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California Department of Water Resources  
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Re: Draft GSP Emergency Regulations Public Comment

This Firm serves as legal counsel to a number of public agencies affected by the Sustainable Groundwater Management Act (SGMA) and the proposed groundwater sustainability plan (GSP) regulations (regulations). Given that these regulations will be permanent, yet are only subject to emergency rulemaking procedures, many of the checks and balances of the traditional rulemaking process are absent. It is therefore imperative that the Department of Water Resources (DWR) give due consideration to these and other comments submitted and make meaningful modifications to the proposed regulatory scheme based on those comments, before the regulations are made permanent. Once adopted, there will be little opportunity to modify the regulations because groundwater sustainability agencies (GSAs) will have already begun implementing the regulations and preparing GSPs. Any significant modification to the adopted regulations will be extremely disruptive and will have the potential to waste significant sums of public money. It is therefore crucial for DWR to ensure that these regulations are well-thought-out and fully consistent with the letter and intent of SGMA. It is more important to get the regulations right the first time than to rush to finalize the regulations before the June 1, 2016, date established in Water Code section 10733.2(a)(1). We urge DWR to put the goal of crafting sustainable, workable, responsible regulations ahead of strict adherence to the arbitrary statutory date.

This letter first presents several comments concerning broader themes in the proposed regulations before addressing specific sections.

I. The Proposed Regulations' Effective Prohibition of Multiple-GSA / Multiple-GSP Basins Violates the Language and Clearly Stated Intent of SGMA.

SGMA is clear that it is intended to promote local control and management of groundwater resources "to the greatest extent feasible." (Water Code § 10720.1(b), (d), (h).) SGMA states that within any basin or subbasin (hereinafter, basin), SGMA may be administered by one or more GSAs pursuant to one or more GSPs. (*Id.* § 10727(b)(3).) In direct contradiction of these statutes, the draft GSP regulations require that where there are multiple GSAs and multiple GSPs in a basin, a single GSA must be identified for the basin as the "sole point of contact with" DWR. (Proposed §§ 351(i), 357.4(b).) The single GSA must "rectify" all the subservient GSAs' data and synthesize the all of the basin's GSPs into a single "Coordinated GSP." (Proposed § 357.4(d).) The draft regulations also state that if a GSP does not cover the entire basin, it "will be deemed inadequate." (Proposed § 355.4(a)(3).) This is a clear violation of SGMA (Water Code § 10727(b)(3)), but section 355.4(a)(3) may have been the result of a drafting error.<sup>1</sup>

The GSA designated as the single point of contact (called the "Coordinating Agency" or the "Submitting Agency" in the regulations,<sup>2</sup> referred to herein as the Coordinating Agency) is bestowed with powers and authorities over the basin's remaining subservient GSAs. All GSPs, amendments, data, annual reports, and periodic evaluations generated in a multiple-GSP basin must be submitted to the Coordinating Agency, even for GSPs to which the Coordinating Agency is not a party. Perhaps most disturbingly, the Coordinating Agency is directed to "rectify data and interpretations regarding basin conditions provided by the [GSAs] and produce a single report synthesizing and summarizing that information into a coherent and credible account of basin conditions." (Proposed § 357.4(d).) DWR refers to the document ultimately produced by the Coordinating Agency as the "Coordinated GSP." (DWR PowerPoint Presentation to CWC, February 17, 2016, at p. 17; DWR Draft GSP Regulation Guide, pp. 9-11.) This means that each basin may have only one meaningful GSA that is authorized to interact with DWR and develop the basin's single, coordinated GSP, in violation of Water Code sections 10727(b)(3) and 10720.1(h).

A basin's GSAs may prefer to utilize multiple GSPs in a basin for several reasons. One

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<sup>1</sup> Other portions of the proposed regulations appear to acknowledge that there may be multiple GSPs in a basin. For example, proposed section 355.4(b)(7) refers to multiple "Plans" subject to a coordination agreement. Also, DWR's recently issued guide to the regulations states at p. 17 that a GSP may be adequate if the basin is covered by one or multiple GSPs.

<sup>2</sup> We presume that the undefined term "Submitting Agency" in the proposed regulations was intended to refer to a "Coordinating Agency," which is a term defined in the regulations. (See proposed § 351.)

is that there may be preexisting tensions among a basin's GSAs that would make the ongoing partnership and integration required for a single, basin-wide GSP difficult and unappealing, particularly if the regulations authorize only one of the GSAs to monopolize control of all data, reporting, and communication with DWR. On the other hand, agreeing upon the technical and scientific elements of a Coordination Agreement would be much simpler, even in a contentious basin, and developing a Coordination Agreement would only be a one-time process. Another reason multiple GSPs may be beneficial is that some basins are simply too large to administer under a single GSP and still adhere to the basic requirement of local control to the greatest extent feasible. The Delta-Mendota and Colusa Basins, for instance, are each approximately one hundred miles long and span multiple counties. If the Coordinating Agency is at one end of the basin it would not be "local" to subservient GSAs located at the other end.

SGMA anticipated these issues by allowing for multiple GSPs in a single basin and requiring multiple-GSP basins to have Coordination Agreements, which require coordination and normalization of specified data and methodologies by *all of the basin's GSAs*, not by just a single GSA that is elevated above all others. (See Water Code § 10727.6.) The proposed GSP regulations authorize only one GSA to coordinate and normalize the data without regard to whether that GSA is local to the other GSAs, or whether the Coordinating GSA is a party to all of the GSPs it is synthesizing and reporting on. (Proposed § 357.4(d).)

DWR's desire to reduce its workload by reducing the number of GSAs it will interact with and the number of GSPs it must review is understandable, but this regulatory system violates SGMA's mandate to allow local management of groundwater "to the greatest extent feasible" and its specific authorization of multiple GSPs in a basin subject to a Coordination Agreement. (Water Code §§ 10720.1(h), 10727(b)(3).) Nowhere does SGMA authorize or require a Coordinated GSP in addition to the statutory Coordination Agreements. DWR's preferences for managing its workflow do not supersede the law. If DWR is concerned that it will not be able to process the volume of GSPs prepared pursuant to Water Code section 10727(b)(3), then it needs to either reorganize, request additional funds to administer the program, or extend its self-imposed two-year review timeframe.

Finally, imposing requirements that effectively permit only one GSA and one GSP per basin adds an unnecessary and expensive layer of bureaucracy and expense to SGMA that will be borne by each GSA and ultimately by the public. All subservient GSAs in a basin will presumably be required to reimburse the Coordinating Agency for the costs of compiling and synthesizing all of the GSPs, amendments, data, annual reports, and periodic evaluations. These costs will be significant and are entirely unnecessary under the structure SGMA was intended to create. It will be more efficient for DWR to synthesize and rectify the data and reports, as SGMA intended, than it would be for each basin's Coordinating Agency to do so. Presumably,

DWR will be synthesizing and rectifying all of the data and reports it receives from all of the basins, so the Coordinating Agency/Coordinated GSP model does nothing more than create expensive paperwork for local agencies that are ill-equipped to shoulder unnecessary financial burdens. DWR has already ensured its ability to synthesize all of the GSPs in the state by mandating, for instance, the methodologies and units required to report water budgets and critical parameters. Coordinating Agencies and Coordinated GSPs are an unnecessary and wasteful intermediate step that are not authorized by SGMA.

**Recommendation:** The proposed GSP regulations should discard the Coordinating Agency / Coordinated GSP model, which violates SGMA, and instead allow each GSP to operate and interact with DWR independently, subject to the mandatory Coordination Agreements, as SGMA intended.

## II. The Proposed Regulations Contain Inadequate Protections for and Deference to Water Rights.

The law is clear that nothing in SGMA “or in any groundwater management plan adopted pursuant to this part, determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights.” (Water Code § 10720.5(b). See also *id.* § 10726.8(b).) However, nothing in the proposed GSP regulations that implicates water rights or the use of surface water includes any recognition of or deference to water rights or the water right priority system. (E.g., proposed § 356.4(b)(3).) Without this acknowledgement, portions of the regulations could be interpreted as affecting rights to surface water and/or groundwater. For example, proposed section 354.20 allows GSAs to establish management areas where critical parameters and minimum thresholds differ from those of the basin at large “provided that the goal of the [GSP] is to achieve sustainable management for the entire basin by the target date and that *operation to different standards within a management area does not produce undesirable results elsewhere.*” (Emphasis added; see also proposed § 354.26(b).) An entity in a management area exercising existing rights to surface water and/or groundwater should not be precluded from exercising these rights merely because it may affect the sustainability of other management areas of the basin. This would be true for basins with areas that are clearly sustainable (e.g., areas with reliable surface water supplies and resulting abundant conserved groundwater supplies) that are surrounded by areas that are unsustainable or teetering on the cusp of unsustainability (e.g., areas that are entirely groundwater dependent). A change in use of surface water or greater use of conserved groundwater in the sustainable portions of the basin may be entirely consistent with the underlying surface water or groundwater rights, but would cause or exacerbate undesirable results in the remaining portions of the basin. The proposed regulations, like SGMA, should include a statement respecting existing water rights and acknowledging that nothing is intended

to alter or determine such rights.

**Recommendation:** Include within Article 1 of the proposed GSP regulations the following:  
“Nothing in this Subchapter 2 determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights or groundwater rights.”

III. Implementation of GSP Regulations Should be Guided by Doctrine of Substantial Compliance.

The overriding principle of local control in the implementation of SGMA can be achieved with minimal revisions to this version of the proposed GSP regulations by strengthening the regulations’ commitment to allow the approval of GSPs and related documents so long as they achieve SGMA’s goals and substantially comply with the regulations’ requirements. Substantial compliance should be broadly defined so that if a GSP or related document contains sufficient information for DWR to determine whether the GSP complies with SGMA and its goals, it is substantially compliant. In addition, local GSAs should be permitted to omit or vary requirements from articles 3, 5, 7, and 8 of the proposed regulations to the extent such requirements are not required by SGMA and further to the extent the GSAs make findings supported by substantial evidence that omitting or varying such requirements will not inhibit achievement of sustainability within the basin.

IV. The Amount of Prescriptive Control the Proposed GSP Regulations Grant DWR Violates the Language and Clearly Stated Intent of SGMA.

SGMA’s intent is to promote and enhance local control and management of groundwater resources “to the greatest extent feasible.” (Water Code § 10720.1(b), (d), (h).) Specifically, a GSA “has and may use the powers [granted in SGMA] to provide the maximum degree of local control and flexibility consistent with the sustainability goals of this part.” (Water Code § 10725(b).) Portions of the regulations giving DWR final prescriptive control over GSPs and over the proposed projects and management actions within the GSPs violate the language and clear intention of SGMA. For instance, proposed section 355.2(e)(2) states that the only way to remedy a “conditionally adequate” GSP, is to implement the “corrective actions recommended by [DWR].” This would prohibit GSAs from developing innovative solutions to make a GSP adequate, regardless of their effectiveness, if they weren’t proposed by DWR. If DWR deems a GSP conditionally adequate or inadequate, DWR should identify the deficiencies and provide recommendations, but allow the GSA to remedy them in the manner the GSA sees fit. DWR would still retain approval authority over the final GSP. By allowing only DWR-proposed corrective actions, the proposed GSP regulations grant DWR too much prescriptive control over

what was intended to be local planning.

The proposed regulations also prohibit adaptive management and flexible administration of projects and management actions, in violation of SGMA's commitment to flexibility and local control. (See Water Code § 10725(b).) The proposed regulations prohibit GSAs from engaging in any project or management action in any manner not described in the GSP. (See proposed Subarticle 5 of Article 5.) But if a GSA is implementing a project or action and determines that sustainability would be enhanced by changes to the project or action, the proposed regulations would prohibit the GSA from making adaptive modifications. The only way to modify ongoing projects or actions would be to follow the GSP amendment process in which DWR has two years to approve or reject proposed GSP amendments, which must be supported by extensive explanations and documentation. (Proposed § 355 [applying § 355.2 to GSP amendments].) If a project needs modifications to help the basin achieve sustainability, such modification cannot be bogged down by years of bureaucratic process. SGMA requires flexible, local control of groundwater, and the proposed regulations hinder that clearly stated goal by vesting too much prescriptive authority in DWR.

**Recommendation:** Strike portions of the proposed regulations that grant DWR prescriptive control over GSP contents, projects, and management actions, and allow local GSAs to manage local groundwater and implement projects and actions flexibly and adaptively.

V. The Proposed GSP Regulations Require GSAs to Collect Large Amounts of Data that May Not Be Available.

Among other things, the proposed GSP regulations require GSAs to submit to DWR information on all water demands [in the basin] by water source type and water use sector and annual data summarizing all groundwater extractions by water use sector, location, and accuracy of measurement methodology. (Proposed §§ 354.18(a)(4); 356.4(b)(2).) No entity in the state, except for perhaps in some adjudicated areas, has all of that information. The bulk of the private extraction data will have to be self-reported by landowners and will be based on laypersons' estimates; it would be impossible to quantify the accuracy of the measurement methodology. It will be difficult enough to determine where small wells are located and who, if anyone, maintains the extraction data. Further frustrating these requirements is the exclusion of *de minimis* extractors from GSAs' data collection powers and authorities in Water Code section 10725.8. A GSA lacks authority to require domestic users who extract no more than 2 acre-feet per year to install meters on their wells or to require such users to file annual extraction reports. (Water Code § 10725.8(d).) GSAs lack legal authority to collect such data, and the data are not available from any other source, yet the proposed regulations require GSAs to gather that data.

Apart from *de minimis* users, many other groundwater extractors will be difficult if not impossible to locate. Well completion reports provide some useful information, but do not give a GSA the information needed to determine whether a well's use is *de minimis* or if its use category has changed since the report. DWR's website states that "requests for Well Completion Reports are numerous and the availability of staff is limited."<sup>3</sup> Such reports may not be a viable source for this information, as DWR staff will be stretched thin responding to requests from the hundreds of GSAs developing GSPs.

The proposed regulations require annual reports to be submitted by April 1 of each year, and the annual report must quantify "[s]urface water supplies used or available for use for groundwater recharge or in-lieu use." (Proposed § 365.4(b)(3).) But surface water use data for the preceding year is not required to be reported to the State Water Resources Control Board (SWRCB) until July (e.g., Water Code § 5101), so much of the data required by proposed section 354.4(b)(3) is not usually available until several months after the deadline for annual reports. And given that a GSA must compile all the surface water data before sending it to a Coordinating Agency, which then normalizes and rectifies the data before submitting the annual report on behalf of the subservient GSAs, significant lead time would be needed between the time surface water data becomes available and the deadline for submitting annual reports to DWR.

Aside from the expensive and infeasible ongoing data collection and reporting requirements, there are one-time data submission requirements that are overly broad and will not provide proportionate benefits to a basin's sustainability. For instance, in the initial GSP, a GSA must collect and submit to DWR "all available information about the wells" that are considered in developing the GSP. (Proposed § 352.6(b)(2).) Requiring "all available" information is so broad a standard as to be meaningless. The regulations should state with specificity what data is required in order to prevent unnecessary and pointless exercises in data collection.

In addition, the requirement to collect and submit all of this information creates a "backdoor" through which huge amounts of private and proprietary data could be made public. Currently, well completion reports available to the public must be redacted to prevent disclosure of individually identifiable information. (E.g., Civil Code § 1798.24.) But GSAs will need the non-public information to determine the locations of wells and contact landowners. It is imperative that confidential well location information not be disclosed because unprotected, remote agricultural wells are common and attractive targets for metal thieves across the state. For domestic wells that exceed the *de minimis* pumping volume, making the well location and

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<sup>3</sup> [http://www.water.ca.gov/groundwater/wells/well\\_completion\\_reports.cfm](http://www.water.ca.gov/groundwater/wells/well_completion_reports.cfm)

other well construction characteristics public may implicate public safety issues. Posting the location on DWR's website of every well in the state will create a treasure map for would-be thieves, will cause vast economic harm to landowners, and may undermine efforts to protect public safety.

**Recommendation:** Strike catch-all and overly broad data submission requirements and state with specificity exactly what information should be submitted; consider the feasibility of data collection requirements before adopting them; assure that confidential information is kept confidential.

VI. Monitoring Network and Modeling Requirements are Unrealistic and Prohibitively Expensive.

While a robust monitoring network is important for the effective, sustainable management of groundwater, the proposed regulations impose unrealistic and infeasible requirements and deadlines upon GSAs to build out monitoring networks compliant with yet-to-be-released standards before the first five-year assessment of the GSP. (E.g., proposed §§ 354.38(c) [gaps in monitoring network to be filled within 5 years]; 356.10(f)(3), (5) [same].) The proposed regulations also mandate securing locations for and drilling additional monitoring wells upon the occurrence of a variety of poorly defined circumstances that would not provide a proportionate benefit to sustainability. (Proposed § 354.38(d).) Acquiring land and drilling monitoring wells is extremely expensive, and these regulations provide no guidance on acceptable levels of well density; such guidance will presumably be given when BMPs are issued at the end of 2016. This will create a decade-long rush of well drilling from 2017, when the standards are issued in the BMPs, until 2027, when initial five-year assessments for GSPs in non-critically overdrafted basins are due. The artificial urgency will drive up land and drilling prices, while limiting opportunities for innovation and creativity in developing functional, successful, economically efficient monitoring networks.

Similarly, the proposed regulations require GSAs to develop extremely complicated groundwater-surface water models as part of the water budgets in the GSPs, which are due four to six years from now. (Proposed § 354.18(c).) Developing such models will be time consuming and expensive. The SWRCB recently approved a contract to develop a groundwater-surface water interaction model for the Russian River watershed; the \$1,200,000 contract with the USGS will take five years to complete. (SWRCB Resolution No. 2016-0014, Mar. 15, 2016.) The proposed regulations would require the same by 2022 in every basin that experiences groundwater-surface water interaction, but most basins lack the financial support of the SWRCB or the technical support of the USGS. Many basins currently lack the needed foundational data (e.g., locations of groundwater-surface water interaction areas) to even begin developing the

models. It is simply not feasible to require every basin in which there is interconnected groundwater and surface water to develop a custom model within the next 4-6 years.

**Recommendation:** Allow a reasonable amount of time for GSAs to build out or improve well monitoring networks, and accept improvements other than increasing network density (e.g., advanced modeling, more frequency data collection, etc.). Only require increases in monitoring network capabilities or density if such improvements can be shown to improve sustainability or fill a significant and material monitoring gap. Permit a reasonable amount of time for GSAs to develop groundwater-surface water interaction models; recognize the cost and time required to develop such models.

## VII. Dispute Resolution Guidance is Inadequate and Poorly Drafted.

It is all but inevitable that disputes will arise related to the implementation of SGMA and specifically related to the development and implementation of GSPs. Given the likelihood of conflict, the proposed regulations' dispute resolution procedures must provide due process protections and be clarified to avoid unnecessary confusion.

For instance, subdivision (a) of proposed section 355.10 confusingly allocates responsibility for resolving disputes within a basin to "the Coordinating Agency or other entities responsible for managing" GSPs within the basin. Where the Coordinating Agency is already granted disproportionate power over subservient GSAs, it makes little sense to vest in the Coordinating Agency authority to resolve disputes to which it may be a party. DWR should remove the reference to Coordinating Agencies from subdivision (a), and leave intra-basin dispute resolution to the entities responsible for managing GSPs within the basin, or as otherwise described in the GSPs or Coordination Agreements. The extraneous reference to Coordinating Agencies only creates confusion.

DWR grants itself full authority to resolve inter-basin disputes, but the regulations lack any consideration of due process or rights of appeal. Interested parties will need to be able to resort to the court system to resolve some of the disputes that may arise in implementing SGMA without resorting to a full-blown groundwater adjudication. The dispute resolution regulations must include sufficient due process protections, including procedures for review in the courts.

Difficult disputes related to GSP development or implementation should not result in state intervention in a basin. Subdivision (d) of proposed section 355.10 states that "if parties are unable to resolve disputes," then DWR may deem the GSP inadequate, which could ultimately result in state intervention in the basin. However, it is not clear how disputes would be unable to be resolved if resort to the court system is available" the court system can resolve any dispute.

Subdivision (d) should be replaced with a tolling provision akin to the one in Water Code section 10735.2(d), which would toll the pre-intervention probationary period for an amount of time equal to the delay caused by the litigation. The tolling provision should also apply where litigation is filed pursuant to Water Code section 10726.6.

The authority DWR grants itself in the proposed regulations to approve or disapprove of dispute resolution procedures in Coordination Agreements should follow the above principles of due process and review by an unbiased court. Proposed section 357.4(h) gives DWR authority to decide whether dispute resolution procedures in coordination agreements are "sufficient." This exceedingly vague standard must be clarified and must allow GSAs in a dispute to resort to unbiased review in the court system. Resort to the state court system will be sufficient to "address any disputes between or among [GSAs] that are parties to the [coordination agreement]." (Proposed § 357.4(h).)

Under proposed subdivision (c), DWR casts itself in two roles: as arbiter and as investigator. These will often be incompatible positions, particularly where DWR may have a bias or a stake in the dispute (e.g., disputes implicating DWR's implementation of the GSP regulations, such as adequacy of approved GSPs or accuracy of DWR-provided foundational data). Subdivision (c) also allows DWR to require a GSA to divulge proprietary data without any protections or assurances of confidentiality. DWR and the opposing GSA should not have access to a GSA's proprietary data without clear assurances and protections against disclosure or malfeasance.

**Recommendation:** Include in the dispute resolution provisions due process protections and rights of appeal; remove references to Coordinating Agency; add tolling provision to delay probationary period for length of time equal to litigation. Do not authorize DWR to serve multiple incompatible roles in a dispute; protect and assure confidentiality of proprietary data divulged during dispute resolution.

## VIII. Specific Comments.

(Suggested deletions are shown in ~~strikeout~~, suggested additions are shown underlined.)

§ 350.2(a): Amend to state "The Plan or Plans must achieve the sustainability goal for the entire basin . . ."

(d)(4): This needs clarification.

(g): Plans are reviewed annually and in more detail every 5 years; more frequent examinations of GSPs may conflate annual fluctuations in conditions with ineffectiveness

of GSPs; planning horizon should allow for 1- and 5-year intervals between review of GSPs; the currently proposed language would allow DWR to be too reactionary.

§ 351 (e): Amend to state “and availability of surface water consistent with water rights and water right priorities”

(i): Strike requirement for single Coordinating Agency for multiple GSPs.

(j) The definition is nonsensical: the “chronic lowering . . . .” is the definition of “undesirable result” found in Water Code § 10721(x); critical parameters are not the same thing as undesirable results; the critical parameters are the six categories of groundwater conditions that are monitored under a GSP to assure that undesirable results do not occur (groundwater levels, groundwater storage, seawater intrusion, groundwater quality, land subsidence, and depletion of interconnected surface water).

Definition should mirror the same language used in SGMA: “depletions of surface water that have significant and unreasonable adverse impacts on beneficial uses of surface water”

(x) Clarify intended meaning of phrase “significant or economic quantities of groundwater”

§ 352.4(a) Confusingly drafted sentence; use of may/shall.

§ 352.6 (b)(2) “All available information about the wells” is too broad a standard; required data should be specified to prevent onerous, unnecessary reporting standards.

(c)(2) This is an illusory and meaningless standard.

§ 353.4(b) Unrealistic to require public employees to provide this sort of certification, especially if final regulations include (against our recommendation) the proposed Coordinating Agency approach that will synthesize data provided by subservient GSAs.

§ 353.8(c)(3) Unrealistic to require public comments submitted 60 days after DWR accepts a plan to rely on same sort of scientific support (e.g., custom groundwater/surface water interaction model) that the GSA had years to develop; too constraining for a time-limited public comment process.

§ 354.6(c) Clarify whether each GSA has a plan manager, or each GSP, or only the Coordinating Agency.

(d) Strike as unnecessary; SGMA grants GSAs the necessary legal authorities and powers.

(e) Clarify what kind of information must be provided. Water Code sections 10730-10731 provide GSAs all the financial authority necessary to implement SGMA

- § 354.8(a)(4) This information is not generally available and would be very difficult to compile.
- (a)(5) This information is not generally available and would be very difficult to compile.
- (f) DWR should clarify why this information must be collected and transmitted. The information should not be used to force water users to participate in conjunctive use programs.
- (g)(4), (7)-(8) The required assessment and summaries are a futile exercise given that SGMA does not permit a conflict between GSPs and land use plans.
- § 354.14(c)(6) Add definition of "imported water supplies," as follows: "Water brought into a stream or other conveyance by artificial means, which water otherwise would not reach the place of use, and foreign or developed water, including waters that are captured, stored, and/or foreign in time."
- § 354.18 Clarify that budget inputs and use of budget information will not have any effect on groundwater or surface water rights.
- (a)(4) as noted above, this information is very difficult to conclusively compile.
- (b)(2)(A) limiting historical water supply availability to only the most recent 10 years creates a skewed dataset, not sufficiently historical. DWR should modify this requirement to allow GSAs to determine the locally appropriate historical time period to select, not the predetermined most recent 10-year period.
- (b)(3)(B) Reference to "most recent . . . information as the baseline" will create skewed results, as land use and other data points reflect drought conditions, not normal conditions.
- (d)(1) DWR should provide information for water budget information for all areas of the state subject to SGMA and not just "central valley land use."
- (d)(3) Requirement to use DWR's estimates of future changes related to population and climate change are too prescriptive; local agencies should have option of utilizing own population, population growth, climate change, and sea level rise assumptions for planning purposes.
- (e) Clarify how each GSA can choose a different flow model if each basin's water budget must use the same data and methodologies pursuant to a coordination agreement.
- § 354.20 This is a good concept, but should not be used to force or coerce GSAs into creating a single basin-wide GSP with promises of flexibility as management areas; option of multiple GSPs in a basin must be preserved as contemplated and authorized by SGMA.
- § 354.26(a)(2) Cumulative effects analysis is not authorized or required by SGMA. Minimum thresholds will be set at the point at which undesirable results occur (the point at which

effects are significant and unreasonable). Because minimum thresholds are single point-in-time measurements, cumulative impacts analysis is incompatible with SGMA and proposed regulations structure. Cumulative impacts on critical parameters will not cause undesirable results unless and until a minimum threshold is crossed. The minimum threshold is the operative metric and cumulative effects do not come into play.

(b) This could punish already sustainable areas by injuring their ability to exercise latent groundwater rights or to modify application of surface water consistent with existing surface water rights. Sustainable areas with different minimum thresholds must be permitted to exercise their groundwater and/or surface water rights; for instance, an area that usually relies on surface water must be able to use groundwater during a drought pursuant to overlying groundwater rights, even if that means that groundwater-only areas will have to cut back more during the drought. Also, entirely groundwater-dependent areas cannot rely upon other neighboring areas use of surface water to achieve sustainability the other landowners have a right to groundwater as well. The regulations should not allow sustainable areas to be punished or underlying groundwater or surface water rights undermined for the benefit of non-sustainable areas. Similarly, the regulations should not allow non-sustainable areas to rely upon neighboring sustainable areas surface water rights to achieve basin sustainability.

§ 354.28 Numeric values for minimum thresholds do not work for the interconnected surface water critical parameter; the effects of depletions of interconnected water on beneficial uses depend on time, place, water year type, etc. that cannot be easily quantified as a single numeric value. Simple basin-wide volume measurements of surface water lost to groundwater pumping do not provide a useful picture of the effects on beneficial uses

(a)(2) This requirement is circular; the protection against undesirable results for other critical parameters are those critical parameters minimum thresholds

(a)(3) Unclear how one basin GSP will be able to discuss effects on an adjacent basin GSP sustainability goals before either GSP is finalized

(b)(2)(A) Amend to state "The annual sustainable natural yield . . ." In accordance with SGMA directive to not alter or determine surface water or groundwater rights, imported water should be accounted for separately.

(b)(6) See note above re: interconnected surface water

(d) "Clear and convincing evidence" is an inappropriate standard "substantial evidence" would be more appropriate to allow deference to local control.

First reference to "Agency" should be "Plan" instead.

(e) "Clear and convincing evidence" is an inappropriate standard "substantial evidence" would be more appropriate to allow deference to local control.

§ 354.30(d) “Clear and convincing evidence” is an inappropriate standard. “substantial evidence” would be more appropriate to allow deference to local control. Reference should be to § 354.28(d).

§ 354.34(a) Correct typo: “effects” not “affects”

(c) Correct double references to Salt and Nutrient Management Plans

§ 354.38(c) It is unreasonable to require GSAs to acquire land and drill additional monitoring wells within 5 years; this would be a significant capital project and could require condemnation proceedings, environmental analysis, permit acquisition, and rate or fee increases.

§ 354.44 Requiring all projects to be described in the GSP constrains GSAs and prevents true adaptive management. Furthermore, the section presumes that new projects and management actions will be necessary to achieve sustainability and avoid undesirable results. Many basins subject to SGMA merely need to formalize existing efforts to manage groundwater and will not require new projects or management actions to maintain sustainability.

(a)(5) The regulations should include a requirement to describe the right to the water in question.

(a)(6) This section is unnecessary; SGMA provides these authorities.

§ 355.2(e)(2), (f) These sections are too prescriptive; GSAs should be able to fix conditionally adequate GSPs using creative solutions apart from those suggested by DWR.

§ 355.4 Modify definition of substantial compliance, as follows: “Substantial compliance means that the Agency has attempted to comply with these regulations in good faith, that the supporting information is sufficiently detailed and the analyses sufficiently thorough and reasonable, in the reasonable judgment of the Department, to permit evaluation of the Plan, and the Department determines based on substantial evidence that any discrepancy would not materially affect . . .”

(a)(3) Strike as inconsistent with SGMA (Water Code § 10727(b)(3)).

(a)(4) Modify, as follows: “The Agency has taken corrective actions, within the period described in Section 355.2, to address deficiencies in the Plan identified by the Department if applicable.”

(b)(4) Modify, as follows: “Whether the interests of the beneficial uses and users of groundwater have been adequately considered if consistent with water right priorities.”

(b)(8) SGMA itself grants the necessary authorities to implement the GSP.

(b)(11) Whether the Plan would impair the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes, consistent with water rights and with the Water Code.

§ 355.6(b)6 The Department may request from the Agency any information the Department reasonably deems necessary to evaluate the progress toward achieving the sustainability goal and the potential for adverse effects on adjacent basins.

(b)(7) The Department may shall identify deficiencies in a Plan or its implementation and coordinate with the Agency to correct deficiencies prior to the issuance of the assessment.

§ 355.8(b) The Department determines that a groundwater sustainability program plan is not being implemented in a manner that will likely achieve the sustainability goal for the basin.

§ 355.10 (See generally comments in Section VII, above.)

(c) proprietary data used by the Agencyies or within the basin.

(d) Clarify that subdivision (d) only applies to intrabasin disputes. If DWR is resolving interbasin disputes, then there should be no reason DWR (or a court) will find those GSPs inadequate. The same reasoning should apply to intrabasin disputes, as a court will be able to resolve any dispute.

§ 356.4(b)(3) Surface water supply used or available for use pursuant to water rights and water right priorities for groundwater recharge or in-lieu use shall be reported based on quantitative data that describes the annual volume and sources for the preceding water year.

§ 355.10(f)(3), (5) unreasonable to require acquisition, construction of new monitoring wells within 5 years.

§ 356.12 Amendments should be on a faster track than initial GSP approval; two-year track.

§ 357.4 (See generally comments in Section I, above.) Suggested modifications to conform to SGMA; requirements and to offer meaningful guidance on intrabasin coordination follow:

(a) Agencies intending to develop and implement Plans pursuant to Water Code Section 10727(b)(3) shall enter into a coordination agreement to ensure that the Plans are developed and implemented utilizing the same data and methodologies and that elements
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of the Plans necessary to achieve the sustainability goal are based upon consistent interpretations of basin conditions.

- (b) Intrabasin coordination agreements shall establish or identify a Submitting Coordinating Agency or Agencies for each Plan that is subject to the intrabasin coordination agreement that shall be the single main point of contact with the Department for that Plan.
- (c) ~~Each~~ The Coordinating Agency or Agencies shall submit to the ~~Submitting Agency Department~~ all the Plans, Plan amendments, supporting information, all monitoring data and other pertinent information, along with annual reports and periodic evaluations.
- (d) ~~The Submitting~~ The Coordinating Agency or Agencies shall, in consultation with any other Agencies in the Plan area, compile and rectify data and interpretations regarding basin conditions provided by the Agencies within a the Plan area and produce a single report synthesizing and summarizing that information into a coherent and credible account of ~~basin~~ conditions within the Plan area.
- (e) The Coordinating Agencies subject to an intrabasin coordination agreement shall jointly prepare the following reports upon initial adoption of the intrabasin coordination agreement and any amendment thereto ~~Reports produced by the Submitting Agency shall include the following:~~
  - (1) ~~An explanation of how the Plans implemented together satisfy the requirements of the Act and are in substantial compliance with this Subchapter.~~
  - (2) (1) An explanation of how the Plans have been integrated using the same data and methodologies ~~to provide useful information~~ regarding the following:
    - (A) ~~Hydrogeologic conceptual models, as described in Section 354.12.~~
    - (B) ~~State of the basin, as described in Section 354.14.~~
    - (C) ~~Water budgets, as described in Section 354.16.~~
    - (D) ~~Undesirable results, minimum thresholds, measurable objectives, as described in Subarticle 3 of Article 5.~~
    - (E) ~~Monitoring networks, and monitoring objectives, as described in Subarticle 4 of Article 5.~~
    - (F) ~~Projects and management actions, as described in Subarticle 5 of Article 5.~~
    - (A) Groundwater elevation data.
    - (B) Groundwater extraction data.
    - (C) Surface water supply.
    - (D) Total water use.
    - (E) Change in groundwater storage.
    - (F) Water budget.
    - (G) Sustainable yield.
  - (3) ~~An explanation of how the integration of information and interpretations described in this section provides useful information regarding each of the assumptions described in Water Code Section 10727.6.~~

~~(4)~~ (2) Reports produced by the Submitting Coordinating Agencies shall accompany the ~~initial Plan, any amendment to the Plan, annual reports, and the five-year assessment by each Agency within the basin~~ intrabasin coordination agreement when it is first submitted to the Department and any material amendments to the intrabasin coordination agreement.

- ~~(e)~~ (f) Intrabasin coordination agreements shall describe the responsibilities of each Agency for meeting the terms of the agreement, the procedures for the timely exchange of information between ~~Agencies and with the~~ Submitting Coordinating Agencies, and procedures for resolving conflicts between ~~Agencies and between Plans~~.
- ~~(f)~~ (g) Intrabasin coordination agreements shall identify adjudicated areas within the basin, and any local agencies that have adopted an alternative that has been accepted by the Department.
- ~~(g)~~ (h) The intrabasin coordination agreement shall be submitted to the Department together with the Plans for the basin and, if approved, shall become part of the each Plan ~~for each participating Agency~~.
- ~~(h)~~ (i) The Department shall evaluate the intrabasin coordination Agreement for compliance with the procedural and technical requirements of this section, and to assure that the intrabasin coordination Agreement is binding on all parties, ~~and that provisions of the Agreement are sufficient to address any disputes between or among Agencies that are party to the agreement~~.
- ~~(i)~~ (j) Plans subject to the requirement of this section shall not be deemed adequate without a legally binding intrabasin coordination agreement.
- ~~(j)~~ (k) Interagency Intrabasin coordination Agreements shall be reviewed as part of the five-year assessment, revised as if necessary, dated, and signed by all parties.

§ 358.4(a) SGMA does not require an alternative to cover the entire basin; that provision should be deleted to allow for one or more alternatives to coexist with one or more GSPs. Proposed section 357.4(f) contemplates both GSPs and alternatives coexisting within a basin pursuant to a coordination agreement.

(c)(3) SGMA requires an alternative under Water Code § 10733.6(b)(3) to demonstrate sustainability for 10 years; nothing in SGMA restricts the 10-year period to 2005-2014. Not only would this produce a skewed result, as that 10-year period was unusually dry, but it would be much more logical to evaluate the most recent 10-year period as of the date the alternative is submitted to DWR.

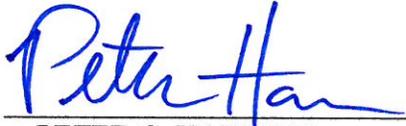
(e) Not every alternative as contemplated in section 10733.6(b) will have functionally equivalent terms and concepts. For instance, an adjudication decree is specifically authorized by SGMA as an alternative to a GSP, and the court decree will almost certainly *not* include critical parameters, minimum thresholds, or interim milestones (or equivalent terms or concepts). SGMA was specifically intended to allow the enumerated

alternatives, and they may not be rejected based on DWR's analysis criteria developed for GSPs. Additionally, requiring functionally equivalent terms and concepts for an alternative under § 10733.6(b)(1) or (b)(3) will essentially require that the GSA develop a GSP. SGMA specifically authorized the specified types of alternatives, and the proposed regulations cannot work against that intent by essentially requiring GSPs for accepted alternatives.

If you have any questions, comments, or responses to this comment letter, please do not hesitate to contact the undersigned.

Very truly yours,

MINASIAN, MEITH, SOARES,  
SEXTON & COOPER, LLP

By:   
PETER C. HARMAN