



PHILLIP PETERS

SUPERVISOR - FIRST DISTRICT

The Honorable Monique Limón
Chair
Senate Committee on Natural Resources,
State Capitol
Sacramento, California 95814

RE: Informational Hearing – Sustainable Groundwater Management Act

Dear Chair Limón:

The implementation of the Sustainable Groundwater Management Act (SGMA) is at a crossroads. Two important public policy questions should be addressed:

1. Is a groundwater adjudication the appropriate venue for a court to de novo review an approved Groundwater Sustainability Plan (GSP)?
2. Should the court in an adjudication be required to hear evidence regarding the water rights of small pumpers, thereby protecting the due process of those that cannot afford to participate in a groundwater adjudication?

Kern County is in a unique position to provide insight into these issues. Two active groundwater adjudications within critically overdrafted basins are pending and a third adjudication is being threatened in the Kern County Subbasin as a means to stay enforcement actions. Without addressing these public policy issues the implementation of sustainability measures are frustrated, SGMA's regulatory process is rendered moot, and the State returns to the costly and time-consuming groundwater adjudication process.

De Novo Review of a GSP:

SGMA establishes a venue for court review of a GSP. In §10737.7 of the Water Code the Legislature established the validation process as a means to litigate the findings, allocations, and groundwater sustainability measures established within the GSP. In conjunction with the standard procedures established in §863 of the Code of Civil Procedure, **any member of the public can file a reverse validation action to challenge a GSP.** SGMA established a venue with an appropriate statute of limitation, six months, to file a validation action and challenge a GSP. That is not what is occurring.

In addition to validation actions, litigants are filing groundwater adjudications and requesting what is historically known as a "Safe Yield" trial to redetermine the maximum rate of withdrawal that can be sustained by an aquifer without causing an unacceptable decline in the hydraulic head or deterioration in water quality in the aquifer. This is the same definition provided within SGMA to determine the "Sustainable Yield" within a GSP.

Litigants in the Indian Wells Valley, Cuyama, and Oxnard-Pleasant Valley groundwater adjudications are asking the court to provide a de novo review of the Sustainable Yield findings through this Safe Yield Trial. **The Sustainable Yield is the underpinning of the GSP.** It establishes the water budget used to determine sustainability measures, which are, in turn, both reviewed and validated by the Department of Water Resources. Pursuant to SGMA, the sustainable yield must be based on sound and demonstrable science. The sustainability measures must be achievable. In asking the court for a de novo review, full and without regard to any previous findings, through a groundwater adjudication litigants are removing the underpinning of the GSP. Without the water budget, sustainability measures are called into question and in the Indian Wells Valley case, litigants are directly requesting the court overturn those sustainability measures in the court's physical solution phase.

Groundwater adjudications do not have a statute of limitations. These actions can be brought years into the approval and implementation of a GSP. Infrastructure funding required for sustainability measures is called into question. Projects are jeopardized and funds are diverted to pay for litigation defending the "sustainable yield." In the Cuyama adjudication, the Groundwater Sustainability Agency (GSA) is not a party to the litigation. This means that the court will conduct a de novo review of the GSP absent the very agency that developed the plan.

DWR has estimated that over \$1 billion has been invested in the implementation of SGMA. Why would any agency go through the cost, time resources, and scientific process of developing a GSP when a court can simply throw it out years into its implementation through a groundwater adjudication? In the Kern County Subbasin both DWR and the State Water Resources Control Board requested the County's participation in the development of a GSP. As an elected official, I cannot recommend the County participate in the costly development of a GSP while at the same time exposing the County to the risk of another groundwater adjudication with cost estimates in the \$100s of millions in legal fees.

The use of groundwater adjudications being filed as a means to stop SGMA implementation is spreading. The litigation strategy of filing a groundwater adjudication is being shopped by law firms throughout the State. Any party with the financial means to file a groundwater adjudication, who is aggrieved by the GSP or any enforcement action undertaken by the State, can simply stop SGMA implementation through this litigation process.

The incompatibility of an adjudication's Safe Yield trial and the establishment of a Sustainable Yield must be addressed. Once a court rules to even review the GSP the precedent has been established. Litigants will have the ability to review a GSA's and DWR's work outside of the validation process, they will have

the ability to stay enforcement actions established by State Water Resources Control Board. A court-precedent to conduct a de novo review will be established over the statutory framework of SGMA. **SGMA will be dead.**

Small Pumpers are being Defaulted

In the three pending groundwater adjudications – Indian Wells Valley, Cuyama, and Oxnard Pleasant Valley – litigants have actively sought to default small pumpers from the litigation. These litigants have actively opposed establishing class counsel for these de minimis users. The court is required under §850(b) of the Code of Civil Procedure to “consider the rights of small farmers and disadvantaged users.”

How can the court consider the rights of these people without an ability to hear evidence regarding their groundwater rights?

The purpose of “defaulting” – the act of blocking the court from hearing evidence from members not a party to the groundwater adjudication – is to increase the amount of available water rights to be divided amongst the participating litigants. De minimis groundwater pumpers, which include small pumpers, small farmers and disadvantaged communities, lack the financial means to participate in the groundwater adjudication. In Kern County, which includes the Indian Wells Valley, Cuyama, and Kern County Subbasin, these de minimis users are largely within the unincorporated areas. It has been frustrating to witness the court default these users from the groundwater adjudication knowing full well its responsibility to consider such groundwater rights but having no means to hear evidence in support of those groundwater rights. As an example, 95% of well owners will be defaulted by less than a half dozen well-funded well owners. **It is a matter of due process and fairness for the State to address this issue.** The ability to obtain a groundwater right through adjudication should not rest entirely on the financial means of the litigation parties. The outcome of this action is to shift the cost-burden of sustainability on those that can least afford it.

As previously stated, there are incompatibilities between the adjudication process and SGMA that need to be addressed. These must be addressed while maintaining the ability of litigants to equitably determine water rights through a groundwater adjudication. But in that groundwater adjudication the underpinning of the GSP – the Sustainable Yield – should not be subject to de novo review by the court, the groundwater sustainability measures of an approved GSP should not be overturned at the will of a physical solution, and small water pumpers should not lose their water rights simply because they cannot afford the litigation costs. The *industry* of groundwater adjudications costing hundreds of millions of dollars and decades to litigate is inappropriate. By contrast the validation process requires the GSA to directly defend the GSP and ensure it is based on solid scientific evidence and legal footing.

I respectfully request that my comments be included in the record of the Informational Hearing and your consideration of legislation to solve these public policy issues. Should you have any questions, please call my Chief of Staff, Leigh Ann Cook at (661) 868-3650.

Sincerely,

A handwritten signature in black ink, appearing to read "Phillip Peters". The signature is fluid and cursive, with a large loop at the end of the last name.

Phillip Peters
Supervisor of the First District
County of Kern, California

cc: Members of the Senate Committee on Natural Resources and Water
The Honorable Wade Crowfoot, Secretary of Natural Resources
Karla Nemeth, Director Department of Water Resources