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The Sustainable Groundwater Management Act: Practical Management Considerations

Effective and efficient groundwater management is overdue for many of California’s groundwater basins. The enactment of the recent Sustainable Groundwater Management Act (“Act”) was a crucial first step. Now comes the challenge of complying with the law.

The Act requires locals to enact sustainable Groundwater Management Plans (“Plan”), but the legislature left key practical issues for future compromise or litigation. For example, in most basins, the Act does not designate which local agency will assume the role of the Groundwater Sustainability Agency (“GSA”) to develop the Plan. It also does not provide for determinations of groundwater rights and how they relate to pumping allocations and obligations to pay for basin replenishment and management. Determining the basin’s sustainable yield and other technical matters may involve considerable controversy.

Local stakeholders must resolve these issues either through negotiated compromise, enforcement by the State Water Resources Control Board, or the courts. Groundwater adjudications will likely be necessary in many basins. For that reason, legislative efforts are under way to develop special rules and procedures to expedite groundwater adjudications. Independent of refinements to the adjudicatory process, groundwater professionals should focus on mediation of groundwater conflicts to achieve consensus for management strategies.

Who Governs?

An early issue will be the identification or creation of the GSA. Local agencies should explore opportunities for shared governance where there are multiple eligible agencies that could fulfill the GSA role. In this respect, the Act allows local agencies to combine powers through the formation of a joint powers agency or a memorandum of agreement.¹ The Act does not, however, extend opportunities for shared governance to nongovernmental stakeholders.² Local agencies might create such opportunities through advisory committees, or through the formation of a watermaster as a component of a groundwater adjudication.

Basin Boundaries

Pursuant to the Act, basins are delineated based upon the designation of basins or subbasins set forth in the Department of Water Resources' Bulletin 118.³ The basin boundaries set forth in Bulletin 118 were not necessarily developed for management purposes, and therefore may not be optimal for effective management in many locales. To address this concern, the Act allows stakeholders to request that the department revise basin boundaries to better facilitate groundwater management.⁴ By January 1, 2016, the department must develop regulations regarding the information required to support such requests.⁵ This process will be an important step to precede Plan development in many basins.

Sustainable Yield and Other Technical Issues

A fundamental goal of the Act is to avoid extractions in excess of a basin's sustainable yield that will ultimately cause "undesirable results."⁶ Determining sustainable yield may be controversial in many basins. Controversy may also develop concerning the merits of technical management options such as groundwater replenishment, storage programs, and other strategies.

As an initial measure to build consensus, the GSA might focus on collaboration respecting a technical study to produce the essential information necessary for future Plan development. Divergent interests that share in the development of the technical study are often more likely to accept the technical findings and resulting management strategies. To facilitate such efforts, the GSA might establish a technical committee populated by participating stakeholders to negotiate the elements of the technical study.

Plan Components

Among other requirements, a Plan must include provisions concerning the basin's physical characteristics and challenges, historic and projected demands, control of saline intrusion, wellhead protection and well abandonment, recharge area protection, abatement and remediation of contaminated groundwater, impacts on groundwater dependent ecosystems, monitoring protocols, overdraft mitigation, and measurable objectives to obtain sustainable groundwater management within a 20-year Planning horizon.⁷ Plans may also include provisions pertaining to groundwater storage, carryover, and voluntary transfers of production allocations. To implement these Plan components, many Plans will need to determine the basin's sustainable yield, establish individual groundwater production allocations, implement replenishment strategies, and impose pump assessments to fund basin replenishment and other solutions.⁸ Such determinations will often invoke controversy among affected stakeholders. The GSA should pursue early and diligent outreach to affected groundwater users to encourage consensus on these subjects.

Groundwater Rights

In practice, balancing basin yield and demands will frequently require reductions in cumulative and individual groundwater production and/or significant assessments to fund replenishment programs. Efforts to assign the burden for these difficult initiatives among competing groundwater users will often be met with claims respecting right priorities. As noted, the Act does not address or resolve groundwater rights. Thus, the GSA will need to resolve such claims through negotiation, litigation, or both.

The GSA may facilitate compromise by structuring the Plan in a manner that respects underlying groundwater rights while affording new opportunities. For example, the GSA might establish different classes of production allocations and distribute financial responsibilities in a manner that reflects underlying groundwater right priorities. Further, groundwater users might be enticed to support the Plan in order to participate in attractive new opportunities included within the Plan. Examples include opportunities to carry over unused production allocations from year to year, storage and conjunctive use programs, and voluntary transfers of production allocations.

Protecting the Plan and Future Conflict Resolution

Once a Plan is developed, the GSA should consider how to protect the Plan from future legal challenge and how to resolve subsequent disputes. The Act allows for the GSA to validate the Plan pursuant to the validation procedures set forth in the Government Code.⁹ This process affords a means to immunize the Plan from future legal challenges pertaining to the Plan. However, a validation action will not define and allocate groundwater rights. Rather, a groundwater adjudication will be necessary if that result is desired.

A groundwater adjudication may be a prudent strategy to achieve finality respecting groundwater rights and Plan durability. Adjudications also benefit from the court's continued jurisdiction to resolve future conflicts pursuant to post-judgment proceedings, thereby avoiding the prospect that a future conflict could nullify aspects of the Plan or otherwise disrupt management.

The downside of many past adjudications has been the substantial time and cost required to complete them. Earnest efforts to garner consensus for a negotiated Plan may reduce the time and costs of future adjudications. Where substantial consensus is achieved, stakeholders can request that the court enter the negotiated Plan in the form of a stipulated judgment among the settling parties. The adjudication can also proceed against objecting parties to bind them to the judgment, as necessary. The greater the consensus, the greater the likelihood of expediting the process. Legislative efforts currently under way to establish a more streamlined adjudicatory process could also substantially expedite the process, if successful.

Conclusion

Local stakeholders will often need to overcome the technical and legal issues discussed above to develop an effective groundwater management Plan that complies with the Act. GSAs should apply diligent efforts to achieve compromise among stakeholders to overcome these challenges. GSAs should also consider the methods discussed herein to ensure long-term Plan durability and efficient resolution of future conflicts.

¹ Water Code § 10723.6(a).

² Water Code § 10723.6(b) allows water corporations regulated by the Public Utilities Commission to participate in a group comprising the GSA but only if the local agencies approve of their participation.

³ Water Code § 10722.

⁴ Water Code § 10722.2.

⁵ Water Code § 10722.2(b).

⁶ Water Code § 10721, paragraphs (t), (u), (v), and (w).

⁷ Water Code §§ 10727.2 and 10727.4.

⁸ Water Code §§ 10726.2 and 10726.4.

⁹ Water Code § 10726.6 providing for validation pursuant to sections 860 et seq. of the Code of Civil Procedure.