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Groundwater Regulation on the Rise as Counties Gear Up to Meet Sustainable Management Requirements

The enactment of the Sustainable Groundwater Management Act (SGMA), in conjunction with increasing concern over drought impacts on groundwater supplies, has set the stage for several California counties' recent adoption of expansive groundwater ordinances, regulating groundwater use to an extent not previously seen.

California cities and counties are vested with an array of options for regulating construction of water wells and pumping of groundwater. Pursuant to the police power (Cal. Const. art. XI, § 7), a city or county may adopt a discretionary well permitting scheme authorizing the agency to approve or deny a well permit. Going further, a city, county or special act agency may seek to regulate groundwater use by (1) conditioning issuance of a well permit on a showing that water is available to meet anticipated demand served by the well or (2) restricting the export of groundwater outside the county. Cities and counties undertake this type of groundwater regulation pursuant to the police power; special acts agencies regulate pursuant to the statutory authorization of their enabling act. Cities and counties are now using urgency ordinances to temporarily prohibit construction of new groundwater wells in response to threats to public health or safety.⁽ⁱ⁾ Whether these ordinances conflict with vested water rights remains untested.

As drafted, the SGMA extends the authority to regulate or limit the amount of water that an individual may extract from the groundwater supply to any local agency that becomes a basin's groundwater sustainability agency (GSA). Although the SGMA declares that the exercise of these powers "shall not be construed to be a final determination of rights to extract groundwater from the basin..." it will be difficult to reconcile the two (and absent an adjudication, property rights may be abrogated) in basins with insufficient supplies to serve projected demand. Such regulation has historically been beyond the limits of a city or county's police power. The powers of special act agencies have also typically been limited to imposing pumping charges and requiring certain types of reporting.

Recently, several cities and counties have either approved, considered, or are in the process of implementing ordinances or policies that fall along this spectrum of groundwater regulation. These ordinances are briefly summarized below:

- **Ventura County & City of Ojai (Urgency Ordinance).** On Oct. 28, 2014, citing persistent drought conditions, rapid depletion of county groundwater resources and concerns over future compliance with the SGMA, the Ventura County Board of Supervisors adopted an urgency ordinance indefinitely prohibiting the issuance of permits for construction of new water wells or modification or repair of existing wells in unincorporated Ventura County, until a basin was found not to require a groundwater sustainability plan or, in basins where required, a GSA has adopted a groundwater sustainability plan.⁽ⁱⁱ⁾ The ordinance carved out a few exceptions, including permits for the repair, modification or replacement of existing wells, backup or standby wells that do not initiate any new or increased use of groundwater and permits in areas subject to an existing groundwater adjudication.

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That same day, the City of Ojai passed a nearly identical urgency ordinance prohibiting issuance of permits for construction of new water wells or modification or repair of existing wells in the city's boundaries.⁽ⁱⁱⁱ⁾

- **Kern County (Urgency Ordinance).** The Kern County Board of Supervisors recently considered, but ultimately rejected, an “urgency” ordinance that would have effectively imposed restrictions on groundwater extractions by agricultural users in the Indian Wells Valley by prohibiting any “new” agricultural uses.^(iv) The staff report for the “urgency” ordinance stated its purpose was “[t]o protect the public safety and health of over 27,000 people living in the Indian Wells Valley who are completely dependent on groundwater for domestic and commercial uses.” The county is currently drafting an Indian Wells Valley Land Use Plan that will consider changes to existing agricultural zone classifications in the Indian Wells Valley in hopes of reducing groundwater use.
- **San Luis Obispo County (Urgency Ordinance and Groundwater Export Prohibition).** In September 2014, the San Luis Obispo County Board of Supervisors directed its staff to prepare a groundwater export ordinance that would prohibit groundwater extracted within the county from being used outside county boundaries or used outside of the basin from which it was extracted, subject to certain exceptions. Upon passage of this ordinance, San Luis Obispo County would join the group of approximately 20 California counties with groundwater export ordinances in place; however, this ordinance is notable because it would be one of the few that not only restricts export beyond county boundaries, but also restricts export of water outside the basin of origin.

In 2013, in response to drought conditions and a recent increase in groundwater pumping, the county passed an urgency ordinance establishing a moratorium on new or expanded irrigated crop production, conversion of grazing or dry farm land to irrigated crop production, and new development dependent on a well in the Paso Robles Groundwater Basin, unless these new uses offset their total projected water use by a 1:1 ratio.^(v) Although the ordinance was challenged in court, a San Luis Obispo Superior Court judge recently upheld it, finding that the county was authorized to pass the ordinance.^(vi)

- **Stanislaus County (Well Drilling Ordinance).** In late October, Stanislaus County supervisors adopted an ordinance tightening the rules for well permits, which was proposed in response to the recently passed SGMA. Subject to certain exceptions, the new regulations require applicants to show that new wells won't have a detrimental effect on the county's groundwater resources before being eligible for a well construction permit. The ordinance also requires well owners to submit pumping data to the county at regular intervals and amended some of the terms in the county's existing groundwater regulations to align with the terminology used in SGMA. Stanislaus County was also in the news in 2013 when it became one of the first counties in California to prohibit the export of groundwater.

The consideration and enactment of these new ordinances suggests that some agencies are already seeking to regulate groundwater extractions to the degree they would be entitled to under the SGMA, likely based on their designation as the GSA in the event that no other public agency steps forward. These new developments may also signal that counties will aggressively seek to serve as the GSA for any basins within their jurisdiction. The landscape is sure to evolve as implementation of the SGMA

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proceeds and local agencies continue to search for means to regulate groundwater extractions during this historic drought.

⁽ⁱ⁾ While urgency ordinances pursuant to Government Code section 6585 may only be adopted for a period of 45 days initially, upon the governing board's approval the ordinance may be extended up to two times for a total of two years.

⁽ⁱⁱ⁾ Ventura County's urgency ordinance cites Government Code sections 25123 and 25131, which authorize counties to adopt such ordinances.

⁽ⁱⁱⁱ⁾ The City of Ojai's urgency ordinance cites Government Code sections 36934 and 36937, which authorize cities to adopt such ordinance, as well as Section 65858(a), which authorizes enactment of urgency ordinances with respect to zoning. Specifically, Section 65858(a) provides: "Without following the procedures otherwise required prior to the adoption of a zoning ordinance, the legislative body of a county, city, including a charter city, or city and county, to protect the public safety, health, and welfare, may adopt as an urgency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time."

^(iv) Kern County's draft urgency ordinance, which was not adopted, cited Government Code section 65858(a), described above.

^(v) San Luis Obispo County's urgency ordinance cites Government Code sections 25123, 25131 and 65858. On Oct. 8, 2013, the ordinance was extended (from its initial 45-day period) for 22 months and 15 days, the statutory maximum.

^(vi) In holding for the county, the Court cited *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, which found that the regulation of groundwater falls within the police powers of a local government such as San Luis Obispo County.

This document is intended to provide you with general information regarding California counties' recent adoption of groundwater ordinances. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact an attorney listed in the link provided below or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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