

Via e-mail to: sgmps@water.ca.gov

Subject: Draft GSP Emergency Regulations Public Comment

DATE GROUNDWATER
SUSTAINABILITY PLAN
REGULATION COMMENT
RECEIVED BY DWR
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Thank you for the opportunity to comments on these draft GSP regulations. As a participant in the GSA/GSP process, my goal in is to lessen the difficulty, cost, and complexity of the process. I believe the regulations, as drafted, would have the opposite effect.

My comments are as an individual, although I am an elected director on the board of a small water district and I represent the district on a committee forming a GSA. I am a retired Civil Engineer.

These comments are in two parts, an overview and detailed by section.

OVERVIEW

Local control and management is a fundamental principle of SGMA according to the cover sheet of the draft regulations. Despite that, the draft has an overall tone of distrust of local management and control by requiring excessive detail on some topics and over-justification of local decisions. Some examples:

- 353.4(b) The phrase "Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information,"
- 354.10(b) The phrase "and the persons or entities representing those interests, and the nature of consultation with those interests." That would be covered by the public meeting summary in (c) and the comments summary in (d).
- 354.10(e)(1) "An explanation of the Agency's decision making process and how stakeholder input and public response will be used."
- 354.10(e)(3) "A description of how the Agency encourages the active involvement of diverse social, cultural, and economic elements of the population within the basin."
- 354.10(e)(5) "A description of the roles and responsibilities of local agencies and the public."
- 354.38 "Assessment and Improvement of Monitoring Network." This would be an automatic process for competent geologists, hydrologists, engineers, and managers in developing and implementing a Plan.
- 354.44(a)(6) "A description of the legal authority required for each project and management action and the basis for that authority within the Agency."
- 354.44(a)(7) "A description of the financial requirement for each project and management action."

- 354.44(b)(4)(A) and (B)
- 356.10(f)(1) thru (5)
- 356.12(a)(1) and (2) Why should an Agency's judgment be trusted for only insignificant modifications?

DWR could show trust in local agencies and really encourage adaptive management by following a concept of 'adaptive oversight'. Give an Agency the benefit of the doubt as it embarks on this new endeavor. The Agency will be distilling the collective knowledge of local elected officials, geologists, hydrologists, engineers, biologists, etc., stakeholders, and interested persons during Plan preparation. If an Agency's actions aren't in good faith in making and implementing a GSP, then is the time to exercise tighter control, not at the start. A statement describing such discretion in evaluating GSPs would be a valuable addition. For example, something like the following could be added to 355, "The Department shall exercise broad discretion in requiring strict adherence to the detailed provisions of this Subchapter if good faith efforts are being made by an Agency to comply with SGMA and the intent of these regulations."

The plan amendments subarticle is unnecessary and undermines adaptive management. There is no guidance as to what constitutes an amendment or other modification. How would either an amendment or other modification be different from changes resulting from using adaptive management techniques? The process of annual and 5-year reviews adequately addresses this issue.

The requirement for contingency projects is unnecessary. Those projects will evolve through adaptive management. Initially, an Agency will develop the best projects and actions to achieve sustainability. It would be inefficient and impractical to require an Agency, in effect, to assume its best efforts won't work for reasons it does not yet know and develop contingency plans based on that lack of knowledge. The process of annual and 5-year reviews adequately addresses this issue.

COMMENTS BY SECTIONS

There are five drafting errors:

356.10(f)(4) does not apply to the monitoring network so it should be a new (g) with changes in the remaining small alphabet lettering, and (f)(5) would then be (4);

354.28(d) and (e) should be (c) and (d), unless the missing (c) is inserted;

354.30(d) where the reference to 354.26(d) should be to 354.28(d);

354.16(e) and (f) where the references to Section 353.2 should be to Section 352.4; and

356.12(a) where (2) and (3) clarify (1), not (a), so (2) and (3) should be (A) and (B) under (1).

350.2(c) Replace ", including subsequent modifications to Plans, and" with "during review of annual". This presumes subarticle 3 is deleted. If it isn't, insert "and amendments" after "subsequent".

350.2(d) This is a general principle. (1) thru (4) are details that don't belong here. 355.4(b) is the operative section and contains the necessary details. Suggest ending sentence with "conditions" and deleting (1) thru (4). A reference could be made to 355.4(b).

351. Suggest adding definitions for the following: best available measurement methods [re 356.4(b)(2) and (4)]; Plan amendment and Other Plan modification (assuming subarticle 3 [356.12] is not deleted); and best available data (re 354.16).

351(h). Because 352.4 states an Agency shall adopt BATs, it would be helpful if that is in the definition by inserting "by an Agency or the Department" after "determined".

351(q). While "minimum threshold" and "point" conceptually operate together, I believe those misrepresent most natural ecosystems, which vary gradually over a continuum. Suggest re-defining as follows: "Minimum threshold for a given critical parameter is the groundwater condition for a relatively narrow range within which an adverse effect starts to become significant and unreasonable."

351(v). "Plan implementation" would be clearer if it was the date the Agency adopted its Plan, since that would be the exercise of one of its powers under the Act. This implies the Agency can put its Adopted Plan into effect while DWR is evaluating it. That is not clearly stated in the regulations.

351(ab) and (ac). What are "stable aquifer conditions"? Generally, water levels vary

continually. Awareness depends on the frequency and accuracy of measurements.

351(ah). General land uses to which the water is applied does not include native vegetation. Why is it part of a 'water use sector'?

352.4(c). It appears to conflict with (a) by requiring an amendment for something the Agency may not use. It would be clearer to start (c) with "If an Agency uses the Department's best management practices and if ...".

352.6(b)(2). Grammatically it would be better to start it with, "The best available information shall be provided for wells ..." unless there is an implication that only new wells should be used.

352.6(b)(3). Start sentence with "New wells ..." otherwise implication is to use only new wells.

352.6 (b)(4). Use of the words initial and Plan is confusing. Is the intent here to mean Initial Plan, defined as one evaluated by the Department? If so, what is the presumption about its status re 355.2(e) - is it adequate, meaning substantial compliance with Subchapter but needs improvement, or is it conditionally adequate? If the intent is initial Plan, as in the first one, why even use initial since it implies there will be more Plans? This raises the question of whether there will be one Plan, changing over time with adaptive management, or whether there will be multiple Plans, each one separate because of amendments or other modifications. I would argue for the former because the nature of amendments or other modifications are not described and adaptive management with periodic reviews and evaluations would accomplish the same result.

353.8(a). What is the intent of DWR accepting comments on a proposed Plan and how will DWR handle those comments? There is an implication a commenter believes an Agency is unresponsive; otherwise why wouldn't the comment go directly to an Agency?

353.8(e). It would be helpful to an Agency if DWR would highlight those public comments it thinks are particularly important in its evaluation of the adopted Plan and to give the Agency a chance to respond to any such comments.

354.6(b) and (c). "Persons with management authority" should be replaced with "Plan Manager" to be consistent with the definition of plan manager in (b) and sentence merged with (c).

354.8(a)(5). Generally data are lacking for identifying de minimis and other small extractors.

354.10(e). Restate (e) as "A communication plan adopted by the Agency to ensure meaningful participation and involvement by interested persons." Then delete (1) thru (5) which are unnecessary with good local judgment and DWR adaptive oversight.

354.16. "Best available data" is not defined. "Best available information" is a better choice.

354.16(a)(1). "current" as of what date, 1-1-15, Plan adoption, or any recent convenient date as judged by an Agency? This ties into "present conditions" in 354.16.

354.18(b)(2). (A) and (B) are confusing and too detailed to apply to all basins. Suggest adding part of (C) to (2) as follows and deleting (A) thru (C): after "water year type" add "and to evaluate how historical conditions concerning hydrology, water demand, and surface water supply reliability may impact the basin's ability to achieve sustainable yield." Also, add "for a minimum of 10 years" after "information" in the first line of (2).

354.18(b)(3)(A). 50 years of historical evapotranspiration in many cases would probably add uncertainty to projected water use. Suggest using an estimate of current value instead. Evaluating "scenarios of future hydrologic uncertainty associated with climate

change" would be just guessing. If weather experts aren't able to forecast rainfall during a strong El Nino, how can anyone have confidence enough to use any scenario of climate change to base management programs. Adaptive management and five year reviews will adequately address problems as they emerge. Suggest deleting remainder of sentence after "horizon,".

354.18(b)(3)(B) and (C). Delete references to climate change for reason stated above.

354.18(c). Delete reference to climate change and sea level rise for reason stated above.

354.18(d). This section seems to conflict with 354.18(a) thru (c) by requiring an Agency, in effect, to replace its use of local information for its water balance with the Department's information. Suggest saying Agencies may use Department information as to (1) thru (3). When would that information be made available, or is it ready now? With regard to climate change and sea level rise in (3), it is unreasonable to expect an Agency to evaluate scenarios about climate change when the Department provides that information. Suggest deleting climate change and sea level rise from (3). It is unclear how the Department can project population growth without considering local general plans of cities and counties. If the Department has that, why ask an Agency to assess effect of general plans on its projections? A sensitivity analysis of potential reductions in long-term water supply due to climate change would be more reliable if an Agency was required to use some percentage reduction, e.g., 5% or 10% and assess the effect thereof on its water balance and ability to achieve sustainability.

354.24. SGMA makes the sustainability goal avoiding a list of undesirable results. The list does not include water supply reliability, the reason for which public water supply agencies exist. Chronic depletion of supply is prevented but use of the basin is conditioned on avoiding other undesirable results. While an Agency may choose to add water supply reliability to its goal, there is no regulatory support other than is 355.4(b)(11), referring to water used for human consumption, cooking and sanitary purposes. Putting all water use outside the home on the chopping block, so to speak, is absurd and conflicts with the statement in the transmittal letter that the long-term planning required by SGMA will ... contribute to reliable water supplies regardless of weather patterns in the State. Per capita water use goals to deal with resource allocation problems would be more realistic rather than indoor household use. Suggest changing "has achieved" to "can achieve" the sustainability goal

354.26(d). Reference to this "Section." would be clearer if it was to this "Subarticle."

354.28(b)(1)(C). Delete "chronic". It is long-term; drought is short-term.

354.28(b)(2). Add "calculated based on historical trends and projected water use in the basin, based on water year type." from (A) after "undesirable results" and delete (A) and last sentence of (2). (A) adds no clarification but appears to be circular reasoning.

354.28(e). Requiring "clear and convincing evidence" is like trying to prove a negative. This would be most difficult with subsidence. Would a geologist's expert opinion, based on knowledge of soils and susceptibility of those to subsidence within the range of water table changes and an absence of known problems be considered clear and convincing evidence? If not, the implication is surveys would be needed.

354.34(e)(3). This would require more detail than would likely be available to prepare the initial GSP. Suggest stating this as a goal to be sought through adaptive management during annual and 5-year reviews of the Plan.

354.34(h). Add the following to end of sentence after "standards:" "for each relevant critical parameter determined by an Agency pursuant to 354.28(e):".

354.38(d)(1). A minimum threshold might have a short-term exceedance with no irreversible effects that is part of a long-term sustainability plan. In this case, the issue is not lack of sufficient monitoring wells.

354.44(a)(1). Delete "proposed". When the Plan is adopted, everything is prospective. Is the intent that the Plan not be implemented until DWR approves it, causing unnecessary delay?

354.44(a)(3). Replace "status" with "plan for". Status implies action is underway before Plan has been implemented.

354.44(b). Delete requirement for contingency projects. Those projects will evolve through adaptive management. Initially, an Agency will develop the best projects and actions to achieve sustainability. It would be inefficient and wasteful to require an Agency, in effect, to assume its best efforts won't work for reasons it does not yet know and develop contingency plans based on that lack of knowledge. The process of annual and 5-year reviews adequately addresses this issue.

354.44(b)(2). The concept of a minimum threshold or undesirable result as a 'never to exceed' value may be valid if an irreversible effect occurs or would occur. However, such a situation, most likely, would be unusual. Conceptually, a minimum threshold could be exceeded for a short-term with no irreversible effects and still be part of a long-term sustainability plan with adaptive management to prevent any recurrence. The term emergency (usually associated with life and major property threats, i.e., public safety) seems out of place when considering the 20-year and 50-year time frames for sustainability and absence of irreversibility. Of course, it depends on how each Agency defines significant and unreasonable adverse effects, but it would be better to use a phrase like 'may require immediate review of conditions and actions' than to use emergency. Re-defining minimum threshold, as suggested above, would, in effect, replace "value" with a "range" which would trigger an Agency to take corrective action.

354.44(b)(5). If adaptive management takes care of contingency plans, this provision raises question of whether changes made through adaptive management are Plan amendments. Those shouldn't be considered so.

355. "Plans" in third line should be "a Plan" and suggest ending sentence after "Agency". I believe the concept of a Plan evolving continuously with adaptive management and checked annually and every 5 years is preferable to having a "new" Plan each time the Department approves an amendment or other modification, which are neither defined nor described.

355.2(e). What is status of Plan while review is underway? Is implementation assumed? Will there be any communication between the Department and an Agency during the review period? "as" in last line should be "is".

355.2(e)(3). Last sentence should direct the Department to seek consultation with the Board to determine how to rectify the inadequate Plan. The Department has already determined the inadequacy and it is in the best position to do so. The Board should help solve the problem.

355.4. The opening sentence is redundant or implies that achieving sustainability could be different from complying with the Act, which could be different from substantial compliance with the Subchapter. If the Subchapter regulations are the implementing vehicle for the Act, why not just say substantial compliance with the Subchapter and continue with remainder of paragraph? If those terms mean different things, how are each different? Suggest changing the wording after the first Plan to read, "to determine whether it is probable that the Plan will have the overall effect ...".

355.4(a). Delete "initial" and change "An" to "A".

355.4(a)(2). After "and" add "deemed necessary by the Department to comply with". This would emphasize the broad discretion the Department should exercise to not require every single item when an Agency is making a good faith effort to prepare a Plan, given the complexity, cost and controversy of doing so.

355.4(b)(5). Delete ",including contingency projects," re comment on 354.44(b) above. Isn't preventing undesirable results the same as ensuring that the basin is operated within its sustainable yield? Mentioning both is redundant or implies those are different.

355.4(b)(8). Suggest deleting "legal authority and". Supposedly SGMA granted GSAs all the authority necessary to implement a Plan. An Agency can't be expected to create additional authority absent legislative change.

355.4(b)(11). As stated, this is essentially meaningless. A Plan can't impair a right to something but it surely can impair a supply of water. There are no guidelines for 'affordable' and SGMA says nothing about affordability. Water "adequate for human consumption ... " is such a low threshold as to be useless. Suggest changing this sentence to read "Whether the Plan adequately describes the effects on existing beneficial uses and users of water from the basin."

355.6(a). Suggest deleting "and whenever the Plan is amended." There are no guidelines for what an amendment is, and conceptually, amendments should not be necessary if an Agency is using adaptive management to improve the Plan.

356.6(b). Suggest changing after "whether" to read "Plan implementation is adequate". The Plan has already been found adequate; the issue is how implementation is going.

356.6(b)(2). Delete "and contingencies" and change "outlined" to "described".

356.6(b)(3). Delete. There are no guidelines for amendments and those shouldn't be necessary with adaptive management.

356.6(b)(5). Suggest changing the beginning after "concludes that" to read "Plan implementation is likely ...". Plan has already been approved.

356.6(b)(7). Rewrite the beginning to read "If the Department identifies deficiencies in Plan implementation, it shall coordinate ...".

356.6(b)(8). Delete. Review is being done for approved Plans so this is redundant.

355.8(a). Change "may be" to "is".

355.8(b) and (c). Combine because there is only one concept - an Agency is not properly implementing a Plan and is not taking actions to correct the deficiencies.

355.10(b) and (d). These are in apparent conflict. Suggest changing (d) to say if the Department can't resolve the disputes related to fundamental issues of groundwater management, it shall find a Plan or Plans inadequate and seek guidance from the Board to determine a course of action.

356. Article 7 includes procedures for Plan amendments. Nowhere in the Article are amendments (or other modifications) characterized. Conceptually, amendments are unnecessary if the Department's mantra of adaptive management is combined with the annual reports and 5-year review cycle. My recommended concept of adaptive oversight, if followed by the Department, would ensure an Agency is making continuous improvements to achieve sustainability.

356.2. In first line, change "by Agencies" to "an Agency".

356.4. This implies an Agency will implement its Plan without waiting for the Department's approval. Otherwise, the Agency wouldn't be able to provide information required by 356.4(c).

356.4(b)(2) and (4). The term "best available measurement methods" is not defined. Will the Department provide that or should the term "best available information" be used because it is defined?

356.4(b)(3). Punctuation makes sentence confusing. Suggest comma after "used". Then it would be clear subject is surface water and groundwater recharge or in-lieu use.

356.4(c). Delete "and the implementation of any contingency measures." per previous comments.

356.6(a). Change "requesting agency" to "submitting Agency".

356.6(b). What is the consequence of treating a previously approved Plan and "conditionally adequate"? A better approach would be for the Department to notify an Agency of any problems in the annual report and allow reasonable time for corrective action before re-classifying the approval status, whatever impact that action would have on the Agency's actions in Plan implementation. Current wording signals a distrust of local agencies.

356.10. Delete "and whenever the Plan is amended."

356.10(b). Suggest replacing "identified" by "taken". There can't be an effect on groundwater unless some action is taken. Instead of "corrective", suggest using something to the effect of "actions taken by the Agency after the previous 5-year review to improve prospects of achieving sustainability". Corrective actions recommended by the Department should be addressed in a separate subsection.

356.10(c). Delete per previous comments.

356.10(d). Delete "or amendment" and "initial". The phrase "warrants changes to any aspect of the Plan" is counter to the concept of adaptive management. The Agency should be encouraged or held accountable to make continuous changes to improve prospects for achieving sustainability and not hindered by implying any changes need to be approved by the Department. Warrants implies having to justify something to someone else. Trust the local agencies.

356.10(f)(2). It seems unreasonable to assume an Agency will identify a problem and not

do anything to fix it. This is another example of distrust of local agencies. Adaptive management should be a key criterion for demonstration of good faith efforts and here the concept is to improve monitoring where data gaps interfere with progress toward sustainability. Delete "overall"; "Plan" is sufficient.

356.10(f)(3). This appears to require correcting data gaps before you know you have any. Does the "first five-year review" occur 5 years after Plan adoption or after Department approval? Data gaps are likely to appear more than once as more is learned about how the basin responds and about the effectiveness of the analytical tools used and actions taken to achieve sustainability. Remediation of data gaps should be part of continuous improvement through adaptive management.

356.10(f)(5). "needs of basin" is vague. The need is where insufficient data are interfering with achievement of sustainability by preventing an accurate assessment of conditions and effects of actions taken.

356.10(g). Suggest replacing "legislative" with "enforcement" or "regulatory". Does an Agency have the power under SGMA to legislate and if so, what is the intent here?

356.10(i). Delete re amendments conflicting with concept of adaptive management and absence of amendment guidelines.

Subarticle 3 356.12. Conceptually, plan amendments undermine adaptive management and local control. Operationally, plan amendments are unnecessary because the draft regulations give the Department oversight authority for any Plan changes with annual reports and 5-year reviews. From a regulatory perspective, this subarticle is vague, having neither guidelines for what constitutes an "amendment or other modification", nor for how changes expected to be made through adaptive management would be categorized. This subarticle could be deleted without diminishing the Department's responsibility to ensure an Agency's Plan will achieve sustainability and it should be deleted because of the above and the problems listed below.

356.12. Is consistency with the Act the same as consistency with this Subchapter? If yes, delete consistency with the Act. If not, what is the difference, and what additionally would be expected of the Agency if it complies with this Subchapter?

356.12(a) through (c). The regulatory structure is wrong; the wording confusing, vague, or incorrect; and one concept is illogical. In (a), an Agency can modify a Plan (apparently meaning adopting and implementing it) and then submit the modification to the Department. Per (b), if the modification was an amendment, the Agency would submit it to the Department. What if the change was an "or other modification"? If it was an amendment, the amended Plan would be considered as if it were a new Plan, meaning the Department could take up to 2 years to make its evaluation and per (c), it would be adequate or inadequate. Why couldn't it be conditionally adequate?

If an Agency chooses to propose the modification to the Department before approving it, (1) applies. (2) and (3) are illogical and demonstrate a mistrust of local agencies. Why would an Agency modify a Plan if the modification wasn't significant? Why should trust of an Agency's judgment be limited to insignificant modifications?

357. "Requirements" for "voluntary" agreements appears contradictory. "Guidelines" would be a better choice, especially because the agreements "may" include a list of provisions as referred to in 357.2.

357.2(b)(4). "will" and "shall" are out of place in a provision that may be included in a voluntary agreement. "could" or "should" are better choices.

Thank you for your consideration.

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