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December 11, 2023

Courtney Tyler, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor, Sacramento, CA 95814-0100
P.O. Box 100, Sacramento, CA 95812-2000

RE: J. G. Boswell Company Comments – Tulare Lake Subbasin

Dear Ms. Tyler:

We represent the J. G. Boswell Company (“Boswell”), and submit these comments on the Tulare Lake Subbasin Probationary Hearing Draft Staff Report (“Draft Staff Report”). Boswell produces, processes, and markets crops including Pima cotton, pistachios, tomatoes for paste, seed crops, and livestock operations in Central California. Boswell operates in the Tulare Lake Subbasin and is concerned about how a prohibitory determination in the Subbasin will impact its operations. Boswell also incorporates by reference the comment letter submitted by El Rico Groundwater Sustainability Agency.

A. Fee Proposal

The Draft Staff Report proposes an annual base filing fee for groundwater extractions (excluding de minimis extractions) in a probationary groundwater basin of \$300 per well and \$40 per acre foot of water extracted. (Draft Staff Report at p. 26.) This fee is excessive. Consider that, according to a recent report from WaterRights.Net that cites the Department of Water Resources’ (“DWR”) annual SGMA report from 2022, the Tulare Lake Subbasin pumped 549,066 acre feet of groundwater from an estimated 2,300 wells.¹ That extraction would impose a fee on landowners in the Tulare Lake Subbasin of \$690,000 for existing wells, \$9,200,000 for meters, and \$21,962,640 for water pumping fees. In other words, the Draft Staff Report proposes generating fees totaling more than \$31,000,000.²

The State Water Resources Control Board (“State Board”) lacks authority to impose such excessive fees. The Draft Staff Report claims that fees are required under Water Code section 1529.5. (Draft Staff Report at p. 26.) Under section 1529.5, the State Board may set fees to “cover all costs incurred and expended from the Water Rights Fund” for the purpose of the State’s intervention, including potentially designating the basin as probationary. (Water Code, § 1529.5, subd. (c).) These costs include “costs incurred in connection with investigations, facilitation, monitoring, hearings, enforcement, and administrative costs in carrying out these actions.” (Water Code, § 1529.5, subd. (a).)

These costs, however, must be consistent with section 3 of Article XIII A of the California Constitution. The State Board thus must set the fees that cover the actual costs incurred from the probationary

¹ GSP Annual Report, 5-022.12 TULARE LAKE 2022 (OCT. 2021 - SEP. 2022), available at <https://sgma.water.ca.gov/portal/gspar/preview/255>.

² WaterRight.Net report on the Tulare Lake Subbasin/State Board Workshop November 9, 2023, available at <https://waterwrights.net/tulare-lake-subbasin-state-board-workshop-november-9-2023/>.

designation. (Water Code, § 1529.5, subd. (c).) And the State Board bears the burden of proving by a preponderance of the evidence that these fees are not a tax; that the amount of fees is no more than necessary to cover the reasonable costs of the State Board's activity; and that the manner in which those costs are allocated to pumpers bears a fair or reasonable relationship to the pumper's burdens on, or benefits received from, the State Board's activity. (Cal. Const., art. XIII A, § 3.)

It is unclear from the Draft Staff Report that the State Board will levy these fees in a way that complies with the Constitution and Water Code section 1529.5. At most, it would appear that the State Board would need to hire temporary staff or consultants, plus collect data during any probationary period to develop a straightforward database. Fees that bring in more than \$30,000,000 per year would be several orders of magnitude greater than the costs of a few staff and some data collection for the State Board's proposed activity.

Under Resolution No. 2017-0033 that adopted the Emergency Regulation for Implementation of SGMA, State Board staff must estimate the programmatic costs and expected revenue when developing and revising the fee schedule. Again, the fee schedule must be sufficient to fund programmatic expenses and must not exceed costs. The State Board has the flexibility to address funding uncertainties that may arise later. For instance, State Board staff can review the fee schedule annually and revise the schedule as necessary. And the State Board may amend fees as needed by subsequent emergency regulation. (Water Code, §§ 348; 1530, subd. (a).) The State Board may further adjust the annual fees to compensate for the over or under collection of revenue in any given year.

With these concerns in mind, Boswell requests that the State Board reconsider the fees that it proposes imposing on the Subbasin should it designate it as probationary. Rather than impose an undue financial hardship on property owners in the Subbasin, the State Board should instead adjust the proposed fees to account only for actual costs. A total cost of approximately \$30,000,000 is an excessive and an unjustifiable extraction from the local agricultural economy should the State Board designate the Subbasin as probationary.

Further, some groundwater sustainability agencies ("GSAs") in the Tulare Lake Subbasin already have data collection/well registration in place. For example, El Rico and South Fork GSAs have extensive data collection from the Irrigated Lands Regulatory Program. To charge the same to all GSAs regardless of capability results in a subsidy out of proportion with the benefit that the fee provides. State Board staff thus should consider what amount they need for each individual GSA and charge a fee based on the benefit it would provide. Any other approach would not be consistent with California Constitution, Article XIII A, section 3.

B. Water Code Section 10735.2(e) – the “Good Actor” Provision

The Draft Staff Report fails to appropriately consider SGMA's "good actor" requirements. Water Code section 10735.2(e) states that "[t]he board shall exclude from probationary status any portion of a basin for which a groundwater sustainability agency demonstrates compliance with the sustainability goal." (Emphasis added.) This requirement is the so-called "good actor" provision, which is designed to exclude from probation "any portion of a basin" that can demonstrate compliance.

The Draft Staff Report recommends that the State Board not exclude any portions of the Tulare Lake Subbasin from the probationary designation. The Draft Staff Report recommends that approach because "Staff believe no GSAs in the subbasin have demonstrated compliance with the sustainability goal. All five GSAs have adopted and are implementing the same GSP [groundwater sustainability plan], which

DWR has determined to be inadequate.” (Draft Staff Report at pp. 17, 121.) But the Draft Staff Report determination lacks substantial evidence and otherwise ignores the clear language of section 10735.2(e) by determining that the entire Subbasin must fail if any portion of the Subbasin fails. Staff also seems to claim that this determination applies because a failing GSP in the Subbasin will cause the entire Subbasin to fail if there is a coordination agreement among multiple GSAs. During the November 3, 2023 Virtual Staff Workshop on the Draft Staff Report, Natalie Stork, P.G., Supervising Engineering Geologist for the Groundwater Management Program at the State Board, stated that that, in order to be excluded, the GSA must have its own GSP.³

While noncompliance with the sustainability goal may be a basis to not invoke the good actor provision, multiple GSAs implementing the same GSP cannot be an appropriate basis for ignoring that provision. Three reasons highlight why.

First, this reasoning is counter to the plain language of the statute, which specifically allows the good actor provision to apply to any portion of a basin for which a GSA demonstrates compliance. (Water Code, § 10735.2, subd. (e).) There is no indication in this provision that the Water Code requires a separate GSP. When interpreting statutory language, we must “look to the words of the statute themselves. The Legislature’s chosen language is the most reliable indicator of its intent because it is the language of the statute itself that has successfully braved the legislative gauntlet.” (*LGCY Power, LLC v. Superior Court* (2022) 75 Cal.App.5th 844, 860, internal citations and quotations omitted; *see also City of Marina v. County of Monterey* (Cal. Ct. App., Nov. 13, 2023, No. H049575) 2023 WL 7485522, at *7, reh’g denied (Dec. 1, 2023).) The statute’s words are given a “plain and commonsense meaning unless the statute specifically defines the words to give them a special meaning.” (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1083.) If the statutory language is clear and unambiguous, there is nothing for an agency to interpret. (*Ibid.*) Consistent with this plain language, the State Board’s guidance document related to the State’s intervention under SGMA states that the “Board will exclude from probation any portion of a basin where the Board accepts that a GSA demonstrates compliance with the sustainability goal.”⁴ The Draft Staff Report’s reasoning conflates these plain language canons and guidance.

Second, the legislative history fully supports the position that Water Code section 10735.2(e) does not require a separate GSP for the portion of the basin that is to be excluded from probationary status. Subdivision (e) was added in 2014 by SB 1319 (Pavley) and narrowed a similar provision in AB 1739 (Dickinson) to only apply to the portion of the basin that is out of compliance. The intention was to ease compliance for basins under GSPs; the Legislature believed that the addition of subdivision (e) would lower costs by placing only portions of basins on probationary status. AB 1739 clarified “that the State Water Board is required to exclude from probationary status any portion of a basin or subbasin for which a groundwater sustainability agency is in compliance with the sustainability goal.” (See California Bill Analysis, S.B. 1319 Sen., 08/29/2014, attached.) The Draft Staff Report’s reasoning thus conflicts with this legislative history. !

³ SGMA contemplates that a GSP may be a single plan covering the entire basin developed and implemented by multiple GSAs. (Water Code, § 10727, subd. (b)(2).) And while multiple plans can be implemented by several GSAs under a single coordination agreement that covers the entire basin (Water Code, §§ 10727, subd. (b)(3); 10727.6), multiple plans are not required.

⁴ Frequently Asked Questions - Groundwater Sustainability Agencies (GSAs) and State Intervention under the Sustainable Groundwater Management Act (SGMA), available at <https://www.waterboards.ca.gov/sgma/docs/20230621-sigma-gsa-faqs.pdf>.

Finally, the Draft Staff Report’s interpretation of section 10735.2 results in bad policy because it allows one non-compliant actor in a subbasin to subject an entire subbasin to probation. The deficiencies found in the Draft Staff Report do not apply equally across the entire Tulare Lake Subbasin. As the GSAs and affected pumpers continue to work with staff to come into compliance, they should not be punished because another areas that they have no control over remains out of compliance.

We thus recommend that the State Board direct staff to ensure that section 10735.2(e) is interpreted and applied based on its plain language to exclude from probationary status any portion of a basin for which a GSA demonstrates compliance with the sustainability goal.

C. Groundwater Quality

While the Draft Staff Report acknowledges that there are several existing water quality programs that regulate and monitor groundwater quality (Draft Staff Report at p. 45), it seemingly demands that the GSAs take actions that trump those programs, though the GSAs should only be concerned with quality when groundwater pumping is causing quality issues. In meetings with State Board staff, it was insinuated that the GSA become the “clearing house” for water quality compliance. This is not the function of a GSA. Nor do GSAs have the required expertise. Particularly since a functioning regulatory structure already addresses water quality, there is neither any authority nor any reason why SGMA should impose on GSAs such heightened requirements. Regulatory agencies comprehensively monitor groundwater in the Tulare Lake Subbasin. These agencies rely on existing regulations and policies to define undesirable results related to the deterioration of groundwater quality. The agencies and coalitions include the Irrigated Lands Regulatory Program (ILRP), Groundwater Ambient Monitoring and Assessment Program (GAMA), Regional Water Quality Control Board (RWQCB), Central Valley Salinity Alternatives for Long-term Sustainability Program (CV-SALTS), and cities and communities within the Tulare Lake Subbasin. Having the GSAs lead those groundwater quality programs—programs that are more mature, have set fee schedules, and are long enacted—is both bad policy and beyond the powers of GSAs.

D. Equal Protection Violation and Arbitrary and Capricious Decision-making

It appears that State Board staff is seeking to apply different standards to similarly situated subbasins under SGMA without adequate reason. For example, during meetings with State Board staff to address deficiencies on the draft GSP for the Tulare Lake Subbasin, it was discussed using the same standards for water levels, measurable objectives, and minimum thresholds that had been approved in other GSPs in other subbasins such as Kings and Westside. Without any explanation, State Board staff said these standards would not work in the Tulare Lake Subbasin. Failing to apply standards consistently among similarly situated parties without reason violates equal protection and reflects arbitrary and capricious decision-making.

The California Constitution Article I, section 7(a) provides that a “person may not be ... denied equal protection of the laws.” An agency violates this constitutional right when it intentionally treats that person differently from other similarly situated persons without any rational basis for the difference in treatment. (*Genesis Environmental Services* (2003) 113 Cal.App.4th 597, 605.) An agency’s selective enforcement or unequal treatment when implementing a statute violates this equal protection right. (See, e.g., *id.* at pp. 601-02, 607 [finding that the plaintiff had sufficiently alleged an equal protection claim where an air pollution control district’s new policy irrationally resulted in certain non-complying contractors being laid off while other non-compliant contractors were allowed to continue working].)

Unless the State Board provides a rational reason otherwise, what works in one basin should inform what can work in another basin to promote acceptable GSPs.

Because this disparate treatment lacks any substantive reason, the Draft Staff Report determinations also lack substantial evidence. In reviewing a GSP's compliance with SGMA, the State Board acts in a quasi-judicial capacity and must provide substantial evidence that explains why it treats similarly-situated basins differently. (See, e.g., *City of Chula Vista v. Superior Court* (1982) 133 Cal.App.3d 472, 488 [explaining that a Coastal Commission review of a local coastal plan acts is a judicial rather than legislative function subject to substantial evidence standard of review].) Because the Draft Staff Report fails to present substantial evidence justifying disparate treatment, its recommendation is arbitrary and capricious. (See *Madonna v. County of San Luis Obispo* (1974) 39 Cal.App.3d 57, 62.) Boswell recommends instead that the State Board apply standards equally across basins, and that an approved standard in one should be applied with equal force in the Tulare Lake Subbasin.

E. Incorrect Assumptions in the Draft Staff Report

The Draft Staff Report makes many assumptions regarding the homogenous nature of subbasins. For both within Tulare Lake Subbasin and as between Tulare Lake Subbasin and neighboring subbasins, those assumptions are false. For example, between the Tulare Lake Subbasin at the valley floor and neighboring subbasins along the Sierra Mountains, the reason for wells drying can vary greatly due to factors such as depth to bedrock. These varied conditions need more consideration before finalizing plans either via a revised GSP or via interim plans.

The Draft Staff Report also appears to assume that there is perfect science in all areas of the Tulare Lake Subbasin (i.e., there is a uniform mathematical correlation between subsidence and a certain level of pumping). That assumption also is false as there are various strata of clay layers, multiple clay layers, intertwined clay layers, among other unique features that impede a perfect understanding. There is no one possible answer at this time due to limited data in many places. The preferred solution is to continue allowing the GSAs to further study the Tulare Lake Subbasin while still allowing the decreased pumping limits in GSAs.

* * * * *

We appreciate the effort of State Board staff in reviewing the Tulare Lake Subbasin GSP and in preparing the Draft Staff Report. While we believe there are many deficiencies in the Draft Staff Report, we do not believe these deficiencies are too large to overcome. We further believe that the GSP can be revised to avoid probationary status. We request that the State Board empower and encourage staff to find a workable resolution to any deficiency in the GSP that allows local and sustainable management of groundwater resources—just as SGMA intended. (Water Code, §§ 113, 10720.1.)

Sincerely,



Nathan A. Metcalf

cc: Jeof Wyrick, Vice President, J. G. Boswell Company

(Without Reference to File)

SENATE THIRD READING

SB 1319 (Pavley)

As Amended August 29, 2014

Majority vote

SENATE VOTE: Vote not relevant

APPROPRIATIONS 11-5

Ayes: Gatto, Bocanegra, Bradford,
Ian Calderon, Campos, Gomez,
Holden, Pan, Quirk, Ridley-Thomas,
Weber

Nays: Bigelow, Donnelly, Eggman, Jones,
Wagner

SUMMARY: Amends AB 1739 (Dickinson) of the current legislative session which, together with SB 1168 (Pavley) of the current legislative session, form the Sustainable Groundwater Management Act (Act) and related provisions. Specifically, this bill:

- 1) Prohibits the State Water Resources Control Board (State Water Board), until January 1, 2025, from using its enforcement authorities under the Act to designate a basin or subbasin as probationary due to significant depletions of interconnected surface waters or require an interim plan to remedy the condition. This provision delays the similar provision in AB 1739 from 2022 to 2025.
- 2) Requires the State Water Board to exclude any portion of a basin or subbasin in compliance with sustainable groundwater management requirements from probationary status. This provision narrows the similar provision in AB 1739 to only apply to the portion of the basin that is out of compliance.
- 3) Requires the State Water Board to include any element of a groundwater sustainability plan (GSP), or the entire plan, in its interim plan if SWRCB finds it would help meet the sustainability goal. This provision revises the similar provision in AB 1739 to allow for the inclusion of local plans when developing interim plans for basins with probationary status.
- 4) Provides the enactment of this bill is contingent upon the enactment of AB 1739 and SB 1168.
- 5) Makes technical and conforming changes.

FISCAL EFFECT: According to the Assembly Appropriations Committee:

- 1) Increased annual out-year costs of between \$1 million and \$2.5 million (special fund) for state interim plans to be covered by fee revenues. The revisions to AB 1739 provided by this bill will likely result in lower costs due to delays in compliance requirements and the ability to only place portions of basins on probationary status.

- 2) Absorbable costs for DWR to assist the State Water Board in developing interim plans. DWR received \$22.5 million in the 2014-15 Budget (\$2.5 million for Fiscal Year (FY) 14-15 and \$5 million each year from FY15-16 through FY18-19 which will fund Bulletin 118 updates and technical assistance.

COMMENTS: This bill was amended on August 28, 2014 to remove the prior provisions and insert language that modifies certain provisions of AB 1739, which is currently pending for concurrence on the Assembly floor. AB 1739 and SB 1168, together, require sustainable groundwater management in basins and subbasins that are determined to be high and medium priority by DWR under criteria set as part of the statute creating the California Statewide Groundwater Elevation Monitoring program in 2009, with certain exceptions.

SB 1168 and AB 1739 were developed through an extensive eight-month stakeholder outreach process facilitated by both a nonprofit nonpartisan foundation and an association of water agencies and which included five professionally-facilitated stakeholder meetings and the participation of both authors' offices as well as the Administration of Governor Brown. Following those meetings language was taken from each bill and the Administration's own proposal and crafted into one integrated statute that was later divided into the two bills with contingent enactment language in each.

SB 1168 and AB 1739 set out a locally-driven sustainable groundwater management process which requires local agencies, as specified, to choose how to form their groundwater sustainability agency (GSA) governance within 2 ½ years of the Act's enactment. Thereafter, the GSA or GSAs for the basin or subbasin adopt groundwater sustainability plans within 5 years if the basin or subbasin is in a critical condition of overdraft and within 7 years for all other high and medium priority basins. Chapter 11 of the Act, which is found in AB 1739, concerns the State's enforcement role if those timelines are not met.

Recent amendments to AB 1739, as contained in this bill, were made at the request of the Administration regarding the State's role and do three things:

- 1) Delay, for 3 years, the State Water Board's authority to intervene in a basin or subbasin that is not in overdraft, but is causing significant depletions of interconnected surface waters.
- 2) Clarify that the State Water Board is required to exclude from probationary status any portion of a basin or subbasin for which a groundwater sustainability agency is in compliance with the sustainability goal.
- 3) Clarify that the State Water Board is required to include in any interim plan it might create, those existing GSPs and any elements of groundwater plans that comply with or aid in complying with the sustainability goals.

The Administration states that these amendments improve the groundwater package. The Administration adds that in many basins we don't have a complete understanding of the surface water and groundwater interaction and this bill provides additional time for such basins to fill the knowledge gap. The Administration advises that while the current language of AB 1739 allows the State Water Board to exclude "good actors" in a probationary basin from enforcement action and incorporate their successful GSPs in any interim plan, this amendment reassures those good actors by requiring both.

Analysis Prepared by: Tina Cannon Leahy / W., P. & W. / (916) 319-2096

FN: 0005573