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To: Vina Stakeholder Advisory Committee (SHAC)

From: Paul Gosselin, Vina GSA Administrator
Valerie Kincaid, Vina Legal Counsel

Re: Legal Implications of Potential Projects and Management Actions

The Vina SHAC voiced concerns about the ability to proceed with identifying potential Projects and Management Actions (PMA) without a greater understanding of the legal implications, particularly those involving recharge. Legal implications are one of many considerations whether a PMA is suitable for inclusion in a GSP. Since there are not specific proposed projects, the discussion of legal implications and other considerations are hypothetical. However, the general discussion of legal implications may identify aspects of potential projects requiring limitations that the Vina GSA Board may need to impose through management actions. The SHAC may identify and recommend management actions that would allow for projects to proceed consistent with the Vina GSP and without harming the basin or groundwater uses. Management actions could involve establishing rules, ordinances, policies and procedures governing projects.

Currently, there are no specific projects proposed in the Vina subbasin. Evaluating the acceptability of a PMA must be based on the specific project's scope, design and intent. However, management actions could be identified through an evaluation of potential characteristics of projects that have negative aspects or are inconsistent with the GSP. For the purposes of this discussion paper, potential projects involve those that result in increased groundwater in the basin. Recharge, conservation and recycling projects could result in increased groundwater in the basin that could be put to beneficial use by the project proponent. Refer to the glossary of potential PMAs.

The following are questions concerning potential legal implications of potential projects. If there are other questions, please let me know prior to the January meeting.

1. Does a project proponent gain water rights over recharged groundwater?
   Yes. A project proponent maintains the right to water that is recharged whether it results from recharge projects or groundwater demand reduction projects (e.g., conservation, recycling). If a project uses or obtains a surface water supply and recharges into the aquifer, the project proponent would have a legal right to the recharged water. Water does not legally become "common" or "native" supply available to overlying groundwater right holders unless it is abandoned by the project proponent. (Los Angeles v. Glendale (1943) 23 Cal.2d 68, 76-78; Los Angeles v. San Fernando (1975) 14 Cal.3d 199, 258-60; Stevens v. Oakdale Irrigation District (1939) 13 Cal.2d 343, 352-43; Crane v. Stevinson (1936) 5 Cal. 2d 387, 398.) Abandonment occurs when there is no evidence the recharger intended to account for recharged water and later extract that water and put it to beneficial use. The recharger is only allowed to extract the amount of water that recharged to the basin. Therefore, usually, when extracting recharged

water, there must be some accounting for "leave behind" or "loss" depending on the local practices and technical components of the subbasin/recharge.

A recharge project could result in recharged water becoming "common" or "native" supply. A project proponent could agree to certain terms of recharge, for example, a leave behind of a certain percent of the total recharge. Alternatively, the GSA may consider an ordinance or other enforcement mechanism that requires some portion of recharged water to be water dedicated to "common" or "native" supply. The recharging party or agency adopting any sort of ordinance would need to be cautious that the agreement/ordinance would not result in exposure to forfeiture for the recharging party (as recharge without later extraction and application to beneficial use is not itself a beneficial use of water).

2. What rights could a project proponent exercise over recharged water?

   If a project includes the application for a new right to recharge water, it would need to obtain a water right permit from the State Water Resources Control Board (SWRCB) through a surface water right application and a supplemental groundwater recharge form. The water right permit application would need to identify the "beneficial use" that the project intends to meet. Recharging groundwater is not considered a beneficial use, however, meeting the sustainable management criteria in a GSP may be determined to be a beneficial use. The amount of recharged water that could be put to future use would be determined from project specific analysis and would be included in the water right permit. Depending upon the water source and the intent of the project, it may be eligible for a streamlined water right permit process established by the SWRCB to facilitate Flood Managed Aquifer Recharge (Flood MAR) and other GSP programs.

   If a water right holder diverts surface water pursuant to an existing right, the diversion of that water makes it the possession of the diverter. Recharging the water into an aquifer changes the location or storage of diverted surface water, but it does not change the ownership. For this reason, recharged water remains the possession of the diverter/recharger and the diverter/recharger may exercise full control over that water unless it can be established that the diverter/recharger abandoned the recharged water or it is subject to reasonable losses.

3. Could a project affect groundwater users rights to pump groundwater or have it limited?

   Not directly. Overlying groundwater rights are held by landowners whose land overly the groundwater aquifer. (Pasadena v. Alhambra (1949) 33 Cal.2d 908, 925.) An overlying water right is not quantified, but allows the water right holder to divert as much water as is reasonable to support beneficial uses on the overlying land. (Katz v. Walkinshaw (1902) 141 Cal. 116; Pasadena, at 925.) These rights are appurtenant to land and cannot be sold or otherwise detached from the land.

   However, recharge projects could decrease the amount of water that has previously been abandoned. In this situation, there would be a decrease in native groundwater supplies available for groundwater right holders. Groundwater users would not lose their right to divert groundwater to support beneficial uses on the overlying land, but lower groundwater elevations may increase cost or make it impracticable. It is also possible that recharge projects may underestimate the amount of water that migrates or is "lost", which could result in allowing the recharger to extract more water than is reasonable, which could result in decreasing the amount of water available for overlying groundwater users.

4. For managed recharge projects, does it matter what the source of the water is or if it comes from another basin?

   No, the source of the water only matters to the extent that it affects ownership. The water source could come from high storm flows, surface water held by the project proponent or surface water supply held by another agency. So long as the water was diverted pursuant to a valid water right prior to recharge, the recharged water would be owned by the diverter.

   There has been discussion and interest of having local surface water supplies be used for recharge projects (e.g., in-lieu, recharge basins) in groundwater dependent areas. Surface water sources would come from outside the Vina subbasin. The legal right to surface water that is imported and recharged into an aquifer is held by the project proponent (importer). (Los Angeles v. San Fernando (1975) 14 Cal.3d 199, 245-55; Water Code 7075.)

   In-lieu recharge occurs when a groundwater right holder does not extract groundwater due to an alternate supply of water (usually surface water deliveries). The water "recharged" in this situation is water that the groundwater holder had a right to extract, but did not, due to the alternate supply. The amount of in lieu recharge would depend on the amount of water available to the groundwater right holder and the amount of groundwater that remained in the ground (not pumped). For example, if an overlying water right holder had the right to pump 100 acre feet and they only pumped 20 because they purchased 80 acre feet of surface water, they would have a right to the 80 acre feet of in lieu recharge. (Water Code 1005.1)

5. Could the owner of a surface water lose their ownership/water right by making their water available to a project proponent?

   Not if they are careful. As noted above, recharge is not a beneficial use of water. (Water Code, 1242.) Therefore, if a surface water right holder diverted surface water and recharged that water into the aquifer without any intent to later extract it and put it to beneficial use for a period of 5 consecutive years, the surface water right could be subject to forfeiture. More likely, the surface water right holder would sell or transfer the surface water through a contract to a project proponent. The transfer of water is a beneficial use. (Water Code, 1745.07.) Water sale/transfer arrangements are not unique and have not resulted in losing ownership or water rights. The owner of a surface water supply would only lose their ownership/water right through a permanent sale and filing of a change in water rights with the SWRCB.

6. How would projects affect groundwater users, the environment (streams, GDEs, all species), and water quality (surface and groundwater)?

   Recharge projects have the potential to affect groundwater users, groundwater quality and/or environmental beneficial uses. Recharge projects will be subject to environmental evaluation under the California Environmental Quality Act (CEQA). Prior to project approval, the project proponent would be required to identify and evaluate the impacts of the proposed project on the environment hydrology, housing, traffic, agriculture, etc. However, CEQA does not require that projects consider or comply with GSPs. The exception is that general plan updates and zoning ordinances must consider the applicable GSP.

7. Could a project be available for out-of-basin export?

   Potentially. Depending upon the project scope, it could intend to export recharge water out-of-basin.

8. Could a project in the Vina subbasin benefit users downslope subbasins?

   Potentially. The Vina and the other subbasins in the Northern Sacramento Valley are interconnected to certain degrees. Depending upon the scope and location of a project, the

benefits could extend beyond the Vina subbasin. As part of the project design, the benefit of the project would be analyzed and monitored.

Potential Management Actions

Management actions would allow the Vina GSA to protect the Vina subbasin and the implementation of the GSP from negative implications from artificial recharge projects through enactment of rules, ordinances and/or policies.

1. Require any recharge project, in lieu project or other project that affects the sustainable management criteria in the GSP be subject to review and approval by the Vina GSA Board for consistency with the GSP.

2. Evaluate ordinances or policies that the GSA may adopt to ensure recharge projects are operating without adverse impact to the basin or the GSA's ability to achieve sustainability.