

Sustainable Groundwater Management Act Groundwater Sustainability Agency Model Collaborative Decision Making Approach

A Joint Document of:
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and the
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BACKGROUND

The Sustainable Groundwater Management Act (SGMA) requires the creation of Groundwater Sustainability Agencies (GSA) and the development of a Groundwater Sustainability Plan (GSP) or plans. GSAs assume a broad set of decision responsibilities to develop a GSP; the outcomes of which impact the financial and water resources of stakeholders within a groundwater basin or subbasin. These decisions may create challenges as GSA Members (Members) and affected stakeholders assess benefits and impacts thereof. Under such challenged conditions, Members and/or affected stakeholders may employ various options to address a decision that affects them. Such options can be as simple as making a public statement in a GSA meeting, or as complex and time and resource consuming as conducting legal action to challenge or defend a GSP or GSA's actions.

To avoid the expense and delay associated with contested legal actions, a GSA should strive to develop broad stakeholder consensus concerning the GSP. Collaborative, consensus-seeking decision-making procedures should be pursued and the GSA should consider integrating such procedures into their formational agreements. This document represents the combined work of Brownstein Hyatt Farber Schreck, LLP and the California State University Sacramento, Center for Collaborative Policy. It presents a proposed approach to integrate collaborative, consensus-based decision-making methods into joint powers agreements (or similar).

DEFINITIONS

The following are definitions for key terms used in this model document.

Board. Board refers to an anticipated Board of Directors of a joint powers authority (or simioar) that will serve as the GSA. The Board deliberates and make decisions on behalf of the joint powers authority.

Consensus. Consensus means that each member of the GSA Board does not reject a proposal. In reaching consensus, some Board members may "support" a particular decision while others may only be able to "live with it." Still others may choose to "stand aside" by verbally noting disagreement, yet allowing the group to reach consensus without them. Any of these actions still constitutes consensus. A lack of consensus is when one or more Board members cannot support, live with, or stand aside on a topic.

Consensus with accountability: The Board will seek mutually acceptable and beneficial decisions whenever possible. In an attempt to achieve consensus, any Board member that disagrees with a decision must provide an alternative that attempts to meet his/her agency's/constituency's interests while also meeting the interests of other Board members. The consensus decision method is based on principles of "consensus with accountability". This approach must be committed to by all Board members so that everyone holds themselves and each other accountable to methods to achieve consensus.

Consensus Seeking: As stated above, the Board will seek to achieve consensus. This reflects an aspiration. However, the work of the Board must be timely and efficient and attempts to reach consensus cannot continue indefinitely. Therefore, “consensus seeking” represents an approach through which the Board will make a robust, reasonable attempt to reach consensus (the duration of which must be decided by the Board). After such attempts are made, if the Board cannot reach consensus, the approach and outcomes are memorialized, and the Board defaults to a secondary, vote-based decision-making method.

Agreements in Principle / Agreements in Detail. In a collaborative decision process, it is beneficial for Board members to have the space and time to propose initial ideas to be introduced, discussed, and potentially modified amongst their Board colleagues, rather than to move straight to a binding vote. This is often achieved using “straw polls” or similar wherein a Member proposes an idea in principle, the Board discusses and modifies it, the group seeks to reach an informal “agreement in principle” first, before eventually voting on the items and achieve, potentially, an agreement in detail. This method allows Members time to informally discuss ideas, test feasibility with other colleagues / leadership or their respective organizations, and eventually reconcile if an idea can achieve consensus.

DECISION-MAKING SEQUENCE

The following describes a general sequence of steps the Board would take to integrate a collaborative, consensus-seeking decision making process into their legal activities. Following this section is proposed text that could be used in joint powers agreements or the authority’s bylaws to codify these collaborative steps and principles into the Board’s work.

Sequence of Steps

1. **Define Guiding Principles** – The Board should define a set of “guiding principles”. These principles will guide the Board’s actions in several ways. The guiding principles:
 - a. Define the intentions, beliefs, interests, and methods that the Board collectively holds itself to.
 - b. Are used routinely to create public speaking points for outreach and media.
 - c. Are memorialized as the authority’s bylaws to guide GSA Board behavior and general SGMA implementation.
 - d. Are kept present during all deliberations to help focus and frame the Board’s work and ensure that all Members hold themselves and others accountable to the collective principles.

2. **Employ Consensus Seeking Decision Approach:**
 - a. Preliminary Discussions. As described in the definitions section, the Board would use a consensus-seeking decision approach wherein the Board is mutually informed on materials that might influence their decisions, they deliberate the topic(s), and create straw proposals to test the feasibility of a decision to achieve consensus. In this step, the use of straw polls, agreements in principle, and consensus with accountability are essential.

 - b. First Vote (First Reading). At a point wherein a Member(s) feels that a matter has been sufficiently discussed, the matter is voted on as a formal action. The result of this step is either a consensus decision, or failure to reach consensus. If the Board achieves consensus on a first vote, then the decision is final. If the Board does not achieve consensus on the first vote, the matter receives a second reading at a future Board meeting where final action may be taken.

- c. Consensus Review. In the time period between a first and a second reading, Board members will review the outcomes of the first reading and the discussion under the first two steps above and will stay committed (ideally as described in the Guiding Principles) to prepare alternatives to the topic that will meet the interests of all Members. Communications between Board members must adhere to the provisions of the Brown Act that prohibit private communications or serial communications involving a majority of the Board. The Board may hold noticed public workshops or meetings between the first and second reading as necessary to foster further consensus-based discussion of the matter. Consideration of viewpoints and alternatives will be particularly important for any Members that could not support the topic during the first reading. In this review period, the consensus with accountability approach will be essential. The duration of the Consensus Review period is at the discretion of the Board and should likely be determined by a simple majority vote.
- d. Second Vote (Second Reading). After the prescribed period of time has passed to have a second reading, the Board will place the decision on their agenda and will conduct the second reading during a public meeting. At that time, Board members will discuss the topic with a particular emphasis placed on proposed alternatives that ideally achieve the interests of all Members. After a sufficient discussion period, the Board will hold the second vote, which shall be final.
- e. Final Vote. Several voting methods can be considered and adopted. This method may be a simple majority or super majority, or a more complex numeric method such as weighted voting. In any voting scenario, the purpose of this step will be for the Board to make a decision after steps to reach consensus have not been successful.
- f. Dispute Resolution. In the event that an outcome of the final vote is considered untenable by one or more Members, those Members will be afforded an opportunity (pursuant to the joint powers agreement) to initiate a dispute resolution process (see proposed text below to address this process).

DECISION-MAKING TEXT FOR LEGAL AGREEMENT

The following is proposed text that can codify the above decision-making sequence into the GSA's Model Legal Agreement

JPA Provision to Address a Consensus-Seeking Decision Approach

Affirmative Decisions of the Board of Directors. Except as otherwise specified in this Agreement, all affirmative decisions of the Board of Directors shall require the affirmative vote of the simple majority of all appointed Directors (whether present or not), unless weighted voting is requested, in which case all affirmative decisions by the Board shall require the affirmative vote of the simple majority of the weighted votes held by all Directors (whether present or not), provided that if a Director is disqualified from voting on a matter before the Board because of a conflict of interest, that Director shall be excluded from the calculation of the total number of Directors, or total number of weighted votes, as applicable, that constitute a simple majority. Notwithstanding the foregoing, a unanimous vote of all Member Directors participating in voting shall be required to approve any of the following: (i) any capital expenditure that is estimated to cost \$100,000 or more; (ii) the annual budget; (iii) the GSP for the Basin or any amendment thereto; or (iv) any stipulation to resolve litigation concerning

groundwater rights within or groundwater management for the Basin. For all matters other than those specified in the immediately preceding sentence, in the event a unanimous vote of all Member Directors participating in voting is not obtained, the agenda item receiving a less than unanimous vote shall be deemed a first reading of the agenda matter and a final and conclusive vote regarding the matter shall be postponed until a future meeting of the Board of Directors, as a second reading of the matter.

JPA Provision to Address Dispute Resolution.

Dispute Resolution. In the event that any dispute arises among the Members relating to (i) this Agreement, (ii) the rights and obligations arising from this Agreement, (iii) a Member proposing to withdraw from membership in the Agency, or (iv) a Member proposing to initiate litigation in relation to legal rights to groundwater within the Basin or the management of the Basin, any aggrieved Member or Member proposing to withdraw from membership shall provide written notice to the other Members of the controversy or proposal to withdraw from membership. Within thirty (30) days thereafter, the Members shall attempt in good faith to resolve the controversy through informal means. If the Members cannot agree upon a resolution of the controversy within thirty (30) days from the providing of written notice specified above, the dispute shall be submitted to mediation prior to commencement of any legal action or prior to withdraw of a Member proposing to withdraw from membership. The mediation shall be no less than a full day (unless agreed otherwise among the Members) and the cost of mediation shall be paid in equal proportion among the Members. The mediator shall be either voluntarily agreed to or appointed by the Superior Court upon a suit and motion for appointment of a neutral mediator. Upon completion of mediation, if the controversy has not been resolved, any Member may exercise all rights to bring a legal action relating to the controversy or withdraw from membership as otherwise authorized pursuant to this Agreement. The Agency may also participate in mediation upon request by an aggrieved stakeholder concerning a dispute alleged by the stakeholder concerning the management of the Basin or rights to extract groundwater from the Basin, with the terms of such mediation to be determined in the sole discretion of the Member Directors.

For more information, please contact:

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