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Legislature Passes Historic Legislation Fundamentally Changing California Groundwater Law

California's depleted groundwater basins will not go unmanaged any longer. That's the directive of the Sustainable Groundwater Management Act ("Act"), passed late Friday, August 29 by the California Legislature, which Governor Brown is expected to sign. For at-risk basins, the Act requires the designation of a "groundwater sustainability agency" and adoption of a "groundwater sustainability plan" within roughly five to seven years. The plan must set the basin on a course toward "sustainable management" to eliminate adverse groundwater conditions specified as "undesirable results" by roughly 2040. If a local agency is not designated as a groundwater sustainability agency, or if a compliant groundwater sustainability plan is not prepared within designated time frames, the State Water Resources Control Board ("SWRCB") may intervene and adopt and enforce its own plan for the basin.

Applicable Basins

The Act applies to basins or subbasins that are to be designated by the California Department of Water Resources ("DWR") as "medium-" or "high-priority" basins. DWR will use its Bulletin 118 to delineate basins. Under the Act, DWR must rank each of the basins or subbasins identified in Bulletin 118 as either a very low-, low-, medium-, or high-priority basin based on the threat to the basin's integrity. The Act does not apply to adjudicated groundwater basins that are managed by the courts, or to basins deemed by DWR to be low or very low priority. Present AB 3030 groundwater management plans (Water Code Sections 10750 et seq.) in medium- and high-priority basins must be replaced or augmented to comply with the requirements for a groundwater sustainability plan under the Act.

We anticipate approximately 125 basins located throughout the state will be designated as medium or high priority for which a plan must be developed. The majority of these basins are in the San Joaquin Valley. Others are coastal basins and other high-demand basins that are at risk of long-term depletion or other harm (e.g., seawater intrusion).

Plan Requirements

The Act requires that plans include prescribed components to achieve sustainable groundwater management to avoid undesirable results, such as chronic depletion of groundwater, water quality degradation, or subsidence. Each plan must include requisite 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 Act also authorizes designated groundwater sustainability agencies to limit or curtail groundwater production, monitor water withdrawals, track the location of wells, and assess regulatory fees to fund groundwater management and replenishment activities, among other powers. Agencies are not, however, authorized to issue or deny well-drilling permits, unless authorized to do so by the encompassing county.

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Plan Development Deadlines

Local agencies have until January 1, 2017, to elect to become or form a groundwater sustainability agency. In medium- or high-priority basins, identified by DWR as being subject to “critical conditions of overdraft,” groundwater sustainability agencies must adopt a compliant plan by January 1, 2020. A compliant plan for all other medium- and high-priority basins must be adopted by January 1, 2022.

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. Groundwater sustainability agencies are required to submit their plans to DWR for initial approval and thereafter to report their progress to DWR every five years.

State Intervention

The Act authorizes the SWRCB to intervene in medium- and high-priority basins when local agencies are not meeting established goals, including: failure to elect a groundwater sustainability agency by January 1, 2017; failure to develop a compliant plan within the designated time requirements; or when (i) DWR, in consultation with the SWRCB, determines that a plan is inadequate or is not being implemented in a manner that is likely to achieve the plan’s sustainability goal, and (ii) the SWRCB determines that the basin is either in a state of long-term overdraft or groundwater extractions are causing significant depletions of interconnected surface water.

Practical Application and Challenges

In practice, compliance with the Act will be challenging for many basins. For example, in some basins, there may be conflict over which of several existing local agencies should be the designated groundwater sustainability agency. If so, the Act permits the creation of a new groundwater sustainability agency and “sharing” of basin governance pursuant to a joint powers agreement, memorandum of agreement, or other legal agreement. The Act also allows a basin to be managed by several separate, but coordinated, groundwater sustainability plans developed by different groundwater sustainability agencies. However, in each circumstance, agreement between local agencies and stakeholders will be necessary to navigate such potential conflicts.

Another significant potential challenge will be allocating the burden of cutbacks in groundwater extractions, as well as responsibility for payment of pump assessments to fund necessary basin replenishment and other management objectives. Under the common 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. The Act expressly does not determine or quantify water rights. Therefore, significant conflicts may arise in the development of a plan where water rights priorities are contested or the equities of a proposed management plan are disputed. The likelihood for these problems warrants significant stakeholder and public outreach at the outset of any groundwater sustainability plan process. If a negotiated agreement cannot be reached to resolve such conflicts, the basin may be subject to SWRCB intervention or a general groundwater adjudication.

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Groundwater adjudications may be the inevitable result for basins in which conflicts on these issues persist. Once complete, the judgment entered in a groundwater adjudication generally provides valuable legal certainty and an efficient means of basin management. Unfortunately, as a result of a lack of judicial procedures specifically tailored to the complexities of groundwater adjudications, which involve complex technical and legal issues, groundwater adjudications often take far too long (sometimes decades) and cost too much. A conceptual procedure to streamline groundwater adjudications was considered for inclusion in the Act, but was excluded because of inadequate time to address the complexities of such a process. Efforts are underway to develop legislation to establish a streamlined adjudication procedure for consideration next year. Such a result could be highly beneficial to cost-effectively resolve groundwater disputes and implement comprehensive management in a timely manner.

Without question, the Act will fundamentally change the landscape of groundwater use and management in California's most important and significant un-adjudicated groundwater basins. [Brownstein Hyatt Farber Schreck](#), LLP has worked on all aspects of groundwater management in California for more than 40 years, played a central role in the negotiations and drafting of the legislation, and is fully versed in the components and implications of the Act. We are prepared to assist groundwater stakeholders in navigating and complying with the Act, as well as its inevitable resulting complications. For the most current information on this topic, and other water law and policy issues, please visit <http://water.bhfs.com/> or call us.

This document is intended to provide you with general information regarding California groundwater management legislation. 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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