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Legislature Passes Historic Groundwater Management Act

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09/08/14

I. INTRODUCTION.

On August 29, 2014, the California Legislature cast the final votes necessary to move three companion groundwater management bills to the Governor's desk. If signed by Governor Brown, the bills will establish the "Sustainable Groundwater Management Act" and comprehensively regulate groundwater for the first time in California's history.

Assembly Bill 1739, together with Senate Bills 1168 and 1319 impose significant new groundwater management responsibilities upon local agencies, and also provide expansive new authority for the State Water Resources Control Board ("State Water Board") to exercise jurisdiction over groundwater extractions.

For certain groundwater basins, the bills require the designation of a groundwater sustainability agency ("GSA"). GSAs will have broad groundwater management powers. Among other things, GSAs may require: **groundwater well registration, measurement of groundwater extractions, and the filing of annual extractions reports. The bills further authorize GSAs to regulate groundwater extractions by imposing well spacing requirements, limiting extractions, and establishing extraction allocations.** The legislation does not apply to adjudicated groundwater basins that are managed by the courts, or to basins deemed by DWR to be low priority.

The bills require GSAs to adopt "groundwater sustainability plans." The plans must set the basin on a course toward "sustainable management" to eliminate adverse groundwater conditions specified as "undesirable results." **To accomplish this objective, the bills require that all high and medium priority groundwater basins, as characterized by the Department of Water Resources ("DWR"), be governed by one or more groundwater sustainability agencies by June 30, 2017. GSAs for high and medium priority basins must adopt a groundwater sustainability plan by Jan. 31, 2022. For basins subject to critical overdraft conditions, the plan must be adopted by Jan. 31, 2020.**

DWR is charged with reviewing the plans for compliance. If a local agency is not designated as a GSA, or if a satisfactory groundwater sustainability plan is not prepared within designated time frames, the State Water Board may intervene, adopt and enforce its own plan for the basin, or trigger a general water rights adjudication.

II. LOCAL MANAGEMENT OBLIGATIONS.

A. Groundwater Sustainability Agencies.

SB 1168 would allow a local agency, which is defined as "a local public agency that has water supply, water management, or land use responsibilities within a groundwater basin," to elect to be a GSA. A combination of local agencies may form a GSA using a joint powers agreement or memorandum of agreement. If there is an area overlying a groundwater basin that is not within the management area of a GSA, the county within which the unmanaged area lies will be presumed to be the GSA for that area, unless the county opts out.

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Local agencies have until January 1, 2017, to elect to become or form a groundwater sustainability agency.

A GSA that adopts a groundwater sustainability plan consistent with the new requirements in SB 1168 would have broad groundwater management powers. Specifically, SB 1168 would authorize GSAs to require groundwater well registration, measurement of groundwater extractions, and the filing of annual extractions reports. SB 1168 would also authorize GSAs to regulate groundwater extractions by imposing well spacing requirements, limiting extractions, and establishing extraction allocations.

B. Groundwater Sustainability Plans.

SB 1168 would require groundwater sustainability plans to include specific information, most notably, measurable objectives to achieve the "sustainability goal" in the basin within 20 years of implementation. SB 1168 defines the sustainability goal as the implementation of one or more groundwater sustainability plans that achieve sustainable groundwater management by ensuring the applicable basin is operated within the sustainable yield.

SB 1168 further defines "sustainable yield" as the maximum quantity of water that can be withdrawn over a period of years without causing an "undesirable result." An "undesirable result" means one or more of the following effects caused by groundwater conditions occurring throughout the basin: (1) chronic lowering of groundwater levels; (2) significant and unreasonable reduction of groundwater storage; (3) significant and unreasonable seawater intrusion; (4) significant and unreasonable degraded water quality; (5) significant and unreasonable land subsidence that substantially interferes with surface land uses; and (6) depletions of interconnected surface water that have significant and unreasonable adverse impacts on beneficial uses of the surface water.

The plan must include monitoring and management for the basin over a 50-year planning horizon, and plans must articulate measurable objectives to be achieved every five years. DWR will review the plans and will have the power to request changes to a submitted plan. The plan must establish measurable objectives, as well as incremental milestones every five years in order to achieve the sustainability goals identified in the plan within 20 years. DWR may grant extensions to groundwater sustainability agencies for up to 10 years upon a request and showing of good cause.

III. STATE BOARD ENFORCEMENT AND OVERSIGHT.

A. DWR REVIEW.

AB 1739 tasks DWR with reviewing groundwater sustainability plans to ensure they comply with the requirements of SB 1168. Further, AB 1739 requires DWR to adopt regulations for evaluating groundwater sustainability plans, the implementation of groundwater sustainability plans, and coordination agreements. AB 1739 also requires DWR to review groundwater sustainability plans every five years.

B. STATE WATER BOARD.

AB 1739 and SB 1319 work together to establish new regulatory authority for the State Water Board. Specifically, these bills allow the State Water Board to designate groundwater basins as probationary basins under certain circumstances. Once designated probationary, the State Water Board may adopt an interim plan for regulating groundwater extractions. **The bills allow the State Water Board to designate a basin as probationary if:**

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1. **after June 30, 2017, no local agency has elected to be a GSA;**
2. **after January 31, 2020, any high or medium priority basin in a critical condition of overdraft has not adopted a GSA for the entire basin;**
3. **after January 31, 2020, for any high or medium priority basin in a critical condition of overdraft, DWR and the State Water Board determine that a GSP is inadequate or a groundwater sustainability program is not being implemented in a manner that is likely to achieve the sustainability goal;**
4. **after January 31, 2022, any high or medium priority basin that is not subject to critical conditions of overdraft, has not adopted a GSA for the entire basin;**
5. **after January 31, 2022, for any high or medium priority basin that is not subject to critical conditions of overdraft, DWR and the State Water Board have determined that a GSP is inadequate and the State Water Board determines a basin is in a condition of long-term overdraft; or**
6. **after January 31, 2025, DWR and the State Water Board determine that a GSP is inadequate and the State Water Board determines that the basin is in a condition where groundwater extractions result in significant depletions of interconnected surface waters.**

If the State Water Board establishes an interim plan for a probationary basin, the interim plan must identify actions necessary to correct conditions of long-term overdraft or a condition where extractions result in significant depletions of interconnected surface waters. **The interim plan must also set a time schedule for the actions to be taken, as well as a description of the necessary monitoring. In addition, the plan may include restrictions on groundwater extraction, a physical solution, and principles for the administration of rights to surface water connected to the basin.**

IV. CONCLUSION.

Governor Brown has until September 30, 2014 to sign these bills into law. There remains substantial opposition to the bills. However, given the active involvement of the Governor's office in developing the bills, the Governor's signature appears likely.

While the bills will comprehensively regulate groundwater for the first time in California's history, many questions remain unanswered. By its own terms, the bills do not determine or quantify water rights. Yet, GSAs are vested with broad power to implement water right cutbacks, limit extractions, and establish extraction allocations. Under existing 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. It is therefore unclear how GSAs will exercise their water right allocation authority, or how groundwater sustainability plans will be developed in areas where water rights priorities are contested or the equities of a proposed management plan are in conflict.

It is also unclear how the burden of water right cutbacks will be allocated, or how the cost of pumping assessments to fund necessary basin replenishment and other management objectives will be achieved. **If a negotiated agreement cannot be reached to resolve such conflicts, the bills suggest affected basins may be subject to State Water Board intervention or a general groundwater adjudication.**

The bills contemplate the creation of new GSAs and the sharing of basin management pursuant to a joint powers agreement, memorandum of agreement, or other legal agreement. However, there may be disputes in the first instance over which local agencies should serve as

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the designated GSA. Indeed, many of the potential agencies likely to serve as GSAs may very well have water rights in dispute.

The effect of these bills may be an increase in groundwater adjudications. History has shown that groundwater adjudications provide valuable water right certainty to stakeholders, and a comprehensive and effective means for managing basins, including the implementation of physical solutions to offset the effect of cutbacks, mechanisms for the purchase of supplemental water supplies for groundwater replenishment, and a local management structure often subject to the continuing jurisdiction of the court. Nonetheless, groundwater adjudications involve complex technical and legal issues, requiring substantial resources and a significant number of years to complete.

Efforts are underway to develop legislation to establish a streamlined adjudication procedure for consideration next year. Significant stakeholder input and public outreach at the outset of any groundwater sustainability plan process will be critical to cost-effectively resolving groundwater disputes, protecting vested water rights, and implementing an appropriate management structure that is responsive to local interests in a timely manner.

How Nossaman Can Help

Nossaman LLP has been a leader in California's water industry for over sixty years. We recognize that the long-term supply of surface water, groundwater, reclaimed water, and desalinated water is critical as resources become scarce throughout the State. Our Water Practice Group represents watermasters, water districts, cities, utilities, developers, agricultural growers and processors, design-builders, operators, and local, regional, and state agencies on a wide range of environmental, financing, water law, and water utility issues, including related litigation. We understand California and federal law and regulations that impact water from every possible perspective, which enables us to serve our clients' diverse needs effectively.

Nossaman has long-standing expertise in the area of water rights. We represent clients in major groundwater adjudications and have handled numerous proceedings before the California State Water Resources Control Board. Our water attorneys have dealt with issues involving every conceivable water right, including appropriative rights, riparian rights, overlying rights, prescriptive rights, and pueblo water rights. We negotiate and/or obtain judicial declarations of water rights, participate in extensive multi-party negotiations concerning physical solutions relating to the allocation of water and water rights, and litigate the matters that cannot be solved through negotiations. We also negotiate the sale, lease, or transfer of water rights and provide legal opinions to help document water right positions.

We also assist in the management of groundwater and have been involved in the formation of AB 3030 plans and other groundwater management programs for numerous clients. We strategize and help to develop conjunctive use programs and work to get the necessary environmental permits for these programs. Additionally, our water lawyers counsel clients on controlling the impact of water quality on water rights, management of safe yield, implementation of judgments, and on the formation of water banks.