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July 13, 2021

Via e-mail

Members of the Advisory Committee
Salinas Valley Basin Groundwater Sustainability Agency
P.O. Box 1350
Carmel Valley, CA 93924

Re: Moratorium on new Deep Aquifer pumping pending completion of study

Dear Members of the Advisory Committee:

As explained in our recent letters, the Advisory Committee should recommend that the Salinas Valley Basin Groundwater Sustainability Agency (SVBGSA) enact a pumping moratorium on new Deep Aquifer wells permitted after July 1, 2021 in the 180/400-Foot Aquifer Subbasin pending completion of the proposed Deep Aquifer study.

I write to respond to a June 12, 2021 letter from the Farm Bureau that suggests that the Advisory Committee not make such a recommendation, arguing that "[d]enying access to water-related property rights, regardless of beneficial use, is not consistent with current California law." (Norman Groot, Farm Bureau, letter to Advisory Committee, June 12, 2021.) The letter argues that, until the Deep Aquifer study has been concluded "water rights must take precedence of any other action." (*Id.*)

The Farm Bureau's brief letter with no analysis does not explain why the GSA cannot act within SGMA to regulate Deep Aquifer pumping by imposing a moratorium on new wells for a period of time. However, the Farm Bureau's categorical claim that a pumping moratorium must be inconsistent with California law is not accurate.

SGMA *expressly* permits regulation of groundwater pumping, including new well moratoriums. As the 180/400-Foot Aquifer Subbasin GSP acknowledges in connection with the proposed Deep Aquifer moratorium, SGMA provides GSA with the authority to "regulate groundwater extraction," including "regulating, limiting, or suspending extractions from individual groundwater wells or extractions from groundwater wells in the aggregate, construction of new groundwater wells, enlargement of existing groundwater wells, or reactivation of abandoned groundwater wells, or otherwise establishing groundwater extraction allocations." (California Water Code §10726.4 (a)(2); see 180/400-Foot Aquifer Subbasin GSP, p. 9-20.)

SGMA does not purport to alter groundwater rights. Thus, any "limitation on extractions by a groundwater sustainability agency shall not be construed to be a final

determination of rights to extract groundwater from the basin or any portion of the basin." (Water Code, § 10724.4(a)(2).)

The regulation of groundwater use under SGMA must be harmonized with California's common law of groundwater rights, but that is not an impossible task:

> There are considerable measures GSAs can take to manage their litigation risk and enhance the durability of their GSPs, including making groundwater allocations in their GSPs consistent with the principles of water rights and seeking consensus among affected stakeholders.[1]

Water law experts have examined the interplay of SGMA and water rights and identified means by which SGMA can be harmonized with the common law: "SGMA is consistent with the common law, and by following its requirements GSAs are unlikely to violate water rights."[2] Water law experts have identified a number of specific ways to regulate extractions in order to minimize legal challenges to the GSA.[3]

These experts have acknowledged that regulation of pumping is an essential tool for GSAs that cannot be avoided. Thus, they have emphasized the value of clear explanations, fact-specific analysis, and compromise among affected users.[4]

> As we have discussed, allocations of authorized groundwater pumping will no doubt be an essential tool to achieve sustainable management in many basins. Groundwater allocations will, in turn, implicate the law of water rights. This area of law is complex, fact-dependent, and sometimes subject to ambiguous and even conflicting precedent. GSAs cannot avoid the legal risks and uncertainty that water rights introduce. They should seek to thoroughly understand the diversity of legal principles that apply to the specific facts at hand and discuss and educate stakeholders on applicable law. Perhaps, most importantly, they should encourage and facilitate broad dialogue to explore opportunities for compromise approaches to allocations that generally reflect water law principles. Such efforts will ideally achieve consensus and avoid legal challenges. If certain issues must be litigated, these efforts may reduce the breadth of opposition, thereby expediting the process and best situate the GSA's allocation program to sustain a legal challenge on the merits

The need for critical regulation, harmonized with groundwater rights, cannot be summarily dismissed without factual analysis through a categorical claim that any

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1 Garner et al., The Sustainable Groundwater Management Act and the Common Law of Groundwater Rights—Finding a Consistent Path Forward for Groundwater Allocation, 2020, UCLA Journal of Environmental Law and Policy, Vol. 38:2, pp. 163 et seq, available at https://escholarship.org/uc/item/3368r414

2 *Id.*, p. 181.

3 *Id.*, pp. 201-206.

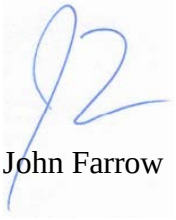
4 *Id.*, p. 215.

pumping reductions are "not consistent with current California law." The GSA should recognize that pumping restrictions are an essential and legitimate tool for addressing groundwater sustainability.

If there are specific objections and arguments as to why the proposed moratorium would violate water rights, then these should be put forward so they can be addressed, perhaps by some other form of shared sacrifice. LandWatch urges the Advisory Committee to seek the advice of its own legal counsel as to *how, not whether* to regulate Deep Aquifer extractions to fulfill the intent of Priority Management Action Number 5.

Yours sincerely,

M. R. WOLFE & ASSOCIATES, P.C.



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JHF:hs

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