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THOMAS S. VIRSIK

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Via email SGMPS@water.ca.gov

California Department of Water Resources
Attn: Sustainable Groundwater Management Section
P.O. Box 942836
Sacramento, California 94236

Re: Comment on Draft Emergency Regulations for Basin Boundary Modification

Dear Sustainable Groundwater Management Section:

This comment to the Draft Emergency Basin Boundary Regulations ("Draft Regulation") may be somewhat atypical in that this office is not submitting it on behalf of any public entity. Its clientele are more akin to "stakeholders" as that term has been used in Sustainable Groundwater Management Act ("SGMA") discussions. This comment is not directed at any specific basin, entity, or geographic region. Our foci are two:

1. Supporting Information Should Include Discussion of Legal or Other Structural Limitations on a Local Agency

Our understanding of the present Draft Regulations is that while a local agency seeking a boundary change is always required to present "technical studies" (§§ 344.14 and 344.16) and generally hydrogeological proof (§ 344.12), the Draft Regulation nowhere requires a local agency to explain what legal restrictions may affect its boundary changes – especially jurisdictional ones. The closest analogue in the Draft Regulation is at section 344.16(1)(B), which allows an adjudication action to substitute for a showing about certain other statutory water management options.

That a formal "adjudication action" will restrict a Local Agency's water management in ways that may bear upon a change of a boundary is reasonably evident. For example, an adjudication action may determine that all water from sub basin X is divided between Greenacre and Blackacre, thus a boundary change enlarging sub basin X to include Blueacre could affront the judgment. The Draft Regulations do not presently appear to allow Blueacre to protest (at DWR) in such a circumstance.

More subtly, “legal” limitations other than an adjudication may bind a Local Agency, such as: a validation judgment, a judicially accepted settlement agreement, or a Proposition 218 proceeding with or without a formal validation judgment as a result thereof. See City of Ontario v. Superior Court (1970) 2 Cal.3rd 334, 341-342 (validation by “doing nothing”). For example, a Local Agency may have validated (by litigation or otherwise) a pump tax on wells in basin Y based on dividing among the lands that basin the cost of maintaining a certain water quality. If that Local Agency seeks to change (reduce or enlarge) basin Y without a prior modification and approval process for the pump tax aspects, must it report that potentially fatal lacuna? In addition, boundary changes should not be allowed if a “foreign” county – potentially not subject to legal restrictions imposed on the home county – obtains any control over part/all of a home county basin, unless the foreign county obligates itself to the same legal restrictions and ability to enforce in the home county.

While there are certain avenues for public input by stakeholders at the notice and public meeting steps, the present DWR protest appears insufficient to address any concerns such as those identified above, which would be on non-technical grounds. § 343.12(a)(4).

We suggest several small additions to the Draft Regulation:

344.2(c): ” A copy of the resolution adopted by the requesting agency formally initiating the boundary modification process, which resolution shall include an opinion by counsel for the agency that the request is consistent with all obligations of the agency in any judgments, settlements, or judgments implied in law as to all lands affected by the request.”

343.12(a)(4): “A protest must rely on the same type of scientific, technical, and legal information, . . .”

2. All Underlying Supporting Information Must be Publically Available – not just Conclusions Based on Underlying Data

The Draft Regulation at Article 5 details various categories of “supporting information” required for certain boundary changes. Some of the specific supporting information is required to be in a form and with sufficient detail that the public may readily understand and verify it. § 344.10(a) (description must be sufficient to allow a map to be plotted from it). But there is no apparent overall requirement that the information a Local Agency may rely upon (1) be available to the public (such as through a Public Records Act Request) or (2) disclose the underlying data on which the Local Agency’s geological, hydrological, water quality, or other conclusions are based. For example, a Local Agency may submit a report that reflects that a certain part of basin Z has experienced a two-foot drop in water levels. The Draft Regulations do not appear to require the Local Agency to make available to the public the data on which that conclusion was reached, e.g., well tests, reports, satellite mapping, etc. While some of the information on which a given Local Agency may rely may already be public (e.g., eWRIMS, CASGEM), the Draft

Regulations appear to allow the public process of boundary modification to rely on non-public data, models, and analyses.

Our suggestion is that the Draft Regulation explicitly require that all Supporting Information and the data on which it is based be public. For example, the Draft Regulation could add the following:

§ 344.1. All Supporting Information is Public

All Supporting Information referenced in this Subchapter shall be treated as “public records” by the Local Agency and the Department, as that term is used in the Public Records Act. All underlying data on which the Supporting Information is based shall be treated as “public records” by the Local Agency, as that term is used in the Public Records Act.

Thank you for the opportunity to comment on the Draft Regulation, which form an important facet of the critically important SGMA.

Sincerely,



Thomas S. Virsik