THE NEW AGE OF WATER REGULATION—WHO WILL FLOAT TO THE TOP?

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Water is on everyone's mind, from the Central Valley farmer to the suburban gardener, from the Kern County oil driller to the Central Coast retiree. We've reached the inevitable point where there just isn't enough to go around. So what happens next?

As with any high-stakes environmental issue, the lawyers step in. Lawmakers are struggling to figure out how to manage California's most critical resource against a backdrop of arcane water rights law governed primarily by cases decided in the nineteenth century. Water law, such as the big-money fights over rights to divert water from the Colorado River, has traditionally been the stuff of law school textbooks. Not for long.

Considering Governor Jerry Brown's recent executive action to limit urban water use significantly, the passage of the game-changing Sustainable Groundwater Management Act (SGMA), and a 2014 Scott Valley decision that applies the public trust doctrine, state regulators have developed a variety of relatively new and powerful tools for regulating water quantity and quality. The approval in November of Proposition 1, a $7.5 billion water bond, provides the state with significant resources to reshape the way California manages water. The water wars are coming to Main Street—these high-stakes disputes will be hashed out in courtrooms for decades to come, and the outcomes will shape the fate of California in the twenty-first century.

WATER-USE RESTRICTIONS

Governor Brown's April 1, 2015, seven-page executive order mandating a 25 percent reduction in statewide water use is the first of its kind in California, the culmination of two years of Brown flexing his executive muscle to manage water.

The order takes a heavy-handed approach to managing urban water use, mandating reductions in statewide use compared to 2013 levels. Per the terms of the order, the Department of Water Resources (DWR) will focus restrictions on heavy urban water users. DWR's April 7, 2015, proposed framework for implementing the law assigns a re-

duction requirement for each water supplier, requiring the heaviest users (more than 165 gallons per day per capita) to reduce usage by 35 percent. By contrast, in areas where per capita use is less than 55 gallons per day per capita, use need only be reduced by 10 percent. DWR also apparently intends to impose new reporting requirements on industrial, commercial, and institutional users.

DWR's proposed framework appears to acknowledge that its enforcement capacity is limited, stating that additional enforcement tools may be adopted by emergency regulation as part of this program.

The order charges DWR with leading a statewide initiative to replace 50 million square feet of lawns with drought-tolerant plants and with funding programs for underserved communities. It requires the State Water Resources Control Board (State Water Board) to impose restrictions on use of potable water on campuses, golf courses, and cemeteries, and to prohibit irrigation of street medians with potable water. It also requires the State Water Board to "direct urban water suppliers to develop rate structures and other pricing mechanisms . . . to maximize water conservation." And perhaps most notably, it requires a significant uptick in enforcement against what the order terms "water waste."

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The order does far less to limit agricultural use of water. Irrigation districts are directed to develop drought management plans, and some agencies are required to monitor and report water-usage levels. But the order does not prohibit particular uses and does not empower the agencies to dictate what crops are planted.

The terms of the order are controversial, to say the least. One major criticism is that the order focuses primarily on municipal and urban water uses, which make up less than 25 percent of Californians' overall water use, leaving the agricultural industry to its own devices.

But while many urban water users are only starting to feel the effects of the drought, farmers have already been heavily hit. More than 400,000 acres were left unplanted last year, dealing a $2 billion blow to the state's economy. For the second year in a row, most Central Valley farmers are expecting no deliveries from the valley's big federal irrigation project, and the State Water Project will provide only 20 percent of requested deliveries this year.

This order comes on the heels of significant restrictions on surface-water use that were implemented in 2014. Acting under the authority of Governor Brown's January 2014 emergency declaration, the State Water Board, beginning in May of last year, issued a series of curtailment notices and orders that limited

or outright prohibited diversions by certain users from a variety of sources, including the Sacramento, San Joaquin, and Russian River watersheds. On April 2, 2015, the State Water Board stated publicly that curtailment orders would be issued again this year, and in short order.

GROUNDWATER

Perhaps even more indicative of the "new age" of water law is the Sustainable Groundwater Management Act, passed by the legislature in 2014 to address accelerating overdraft of California's famous aquifers. For centuries, farmers up and down California's Central Valley have relied on groundwater as a critical source of water for agriculture, and there was little regulation—the law generally allowed property owners to pump as much groundwater as their wells could access. But overpumping has stretched California's water supply very thin, leaving many aquifers in a state of constant overdraft and some parts of the state sinking by as much as a foot per year.

In response, on September 16, 2014, the state legislature passed and Governor Brown signed a package of three bills that collectively constitute SGMA, creating an entirely new regulatory scheme governing the extraction and use of California's groundwater. The goal of SGMA is to ensure that California's groundwater resources are "managed sustainably for long-term reliability and multiple economic, social and environmental benefits for current and future beneficial uses." It defines "sustainable groundwater management" as management and use of groundwater that can be maintained during a fifty-year time period without causing an

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"undesirable result," such as the significant and unreasonable depletion of supply, reduction of groundwater storage, seawater intrusion, degraded water quality, and land subsidence.

The law will be implemented through a local public agency that elects to become a groundwater sustainability agency (GSA) for the area. If a GSA fails adequately to manage a specified basin, or if DWR makes a determination that the basin is in a condition of long-term overdraft, the State Water Board will have the authority to develop and implement an interim plan until the GSA is prepared to resume management.

GSAs are granted broad powers, including the ability to require groundwater well registration, measurement of groundwater extraction, and filing of annual extraction reports. GSAs with authority over basins designated as "high-priority" or "medium-priority" will be required to develop and implement groundwater sustainability plans (GSPs) or, in the alternative, demonstrate existing sustainable management pursuant to an adjudicated action. Basins designated as low or very low priority are encouraged, but not required, to develop and implement GSPs.

GSAs can, if they choose, regulate the construction of new groundwater wells, limit the enlargement of existing wells, and establish groundwater allocations. Finally, and perhaps most importantly, GSAs may also impose and collect regulatory fees to fund the costs of groundwater management programs. However, it is not clear how Proposition 218, a 1996 ballot measure that gave voters more say in local government finances, may affect collection of those fees in light of recent decisions addressing the issue directly, with mixed results: *City of San Buenaventura v. United Water Conservation Dist.* (2015) 2015 Cal.

App.LEXIS 242 and *Great Oaks Water Company v. Santa Clara Valley Water District* (2015) 2015 Cal.App. LEXIS 264.

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The process of prioritizing basins is already under way, and the first GSAs are forming now. Next year, DWR will issue regulations that identify the required components of GSPs and that will shed additional light on how GSAs will be expected to regulate groundwater users. Once implemented, the GSPs will likely require a significant amount of regulatory reporting for any user who uses more than the "de minimis" amount of two acre feet annually.

Vocal critics have come out on both sides of the law. The regulated community fears that the local implementation will result in uneven enforcement and disparate treatment in different aquifers. From a scientific standpoint, water users are concerned that the law is too reliant on firm aquifer "boundaries," which are not easy to define, and that it appears to ignore groundwater extracted from fractured rock located below aquifers throughout California. Proponents of the law say the schedule for implementation is too conservative; although the regulatory process is already under way, implementation of GSPs will not begin until 2017, and the law seeks to achieve "sustainability" in 2040. Environmental groups fear the resources won't last long enough to be saved.

To return California's groundwater to a state that is sustainable, groundwater pumping will need to be restricted, but how and when those restrictions are imposed is a question for regulators and, ultimately, the courts to resolve. But groundwater users had best be arming themselves for a fight.

THE SCOTT VALLEY CASE: WATER AND THE PUBLIC TRUST

Finally, a 2014 court decision regarding water resources in Scott Valley, west of Mount Shasta, granted agencies a means of regulating groundwater extraction in order to preserve surface water resources, a regulatory hook that hadn't previously been recognized. (*Environmental Law Foundation v. State Water Resources Control Board*, Sacramento Superior Court Case No. 34-2010-80000583, July 15, 2014.) A Sacramento County judge found that the public trust doctrine can be applied to restrict pumping of groundwater when the extraction harms "the public's right to use those navigable waters for trust purposes." The decision only affects new groundwater wells more than five hundred feet from the Scott River, and it is important to note that groundwater itself was not deemed a public trust resource—the doctrine was found to apply to groundwater pumping that affects navigable waters. Nonetheless, the case represents yet another expansion of the legal framework governing Californians' right to use water as they choose.

Siskiyou County filed a motion for reconsideration of the court's decision in light of the passage of SGMA, and that motion has not yet been resolved. It's likely the Court of Appeal will have the opportunity to review this issue, so stay tuned.

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