

**COUNTY OF SAN LUIS OBISPO BOARD OF SUPERVISORS  
AGENDA ITEM TRANSMITTAL**

(1) DEPARTMENT Public Works Planning and Building County Counsel	(2) MEETING DATE 3/17/2015	(3) CONTACT/PHONE Mark Hutchinson, Deputy Director of Public Works (805)-781-5458	
(4) SUBJECT Discussion and possible direction regarding an amendment to the Health and Sanitation Ordinance, Title 8 of the San Luis Obispo County Code relating to regulation of the exportation of groundwater. All Districts.			
(5) RECOMMENDED ACTION It is recommended that the Board provide direction on content and future action for an ordinance regulating the exportation of groundwater.			
(6) FUNDING SOURCE(S) N/A	(7) CURRENT YEAR FINANCIAL IMPACT N/A	(8) ANNUAL FINANCIAL IMPACT N/A	(9) BUDGETED? N/A
(10) AGENDA PLACEMENT <input type="checkbox"/> Consent <input type="checkbox"/> Presentation <input type="checkbox"/> Hearing (Time Est. ___) <input checked="" type="checkbox"/> Board Business (Time Est. <u>90 min.</u> )			
(11) EXECUTED DOCUMENTS <input type="checkbox"/> Resolutions <input type="checkbox"/> Contracts <input type="checkbox"/> Ordinances <input type="checkbox"/> N/A			
(12) OUTLINE AGREEMENT REQUISITION NUMBER (OAR) N/A		(13) BUDGET ADJUSTMENT REQUIRED? BAR ID Number: N/A <input type="checkbox"/> 4/5 Vote Required <input checked="" type="checkbox"/> N/A	
(14) LOCATION MAP Attached	(15) BUSINESS IMPACT STATEMENT? No	(16) AGENDA ITEM HISTORY <input type="checkbox"/> N/A    Date: 9/9/14, #33; 11/25/14, #2	
(17) ADMINISTRATIVE OFFICE REVIEW			
(18) SUPERVISOR DISTRICT(S) All Districts			

Reference:      15MAR17-BB-2

# County of San Luis Obispo



TO: Board of Supervisors  
FROM: Public Works / Mark Hutchinson, Deputy Director of Public Works  
Planning and Building / Trevor Keith, Division Manager  
County Counsel / Eric Stuckey, Deputy County Counsel

Wade Horton, Director of Public Works  
Jim Bergman, Director Planning and Building

VIA: Rita Neal, County Counsel

DATE: 3/17/2015

SUBJECT: Discussion and possible direction regarding an amendment to the Health and Sanitation Ordinance, Title 8 of the San Luis Obispo County Code relating to regulation of the exportation of groundwater. All Districts.

## **RECOMMENDATION**

It is recommended that the Board provide direction on content and future action for an ordinance regulating the exportation of groundwater.

## **DISCUSSION**

On January 28, 2014, the Board directed to staff to explore the technical and legal aspects of an ordinance regulating the exportation of groundwater.

On September 9, 2014, the Board directed staff to prepare an ordinance regulating the exportation of groundwater. Staff prepared a draft ordinance and solicited public feedback on the draft, including referrals to the Water Resource Advisory Committee, Agricultural Liaison Advisory Board, Paso Robles Groundwater Basin Advisory Committee, Community Advisory Councils, and others.

On November 25, 2014, the Board directed staff to move consideration of the proposed ordinance off calendar.

On February 3, 2015, the Board directed staff to bring the ordinance forward for Board discussion.

## ***Groundwater Basins***

According to the California Department of Water Resources (DWR) Bulletin No. 118 (Bulletin 118), there are twenty two (22) groundwater basins that underlie San Luis Obispo County (Attachment A). Bulletin 118 contains descriptions of each delineated groundwater basin in California. The County's twenty two identified basins range from very small, such as the San Carpoforo Valley

Basin located in the far north coast, to the Paso Robles Area Subbasin, a subbasin of the large Salinas Valley Groundwater Basin that covers an area from Monterey County into northern San Luis Obispo County.

### ***Legal Authority to Regulate***

In *Baldwin v. County of Tehama*, the Third District Court of Appeal held groundwater use is within the municipal police power and that state law does not wholly preclude county regulation of groundwater.<sup>i</sup> The County may enact a local ordinance regulating groundwater subject to the constitutional constraints applicable to all legislation, provided the ordinance does not conflict with the general law.<sup>ii</sup> More than twenty counties (Attachment B) have adopted ordinances regulating the exportation of groundwater; however, there is no appellate case law addressing whether the specific provisions of any of these ordinances conflict with the general law. In the recently enacted Sustainable Groundwater Management Act (SGMA), the Legislature declared its intent to acknowledge and preserve the authority of counties to manage groundwater pursuant to their police powers.<sup>iii</sup>

In recognition of the language of Article X, Section 2 of the California Constitution (“*the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they may be capable*”) and the common law principle allowing for the export of groundwater from a basin once the basin’s reasonable overlying needs are met, none of the existing ordinances contain a flat prohibition on the exportation of groundwater, but rather require a permit to export.<sup>iv</sup> Permits range from staff-issued administrative permits to conditional use permits issued by the Planning Commission.

### ***Draft Ordinance***

The Draft Ordinance (Attachment C) was based on direction provided by your Board on September 9, 2014 and on comments received during the public review process. This report summarizes comments received (Attachment D) and subsequent modifications made to the public review draft and, where applicable, offers suggestions for additional modifications to the proposed ordinance in response to comments. Correspondence received in response to the September 9 Board discussion is included as Attachment E.

### ***Definitions — Section 8.95.20***

#### **Export**

On September 9, 2014, your Board provided direction to draft an ordinance that would define “export” as the extraction of groundwater underlying the county for use outside county boundaries **or** for use outside of the groundwater basin from which it was extracted (referred to as the county and basin-based definition). A number of comments were received from private parties and purveyors to delete the county boundary limitation and to include a purely basin-based definition. Removal of the county boundary limitation would allow for out-of-county transfers **within** the three groundwater basins that cross county lines, namely the Paso Robles Area Groundwater Basin, the Santa Maria River Valley Groundwater Basin and the Cuyama Valley Groundwater Basin. For example, groundwater could be extracted from a parcel overlying the Paso Robles Area Groundwater

Basin within the county for use on a parcel overlying the Paso Robles Area Groundwater Basin within Monterey County without the benefit of a permit.

If your Board wants to consider this change, then under the definition of “Export”, the language “or for use outside of the county” would need to be deleted.

### Groundwater

Staff received a number of comments related to the definition of groundwater and that only “native” groundwater be regulated by this ordinance. As part of the Board’s direction on September 9, 2014, the ordinance was not to differentiate between “native” and “non-native” groundwater. The proposed ordinance reflects this direction.

### Historical Practice and Contiguous Parcels

Comments were received that asked for clarification on what was meant by “contiguous parcels” and “historical practice” as used in the ordinance in the exemption section. Definitions have been included in the proposed ordinance in order to make it clear when the exemptions would apply.

### Local Water Agency

Comments were received asking that the ordinance clarify that all water purveyors be exempt from the ordinance. Staff proposes a change to the definition of “Local Water Agency” (formerly “Local Agency”) such that mutual water companies and private water companies regulated by the Public Utilities Commission, in addition to Community Services Districts and County Service Areas, would be exempt from the ordinance with respect to transfers within their boundaries or services areas.

### Site

There were comments made regarding the definition of “Site” and the exemption for movement of groundwater between contiguous parcels “under common ownership” consistent with historical practice. The concern is that contiguous properties might be under the common control of a particular person (e.g. an agricultural lessee), but not under the same ownership. In order to address this, the draft ordinance has been revised to additionally reference contiguous parcels having the same lessee or the same controlling entity within the definition of site as well as within the exemption.

## ***Exemptions — Section 8.95.40***

### Contaminated Water

Comments were received about the exemption for contaminated water. There was confusion about the need to create this exemption and when it would be used, as well as concern that it could potentially encompass a large number of exports and that “contaminated” groundwater would need to be defined in great detail. Based on the foregoing, the exemption was deleted from the draft ordinance.

## County Exemption

There were numerous comments received regarding the exemption for groundwater exports undertaken by the County or the San Luis Obispo County Flood Control and Water Conservation District (District) or their contractors. On September 9, 2014, your Board directed that the ordinance contain an exemption for the County. Due to the confusion raised by the use of the term “or their contractors” and its potential breadth, that part of the exemption was deleted. However, the exemption for the County and the District remains.

Prior to a County or District project occurring that would export groundwater from one basin to another or to a location outside of the county, the following process would occur:

The Public Works Department first prepares a Project Execution Plan that includes a Public Outreach Plan. The Public Outreach Plan:

- Establishes a single point of contact within the Department
- Identifies the affected and/or interested public stakeholders
- Establishes the method(s) to be used to inform and seek information from all stakeholders
- Includes the necessary contacts with Advisory Committees, neighborhood groups, industry groups, etc.
- Identifies the location and timing for public meetings and hearings

In addition to the Public Outreach Plan, all Public Works Projects are subject to environmental review under CEQA, as well as other State and Federal environmental regulatory processes. The majority of these regulatory processes include a public information and comment component. At a minimum, all CEQA documents prepared for Public Works Projects are reviewed and approved by the Board of Supervisors at a regularly scheduled Board hearing, after all required public notice requirements have been met.

As this process provides for extensive public notice and input, requiring County and District projects to receive permits as envisioned by the draft ordinance would duplicate existing processes. If your Board would like to consider modifying the exemption, a provision could be added that would require the Board to make the same findings that are set forth in the proposed ordinance (Section 8.92.070) as part of its decision to fund and approve any County or District export project.

## De Minimis Exports

Your Board’s direction included an exemption for exportation of not more than one-half acre foot per year. Comments included that the amount was too small, the amount was too large, that any amount was not appropriate, and that enforcement of this provision was going to be difficult as the exportation would be exempt and therefore not tracked.

If your Board wanted to leave in this exemption, but create a way to track where and how much water was being exported from site to site, a provision could be added that would require an exporter moving less than one-half acre foot per year to file a de minimis exemption form. The form would be kept on file with the Public Works Department. The form could include the location of the export site,

the location of the import site and precisely how much water was going to be exported. If complaints about water exportation were received, the form would provide the County with information that the exportation was being done under an exemption from the ordinance and save investigation time.

If your Board wanted to remove this exemption but still wanted to include an exemption responsive to similar concerns, it could add an exemption for exports during periods of declared emergency where necessary to provide a domestic or public water supply.

### Other Exemptions

Comments were received about not allowing any exportation from basins certified as a Level of Severity III under the County's Resource Management System or conversely that the ordinance should only apply to those basins and not to other basins in the county. In addition, comments regarding the applicability of the ordinance to adjudicated basins were received.

If your Board wanted to consider adding an exemption for adjudicated basins, you could consider an exemption for exports from or within the areas adjudicated in *Santa Maria Valley Water Conservation District v. City of Santa Maria, et al.* (Lead Case No. CV 770214) as long as the exports were completed in accordance with the procedures set forth in the Stipulation dated June 30, 2005. Except upon further order of the court, the stipulation prohibits all Stipulating Parties from transporting groundwater outside of the basin except for those uses in existence as of the effective date of the stipulation. In addition, the stipulation prohibits transport of any groundwater produced within the Northern Cities Management Area outside of the Northern Cities Management Area without the agreement of each of the Northern Cities (Arroyo Grande, Pismo Beach, Grover Beach and Oceano). Thus, a mechanism already exists for the management of exports from the Santa Maria basin.

### **Permit Procedures — Sections 8.95.50 and 8.95.60**

#### Public Works Director

There were comments received about who should be delegated the authority to make export permit decisions, including the idea of forming a new decision-making authority that would make these decisions. Your Board agreed with the information provided at your September 9, 2014 meeting, that the Public Works Director, after a process that included public notice and the ability to receive input, would be the appropriate decision-making authority. The Public Works Department has staff with specialized water expertise and is in the best position to appropriately and adequately review applications and make decisions. Your Board also agreed that the ordinance would include the ability to appeal the Public Works Director's decision to your Board.

#### Referral Process

The public review draft ordinance set forth the referral process after the Public Works Director receives an application for an export permit. A number of the comments received discussed this process and felt that it should be broader. In response to those comments, the draft ordinance expands who would get a referral and where notice of a new application would be posted. Notice of receipt of an application would be required to be posted on the Public Works Department's website and at the end of the Board's agenda (in a manner similar to how environmental determinations are posted on the Board's agenda now). The application would be sent to applicable public agencies, the Water

Resource Advisory Committee, as well as any relevant Board-authorized advisory groups, such as the local Community Advisory Councils and the Paso Robles Groundwater Basin Advisory Committee. Also, any interested person can request that notice be sent directly to him or her.

### Review Process

There were numerous comments about the process that would be used to review and approve or deny a request for an export permit.

### Public Hearing Notice

The draft ordinance requires notice of the hearing to include mailed notice to all owners of property within a one mile radius of the exterior boundaries of the site from which the export is to occur. Comments were received that the radius for notification should be 2 to 5 miles, that all property owners within the affected basin be notified and that property owners should receive notice of all new applications in addition to the hearing notice. The requirement for posting new applications on the Department's website, as well as on the Board's agenda should provide adequate notice of application submittal to neighboring property owners. However, staff did feel that the standard 300 foot radius notification of a hearing was not adequate and that a one mile radius was a better standard, but that a 2 to 5 mile radius or all property owners in the basin was not practical.

### Public Hearing

The ordinance includes provisions for a public hearing that mirror those found in the Land Use and Coastal Zone Land Use Ordinances for a Minor Use Permit (MUP). At your September 9, 2014 meeting, your Board provided direction that a public hearing process be created that was similar to the simplest land use hearing. Using the provisions as set forth in the draft ordinance would provide the opportunity for a public hearing where one was requested. The timing on when a request would need to be made is the same as the process used for a MUP, as is the process by which a hearing is conducted. However, in response to comments received, the specificity of how the hearing is to be conducted was removed from the draft ordinance.

### ***Sunset Clause — Section 8.95.180***

There were comments about a mandatory yearly review of the ordinance by the Board of Supervisors. At your September 9, 2014 meeting, direction was provided that a clause be written that would expire the ordinance five years from the date of its adoption unless specifically extended by the Board of Supervisors. This has been included in the draft ordinance.

Information regarding the requirements of the SGMA was not fully understood at the time of previous Board and public review of the ordinance. Therefore, the Board may consider linking a sunset clause to the approval of a Groundwater Sustainability Plan (GSP) by the DWR. Note, however, that this approach would apply only in the Paso Robles, Los Osos, San Luis (Edna), Santa Maria, and Cuyama Basins.

## **OTHER AGENCY INVOLVEMENT/IMPACT**

The draft ordinance was referred to applicable agencies and community advisory groups.

## **FINANCIAL CONSIDERATIONS**

The cost of developing the draft ordinance is covered by the current County budget.

## **RESULTS**

Providing direction on the contents of a potential ordinance will allow for the preparation of the ordinance in order to introduce and hold public hearings in front of the Board of Supervisors, thereby leading to a well governed community.

Reference: 15MAR17-BB-2

File: CF 640.65.01 Groundwater Export Permitting (New)

L:\MANAGEMENT\MAR15\BOS\2015.03.24 Anti Export BoS rpt.002.docx MH:jb

---

<sup>i</sup> Baldwin v. County of Tehama (1994) 31 Cal.App.4th 166, 171, 173

<sup>ii</sup> Id.

<sup>iii</sup> Senate Bill No. 1168 (2014), Section 1, Subdivision (b)(5); Assembly Bill No. 1739 (2014), Section 1, Subdivision (b)(5).

<sup>iv</sup> Katz v. Walkinshaw (1903) 141 Cal. 116, 135-136. In addition, Water Code Section 109(b) provides that it is the established policy of the State "to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import."

## **ATTACHMENTS**

1. A. Groundwater Basin Map
2. B. List of Counties
3. C. Draft Ordinance
4. D. Comments Received
5. E. September 9, 2014 Correspondence