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April 1, 2016

Via Electronic Submission

California Department of Water Resources
Director Cowin
ATTN: Lauren Bisnett, Public Affairs Office
P.O. BOX 942836
Sacramento, CA 94236
SGMPS@water.ca.gov

Re: Comments to SGMA Draft Emergency Regulations for Groundwater Sustainability Plans and Alternatives

Dear Director Cowin:

ACDF, LLC, on behalf of itself and its affiliated entities, respectfully submits these comments in response to the California Department of Water Resources (“DWR”) release of the Sustainable Groundwater Management Act (“SGMA”) Draft Emergency Regulations for Groundwater Sustainability Plans (“GSPs”) and Alternatives (collectively, the “Draft Regulations”).

ACDF is a diverse, family owned and operated farming organization. We farm permanent and row crops across California, including land in the following water service areas: Friant System, Kern County Water Agency, Kings River Basin, San Luis-Delta Mendota Water Authority and areas north of the Sacramento–San Joaquin River Delta. Our operations employ a diverse conjunctive use strategy with short-term and long-term federal, state and local surface supplies coupled with private and district groundwater wells and groundwater banking assets. Groundwater storage and use are not only of critical importance to our operations but also to the economy of the State of California and the food safety, security and reliability for all Americans.

Our comments to the Draft Regulations center on a few key themes:

- The Draft Regulations must be consistent with SGMA.
- By design, SGMA allocates compliance responsibility to local agencies, not DWR. Therefore, DWR’s ability to enforce SGMA – both at the outset and during implementation – must be fundamentally limited.
- GSAs should have the flexibility to evaluate cost-benefit analyses when considering both procedural and substantive compliance with SGMA.

Where applicable, we have included section references below.
A. **Local Governance**

1. **Sustainability must be Managed Locally under SGMA.** Local management of the groundwater basins is a critical cornerstone to SGMA. We therefore anticipated that the Draft Regulations would provide suggestions and guidelines for the Groundwater Sustainability Agencies (“GSAs”) to consider in constructing their GSPs. Instead, the Draft Regulations are unexpectedly prescriptive in nature, which is fundamentally inconsistent with the letter and spirit of SGMA. As a general matter, DWR should review the Draft Regulations in their entirety with this SGMA principle at the forefront: how sustainability is defined, monitored and ultimately achieved is by law left to the GSAs, not DWR. (example sections: Article 3, Article 5)

2. **GSAs are Not Bound to Adopt Doctrines Found in Past California Water Adjudications.** SGMA’s passage was in part driven by the inadequacies found in the adjudication process in California (i.e., time to resolution, excessive costs to litigate, failure to resolve disputes, etc.). Accordingly, the Draft Regulations should be clear that, in developing rules for their covered areas, GSAs will have maximum flexibility and need not be bound by adjudicatory principles (e.g., priority of appropriation, extent of established use, etc.).

3. **GSAs are Not Obligated to Adopt State BMPs.** The language in Section 352.4 should be revised as follows: “…may elect to amend the Agency’s best management practices to correspond to these of the Department.” Since GSA’s have no obligation to follow the BMPs of the State (and may develop their own local BMPs), an obligation to institute them never arises regardless of where a GSA is in DWR’s review cycle.

4. **Water Quality Matters Need to be Left to Local Consideration.** The Draft Regulations require GSAs to avoid the undesirable result of degraded groundwater quality. This is generally consistent with SGMA but the Draft Regulations should recognize that groundwater quality has historically and will continue to vary from basin to basin. And adequacy of water quality in any given basin is contingent upon use, including crop selection. Accordingly, the Draft Regulations should expressly defer to the GSAs for any determination of local groundwater quality standards. State groundwater quality standards should not be imposed under SGMA. (example sections: 354.8; 354.16; 354.28(b)(4); 354.34(h)(4))

5. **Groundwater Banking and Recharge Must Be Expressly Exempted.** Groundwater banking and recharge activities are not expressly exempt from the Draft Regulations. DWR should add a provision that specifically states that district and private groundwater banking and recharge programs will not be restricted under SGMA.
B. Cost-Benefit

1. Commercial Viability Needs to be Considered. The Draft Regulations do not expressly offer GSAs the flexibility to consider whether a particular procedural action or substantive action by the GSA is commercially viable. The Draft Regulations should be modified to encourage GSAs to perform a cost-benefit analysis when considering each compliance action.¹ (example sections: Article 3; Article 5; 352.6(b)(2); 354.14; 354.16; 354.18; 354.38; 354.44(a)(7) and (b)(1); 356.10)

2. Submitting Agencies Are Costly and Unnecessary. A ‘Submitting Agency’ is a new concept found in the Draft Regulation that is not required under SGMA. It appears that the Submitting Agency’s function is merely to “compile and rectify data” as submitted by the GSAs. This is a costly effort that is not mandated by SGMA and could have substantive impacts on the various GSPs submitted by each GSA. DWR should therefore delete the concept from the Draft Regulations. (example section: 357.4)

C. Inconsistency with SGMA

1. Multiple GSPs and GSAs are Permitted within a Basin. The Draft Regulations provide that one GSP must achieve sustainability for the “entire basin” within 20 years. This is inconsistent with SGMA and the notion that multiple GSAs and GSPs may cover any given basin. DWR should modify the Draft Regulation to account for the structural flexibility called for in SGMA. (example section: 350.2; 354.20; 355.4(a)(3); 358.4)

2. Directives on the Collection of Information Are Overbroad. The Draft Regulations direct each GSA to collect a substantial volume of data regarding its respective basin (or portion thereof). First, as discussed above, these directives are prescriptive in nature and therefore inconsistent with SGMA’s central tenant of local management. Second, the Draft Regulations presume that new studies, reports, technologies, etc., will be employed for purposes of collecting this information, which would have the effect of disregarding existing, valuable information the GSAs have collected in prior years for purposes other than substantial compliance with SGMA. (example section: 354.14) Third, GSAs should not be forced to deploy the latest technology/techniques for monitoring if they have existing techniques that can be utilized more efficiently or cost effectively. If the State forces a ‘highest common denominator’ standard on technology/techniques, then the cost of SGMA compliance will be difficult to contain. (example sections: 354.30 – 354.40). DWR should modify the Draft

¹ DWR should note that Water Code Section 10608.48(c) provides for a similar cost-based analysis when considering water efficiency measures: “Agricultural water suppliers shall implement additional efficient management practices, including, but not limited to, practices to accomplish all of the following, if the measures are locally cost effective and technically feasible:…” (emphasis added)
Regulations to account for the availability of these existing, more cost effective materials/technologies/techniques.

3. **Confidentiality Commitments under SGMA Must Not be Circumvented.** In a number of areas, GSAs will need to provide information to DWR which may be as detailed as a site/legal parcel/water user basis. Although personal information is not disclosable under SGMA, this level of granularity in the Draft Regulations has the effect of circumventing the privacy requirements embedded in the legislation. DWR should revise the Draft Regulations to ensure that the information provided does not indirectly do what SGMA directly prohibits. (example sections: 352.6(4), 352.8, 354.8(a)(5), 354.10(b); 354.26(a)(3) and (b); 354.40).

4. **Detailed Well Information is Not Required or Necessary under SGMA.** Some of the well information identified in the Draft Regulations is not necessary for managing groundwater sustainability as envisaged in SGMA. Further, it increases the cost and administrative burden associated with substantial compliance. Specifically, information regarding “well construction” and “casing perforations, borehole depth, and total well depth” is not required under SGMA nor is it necessary for managing groundwater. Accordingly, Sections 352.6(b)(2) and 352.6(b)(3)(D) should be deleted. At minimum, this information should only be provided ‘to the extent readily available’ as some of the information may not be known or reasonably accessible.

5. **Speculation on Climate Change is Not Required under SGMA.** Given all the uncertainty on the impacts of climate change, it is not sensible for GSAs to have to spend time, money and resources on mere speculation. This should be revisited at a later date when there is clearly quantifiable climate change data that can be included in each GSA’s analysis. (example sections: 354.18(c))

6. **Land Use Matters Are Not Under the Authority of the GSAs.** The Draft Regulations require the GSAs to provide information on current and future land use matters. While land use agencies may utilize the information generated by the GSAs in exercising their land use authority, it is not the obligation of the GSAs to play a role in speculating in that arena. Accordingly, the land use requirements in the Draft Regulations should be deleted. (example sections: 354.8)

7. **Additional Compliance Requirements are not Contemplated in SGMA.** The Draft Regulations state in multiple provisions that the Plan must “achieve sustainability, comply with the Act and substantially comply with the Subchapter” (and variations thereof). This could be misconstrued as having strict SGMA compliance requirements in addition to equitable requirements beyond SGMA. In each instance, this concept should be simply stated as the GSP must “substantially comply with the Act”. (example sections: 353.6, 354.20; 354.24; 355.4; 355.6 (first para); 355.6(b)(6); 355.8(b); 356.2; 356.10)
8. **DWR Reviews are Set at Periodic Intervals Only.** SGMA requires that GSPs will be evaluated at least every 5 years. This was intended to set a maximum interval, not to allow for spot reviews in DWR’s discretion. Therefore, Section 350.2(g) is fundamentally inconsistent with SGMA by allowing DWR evaluations “at any time”. Similarly, the repeated use of the phrase “at least” – Sections 352.4(b), 356.6 – without any further parameters suggests that the State can review a GSP as frequently as it wishes. This is not consistent with SGMA and is likely to cause complexity, administrative burdens, costs and risks not imposed by the legislation. DWR should amend the Draft Regulations to allow for the establishment of reasonable review intervals.

**D. DWR’s Limited Role**

1. **Dispute Resolution is Not Limited to DWR; Private Parties Do Not Have Standing.** SGMA does not appoint DWR as the exclusive arbiter of disputes among GSAs. Therefore, the Draft Regulations should be modified to clearly indicate that, while DWR is an option for dispute resolution, SGMA does not preclude the exercise of other legal or equitable rights. Further, where DWR is serving in the role of arbiter, the Draft Regulations need to clarify the rules that would apply in such an instance, including expectations of due process. Finally, with respect to an instance where a GSA is not in substantial compliance with SGMA, the Draft Regulations should be clear that private parties do not have standing to bring claims against a GSA under SGMA. (example section: 355.10)

2. **Scope of ‘Step-In’ Remedies Must Be Limited under SGMA.** The DWR-GSA relationship can be analogized to a lender-borrower relationship where lender ‘step-in’ remedies are typical for borrower noncompliance. With that said, it is also typical for lender remedies to have limitations and qualifications such that remedies are not triggered for any minor or technical area of noncompliance. It follows that DWR should also have such limitations and should modify the Draft Regulations as follows:
   a. **Inadequacy Response.** An inadequacy notice needs to give specific details as to areas of substantial noncompliance backed by science and suggestions for commercially viable cures. Absent such detail, any such DWR notice would be unreasonably vague. (example section: 355.2(e)(3))
   b. **Notice and Cure.** When DWR notifies a GSA of substantial noncompliance, the GSA should have reasonable notice and an opportunity to cure prior to DWR’s remedies being triggered. The period to cure should be extended for as long as necessary so long as the GSA is working diligently on problem resolution and the relevant parties are not irreparably impacted by the extension of time. (example section: 355.2)
   c. **Materiality Threshold.** The phrase ‘without causing undesirable results’ and other similar phrases should be qualified by materiality in all cases.
   d. **Reasonableness Qualifier.** As with standard contractual covenants that are conditional, the terms ‘could’ and would’ should be qualified throughout as ‘…could reasonably be expected to…’ or ‘…would reasonably be
expected to...’. (example sections: 354.8(d) and (g)(8); 354.26(a)(3) and (d); 354.28(a); 354.38 (first para.); 354.44(a)(4)(A); 355.4 (first para. and (b)(11); 357.2(b)(4))

e. **Substantial Compliance.** All references to ‘compliance’ with SGMA found in the Draft Regulations should be qualified by ‘substantial compliance’. The drafting within the Draft Regulations is inconsistent on this point.

3. **Other Drafting Points.**

f. **Delete Sec 355.4(b)** – This section is not needed as it merely repeats what is already required under SGMA.

g. **Incorrect standard** – The ‘clear and convincing’ standard is incorrect for administrative determinations. (example sections: 354.28(d) and (e) and 354.30(d))

Sincerely,

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Water Management Team
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