



Fillmore and Piru Basins
Groundwater Sustainability Agency

Groundwater Sustainability Planning Legal Considerations Question and Answer

The Fillmore and Piru Basins Groundwater Sustainability Agency (“Agency”) was formed pursuant to the Sustainable Groundwater Management Act (“SGMA”). Adopted in 2014, SGMA is the first legislative enactment in California that is designed to achieve sustainable groundwater management. It was enacted to halt overdraft and bring groundwater basins into balanced levels of pumping and recharge. SGMA provides for the creation of Groundwater Sustainability Agencies (“GSAs”) that become the local authorities tasked with implementing SGMA. An essential element of SGMA implementation is the development of Groundwater Sustainability Plans (“GSPs”), which establish basin management protocols to achieve sustainability. SGMA is a relatively recent statutory framework, and consequently there is little case law or other guidance to help interpret the law’s provisions. The Agency Board has encountered several legal issues as it develops its GSP and has generated the following “Q and A” to shed light on some of these issues.

(1) What does it mean to “consider” the interests of all beneficial uses and users of groundwater under the Sustainable Groundwater Management Act (SGMA)?

A GSA must ensure that the interests of the relevant stakeholders identified in Water Code section 10723.2 are represented and that their issues/concerns are addressed in the GSP. Relevant stakeholders include, but are not limited to, environmental users of groundwater, surface water users (assuming there is a hydrologic connection between surface and groundwater bodies), and the federal government. (Water Code § 10723.2) GSAs must work with these groups to ensure that issues concerning endangered species, water quality, and overlying water rights are properly represented and considered in implementation of the GSP.

In addition, GSAs must explain their decision-making processes and how public input was used in the development of the GSPs. Specifically, GSPs must include a communication section that provides an explanation of the GSA’s decision making process as well as the GSA’s procedure for engaging the public and encouraging the active involvement of diverse social, cultural, and economic elements of the population within the basin. The GSA must identify opportunities

for this public engagement and inform the public about their progress in implementing the plans (including the status of projects and actions). (Cal. Code. Reg. § 354.10) The California Department of Water Resources will then use this communication section as a basis for determining whether the GSA properly considered the interests of beneficial uses/users of the basin groundwater.

The Agency has met these requirements by soliciting public input and engaging with relevant stakeholders. Several, well-advertised workshops have been hosted to discuss the development of essential elements of the GSP. Staff have also communicated with governmental agencies interested in the GSP development to ensure their input is properly received and considered. The Fillmore and Piru GSA has also made all documents, comment letters and meetings materials available on its website.

(2) Is a groundwater sustainability agency (GSA) required to consider and comply with federal/state laws and regulations, such as the Endangered Species Act and the California Environmental Quality Act?

A GSA must ensure that it complies with all other laws concerning groundwater use. Even where such actions might be “reasonable” under SGMA, violations of federal or state laws are still impermissible.

The Agency has endeavored to comply with all other laws concerning groundwater use. This is a challenging process, as the language of SGMA often mandates compliance with legal principles without defining how to do so. For example, SGMA defines “Sustainable groundwater management” as “the management and use of groundwater in a manner that can be maintained during the planning and implementation horizon *without causing undesirable results.*” (Wat. Code § 10721 (v) [emphasis added].) One of the six “undesirable results” is defined as - “depletions of interconnected surface water that have *significant and unreasonable adverse impacts* on beneficial uses of the surface water” (Wat. Code § 10721 (x) [emphasis added].) However, SGMA does not further define what constitutes a “significant and unreasonable adverse impact” on the uses of surface water. To that end, other state and federal laws, regulations and legal doctrines must be examined for guidance on the types of impacts impermissible under SGMA.

There are two overarching legal doctrines that help guide GSAs in SGMA compliance. The first, the “Reasonable Use Doctrine”, requires that all water be put to reasonable and beneficial use—regardless of the type of underlying water right. (Cal Constitution Art X, sec. 2) This doctrine is inherently flexible and contextually is very fact specific. To that end, GSAs should identify, define and

avoid undesirable results with the goal of achieving a reasonable use of groundwater that prevents waste. The second, the “Public Trust Doctrine”, requires the state to hold in trust designated resources for the benefit of the people. Traditionally applied to commerce and fishing, it has been expanded to include fish, wildlife, habitat, and recreation in navigable waters. The Santa Clara River, which is within the area subject to the GSP that is being developed, has been identified by the U.S. Army Corps of Engineers as a non-navigable water. Thus the Public Trust doctrine does not apply, but its principles have been considered. The Agency’s GSP prioritizes SGMA’s identification of specific undesirable results and directs its focus on their prevention and mitigation.

Of course, these two doctrines are not the sole legal considerations the Agency must take into account. Other existing statutes, such as the Endangered Species Act (“ESA”) and the California Environmental Quality Act (“CEQA”), existed long before SGMA and therefore must also be considered. The ESA specifically prohibits *anyone* from actions that will “take” listed endangered species. “Taking” includes the modification of habitats that might harm a listed species. (16 U.S.C. § 1538.) GSAs should thus develop habitat conservation plans or mitigation programs to protect or restore habitats to compensate for any unavoidable negative impacts to listed endangered species. This also means that

GSA's ought to consider impacts on species that are "potentially at risk" as they develop their GSP.

The California Environmental Quality Act. CEQA requires California's public agencies and local governments to measure the environmental impacts of development projects or other major land use decisions, and to limit or avoid those impacts when possible. CEQA is an arduous statutory framework that requires projects and developments which may produce environmental impacts to undergo a rigorous review to ensure proper mitigation and prevention. (Pub. Resources Code §21000, *et. seq.*) SGMA expressly exempts the development of GSPs from this type of review. GSA's may design their GSPs without undergoing the environmental review process. (Water Code § 10728.6) This aids a GSA in timely preparation of their long-term sustainability plans and places them in range to achieve those plans within the statutory deadline. SGMA does recognize the need for environmental consideration and simply defers the CEQA process to the actual implementation of GSP projects. By doing so, GSA's are not hindered in their initial overall planning process, yet environmental considerations are given their due course before any real GSP projects are carried out.

Agency has documented its consideration of these other statutes within the development of the sustainable management criteria for the GSP and continues to assess the impacts of other existing laws.

(3) Should any adverse impact on groundwater dependent ecosystems (“GDEs”) be addressed in the GSP?

SGMA requires GSAs to describe potential effects on GDEs that may occur or are occurring from any of the groundwater conditions being used to evaluate sustainability. (See 23 C.C.R. §§ 354.26 (a), 354.26 (b)(3).) The impact on GDEs, as well as compliance with other laws, is reviewed by the California Department of Water Resources (“DWR”). To that end, GSAs are advised to evaluate the susceptibility of GDEs to current and future groundwater conditions.

Thresholds/triggers should be used to identify when any conditions may cause adverse impacts to GDEs. A thorough analysis here is required for DWR approval and detailed hydrologic and biological data must support any GSA positions. To date, the Agency’s development of the GSP has complied with these recommendations concerning GDE’s.

Conclusion

The ambitious sustainability goals of SGMA, coupled with the recency of its passing, present a challenging task for GSAs around California. While its force of

law makes it a compelling tool in addressing the state's dire water conditions, the interplay with existing laws and society at large make achieving sustainability a tremendous goal. As SGMA's twenty-year timeline progresses, GSAs will likely face unprecedented social, legal, and political obstacles. The consideration of all stakeholders and their beneficial use of groundwater will be paramount to SGMA's and GSA success.