

DOWNEY BRAND

MEMORANDUM

To: BORREGO WATER DISTRICT BOARD OF DIRECTORS

From: DAVID R.E. ALADJEM
REBECCA R.A. SMITH

Date: SEPTEMBER 24, 2015

Re: **PROCEDURE FOR IMPOSITION OF REGULATORY FEES UNDER
SGMA**

Climat: 41511.00000

Borrego Water District intends to serve as the groundwater sustainability agency for its boundaries, as well as some “white areas” outside its boundaries. In that role, the District will be required to develop and implement a groundwater sustainability program consistent with the requirements of the 2014 Sustainable Groundwater Management Act (SGMA).

We have previously advised you that a fee to fund the costs of a groundwater sustainability program that is imposed under Water Code §10730(a) should be considered a regulatory fee, and therefore not subject to Proposition 218.¹ This memorandum lays out the procedures that the District must follow to impose such a fee.

FORM OF THE REGULATORY FEE

The District has the authority under its existing police power to impose regulatory fees, and Water Code 10730 provides agencies that have established themselves as GSAs with the explicit authority to impose such fees to fund the costs of their groundwater sustainability programs. These costs include the expenses associated with preparing, adopting, enforcing, and administering a groundwater sustainability plan (Water Code § 10730(a)).

Before adopting a fee under Section 10730, the District must compile the data upon which the fee is to be based. See Water Code § 10730(b)(3). That data should demonstrate that:

- The fee is imposed in an amount necessary to carry out the purposes and provisions of the regulation (here, to fund the groundwater sustainability plan and program);
- Does not exceed the reasonable cost of providing the services necessary to the activity on which the fees are based; and

¹ As we previously advised you, this issue is the source of on-going litigation (see *City of San Buenaventura v. United Water Conservation District* (Cal. Ct. App., Mar. 17, 2015) 185 Cal.Rptr.3d 207). Although the appellate court in *City of San Buenaventura* observed that fees under section 10730 did not require Proposition 218 compliance, the California Supreme Court has granted review of that decision, and it can no longer be cited as binding law. Still, we believe that the reasoning in *City of San Buenaventura* is strong. We will of course apprise the District of any changes to the law on this point.

- Is not levied for an unrelated revenue purpose.

California Assn. of Professional Scientists v. Department of Fish & Game (2000) 79 Cal.App.4th 935, 945). Fees on groundwater extractions that fund the costs of a groundwater management program, including property acquisition; water supply, treatment, and distribution; and program administration, operation, and maintenance, are explicitly required to comply with Proposition 218. The District's proposed regulatory fee should therefore be carefully structured to avoid such a characterization. Additionally, no fees may be imposed under section 10730 on de minimis extractors unless the District as groundwater sustainability agency has already regulated them. De minimis extractors are defined as persons who "extract, for domestic purposes, two acre-feet or less per year." Water Code § 10721.

Pursuant to recent amendments to SGMA (SB 13), these fees may not be imposed on property outside of the District's boundaries. Water Code § 10726.8(b).

PROCEDURES FOR ADOPTION OF FEE

To impose a regulatory fee under Section 10730(a), the District must act by resolution or ordinance, following a properly noticed public meeting. That procedure requires:

- Notice of the public meeting at which the fee is to be considered, published twice weekly, at least two weeks prior to the meeting; posted on the District's website, and mailed to any party that has filed a written request for notice regarding meetings on new or increased fees. Water Code § 10730(d); Gov. Code § 6066. The notice should include "a general explanation of the matter to be considered" and a statement that the data upon which the fee is based is available for the public to review (with guidance as to how to obtain that data).
- Data supporting the new fee, available to the public at least 10 days prior to the public meeting at which the District will consider the adoption of the fees. Water Code § 10730(b)(3).
- A public meeting, at which oral and written presentations may be made. Following the public meeting, and after considering all public comments, the District may adopt and implement the fee. The District may also, by resolution, request that the County collect the fee in the same manner as ordinary municipal ad valorem taxes.

The Water Code does not provide for any waiting period between when the fee is adopted and when it is effective, nor does it require additional noticing procedures to be conducted following the fee's adoption. If the District elects to proceed via ordinance, additional noticing and publication procedures may apply. We would be happy to assist the District in developing and implementing a fee program tailored to the District's needs. Please do not hesitate to contact me with any questions.



May 13, 2015

Mr. Lyle Brecht
Borrego Water District
806 Palm Canyon Drive
Borrego Springs, CA

RE: Shared Allocation of Groundwater Sustainability Plan (GSP) development costs

Dear Lyle:

The Borrego Water Coalition approved, in concept, a blended shared allocation of the development costs for the GSP. We understand that costs will be shared between Agriculture, Municipal users and Recreational users. Our conceptual approval is based upon the final blended share determination and final estimated costs, once known.

Please advise the Borrego Water Coalition when this blended shared allocation recommendation and cost has been established.

Borrego Water Coalition

Jim Moxham

GROUNDWATER SUSTAINABILITY PLAN (GSP) DEVELOPMENT COSTS ESTIMATES

August 25, 2015 Best Professional Estimates

GSP Cost Allocation Summary

US Bureau of Reclamation	\$850,000
US Geological Survey	\$211,650
US Environmental Protection Agency	\$250,000
California Department of Water Resources	\$ 670,000
Borrego Water District (ratepayers only)	\$1,056,000
All Pumpers (including District)	\$1,385,522
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Total Economic Cost to Produce a Defensible GSP	\$4,423,172

GROUNDWATER SUSTAINABILITY PLAN (GSP) DEVELOPMENT COSTS ESTIMATES

GSP TASK ITEM	CONSULTANT	COST ESTIMATE	ALLOCATION
Basin Characteristics (2015)	US Geological Survey (USGS)	\$740,000	\$422,000 District ratepayers to USGS, \$106,000 District ratepayers to DWR; \$212,000 USGS
Engineering & Economics of Imported Water (2015)	US Bureau of Reclamation (Reclamation)	\$862,000	\$425,000 Reclamation; \$425,000 District ratepayers in-kind services; \$12,000 District ratepayers
Potential sources of augmented supply from nearby basins (2013)	US Environmental Protection Agency (USEPA)	\$746,000	\$496,000 District ratepayers; \$250,000 USEPA
Economics of Reduction options	California Department of Water Resources	\$70,000	\$70,000 California Department of Water Resources (DWR)
Water Level Monitoring	California Department of Water Resources	\$600,000	\$600,000 DWR costs estimated by Tim Ross
GSA application legal costs & basin boundary changes	District special counsel	\$20,000	\$20,000 District ratepayers
GSP governance & stakeholder facilitation services	choice of vendor will depend on whether DWR provides a full grant for these services over next 18-months	\$60,000	all pumpers will share in these costs
Basin depth dependent water quality study necessary to defend reduction timeline	USGS	\$240,000	all pumpers
Project management costs	Dudek	\$120,000	all pumpers
Plan technical requirements to meet DWR regulations	Dudek	\$470,522	all pumpers

GROUNDWATER SUSTAINABILITY PLAN (GSP) DEVELOPMENT COSTS ESTIMATES

GSP TASK ITEM	CONSULTANT	COST ESTIMATE	ALLOCATION
Market structure; Financial structuring and investment banking services to pay for GSP implementation costs	Orrick bond counsel; investment banking services chosen in future depending on financial structure	\$110,000	all pumpers
Court validation costs	District & County legal counsel for GSA	\$35,000	all pumpers
GSP defense reserve for litigation	Reserve used only if/when GSP must be defended	\$350,000	all pumpers
County land use and groundwater ordinance changes			

GROUNDWATER SUSTAINABILITY PLAN (GSP) DEVELOPMENT COSTS ESTIMATES

Milestone	estimated date (1)	responsible party
draft withdrawals benchmarks methodology acceptable to DWR, SWRCB, GSAs	June - August 2015	Borrego Water Coalition ("the Coalition) benchmarks committee
establish location of all producing wells in Valley	June - August	Coalition benchmarks committee
establish who owns each producing well in Valley	June - August	Coalition benchmarks committee
finalize depth dependent water quality scope of work	June - July	Borrego Water District ("the District") & San Diego County Department of Planning & Development Services ("the County" or "PDS")
draft MOU among Coalition + County + District for recognition as official stakeholder in GSP process	June - August	Coalition representative committee
GSP development estimated costs proposal finalized	August	District
Raftelis apportionment memo	August	District
final withdrawals benchmark methodology sent to GSAs	September	Coalition
Development costs & apportionment of GSP development costs agreed to	September	Coalition + County + District
County & District have applied for GSA status	September	County + District
GSP governance structure agreed to in writing by parties	September - October	Coalition + County + District
218 process to establish GSP development costs funding mechanism	October	District
Start depth-dependent water quality study	October	District
Contract with main GSP development engineer finalized	November	District
DWR has allowed adjustment of Basin boundary from existing Bulletin 118 boundary	November	County + District
GSP development tasks finalized	December	Coalition + County + District

GROUNDWATER SUSTAINABILITY PLAN (GSP) DEVELOPMENT COSTS ESTIMATES

Milestone	estimated date (1)	responsible party
218 rate process w/ Raftelis	January/February 2016	District
Begin creation of reduction plan	January	GSAs + Coalition
Town Hall community-wide meeting for GSP	March	Coalition + GSAs
Release of final DWR GSP regulations & conformance w/ work to date	June	GSAs + Coalition
Draft GSP released for public comment	September	Coalition & GSAs
Adoption of GSP	December	GSAs
Court validation process	January - June 2017	GSAs
GSP funding process	July 2017 - January 2018	District