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Editor's Note...

by Scott B. Birkey

I write this Editor's Note on the heels of the 25th Anniversary of the Environmental Law Conference at Yosemite®. The Conference is the State Bar Environmental Law Section's marquee event, and over the years it has become an important gathering of lawyers, consultants, policymakers, regulators, and others interested in environmental, natural resource, and land use issues. It's also an opportunity to showcase the broad spectrum of those issues, and the topical line-up of panels, plenary speakers, and presentations for this year's Conference certainly reflected that spectrum. I suppose you could say there's always something for everyone at the Conference. I'd like to encourage all of our Section members and friends to continue to support the Conference and its tradition of creating a space where all of us can gather to get reacquainted, share ideas, and work on perfecting our craft.

Like the annual Conference, the *Environmental Law News* also seeks to showcase that broad spectrum of topics and positions related to environmental law. This issue of the News is no exception. We bookend this issue with articles on the Sustainable Groundwater Management Act, which is an evolving and important statute that has garnered much attention throughout the year. We include an article on the recent *Newhall Ranch* decision and new standards for the analysis of greenhouse gas impacts under CEQA. We follow that article with a piece on the Clean Power Plan litigation and how that litigation may change, or at least inform, the applicability of the *Chevron* doctrine of deference. We then give you an article on the state of California's regulation of chemicals after recent reforms to the Toxics Substances Control Act and after that an article on the evolving regulation of tricholoroethylene, or "TCE," vapor by federal and state regulatory agencies.

This is my last issue as Editor of the *Environmental Law News*, as I'll be handing the baton to Julia E. Stein, newly appointed to the Section's Executive Committee. I'd like to thank all of the authors who have contributed articles to the *News* during my three-year tenure. I'd also like to thank in particular all of the article editors that tirelessly and with much cheer and intelligence assisted me and the authors in getting all of these articles into print. Thank you!

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California Groundwater Management: Laboratories of Local Implementation or State Command and Control?

by David R.E. Aladjem & Meredith E. Nikkel*

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The controversy over local or unified governance was debated before the formation of the United States, and continues today. In The Federalist No. 46, James Madison rejects fears that establishment of a federal government would result in "a meditated and consequential annihilation of the State governments" and argues that the "federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes."[1]

Over two and a quarter centuries later, the California Legislature passed a landmark groundwater law that embodies the different purposes and powers of both local and unified governance. Under the Sustainable Groundwater Management Act of 2014 (SGMA), the management of groundwater basins in California resides first in the hands of locals, the same hands that James Madison recognized were the "natural attachment of the people."[2] For Madison, the Union was "essential to guard them against those violent and oppressive factions which embitter the blessings of liberty."[3] Similarly, SGMA depends on the state to guard against local politics interfering with the protection of the state's underground water supplies.

SGMA delicately balances local control and state command in a manner that has already seen mounting tension in its short lifespan. Empowered with regulatory control over groundwater supplies in their service area, local agencies have developed numerous techniques to self-organize and chart a path towards local management. At the same time, the state agencies with defined roles under SGMA have adopted formal regulations, informal guidelines and administrative practices that reveal a trend toward state-level control over groundwater management.

This article will explore the strategies deployed by local agencies to maintain control over the groundwater management requirements in the Act and the ways that state administrative bodies exercise regulatory control of those efforts. We will also analyze the ways in which these approaches are meeting SGMA's statewide goal of local governance tailored to local circumstances with support for those local institutions from the state. Through this analysis we will identify areas where state control should be avoided and areas where state control may be required. Finally, we will offer our thoughts on how the state can best work with local entities in order to achieve the goal of sustainable groundwater management.

In the end, we believe that SGMA has the potential to bring our founding fathers' guidance to life by entrusting state and local governments with different powers to act together as trustees for the people and their groundwater supplies.

I. THE SETTING

In 1951, the California Department of Public Works (now the Department of Water Resources, DWR) issued "Water Resources of California," its first statewide bulletin. Even then, DWR recognized that occurrence and availability of groundwater is unique to the physical conditions existing in areas throughout the state.[4] DWR noted that groundwater supplied about half the water use in California in 1949.[5] The Legislative Analyst's Office estimates that about 43 percent of Californians currently depend on groundwater, at least in part.[6] Much of the state's vast farmland overlies groundwater basins and relies on groundwater for irrigation. So, while groundwater supply is based on local characteristics, demand is a matter of state and worldwide interest.

Groundwater has been managed locally since at least the formation of the Orange County Water District in 1933, and numerous other local entities have since been established across the state for this purpose. The Legislature in 2014 expressly acknowledged the importance of these local entities in finding that: "[g]roundwater resources are most effectively managed

at the local or regional level."[7] The legislative intent behind SGMA was expressly to manage groundwater "through the actions of local governmental agencies to the greatest extent feasible, while minimizing state intervention to only when necessary to ensure that local agencies manage groundwater in a sustainable manner."[8] Since SGMA's enactment, local agencies across the state have taken the principle of local control seriously by actively engaging in the management process prescribed by the Legislature. For example, approximately 90 entities have already expressed their intent to serve as the groundwater sustainability agency for their service area.[9] Indeed, in many areas the groundwater sustainability agencies overlap and local coordination efforts are well underway.

Against this backdrop, we consider whether the center for groundwater management is best left to these local entities and how (if at all) the state should be involved.

II. PRINCIPLES OF LOCAL PRIMACY

SGMA was enacted with recognition of existing local regulation of groundwater extractions. Historically, those owning property overlying groundwater had absolute ownership of that groundwater, "to the same extent and as fully as [a landowner] own[s] the soil, or the rocks or timber on the land."[10] This sentiment was deeply rooted in the common law of property that afforded individuals private rights to groundwater. Groundwater extractions were managed in the same way that landownership was managed: through the judicial process. This approach to management has resulted in a web of California case law that applies on a basin-by-basin or even well-by-well basis. SGMA acknowledges this historic approach to groundwater management by exempting groundwater basins that are subject to continued court jurisdiction from the requirements of groundwater sustainability planning under the Act.[11]

In addition to the judicial process, the California Supreme Court held as early as 1933 that a county's police power is properly exercised over the control of groundwater extractions.[12] In a manner reminiscent of James Madison, the Court explained that although the police power of the state includes legislating about the management of water as it might affect public welfare, "[t]his does not mean, however, that this phase of the police power is to be exercised exclusively by the state legislature."[13] The dual nature of groundwater as a uniquely local resource and at the same time available for statewide benefit requires dual coverage under state and local police powers.

In the first instance, SGMA continues this history of local control by allowing local agencies to take on the responsibility and authority of groundwater management for the basins that underlie the agency's service area. Local agencies are the vehicles invested with the authority to "perform any act necessary or proper to carry out the purposes of this part."[14] In areas within a basin that are not within the management of a groundwater sustainability agency (or GSA) by June 30, 2017, the county (not the state) is presumed to be the GSA for that area.[15] Only upon failure of both a local agency and the county to step up as the GSA will state intervention be automatically imposed.[16]

Local agencies that assume responsibility as GSAs are tasked with developing the groundwater sustainability plan (or GSP) that must identify and implement a sustainability goal for a particular groundwater basin.[17] The sustainability plan and sustainability goal are to be developed within the context of the physical setting and characteristics of the basin and its current conditions.[18] In addition, GSAs must "consider the interests of all beneficial uses and users of groundwater."[19] In these ways SGMA instills principles of local control in the development of sustainability plans by grounding those plans in the local groundwater conditions and users of that groundwater.

Finally, a local agency that elects to become a GSA and submits a groundwater sustainability plan receives additional authority under SGMA and tools to fund and enforce groundwater management in its service area.[20] These tools are the Legislature's way of ensuring that local control can prevail over state intervention when that local control is meeting the sustainability goal for the basin. For its part, DWR is charged with using its "best efforts" to provide technical assistance to local agencies implementing the Act, including the adoption of best management practices for sustainable management of groundwater.[21] In other words, the state is charged with providing technical assistance to promote local control of groundwater as the primary mode of groundwater management under SGMA.

III. PROVISIONS FOR STATE CONTROL

Although the basic framework for groundwater management under SGMA is founded upon local control, the ultimate enforcement mechanism is through the exercise of state evaluation and final authority to manage groundwater resources. In this way, SGMA incentivizes local action under the threat of state oversight or "backstop."

In addition to its technical assistance role, DWR is given significant authority to define groundwater basins and to evaluate groundwater management plans adopted by local agencies. Since 1980, the Department has been charged with developing descriptions of the state's groundwater aquifers,

including boundaries and general patterns of use within the basins.[22] Last updated in 2003, DWR's Bulletin 118 series contains identifications and descriptions of 515 groundwater basins and subbasins.[23] SGMA codified the significance of Bulletin 118 by defining basin boundaries for purposes of the Act as those identified in Bulletin 118.[24] Acknowledging the continued local interest in the issue of basin boundaries, however, SGMA provides a process for local agencies to request that DWR revise the boundaries of a basin, including the establishment of new subbasins.[25] However, the Department remains the ultimate arbiter of whether to modify any particular basin boundary and can issue emergency regulations that have the force of law[26] which govern the request and modification procedure.[27] The state-determined basin boundaries will significantly shape the structure and implementation of local groundwater management.

Significantly, DWR is charged with the evaluation and assessment of groundwater sustainability plans developed by local GSAs.[28] The terms used in SGMA are important and illuminate the balance that the Legislature attempted to strike between local control and state oversight. Rather than using the term "approval," SGMA requires that the State of California "evaluate" or "assess" a GSP. The difference is subtle but important. In using the word "evaluate" rather than "approve," the Legislature was attempting to signal to DWR and the State Water Resources Control Board (SWRCB) that local agencies have flexibility in determining how to manage their groundwater basins and that the State of California will not impose a "one size fits all" solution on local agencies. Instead, the goal is to have the type of cooperative federalism envisioned by Justice Brandeis in his famous dissent in *New State Ice Company v. Liebmann.*[29] Under SGMA, local agencies should be allowed to be courageous enough to serve as a laboratory to "try novel . . . experiments without risk to the rest of the [state]." [30]

However, in addition to its charge to support local agencies through technical assistance and defining the boundaries of the state's regulated groundwater basins, DWR can play the role of arbiter of the success of local control by GSAs. The Department, exercising this authority "in consultation" with the SWRCB, can determine that a local plan for groundwater sustainability is inadequate and therefore the subject of state intervention.[31] The Department and Board[32] have collaborated in the development of regulations regarding the assessment and evaluation process,[33] but have received significant criticism for overreaching the authority of SGMA by proposing onerous requirements to meet the standards of adequacy and avoid state intervention. Some fear that the state's statutory authority to evaluate, and the regulatory power to impose exacting requirements on local agencies, will render SGMA's local control a myth. It remains to be seen whether the exertion of state control in this manner will lead, as Madison's opponents feared, to the "meditated and consequential annihilation" of local governments.

IV. STRATEGIES FOR LOCAL IMPLEMENTATION

The first arena for local implementation of SGMA is the election of GSAs. In many basins, several local agencies have elected to become the GSA and have created overlapping GSA boundaries. Under the original enacted version of SGMA, local agencies were allowed to form GSAs for any area of a basin underlying its service area.[34] Although the law was silent as to how overlapping GSA service areas would be resolved, the basic requirement that any two GSAs operating in a single basin must either adopt a single plan or coordinate multiple plans by way of a coordinating agreement would ensure that the sustainability goal for a basin was achieved in a coordinated fashion.[35]

In 2015, however, SGMA "clean up" legislation was enacted that included specific direction about overlapping GSAs.[36] SGMA now requires overlapping GSAs to "reach agreement to allow prompt designation of a groundwater sustainability agency" before any decision of a local agency to become a GSA becomes effective.[37] In its role as technical advisor, DWR has made funding available for facilitation services to help local agencies reach agreement on a single GSA for any particular area of a basin.[38] The requirement to resolve GSA overlaps forces local agencies to concede some power so that a unified approach to management can be obtained by a single GSA overlying each portion of a basin. In some areas, this may not be accomplished without intervention from the SWRCB. This "overlap" requirement has forced to the forefront the political questions about governance that constitute one of the most difficult aspects of SGMA. In the normal course of complicated negotiations, it is often helpful to discuss and resolve the technical aspects of the situation first, to build trust and confidence, and then deal with the more political aspects of the negotiation later, once each of the parties has some confidence that it will get what it needs from the negotiation. The overlap requirement reverses this process and, consequently, may actually impede the development of GSPs that it was adopted to foster.

In many areas, local agencies are using the tool of a joint powers authority to bring multiple entities together as a single, unified GSA. A joint powers authority can be composed of two or more local agencies in addition to a mutual water company and can itself become a new local entity.[39] The member entities

have significant flexibility to agree upon governance and financing terms, including the assignment of members to a board of directors and voting requirements.[40] In some areas, a joint powers authority including the county may be used to ensure full coverage of a basin even though the main responsibilities of groundwater management will be performed by districts within the county. In this way, the unified county governance cedes some of its power to smaller local agencies. In other areas, local agencies are opting to form numerous smaller GSAs that will each develop their own plans for a single basin. This disaggregated form of local control is tempered by the requirement under SGMA that multiple plans for a basin be coordinated in terms of data collection and analysis and sustainability goals.[41] Even in neighboring subbasins that are highly connected, some measure of unified governance will be required to ensure that each basin reaches its sustainability goal.

Another strategy for local control will play out during the plan development stage of implementation. Recognizing the potential for localized areas of sustainability within a basin, SGMA allows the SWRCB to exclude any portion of a basin for which the GSA demonstrates sustainability from probationary status.[42] This provision serves to afford full local control to areas that are sustainably using the groundwater resources—for example in localized areas of supplemental supply or rationed use of the groundwater. DWR's regulations for evaluation of groundwater sustainability plans bolster this concept by allowing a GSA to define "management areas" at the outset where local conditions differ significantly within the basin.[43] In these ways, SGMA and DWR have granted significant authority to local agencies to find ways to reach sustainability on a small scale even if unified sustainability is not possible for political or other reasons.

V. CONCLUSION

There may be some areas where state control or basin-wide adjudication is appropriate because local politics do not allow for coordinated local planning. Indeed, there may be basins where the local politics are such that the external force of the state is necessary to move towards sustainability. However, many sub-basins are appropriate for local control and DWR and the SWRCB should provide tools to make that happen by facilitating funding and streamlining necessary permitting of projects instead of imposing onerous planning requirements. The focus of DWR's and the Board's oversight role should be on achieving the sustainability goal of SGMA, not on requiring that the goal be achieved in a particular way for each basin in the state.

ENDNOTES

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1. J. Madison, *Federalist No. 46: The Influence of the State and Federal Governments Compared*, (1788).
2. *Id.*
3. J. Madison, *Federalist No. 45: The Alleged Danger From the Powers of the Union to the State Governments Considered*, (1788).
4. State Water Resources Board, Bull. No. 1, Water Resources of California (1951) at p. 17, 25-26.
5. Bulletin No. 1, at 20.
6. Legislative Analyst's Office, CA Water Plan Update 2009 Vol. 4, Water Rights: Issues and Perspectives (Mar. 10, 2009), http://www.water.ca.gov/waterplan/docs/cwpu2009/0310final/v4c21a07_cwp2009.pdf, at 8.
7. A.B. 1739, § 1(a)(6) (Cal. 2013-14); S.B. 1168, § 1(a)(6) (Cal. 2013-14).
8. Water Code § 10720.1.
9. Table of GSA Formation Notifications Received by DWR, http://www.water.ca.gov/groundwater/sgm/gsa_table.cfm (last visited on June 30, 2016).
10. *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 622 (1899); *see also id.* at 602 (collecting references for proposition that "percolating water belongs to the owner of the soil").
11. Water Code § 10720.8.
12. *In re Maas* (1933) 219 Cal. 422, 424-25.
13. *Id.*
14. Water Code § 10725.2(a).
15. Water Code § 10724(a).

16. Water Code § 10735.2.
17. Water Code § 10727.
18. Cal. Code Regs. tit. 23, § 354.12.
19. Water Code § 10723.2.
20. Water Code § 10725 *et seq.;* 10730 *et seq.*
21. Water Code § 10729.
22. Water Code § 12924 (1978).
23. California Department of Water Resources, Bull. No. 118 – Update 2003, available at http://water.ca.gov/groundwater/bulletin118/report2003.cfm.
24. Water Code § 10722.
25. Water Code § 10722.2.
26. In addition to emergency rulemaking authority, SGMA also affords DWR the authority to adopt "a guideline, criterion, bulletin, or other technical or procedural analysis of guidance" without abiding by the requirements of the Administrative Procedure Act. Water Code § 10729.2. It remains to be seen how DWR will exercise this unfettered authority to issue guidelines without public notice or comment.
27. Water Code § 10722.2; Cal. Code Regs., tit. 23, §§ 340 et seq.
28. Water Code § 10733.
29. *New State Ice Co. v. Liebmann* (1932) 285 U.S. 262, 311.
30. *Id.*
31. Water Code § 10735.2(a)(3).
32. SWRCB has taken the position that it has authority under Water Code section 275 to take actions to prevent waste or unreasonable use of groundwater. *See* State Water Board Decision 1474 (1977); *see e.g.* Cal. Code Regs., tit. 23, § 862 (Russian River frost protection regulation applied to hydraulically connected groundwater); *see also Light v. State Water Resources Control Board* (2014) 226 Cal. App. 4th 1463, 1482-87 (Section 275 includes SWRCB rulemaking authority); J. Sax, *We Don't Do Groundwater: A Morsel of California Legal History*, 6 U. Denv. Water L. Rev. 269, 308-313 (2003).
33. Water Code § 10733.2.
34. Water Code § 10723.8(b) (2014).
35. Water Code § 10727.6.
36. SB 13 (2015).
37. Water Code § 10723.8(c).
38. California Department of Water Resources, Facilitation Support Services (2015), http://wwwdwr.water.ca.gov/irwm/partnership/facilitation_services.cfm.
39. Cal. Gov't Code § 6502; 6507; 6525.
40. *See* Cal. Gov't Code § 6508.
41. Water Code § 10727.6.
42. Water Code § 10735.2(e).
43. Cal. Code Regs. tit. 23, § 354.20.