earth LAW CENTER
FIGHTING FOR NATURE'S RIGHTS

P.O. Box 610044, Redwood City, CA 94061
tel (650) 877-2710
www.earthlawcenter.org

MEMORANDUM

To: Mark Gold, Chair, Santa Monica Task Force on the Environment
From: Linda Sheehan, Earth Law Center
Date: October 25, 2016
Re: Legal Support for Ordinance Banning Private Well Construction in Santa Monica

Thank you for the opportunity to attend the Santa Monica Task Force on the Environment meeting last night to discuss the draft well ordinance and Sustainability Rights Ordinance. This memorandum follows up from the discussion in that meeting regarding legal support for the banning of new private well construction in Santa Monica. I have provided information related to this question to the Office of Sustainability and the Environment in the past; this memo compiles and adds to that information to respond to the legal issues raised last night.

Water Use Rights Are Not Like Other Property Rights

There is a general misconception that water rights are private property subject to takings law regardless of the circumstances. This is not the case. First, the "rights" are in the use of water, not the water itself. Water itself is "the property of the people of the state,"[1] not private property.

Second, water use rights are subject to numerous limitations and conditions in law to protect the corpus upon which the use right is based – that is, to protect the waterways and their uses. Such limitations and conditions include the waste and unreasonable use doctrine, the public trust doctrine, state and federal endangered species protection laws, and other laws designed to protect waterways for the public and the environment.

These conditions and limitations include the extraction of groundwater (*i.e.*, they are not limited to surface water). Overlying landowners cannot simply withdraw water under their land with impunity. As one example, under the correlative use doctrine, a landowner cannot impact other users of a shared aquifer; all have co-equal rights to the groundwater, and all must share. Adjudication occurs when that sharing is not offered voluntarily and the aquifer is impacted as a result.

Further, the State Water Resources Control Board has broad constitutional authority to prevent the waste and unreasonable use of the State's water resources, including groundwater.[2] The state Supreme Court decided this issue well over 100 years ago in *Katz v. Walkinshaw*, 141 Cal. 116

[1] Water Code Sec. 102.
[2] http://www.waterboards.ca.gov/water_issues/programs/groundwater/index.shtml.

(1903). The state Constitution specifically prohibits the waste and unreasonable use of all water in Article X, Section 2, stating:[3]

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. *The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.* . . . This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.[4]

In other words, there is ***no property right*** in the wasteful and/or unreasonable use, method of use, and/or method of diversion of water.[5] The First Appellate District Court reiterated these points in *Light v. State Water Resources Control Board*, which found that the State Water Board "is charged with acting to prevent unreasonable and wasteful uses of water, regardless of the claim of right under which the water is diverted."[6]

The State Water Board's Chief Counsel Has Concluded that the Waste and Unreasonable Use Doctrine Allows Decisionmakers to Proactively Regulate Groundwater Extraction

The authority to apply the waste and unreasonable use doctrine does not belong solely to state agencies. Local entities and even citizens can take action to enforce this constitutional directive. The state Supreme Court affirmed this in *In re Water of Hallett Creek Stream System*, 44 Cal.3d 448, 472 (1988), concluding that:

> the [State Water] Board's and the state's interest in the conservation and efficient use of water does not depend upon the fortuitous filing of claims by private parties, but may be asserted, and adequately protected, by initiative of the state itself or of concerned citizens.

Santa Monica thus can regulate groundwater use consistent with the waste and unreasonable use doctrine. Indeed, the City can take proactive measures to protect the aquifer, well before it is so

---

[3] http://leginfo.legislature.ca.gov/faces/codes.xhtml. *See also* Water Code Section 100 (echoing virtually the same language) and Water Code Section 85023 ("The longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy").

[4] Emphasis added; *see also* Water Code Section 275.

[5] *See, e.g.*, *Light v. State Water Resources Control Board,* 226 Cal. App. 4th 1463, 173 Cal. Rptr. 3d 200 (Cal. App. 1st Dist. June 16, 2014, as modified July 11, 2014) (*Light v. SWRCB*) ("since enactment of Article X, Section2, there can no longer be any property right in the unreasonable use of water"). *See also* Craig M. Wilson, Delta Watermaster, "The Reasonable Use Doctrine & Agricultural Water Use Efficiency: A Report to the State Water Resources Control Board and the Delta Stewardship Council," p. 3 (Jan. 2011) (Wilson Report); at: http://deltacouncil.ca.gov/sites/default/files/documents/files/Item_9.pdf ("All water use must be reasonable and beneficial regardless of the type of underlying water right. No one has an enforceable property interest in the unreasonable use of water.").

[6] *See supra* n. 5; at http://bit.ly/1KQ14Mq and http://bit.ly/1L5sNcM. On October 1, 2014, the California Supreme Court denied review of *Light v. State Water Resources Control Board*, leaving the Appellate Court decision intact.

devastated that emergency action is needed, as is the case in some Central Valley communities and elsewhere.

For support, we turn to a memorandum[7] by Craig M. Wilson, long-time Chief Counsel of the State Water Board and later the state's Delta Watermaster, which we urge you to read. The memorandum first reviews the applicable statutory and case law on waste and unreasonable use. It next outlines situations in which the State Water Board and the courts have used the doctrine to find unreasonable water uses in a variety of settings. Significantly, Mr. Wilson then adds that ***"the Reasonable Use Doctrine may be used more broadly to promote the efficient use of water."***[8] As explained,

> the inefficient use of water is an unreasonable use of water. Accordingly, ***the Reasonable Use Doctrine is available prospectively to prevent general practices of inefficient water use.*** Indeed, the Reasonable Use Doctrine, as set forth in the State Constitution and California Statutes is broad and inviolate in scope. As interpreted by case law and administrative decisions and used to its full potential, it can comprehensively address the inefficient use of water in California.[9]

(Emphasis added.)

Mr. Wilson's legal opinion was later supported by the appellate court in *Light v. SWRCB* court, which upheld a regulation that had found *in advance* that certain uses of water were "unreasonable," *even though* the uses were otherwise beneficial for growing purposes. The *Light* court specifically held that "[e]fficient regulation of the state's water resources in these circumstances demands that the Board have the authority to enact tailored regulations" – rather than act post-incident, by which time the damage would have been done.

Mr. Wilson's legal memorandum concludes by recommending specifically that the state employ the waste and unreasonable use doctrine proactively, to promote more efficient water use or methods of use, rather than simply react to dire situations of over-diversion.[10] This conclusion makes strong policy sense, as aquifer drawdowns are notoriously difficult to correct, especially if communities have become used to misusing the aquifer in this way.

Santa Monica Has the Authority to Prohibit Construction of New Private Wells under the Waste and Unreasonable Use Doctrine, the Sustainability Rights Ordinance, and Its Police Powers

Waste and Unreasonable Use Doctrine

In light of the legal support outlined above, the City of Santa Monica may consider a new private well ban if needed to prevent the wasteful or unreasonable use, method of use, or method of diversion of water. The first step would be to assess whether those conditions are met in light of the City's circumstances. The application of the doctrine has been made on a case-by-case basis, and context is key. As the *Light v. SWRCB* court found:

[7] Wilson Report, *supra* n. 5.
[8] *Id*., p. 9 (emphasis added).
[9] *Id*., p. 3 (emphasis added).
[10] *Id*., pp. 15-16.

> California courts have never defined, nor as far as we have been able to determine, even attempted to define, what constitutes an unreasonable use of water, perhaps because *the reasonableness of any particular use depends largely on the circumstances. . . .*

(Emphasis added.)

In other words, there are no specific definitions of "waste" or "unreasonable" that the City need refer to. Instead, the courts have said that the *context* of the water use can provide such guidance on a case-by-case basis. This context can change due to increasing pressures, changing climate, and other factors that alter original use scenarios. Again, the *Light* court is instructive here, holding that: "the extent of a particular user's vested right to use water similarly may change" over time.[11]

Accordingly, what were formerly "reasonable" uses (such as certain levels of residential irrigation) under prior water circumstances in Santa Monica may become "wasteful" or "unreasonable" based on a new context – such as ongoing drought, overall heightened insecurity over the reliability of water supplies, and a City ordinance protecting the inherent rights of its aquifer to health.

If Santa Monica wishes to apply the waste and unreasonable use doctrine to support a ban on the installation of new private wells, it should first develop a clear foundation of context in support. In fact, there are numerous factors that do support such a foundational context. These include, but are not limited to, the following:

- The City's commitment to reaching and maintaining a 2020 goal of water self-sufficiency, which depends largely on a healthy aquifer (which the City currently does *not* have, based on state assessment under SGMA).
- The City's experiences with the precariousness of its groundwater quality in the context of MTBE contamination.
- The lack of real-time information on the state of the aquifer.
- The semi-arid nature of the City's climate, and the fact that residential water use for landscaping in the City still fails overall to consider the limits the City's climate imposes.
- The need for precautionary action[12] in light of the uncertainties of climate change (a fact referenced in multiple state reports[13]). This includes lower precipitation, higher temperatures and the potential for seawater intrusion from over-pumping.
- The ongoing, current drought and the City's heightened responsibility to meet the water needs of residents, rather than water desires (such desire as for extensive, water-dependent landscaping).
- The City's preparation of a drought response Plan that identifies specific levels and methods of water use and prohibitions on certain uses, in response to drought pressures.
- The City's new groundwater planning responsibilities under SGMA.[14] Because the groundwater basins on which Santa Monica relies are deemed "medium-priority" basins, stakeholders must

---

[11] *See also Environmental Defense Fund, Inc. v. East Bay Municipal Utility District*, 26 Cal.3d 183, 194 (1980) ("[w]hat constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes").

[12] *See, e.g.*, UCLA Luskin School of Public Affairs, "Los Angeles County Community Water Systems: Atlas and Policy Guide, Vol. 1," (March 2015); at: http://164.67.121.27/files/Downloads/luskincenter/water/Water_Atlas.pdf.

[13] Citations available upon request.

[14] On September 16, 2014, Governor Jerry Brown signed into law a three-bill legislative package composed of AB 1739 (Dickinson), SB 1168 (Pavley), and SB 1319 (Pavley), collectively known as the "Sustainable Groundwater

establish a management entity by 2017 and adopt a plan for sustainability by 2020. Establishing restrictions to prevent overdraft now are prudent to achieving SGMA goals.
- The potential for other aquifer users (particularly the City of Los Angeles) to tap into the groundwater aquifer at significantly higher levels than presently, and the message that a Santa Monica ordinance facilitating private well construction could send to such new users.
- The difficulty (as in *Light*) of correcting injuries to the City's water supply (*i.e.*, the groundwater aquifer(s)) once such injuries have been made through over-diversion, as compared with the City's ability to prevent such situations through targeted regulation.
- As discussed further below, the City's 2013 adoption of its Sustainability Rights Ordinance,[15] which set in law City policy to ensure that its aquifer "flourishes." *By definition*, this requirement cannot be met while the City's basin remains Medium Priority under SGMA.

The City could use any and all of these factors, among others, to support a ban on new private well construction under the waste and unreasonable use doctrine.

Finally, at the Task Force meeting last evening, the concern was raised that the City of Santa Monica could not support a ban on new private wells because the City reported to the state of California that it had sufficient water. First, this statement must be taken in the context of the numerous other factors above, which point to a degraded aquifer[16] rather than a healthy one, despite the City's protestations. Second, virtually all California municipalities similarly reported to the state that their water supplies were adequate, as the alternative was to continue under mandatory water conservation measures that had become controversial and unpopular. Finally, this report to the state is only a three-year "stress test" assessment of whether water exists.[17] It is not a short- or long-term assessment of the health or status of the aquifer. As such, it does not overcome the numerous contextual factors outlined above that support a new private well ban by the City, pursuant to the waste and unreasonable use doctrine.

Sustainability Rights Ordinance (SRO)

> Section 4.75.040 of the Municipal Code states:
>
> (a) All residents of Santa Monica possess fundamental and inalienable rights to: clean water *from sustainable sources*; … [and]
> (b) *Natural communities and ecosystems possess fundamental and inalienable rights to exist and flourish* in the City of Santa Monica… natural communities and ecosystems [are] *defined as: groundwater aquifers*, atmospheric systems, marine waters, and native species within the boundaries of the City.

(Emphasis added.)

Management Act" (SGMA). The Governor's signing message states that "a central feature of these bills is the recognition that groundwater management in California is best accomplished locally." For more information, visit the Sustainable Groundwater Management website, at: http://www.water.ca.gov/groundwater/sgm/index.cfm.

[15] Santa Monica Municipal Code, Art. 4, Ch. 4.75.

[16] The state's assessment of the aquifer as "Medium Priority" under SGMA means that the aquifer suffers from "critical conditions of overdraft." *See, e.g.*, Water Code Section 12924; for more information, *see* http://www.water.ca.gov/groundwater/sgm/cod.cfm.

[17] *See* "State Water Resources Control Board Posts 36-Month Urban Water Supply Stress Test Submissions," at: http://www.waterboards.ca.gov/water_issues/programs/conservation_portal/docs/emergency_reg/fs81616_stress_test.pdf.

The SRO defines residents' rights to water from *sustainable* sources, not unsustainable uses. It also states that the aquifer itself holds its own "fundamental and inalienable rights to exist and ***flourish***." (Emphasis added.) This language emphasizes the City's responsibility to ensure the aquifer remains at *healthy* levels throughout the drought – not that it just simply continues to have *some* water in it. Through the SRO, the City emphasizes the local importance of exercising its civic water responsibilities more carefully than has been done by the state, which has let rivers and aquifers run dry and become almost irretrievably contaminated.

The SRO further adds an enforcement provision, which states that: "residents of the City may bring actions to protect these natural communities and ecosystems," including the aquifer(s). This enforcement provision provides an important, additional layer of protection and direction to ensure that use of the aquifer – which belongs to *all* City residents as per Water Code Section 102 – is consistent with local and state law.

City policy that effectively ensures the orderly and wise use of water in City borders consistent with the SRO will help prevent after-the-fact reactions that might occur too late for the aquifer. The City's adopted goal of water self-sufficiency by 2020[18] is expected to be achieved through heavy reliance on groundwater,[19] making the health of the aquifer of critical importance to the City.

Finally, the aquifer's inherent "right to flourish" in the SRO is a far more protective standard than provided in SGMA, which generally allows aquifer degradation up to "significant and unreasonable" results.[20] The poor standard for aquifer protection offered by SGMA, combined with SGMA's decades-long implementation timeframe, fails to provide the City with the support it needs to meet its local self-sufficiency goals and protect its residents' water supply for decades to come. Adherence to the SRO, by contrast, will ensure that these goals would be met. A private well ban thus can be supported in law by the City's SRO, as well as the City's constitutional police powers to regulate groundwater use for the purpose of protecting public health, welfare and safety.[21]

---

[18] *See, e.g.*, City of Santa Monica, Water Resources Division, "Draft 2015 Urban Water Management Plan," prepared by SA Associates, pp. 1-2 (April 2016) (UWMP), at: https://www.smgov.net/uploadedFiles/Departments/Public_Works/Water/SWMP.pdf. The Draft UWMP makes no specific mention of the aquifer's right to flourish under the SRO; this gap should be addressed in the Final UWMP.

[19] Staff recommended to the City Council in May 2013 a water supply option based on 74% reliance on groundwater, a recommendation the City Council approved. City of Santa Monica, Water Resources Division, "Sustainable Water Master Plan," prepared by Kennedy-Jenks Consultants, pp. 5-13 – 5-15 (Dec. 2014), at: https://www.smgov.net/uploadedFiles/Departments/Public_Works/Water/SWMP.pdf. Note that like the UWMP, the Sustainable Water Master Plan should be updated to specifically address the aquifer's right to flourish under the SRO.

[20] SGMA defines "sustainable groundwater management" as "management and use of groundwater in a manner that can be maintained … without causing undesirable results." "Undesirable results" is defined as including "one or more of the following effects …:
(1) Chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply if continued…
(2) Significant and unreasonable reduction of groundwater storage.
(3) Significant and unreasonable seawater intrusion.
(4) Significant and unreasonable degraded water quality…
(5) Significant and unreasonable land subsidence that substantially interferes with surface land uses.
(6) Depletions of interconnected surface water that have significant and unreasonable adverse impacts on beneficial uses of the surface water."

[21] In 1995 the California Supreme Court declined to review an appeal of a lower court decision challenging local groundwater management, upholding local authority arising from existing police powers. Water Education Foundation, "The 2014 Sustainable Groundwater Management Act: Approach and Options for New Governance," p. 2, at: http://groundwater.ca.gov/docs/WEFSGMA-Approaches_and_Options_for_New_Governance_00282995xA1C15.pdf.

***

In sum, the City may apply the Constitutional, statutory, and judicial directives to prohibit the installation of new private wells within the City. In doing so, the City should be sure to clearly provide the context for this regulation, tailored to the goals, needs, and policies of the City.

Thank you for the opportunity to work with the City of Santa Monica to develop a draft groundwater extraction ordinance consistent with the SRO, which can help guide the City's larger groundwater protection strategies.