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May 15th, 2020

Re: Recommendations for DWR and SWRCB Action Regarding the Central Kings Groundwater Sustainability Plan

Dear Department of Water Resources and State Water Resources Control Board,

Leadership Counsel for Justice and Accountability works with low-income communities of color in the San Joaquin Valley and the Eastern Coachella Valley. We have been engaged in the Sustainable Groundwater Management Act (SGMA) implementation process because most of the communities we work with are wholly dependent on groundwater for their drinking water supplies, and many have already experienced groundwater supply and quality issues. The communities where we work have not been adequately included in decision-making about their precious water resources, and their needs are not prioritized in such decisions.

Disadvantaged communities in the Central Kings GSP area have the most to gain and the most to lose from SGMA implementation in the region. Communities like Tombstone Territory are

majority Latino and depend on small community water systems and/or domestic wells for their drinking water supply. Because residents in disadvantaged communities do not typically have the financial means to dig deeper wells or to install, operate and maintain drinking water treatment infrastructure, they are more likely to be severely impacted by lowering groundwater levels and groundwater contamination.

As a particularly vulnerable group, the critical drinking water needs of disadvantaged communities and low-income households must be considered and protected by the Groundwater Sustainability Plan (GSP). The Central Kings Groundwater Sustainability Agency (GSA) has not adequately done so in this GSP. As described below, the GSP is likely to cause more than 500 wells to go dry in the subbasin and puts domestic wells at risk of contamination from many unmonitored drinking water contaminants, with no clear plan to prevent and mitigate drinking water impacts.

The Department of Water Resources (DWR) and the State Water Resources Control Board (SWRCB) must evaluate GSPs according to the Human Right to Water, and ensure that the GSPs comply with SGMA, the GSP regulations, and state and federal civil rights law, among other laws and regulations. In 2012, California recognized the Human Right to Water, codifying “the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.”¹ Under the Human Right to Water law, DWR and the State Water Resources Control Board must consider the Human Right to Water on review of GSPs.² In order to comply with this obligation, the Department and Board must ensure that GSPs do not cause or allow further drinking water crises that interfere with residents’ access to an adequate supply of safe drinking water. In coordination with the Community Water Center and Self-Help Enterprises, we have developed a Human Right to Water Scorecard that contains elements necessary for state review of GSPs to comply with the Human Right to Water.³ We urge DWR and the SWRCB to use this scorecard in evaluating this GSP.

Additionally, SGMA requires GSAs to include disadvantaged communities in decision-making, and create GSPs in a transparent and inclusive way. DWR and the SWRCB must ensure that GSPs do not cause “significant and unreasonable impacts” to the beneficial uses and users of groundwater in the subbasin, that they encourage the participation of a diverse variety of stakeholders,⁴ and that they “consider the interests of” an enumerated list of all types of beneficial users, including disadvantaged communities on domestic wells and community water

¹ Water Code § 106.3(a)

² Water Code § 106.3(b)

³ Attached as Exhibit B.

⁴ Water Code § 10727.8(a) [“The groundwater sustainability agency shall encourage the active involvement of diverse social, cultural, and economic elements of the population within the groundwater basin prior to and during the development and implementation of the groundwater sustainability plan.”].

systems.⁵ Furthermore, state law provides that no person shall, on the basis of race, national origin, ethnic group identification, and other protected classes, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state.⁶ The state’s Fair Employment and Housing Act guarantees all Californians the right to hold and enjoy housing without discrimination based on race, color, or national origin.⁷ DWR and the SWRCB must evaluate GSPs in accordance with all of these and other relevant legal obligations.

Unfortunately, the Central Kings GSA did not take advantage of the opportunity to protect the drinking water resources relied upon by disadvantaged communities or low-income households, or avoid disparate impacts, and the GSP is incomplete and does not comply with SGMA and other applicable state laws. As noted above, we reviewed the Central Kings GSP according to our Human Right to Water Scorecard. Our review shows that the GSP does not contain all of the information required under SGMA, does not adequately evaluate “significant” and “unreasonable” impacts to beneficial uses including the drinking water needs of disadvantaged communities, failed to create sustainable management criteria for groundwater quality, is likely to create a disparate impact on protected classes unless significantly modified, and does not comply with the Human Right to Water statute.

For the reasons discussed in these comments, and in prior written and oral comments provided to the GSA, DWR must not approve the GSP.⁸

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⁵ Water Code § 10723.2.

⁶ Gov. Code § 11135 [“No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.”]; Gov. Code § 65008 [Any discriminatory action taken “pursuant to this title by any city, county, city and county, or other local governmental agency in this state is null and void if it denies to any individual or group of individuals the enjoyment of residence, land ownership, tenancy, or any other land use in this state...”]; Government Code §§ 12955, subd. (l) [unlawful to discriminate through public or private land use practices, decisions or authorizations].

⁷ Gov. Code § 12900 et seq.

⁸ Attached as exhibits are certain documents, studies and analysis supporting these comments, which we request be incorporated into the record.

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**A. The GSP Does Not Comply with SGMA Because It Lacks Required Information**

The GSP must contain all of the elements set forth in the GSP regulations. However, this GSP omits critical data and information to comply with the GSP regulations. As discussed below, the GSP lacks required information and analyses, including among other things an analysis of the significance and reasonableness of sustainable management criteria, elements of the description of the water budget, a clear plan implementation timeline, project details. Therefore, the GSP fails to “include[] the information required by [SGMA] and [its accompanying regulations],” and is thus inadequate.<sup>9</sup> These inadequacies prevent DWR from being able to determine that the GSP will likely achieve its sustainability goal.<sup>10</sup> Given these deficiencies, we ask DWR not to approve the plan.

**B. DWR Cannot Approve The GSP Because It Will Cause Disproportionate And Disparate Negative Impacts On Protected Classes.**

The Central Kings GSA must ensure that the GSP does not cause a disparate impact on protected groups, and must prioritize drinking water as an essential pillar of their groundwater sustainability plan. The GSP does not comply with this responsibility.

State law provides that no person shall, on the basis of race, national origin, ethnic group identification, and other protected classes, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by any state agency.<sup>11</sup> In addition, the state’s Fair Employment and Housing Act guarantees all Californians the right to hold and enjoy housing

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<sup>9</sup> 23 CCR § 355.4(a)(2).

<sup>10</sup> Water Code § 10733(a); 23 CCR § 355.4(b).

<sup>11</sup> Gov. Code § 11135 [“No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.”]; Gov. Code § 65008 [Any discriminatory action taken “pursuant to this title by any city, county, city and county, or other local governmental agency in this state is null and void if it denies to any individual or group of individuals the enjoyment of residence, land ownership, tenancy, or any other land use in this state...”]; Government Code §§ 12955, subd. (l) [unlawful to discriminate through public or private land use practices, decisions or authorizations].

without discrimination based on race, color, or national origin.<sup>12</sup>

The GSP will have disparate impacts on protected classes, including negative and discriminatory impacts on the basis of race, color, ancestry, national origin, and ethnic group identification. “Low-income communities and communities of color in the Central Valley rely disproportionately on private wells because adequate public services were not developed in those communities.”<sup>13</sup> As a result, “low-income households, people of color, and communities already burdened with environmental pollution suffered the most severe impacts [from drought]” and dry wells.<sup>14</sup> Similarly, communities of color in the Central Valley are disproportionately impacted by groundwater contamination.<sup>15</sup>

Consistent with these studies, this GSP will cause disproportionate negative impacts on communities of color reliant on small water systems and domestic wells. Central Kings GSP spans a portion of Fresno County including the City of Fresno and surrounding communities. Fresno County contains at least 93 disadvantaged unincorporated communities (DUCs), many of which are within the boundaries of the GSA.<sup>16</sup> Approximately 50% of Fresno County’s total population are people of color, compared to 67% of people living in Fresno County DUCs.<sup>17</sup> As an example, based on our experience, Tombstone Territory is majority Hispanic or Latino significantly above the percentage of Fresno County as a whole.

As discussed below, the GSP’s determinations and policy decisions will result in many more dry wells, and will not prevent increased drinking water contamination from groundwater activities, particularly for disadvantaged communities reliant on small water systems and domestic wells. This will cause severe harm to residents’ health and daily lives, as well as permanent impacts on residents’ finances and living situations. Additionally, the GSP contains no measures to mitigate these impacts. Therefore, because the GSP is likely to have significant negative impacts on households reliant on small water systems and domestic wells, and because the people reliant on small water systems and domestic wells are disproportionately people of color, the GSP is likely

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<sup>12</sup> Gov. Code § 12900 et seq.

<sup>13</sup> Feinstein et al., “Drought and Equity in California,” p. 21 (January 2019), available at [https://pacinst.org/wp-content/uploads/2017/01/PI\\_DroughtAndEquityInCA\\_Jan\\_2017.pdf](https://pacinst.org/wp-content/uploads/2017/01/PI_DroughtAndEquityInCA_Jan_2017.pdf).

<sup>14</sup> *Id.* at p. 6.

<sup>15</sup> See Balazs et al., “Social Disparities in Nitrate Contaminated Drinking Water in California’s San Joaquin Valley,” *Environmental Health Perspectives*, 19:9 (September 2011), available at <https://ehp.niehs.nih.gov/doi/full/10.1289/ehp.1002878>; Balazs et al., “Environmental Justice Implications of Arsenic Contamination in California’s San Joaquin Valley,” *Environmental Health Perspectives*, 11:84 (November 2012), available at <https://ehjournal.biomedcentral.com/articles/10.1186/1476-069X-11-84>.

<sup>16</sup> Flegel et al., “California Unincorporated: Mapping Disadvantaged Communities in the San Joaquin Valley,” p. 32 (2013), available at <https://www.policylink.org/resources-tools/california-unincorporated-mapping-disadvantaged-communities-in-the-san-joaquin-valley>; see also Fresno County Analysis of Disadvantaged Unincorporated Communities SB 244, Public Review Draft, available at <https://www.co.fresno.ca.us/home/showdocument?id=40317> [cited as evidence of disparate impact, not as an endorsement of the adequacy of the draft].

<sup>17</sup> *Id.* at pp. 25, 30.

to cause disparate impacts on protected classes.

### **C. The GSP Does Not Adequately Evaluate Whether Adverse Impacts Are “Significant And Unreasonable” Or Consider Beneficial Uses And Users.**

Under SGMA, DWR must find that a GSP is likely to achieve its sustainability goal before DWR may approve the plan.<sup>18</sup> “‘Sustainability goal’ means the existence and implementation of one or more groundwater sustainability plans that achieve sustainable groundwater management by identifying and causing the implementation of measures targeted to ensure that the applicable basin is operated within its sustainable yield.”<sup>19</sup> “‘Sustainable groundwater management’ means the management and use of groundwater in a manner that can be maintained during the planning and implementation horizon without causing undesirable results.”<sup>20</sup> An “undesirable result” occurs when a GSP allows a “significant and unreasonable” adverse impact to one of six sustainability indicators, including groundwater levels, groundwater storage, groundwater quality, and land subsidence.<sup>21</sup>

If a GSP is unlikely to achieve its self-selected sustainability goal, DWR cannot approve the plan.<sup>22</sup> DWR must also independently determine whether or not the GSP is likely to avoid “significant and unreasonable” adverse impacts with regard to each sustainability indicator, and if not then DWR cannot approve the plan. If a GSP will allow an undesirable result even if implemented effectively, then the GSP cannot achieve sustainable groundwater management.<sup>23</sup> Likewise, a plan that cannot achieve sustainable groundwater management has failed to set a valid sustainability goal, in violation of SGMA.<sup>24</sup> If a GSP does not contain a valid sustainability goal, DWR cannot determine that the GSP is “likely to achieve the sustainability goal for the basin,” and DWR cannot approve it.<sup>25</sup>

In addition to defining undesirable results, GSPs must quantify benchmarks for groundwater conditions, or “minimum thresholds,” that may cause undesirable results if exceeded.<sup>26</sup> GSPs must include “an explanation of how the Agency has determined that basin conditions at each minimum threshold will avoid undesirable results for each of the sustainability indicators.”<sup>27</sup> A GSP’s determination of when an undesirable result will occur must be based on analysis of when

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<sup>18</sup> Water Code § 10733(a).

<sup>19</sup> Water Code § 10721(u).

<sup>20</sup> Water Code § 10721(v).

<sup>21</sup> Water Code § 10721(x).

<sup>22</sup> Water Code § 10733(a).

<sup>23</sup> Water Code § 10721(v).

<sup>24</sup> Water Code § 10721(u).

<sup>25</sup> Water Code § 10733(a); *see also* 23 CCR 354.24 (“Each Agency shall establish in its Plan a sustainability goal for the basin that culminates in the absence of undesirable results within 20 years of the applicable statutory deadline.”).

<sup>26</sup> 23 CCR 354.28(a).

<sup>27</sup> 23 CCR 354.28(b)(2).

adverse impacts become “significant” and “unreasonable.”<sup>28</sup>

In all of its actions, a GSA must “consider the interests of” all categories of beneficial users, including express requirements to consider disadvantaged communities on domestic wells and community water systems.<sup>29</sup> Failure to consider the interests of a category or categories of beneficial users is itself grounds for DWR to decline to approve a plan.<sup>30</sup> DWR regulations also establish that a failure to consider all beneficial uses and users of groundwater undermines the likelihood that a basin will reach its sustainability goal.<sup>31</sup>

As explained below, the GSA has not based its policy determinations on an analysis of what impacts are “significant” and “unreasonable,” and has not considered the interests of disadvantaged communities or low-income households reliant on small water systems or domestic wells.

Furthermore, the GSP seeks to evade responsibility for vulnerable drinking water users in the GSP area. The GSP states that, as of 2015, “[t]he historic change in groundwater levels had not resulted in declining levels that caused wells to go dry.”<sup>32</sup> The GSP states that there are shallow wells in the GSA area that are “recognized as being past their useful life,” and “[a]s the gradual groundwater conditions have dropped, newer wells that have replaced these older wells have been drilled differently generally, deeper and gravel packed. Thus, the useful life of most wells has been maintained and the gradual decline has not resulted in an undesirable result.”<sup>33</sup> The GSP then goes on to state that the drought did not cause any undesirable results, and the decline in groundwater levels “has been gradual and has allowed those reliant on this source of water supply an ability to respond, and has not led to an undesirable result,” and that rural residential users have not experienced undesirable results.<sup>34</sup> The GSP then states that it “does not view a well going dry as an undesirable result” because water levels will continue to decline until overdraft is corrected, well depths are unknown, and some wells “may have been poorly constructed or constructed too shallow for long term operation.”<sup>35</sup>

This information is incorrect, and communicates a lack of understanding of groundwater

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<sup>28</sup> Water Code § 10721(x); 23 CCR 354.28(b); *see also* Cal. Dep’t Water Res., *Draft Best Management Practices for the Sustainable Management of Groundwater* 6 (Nov. 2017) [“GSAs must consider and document the conditions at which each of the six sustainability indicators become significant and unreasonable in their basin, including the reasons for justifying each particular threshold selected.”]; *id.* 8 [“The GSP must include an analysis and written interpretation of the information, data, and rationale used to set the minimum threshold.”].

<sup>29</sup> Water Code § 10723.2.

<sup>30</sup> Water Code § 10723.2; 23 CCR 355.4(b) [“The Department shall evaluate a Plan ... to determine whether the Plan ... complies with the Act ....”].

<sup>31</sup> 23 CCR 355.4(b)(4).

<sup>32</sup> Central Kings GSP p. 4-6, dated December 11, 2019.

<sup>33</sup> Central Kings GSP p. 4-6 and 4-7, dated December 11, 2019.

<sup>34</sup> Central Kings GSP p. 4-7, dated December 11, 2019.

<sup>35</sup> Central Kings GSP p. 4-7, dated December 11, 2019.

conditions affecting disadvantaged communities in the GSA area. In our experience, over half of the homes in Tombstone Territory began to experience dry wells in 2014, and many families were not able to drill deeper wells to meet the quickly declining groundwater levels. Some families have gone four months without water in their homes to drink, cook, bathe, and flush the toilet. Residents had to get water from neighbors' hoses, or fill up tanks and carry water through their homes to provide their families with basic health and sanitation needs. This experience was traumatizing for many residents, particularly those who have children, or who have physical ailments that make it difficult to transport water.

To this day, residents live with the constant fear that their wells will go dry at any moment. Another well has just gone dry on Greenwood in Tombstone Territory, and residents' fear that their well may be next is palpable. Many community residents hope to connect to Sanger's water system so that they will have a stable and clean source of drinking water, but such a project will take roughly three years to complete.

We note that an impact on drinking water that persists for even a relatively short period of time (e.g., months or years rather than decades) may have permanent and irreversible impacts on households and communities. A household is not habitable without access to an adequate supply of safe drinking water, and once families begin to leave uninhabitable dwellings after wells have failed, community cohesion is irreparably harmed. These impacts are inconsistent with the very concept of sustainable groundwater management.

In addition to rapidly declining water levels, Leadership Counsel and partnering organizations have conducted numerous water quality tests throughout the community. In Tombstone we have found traces of, 1,2,3, trichloropropane, total colorfirm, and nitrate all above the MCL. These test results have resulted in bottled water delivery to all households through state grants, as the water in Tombstone is not safe to drink.

Central Kings must consider the drinking water needs of the community of Tombstone Territory and other disadvantaged communities in the GSA area. The potential consolidation of Tombstone Territory into the City of Sanger will at minimum take three years for full completion. In the meantime, community members will undergo financial hardship and may be forced to leave their homes and leave uninhabitable dwellings. It is impermissible for Central Kings GSA to allow these significant and unreasonable impacts to occur during the GSP implementation period and into 2040.

#### **D. DWR Cannot Approve The GSP Because It Was Developed With Inadequate Transparency, Accessibility, Consideration Of Public Input And Representation.**

As public agencies, GSAs are subject to the requirements of the Brown Act, which requires transparency of public agencies through notice of meetings and prior posting of agendas, posting

of meeting minutes after meetings, and public access to meeting materials upon request by a member of the public.<sup>36</sup> GSAs are also subject to the requirements of the Bilingual Services Act, which requires a public agency to provide interpretation and translate materials into all languages for which there is a “substantial” number of people who it serves who speak that language.<sup>37</sup>

In addition, GSAs must also adhere to the specific public participation and inclusivity requirements laid out in SGMA. As discussed above, SGMA requires that a GSA “shall consider the interests of all beneficial uses and users of groundwater,” which expressly includes “[h]olders of overlying rights” and “[d]isadvantaged communities, including, but not limited to, those served by private domestic wells or small community water systems.”<sup>38</sup> The emergency regulations similarly require that a GSP summarize and identify “opportunities for public engagement and a discussion of how public input and response will be used.”<sup>39</sup> The GSA thus must engage “diverse social, cultural, and economic elements of the population within the basin.”<sup>40</sup> The regulations recognize that failure to engage adequately with a diverse cross-section of the public undermines the likelihood that a GSP will avoid undesirable results and meet its sustainability goal.<sup>41</sup>

Throughout the GSP development process, the Central Kings GSA did not accept assistance from our organization to help the GSA conduct outreach to disadvantaged communities.<sup>42</sup> Board members and staff have voiced that it is unnecessary to do such outreach, and that they were going to protect the interests of all disadvantaged communities in their service area, yet were not aware of Tombstone Territory’s existence until our organization alerted them to its location and past water issues at a board meeting.<sup>43</sup>

The GSA did not have a Stakeholder Communication and Engagement Plan. Meetings were held during the day right before CID board meetings. Meetings were noticed over email, but notices were not translated into threshold languages including Spanish.

The GSA hosted two workshops on GSP development. While workshops were held at times that would be accessible for residents to attend in the evening, the GSA did not work with community-based organizations to reach out to DAC residents or shape the format and content of the workshops to ensure that DAC residents would be able to meaningfully participate. Interpretation services were not provided at workshops. Workshops were not a space for hearing

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<sup>36</sup> California Gov. Code § 54954.1

<sup>37</sup> Bilingual Services Act, Gov. Code, §§ 7293, 7295.

<sup>38</sup> Water Code § 10723.2.

<sup>39</sup> 23 CCR 354.10(d).

<sup>40</sup> Guidance Document for Groundwater Sustainability Plan; Stakeholder Communication and Engagement, p. 1.

<sup>41</sup> 23 CCR 355.4(b)(4).

<sup>42</sup> The Central Kings GSA denied our request for a letter of support to obtain state funding to work on SDAC engagement in the GSA area. Board Meeting, August 8th, 2018.

<sup>43</sup> Central Kings GSA Board Meeting, August 8th, 2018.

feedback from all beneficial user groups; unfortunately, when we gave feedback at the last workshop, GSA board members and staff actively dismissed our comments, and only took them seriously when other members of the public echoed the same concerns. Workshops were formatted to provide information to the public about the GSP, and not to solicit feedback to shape the GSP.

The GSA did not have an advisory committee. There were no representatives of DACs on the GSA board.

Central Kings GSA board meetings have been hostile to public participation, and have been conducted without the opportunity to provide public comment as required by the Brown Act.<sup>44</sup> On several occasions we have had to interject as meetings were being adjourned in order to make public comments. GSA staff and board members did not release details about the GSP at GSA meetings; instead, the GSA meetings reviewed administrative issues and staff refused to provide concrete answers to our questions regarding the substance of the plan. These practices are against the mandates under SGMA to consider the interests of all beneficial user groups and encourage the involvement of diverse elements of the population.

The public engagement process for this GSP was therefore woefully inadequate. At a minimum, an adequate process must include the following elements, which were not present here:

1. **Comply with the Brown Act.**
2. Ensure that the GSP includes a **Stakeholder Communication and Engagement Plan**
3. **Description of DAC engagement:** Ensure that the GSP specifically identifies how DAC beneficial users were engaged in the planning process.
4. **Notice:**<sup>45</sup> Ensure that the GSA provided clear notice to the public about GSA meetings to develop the GSP, posted in ways that all stakeholders were made aware of the meetings, and translated into all languages spoken by at least 5 percent of the public served by the agency, who do not speak English or are unable to effectively communicate in English.<sup>46</sup>
5. **Translation of materials:**<sup>47</sup> Ensure that the GSA translated materials into all languages spoken by at least 5 percent of the public served by the agency, who do not speak English or are unable to effectively communicate in English.

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<sup>44</sup> Gov Code § 54954.3(a)

<sup>45</sup> Government Code § 54954(a).

<sup>46</sup> Government Code sec. 7296.2: Dymally-Alatorre Bilingual Services Act, stating that local agencies providing services to the public must provide translated materials and interpretation when it serves a substantial number of non-English-speaking people. The law defines a “substantial number of non-English-speaking people” as “members of a group who either do not speak English, or who are unable to effectively communicate in English because it is not their native language, and who comprise 5 percent or more of the people served by the statewide or any local office or facility of a state agency.” This is because “effective maintenance and development of a free and democratic society depends on the right and ability of its citizens and residents to communicate with their government and the right and ability of the government to communicate with them.”

<sup>47</sup> Government Code sec. 7296.2.

6. **Interpretation:**<sup>48</sup> Ensure that the GSA provided interpretation services at board meetings, committee meetings and workshops into all languages spoken by at least 5 percent of the public served by the agency, who do not speak English or are unable to effectively communicate in English.
7. **Accessible workshops:** Ensure that the GSA hosted workshops held at accessible times and locations for disadvantaged community residents.
8. **DAC representation on advisory committee:** Ensure that the GSA developed the GSP with an advisory committee that contained representatives from DACs.
9. **DAC representation on GSA board:** Ensure that the GSA developed the GSP with a Board that contained representatives from DACs.
10. **Partnership with local community based organizations:** Ensure that the GSA partnered with community based organizations and nonprofits on outreach and engagement.
11. **Incorporation of stakeholder input:** Ensure that the GSP explicitly describes how stakeholder input was incorporated into the GSP process and decisions, including sustainable management criteria and all projects and management actions.

#### **E. The Water Budget is Inadequate**

Water budgets must contain an accounting and assessment of the total annual volume of groundwater and surface water entering and leaving the basin, including historical, current and projected water budget conditions, and the change in the volume of water stored.<sup>49</sup> DWR regulations also require that the historical water budget “start[] with the most recent available information.”<sup>50</sup> In order to have any chance of meeting a GSA’s sustainability goal, a GSA must accurately estimate current and future groundwater usage. A GSP’s sustainable yield must also be “calculated over a base period representative of long-term conditions in the basin.”<sup>51</sup>

The GSP does not conform to these requirements. For the historical water budget, the GSP underestimates the year-to-year variability. The GSP states that it was “impractical” to include the extreme drought years of 2012-2016, without explaining why.<sup>52</sup> However, climate change has had and will continue to impact California’s hydrology leading to more and more variability in wet and dry years. In this past drought, several wells in the Kings basin were dewatered. Failing to include the drought years in the historical water budget violates SGMA’s regulations, which require that the historical water budget “start[] with the most recent available information.”<sup>53</sup>

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<sup>48</sup> Government Code sec. 7296.2.

<sup>49</sup> 23 CCR § 354.18.

<sup>50</sup> 23 CCR 354.18(c)(2)(B).

<sup>51</sup> Water Code § 10721(w).

<sup>52</sup> Central Kings GSP p.3-93, adopted December 11, 2019

<sup>53</sup> 23 CCR 354.18(c)(2)(B).

Additionally, the GSP estimates large variability in historical changes in groundwater storage based on water year type, showing a common occurrence of extreme wet and extreme dry years.<sup>54</sup> By the GSA's own estimates, the current water budget shows similar variability, but this variability is not reflected in the GSP's future water budget.<sup>55</sup> Despite the common occurrence of extreme wet and dry years, the Central Kings GSA estimates an average depletion of 17000 AF/year, which was consequently utilized to establish measurable objectives and minimum thresholds for groundwater levels and groundwater storage.<sup>56</sup> Underestimating year-to-year variability decreases the probability that the basin will meet its sustainability goal, and further means the GSP's sustainable yield does not comply with SGMA because it was not "calculated over a base period representative of long-term conditions in the basin."<sup>57</sup>

The water budget's components have extremely low confidence intervals. The GSP states that the quantification of current water budget components was constrained by the timeline and limited funding and they had to use the "best available data that is obtainable at the time the GSP is developed."<sup>58</sup> As a result, all parameters have a confidence interval ranging from 5%-50%, making their budget merely an approximate of the hydrology in the GSA.<sup>59</sup> Furthermore, there are critical uncertainties in the water budget because only one parameter, surface water diversions, was directly measured. The largest component of the budget (evapotranspiration of applied water) has 15% confidence intervals due to uncertainty in cropping pattern surveys, indirect estimates of unit evapotranspiration rates for crop types, and varieties in management practices. This is very concerning as these values were utilized to create measurable objectives and minimum thresholds for groundwater levels and groundwater storage.

In regards to inflows to the basin, riparian surface water for irrigation was estimated to be 3 acre-feet/acre. However, this may not be a fair assumption for many crops in the region; for example, perennial nut trees have water requirements that range from 40 to 55 inches per year.

Additionally, key assumptions of the water budget were not explained. The GSP's unconfined groundwater inflow calculations use water levels from spring (before agricultural pressures of summer) and assume that "the aquifer is relatively homogeneous and isotropic,"<sup>60</sup> but do not explain the foundation of this assumption or address the unlikelihood that this assumption is accurate. Confined groundwater inflows were computed similarly, but "groundwater level data

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<sup>54</sup> Central Kings GSP p.3-110 to 3-112, dated December 11, 2019

<sup>55</sup> Central Kings GSP p.3-112, dated December 11, 2019; Central Kings GSP p.3-121, dated December 11, 2019

<sup>56</sup> Central Kings GSP p.3-112, dated December 11, 2019

<sup>57</sup> Water Code § 10721(w).

<sup>58</sup> Central Kings GSP p.3-97, adopted December 11, 2019

<sup>59</sup> Central Kings GSP p.3-97, adopted December 11, 2019

<sup>60</sup> Central Kings GSP p.3-101, adopted December 11, 2019

available to compute the subsurface flows was more limited and has a greater degree of uncertainty than the unconfined groundwater inflows.”<sup>61</sup>

Furthermore, the calculations for deep percolation greatly over-estimate irrigation efficiency. Calculations for inflows to the groundwater system include deep percolation of irrigation water (only in rural areas), 100% indoor water use and 25% of outdoor water use, seepage of channels and pipelines, urban stormwater recharge, local streams recharge (31,200 AF), and other recharge. Deep percolation assumes 84% irrigation efficiency throughout the entire GSA. This assumption greatly over-estimates irrigation efficiency and is likely not representative of actual land use and agricultural practices in this region, and thus has the potential to introduce significant error in the water budget. Further, these calculations include many assumptions for water use and percolation rates without citations and references.

Inconsistencies and insufficient data in the water budget also render it invalid. Similar to the calculations for outflows from the groundwater system calculations, pumping rates were determined based on water demands calculated from crop evapotranspiration (minus effective precipitation) with irrigation efficiencies specific to crop types from local agency staff.<sup>62</sup> Field crops assumed to be flood irrigation (70% efficiency) with trees and vines assumed to be micro irrigated (85% efficiency).<sup>63</sup> This section, 3.3.6, is inconsistent with the description of assumed irrigation efficiencies in section 3.3.5. Pumping for indoor use assumes 70 gallons/capita/day and each parcel has 4 residents, which may be an underestimate.<sup>64</sup> Outflows from basin include evapotranspiration of applied irrigation water, applied municipal and industrial water, effective precipitation, conveyance channels, reservoirs and recharge basins, etc. and runoff of precipitation, operational spills, groundwater exports, and groundwater outflow (35,400 AF).<sup>65</sup> Land use data was estimated by the Department of Water and Resource’s Land Use data by county (Fresno- 1994, 2000, 2009; Kings - 1996, 2003; Tulare - 1999, 2007), which are sporadic and likely insufficient data sources.<sup>66</sup>

Last, we would like to highlight that the sustainable yield, 1,140,000 AF/year, is a basin-wide value.<sup>67</sup> Consequently, this value cannot be used to estimate sustainable yield in local areas. Central Kings GSA fails to state how the sustainable yield per acre will be determined, which will be different for each GSA within the Kings Basin.

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<sup>61</sup> Central Kings GSP Exhibit E p.11, adopted December 11, 2019

<sup>62</sup> Central Kings GSP p.3-105, adopted December 11, 2019

<sup>63</sup> Central Kings GSP p.3-105, adopted December 11, 2019

<sup>64</sup> Central Kings GSP p.3-102, adopted December 11, 2019

<sup>65</sup> Central Kings GSP p.3-108, adopted December 11, 2019

<sup>66</sup> Central Kings GSP p.3-106, adopted December 11, 2019

<sup>67</sup> Central Kings GSP p.3-125, adopted December 11, 2019

The water budget is central to establishing effective policies for sustainable groundwater management in the GSA area. Since the GSP's water budget is inadequate, DWR cannot approve this GSP.

#### **F. The GSP's Sustainable Management Criteria for Groundwater Levels Are Not Adequate**

The sustainable management criteria for groundwater levels must be made after considering the interests of all beneficial user groups, including disadvantaged communities reliant on domestic wells and community water systems,<sup>68</sup> and must be based on an analysis of what are “significant” and “unreasonable” impacts.<sup>69</sup> These policy decisions must also avoid disparate impacts on protected groups pursuant to state and federal law.<sup>70</sup> As discussed below, the GSP does not meet these requirements.

##### **a. The Undesirable Result for Groundwater Levels are Inadequate**

Undesirable results are the point at which groundwater conditions cause “significant and unreasonable” impacts on beneficial users. The SGMA regulations require GSAs to justify their undesirable results by including the “[p]otential effects on the beneficial uses and users of groundwater.”<sup>71</sup> GSAs must also describe the “processes and criteria relied upon to define undesirable results.”<sup>72</sup> These determinations must be made based on an analysis of when decreasing groundwater levels will cause results that are either “significant” or “unreasonable” in light of the context of the basin and the real-world circumstances on the ground. The undesirable results determination does not comply with these requirements because it is unsupported by analysis, it is too vague, and it does not show how the GSA considered the interests of beneficial users in shaping its conclusions.

The GSP states that “chronic lowering of the groundwater level is an undesirable result.”<sup>73</sup> It is not clear what is meant by “chronic lowering,” it is not clear what processes or criteria the GSA relied upon to create this definition, and it is not clear what effect this phenomenon would have on beneficial users. Indeed, this appears to be merely a restatement of SGMA's sustainability indicator for groundwater levels.<sup>74</sup> The GSP contains no analysis of when decreasing

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<sup>68</sup> Water Code § 10723.2.

<sup>69</sup> Water Code § 10721(x); 23 CCR 354.28(b); *see also* Cal. Dep't Water Res., *Draft Best Management Practices for the Sustainable Management of Groundwater* 6 (Nov. 2017) [“GSAs must consider and document the conditions at which each of the six sustainability indicators become significant and unreasonable in their basin, including the reasons for justifying each particular threshold selected.”]; *id.* 8 [“The GSP must include an analysis and written interpretation of the information, data, and rationale used to set the minimum threshold.”].

<sup>70</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

<sup>71</sup> 23 CCR § 354.26.

<sup>72</sup> 23 CCR § 354.26.

<sup>73</sup> Central Kings GSP p. 4-5, adopted December 11, 2019

<sup>74</sup> Water Code § 10721(x)(1).

groundwater levels will cause results that are either “significant” or “unreasonable” in light of the context of the basin and the real-world circumstances on the ground. The undesirable results determinations therefore do not comply with the requirements under SGMA because they are unsupported by analysis, too vague, and do not show how the GSA considered the interests of beneficial users in shaping its conclusions.

**b. The Measurable Objectives for Groundwater Levels are Inadequate**

The SGMA regulations require GSAs to set measurable objectives that “achieve the sustainability goal for the basin within 20 years of Plan implementation and...continue to sustainably manage the groundwater basin over the planning and implementation horizon.”<sup>75</sup>

The GSA has taken the 1997-2012 trend line and set the measurable objective for 2040 at the groundwater elevation reached by the trend line in 2040.<sup>76</sup> The GSA has not evaluated how this groundwater elevation will affect domestic well users and disadvantaged communities, whose critical drinking water resources will be impacted by a decline in groundwater levels. In fact, the attached Technical Review shows that approximately 515 of domestic wells in the GSA area will be dewatered if groundwater levels reach the measurable objectives. The GSA cannot therefore have considered the interests of this beneficial user group in determining its measurable objectives, and is likely to have a disparate impact on a protected group if it pursues this course of action.

In order to show that it has considered impacts on domestic well users and disadvantaged communities, and ensure that it is not causing a disparate impact on groups protected from such impact by state civil law, the GSA must conduct a complete analysis of how many wells will be impacted by this measurable objective, in particular domestic wells and small community system wells in disadvantaged communities. It should measure whether the impacts to wells are “significant and unreasonable” by consulting with domestic well owners and disadvantaged communities. If its current measurable objective will cause a disparate impact or cause significant and unreasonable impacts to these beneficial user groups, it must modify its measurable objective to comply with its legal obligations.

It is also unclear how the measurable objectives will achieve the sustainable yield. The GSA must clarify how achieving the measurable objectives at all representative monitoring wells will cumulatively result in attaining the sustainable yield for the GSA area.

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<sup>75</sup> 23 CCR § 354.30(a)

<sup>76</sup> Central Kings GSP p. 4-46 to p.4-47, adopted December 11, 2019

### **c. The Minimum Thresholds for Groundwater Levels are Inadequate**

The groundwater levels sustainable management criteria set by a GSA must be the point that, “if exceeded, may cause undesirable results.”<sup>77</sup> SGMA requires GSAs to analyze both the significance and reasonableness of proposed minimum thresholds,<sup>78</sup> and minimum thresholds must have the purpose of avoiding “significant and unreasonable” impacts on beneficial users.<sup>79</sup> The GSA’s determination of what is “significant and unreasonable” must consider the impacts on all types of beneficial users, including disadvantaged communities.<sup>80</sup> For groundwater levels specifically, GSAs must place minimum thresholds for each monitoring site at the level “that may lead to undesirable results.”<sup>81</sup> Under DWR regulations, the GSA must provide a description of “the information and criteria relied upon to establish minimum thresholds,” an explanation of how the proposed minimum thresholds will “avoid undesirable results,” and “how minimum thresholds may affect the interests of beneficial uses and users of groundwater.”<sup>82</sup>

The Central Kings GSA’s approach to setting minimum thresholds does not “consider the interests of” drinking water beneficial users, and will allow large amounts of pumping to occur at the potential expense of more than a thousand of the domestic wells in the GSA area. The GSA has chosen to set the minimum threshold by taking the measurable objective and lowering it by the predicted elevation change that would occur from a 5-year drought.<sup>83</sup> It is unclear how this minimum threshold methodology was decided upon. The GSP lacks analysis of both the significance and reasonableness of this minimum threshold, as SGMA requires.<sup>84</sup> Merely relying on past groundwater declines to define what will be significant and unreasonable in the future is inadequate.<sup>85</sup> The analysis of significance and reasonableness requires consideration of context and of the interests of various water users.<sup>86</sup> Because this analysis is entirely lacking, it is impossible to know when the GSP may allow “significant and unreasonable” impacts to groundwater levels or storage, and thus DWR may not approve the plan.

Further, the minimum threshold determinations did not consider the interests of disadvantaged communities on domestic wells. As our Technical Review shows, approximately 1,036 (43%) of domestic wells within a 2-mile radius of the monitoring wells will be dewatered at the minimum

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<sup>77</sup> 23 CCR § 354.28.

<sup>78</sup> Water Code § 10721(x); 23 CCR 354.26(a), (b), 354.28(b); see also Cal. Dep’t Water Res., Draft Best Management Practices for the Sustainable Management of Groundwater 6, 8 (Nov. 2017).

<sup>79</sup> 23 CCR § 354.26.

<sup>80</sup> Water Code § 10723.2.

<sup>81</sup> 23 CCR § 354.28.

<sup>82</sup> 23 CCR § 354.28.

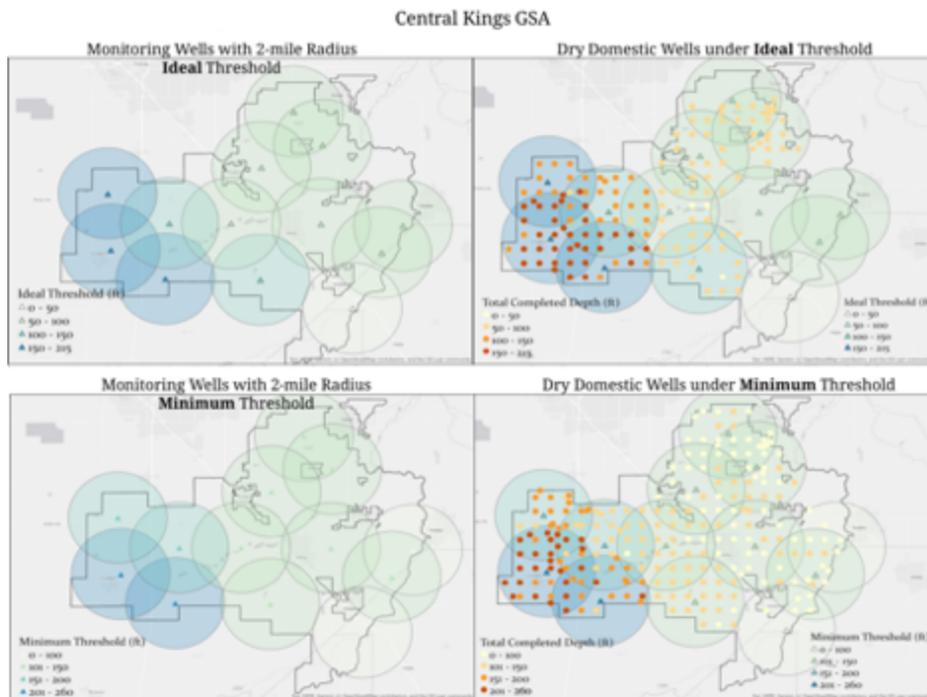
<sup>83</sup> Central Kings GSP p. 4-44, adopted December 11, 2019

<sup>84</sup> Water Code § 10721(x); 23 CCR 354.26(a), (b), 354.28(b); see also Cal. Dep’t Water Res., Draft Best Management Practices for the Sustainable Management of Groundwater 6, 8 (Nov. 2017).

<sup>85</sup> See *Light v. State Water Res. Control Bd.* (2014) 226 Cal. App. 4th 1463, 1479.

<sup>86</sup> See *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal. 3d 339, 354; *Light v. State Water Res. Control Bd.* (2014) 226 Cal. App. 4th 1463, 1479.

thresholds proposed in the GSP.<sup>87</sup> Since domestic well users are de minimis pumpers and are not part of this aquifer-depleting pumping, this will cause a disproportionately negative impact on domestic users, the majority of whom belong to a group protected by state civil rights law. This therefore will cause a disparate impact in violation of state civil rights law.



The groundwater levels sustainable management criteria for this GSP are therefore inadequate. At a minimum, adequate groundwater levels sustainable management criteria must include the following elements, which are not present here:

1. **Evaluate the drinking water impact of sustainable management criteria:** Ensure that the GSP includes an analysis of how many drinking water wells (municipal wells, community water system wells, and domestic wells) might go fully or partially dry if groundwater levels reach the Undesirable Results (URs),<sup>88</sup> Measurable Objectives (MOs) and Measurable Objectives (MTs),<sup>89</sup> including a map of wells that will go fully and partially dry at the MOs and MTs. Ensure that the GSP includes estimates of the increased pumping costs from additional lift needed to pump water from lower elevations if the URs,<sup>90</sup> MOs and MTs<sup>91</sup> were to be reached.

<sup>87</sup> Central Kings GSP Technical Review

<sup>88</sup> 23 CCR § 354.26(c)

<sup>89</sup> 23 CCR § 354.28(b)(4)

<sup>90</sup> 23 CCR § 354.26(c)

<sup>91</sup> 23 CCR § 354.28(b)(4)

2. **Avoid significant and unreasonable impacts to drinking water users in creating sustainable management criteria:**<sup>92</sup> The GSA must analyze “when significant and unreasonable effects ... are caused by groundwater conditions occurring throughout the basin,” taking into account the beneficial users of groundwater and the basin’s specific circumstances.<sup>93</sup> Therefore the GSP must explicitly state how the GSA considered drinking water impacts in shaping URs, MOs, and MTs for groundwater levels; for example, the GSP could state how its well impact analysis supported setting stricter MTs and MOs near at-risk communities.
3. **Incorporate new drinking water data into SMC:**<sup>94</sup> Ensure that the GSP includes a description of how data gaps and uncertainties of its drinking water well impact assessment will be addressed and serve to reassess the sustainable management criteria, projects and management actions in accordance with new data.
4. **Implement DAC and drinking water user input into SMC:**<sup>95</sup> Ensure that the GSP discusses how stakeholder input from DAC community members was considered in the development of URs, MOs, and MTs. For example, the GSP could state how they took the results of the well impact assessment to the public through meetings, workshops, or Advisory Committees, and together with stakeholders decided how to change SMC to protect drinking water, or other programs to implement to mitigate these impacts.
5. **Avoid disparate impact:**<sup>96</sup> Ensure that the MOs and MTs for groundwater levels are established in such a way that prevents a disproportionately negative impact on communities of color in the GSP area. For example, the GSP should ensure that the same MT methodology across the GSP area will not lead to disproportionately more wells going dry for residents of color than for white residents.

### **G. The GSP Impermissibly Fails to Establish Sustainable Management Criteria for Groundwater Quality**

GSA activities and policies could cause increased contamination in many ways. For example, the proposed timeline for implementation of demand reduction may allow for continued pumping which may create an increase in naturally occurring contaminants and/or migration of contaminant plumes. On-farm recharge projects could also have severe impacts on groundwater quality by facilitating water percolation on land contaminated with years of pesticide, herbicide, fungicide, and fertilizer application. A groundwater market is likely to cause geographic

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<sup>92</sup> Water Code § 10723.2

<sup>93</sup> 23 CCR § 354.26.

<sup>94</sup> 23 CCR § 354.38(e)(3)

<sup>95</sup> 23 CCR § 354.10(d); DWR Guidance Document for Groundwater Sustainability Plans: Stakeholder Communication and Engagement, p.1.

<sup>96</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

concentrations of pumping that increase the likelihood of contaminant plume migration, putting drinking water resources at risk.

SGMA charged GSAs with the responsibility to protect water quality from further degradation due to groundwater management practices, and requires GSAs to establish sustainable management criteria to prevent degraded groundwater quality,<sup>97</sup> based on a determination of what is a “significant and unreasonable” impact on all beneficial users, including domestic well users and disadvantaged communities.<sup>98</sup> This GSP establishes an overly vague Undesirable Result and Sustainability Goal for groundwater quality, and creates no minimum thresholds or measurable objective for groundwater quality, in violation of SGMA. The GSP therefore must not be approved.

#### **a. The Sustainability Goal for Groundwater Quality is Inadequate**

The GSP states that Central Kings GSA’s “groundwater quality sustainability goal is to maintain the overall groundwater quality in CKGSA at its general current state.”<sup>99</sup> This is overly vague, and ‘general state’ is not explicitly defined anywhere in the GSP. It is thus impossible for DWR to determine either (1) whether the GSP will achieve this sustainability goal; or (2) whether meeting this sustainability goal will result in sustainable groundwater management. Furthermore, considering the Central Kings GSA has decided not to set any measurable objectives, minimum thresholds, or interim milestones for groundwater quality, there is no reference as to how they plan to reach this vague sustainability goal.

#### **b. The GSP’s Undesirable Results for Groundwater Quality are Inadequate**

Undesirable results are the point at which “significant and unreasonable” impacts on beneficial users caused by degraded groundwater quality. GSAs must also describe the “processes and criteria relied upon to define undesirable results.”<sup>100</sup> GSAs must place groundwater quality minimum thresholds for each monitoring site at the level “that may lead to undesirable results.”

<sup>101</sup>

The GSP defines undesirable results for groundwater quality as “the significant and unreasonable reduction in groundwater quality such that the groundwater is no longer generally suitable for agricultural irrigation and domestic use.”<sup>102</sup> Similarly to the sustainability goal, this definition is overly vague, and “generally suitable” is not defined. This definition of undesirable results is

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<sup>97</sup> Water Code § 10721(w)(4); 23 CCR § 354.28(c)(4).

<sup>98</sup> Water Code §§ 10727.2(d)(2); 10721(x)(4)

<sup>99</sup> Central Kings GSP p.4-58, adopted December 11, 2019

<sup>100</sup> 23 CCR § 354.26.

<sup>101</sup> 23 CCR § 354.28.

<sup>102</sup> Central Kings GSP p.4-59, adopted December 11, 2019

inadequate because it cannot be measured or monitored for compliance by DWR, and has not considered the interests of all beneficial users.

### **c. The GSP's Lack of Sustainable Management Criteria for Groundwater Quality is Impermissible**

SGMA charges GSAs with the responsibility to protect water quality from further degradation due to groundwater management practices, and requires GSAs to establish sustainable management criteria to prevent degraded groundwater quality.<sup>103</sup> The GSP does not set measurable objectives, interim milestones or minimum thresholds for degraded water quality, and states that the GSA does not plan on setting sustainable management criteria for groundwater quality until the 5-year GSP update.<sup>104</sup>

The only reasons why a GSA may decide not to set sustainable management criteria for a sustainability indicator are “where the Agency can demonstrate that [groundwater levels are] a reasonable proxy”<sup>105</sup> or where a sustainability indicator is “not present” or “not likely to occur” in a basin.<sup>106</sup> The GSA has not shown that groundwater levels are a proxy for groundwater quality, and it has shown in the Basin Setting section that groundwater quality issues are present in the basin.<sup>107</sup> As written, the GSP leaves beneficial users unprotected from increased concentration and spread of existing groundwater contamination due to pumping patterns and groundwater management practices.

The GSA seeks to avoid responsibility for protecting against degraded groundwater quality by stating that contamination plumes are “already monitored and tracked by others,”<sup>108</sup> and that municipal water systems already ensure compliance with drinking water standards, and that the GSA has “no responsibility with regards to municipal water.”<sup>109</sup> However, SGMA does not exempt GSAs from monitoring groundwater if water is already being tested by other agencies for other purposes. Rather, the goal of SGMA is to ensure that GSAs are incorporating well testing data into their monitoring systems in order to ensure that *the GSA's activities or policies* are not causing increased groundwater contamination. Therefore, regardless of other agencies' groundwater quality management, it must still establish minimum thresholds and measurable

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<sup>103</sup> Water Code § 10721(w)(4); 23 CCR § 354.28(c)(4).

<sup>104</sup> Central Kings GSP p.4-61, adopted December 11, 2019

<sup>105</sup> 23 CCR § 354.28(d)

<sup>106</sup> 23 CCR § 354.28(e)

<sup>107</sup> Central Kings GSP p.3-76, dated December 11, 2019: In its Basin Setting, the Central Kings GSA notes a number of groundwater quality concerns affecting their region, including: Nitrate, Arsenic, DBCP (Dibromochloropropane), EDB (Ethylene dibromide), TCP (1,2,3-Trichloropropane), solvents like TCE (trichloroethylene) & PCE (Perchloroethylene), MTBE (methyl tert-butyl ether), hexavalent chromium, petroleum hydrocarbons, Gross Alpha, Nitrate, Uranium, landfill leachate within their area; other constituents of concern include boron, chloride, fluoride, and sodium (i.e. high salinity)

<sup>108</sup> Central Kings GSP p.4-59, dated December 11, 2019

<sup>109</sup> Central Kings GSP p.4-61, dated December 11, 2019

objectives by which to measure whether its groundwater management activities are impacting groundwater quality, and it can collaborate with existing groundwater quality management programs to do so. Further, it is not the responsibility of a municipal water system to track the movement of contaminant plumes. Additionally, this ignores those reliant upon private domestic wells or state small water systems which are not required to test water quality, and often lack the resources to do so. Instead a GSA is responsible for monitoring groundwater quality in the basin, and must use this data to prevent and/or mitigate impacts. As stated above, groundwater quality in this GSA does not fall into the exception of having a proxy or being absent, so Central Kings GSA must develop minimum thresholds, measurable objectives and interim milestones for this sustainability indicator.

SGMA also requires that the GSA consider the interests of all beneficial users including domestic well users and disadvantaged communities.<sup>110</sup> The GSA has not shown how it has considered the interests of beneficial users including domestic well owners and disadvantaged communities in making this decision to not have groundwater quality sustainable management criteria,<sup>111</sup> and may cause severe drinking water issues to occur for these beneficial users, who do not have the financial resources to treat their water or purchase alternative water supplies. Given the demographic makeup of the disadvantaged unincorporated communities in the area, the resulting impact from the proposed sustainable management criteria will likely lead to disparate impact on protected groups, in conflict with state and federal law.<sup>112</sup>

The GSA states that it may include groundwater quality sustainable management criteria at the five-year review. However, SGMA requires that measurable objectives and interim milestones are included in every GSP.<sup>113</sup> Further, minimum thresholds must also be included in the GSP, not the 5-year update.<sup>114</sup>

Based on the sustainable management criteria and the sustainability goal presented in the GSP, DWR cannot possibly determine whether the GSA has reached its sustainability goal, or when an undesirable result will occur in the basin.<sup>115</sup> For these reasons and those stated above, the GSP is in violation of its duties under SGMA and DWR should not approve it.

The failure to establish groundwater quality sustainable management criteria for this GSP is impermissible. At a minimum, adequate groundwater quality sustainable management criteria must include the following elements, which are not present here:

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<sup>110</sup> Water Code §§ 10727.2(d)(2); 10721(x)(4)

<sup>111</sup> Water Code § 10723.2.

<sup>112</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

<sup>113</sup> Water Code § 10727.2 (b).

<sup>114</sup> 23 CCR § 354.28 (a).

<sup>115</sup> Water Code § 10733(a); 23 CCR 355.4(b).

1. **Establish a clearly defined and measurable Sustainability Goal for Groundwater Quality.**
2. **Establish a clearly defined and measurable definition of Undesirable Results for Groundwater Quality.**
3. **Ensure that the GSP sets MOs and MTs at all representative monitoring wells for the following contaminants:<sup>116</sup>**
  - a. Contaminants with primary drinking water standards,
  - b. PFOs/PFOAs and chrome-6, which are contaminants known to be very harmful to human health, AND
  - c. Contaminants like Uranium which are known to increase due to groundwater management practices.
4. **Ensure that the GSP triggers a violation of a minimum threshold after *one* test shows that there has been an increase in contamination since January 1st, 2015.** Once the minimum threshold is reached, the GSA must start the evaluation of whether groundwater management activities or groundwater pumping have caused the increase, or whether the increase was caused by other factors such as natural fluctuation, testing inaccuracy, or activities outside the purview of the GSA. If the increase was caused by groundwater management activities or groundwater pumping, the GSA must immediately stop increasing the contamination and remediate.
5. **Immediately remediate any contamination caused by groundwater conditions since 2015:** The GSA must immediately remediate any increased contamination caused by groundwater management policies or activities (including lack of adequate regulation of pumping) since 2015. The GSA must begin remediation immediately upon establishing causation. The GSA must remediate contamination within two years, or as soon as technologically and hydrologically possible, whichever is faster. Design and implementation of remediation measures must be done in partnership with all groundwater users, primarily disadvantaged communities. The GSA must also clearly identify funding sources for remediation, and identify a timeline for procuring those funds.
6. **Strive to remediate existing drinking water contamination:** Ensure that the GSA will strive to remediate drinking water contaminants that exceeded the MCL before 2015 wherever feasible, through projects, management actions and policies.
7. **Evaluate the drinking water impact:** Ensure that the GSP includes an analysis of how drinking water wells (municipal wells, community water system wells, and domestic wells) are likely to be affected by the undesirable results,<sup>117</sup> measurable objectives and minimum thresholds.<sup>118</sup>

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<sup>116</sup> 23 CCR § 354.34(b)(2) and (f)(3)

<sup>117</sup> 23 CCR § 354.26(c)

<sup>118</sup> 23 CCR § 354.28(b)(4)

8. **Implement DAC and drinking water user input into SMC:**<sup>119</sup> Ensure that the GSP discusses how stakeholder input from DAC community members was considered in the development of URs, MOs, and MTs.
9. **Incorporate new drinking water data into SMC:**<sup>120</sup> Ensure that the GSP includes a description of how data gaps and uncertainties of its drinking water well impact assessment will be addressed and serve to reassess the sustainable management criteria, projects and management actions in accordance with new data.
10. **Avoid disparate impact:**<sup>121</sup> Ensure that the minimum thresholds for groundwater quality are established in such a way that prevents a disproportionately negative impact on communities of color in the GSP area; for example, the GSP should ensure that the same MT methodology across the GSP area will lead to disproportionately more wells go dry for residents of color than for white residents.

#### **H. The Monitoring Network is Inadequate With Respect to Groundwater Levels and Groundwater Quality**

GSA's must monitor impacts to groundwater for drinking water beneficial users,<sup>122</sup> including disadvantaged communities on domestic wells,<sup>123</sup> and must avoid disparate impacts on protected groups pursuant to state law.<sup>124</sup>

The GSA's monitoring network does not comply with SGMA regulations, and fails to capture drinking water impacts to disadvantaged communities and domestic wells. The GSA has therefore not considered the interests of this beneficial user group and the GSP is likely to cause a disparate impact on protected groups who are dependent on domestic wells in the GSA area.

Moreover, the lack of adequate monitoring will make it impossible for the GSA to monitor drinking water to prevent undesirable results, undermining the likelihood that the basin will achieve sustainable groundwater management.

The insufficiency of the representative monitoring network poses a significant threat to the validity of the Plan at large, and therefore must be addressed immediately.

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<sup>119</sup> 23 CCR § 354.10(d); DWR Guidance Document for Groundwater Sustainability Plans: Stakeholder Communication and Engagement, p.1.

<sup>120</sup> 23 CCR § 354.38(e)(3)

<sup>121</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

<sup>122</sup> 23 CCR § 354.34

<sup>123</sup> Water Code § 10723.2.

<sup>124</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

### a. Groundwater Level Monitoring

The SGMA regulations state that monitoring networks must include a “sufficient density of monitoring wells to collect representative measurements through depth-discrete perforated intervals to characterize the groundwater table or potentiometric surface for each principal aquifer.”<sup>125</sup> The GSA must also make decisions about the monitoring network in a way that considers the interests of all beneficial users.<sup>126</sup>

The Central Kings GSA claims that it maintains 80 groundwater monitoring wells, located on a 2-mile square grid pattern.<sup>127</sup> However, the Central Kings GSA monitoring network for groundwater levels only has 13 representative monitoring wells that will be used to establish measurable objectives and minimum thresholds. As the GSP states, this amounts to only one well for every 10,000 acres.<sup>128</sup>

Furthermore, the assumption that monitoring wells that represents a 2-mile radius will adequately account for the changing groundwater level gradients in the area, is false. This is a particularly questionable claim considering the differing groundwater conditions found within the subbasin, a point the GSP highlights.<sup>129</sup> The proposed monitoring network is far too sparse and leaves disadvantaged communities without monitoring.

The groundwater levels monitoring network for this GSP is therefore inadequate. At a minimum, an adequate groundwater levels monitoring network must include the following elements, which are not present here:

1. **Ensure accurate detection of impacts on drinking water users and DACs:**<sup>130</sup> Ensure that the groundwater level monitoring network includes *representative* monitoring wells *in or near DACs*, and placed in a way that detects impacts to the *vast majority* of drinking water users in the GSP area. If new monitoring wells are required, ensure that the GSP contains a concrete plan to fund and construct new representative monitoring wells within the first year of GSP implementation to ensure that vulnerable communities’ drinking water resources are monitored. The plan to improve the monitoring network should include testing of domestic wells in the interim as wells are constructed.
2. **Clearly show representative monitoring well locations in relation to DACs:**<sup>131</sup> Ensure that the representative monitoring wells (RMWs) for groundwater levels are presented on

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<sup>125</sup> 23 CCR § 354.34(c)(1)(A)

<sup>126</sup> 23 CCR § 354.34(b)(2)

<sup>127</sup> Central Kings GSP p.2-10, adopted December 11, 2019

<sup>128</sup> Central Kings GSP p.4-8, adopted December 11, 2019

<sup>129</sup> Central Kings GSP p.4-24, adopted December 11, 2019

<sup>130</sup> 23 CCR § 354.34(b)(2) and (f)(3)

<sup>131</sup> 23 CCR § 354.34(b)(2) and (f)(3)

maps and in tables that identify which set of MTs/MOs will be applied to which RMWs, and that these maps clearly identify the locations of DACs, small water systems and other sensitive users.

3. **Identify and address other drinking water data gaps:**<sup>132</sup> Ensure that the GSP clearly identifies any other gaps in data regarding impacts to drinking water users, and that the GSP contains a clear plan to fill data gaps regarding impacts to drinking water users. The GSP explains how it will fill some monitoring data gaps, but does not ensure that these gaps will capture impacts on all drinking water users, particularly disadvantaged communities.

### **b. Groundwater Quality Monitoring**

SGMA regulations require that GSPs create a groundwater quality monitoring network that will “collect sufficient spatial and temporal data from each applicable principal aquifer to determine groundwater quality trends for water quality indicators, as determined by the Agency, to address known water quality issues.”<sup>133</sup>

Despite having identified many known water quality issues in the Basin Setting chapter,<sup>134</sup> the GSP fails to do a comprehensive analysis of whether the sites being monitored by existing programs will adequately “address known water quality issues” and their impacts on all beneficial users in the GSA area.<sup>135</sup> As proposed, it is unclear which monitoring wells in the monitoring network will monitor for which contaminants, and whether monitoring wells will detect groundwater quality impacts on domestic well users and disadvantaged communities. From the description of the existing programs, we can infer that groundwater quality will be measured in communities and cities that have public water systems; however, in unincorporated areas the only groundwater quality monitoring programs are agricultural water suppliers, agencies monitoring for toxic waste from specific facilities, and ILRP. These programs will not capture changes in extent or concentration of drinking water contaminants identified in the Basin Setting, such as 123-TCP, Arsenic, DBCP, and others.

Therefore the monitoring network as written violates the GSA’s responsibility to collect sufficient data to determine trends and address known water quality issues affecting beneficial

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<sup>132</sup> 23 CCR § 354.38(e)(3)

<sup>133</sup> 23 CCR § 354.34(c)(4)

<sup>134</sup> Central Kings GSP p.3-76, adopted December 11, 2019: In its Basin Setting, the Central Kings GSA notes a number of groundwater quality concerns affecting their region, including: Nitrate, Arsenic, DBCP (Dibromochloropropane), EDB (Ethylene dibromide), TCP (1,2,3-Trichloropropane), solvents like TCE (trichloroethylene) & PCE (Perchloroethylene), MTBE (methyl tert-butyl ether), hexavalent chromium, petroleum hydrocarbons, Gross Alpha, Nitrate, Uranium, landfill leachate within their area; other constituents of concern include boron, chloride, fluoride, and sodium (i.e. high salinity)

<sup>135</sup> Central Kings GSP p.5-18, adopted December 11, 2019

users in the GSA area. As written, the monitoring network would allow severe drinking water impacts to occur on domestic well users and in unincorporated communities.

The groundwater quality monitoring network for this GSP is therefore inadequate. At a minimum, an adequate groundwater quality monitoring network must include the following elements, which are not present here:

1. **Ensure that the GSP plans to measure the following contaminants at all representative monitoring wells:**<sup>136</sup>
  - a. Contaminants of concern with primary drinking water standards
  - b. PFOs/PFOAs and chrome-6, which are contaminants known to be very harmful to human health
  - c. Contaminants like Uranium which are known to increase due to groundwater management practices
2. **Clearly describe how the GSA will monitor for drinking water impacts:** Ensure that the GSP includes a description of how the GSA(s) will monitor groundwater contamination that could affect drinking water in the GSA area. Ensure that the representative monitoring wells (RMWs) for groundwater quality are presented on maps and in tables, and that the maps of RMWs clearly identify the locations of DACs, small water systems and other sensitive users.
3. **Ensure accurate detection of impacts on drinking water users and DACs:**<sup>137</sup> Ensure that the groundwater level monitoring network includes *representative* monitoring wells *in or near DACs*, and placed in a way that detects impacts to the *vast majority* of drinking water users in the GSP area. If new monitoring wells are required, ensure that the GSP contains a concrete plan to fund and construct new representative monitoring wells within the first year of GSP implementation to ensure that vulnerable communities' drinking water resources are monitored.. The plan to improve the monitoring network should include testing of domestic wells in the interim as wells are constructed.
4. **Identify baseline contaminant levels:** Ensure that the GSP identifies the current contaminant levels, MTs and MOs at each RMW, so that it is clear to the public how the contamination will change at each RMW site.
5. **Frequent testing:** Ensure that the groundwater quality monitoring network tests for contaminants of concern frequently, in a way that avoids persistent drinking water contamination. Testing should be done monthly.
6. **Collaboration with other agencies:**<sup>138</sup> Ensure that the GSP explains how the GSA(s) will share data with and collaborate with other groundwater quality regulatory programs, such as ILRP, IRWM, and CV SALTS, in order to build better regional understanding of

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<sup>136</sup> 23 CCR § 354.34(b)(2) and (f)(3)

<sup>137</sup> 23 CCR § 354.34(b)(2) and (f)(3)

<sup>138</sup> 23 CCR § 354.34(e)

groundwater quality issues and better respond to groundwater quality impacts caused by groundwater management.

## **I. Projects and Management Actions Are Inadequate**

The GSA must consider the interests of all beneficial users including domestic well owners and disadvantaged communities<sup>139</sup> and avoid disparate impacts on protected groups.<sup>140</sup> The GSP must also concretely outline how each objective and the overall sustainability goal will be achieved.<sup>141</sup> The projects and management actions set forth in the GSP do not demonstrate a path towards achieving sustainability goals in the plan, and do not adequately account for the needs of disadvantaged communities pertaining to protected groups under state law. This undermines the likelihood that the basin will reach its sustainability goal by 2040, as required by SGMA.<sup>142</sup>

### **a. The Projects and Management Actions are Inadequate, Do Not Protect Drinking Water for Disadvantaged Communities, and Will Likely Cause Disparate Impacts.**

The projects and management actions set forth in the GSP does not demonstrate a path towards achieving the sustainability goals in the plan by 2040, as required by SGMA.<sup>143</sup> The GSA has not demonstrated how it has considered the interests of beneficial users including domestic well owners and disadvantaged communities.<sup>144</sup> The resulting impact from the proposed sustainable management criteria will likely lead to disparate impacts on protected groups pursuant to state and federal law.<sup>145</sup>

The only project or management action Central Kings GSA has defined in the plan is the addition of 80 acres of recharge areas.<sup>146</sup> The success or failure of this management action is

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<sup>139</sup> Water Code § 10723.2.

<sup>140</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

<sup>141</sup> Water Code § 10727.2(b)(2).

<sup>142</sup> Water Code § 10727.2(b)(1).

<sup>143</sup> Water Code § 10727.2(b)(1).

<sup>144</sup> Water Code sec. 10723.2.

<sup>145</sup> Gov. Code § 11135 [“No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.”]; Gov. Code § 65008 [Any discriminatory action taken “pursuant to this title by any city, county, city and county, or other local governmental agency in this state is null and void if it denies to any individual or group of individuals the enjoyment of residence, land ownership, tenancy, or any other land use in this state...”]; Government Code §§ 12955, subd. (l) [unlawful to discriminate through public or private land use practices, decisions or authorizations].

<sup>146</sup> Central Kings GSP p.6-3, adopted December 11, 2019

heavily dependent on our rain/snowmelt patterns. Considering the potential impacts of climate change, it seems highly illogical to make the sustainability of the basin reliant on the increase of surface water.<sup>147</sup> The GSA also provides a table of many types of other projects and management actions, but it is unclear whether these actions are being considered; they are not outlined with benefits, measurable objectives, costs and other as required.<sup>148</sup> Dependence solely on recharge, with no plan for demand reduction and no diversification of actions, is unlikely to allow the GSA to reach its sustainability goal by 2040 and avoid “significant and unreasonable” impacts to beneficial users.

### **b. Minimum Requirements for Projects and Management Actions**

The projects and management actions for this GSP are inadequate. At a minimum, adequate projects and management actions must include the following elements, which are not present here:

1. **Include a Drinking Water Well Impact Mitigation Program:** Ensure that the GSP contains a drinking water protection program to prevent impacts to drinking water users and mitigate the drinking water impacts that occur. Please reference the Framework for a Drinking Water Well Impact Mitigation Program that our organization developed with the Community Water Center and Self-Help Enterprises for more details, a draft of which is attached as part of the Human Right to Water Scorecard in Exhibit B.
2. **Establish a clear and proactive plan for demand reduction.** Demand reduction should be fully implemented by 2025.
3. **Describe the potential drinking water impacts of each project or management action.**
4. **Include management actions to measure groundwater extraction using the most scientifically accurate method.** From our research, it is clear that metering is the most accurate way of measuring groundwater extraction. Metering should be required for all users, particularly large agricultural pumpers.
5. **Ensure that the GSP’s projects and management actions will not cause a disparate impact:**<sup>149</sup> Ensure that the GSP’s projects and management actions, taken as a whole, prevent a disproportionately negative (“disparate”) impact from occurring on communities of color in the GSP area. Projects and management actions may not cause

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<sup>147</sup> IPCC, 2018: Impacts of 1.5°C Global Warming on Natural and Human Systems. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*; See also AghaKouchak, A., Cheng, L., Mazdiyasn, O., and Farahmand, A. (2014), Global warming and changes in risk of concurrent climate extremes: Insights from the 2014 California drought, *Geophys. Res. Lett.*, 41, 8847– 8852, doi:10.1002/2014GL062308.

<sup>148</sup> Central Kings GSP p.6-4, adopted December 11, 2019

<sup>149</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (1).

disproportionately more dry wells and contaminated water for residents of color than for white residents in the GSP area.

## **J. Plan Implementation Section is Inadequate**

The proposed plan implementation is insufficient in regards to public engagement/outreach and does not contain adequate information regarding annual reporting or the potential to make amendments to the GSP.

GSPs must include a planning and implementation horizon.<sup>150</sup> However, the GSP fails to provide a timeline for when and how the GSP will be implemented. Under the schedule for implementation section, the Central Kings GSA only states that it will “add 100 acres of ponds annually. This program has been initiated following the passage of the Proposition 218 election in November 2018.”<sup>151</sup> The plan gives no detail as to how it plans to implement other aspects of the plan, such as groundwater level monitoring.

Additionally, the plan implementation chapter should contain basic information on annual reporting, periodic evaluation of the GSP, and how the costs of the GSP implementation will be covered. The Central Kings GSP does not include this critical information.

As a public agency, the GSP must also establish processes by which it will seek and incorporate feedback from the public on an ongoing basis. GSP implementation must also continue to consider the interests of all beneficial user groups and engage a diversity of stakeholders. It must do so through direct outreach to disadvantaged communities, collaboration with local community-based nonprofits, and public meetings or workshops that are held in locations and at times that are accessible to all beneficial user groups, with presentations and materials translated into all threshold languages.<sup>152</sup> Additionally, proposed changes to the plan must be publicly noticed and circulated for public review and comment prior to final adoption. None of these processes for public participation are outlined in the GSP.

The plan implementation section for this GSP is therefore inadequate. At a minimum, an adequate plan implementation section must include the following elements, which are not present here:

### **1. Include a planning and implementation horizon.**

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<sup>150</sup> Water Code § 10727.2.(c).

<sup>151</sup> Central Kings GSP p.323, adopted December 11, 2019

<sup>152</sup> Bilingual Services Act, Gov. Code, §§ 7293, 7295: a public agency must provide interpretation and translate materials into all languages for which there is a “substantial” number of people that it serves who speak that language.

2. **Include basic information on annual reporting, periodic evaluation of the GSP, and how the costs of the GSP implementation will be covered.**
3. **Description of DAC engagement:** Ensure that the GSP describes how ongoing engagement will be conducted during GSP implementation, including but not limited to engagement regarding: decisions about projects, management actions, modifying sustainable management criteria, changes to monitoring networks, and conducting GSP updates.
4. **Notice:**<sup>153</sup> Ensure that the GSP states that ongoing engagement will include clear notices about GSA meetings and workshops that are posted in ways that all stakeholders were made aware of the meetings, and translated into all languages spoken by at least 5 percent of the public served by the agency, who do not speak English or are unable to effectively communicate in English.<sup>154</sup>
5. **Translation of materials:**<sup>155</sup> Ensure that the GSP states that ongoing engagement will include translation of materials into all languages spoken by at least 5 percent of the public served by the agency, who do not speak English or are unable to effectively communicate in English.
6. **Interpretation:**<sup>156</sup> Ensure that the GSP states that ongoing engagement will include interpretation services provided at board meetings, committee meetings and workshops into all languages spoken by at least 5 percent of the public served by the agency, who do not speak English or are unable to effectively communicate in English.
7. **Accessible workshops:** Ensure that the GSP states that ongoing engagement will include workshops held at accessible times and locations for disadvantaged community residents.
8. **DAC representation on advisory committee and board:** Ensure that the GSP states that ongoing engagement will include advisory committees and Boards containing representatives from DACs.
9. **Partnership with local community based organizations:** Ensure that the GSP states that ongoing engagement will include partnership between GSA and community based organizations and nonprofits.
10. **Engagement on key decisions:** Ensure that the GSP states that ongoing engagement will include strategies to keep the public informed and engaged during and prior to critical decisions about the GSP, including but not limited to the five year GSP review, modification of sustainable management criteria, design and adoption of any projects and management actions, and development and adoption of the programs to assist with impaired wells.

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<sup>153</sup> Government Code § 54954(a).

<sup>154</sup> Government Code sec. 7296.2.

<sup>155</sup> Government Code sec. 7296.2.

<sup>156</sup> Government Code sec. 7296.2.

11. **Engagement on financial issues:** Ensure that the GSP states that it will conduct outreach to DACs before approving operating budgets and enacting groundwater fees.

#### **K. The Coordination Agreement Is Inadequate.**

“If groundwater sustainability agencies develop multiple groundwater sustainability plans for a basin,” they must submit a coordination agreement that “...ensure[s] the coordinated implementation of the groundwater sustainability plans for the entire basin.”<sup>157</sup> A “coordination agreement” is defined by SGMA as “a legal agreement adopted between two or more groundwater sustainability agencies that provides the basis for coordinating multiple agencies or groundwater sustainability plans within a basin pursuant to this part.”<sup>158</sup> The SGMA regulations require coordination agreements to “ensure that the Plans are developed and implemented utilizing the same data and methodologies, and that elements of the Plans necessary to achieve the sustainability goal for the basin are based upon consistent interpretations of the basin setting.”<sup>159</sup>

Coordination agreements must also describe “[h]ow the Agencies have used the same data and methodologies for assumptions described in Water Code Section 10727.6 to prepare coordinated Plans, including the following:”

(A) Groundwater elevation data, supported by the quality, frequency, and spatial distribution of data in the monitoring network and the monitoring objectives as described in Subarticle 4 of Article 5.

(B) A coordinated water budget for the basin, as described in Section 354.18, including groundwater extraction data, surface water supply, total water use, and change in groundwater in storage.

(C) Sustainable yield for the basin, supported by a description of the undesirable results for the basin, and an explanation of how the minimum thresholds and measurable objectives defined by each Plan relate to those undesirable results, based on information described in the basin setting.<sup>160</sup>

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<sup>157</sup> Water Code § 10733.4(b)(3).

<sup>158</sup> Water Code § 10721(d).

<sup>159</sup> 23 CCR § 357.4.

<sup>160</sup> 23 CCR § 357.4.

Finally, “[t]he coordination agreement shall explain how the Plans implemented together, satisfy the requirements of the Act and are in substantial compliance with this Subchapter.”

Here, the Kings Subbasin Coordination Agreement submitted with the GSP does not comply with these requirements. As an initial matter, the Coordination Agreement is submitted only by GSAs in the subbasin, rather than the entire basin as required by SGMA.

While the Coordination Agreement does contain a water budget, it fails for the same reasons discussed above with respect to the GSP water budget. We note that in particular that the Coordination Agreement’s description of why data during the recent drought was not used in the water budget is inadequate. The GSAs are not free to ignore relevant data by merely concluding that it is “extreme” and therefore not relevant to average conditions. Unfortunately, such events are likely to become much more frequent as a result of climate change, which SGMA requires GSAs to consider.<sup>161</sup>

Further, while the Coordination Agreement briefly discusses sustainable yield, it does not provide a description of the undesirable results for the basin, or an explanation of how the minimum thresholds and measurable objectives defined by each plan relate to those undesirable results. Instead, the Agreement states that “[a] water budget resulting in no ongoing storage change under average conditions was used as the basis for determining sustainable yield, in addition to localized review for areas with potential undesirable results.” There is no description in the Coordination Agreement regarding the undesirable results established by each signatory to the Agreement, or how the minimum thresholds and measurable objectives for each plan result to those undesirable results. There is certainly no description of how the differing approaches in each GSP will result in sustainable groundwater management in the basin as a whole.

In short, the Coordination Agreement does not explain how the relevant GSPs, implemented together, will result in sustainable groundwater management. As the GSP is not supported by a coordination agreement that meets the relevant statutory and regulatory requirements, the GSP is inadequate.

#### **L. The GSP Does Not Comply With California Water Law.**

##### **a. The GSP Conflicts With Water Code § 106.3.**

As noted above, California codified access to an adequate supply of safe and affordable drinking water as a human right in 2012. Water Code § 106.3(a) provides as follows:

It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and

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<sup>161</sup> See 23 CCR § 354.18(c)(3).

accessible water adequate for human consumption, cooking, and sanitary purposes.

It is often incorrectly stated that this section is not binding. This is a misnomer for several reasons. First, § 106.3(b) expressly states in that “[a]ll relevant state agencies, including the department, the state board, and the State Department of Public Health, shall consider this state policy when revising, adopting, or establishing policies, regulations, and grant criteria when those policies, regulations, and criteria are pertinent to the uses of water described in this section.” The use of the mandatory “shall” rather than a permissive “may” indicates that the requirement of subsection (b) to consider the Human Right to Water is a mandatory duty of DWR and the SWRCB.

Moreover, there is nothing in § 106.3 that indicates that either a GSA or a state agency may take an action that conflicts with the human right of all Californians to access safe and affordable drinking water. Rather, the section and its requirements are subject to only three narrow exceptions. First, subsection (c) states that “[t]his section does not expand any obligation of the state to provide water or to require the expenditure of additional resources to develop water infrastructure beyond the obligations that may exist pursuant to subdivision (b).” This exception applies only to the “state,” and does not apply to GSAs. Further, it speaks only to the obligation to provide water or to require development of water infrastructure, not to any obligation to manage groundwater resources in a way that protects existing access to drinking water.

Second, subsection (d) states that “[t]his section shall not apply to water supplies for new development.” It is silent regarding water supplies for existing households.

Third, subsection (e) states that “[T]he implementation of this section shall not infringe on the rights or responsibilities of any public water system.” As a GSA is not a public water system, this exception is not relevant here.

Given that none of the three exceptions contained in § 106.3 apply to the development and implementation of GSPs, they must be consistent with the Human Right to Water, and separately, DWR must consider the human right on review of GSPs. Because the GSP at issue here conflicts with § 106.3 by interfering with access to safe and affordable drinking water, DWR cannot approve it.

### **b. The GSP Threatens to Infringe Upon Water Rights**

In enacting SGMA, the legislature found and declared that “[f]ailure to manage groundwater to prevent long-term overdraft infringes on groundwater rights.”<sup>162</sup> The text of SGMA further notes that “[n]othing in this part, or in any groundwater management plan adopted pursuant to this part, determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights.”<sup>163</sup> As discussed in detail above, the GSP allows continued overdraft above the safe yield of the basin, such that drinking water wells (especially domestic wells) will continue to go dry, infringing upon the rights of overlying users of groundwater. DWR cannot approve the GSP until it is revised to protect the rights of residents of disadvantaged communities and/or low-income households who hold overlying rights.<sup>164</sup>

### **c. The GSP Conflicts with the Reasonable And Beneficial Use Doctrine**

The “reasonable and beneficial use” doctrine is codified in the California Constitution. It 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.”<sup>165</sup> The doctrine applies to all water users, regardless of basis of water right, and all water rights and methods of diversion.<sup>166</sup> A determination of reasonableness of a use “cannot be resolved in vacuo isolated from statewide considerations of transcendent importance.”<sup>167</sup>

DWR and the Water Board must ensure that GSPs’ water allocations are consistent with the reasonable and beneficial use doctrine.<sup>168</sup> In doing so, DWR and the Board must follow the Legislature’s directive to prioritize domestic use of water resources over irrigated agriculture<sup>169</sup>

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<sup>162</sup> AB 1739 (2014).

<sup>163</sup> Water Code § 10720.5(b).

<sup>164</sup> See also Water Code § 10723.2 [The groundwater sustainability agency shall consider the interests of all beneficial uses and users of groundwater... [including] Domestic well owners.”].

<sup>165</sup> Cal Const, Art. X § 2; see also Water Code § 100; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 105 [“...superimposed on those basic principles defining water rights is the overriding constitutional limitation that the water be used as reasonably required for the beneficial use to be served.”].

<sup>166</sup> *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 367, 372; *Light v. State Water Resources Control Board*, (2014) 226 Cal. App. 4th 1463, 1479.

<sup>167</sup> *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 140.

<sup>168</sup> Water Code § 275 [“The department and board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state”]; *Light*, 226 Cal.App.4th at 1482-83 [same].

<sup>169</sup> Water Code § 106 [“It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation”]; *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 103 .

and ensure that SGMA implementation furthers the human right to safe and affordable drinking water<sup>170</sup> — both statewide considerations of transcendent importance. In other words, a GSP that allows use of water for irrigation at the expense of use of water for domestic purposes is not consistent with the reasonable and beneficial use doctrine.

The reasonable and beneficial use doctrine applies here given the negative impacts of the GSP on groundwater supply and quality, which are likely to unreasonably interfere with the use of groundwater for drinking water and other domestic uses. As the GSP authorizes waste and unreasonable use, and indeed does not even analyze the reasonable and beneficial use doctrine at all, it conflicts with the reasonable and beneficial use doctrine and the California Constitution. As a result, DWR cannot approve the GSP as presently drafted.

#### **d. The GSP Conflicts with the Public Trust Doctrine**

The public trust doctrine applies to the waters of the State, and establishes that “the state, as trustee, has a duty to preserve this trust property from harmful diversions by water rights holders” and that thus “no one has a vested right to use water in a manner harmful to the state’s waters.”<sup>171</sup>

The public trust doctrine has recently been applied to groundwater where there is a hydrological connection between the groundwater and a navigable surface water body.<sup>172</sup> In *Environmental Law Foundation v. State Water Resources Control Board* (“*ELF*”), the court held that the public trust doctrine applies to “the extraction of groundwater that adversely impacts a navigable waterway” and that the government has an affirmative duty to take the public trust into account in the planning and allocation of water resources.<sup>173</sup> Under *ELF*, the Public Trust doctrine imposes an affirmative and independent obligation to consider the public trust that applies to DWR’s decisions regarding submitted GSPs, imposing a legal duty on DWR to not only consider the potential adverse impacts of groundwater extractions on navigable waterways but also “to protect public trust uses whenever feasible.”<sup>174</sup> The court also specifically held that SGMA does not supplant the requirements of the common law public trust doctrine.<sup>175</sup>

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<sup>170</sup> Water Code § 106.3.

<sup>171</sup> *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 106; *see also Nat’l Audubon Soc’y v. Superior Court* (1983) 33 Cal.3d 419, 426 [“before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.”].

<sup>172</sup> *Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 844.

<sup>173</sup> *Id.* at 856-62.

<sup>174</sup> *Id.* at 865.

<sup>175</sup> *Id.* at 862-870.

Notably, the public trust doctrine applies to both currently navigable surface water bodies and surface water bodies that were historically navigable at the time of statehood.<sup>176</sup> Further, certain rivers like the San Joaquin River have been declared navigable in statute.<sup>177</sup>

In contrast to these requirements, the GSP does not consider impacts on public trust resources, or attempt to avoid insofar as feasible harm to the public’s interest in those resources. DWR cannot approve the GSP without evaluating impacts to public trust resources and protecting public trust uses whenever feasible. Specifically, DWR must (1) identify any public trust resources within the basin; (2) identify any public trust uses within the basin; (3) identify and analyzing potential adverse impacts of groundwater extractions on public trust resources and uses; and (4) determine the feasibility of protecting public trust uses and protect such uses whenever feasible.

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DWR cannot approve the GSP because it fails to protect access to drinking water. We welcome the opportunity to discuss our concerns with the Department of Water Resources and the State Water Resources Control Board. Furthermore, we urge DWR to review this and all other GSPs according to the Human Right to Water Scorecard, as we have done in this letter.¹⁷⁸ We hope to successfully work with GSAs, communities, DWR and the SWRCB to ensure that groundwater management is equitable and sufficiently protective of vital drinking water resources. Going forward, we ask DWR to ensure that GSPs currently being developed adhere to the standards in the Human Right to Water Scorecard, and that these standards are followed during GSP implementation.

Sincerely,

Nataly Escobedo Garcia and Amanda Monaco
Leadership Counsel for Justice and Accountability

¹⁷⁶ See *San Francisco Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202, 232 citing *Western Oil & Gas Asso. v. State Lands Com.* (1980) 105 Cal.App.3d 554, 562 [“When California became a state in 1850 it succeeded to sovereign ownership of various tidelands and submerged lands under the terms of common law trust doctrine... .”]; *PPL Montana, LLC v. Montana* (2012) 565 U.S. 576, 592 [“For state title under the equal-footing doctrine, navigability is determined at the time of statehood...and based on the ‘natural and ordinary condition’ of the water.”] [internal citation omitted].

¹⁷⁷ Harb. & Nav. Code s. 105 [affirmatively declaring the San Joaquin River to be navigable “between its mouth and Sycamore Point.”].

¹⁷⁸ Attached as Exhibit B.