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April 12, 2022

Via email
Board of Directors
Salinas Valley Basin Groundwater Sustainability Agency
P.O. Box 1350
Carmel Valley, CA 93924

Re: Cost apportionment among subbasins – May 12, 2022 Agenda items 5c and 6b

Dear Members of the Board:

LandWatch Monterey County (LandWatch) offers the following comments regarding the need to develop a proactive and principled method to apportion the differential costs to implement the six groundwater sustainability plans (GSPs) among the six subbasins. This issue has arisen before without resolution and will become more urgent as the SVGBGSA moves from activities that are roughly equal in cost to each subbasins (e.g., development of six cookie cutter GSPs) to activities whose costs will vary widely by subbasin (e.g., feasibility studies and implementation of projects and management actions.) In short, it is time to address the tough issues of who pays and how much.

LandWatch recommends that the SVGBGSA acknowledge and address concerns that have arisen over the need to consider apportioning the 2022-2023 regulatory fee differently among the six GSPs based on their different benefits. The Board should seek stakeholder consensus on the 2022-2023 regulatory fee apportionment based on a commitment to begin a data-driven, structured process to identify and address future apportionment issues. Those issues should be addressed by a task force at the Board level with stakeholder participation and legal advice.

The primary issue in dispute is responsibility of landowners within a GSP for mitigation of conditions outside that GSP area. Absent mitigation responsibility, there is no benefit from mitigation expenditures and thus no basis to apportion either Proposition 26 fees or Proposition 218 assessments. Determining mitigation responsibility may not be simple. The Board should develop an understanding of the SGMA regulation that governs GSP interactions; consider whether and how changes to groundwater management regimes affect cost apportionment; consider the potential relevance of principles of adjudication and physical solutions for interconnected basins; and consider the potential relevance of historical investments and changes to groundwater conditions.

It is time to address these issues head on. The costs and benefits from the SVGBGSA are beginning to diverge among the six GSPs.

A. Background

A GSA's regulatory fee must bear a reasonable relationship to the burdens and benefits of the GSA activity.

> To qualify as a nontax "fee" under article XIII C, as amended, a charge must satisfy both the requirement that it be fixed in an amount that is "no more than necessary to cover the reasonable costs of the governmental activity," and the requirement that "the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Cal. Const., art. XIII C, § 1, subd. (e).)

(*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1214.) While an agency may have some flexibility in determining its reasonable costs and in apportioning a fee to recover those costs, the agency must provide a clear administrative record to support its determination. (*City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 925, 936-937.)

The question whether the SVGBGSA's regulatory fee does bear a reasonable relationship to the benefits it funds to each subbasin arises now from two items on the May 12 agenda. First, consent calendar item 5c, Amendment of Hansford contract, would authorize a contract to provide apportionment of 2022/2023 fee. However, the scope of work for Hansford does not provide for any assessment whether the fees should be apportioned differently among the six GSPs.

Second, item 6b call for adoption of cash flow reserve policy. However, the draft policy does not include a provision regarding replenishment of the reserve in the event that the reserve is used to cover expenses that benefit some but not all of the GSPs.

The SVGBGSA has not formally considered apportioning costs differently among its six GSPs. The 2019 Fee Study does not consider any method of apportionment that would have allocated different levels of fees to each GSP. (Salinas Valley Basin Groundwater Sustainability Agency 2018 Regulatory Fee Study, February 4, 2019, pp. 17-24, available at https://svbgsa.org/wp-content/uploads/2021/04/2019-Fee-Study.pdf.)

Furthermore, the 2019 Fee Study does not consider the kinds of costs that must be incurred by the SVGBGSA after developing the GSPs but before funding projects through sources other than Proposition 26 regulatory fees, such as Proposition 218 assessments or grants. The fee study mentions only recurring administrative costs, GSP development costs, and reserves, but is silent as to implementation costs incurred prior to long-term infrastructure financing:

> The fee will only fund regulatory activities of managing groundwater to sustainability (such as GSP development), day-to-day administrative operations costs, and prudent reserves. . . .. Revenue from the fee will not be available to pay

> for other operational costs (such as providing water service) or for infrastructure or resource capital costs.

(*Id.* at 4.) The costs that must be incurred after GSP adoption but before long-term capital funding include costs for project feasibility analyses, preliminary engineering costs, and cost-benefit studies, and the costs to finance project development costs, even if those project development costs might later be recovered through grants or Proposition 218 funding. And the Proposition 26 regulatory fee may ultimately have to cover "stranded" project development costs if a Proposition 218 vote fails or grants are not secured.

As discussed below, the SVGBGSA cannot assume that its regulatory fee will remain equally beneficial to all six GSPs. Accordingly, the SVGBGSA will need to begin making express determinations regarding cost apportionment.

B. The activities covered by the 2022-2-23 regulatory fee benefit some GSPs much more than others.

SGMA's authorization for imposing fees is predicated on the assumption that a GSA will use the fee to fund the preparation and implementation of a GSP. (Water Code, §§ 10730(a), 10730.2(a).) Unlike other GSAs, the SVGBGSA is responsible for multiple GSPs. Accordingly, the SVGBGSA should be sensitive to the likelihood that its activities may not benefit each GSP area equally.

The fundamental documents setting forth the SVGBGSA's findings regarding the need for projects and management actions, the costs and benefits of those projects and management actions, and the budgets to implement the GSPs are the GSPs themselves. Unless the SVGBGSA has established some other basis to determine the amount and apportionment of its fee, the administrative record justifying that determination is the six adopted GSPs. And if the SVGBGSA intends to adopt a budget inconsistent with these GSPs, it is bound to revise the GSPs through an open public process.

The six GSPs do not establish that each GSP would receive the same benefits from the regulatory fee. The two southern GSPs, those for the Upper Valley and Forebay, determine that no projects or management actions are required to attain sustainability. The record establishes that the SVGBGSA plans to commit more efforts and resources addressing sustainability in the four GSPs for the northern subbasins than the two GSPs covering inland subbasins in the south.

Resources are not evenly allocated among GSPs in Fiscal Year 2022-2023, and the differential is projected to increase over the five year budget projection. For example, costs incurred in Fiscal Year 2022-2023 are projected to include well construction costs ($21,000) and costs for addressing data gaps ($81,000). Although the budget document does not indicate for which GSPs these costs would be incurred in the 2022-2023 fiscal year, these categories of projected costs are greater in the GSPs for the northern subbasins than the other GSPs. (See Tables 10-1 in the GSPs.)

Or for example, the five-year budget includes $600,000 for continued project and management action feasibility studies. Again, however, the two southern GSPs do not call for implementing any projects or management actions based on their conclusions that these two subbasins have attained sustainability. Thus, absent some showing that these GSPs are obligated to mitigate conditions in other GSPs, it is unclear what benefit these GSPs would derive from the spending.

The five-year budget figure of $600,000 for feasibility studies is likely greatly understated because it does not include the total costs for project feasibility work. The projected cost of feasibility studies in the GSPs is $4,804,500, or $2,830,000 after available grant funding is applied:

GSP	**Feasibility Study Budget**	**Grant funded**
Eastside	$300,000	
Langley	$100,000	
Monterey	$1,250,000	
180/400 GSP Update	$3,054,500	$1,974,500
Upper Valley	$50,000	
Forebay	$50,000	
Total	$4,804,500	
Total after grant	$2,830,000	

All but $100,000 of these totals would be incurred for the northern GSPs. Since all of the GSP's call for completion of "project selection, planning, and funding" by 2024, project feasibility studies must presumably be completed in that five year budget projection. (See GSPs, Figures 10-1.)

Although the Fiscal Year 2022-2023 Budget Memorandum states that feasibility studies will be grant funded in 2022-2023 and 2023-2024, there can be no expectation that grants will in fact cover all necessary costs. Grant funding was sought for $2,304,000 of the 180/400 feasibility study costs, but only $1,974,500 was awarded, a shortfall of $609,000 in the award. (DWR, grant awards, https://water.ca.gov/-/media/DWR-Website/Web-Pages/Work-With-Us/Grants-And-Loans/Sustainable-Groundwater/Files/Award-List-COD-Basins-Final-Table.pdf). Shortfalls in grant funding will have to be covered by the SVGBGSA fee revenues.

Furthermore, it appears that, based on the 180/400 and Monterey GSP budgets for feasibility studies, the $300,000 budget for the Eastside GSP may be greatly understated. The line item to "Refine and Implement Projects and Management Actions" in the GSPs'

Tables 10-1 include subtasks "engineering feasibility studies and project design," "permitting and environmental review," and "cost-benefit analyses." The Eastside GSP identifies 15 discrete projects and management actions, several of which are estimated to cost over $100 million. It is not credible that $300,000 would be sufficient to cover the "engineering feasibility studies and project design," "permitting and environmental review," and "cost-benefit analyses" for these projects.

In sum, the existing GSP budgets indicate plans to expend millions of dollars on feasibility studies of which only a very small portion would be allocated for projects and management actions in the GSPs for Upper Valley and Forebay. And the larger amounts that would be spent on feasibility studies called for by the other four GSPs are not equal among those four GSPs.

It is difficult to understand, based on the existing record, how the feasibility studies required for the northern GSPs will benefit the two southern GSPs. Further investigation may reveal that the two southern GSPs do in fact need projects or management actions, or that they will benefit from projects and management actions proposed by other subbasin GSPs based on some theory of legal responsibility to mitigate conditions outside these subbasins. However, the record that exists now does not support such a conclusion, primarily because there is no agreement as to responsibility to mitigate overdraft and seawater intrusion in the northern subbasins. As discussed below, there is a long-standing historical dispute between northern and southern agricultural interests on this issue.

C. Subbasin-specific costs will increase over time and the SVGBGSA implements projects and management actions.

Eventually, the SVGBGSA or other agencies may construct and operate capital improvement projects and undertake management actions to attain and maintain sustainability. If funded by assessments, these activities will be subject to Proposition 218 votes.[1] The SVGBGSA will have to demonstrate that assessed properties receive a special benefit and that the amount of an assessment is proportional to and no greater than the special benefit conferred. (Cal. Const. art. XIII D, § 4, subd. (f).) The proportionality requirements under Propositions 218 and 26 are similar but not entirely analogous:

> The apportionment language of Proposition 26’s article XIII C, section 1, subdivision (e) [final par.] (“fair or reasonable relationship”) differs from the apportionment language of Proposition 218’s article XIII D, section 6, subdivision (b)(3) (“proportional cost of the service attributable to the parcel”). Therefore, Proposition 218 authorities should be used cautiously as analogous authority for

[1] As noted, “stranded” project development costs for projects unable to secure Proposition 218 or grant funding would have to be covered by the Proposition 26 regulatory fee.

> these issues under Proposition 26, and vice versa. The restrictions on property-related fees in Proposition 218 are different from those imposed on regulatory fees by Proposition 26. (California Building Industry Association, v. State Water Resources Control Board (2018) 4 Cal. 5th 1032, 1053).

(League Of California Cities, Proposition 26 And 218 Implementation Guide, May 2019, p. 62, available at https://www.cacities.org/Prop218andProp26.)

Even if the SVGBGSA has more flexibility in apportioning costs under Proposition 26 than it will have under proposition 218, the SVGBGSA must still make a determination that the apportionment has a fair and reasonable relationship to the benefits of the SVGBGSA's activities.

D. The SVGBGSA should develop a principled basis to apportion costs among GSPs, which requires a principled understanding of the GSPs' responsibilities to mitigation conditions in other GSP.

For both Proposition 26 and Proposition 218 purposes, the SVGBGSA will increasingly need to make determinations whether costs it incurs should be apportioned to a single subbasin, to a subset of the six subbasins, or to all six subbasins. Where the cost will not be apportioned equally among all six subbasins, the SVGBGSA will need to make a determination as to how to assign shares.

Reasonable people may disagree as to the apportionment of costs. For example, some may argue that the rule for paying for a study of, or a solution to, a problem (e.g., seawater intrusion or aquifer depletion) is that the cost should be borne by the landowners in the subbasin with the problem. However, the landowner in that subbasin may think that the cost should be borne by landowners in all subbasins in which current, future, and/or historical water use contributes, will contribute, or has contributed to the problem under review.

The first rule is easier to administer since the SVGBGSA can determine the assessment boundaries in advance. The second approach is more difficult to administer for two reasons. First, it may not be clear until the study is concluded what subbasins are causally implicated and to what extent. Second, and much more problematically, it is not simple to determine whether and to what extent subbasins that cause but do not suffer the problem benefit from mitigation activities. Any benefit to a subbasin not suffering the problem depends on some showing of legal responsibility for mitigation. That is, even if extractions or the groundwater management regime in subbasin A cause a problem in subbasin B, subbasin A would arguably derive no benefit from identifying and mitigating that problem unless Subbasin A is legally responsible under SGMA or water law principles for some share of the mitigation burden.

LandWatch has repeatedly asked that the SVGBGSA consider and develop a principled method for apportioning costs. LandWatch explained that the SVGBGSA cannot realistically select a least-cost suite of projects and management actions for which stakeholders will be willing to pay without addressing the inter-subbasin equity issue directly.[2] Again, in its comments on the five new GSPs, LandWatch objected that the new GSPs fail to acknowledge or address the long-standing stakeholder concerns about equitable allocation of sustainability burdens to each Salinas Valley subbasin.[3] In that letter, LandWatch outlined the north-south conflict, noting that many in the north believe that the reservoir project benefits have been inequitably allocated because the County did not implement the proposed well field in the Forebay to support groundwater transfers to the north, as recommended in DWR's Bulletin 52.[4] Regardless of the merits of this argument, some resolution is required. Thus, LandWatch recommended that DWR require the GSA to revise the GSPs to specify necessary data collection and analysis and a data-driven process to support a principled allocation of the costs of Basin-wide projects and management actions. LandWatch has explained that the repeated calls for revisions of water balances and studies of inter-subbasin flows have not been accompanied by any discussion of a principled way to <u>use</u> that data to apportion costs.

On May 5, 2022, in response to public comments objecting to the failure to apportion the proposed 2022-2023 regulatory fee to reflect differences in GSP costs, the Budget and Finance Committee directed staff to return in six months with a "policy for revenues that benefit only one subbasin." This is too little, too late. The motion did not articulate the scope of the problem, which is not something that can be solved by the kinds of suggestions discussed at the meeting that staff add more expenditure categories to the chart of accounts or schedule more frequent comparisons of expenditures to budgets. These bookkeeping procedures may be necessary, but they are not sufficient to address the fundamental issue. <u>Again, the fundamental issue is to develop a principled method, grounded on a factual record, to allow the Board to apportion expenditures so that they bear a reasonable relationship to the benefits to implementation of each GSP.</u>

As noted, the primary issue in dispute is responsibility for mitigation of conditions outside the GSP area. Absent mitigation responsibility, there is no benefit from mitigation expenditures and thus no basis to apportion either Proposition 26 fees or

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[2] LandWatch, Selection of Projects and Management Actions for Salinas Valley Water Supplies, Draft Report, Oct. 28, 2021, pages 12-14, available as pdf pages 24-26 at https://landwatch.org/pages-new/policy/water/SVBGSA/123021-LWComments-SVBGSA-Projects%26Actions.pdf.

[3] LandWatch, letter to DWR, Feb 14, 2022, Comments on the Submitted Groundwater Sustainability Plans for the Upper Valley Aquifer Subbasin, Forebay Aquifer Subbasin, Eastside Aquifer Subbasin, Langley Aquifer Subbasin, and Monterey Subbasin, pp. 14-17, available at https://landwatch.org/pages-new/policy/water/SVBGSA/021522-LWComments-DWR-SustainabilityPlanReview.pdf.

[4] See Hydrogeology And Water Supply Of Salinas Valley, A White Paper prepared by Salinas Valley Ground Water Basin Hydrology Conference For Monterey County Water Resources Agency, June 1995.

Proposition 218 assessments. Determining mitigation responsibility may not be simple. Some questions that arise include:

- What is the operational constraint of the DWR evaluation criteria for GSPs at 23 CCR § 355.4(b)(7), "[w]hether the Plan will adversely affect the ability of an adjacent basin to implement its Plan or impede achievement of its sustainability goal?" How should a GSA exercise its discretion to determine whether a GSP "adversely affects" or "impedes achievement?" What limits the GSA's discretion?

- How should changes to groundwater management regimes that affect subbasins differentially be considered in the context of determining whether fees and assessments bear a reasonable relation to benefits? For example, if reservoir reoperation is an alternative to a capital project, how do Proposition 26 and 218 apportionments take this into account, if at all?

- How are adjudication and physical solution principles governing interconnected basins relevant to apportioning mitigation costs among subbasins?

- How are historical investments in and assessments for water projects, investment-backed expectations, and historical changes to groundwater conditions relevant to apportioning mitigation costs among subbasins?

Resolving these issues requires data-driven, structured stakeholder engagement because the GSPs cannot be implemented unless stakeholders are willing to forebear Proposition 26 challenges and to vote for Proposition 218 assessments.

LandWatch recommends that the SVGBGSA Board begin to address cost apportionment issues immediately by taking the following measures:

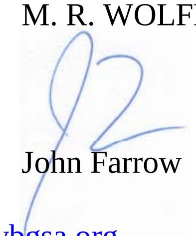
1. Carefully review the line items in the 2022-2023 fiscal year budget to identify each line item that does not benefit each GSP equally.
2. For each line item with differential benefits, determine to which GSPs the cost should be apportioned and why.
3. Seek stakeholder consensus on the 2022-2023 apportionment with a commitment to begin a data-driven, structured process to identify and address future apportionment issues.
4. Direct Hansford to apportion the 2022-2023 expenditures to parcels in each GSP area based on the different cost apportionment to each GSP.
5. Initiate a Board level task force to examine the likely cost apportionment issues that will arise in connection with future Proposition 26 regulatory fees and Proposition 218 assessments as more funding is required for GSP implementation and as expenditure levels benefitting each subbasin begin to diverge. The task force should consider the principles that will be common to the Proposition 26 and Proposition 218 apportionments and should also consider how these

apportionments may differ. The task force should consider the apportionment questions identified above with the assistance of legal counsel. The task force should consider how costs might be apportioned in principle for several of the large multi-subbasin projects under consideration, such as the seawater intrusion barrier, the regional desalination project, the movement of surface water from south to north for ASR injection or direct use, and new diversions.

Proactive consideration of these emerging issues is critical to timely implementation of sustainability projects and management actions. The SVGBGSA should not wait for these issues to fester with the expectation that they can be addressed on an ad hoc basis after expenditures are committed. As it begins feasibility studies, which include cost benefit analyses, the SVGBGSA should know if the Proposition 26 and 218 cost apportionment constraints will limit the available funding for projects and management actions.

Yours sincerely,

M. R. WOLFE & ASSOCIATES, P.C.



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