

# Swing, Pendulum, Swing: California's Historic Drought and Unprecedented Responses

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## INTRODUCTION

Most know by now that California is facing one of its driest years in recorded history. Yet droughts are not new to California, and to put things in context we can be thankful that current drought conditions are only as bad as they are. The “dustbowl drought” of the 1920s and 1930s nearly crippled the state. And even that could have been worse: tree-ring data show that centuries ago California and other western states were gripped by mega-droughts spanning 20 to 50 years.

Water is said to be our most critical natural resource (try going without it for a couple days). Ironically, however, it is something most Californians have taken for granted. But that dynamic is now beginning to change. Water education is catching up and catching on, and the conundrum we face with increasing demand and shrinking supply is practically impossible to ignore. Recent projections show the statewide population growing by almost 10 million over the next 20 years, to a total of 45 million. But the supply curve is going the other way. Over the last 10 years, various legal and regulatory decisions have substantially decreased the amount of water available from the State's largest water supply projects, the State Water Project (SWP), the federal Central Valley Project (CVP), and the Colorado River.

The SWP and CVP combined deliver water to more than 25 million people throughout California and to millions of acres of prime farmland in the Central and San Joaquin Valleys. Both projects require moving water through the Sacramento-San Joaquin Delta (the Delta), which has been subject to an increasing set of operating and delivery restrictions to protect in-Delta water users, water quality, and rare and endangered fish species in the Delta. Recent restrictions have resulted from biological opinions

issued under the federal Endangered Species Act by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to protect Delta smelt and anadromous salmon. Delta water supplies are now also the subject of various state and federal court litigation. Supplies from the Colorado River are facing similar pressures. California shares the Colorado River with other states whose reliance on the system has increased as their populations have grown. Whereas California used to rely on “surplus” water from the Colorado, that surplus is gone, and the state must now live within its annual allotment of 4.4 million acre-feet per year. The Quantification Settlement Agreement (QSA), California's plan for the allocation, transfer, use, and conservation of its share of Colorado River water, was attacked through state and federal litigation for over a decade. Fortunately, the QSA withstood challenge, but the availability and reliability of Colorado River supplies continue to decline as problems relating to climate change, water quality, endangered species, and legal issues become more prevalent.

Add multi-year drought conditions to the equation, and suddenly everyone is talking about water. And for good reason. The winter and spring seasons of 2012-2013 were below normal and many knew “things were going to get bad in California” if the state did not have good rain and snowfall numbers in late 2013. But the rain and snow did not come. Indeed, the numbers were so dismally low that the California Department of Water Resources (DWR) has declared the 2013-2014 period as the driest year in recorded history. In early 2014, a zero percent allocation was initially declared for the SWP, and the final allocation was bumped to a mere five percent. Vast portions of the CVP will go entirely without deliveries this year. As of early September, Lake Oroville (the largest SWP reservoir) was at 31 percent of capacity and Lake Shasta (the largest CVP reservoir) was at 28 percent of capacity. The San Luis Reservoir, a key south-of-Delta supply and regulating pool for the SWP and CVP, holds only 19 percent of capacity.

Throughout the state, many watersheds and surface water supplies are much drier than normal. Some areas are badly parched and others are literally out of water. In response, the State Water Resources Control Board (State Board) has taken regulatory action to limit diversions from certain river systems. And with less surface water available, many local agencies, businesses, and individuals are ramping up production from already

strained or overdrafted groundwater supplies. For those who rely on groundwater, some have reached the bottom of the well, and there is nothing left to pump. This in turn has brought sweeping legislative reform to California's groundwater management laws. In addition, the drought has prompted aggressive state action to promote recycled water use and increase water conservation.

Current drought conditions have brought California to a crossroads. While opinions vary on which way to go, most agree that clear direction is needed. Big steps are being taken already, thrusting key legal and policy issues into the spotlight.

## **THE GOVERNOR'S DECLARATION AND PROCLAMATION OF DROUGHT EMERGENCY**

On January 17, 2014, Governor Jerry Brown declared a state of drought emergency (the Declaration) in response to record low water levels in California's rivers and reservoirs and an abnormally low snowpack. The Declaration took several extraordinary steps, including the following:

- Directed local urban water suppliers and municipalities to immediately implement local water shortage contingency plans and update urban and agricultural water management plans;
- Required DWR to undertake a statewide water conservation program to encourage Californians to reduce water use by 20 percent;
- Directed the State Board to expedite the processing of water transfers to enable the efficient use of water;
- Instructed DWR and the State Board to accelerate funding for water supply enhancement projects that are capable of breaking ground this year;
- Directed the State Board to place state water right holders on notice that they may be required to cease or reduce water diversions;
- Required DWR to evaluate changing groundwater levels, land subsidence, and agricultural land following as the drought persists and to provide a public update by April 30, 2014, to identify groundwater basins with water shortages;
- Directed the California Department of Food and Agriculture to connect farmers to state and federal programs for assistance during the drought; and
- Required the Governor's Drought Task Force to develop a plan to provide emergency food, financial assistance, and unemployment services in communities expected to suffer high levels of unemployment as a result of the drought.

The Governor's Declaration also exempted the state from compliance with aspects of water quality plans and the California Environmental Quality Act (CEQA) when undertaking certain actions necessary to make water immediately available during the drought. For example, the Declaration suspends CEQA from applying to the State Board's approval of petitions requesting water transfers and exchanges between users within the SWP and CVP. It also suspends CEQA from applying to State Board decisions to modify reservoir release requirements or diversion limitations in place to implement a water quality control plan.

On April 25, 2014, the Governor issued a Proclamation of a Continued State of Emergency (the Proclamation) due to persisting record-low water conditions and in anticipation of extended dry months throughout the summer. The Proclamation builds upon the January drought Declaration, and strengthens the state's ability to effectively manage water resources while calling on all Californians to redouble their efforts to conserve water. The Proclamation moved beyond the Declaration by further waiving CEQA compliance for certain actions taken by state agencies. Specifically, the Proclamation suspends CEQA to allow the following:

- Processing of DWR and/or State Board requests to transfer water to areas of need;
- Implementation of water reduction plans to reduce potable water usage for outdoor irrigation at recreational facilities and large institutional complexes;
- Immediate monitoring of endangered species (such as the Sacramento River's winter-run Chinook salmon) by the Department of Fish and Wildlife;
- Implementation of projects by DWR to benefit fish and wildlife impacted by the drought, including certain projects in priority watersheds designed to protect threatened and endangered species;
- Implementation of pump-back water deliveries by DWR through SWP facilities on behalf of water districts;
- Adoption of statewide general waste discharge requirements by the State Board to facilitate the use of recycled water and reduce demand on potable supplies;
- Provision of DWR and State Board assistance to public agencies and private water companies to establish temporary water supply connections;

- Implementation of an agricultural assistance program by the California Department of Food and Agriculture; and
- Adoption of emergency regulations by the State Board relating to water conservation.

In addition, the Proclamation suspends CEQA for local agency actions necessary to implement measures recommended by the Department of Public Health to abate acute drinking water shortages, subject to certain conditions. The Proclamation also requires the State Board to direct any urban water suppliers that are not already implementing drought response plans to limit outdoor irrigation and other wasteful water practices, and to request an update from urban water suppliers on the effectiveness of their current actions to reduce water usage.

### THE GROUNDWATER PUZZLE

Although California enacted a statewide surface water law in 1914 requiring permits for appropriative surface water diversions and use, the state has never broadly regulated groundwater. This is unusual because nearly all other states have some form of statewide groundwater regulation. The drought has forced many water users to seek alternative supplies, and in many parts of the state this has involved pumping more native groundwater, or using more water previously stored in a regional or local groundwater banking program. Yet increased production from a basin and/or multiple “calls” from a groundwater bank can lead to rapid groundwater level declines, competing demands for pumping and conveyance capacity, and water quality concerns. These issues, particularly without an enforceable management structure, can spark disputes between and among landowners, water providers, and other public agencies.

Several features of California groundwater law have contributed to the problem. First, landowner based rights to groundwater (overlying rights) are correlative, meaning in theory that each has a shared priority to make reasonable and beneficial use of the safe yield. However, because correlative rights are unquantified and any needed reductions are based on a standard of reasonableness that varies with the facts and circumstances of each basin, they create great uncertainty among landowners as to which pumpers will need to cut back and how much they will need to cut back when supplies are not sufficient to meet the collective demand. Furthermore, the threat of prescription pits overlying rights against non-overlying rights, such as those held by cities and other public water purveyors. This fosters a system where there is little information on pumping, it is unclear who

has to cut back in a shortage, and thus pumpers have an incentive to keep pumping to protect their rights. Often these conditions can lead to overdraft and the many undesirable effects that result from overdraft. Ultimately, litigation is the only way to sort this out. While groundwater adjudications can have the positive effect of providing certainty and an efficient and effective management structure, they are very expensive and typically take a decade or more to resolve.

In early March 2014, the Governor’s Office of Planning & Research (OPR) sought stakeholder input on actions to improve groundwater management in California, consistent with the Governor’s January 27 California Water Action Plan (Action Plan). A major objective of the Action Plan is to establish a legal framework to expand groundwater storage capacity and improve groundwater management. The Action Plan calls for state legislation to provide local and regional agencies with comprehensive groundwater management authority, and proposes allowing the state to temporarily assume groundwater management responsibility if local agencies fail to achieve “sustainable management.” OPR initiated a public process and sought written comments on a wide variety of questions relating to the Action Plan and a new approach for statewide groundwater management.

In March and April, OPR organized sustainable groundwater management workshops in Sacramento, facilitated by the California Environmental Protection Agency, the California Department of Food and Agriculture, and the California Natural Resources Agency. The workshops were attended by a diverse group of water leaders from the legislature, state and local government, agribusiness, water associations, and other interests. The discussions focused on (1) the potential definition of “sustainable groundwater management,” and how to measure progress and success in that arena; (2) tools, authorities, and incentives to help local agencies manage groundwater; (3) key funding mechanisms, barriers, and solutions; and (4) the state’s role in assisting local agencies with groundwater management. In response to OPR’s request for written comments, position papers were submitted by the Association of California Water Agencies, California Water Foundation, National Heritage Institute, Planning and Conservation League, Valley Agricultural Water Coalition, and others.

Soon after the close of the OPR workshop and comment process, on April 30, 2014, DWR released a report concluding that groundwater levels throughout the state had reached all-time historic lows and that many areas lacked adequate groundwater monitoring. The key conclusions of DWR’s report were as follows:

**1. Groundwater levels throughout the state have reached all-time historic lows.**

- Groundwater levels have decreased statewide since spring 2013;
- Groundwater levels have decreased even more significantly since spring 2010;
- Groundwater levels have dropped most significantly in the San Francisco Bay Hydrologic Region, the South Lahontan and South Coast areas, and the San Joaquin Valley;
- Nevada, Placer and El Dorado counties have the greatest concentration of well deepening activity;
- Thirty-six alluvial groundwater basins in the state serve as the primary water source for their regions and are most likely to incur drought-related shortages; these basins are in the North Coast, Central Coast, Sacramento River, Tulare Lake, and South Coast regions and serve a total population of about 6.18 million.

**2. Areas throughout the state lack adequate groundwater monitoring.**

- Groundwater monitoring is critical for maintaining the health of basins, especially in drought conditions;
- Only 169 out of 515 alluvial groundwater basins in the state are fully or partially monitored under the California Statewide Groundwater Elevation Monitoring (CASGEM) program;
- Of the 126 high and medium priority groundwater basins, 40 are not monitored under CASGEM;
- Some basins are partially monitored but have data gaps;
- The lack of monitoring and absence of groundwater management plans subject these basins to increased stress under drought conditions.

The DWR report analyzed data from the CASGEM program, the Water Data Library, the draft Bulletin 160 California Water Plan Update 2013, and well drillers' logs submitted to DWR. The report also notes that DWR is working with NASA and NOAA to evaluate land subsidence and agricultural land following using satellite monitoring. DWR is required to issue a follow-up report by November 30, 2014, which will address areas where the drought has had significant impacts on groundwater resources.

**CALIFORNIA GROUNDWATER LEGISLATION – BABY STEPS TO FULL SPRINT**

As part of the November 2009 extraordinary legislative session, a new water law was enacted (SBX7-6, Water Code 10920 et seq.) which created the California Statewide Groundwater Elevation Monitoring (CASGEM) program. For the first time in state history, SBX7-6 established a requirement for local monitoring agencies to coordinate with DWR to collect and report groundwater elevation data that must be made available to the public. If local agencies do not volunteer or if they otherwise fail to perform the groundwater monitoring functions, DWR is authorized to assume those functions and the local agencies become ineligible for water grants or loans from the state. Many considered SBX7-6 to be the first “baby step” in what *some day* might lead to *some form* of a statewide groundwater management program. Yet few believed the baby would be sprinting like an NFL wide receiver in just a couple of years.

In Spring 2014, around the time OPR was conducting its public workshop and comment process discussed above, two bills swept into the legislative process that proposed to change California groundwater law as we have known it for the last 100 years. Senate Bill 1168 (Pavley; D-Agoura Hills) and Assembly Bill 1739 (Dickinson; D-Sacramento) would require local agencies to develop groundwater sustainability plans and create new enforcement tools for managing groundwater resources. SB 1168 and AB 1739 conveyed the same message: the state's current groundwater management system is broken.

In late August, after various amendments, and a last minute gut-and-amend to Senate Bill 1319 (Pavley, D-Agoura Hills), the Legislature passed SB 1168, AB 1739, and SB 1319 as a package to establish the Sustainable Groundwater Management Act. The legislation was signed by the Governor on September 16, 2014.

**SUMMARY AND KEY COMPONENTS OF THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT**

The Sustainable Groundwater Management Act (the Act) declares that groundwater is a critical natural resource for the state and must be sustainably managed. The Act defines “sustainable groundwater management” as the management and use of groundwater in a manner that can be maintained during a 50-year planning and implementation horizon without causing “undesirable results,” such as “significant and unreasonable” lowering of water levels, reduction in storage capacity, seawater intrusion, degraded water quality, land subsidence, or depletions of interconnected surface water. The Act also states that sustainable management best occurs at the local level, but provides authority for state management when local agencies are unwilling or unable

to implement the new requirements. For purposes of the Act, groundwater does not include subsurface water that flows in known and definite channels, which in large part is already subject to the permitting jurisdiction of the State Board.

### **A. Application**

The Act requires DWR to categorize each groundwater basin in the state, as identified and defined in DWR's Bulletin 118, as high, medium, low, or very low priority by January 31, 2015. All basins designated as high or medium priority *and* also designated in Bulletin 118 as being subject to critical conditions of overdraft must be managed under a groundwater sustainability plan or plans in accordance with the Act by January 31, 2020. All basins designated as high or medium priority *but not* also designated in Bulletin 118 as being subject to critical conditions of overdraft must be managed under the Act by January 31, 2022. Basins designated by DWR as low and very low priority are not subject to the requirements of the Act, but are "encouraged" to be managed under groundwater sustainability plans.

Certain adjudicated areas, and local agencies that conform to the requirements of those adjudications, are expressly exempt from the Act, subject to ongoing reporting requirements. To the extent authorized under federal or tribal law, the Act applies to Indian tribes and the federal government, but the Act provides that federally reserved water rights to groundwater "shall be respected in full." The Act authorizes a groundwater sustainability agency to regulate, limit or suspend groundwater extractions from individual wells, but it does not authorize such agencies to make a binding determination of the water rights of any person or entity.

### **B. Establishment of Groundwater Sustainability Agencies**

The Act authorizes any local agency or a combination of local agencies overlying a basin to become a groundwater sustainability agency for that basin. A local agency is defined as a public agency having water supply, water management or land use responsibilities within the basin. Where a combination of local agencies seeks to form a single groundwater sustainability agency, it must be done pursuant to a joint powers agreement or other legal agreement. A water corporation regulated by the California Public Utilities Commission may participate in a groundwater sustainability agency formed by a combination of local agencies, but the local agencies must agree. For some areas of the state, specific agencies that already have been created by statute to manage groundwater are deemed by the Act to be the exclusive groundwater sustainability agencies within their respective boundaries, although such agencies

may opt out of that role by providing notice to DWR. In that case, any other local agency or agencies may notify DWR of an election to be the groundwater sustainability agency in accordance with required procedures.

Any local agency or agencies electing to be a groundwater sustainability agency must first hold a noticed public hearing in the county or counties overlying the basin, and must submit a notice of intent to DWR describing the proposed boundaries of the basin (or portion thereof) that the agency or combination of agencies intends to manage. Within 30 days of electing to be or forming a groundwater sustainability agency, the agency must notify DWR, and provide a list of "interested persons" and an explanation of how their interests will be considered in the development and implementation of the agency's sustainability plan. Under the Act, interested persons include: agricultural water users; domestic well owners; municipal well owners; public water systems; local land use planning agencies; environmental users of groundwater; users of surface water with a hydrologic connection to groundwater; federal agencies; affected California Native American Tribes; disadvantaged communities; and entities monitoring and reporting groundwater elevations under the CASGEM program.

### **C. Basin Coverage Under Groundwater Sustainability Plans**

The Act identifies a clear legislative intent that the entirety of each high and medium priority groundwater basin must be covered by one or more groundwater sustainability plans. In other words, there can be no "dead zones" or unmanaged areas. In this regard the Act provides that a basin plan may be: (1) a single plan covering the entire basin developed and implemented by one groundwater sustainability agency; (2) a single plan covering the entire basin developed and implemented by multiple groundwater sustainability agencies; or (3) multiple plans implemented by multiple groundwater sustainability agencies and coordinated pursuant to a single coordination agreement that covers the entire basin. If multiple coordinated plans are prepared to cover a basin, the groundwater sustainability agencies must ensure that the plans utilize the same data and methodologies for developing assumptions regarding groundwater elevations, groundwater extractions, surface water supplies, total water use, changes in groundwater storage, water budget, and sustainable yield.

The Act mandates that in less than three years—by June 30, 2017—every portion of a high or medium priority basin must be covered by the boundaries of at least one groundwater sustainability agency. If an area within a basin is not within the management area of a groundwater sustainability agency, the county within which the unmanaged area lies is presumed to

be the sustainability agency for that area, unless the county opts out of that role by notifying DWR. If an entire basin is not covered by one or more groundwater sustainable agencies by the June 30, 2017 deadline, groundwater extractions in that area become subject to specific reporting requirements, and the State Board may designate the basin as a “probationary basin” and step in to adopt an interim plan for the basin.

#### **D. Contents of Groundwater Sustainability Plans**

Groundwater sustainability plans must include the following components:

- The physical setting and characteristics of the aquifer system underlying the basin;
- Measurable objectives, and interim milestones in five-year increments to achieve the sustainability goal in the basin within 20 years of implementation;
- A planning and implementation horizon, defined by the Act as a 50-year time period over which a groundwater sustainability agency determines that plans and measures will be implemented in a basin to ensure it is operated within its sustainable yield;
- Components relating to the monitoring and management of groundwater levels; groundwater quality, inelastic land surface subsidence, and changes in surface flow and surface water quality that directly affect groundwater levels or quality or are caused by groundwater extraction in the basin; mitigation of overdraft; how recharge areas contribute to basin replenishment; and surface water supplies used or available for groundwater recharge or in lieu use;
- A summary of monitoring sites, type of measurements, and frequency of monitoring various factors;
- Monitoring protocols designed to detect changes in groundwater levels, groundwater quality, inelastic surface subsidence, and flow and quality of surface waters that directly affect groundwater levels or quality or are caused by groundwater extractions in the basin; and
- A description of how applicable county and city general plans have been considered and a description of the various adopted water resource-related plans and programs within the basin and an assessment of how the groundwater sustainability plan may affect such other plans and programs.

In addition, groundwater sustainability plans shall include basin-specific measures where appropriate, such as:

- Control of saline water intrusion;
- Wellhead protection and recharge areas;
- Migration of contaminated groundwater;
- Well construction, abandonment and destruction programs and policies;
- Activities and opportunities for conjunctive use;
- Measures addressing cleanup of groundwater contamination, groundwater recharge, diversions to storage, conservation, water recycling, conveyance, and extraction projects;
- Efficient water management practices;
- Efforts to develop relationships with state and federal regulatory agencies;
- Processes to review land use plans and efforts to coordinate with land use planning agencies to assess activities that potentially create risks to groundwater quality or quantity; and
- Impacts to groundwater dependent ecosystems.

#### **E. Adoption of Groundwater Sustainability Plans and DWR Review**

Prior to initiating the development of a groundwater sustainability plan, the sustainability agency or agencies must notify the public, DWR, and any city or county located within the area to be covered by the plan about how interested parties may participate in the plan's development and implementation. The sustainability agency must also encourage the active involvement of diverse social, cultural, and economic communities within the groundwater basin prior to and during the development and implementation of the plan.

A groundwater sustainability plan may only be adopted after a public hearing held at least 90 days after notice was provided to any city or county within the area affected by a groundwater sustainability plan. Upon adoption of a plan, the groundwater sustainability agency must submit the plan to DWR for review. DWR must post the plan on its website and provide a 60-day public comment period. In addition, DWR must evaluate and issue an assessment of the plan within two years of submission and may include corrective actions to any perceived deficiencies in the plan. The Act also allows an adopting agency to file a validation action on its plan 180 days after the plan is adopted.

## F. Alternatives to Groundwater Sustainability Plans

The Act provides local agencies with alternatives to preparing a new groundwater sustainability plan, but the options are limited to:

- A groundwater management plan prepared in accordance with Water Code 10750 et seq. (AB 3030) or other law authorizing groundwater management;
- Management pursuant to an adjudicated action; or
- A professional analysis of basin conditions that shows the basin has operated with sustainable yield for a period of at least 10 years.

An alternative plan must be submitted to DWR no later than January 1, 2017 for an assessment and evaluation by DWR to determine if the alternative satisfies the objectives of the Act.

## G. Powers of Groundwater Sustainability Agencies

Groundwater sustainability agencies that adopt sustainability plans will have broad new powers and authorities. The agencies “may do anything necessary or proper” to carry out the purposes of the Act, which includes the authority to:

- Adopt rules, regulations, ordinances, and resolutions;
- Conduct investigations to determine the need for groundwater management, including investigations of surface waters, groundwater, and surface and groundwater rights, and inspections of property or facilities by consent or through an inspection warrant;
- Propose, update, and impose fees, and levy groundwater charges;
- Require registration of and impose requirements on wells and other groundwater extraction facilities;
- Require water measuring devices (i.e., meters) on all groundwater wells within the agency’s boundaries;
- Acquire, use, and dispose of real and personal property, such as land, rights-of-way, water rights, structures and infrastructure;
- Import surface and/or groundwater into the agency, conserve and store water within or outside the agency, and purchase, transfer, deliver or

exchange water or water rights of any type with any person to carry out any purposes of the Act;

- Transport, reclaim, purify, desalinate, treat, or otherwise manage and control polluted water, wastewater, or other waters for subsequent use;
- Control groundwater extractions by regulating, limiting, or suspending extractions from individual groundwater wells or wells in the aggregate;
- Authorize temporary and permanent transfers of groundwater extraction allocations within the agency boundaries; and
- Enforce violations of the Act or agency rules, regulations, ordinances or resolutions, including the ability to impose civil penalties and bring legal actions.

The Act also provides groundwater sustainability agencies with broad financial powers. For example, sustainable agencies will be authorized to impose a wide variety of fees covering matters such as: permitting; groundwater extractions; preparation, adoption, and amendment of groundwater sustainability plans; investigations; inspections; compliance; enforcement; program administration; reserves; acquisition of lands or other property, facilities or services; and water supply, production, treatment or distribution.

## H. State Intervention

While the Act clearly acknowledges that sustainable groundwater management occurs best at the local level, if local agencies are either unwilling or unable to implement the new requirements of the Act, the state may step in. To this end, the Act provides the State Board with broad discretion to determine that a high or medium priority basin should be designated as a “probationary basin” and thereby trigger State Board management authority. When state action is required, the Act provides various mechanisms to return local control whenever feasible.

## I. CEQA Implications

The Act provides that the preparation and adoption of groundwater sustainability plans is exempt from CEQA, but any project that would implement actions taken pursuant to an adopted plan are *not* exempt from CEQA.

## ISSUES UNRESOLVED BY THE NEW ACT

The Sustainable Groundwater Management Act will influence and affect other areas of California water law and policy. One key area is the legal intersection of water rights, water supply planning, and land use decision making. The drought creates legal, practical, and policy

issues for land use planning. With the economy improving and entitlements and permitting on the rise, developers are seeking to demonstrate that they have sufficient water supplies for new construction. Various documents and analyses, prepared under various laws, are used to show water supply sufficiency for new projects. Examples include Urban Water Management Plans, Water Supply Assessments, Written Verifications, and water supply analyses under CEQA—all of which can be lightning rods for challenges to proposed development. These analyses generally address whether sufficient water supplies will be available to serve the proposed development and other existing and planned future uses over a 20-year projection during normal, single-dry and multiple dry periods, and whether the uses of surface water, groundwater, and other supplies identified to serve a project are likely to have a significant environmental impact on water resources. Drought conditions typically widen the divide between water resources and development, and often complicate a developer's ability to demonstrate water supply sufficiency under applicable legal standards.

The Act seeks to address this relationship. Yet, whether by design or oversight, the Act only scratches the surface of the inevitable overlap of a "groundwater sustainability plan," other water supply sufficiency determinations, and the land use decision-making process.

Current general planning laws declare the importance of having close coordination and consultation between water supply agencies and land use approval agencies to ensure proper water supply planning for projects resulting in increased water demands. (Govt. Code § 65352.5(a)-(b).) For the most part, this coordination process is found in the requirement that a city or county, prior to adopting or substantially amending its general plan, must refer the proposed action to the public water system that serves water to customers within the area covered by the proposal. (Govt. Code § 65352(a)(7).) In turn, the public water system is required to submit the current versions of its Urban Water Management Plan (UWMP), Capital Improvement Plan, and other water-related information to the city or county, including:

- A description of the source(s) of the total water supply currently available to the water provider by water right or contract, taking into account historical data concerning wet, normal, and dry runoff years;
- A description of the quantities of surface water and groundwater purveyed by the water provider in each of the previous five years;
- A description of all proposed additional sources of water for the water provider, including the

estimated quantities and dates by which those additional supplies are expected;

- A description of the total number of customers currently served by the water provider according to different categories of water users;
- A quantification of the water provider's expected reduction in total water demand for each category of water customer associated with future implementation of water use reduction measures identified in the provider's UWMP; and
- Any additional information relevant to determining the adequacy of existing and planned future water supplies to meet existing and planned future demands. (Govt. Code § 65352.5(c).)

A similar requirement is for cities and counties, when adopting or substantially amending a general plan, to use "as a source document" any UWMP submitted by the public water provider, presumably for purposes of preparing the CEQA analysis related to the proposed land use action. (Govt. Code § 65302.2.)

The Act amends the Government Code to require that cities and counties also consider any groundwater sustainability plan adopted under the Act that applies to the area affected by the city or county general plan. While this appears to be a sensible requirement, the Act does not address several other related issues.

For example, both UWMPs and the new groundwater sustainability plans are required to include detailed information and analyses regarding basin conditions, management efforts, and the sufficiency of groundwater supplies to serve existing and projected demands. However, different standards apply to these different planning documents, and they often will be prepared by different agencies. Despite the potential for inconsistent information, analyses, conclusions, and timing of preparation, the Act does not amend the UWMP Act to require the findings of a groundwater sustainability plan to be included within, relied upon, or accounted for in preparing an UWMP. Similarly, the Act does not require an agency developing a groundwater sustainability plan to consider the groundwater information, analyses or conclusions contained in a duly adopted UWMP. If the information and analyses of a UWMP and a groundwater sustainability plan are not in perfect harmony, the Act does not address whether a city or county must or should choose one over the other in preparing its general plan. The Act does provide that a groundwater sustainability plan does not supersede the land use decision making of a city or county, but it does not provide guidance on how the city weighs the evidentiary strength of both the UWMP and a sustainability plan. Thus, the potential for conflict and difficulties for cities or counties in charting an



analytical path are heightened by the new requirements of the Act.

In a similar vein, the Act does not address the relationship between groundwater sustainability plans and project-level water supply sufficiency determinations made by retail water providers under the Water Supply Assessment (WSA) and Written Verification (WV) statutes. The WSA statute (commonly referred to as “SB 610”) and CEQA require a city or county undertaking CEQA review for certain projects defined by Water Code section 10912 to request a WSA from the public water system that will provide retail water service to the project. (Water Code § 10910(b); Pub. Res. Code § 21151.9.) The following types of projects trigger the need to prepare a WSA:

1. A residential development of more than 500 units;
2. A business/shopping center with more than 1,000 employees or more than 500,000 square feet of floor space;
3. A commercial office building with more than 1,000 employees or more than 250,000 square feet of floor space;
4. A hotel/motel with more than 500 rooms;
5. An industrial/manufacturing/processing plant or industrial park with more than 1,000 employees, encompassing more than 650,000 square feet of floor space, or occupying more than 40 acres of land (provided, until January 1, 2017, a photovoltaic or wind energy generation facility is not a project that requires a WSA if the facility would demand no more than 75 acre-feet of water annually);
6. A mixed-use development project that includes one or more of the projects specified in subsections (1) through (5) above;
7. A project that would demand an amount of water equivalent to, or greater than, the amount of water required by a 500 dwelling unit project; or
8. For a supplier with 5,000 or fewer connection, a project that will increase the number of connections by 10% or more. (Water Code § 10912(a)-(b); State CEQA Guidelines § 15155.)

Among other requirements, a WSA must provide comprehensive information and analyses regarding groundwater basin conditions, adjudicatory and/or management efforts regarding groundwater resources, and groundwater sufficiency. (Water Code § 10910(f).) Once prepared and adopted by the public water system, the WSA must be provided to the city or county as the CEQA lead agency and included in the CEQA document

being prepared for the proposed project. Based on the WSA and other evidence, the city or county must determine whether total projected water supplies, including groundwater, are sufficient to serve the project in addition to existing planned future uses. (Water Code § 10911(b)-(c).) The WSA can also be used to evaluate a project's potential environmental impacts to groundwater resources under applicable CEQA standards.

The WV statute (commonly referred to as “SB 221”) requires a city or county to condition its approval of a development agreement or tentative map that includes a “subdivision” (a proposed residential development of more than 500 units) on the requirement that a sufficient water supply will be available to serve the project. (Govt. Code §§ 65867.5; 66473.7.) Proof of a sufficient water supply must be based on a WV prepared by the public water system that will provide retail water service to the project. Like WSAs, a WV must provide comprehensive information and analyses regarding groundwater basin conditions, adjudicatory, and/or management efforts regarding groundwater resources, groundwater rights, and groundwater sufficiency. (Govt. Code § 66473.7(c), (h).) Moreover, the WV statutes expressly provide that information and analyses from an UWMP and/or WSA can be used as evidence in support of the WV. (Govt. Code § 66473.7(c).)

However, the Act does not amend the WSA statute, the WV statute, or CEQA to expressly require that the findings of a groundwater sustainability plan be included within, relied upon, or accounted for in preparing a WSA, WV, or water supply analysis under CEQA. Consequently, a number of questions unanswered by the Act arise: Is a WSA, WV, or CEQA analysis that fails to account for the framework and conclusion of a duly adopted groundwater sustainability plan invalid per se? Conversely, is a WSA, WV, or CEQA analysis that incorporates the findings of a groundwater sustainability plan valid per se for purposes of the information and conclusions regarding groundwater management, groundwater sufficiency, and potential groundwater impacts? If the information, analyses, or conclusions of a WSA, WV, or CEQA analysis are inconsistent with those of an adopted groundwater sustainability plan, how will those inconsistencies be resolved?

On this issue, the Act could signal an important shift in the traditional land use decision-making process. When the WSA and WV statutes were adopted in 2001, both included express provisions that gave cities and counties the final say in whether sufficient water supplies exist to serve a proposed project. (See Water Code § 10911(c); Govt. Code § 66473.7(b)(3), (f).) Those provisions were specifically included to ensure that water agencies would not be empowered with a decision that ultimately could determine whether or not a land use decision is approved.

Under the Act, when a city or county proposes to adopt (or substantially amend) its general plan, a groundwater sustainability agency (which could be the local water supply agency) must provide a report on the “*anticipated effect*” of the proposed land use action on the groundwater sustainability plan. In preparing a sustainability plan, the Act requires the plan to “take into account” the most recent planning assumptions stated in local general plans of jurisdictions overlying the basin. But this does not require a sustainability plan to use the same planning assumptions as the general plans, nor does it provide a mechanism to prevent the two documents from repeatedly chasing and potentially working at odds with each other. Thus, the evidentiary effect of the sustainability agency’s report and whether the city or county acting as the lead agency under CEQA must or should agree with the findings of the sustainability agency are not resolved by the Act. On the one hand, the Act states that a sustainability plan shall not be interpreted as superseding the land use authority of cities and counties or their general plans. On the other hand, the Act requires the groundwater sustainability agency to report on the anticipated effect of the general plan proposal on the 50-year sustainability plan. Whether groundwater management agencies could seek to use the Act as a trump card or as leverage in certain land use decisions by cities and counties remains to be seen.

The opposite effect is also possible. Assuming a city or county wants to rely upon and incorporate the findings of a groundwater sustainability plan, it must beware the fruit of a poisonous tree. This potential complication has arisen in connection with the relationship between UWMPs and project-specific water supply analyses. On the one hand, WSAs, WVs, and CEQA analyses can be buttressed by the information and conclusions of a current UWMP. On the other hand, if the legal sufficiency of the UWMP has been challenged or if the UWMP is otherwise deficient, subsequent project-specific analyses can get caught in the crossfire. As the Courts of Appeal have noted:

If an UWMP is inadequate the public and the various governmental entities that rely on the UWMP may be seriously misled by it and, if the wrong set of circumstances occur, the consequences to those who relied on the UWMP, as well as those who share a water supply with them, could be severe.” (*Sonoma County Water Coalition v. Sonoma County Water Agency* (2010) 189 Cal.App.4th 33, 61-62; quoting *Friends of the Santa Clara River v. Castaic Lake Water Agency* (2004) 123 Cal.App.4th 1, 15.)

Groundwater sustainability plans substantially affect a wide variety of stakeholders, and thus may be controversial. If such a plan is legally challenged, it may cloud the record for purposes of preparing UWMPs, WSAs, WVs, and water supply analyses under CEQA that seek to rely on the challenged plan.

## **DROUGHT RESPONSE ACTIONS ON SURFACE WATER, RECLAIMED WATER, AND PUBLIC CONSERVATION**

In addition to the proposals for regulating groundwater, state agencies have been acting in response to the drought on measures to conserve surface water, promote the use of recycled water, and mandate public conservation efforts.

### **A. New Curtailment Orders for Surface Water Diversions**

Drought conditions are also affecting surface water rights in unprecedented ways. In parallel with the Governor’s January 2014 Declaration of drought emergency, on January 17, 2014, the State Board announced that it may issue “curtailment notices” requiring holders of surface water rights to limit or stop diversions under their water rights permits. The announcement advised water rights holders to seek out alternative water supplies, including groundwater, purchased water, and recycled water. The curtailment process is designed to follow California’s “first in time, first in right” surface water right system. Junior water rights holders are generally those with water rights granted after 1914, which is when the state began regulating and permitting surface water diversions on a statewide level. Senior water rights holders are generally those whose surface water rights existed before 1914 and those with riparian rights who own property adjacent to water courses. Under a curtailment notice, junior water rights holders can be ordered to limit or stop diverting water. Curtailment orders also require the completion of a compliance certification form.

On July 2, 2014, the State Board adopted emergency regulations to provide a more streamlined process to curtail surface water diversions to prevent the unreasonable method of diversion or use of water such that appropriate minimum amounts of water are available for (1) senior water right users, (2) public trust needs for state and federally protected fish, and (3) minimum health and safety needs.

As of this writing, the State Board has issued curtailment notices and orders for post-1914 appropriative water rights in the Mill, Deer, and Antelope Creek watersheds, the Scott River Watershed, the Sacramento and San Joaquin River watersheds, the Russian River watershed, and the Eel River watershed. Those who divert water in violation of a curtailment order or beyond their senior

legal rights are subject to administrative fines, cease and desist orders, and court action. Under the emergency regulations, the State Board is authorized to impose fines of \$1,000 per day per violation, and \$2,500 for each acre-foot diverted or used in excess of a valid water right. (See Water Code §§ 1052, 1055.) In addition, failure to comply with a cease and desist order is punishable by a fine of \$10,000 per day. (See Water Code §§ 1831, 1845.)

### **B. State Board Efforts to Streamline Recycled Water Use Permits**

On June 3, 2014, as another response to the Governor's Declaration and Proclamation of continued emergency, the State Board adopted a General Order that enables Regional Water Quality Control Boards to streamline the permitting process for recycled water uses.

The General Order establishes standard conditions for certain uses of recycled water which, according to the State Board, relieves producers, distributors, and users of recycled water from the often lengthy permitting and approval process. The General Order applies to most non-potable uses of treated municipal wastewater found in Title 22 of California's Code of Regulations, such as dust control, agricultural irrigation, landscape irrigation, cooling towers, and other industrial processes. The General Order does not provide permitting coverage for groundwater recharge.

All recycled water use under the General Order must be consistent with applicable Salt and Nutrient Management Plans approved by the Regional Boards, and any violations of the General Order are subject to enforcement action. The State Board indicates that recycled water use under the General Order will help the state meet its water recycling goals in the California Water Action Plan. Pursuant to the Governor's emergency drought declarations, adoption of the General Order was exempt from CEQA review.

### **C. Emergency Regulations for Statewide Water Conservation**

On July 15, 2014, the State Board adopted emergency regulations for water conservation regulations. The regulations apply to individuals, urban water suppliers (a supplier providing water for municipal purposes directly or indirectly to more than 3,000 customers or supplying more than 3,000 acre-feet of water annually), and other distributors of public water that are not defined as urban water suppliers (including publicly and privately owned water suppliers and mutual water companies).

As to individuals, the regulations prohibit the application of water to outdoor landscapes in a manner that causes visible runoff, the use of a hose to wash an automobile except where the hose is equipped with a shut-off

nozzle, the application of potable water to driveways and sidewalks, and the use of potable water in non-recirculating decorative water fountains. Violations would be punishable by a fine of up to \$500 for each day in which the violation occurs, although local agencies retain their enforcement discretion in enforcing the regulations.

As to urban water suppliers, the regulations require each supplier to implement all requirements and actions of the stage of its water shortage contingency plan that imposes mandatory restrictions on outdoor irrigation of ornamental landscapes or turf with potable water. As an option, urban water suppliers may develop an alternate plan that does not include mandatory restrictions on outdoor irrigation if allocation-based water rate structures, combined with other measures, achieve a level of conservation that would be greater than that achieved by limiting outdoor irrigation to two days per week. For urban water suppliers without a water shortage contingency plan or with an insufficient plan, and for all distributors of public water supplies, the regulations require, within 30 days, the implementation of limits on outdoor irrigation of ornamental landscapes or turf with potable water to no more than two days per week, or other conservation measures to achieve a reduction in water consumption from 2013 levels.

The regulations also require all urban water suppliers to submit a monthly monitoring report to the State Board, indicating the amount of potable water produced (including water provided by a wholesale agency) in the preceding month and an estimate of the gallons of water used per person per day. Further, the initial report must state the number of people served by the urban water supplier.

Depending on local water supply portfolios, the State Board's emergency regulations may require many water providers to declare water shortage emergencies and impose mandatory conservation, rationing or allocation-based water pricing (many already have voluntary measures in place). The authority to impose these restrictions derives from specific provisions of the Water Code, general police powers, and other express powers of special act agencies. Legal challenges may arise as water supply agencies seek to allocate limited supplies and the effects of those efforts begin to manifest.

### **CONCLUSION**

California's historic drought is eliciting historic and unprecedented responses from the Legislature, the Governor, the State Water Resources Control Board, the courts, and interested parties throughout the state. The drought highlights the reality we face in California, where water demands will continue to increase, while supplies will continue to face both hydrologic and regulatory

constraints. This growing tension between demand and supply will bring challenges, opportunities, and a host of consequences. Fasten your seatbelts as California water law speeds into the 21st century.

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ENDNOTES

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