

July 19, 2021

Via e-mail

Members of the Executive Committee
Salinas Valley Basin Groundwater Sustainability Agency
P.O. Box 1350
Carmel Valley, CA 93924
Via email board@svbgsa.org

Re: July 22 Agenda Item 4b: implementing the July 15 Advisory Committee motion regarding restrictions on Deep Aquifer groundwater extractions

Dear Members of the Executive Committee:

On July 15, 2021, in response to a motion that it recommend implementation of the moratorium on new Deep Aquifer extractions contained in Priority Management Action Number 5 in the 180/400-Foot Aquifer GSP, the Advisory Committee passed an alternative motion. That motion provides as follows:

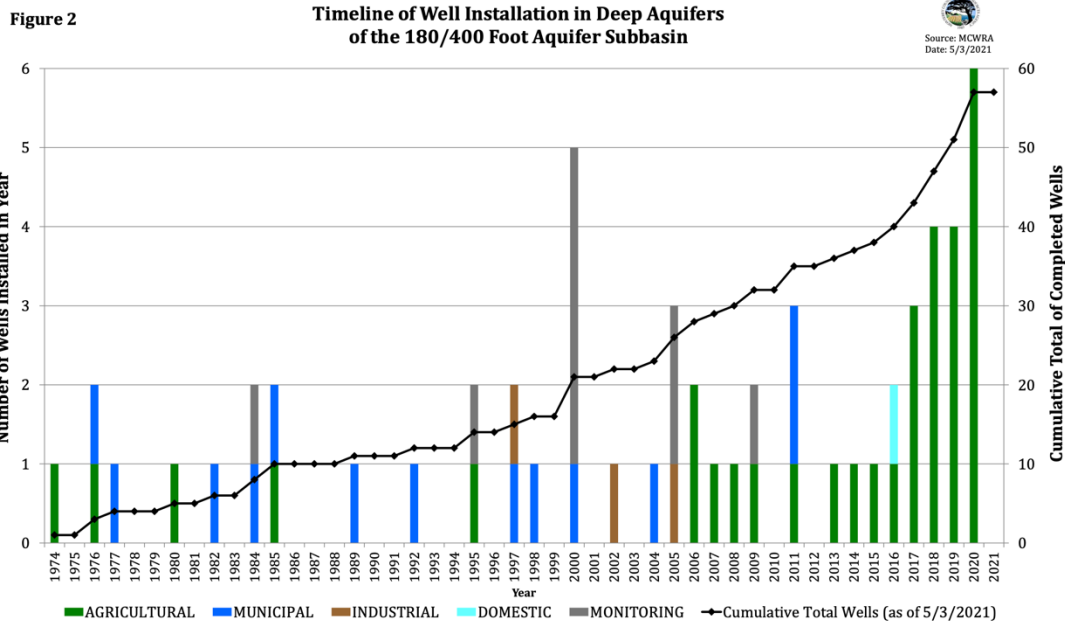
Recommend that the SVBGSA Board of Directors direct staff and consultants to review issues related to extractions from the deep aquifers and the implementation of the groundwater sustainability plan for the 180/400 subbasin aquifer to provide more information and appropriate recommendations to the Advisory Committee and the Board of Directors, and request agency legal counsel to implement any of the plan recommendations, including the authority of the SVBGSA to manage or restrict groundwater extraction in any specific area or aquifer, and the relationship of that authority to the reasonable and beneficial uses of groundwater. SVBGSA will continue to initiate the Deep Aquifer Study in an expeditious manner.

The Executive Committee is now to consider directing staff, consultants, and legal counsel how to implement the July 15 motion. We write to suggest that the motion be implemented through a working group charged with two distinct tasks:

- (1) to determine how any interim Deep Aquifer pumping restrictions found to be necessary in the 180/400-Foot Aquifer Subbasin can be implemented effectively, equitably and legally, and
- (2) to develop the subbasin-wide pumping allocations that are required by the 180/400-Foot Aquifer Subbasin GSP in order to implement its water charges framework and other management actions.

The two tasks are distinct but related because both require the GSA to make pumping allocations consistent with SGMA and California water rights law.

The two tasks are urgent. Interim restrictions on Deep Aquifer pumping are urgent because Deep Aquifer groundwater levels have been declining since 2014 as the County permits more and more wells and pumping volumes increase:¹



Deep Aquifers Groundwater Extraction History Since 1993*

Year	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Municipal	2,054	1,992	2,036	2,137	2,170	1,906	2,056	2,302	2,355	2,399	2,366	2,442	2,358	2,005	1,738	2,004	2,102	1,903	1,803	2,044	1,989	3,784	3,746	3,788	4,116	4,605	4,820
Agricultural	1,507	2,620	2,302	1,990	2,556	1,648	96	1	0	0	0	0	0	0	58	384	696	982	927	1,397	1,097	2,031	2,010	4,194	4,834	4,749	5,331
Industrial	0	0	0	0	0	0	0	3	13	17	379	305	343	336	393	371	348	333	370	380	523	620	617	569	567	291	196
Total	3,561	4,612	4,338	4,127	4,725	3,554	2,151	2,307	2,368	2,416	2,745	2,747	2,701	2,341	2,189	2,759	3,146	3,218	3,100	3,821	3,608	6,436	6,373	8,551	9,516	9,645	10,347

* Notes: Table includes all reported extraction data for the thirty-four (34) Deep Aquifer production wells that have reported extractions since inception of the Agency's GEMS program in 1993. Data are reported in acre-feet. Colors denote water use category (Municipal, Agricultural, Industrial). An additional twelve (12) recently constructed Deep Aquifer Agricultural production wells have yet to report extractions as of Reporting Year 2019.

Developing the pumping allocations required by the 180/400-Foot Aquifer Subbasin GSP is urgent because the GSP requires these allocations to be completed in 2023. (180/400 GSP, pp. 9-4 to 9-5, 9-10.)

¹ Monterey County Water Resources Agency (MCWRA), Well Permit Application Activities Update, prepared for May 17, 2021 MCWRA Board of Directors meeting, <https://monterey.legistar.com/View.ashx?M=F&ID=9381226&GUID=34ED34CD3A39-4851-87A3-298BE70D383C>. For background and links to relevant documents, see LandWatch to GSP Board, June 9, 2021, available at <http://www.landwatch.org/pages/issuesactions/water/060921-LWComments-GSP-Implementation.pdf>.

1. The point of the July 15 motion is to determine not *whether* but *how* to restrict pumping if that is independently found to be necessary as a result of the Deep Aquifer study.

The July 15 Advisory Committee motion clearly reflects the consensus that the proposed Deep Aquifers hydrological study should be expedited in order to determine *whether* pumping restrictions are necessary to manage the aquifers sustainably. But the focus of the Advisory Committee debate was not the hydrological issues, but instead the legal and economic issues related to pumping restrictions if they are found necessary. Thus, the main thrust of the motion is that staff must develop recommendations for *how* any needed pumping restrictions should be implemented, presumably in an effective, equitable and legally defensible manner.

The record, including the 180/400 GSP document and numerous technical studies, already demonstrates the need for immediate pumping restrictions. However, for those who remain unconvinced, LandWatch is encouraged that the Deep Aquifer study is to be designed to provide ongoing interim reporting and may not take as long as its entire two-year funding cycle. Thus, it may not be necessary to wait two more years to develop a consensus that pumping restrictions are in fact needed in the Deep Aquifers.

The point of the July 15 motion, then, is to *make sure that the SVBGSA is not caught flat-footed* when the Deep Aquifer hydrological study is completed, but is instead prepared to act as soon as there is a consensus that pumping restrictions are needed. There is certainly enough evidence now of the need for pumping restrictions to begin to plan for them.

2. The July 15 motion is effectively a call to begin the difficult work of setting pumping allowances, which the 180/400 GSP requires to be completed by year-end 2023.

In the unlikely event that the Deep Aquifer hydrological study finds that no pumping restrictions are needed, the effort to develop Deep Aquifer pumping restrictions will not have been wasted. Evaluation of Deep Aquifer restrictions will develop the GSA's institutional competence in the difficult process of setting pumping allowances.

The 180/400 GSP requires that the GSA develop this institutional competence in a larger context than the proposed Deep Aquifer moratorium in Priority Management Action Number Five. In particular, the GSP requires that pumping allowances be developed within three years to support the water charges framework, i.e., "to enable development of the tiered pumping charge system, and calculation of over-pumping surcharges and supplemental charges:"

Sustainable Pumping Allowances: All land parcels located outside of the service area of a municipal water provider, and land parcels located within the service area of a municipal water provider that are actively farmed as of 2017, will receive a sustainable yield pumping allowance based on a pro-rata share of their subbasin's sustainable yield. *The methodology for determining pro-rata shares will be developed during the first three years of GSP implementation.* The pro-rata shares may be based on some combination of land acreage, historical crop types grown on the parcel, standardized crop duties for the particular subbasin, historical groundwater use, or other factors. Because the sustainable pumping allowances are designed to limit pumping to the Subbasin's sustainable yield, it is likely that in the 180/400-Foot Aquifer Subbasin, the pro-rata sustainable allowances will be less than the current groundwater use in the Subbasin.

Sustainable allowances for municipal and industrial groundwater pumpers will be addressed when sustainable pumping allowances are being developed for agricultural pumpers. Because these allowances are not water rights, municipal and industrial water users will be able to pump groundwater even without a quantified sustainable allowance. However, if municipal and industrial groundwater pumpers are not provided a sustainable allowance, any groundwater pumping by these entities will be subject to the Tier 2 Transitional Pumping Charge and Tier 3 Supplemental Pumping Charge.

(180/400 GSP, pp. 9-4 to 9-5, emphasis added.) The GSP provides that prorata shares, as well as the pumping allowances calculated by applying the prorata shares to the sustainable yield, must be established in order to implement the water charges framework, which is the central management feature of the GSP. The pumping allocations are also required to implement management actions such as the retirement of pumping allowances to implement Priority Management Action Number One (*id.*, pp. 8-4, 9-11), relocation and transfer of pumping allowances (*id.*, p. 9-8), carryover and recharge credits (*id.*, p. 9-8), ramping down allowances to meet sustainable yield objectives (*id.*, p. 9-9), and balancing water charges between subbasins (*id.*, p. 9-10).

The GSP calls for implementation of the water charges framework and the development of pumping allowances in the first three years of implementation of the 180/400 GSP. (*Id.*, p. 9-10). Now halfway through those first three years, LandWatch is unaware of any publicly available work by the GSA, its staff, or its consultants to begin the complex work of determining pumping allowances. Despite the press of other duties, including completion of the GSP documents for the subbasins that are not critically overdrafted, the GSA must begin this work now. The GSP explains that the details that must be developed and negotiated among stakeholders to develop pumping allowances are daunting:

The sections above present an initial structure for the water charges framework; however, *stakeholders must agree to a number of details* before the SVBGSA initiates the water charges framework. An initial list of details that must be

negotiated are presented below to provide SVBGSA members and stakeholders an understanding of the range of specifics that are open for negotiation during the first three years of implementation.

- Are de-minimis pumpers that pump less than 2 AF/yr. for domestic purposes exempt from the water charge framework and other management actions?
- Are any class of pumpers other than de-minimis pumpers exempt from the water charge framework and other management actions?
- *How are sustainable pumping allowances set?*
- How are transitional allowances phased out in the Subbasin? Over what time frame are pumping allowances ramped down?
- What is the Tier 1 Sustainable Pumping Charge?
- What is the Tier 2 Transitional Pumping Charge?
- What is the Tier 3 Supplemental Pumping Charge?
- What is an equitable balance between the Tier 1 Sustainable Pumping Charge collected in the 180/400-Foot Aquifer Subbasin and the Tier 1 Sustainable Pumping Charge collected in other subbasins?
- What is an equitable balance between the Tier 2 Transitional Pumping Charge collected in the 180/400-Foot Aquifer Subbasin and the Tier 2 Transitional Pumping Charge collected in other subbasins?
- What is an equitable balance between the Tier 3 Supplemental Pumping Charge collected in the 180/400-Foot Aquifer Subbasin and the Tier 3 Supplemental Pumping Charge collected in other subbasins?
- How is currently non-irrigated (e.g., fallowed) land addressed?
- How are municipalities addressed?
- What are the limits and parameters of the carryover and recharge options?
- What is involved in approving relocation or transfer of pumping credits?

(180/400 GSP, pp. 9-9 to 9-10, emphasis added.) As discussed below, a critical threshold decision will be to choose a legally defensible method for allocations, and implementing that decision will then likely trigger extensive data collection about existing appropriative, prescriptive, and public uses of groundwater.

In effect, the July 15 Advisory Committee motion calls for the GSA to begin the process of setting pumping allowances by looking at the likely urgent need to set pumping allowances, and a fair and effective ramp-down process, for a *subset* of the 180/400-Foot Aquifer Subbasin wells, those wells pumping from the Deep Aquifers. As such, the implementation of the July 15 motion should acknowledge the larger context, i.e., the requirement to develop subbasin-wide pumping allowances for all wells, but it should focus on the potentially urgent need to implement Deep Aquifer restrictions before there is a complete development of pumping allowances for all pumping in the 180/400-Foot Aquifer Subbasin.

3. The GSA should convene and direct a working group to propose effective, equitable, and legally defensible pumping allowances, beginning with an urgent interim set of allowances for Deep Aquifer wells if that is found necessary as a result of the Deep Aquifer study.

LandWatch recommends that the Executive Committee convene an open and transparent working group on pumping allowances to implement the July 15 motion. The group should be directed to address both the subbasin-wide pumping allowances that are required to implement the water charges framework and the potentially more urgent need for interim restrictions on Deep Aquifer pumping. The immediate focus should be on the Deep Aquifers.

With regard to the Deep Aquifers, the working group should be charged to assume that some pumping restrictions may be needed so that they focus on the question of *how* not *whether* restrictions are needed. The group should also be charged to assume that it may be necessary to implement pumping allowances and restrictions for the Deep Aquifers with some urgency, i.e., before determining the complete set of pumping allowances for the subbasin. Recognition of this urgency may justify less precision or different approaches to interim Deep Aquifer pumping allowances. For example, an interim moratorium on *new* pumping would give precedence to groundwater rights that have already been exercised at the expense of those that are dormant. This may not be the recommended long-term solution for pumping allowances, but it may be justified by a current emergency.

The working group should be broadly representative of the types of stakeholders that are represented on the GSA Board, including agricultural, urban, and environmental interests. It should clearly include those who are pumping from the Deep Aquifers.

We suggest that the working group may organize and inform its work using existing legal analyses of the coordination of SGMA and California groundwater law, for example,

- 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>.
- Babbitt and Dooley, Groundwater Pumping Allocations under California’s Sustainable Groundwater Management Act, 2018, available at https://www.edf.org/sites/default/files/documents/edf_california_sgma_all_ocations.pdf.

The GSP evidences some familiarity with these issues in its recitation of potential means of making pumping allocations. (180/400 GSP, pp. 9-4 to 9-5.)

A reasonable work plan would begin with the determination whether the GSA intends to use (1) the simpler allocations methods such as proration by acreage, irrigated acreage, or historic pumping or (2) the legally more defensible “hybrid” or “comprehensive” allocation systems that preserve the relative priority of overlying, prescriptive, and appropriative uses and address unexercised rights of overlyers. There appears to be a consensus of experts that the comprehensive or hybrid approach will ultimately withstand legal challenges, in part based on previous adjudications upholding physical solutions using these approaches.

If the working group focused on the hybrid or comprehensive allocation method, it would then need to collect information to support that allocation method. This would include

- water balances, presumably based on the GSP
- characterization of existing appropriative, prescriptive, and public uses of groundwater
- initial allocations to overlying land
- a policy and allocation for dormant unexercised rights
- importation credits, if any
- ramp-down needed to attain sustainable yield

This work must clearly begin now to meet the three-year deadline in the GSP.

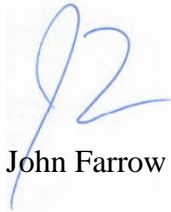
Again, LandWatch recommends that the working group consider that it may be justified to use a simpler method on an interim basis to address the urgent Deep Aquifer situation while developing a more comprehensive approach for the long term. For example, needed Deep Aquifer pumping reductions might be attained *on an interim basis* by imposing a moratorium on unexercised rights, holding prescriptive urban appropriators to the level needed to support existing and planned urban uses, and prorating any further needed reductions in proportion to historic deep aquifer pumping.

The working group should also evaluate whether using the County’s regulatory powers for land use and health and safety based pumping restrictions instead of the GSA’s authority would provide a legally more defensible means for interim Deep Aquifer pumping allocations needed on an urgent basis. The County’s willingness to reconsider a moratorium on Deep Aquifer pumping may be heightened by recommendations based on a process informed by a working group that has broad stakeholder participation and GSA support.

Finally, LandWatch recognizes that any system of pumping allocations demands the participation and cooperation of all stakeholders, which includes agricultural, urban, and environmental interests. LandWatch seeks to participate constructively in this process to manage a common resource that is critical to the continued vitality of Monterey County.

Yours sincerely,

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

A handwritten signature in blue ink, appearing to read 'JF', is positioned above the name 'John Farrow'.

John Farrow

JHF:hs

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