



SENT VIA EMAIL

December 18., 2013

State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: **Groundwater Workplan**

Dear State Water Board Members:

The San Joaquin Tributaries Authority (“SJTA”) reviewed the discussion draft Groundwater Workplan Concept Paper (“Groundwater Workplan”) and was encouraged by the focus on maintaining local control and regulation. As the Groundwater Workplan noted, each groundwater basin has special challenges and attributes. Because of this, the regulation of groundwater must remain localized and controlled at the basin level.

Although the SJTA supports the Groundwater Workplan’s general approach, it has concerns regarding: (1) the degree of commitment to regional control; (2) the lack of analysis concerning the effect of the proposed State Water Resources Control Board (“State Water Board”) regulations on groundwater; (3) the authority of the State Water Board to regulate groundwater; (4) the failure of the Workplan to identify sources of funding; and (5) several technical issues that appear throughout the Workplan. The SJTA further explains these issues below and looks forward to working with the State Water Board toward resolution.

1. Commitment to Regional Groundwater Control

The Workplan opens with a single paragraph on groundwater regional leadership, but the remainder of the Workplan is focused on regulatory controls of the State Water Board and other state agencies regarding groundwater thresholds and compliance. This makes it appear the State Water Board may not be as committed to regional control as is necessary to successfully manage groundwater basins. The SJTA recommends the State Water Board demonstrate its commitment to regional control by revising the Groundwater Workplan to explain how the State Water Board may support regional and local consensus building opportunities. Specifically, the Groundwater Workplan should be refocused on efforts that outline how the State Water Board can provide technical assistance, where needed, to existing basin management through the local and regional agencies who act as responsible local stewards of water resources within their boundaries. The State Water Board has the opportunity to be a partner in these efforts, but should be cautious not to attempt to usurp regional efforts through state regulatory action.

2. Bay Delta Review – Phase 1.

The Groundwater Workplan does not address the impacts of the State Water Board's proposal to increase instream flow requirements on the San Joaquin River system. The draft substitute environmental document for Phase 1 of the ongoing Bay-Delta Plan review ("SED") analyzes the environmental impacts caused by proposed changes to the south Delta salinity objective and the proposed establishment of the lower San Joaquin River flow objective. The SED states that these proposed changes will significantly reduce groundwater levels, degrade groundwater quality, and interfere with groundwater recharge in each of the four groundwater basins in the lower San Joaquin River system. (SED, at 9-26.) Yet, the State Water Board plans to continue to regulate in this manner.

In stark contrast to the State Water Board's SED, the Groundwater Workplan's governance and management section states that managing groundwater requires "maintaining a balance between pumping, natural depletion, and recharge at the basin scale over the long-term." (Groundwater Workplan, at 6.) However, the State Water Board's proposed Phase 1 regulations result in imbalance and compromise the ability of local and regional agencies to properly manage groundwater in the San Joaquin River basins. Specifically, the San Joaquin River basin aquifers need the option of recharge and this option is removed by the proposed Phase 1 regulations. The State Water Board should revise the Groundwater Workplan to directly address the significant and unavoidable damage its surface water quality regulation will cause to the groundwater basins of the San Joaquin River and explain how the actions suggested by the Groundwater Workplan can be effective in the face of the serious damage the proposed Phase 1 regulations will cause to these basins.

3. State Water Board Authority Over Groundwater.

Throughout the Groundwater Workplan, the State Water Board asserts it has the authority to regulate, manage, or otherwise take action with reference to groundwater. Specifically, the State Water Board asserts it has "broad constitutional authority to prevent the waste and unreasonable use of the State's water resources (including groundwater)" (Groundwater Workplan, at 1.) The State Water Board also states it is soliciting input regarding whether it should integrate its authority over public trust resources into the Groundwater Workplan. (*Id.*, at 10.)

The State Water Board does not have jurisdiction over groundwater rights. (Water Code, § 1200; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240.) Furthermore, it is questionable whether the State Water Board could use its authority under the public trust, or authority to prevent waste and unreasonable use, to limit the extraction of groundwater. Even if these authorities were established as applying to groundwater, which is questionable, they are unlikely to be helpful in the management of groundwater. They would not enable the State Water Board to set groundwater level thresholds, monitor groundwater levels, or take enforcement actions if such thresholds were violated. Instead, the State Water Board's authority would be limited to addressing only the most egregious uses. The State Water Board recognized the severe limitations of using its authority to prevent waste and unreasonable use to limit groundwater extraction in the SED, concluding the use of such authority is not feasible because it would be too expensive and complex. (SED, at 9-28.) There is nothing to suggest use of the State Water Board's authority to prevent waste and unreasonable use would be feasible in addressing the actions contemplated by the Groundwater Workplan.

4. Funding.

The Groundwater Workplan does not include potential sources of funding for the State Water Board's actions. This is a major flaw. Without identifying a source of funding, the State Water Board will be unable to achieve any of the potential actions identified in the Groundwater Workplan. This funding limitation is well-understood by the State Water Board. In the SED, the State Water Board concluded that mitigating the significant impacts to groundwater would be infeasible, stating:

“The State Water Board’s water right program is funded primarily through annual water right permit and license fees. The State Water Board has limited funding through general funds or other funding sources available for regulating the diversion and use of water not subject to the water right permit and license system. Most, if not all, of this non-fee funding is needed for other activities, such as applying public trust and reasonableness requirements to riparian and pre-1914 diversions. Thus, a proceeding to prevent waste or unreasonable use of groundwater is not a feasible mitigation measure.” (SED, at 9-28.)

Thus, the Groundwater Workplan must identify potential sources to fund the suggested actions in the Workplan.

5. Technical issues.

- The Groundwater Workplan includes an action item that calls for the State Water Board to clarify how the Antidegradation Policy applies to groundwater. The Antidegradation Policy is based on the power to grant permits and licenses for unappropriated water, which are actions limited to surface waters. For this reason, it does not appear the Antidegradation Policy applies to groundwater. In its clarification, the State Water Board should address this issue and the difficulty of establishing a baseline for groundwater quality.
- The Groundwater Workplan includes an action item that calls for the State Water Board to incorporate salt and nutrient thresholds into basin plans. It is unclear whether the State Water Board is referring to surface water basin plans, and, if so, how the regulation of surface water relates to or will otherwise help with groundwater quality. The Groundwater Workplan should be revised to delete this potential action or explain how the regulation of surface water will benefit groundwater quality.
- In each section, the Groundwater Workplan includes “Potential Actions for Others.” These potential actions are often unclear because the Workplan fails to identify the party that should be taking the action. (Groundwater Workplan, at 6 [4-5], 8 [1,4], 9 [1].) The Groundwater Workplan should be revised to identify the party that should take the potential action and cite the authority under which that party could, or should, take such an action.

- The Groundwater Workplan includes an action item that would require parties responsible for nitrate contamination to provide replacement water. The meaning of this action and the authority to take this action are both unclear. The Groundwater Workplan should be revised to define “replacement water” and identify the authority under which the State Water Board could make such an order.
- The State Water Board should recognize that any water quality or quantity threshold to be set should be specific to not only each DWR recognized subbasin but also smaller subbasins within, that are identified by the local users per their local plans. For example, under the proposed regulatory scheme, the heterogeneity of geologic formations in the valley will cause some areas of a basin to be unavoidably harmed, and others to be benefitted. Actions should be tailored to each of these smaller subbasin’s localized hydrogeology in order to ensure benefit and prevent harm within the entire region.

Very truly yours,

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TRIBUTARIES AUTHORITY

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cc: San Joaquin Tributaries Authority