

Via e-mail to: sgmps@water.ca.gov

Subject: Draft GSP Emergency Regulations Public Comment

DATE GROUNDWATER
SUSTAINABILITY PLAN
REGULATION COMMENT
RECEIVED BY DWR
3/03/2016

Please accept the following comments on the draft SGMA regulations:

- (1) Words like “adequate” and “complete” are used throughout the regulations, but it’s seldom clear what such descriptors mean. A defined legal standard with which attorneys and planners are familiar would be more helpful. DWR has previously expressed that since local control is a key goal of SGMA, the department intends to defer to agency determinations. I therefore recommend applying a “substantial evidence” standard to agency determinations made under the regulations, except in the rare circumstances where the regulations already call for decisions to be supported by clear and convincing evidence. This could be accomplished through a simple statement somewhere in Article 1 that, except as otherwise noted in the regulations, any determination left by the regulations to local agency discretion shall be entitled to deference by DWR if it is supported by substantial evidence. A definition in section 351 of the regulations of “substantial evidence” would also be warranted. I recommend borrowing the definition from the CEQA guidelines found at 14 CCR 15384.
- (2) I’m not sure what section 350.2(g) means (“The Department may evaluate a Plan at any time, for compliance with the Act and this Subchapter.”). There is already a regulation at section 355.6 describing when and under what circumstances a plan may be subject to review by DWR, and there is already provision for approval at the outset, annual reporting, five year reporting, and review by DWR any time a plan amendment is proposed. Once a plan has been approved, unless it is amended, and subject to periodic review at defined intervals, agencies should be given the opportunity to do their jobs without excessive oversight.
- (3) There is a typo at section 352.6(e): “. . . a Plan shall be consist of public domain open-source software . . .” Should it read: “. . . a Plan shall consist of . . .”?
- (4) What is a “central valley land use,” as that expression is used in section 354.18(d)(1)? Is the regulation referring somehow to the Central Valley? Either way, the meaning is uncertain.
- (5) Should section 354.26(d) read instead: “An agency that is able to demonstrate that undesirable results are not present and will not occur in a basin for one or more critical parameter shall not be required to conduct the analysis for those critical parameters described in this Section.”? Otherwise, I’m not sure I fully understand the regulation.
- (6) Section 354.28, et seq., regarding minimum thresholds, objectives, and milestones, is particularly well suited for reliance on a “substantial evidence” standard. DWR previously explained to counties in a webinar that it will defer to agency-identified targets if they are reasonable.
- (7) Under section 354.38(d), the circumstances under which an agency may be required to adjust its monitoring program (i.e., (d)(1)-(4)) are not drafted in a manner that is grammatically parallel, which is likely to cause confusion. Also, it seems as though the only relevant circumstance is (d)(1). Provided an agency can show that it is meeting its targets, as approved by DWR, why should it be required to do otherwise than what is called for in its plan?

- (8) The deadline for an agency to submit a plan for initial review by DWR is unclear. Water Code section 10720.7 defines when an agency must begin to implement its plan. Section 355.4(a)(1) refers to section 10720.7 as a deadline to file a proposed plan with DWR. However, section 355.2 states that review will take up to two years. Perhaps the regulations should clarify that an agency should submit and begin to implement its plan by the deadline stated in section 10720.7, but that DWR shall have up to two years to review and approve a plan and propose changes.
- (9) Section 355.4(a)(3) requires that a plan cover an entire basin. My understanding is that there can be multiple plans for a single basin, subject to a coordination agreement. This should be clarified.
- (10) Section 355.6(b) lists eight aspects of a plan that may be reviewed periodically by DWR, the first being whether the agency is meeting its DWR-approved interim milestones. Provided an agency is meeting its milestones, as determined through monitoring programs described in the agency's DWR-approved plan, it seems unnecessary to audit other aspects of an agency's performance. Local control is a key goal of SGMA, and agency resources should be expended implementing plans, not continually justifying plans to DWR.
- (11) Section 355.8, regarding consultation with the SWRCB, cites as authority Water Code sections 10735.2 and 10735.4, which in turn describe consultation by DWR as a precursor to placing a basin in probationary status. With the stakes so high, section 355.8 should further clarify the times and circumstances when such consultation will be warranted, and should include some provision for notifying an agency and providing an opportunity to cure defects before consulting with the SWRCB.
- (12) Section 356.6(b) is confusing. DWR may "provide recommended corrective actions to address any deficiencies in [an] annual report," and shall treat the agency's plan as conditionally adequate until the deficiencies are addressed. Are the recommended corrective actions then actually "recommended" if the agency shall be sanctioned until deficiencies are addressed? What is intended by this language?
- (13) At section 356.10, the amount of information that an agency must compile seems appropriate in the case of a plan amendment, but not for a five year review. The big question at a five year review should be whether an agency is meeting its DWR-approved five year milestones according to the monitoring program that DWR also approved as part of the agency's plan. If milestones are not being met, then more information is appropriate to help the agency and DWR understand what needs to be done differently. But otherwise it should be sufficient for an agency to prove that it is meeting its milestones.
- (14) Is the term "Submitting Agency" as used in section 357.4 the same as a "Coordinating Agency," as used in sections 355.10(a) and 351(i)? If so, then consistent terminology should be used. Either way, "Coordinating Agency" should be defined more clearly.
- (15) Under section 357.4, why is a Submitting Agency required to do more than simply show that the coordination agreement satisfies the requirements of Water code section 10727.6?
- (16) Section 358.4(c)(2)(C) refers to Water Code section 10733.6, subdivision (b)(4)(B). However, there is no subdivision (b)(4)(B) at section 10733.6.