrastructure, and securing supplemental supplies. The Legislation empowers GSAs to impose new fees on all water users to fund the cost of sustainable management.
- **Coordinated Land and Water Supply Planning:** The Legislation amends existing general plan law to require close coordination between land use planning agencies (cities and counties) and GSAs. This reduces the risk that land use plans will be inconsistent with Plans. On the flip side, landowners should be aware that counties and cities may implement zoning changes to address water shortages.
- **Expedited Land Use Approvals:** Optimistically, when all of the potential benefits identified above are taken together, the Legislation may – in the long-term – simplify and expedite a developer's compliance with CEQA, including preparation of water supply assessments for new development. This is because increased technical understanding of the availability of supplies, improved management, and durable management plans will be in place when a landowner initiates the development process, thereby avoiding the need for the developer to gather this information and process it unilaterally for its own purposes.
- **Adjudication of Water Rights:** In the event a GSA's activities to sustainably manage a particular groundwater basin cannot be adopted without limiting groundwater extractions by some or all users, a judicial action to declare all water rights in a basin that is subject to the Act is likely, especially if anticipated follow-on legislation providing for streamlined adjudications is adopted.<sup>12</sup> Although litigation is notoriously protracted and expensive, the result is increased certainty for all groundwater users and a more durable plan.

## Risks for Landowners

- **Decreased Certainty:** Although the Act may increase a landowner's certainty over the long run regarding the availability of the groundwater supply to meet existing and projected demands, in the short-term, the Act could frustrate land development. This is because priority basins for which a Plan is required may be assumed to be non-sustainable until the basins are compliant with the Act – i.e., a Plan is adopted, validated and meeting its objectives. This process likely won't be completed until 2025 at the earliest.<sup>13</sup> Further, the process of complying with the Act may trigger litigation to adjudicate water rights, especially if existing or future groundwater uses will be curtailed.<sup>14</sup> Hopefully, the anticipated follow-up legislation will expedite the adjudicatory process, but in any case, uncertainty will persist until a final judgment is entered in the action.
- **Increased Expense:** Landowners can bank on the fact that groundwater production just got a whole lot more expensive. The planning process alone will be costly. A GSA may impose fees on all basin users to fund its activities, including for example, the acquisition of new or supplemental sources of supply which may be required to permit sustainable groundwater management.<sup>15</sup>
- **Reduced Access to Groundwater:** A GSA may find that existing supplies are insufficient to satisfy projected demands, and, after satisfying certain conditions, limit existing groundwater production and/or prohibit additional/future groundwater production.
- **Superficial Respect for Water Rights in the Absence of Adjudication:** The Act grants new and expansive powers to GSAs to manage groundwater, including the power to assess fees on groundwater production and to limit or prohibit production. While the Act declares that the exercise of these powers "shall not be construed to be a final determination of rights to extract groundwater from the basin...,"<sup>17</sup> it will be difficult to reconcile the two – and absent an adjudication, property rights may be abrogated – in basins with insufficient supplies to serve all projected demands.
- **Deprioritization of Future Groundwater Uses:** Case law acknowledges that future, unexercised overlying rights may have to give way to present reasonable uses – a deprioritization of dormant (unused) overlying rights. The Legislation builds on this principle. If a landowner's demands are not yet known or development is not sufficiently planned, a GSA's powers may be exercised in a manner that does not account for the land's potential future uses. Further, given the Legislation's requirement that general plan development be coordinated with the Plans, land use planning may be constrained by a Plan until such time as sufficient groundwater supplies become available.



- <sup>1</sup> Senate Bill 1168 (Pavley), Senate Bill 1319 (Pavley), and Assembly Bill 1739 (Dickinson).
- <sup>2</sup> See Water Code § 10723 et seq.
- <sup>3</sup> See Water Code §§ 10720.3, 10723, 10724.
- <sup>4</sup> The Act mandates creation of a Plan for all non-exempt groundwater basins designated by the Department of Water Resources (“DWR”) as medium- and high-priority basins. (Water Code § 10727(a).) However, the Act encourages low- and very low-priority basins to be managed pursuant to a Plan as well. (Water Code § 10720.7(b)).
- <sup>5</sup> Government Code § 65352.5. These changes are found primarily in Assembly Bill 1739 (Dickinson).
- <sup>6</sup> See Water Code § 10720.1(b).
- <sup>7</sup> See Water Code § 10735.
- <sup>8</sup> See Water Code §§ 10720.1, 10727.2.
- <sup>9</sup> See Water Code §§ 10720.1, 10729, 10733.2.
- <sup>10</sup> See Water Code §§ 10723.2, 10723.4, 10727.8.
- <sup>11</sup> See Water Code § 10726.6.
- <sup>12</sup> See Water Code § 10726.4.
- <sup>13</sup> See Water Code § 10720.7.
- <sup>14</sup> See Water Code § 10726.6.
- <sup>15</sup> See Water Code §§ 10730.2, 10730.4, 10730.6, 10731.
- <sup>16</sup> See Water Code § 10720.1(d).
- <sup>17</sup> See Water Code § 10726.4.