



Department of Water Resources

Karla Nemeth, Director

Taryn Ravizzini, Deputy Director of Statewide Groundwater Management

Craig Altare, Supervising Engineering Geologist

Steven Springhorn, Senior Engineering Geologist

Keith Wallace, Project Manager

State Water Resources Control Board

E. Joaquin Esquivel, SWRCB Board Chair

Dorene D'Adamo, SWRCB Board Member

Tam M. Dudoc, SWRCB Board Member

Sean Maguire, SWRCB Board Member

Laurel Firestone, SWRCB Board Member

Eileen Sobeck, Executive Director

Natalie Stork, Chief of Groundwater Management Program

Andrew Altevogt, Program Coordinator of Safe and Affordable Drinking Water

May 15, 2020

Re: Recommendations for DWR and SWRCB Action Regarding the North Fork 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 North Fork Kings GSA area have the most to gain and the most to lose from SGMA implementation in the region. Communities like Lanare 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 North Fork Kings Groundwater Sustainability Agencies (GSA) has not adequately done so in this GSP. As described below, the GSP is likely to allow at least 83% of drinking water wells to go dry, and allows many drinking water contaminants to go unmonitored, 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 North Fork 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 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, will 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

~ ~ ~ ~ ~

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.

Table of Contents

The GSP Does Not Comply with SGMA Because It Lacks Required Information	5
DWR Cannot Approve The GSP Because It Will Cause Disproportionate And Disparate Negative Impacts On Protected Classes.	5
The GSP Does Not Adequately Evaluate Whether Adverse Impacts Are “Significant And Unreasonable” Or Consider Beneficial Uses And Users.	7
DWR Cannot Approve The GSP Because It Was Developed With Inadequate Transparency, Accessibility, Consideration Of Public Input And Representation.	8
The Water Budget is Inadequate	10
The GSP’s Sustainable Management Criteria for Groundwater Levels are not Adequate	13
The Undesirable Result for Groundwater Levels are Inadequate	13
The Measurable Objectives for Groundwater Levels are Inadequate	15
The Minimum Thresholds for Groundwater Levels are Inadequate	15
The GSP Fails to Adequately Address Groundwater Quality Through its Sustainable Management Criteria for Groundwater Quality	18
The “Contaminants of Concern” for Groundwater Quality Are Inadequate	19
The Minimum Threshold for Groundwater Quality is Inadequate	19
The Monitoring Network is Inadequate With Respect to Groundwater Levels and Groundwater Quality	22
Groundwater Level Monitoring	22
Groundwater Quality Monitoring	23
Projects and Management Actions Are Inadequate	25
The Projects and Management Actions are Inadequate, Do Not Protect Drinking Water for Disadvantaged Communities, and Will Likely Cause Disparate Impacts.	26
Minimum Requirements for Projects and Management Actions	27
Plan Implementation Section is Inadequate	27
The Coordination Agreement Is Inadequate.	29
The GSP Does Not Comply With California Water Law.	31
The GSP Conflicts With Water Code § 106.3.	31
The GSP Threatens to Infringe Upon Water Rights	32
The GSP Conflicts with the Reasonable And Beneficial Use Doctrine	32

~ ~ ~ ~ ~

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, a complete description of the monitoring network, and a complete description of the water budget. Therefore, the GSP fails to “include[] the information required by [SGMA] and [its accompanying regulations],” and is thus inadequate.⁹ These inadequacies prevent DWR from being able to determine that the GSP will likely achieve its sustainability goal.¹⁰ Given these deficiencies, we ask DWR not to approve the plan as drafted.

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

The North Fork 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 its 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.¹¹ In addition, the state’s Fair Employment and Housing Act guarantees all Californians the right to hold and enjoy housing

⁹ 23 CCR § 355.4(a)(2).

¹⁰ Water Code § 10733(a); 23 CCR § 355.4(b).

¹¹ 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.¹²

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.”¹³ 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.¹⁴ Similarly, communities of color in the Central Valley are disproportionately impacted by groundwater contamination.¹⁵

Consistent with these studies, this GSP will cause disproportionate negative impacts on communities of color reliant on small water systems and domestic wells. North Fork Kings GSA spans a portion of Fresno County, which contains at least 93 disadvantaged unincorporated communities (DUCs).¹⁶ Approximately 50% of Fresno County’s total population are people of color, compared to 67% of people living in Fresno County DUCs.¹⁷ As an example, Lanare is a DUC within the boundaries of the GSA that is 88.5% Hispanic or Latino and 11.5% African American, according to the most recent American Communities Survey data.¹⁸

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

¹² Gov. Code § 12900 et seq.

¹³ 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.

¹⁴ *Id.* at p. 6.

¹⁵ 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>.

¹⁶ 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].

¹⁷ *Id.* at pp. 25, 30.

¹⁸ Data available at <https://data.census.gov/cedsci/>, accessed on May 14, 2020.

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 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.¹⁹ “‘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.”²⁰ “‘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.”²¹ 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.²²

If a GSP is unlikely to achieve its self-selected sustainability goal, DWR cannot approve the plan.²³ 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.²⁴ Likewise, a plan that cannot achieve sustainable groundwater management has failed to set a valid sustainability goal, in violation of SGMA.²⁵ 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.²⁶

In addition to defining undesirable results, GSPs must quantify benchmarks for groundwater conditions, or “minimum thresholds,” that may cause undesirable results if exceeded.²⁷ GSPs must include “an explanation of how the Agency has determined that basin conditions at each

¹⁹ Water Code § 10733(a).

²⁰ Water Code § 10721(u).

²¹ Water Code § 10721(v).

²² Water Code § 10721(x).

²³ Water Code § 10733(a).

²⁴ Water Code § 10721(v).

²⁵ Water Code § 10721(u).

²⁶ 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.”).

²⁷ 23 CCR 354.28(a).

minimum threshold will avoid undesirable results for each of the sustainability indicators.”²⁸ A GSP’s determination of when an undesirable result will occur must be based on analysis of when adverse impacts become “significant” and “unreasonable.”²⁹

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.³⁰ Failure to consider the interests of a category or categories of beneficial users is itself grounds for DWR to decline to approve a plan.³¹ 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.³²

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.

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.

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. GSAs are also subject to the requirements of the Bilingual Services Act,

²⁸ 23 CCR 354.28(b)(2).

²⁹ 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.”].

³⁰ Water Code § 10723.2.

³¹ Water Code § 10723.2; 23 CCR 355.4(b) [“The Department shall evaluate a Plan ... to determine whether the Plan ... complies with the Act”].

³² 23 CCR 355.4(b)(4).

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.³³

In addition, GSAs must 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.”³⁴ 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.”³⁵ The GSA thus must engage “diverse social, cultural, and economic elements of the population within the basin.”³⁶ 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.³⁷

The GSA had a stakeholder engagement plan, worked with both Self-Help Enterprises and our organization to do outreach to disadvantaged communities in the area, had a DAC representative on the GSA board, had a Rural Communities Advisory Committee containing representatives from disadvantaged communities in the GSA area, and had a public comment period of at least 60 days. The GSA conducted workshops at accessible times and places for residents to attend, adequately noticed these workshops in English and Spanish, and provided interpretation and some translated materials. The GSA did not provide translation at most GSA board meetings, but began to do so upon request near the end of GSP development.

However, while the agency performed well on these indicators of public participation, the GSA did not consider or incorporate stakeholder feedback into its evaluation of impacts on disadvantaged communities, or into its policies, projects or management actions. Residents worried about their wells asked repeatedly at GSA board meetings and Rural Community Advisory Committee meetings for more protection of their drinking water wells, including a domestic well mitigation program. These requests were echoed by our organization and Self-Help Enterprises at board meetings, where we made repeated asks for the GSA to evaluate how many wells would go dry from the proposed sustainable management criteria, asked for more protective minimum thresholds, and asked for a domestic well mitigation program, among other requests. The board did not consider these requests, and in doing so failed to meet the requirements of SGMA.

³³ Bilingual Services Act, Gov. Code, §§ 7293, 7295.

³⁴ Water Code § 10723.2.

³⁵ 23 CCR 354.10(d).

³⁶ Guidance Document for Groundwater Sustainability Plan; Stakeholder Communication and Engagement, p. 1.

³⁷ 23 CCR 355.4(b)(4).

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

1. **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.³⁸ DWR regulations also require that the historical water budget “start[] with the most recent available information.”³⁹ 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.”⁴⁰

The GSP does not conform to these requirements. The GSP identifies all components of the water budget and includes descriptions of how data for each component were obtained or estimated; however, not all of the described water budget components apply to the North Fork Kings GSA. For the reasons identified below, the description of the water budget in the GSP is not complete or transparent, and it is not clear how drinking water users will be protected if sustainable yield allocations or groundwater pumping restrictions are implemented.

The GSP should contain summary information on land use and crop evapotranspiration information in the GSA area so that these values can be assessed. Based on the GSP, agricultural water use is supplied by a combination of surface water and groundwater and is the largest component of the water budget. Agricultural pumping was estimated to be 266,000 acre-feet per year (AFY), which is about 150% of the average surface water supply. Surface water comes primarily from the Kings River and the availability of surface water supply varies annually depending on climatic conditions. Surface water delivery records were obtained from Watermaster reports and are considered relatively accurate. Agricultural demand not met by surface water is supplied by groundwater pumping. Groundwater pumping for irrigation was estimated as the crop water demand minus the surface water deliveries. Crop water demand was calculated using county land use data and annual crop evapotranspiration from DWR. The estimation of groundwater pumping also considered irrigation efficiency, effective precipitation,

³⁸ 23 CCR § 354.18.

³⁹ 23 CCR 354.18(c)(2)(B).

⁴⁰ Water Code § 10721(w).

surface water system losses, and deliveries for intentional recharge. This is a common and accepted method for estimating agricultural pumping in areas where pumping data is not available. However, the GSP should contain summary information on land use and crop evapotranspiration information in the GSA area so that these values can be assessed.

The GSP should include more specific information on public water supplies, population, and rural residential land use so that the accuracy and uncertainty in these values can be assessed. Based on the GSP, the water supply for municipal and industrial uses (M&I) comes solely from groundwater pumping. “M&I groundwater pumping by urban water suppliers was collected directly from the local urban Agencies” (Section 3.3.6). The GSP does not specifically identify these public water suppliers, which makes it unclear if the demands by Lanare Community Services District, Laton Community Services District, and Riverdale Public Utilities District are considered. Specific data collected are not reported in the GSP, but water budget results show groundwater pumping from local urban agencies averages 1,400 AFY. “Rural residential water demands include domestic well pumping at farm houses and rural communities that are not served water from a City, County Service Area, Community Services District or other water utility” (Section 3.3.6). Demand for rural residential users was estimated from estimates of indoor and outdoor water use, which were, in turn, estimated from (1) 2010 Census data, (2) estimated per capita water use, and (3) estimated parcel size and irrigated area. Rural residential demand was estimated to be 0.49 acre-feet (AF) per person per year, or an average of 7,200 AFY of rural residential groundwater pumping. Therefore, total pumping for M&I use in the historical water budget was estimated to be 8,600 AFY, which is about 3% of the volume of agricultural pumping. For the current water budget, it was assumed that M&I water use is unchanged relative to use during the historical period. Historical and current water budget results are presented for the entire GSA area as the average for a normal year, a dry year, and a wet year. The GSP should include more specific information on public water supplies, population, and rural residential land use so that the accuracy and uncertainty in these values can be assessed.

The GSP should present the uncertainty in groundwater storage change due to a plausible range in groundwater storage properties and compare that to the storage change calculated from the water budget. The GSP contains a section on uncertainty in the water budget and its effect on calculation of groundwater storage change. The lowest uncertainty relates to surface water deliveries (5%), which are measured. The largest component of water use is crop evapotranspiration, which has an uncertainty of 15%. The groundwater storage change estimated from the water budget is about 50% greater than the groundwater storage change estimated from water levels and groundwater storage properties. Because the storage change calculated from water level change and groundwater storage properties is considered more accurate, it is assumed that the water budget likely contains inaccurate estimates of several components. Based on this assumption, a water budget correction factor of 32,500 AFY is applied to the current and future

water budgets to attempt to align the water budget storage change with the storage change estimated from water levels and groundwater storage properties.

The GSP should include more detailed information on how increases in M&I water demand were determined. The GSP includes projected water budgets for 2040 and 2070. The effects of climate change were incorporated into the water budgets to account for changes to precipitation, evapotranspiration, and surface water supplies. The future water budgets include increases in M&I groundwater pumping from both public agencies and from rural domestic users. Although population growth was considered for projected water use, according to the GSP that “Future water use for municipal areas has been updated based on projected population rates and updated per capita water use. Projected populations for smaller urban areas in the GSA are taken from the Fresno County Council of Governments 2017 report” (Section 3.3.10), the GSP does not identify the estimated population growth values. Groundwater pumping by public agencies is estimated to increase to 1,600 AFY and 1,700 AFY for 2040 and 2070, respectively. Groundwater pumping by rural domestic users is estimated to increase to 3,000 AFY and 3,300 AFY for 2040 and 2070, respectively. However, no information is provided showing how these increases were determined. The GSP should include more detailed information on how these increases in M&I water demand were determined, including the underlying population growth estimates.

The GSP should provide more detailed information as to how DACs, CSDs, and domestic well users would be considered if a groundwater allocation program is implemented, and how groundwater pumping restrictions would apply to domestic well users. The GSP provides an estimate of sustainable yield for the entire subbasin (1,140,000 AFY) “as the Total Groundwater Recharge (from natural and artificial sources) minus the Groundwater Outflow” (Section 3.3.13). The GSP notes that the estimated sustainable yield value is approximate and subject to change. The GSP recognizes the estimated “value cannot be used to estimate sustainable yield in local areas. The effective sustainable yield on a per acre basis will be different for each GSA and may also vary in different parts of a GSA” (Section 3.3.13). Groundwater allocations are discussed in the GSP as a potential management action to achieve sustainability: “The sustainable yield and ultimate groundwater allocation would take into consideration the existing water rights holders, disadvantaged communities (DACs), community service districts (CSDs), public utility districts (PUDs), groundwater-dependent ecosystems (GDEs), and California Native American tribes” (Section 6.3.3.1). The GSP also identifies groundwater pumping restrictions as a potential management action, which could include “prohibition of new groundwater exports, requiring new developments to prove sustainable water supply, pumping restrictions during droughts, and moratorium on new production wells” (Section 6.3.6.1). The GSP should provide more detailed information as to how DACs, CSDs, and domestic well users would be considered if a groundwater allocation program is implemented; for example, would full demand by drinking

water users be protected, regardless of the calculated sustainable yield number? The GSP should also identify how groundwater pumping restrictions would apply to these drinking water users.

The GSP should provide a discussion of the uncertainty in the water budget correction factor, the uncertainty in the benefits gained from the Projects & Management Actions, and the effect of these uncertainties in achieving sustainability by 2040. The projected water budget shows sustainability is reached by 2040 for normal year hydrologic conditions, with no annual change in groundwater storage. This sustainability is achieved using the water budget correction factor (32,000 AFY) described above and the projected effects of Projects & Management Actions (68,900 AFY). In a dry year scenario, the projected water budget reflects an estimated 185,900 AFY decline in groundwater storage. A discussion of the uncertainty in the water budget correction factor and the benefits gained from the Projects & Management Actions are necessary to demonstrate how sustainability will be achieved by 2040.

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,⁴¹ and must be based on an analysis of what are “significant” and “unreasonable” impacts.⁴² These policy decisions must also avoid disparate impacts on protected groups pursuant to state and federal law.⁴³ 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.”⁴⁴ GSAs must also describe the “processes and criteria relied upon to define

⁴¹ Water Code § 10723.2.

⁴² 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.”].

⁴³ Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

⁴⁴ 23 CCR § 354.26.

undesirable results.”⁴⁵ 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’s definition of undesirable results for groundwater levels is inadequate because it allows significant and unreasonable impacts to the overwhelming majority of beneficial users to occur without triggering an undesirable result. The GSP states that an undesirable result for groundwater levels will only be triggered when “either the water level has declined to a depth that a new productive well cannot be constructed or when the water level has declined to a depth that water quality cannot be treated for beneficial use.”⁴⁶ This standard is absolutely inconsistent with sustainable groundwater management and the intent of SGMA. Reaching a situation anywhere near that level of groundwater decline would have unreasonably severe, and likely irreversible, impacts on domestic well users, particularly given that reaching the minimum thresholds in the North Fork Kings GSA alone would dewater 83% of domestic wells and partially dewater an additional 8% of domestic wells within a 1.5 radius from indicator wells.⁴⁷ It appears that domestic wells in the south of the GSA area would be most impacted by such groundwater decline.⁴⁸ Furthermore, the vast majority of wells that the GSP allows to go dry before triggering the undesirable result are domestic wells relied upon by low-income households and residents of disadvantaged communities, causing a disparate impact in violation of state law. In order to comply with SGMA and avoid these disparate impacts, the GSA must change the undesirable result or define its own local undesirable result to prevent widespread drinking water impacts in the GSA area.

Residents in Lanare are concerned with this unacceptable proposed undesirable result definition because it could significantly harm their drinking water resources and drinking water resources of many families and communities in the GSA area who cannot afford to deepen their wells. Residents have stated that, while their economy and many jobs currently depend on agriculture, the GSA must balance the pumping needs of agriculture with the basic needs of all people in the GSA area to have access to safe and reliable drinking water. As written, the plan prioritizes agricultural needs over the basic human right to drinking water in contravention of SGMA and state law.

⁴⁵ 23 CCR § 354.26.

⁴⁶ North Fork Kings GSP pg. 4-3, adopted December 18, 2019.

⁴⁷ Focused Technical Review, Figure 3.

⁴⁸ Focused Technical Review, Figure 3.

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.”⁴⁹

The GSP states that the measurable objective at each monitoring well is the current water level, minus the level of decline that would naturally occur based on historic trends from 1997 to 2012, plus “the basin wide agreed incremental mitigation rate for correction” which “provides the calculation of the anticipated water level at 2040.”⁵⁰ The GSA explains that this incremental mitigation rate was “selected based on the understanding that correcting decades of overdraft will take many years and implementation is dependent on many factors.”⁵¹ The GSP states that, “[b]y 2040, there should no longer be a long-term average decline, therefore, the water level estimated for 2040 becomes the measurable objective.”⁵² This determination of measurable objectives does not consider the impact on beneficial users in the GSA area, or whether impacts on these categories of users are “significant and unreasonable.”

“Long-term” “average” rates of decline mask both “short term” impacts on drinking water and more localized long-term impacts. 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.

a. 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.”⁵³ SGMA requires GSAs to analyze both the significance and reasonableness of proposed minimum thresholds,⁵⁴ and minimum thresholds must have the purpose of avoiding “significant and unreasonable” impacts on beneficial users.⁵⁵ The GSA’s determination of what is “significant and unreasonable” must consider the impacts

⁴⁹ 23 CCR § 354.30(a)

⁵⁰ North Fork Kings GSP pg. 4-15, adopted December 18, 2019.

⁵¹ North Fork Kings GSP pg. 4-16, adopted December 18, 2019.

⁵² North Fork Kings GSP pg. 4-15, adopted December 18, 2019.

⁵³ 23 CCR § 354.28.

⁵⁴ 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).

⁵⁵ 23 CCR § 354.26.

on all types of beneficial users, including disadvantaged communities.⁵⁶ For groundwater levels specifically, GSAs must place minimum thresholds for each monitoring site at the level “that may lead to undesirable results.”⁵⁷ 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.”⁵⁸

The North Fork Kings GSA’s approach to setting minimum thresholds did not comply with these requirements. The GSA placed its minimum thresholds at a level below the measurable objectives that would allow for a five-year drought, based on the 2012-2016 drought.⁵⁹ The GSA states that it established these minimum thresholds to “provide[] the operational flexibility to allow for periods of increased groundwater pumping during dry periods.”⁶⁰ This goal only considers the interests of those who have wells deep enough to keep pumping at lower depths. Upon request of Leadership Counsel and Self-Help Enterprises, the GSA conducted an analysis of how many wells would go dry if levels were to reach its minimum thresholds. Despite concluding that between 259 and 519 domestic wells would go dry,⁶¹ the GSA did not modify its minimum thresholds or incorporate this analysis into its minimum thresholds determination.⁶² These minimum thresholds were therefore not based on a consideration of impacts to all categories of beneficial users, and whether those impacts are significant and unreasonable.

As shown in the attached Focused Technical Review, reaching the minimum thresholds in the North Fork Kings GSA would dewater 83% of domestic wells within a 1.5 radius from indicator wells, or approximately 348 wells, and partially dewater an additional 8% of domestic wells, or approximately 34 more wells.⁶³ It is unclear whether any of these drinking water wells are community water system wells. Further, as noted above, these impacts are likely to cause a disparate impact on protected classes under civil rights law.

Another concerning fact that our Focused Technical Review revealed was that the minimum thresholds proposed in the GSP may cause changes to groundwater gradients, thereby impacting overall flows of groundwater throughout the subbasin and affecting the movement of groundwater contaminant plumes. This serious alteration in the flow of groundwater could lead

⁵⁶ Water Code § 10723.2.

⁵⁷ 23 CCR § 354.28.

⁵⁸ 23 CCR § 354.28.

⁵⁹ North Fork Kings GSP pg. 4-7, adopted December 18, 2019.

⁶⁰ North Fork Kings GSP pg. 4-8, adopted December 18, 2019.

⁶¹ North Fork Kings GSP pg. 276-277, Figures 4-2 and 4-3, adopted December 18, 2019. These two Figures show how many wells will go dry in each section of the GSP area; we added the numbers in each section to reach the total number in each Figure. These numbers are in contrast to the conclusion in the attached Focused Technical Review, which concludes 83% of wells would go dry if the minimum threshold is reached. Regardless of which estimate is more accurate, these percentages are wholly unacceptable.

⁶² North Fork Kings GSP pg. 4-11, adopted December 18, 2019.

⁶³ Focused Technical Review, Figure 3.

to other unforeseen impacts as well. The GSA must reconsider the minimum thresholds to ensure that it does not cause such a significant and unreasonable impact to the hydrology of the subbasin.

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. **Thoroughly 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,⁶⁴ measurable objectives and minimum thresholds,⁶⁵ including a map of wells that will go fully and partially dry at the measurable objectives and minimum thresholds. Ensure that the GSP includes estimates of the increased pumping costs from additional lift needed to pump water from lower elevations if the undesirable results, measurable objectives and minimum thresholds were to be reached.
2. **Avoid significant and unreasonable impacts to drinking water users in creating sustainable management criteria:**⁶⁶ 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.⁶⁷ Therefore the GSP must explicitly state how the GSA considered drinking water impacts in shaping undesirable results, measurable objectives and minimum thresholds for groundwater levels; for example, the GSP could state how its well impact analysis supported setting stricter measurable objectives and minimum thresholds near at-risk communities.
3. **Incorporate new drinking water data into sustainable management criteria:**⁶⁸ 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 sustainable management criteria:**⁶⁹ Ensure that the GSP discusses how stakeholder input from DAC community members was considered in the development of undesirable results, measurable objectives and minimum thresholds. For example, the GSP could state how they took the

⁶⁴ 23 CCR § 354.26(c)

⁶⁵ 23 CCR § 354.28(b)(4)

⁶⁶ Water Code § 10723.2

⁶⁷ 23 CCR § 354.26.

⁶⁸ 23 CCR § 354.38(e)(3)

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

results of the well impact assessment to the public through meetings, workshops, or Advisory Committees, and together with stakeholders decided how to change sustainable management criteria to protect drinking water, or other programs to implement to mitigate these impacts.

5. **Avoid disparate impact:**⁷⁰ Ensure that the measurable objectives and minimum thresholds for groundwater levels are established in such a way that prevents a disproportionately negative impact from occurring on communities of color in the GSP area. For example, the GSP should ensure that the same minimum threshold 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 Fails to Adequately Address Groundwater Quality Through its 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.⁷¹ Recharge projects, if implemented without proper analysis and planning, could also have severe impacts on groundwater quality by facilitating water percolation on land contaminated with years of pesticide, herbicide, fungicide, and fertilizer application and/or by releasing natural contaminants like uranium into groundwater.⁷² A groundwater market is likely to cause geographic 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,⁷³ based on a determination of what is a “significant and unreasonable” impact on all beneficial users, including domestic well users and disadvantaged communities.⁷⁴ This GSP fails to clearly define its undesirable results, minimum thresholds or measurable objectives for groundwater quality, so the public and DWR

⁷⁰ Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

⁷¹ See Smith et al., Overpumping Leads to California Groundwater Arsenic Threat, 9 Nature Communications 2089 (2018), available at <https://www.nature.com/articles/s41467-018-04475-3>.

⁷² See Fakhreddine et al., Protecting Groundwater Quality In California, Management Considerations For Avoiding Naturally Occurring And Emerging Contaminants (2019), available at <https://www.edf.org/sites/default/files/documents/groundwater-contaminants-report.pdf> [“Recharging water, even clean water, into a previously uncontaminated aquifer can potentially alter the existing geochemistry and hydrology and subsequently cause the release of geogenic contaminants from soils and sediments.”].

⁷³ Water Code § 10721(w)(4); 23 CCR § 354.28(c)(4).

⁷⁴ Water Code §§ 10727.2(d)(2); 10721(x)(4)

cannot evaluate their impact on beneficial users in the GSA area, and does not monitor for key drinking water contaminants.

a. The “Contaminants of Concern” for Groundwater Quality Are Inadequate

The GSP states that the GSA will monitor for arsenic, chromium, fluoride, gross alpha, lead, nitrate, 123-TCP, uranium, aluminum, iron, manganese and total dissolved solids.⁷⁵ As written, the groundwater quality minimum threshold puts all drinking water at risk of contamination from drinking water contaminants that are not included in this list of contaminants of concern. The impacts of this contamination will be particularly felt by domestic wells, which are most vulnerable to drinking water contamination, and are not going to be monitored for compliance with any drinking water contamination that may result from the GSA’s groundwater management activities. Additionally, Lanare’s water system is contaminated with benzene, which is not one of the GSA’s contaminants of concern. Since benzene will not be monitored for compliance with sustainable management criteria, groundwater activities could aggravate or spread this contaminant without the GSA’s knowledge.

b. The Minimum Threshold for Groundwater Quality is Inadequate

GSAs must place groundwater quality minimum thresholds for each monitoring site at the level “that may lead to undesirable results.”⁷⁶ Under the SGMA regulations, the GSP 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.”⁷⁷

The GSP states that a violation of a minimum threshold will have occurred if either of the following situations occur for more than two consecutive years: (a) at monitoring sites where a contaminant of concern has historically violated the MCL, the minimum threshold is when measurements of the contaminant show a “groundwater quality trend,” and (b) at monitoring sites where a contaminant of concern has historically not reached the MCL, the minimum threshold is when a contaminant violates the MCL.⁷⁸ The GSP states that “[i]f water quality sampling indicates an MCL exceedance or concerning trends, then an evaluation will need to occur to determine if the exceedance is a result of groundwater management activities.”⁷⁹

The GSP does not define a “groundwater quality trend,” or how it will determine that an increase in concentration of a contaminant was caused by its groundwater management activities. Additionally, and perhaps most concerningly, only three of the 35 wells in the GSA’s

⁷⁵ North Fork Kings GSP, p. 4-30, adopted December 18, 2019.

⁷⁶ 23 CCR § 354.28.

⁷⁷ 23 CCR § 354.28.

⁷⁸ North Fork Kings GSP pg. 4-32, adopted December 18, 2019.

⁷⁹ North Fork Kings GSP pg. 4-32, adopted December 18, 2019.

groundwater quality monitoring network will be tested annually, while the others will be tested every 3 to 5 years.⁸⁰ Therefore, if groundwater pumping patterns or other GSA activities are causing an increase in contamination in a certain area, well users could have no recourse for more than ten years, the time in which it could take to establish a “groundwater quality trend” that violates a minimum threshold. Furthermore, the GSP does not specify what actions the GSA will take if a minimum threshold for groundwater quality is triggered. It is therefore impossible for the public to evaluate whether drinking water impacts will be adequately protected by the minimum thresholds.

Based on our conversation with staff on October 3rd, 2019, we understand that indicator wells outside of public water systems will not test for any drinking water contaminants other than nitrates. This raises particular concerns in relation to drinking water quality for domestic well users, whose drinking water quality will not be monitored. GSA staff and consultants stated on our October 3rd call that, if the GSA sees that nitrates are moving due to pumping activities, recharge, or other groundwater management activities or policies, the GSA will increase monitoring for other drinking water contaminants. Such a response is not detailed in the GSP, however, and it is unclear what actions the GSA will take if increased contaminants are found.

Lastly, the fact that a minimum threshold will not occur until after at least two years is likely to leave drinking water users with contaminated drinking water for years before GSA action is taken. Years of contaminated drinking water is a significant and unreasonable impact to drinking water users. The GSP’s minimum thresholds therefore do not avoid significant and unreasonable impacts, and do not consider the interests of all beneficial users of groundwater.

Because the GSP’s groundwater quality sustainable management criteria are incomplete, they leave domestic well users and disadvantaged communities unprotected from drinking water contamination. These definitions have not considered the impacts on disadvantaged communities as SGMA requires, and are likely to cause a disparate impact on groups protected under state civil rights law.

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

- 1. Ensure that the GSP sets measurable objectives and minimum thresholds at all representative monitoring wells for all of the following contaminants:⁸¹**
 - 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

⁸⁰ North Fork Kings GSP pg. 1226, adopted December 18, 2019.

⁸¹ 23 CCR § 354.34(b)(2) and (f)(3)

- c. Contaminants like uranium, arsenic and nitrate which are known to increase due to groundwater management practices.
2. **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.
 3. **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.
 4. **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.
 5. **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,⁸² measurable objectives and minimum thresholds.⁸³
 6. **Implement DAC and drinking water user input into sustainable management criteria:**⁸⁴ Ensure that the GSP discusses how stakeholder input from DAC community members was considered in the development of undesirable results, measurable objectives and minimum thresholds. The GSA should consult directly with disadvantaged communities and other drinking water users through community meetings and the GSA's Rural Communities Advisory Committee.

⁸² 23 CCR § 354.26(c)

⁸³ 23 CCR § 354.28(b)(4)

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

7. **Incorporate new drinking water data into sustainable management criteria:**⁸⁵ 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.
8. **Avoid disparate impact:**⁸⁶ 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 minimum threshold 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,⁸⁷ including disadvantaged communities on domestic wells,⁸⁸ and must avoid disparate impacts on protected groups pursuant to state law.⁸⁹

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 is likely to cause a disparate impact on protected groups who are dependent on domestic wells in the GSA area.

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."⁹⁰ The GSA must also make decisions about the monitoring network in a way that considers the interests of all beneficial users.⁹¹

Figure 5-2 shows that there are no groundwater levels monitoring wells in or near Lanare, so GSA will not detect impacts to the critical drinking water supplies for Lanare.⁹² According to the same Figure, there are no indicator wells in or near the disadvantaged communities of Lanare, Riverdale or Laton, which have small community water systems as well as a significant number of residents on domestic wells. Since there are no wells monitoring for compliance with

⁸⁵ 23 CCR § 354.38(e)(3)

⁸⁶ Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (1).

⁸⁷ 23 CCR § 354.34

⁸⁸ Water Code § 10723.2.

⁸⁹ Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (1).

⁹⁰ 23 CCR § 354.34(c)(1)(A)

⁹¹ 23 CCR § 354.34(b)(2)

⁹² North Fork Kings GSP pg. 314, adopted December 18, 2019.

minimum thresholds in or near these three communities, no GSA action will be triggered if groundwater levels decline past minimum thresholds. This leaves the three communities unprotected from groundwater level decline caused by groundwater management activities.

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:**⁹³ 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. **Identify and address other drinking water data gaps:**⁹⁴ 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 contain 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.”⁹⁵

The GSP states that all wells in Figure 5-3 will be indicator wells for groundwater quality sustainable management criteria.⁹⁶ These indicator wells include community wells in Lanare, Riverdale and Laton, which ensures that contaminants will be monitored in the three communities at the depth of the community wells. However, the groundwater quality monitoring network does not capture effects on domestic well users, since the monitoring wells will not test at the levels where domestic wells are screened. Domestic wells are typically shallower and thus

⁹³ 23 CCR § 354.34(b)(2) and (f)(3)

⁹⁴ 23 CCR § 354.38(e)(3)

⁹⁵ 23 CCR § 354.34(c)(4)

⁹⁶ North Fork Kings GSP pg. 336, adopted December 18, 2019.

most vulnerable to contaminants like nitrate. As a result, failure to monitor shallow groundwater depths will leave domestic wells unprotected from water quality impacts.

Further, only three of the 35 wells in the GSA's groundwater quality monitoring network will be tested annually, while the others will be tested every 3 to 5 years.⁹⁷ Added to the fact that minimum thresholds are vague for monitoring wells that have historically reached MCLs (where minimum thresholds will be triggered if the GSA finds that a "groundwater quality trend" has occurred), this means that, if groundwater pumping patterns or other GSA activities are causing an increase in contamination in a certain area, well users may not know for more than ten years, the time in which it could take to establish a "groundwater quality trend" that violates a minimum threshold in a well monitored only every 5 years.

It is unclear in Appendix 5-D which monitoring wells will monitor for which contaminants, and what the baseline contaminant levels are in each well. It appears that the GSA will monitor for some drinking water contaminants in public municipal wells which are already monitoring for all Title 22 contaminants. Only testing for drinking water contaminants in municipal wells, at depths far below those used by domestic wells, will not detect impacts to domestic wells. Additionally, monitoring for only some drinking water contaminants will not detect the emergence or spread of other drinking water contaminants. Therefore the GSP's monitoring well does not adequately monitor for significant and unreasonable impacts on all types of beneficial users.

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 monitoring wells:⁹⁸**
 - 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, arsenic and nitrate which are known to increase due to groundwater management practices
- 2. Clear description of how the GSA will monitor for drinking water impacts:** Ensure that the GSP includes a description of how the GSA 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.

⁹⁷ North Fork Kings GSP pg. 1226, adopted December 18, 2019.

⁹⁸ 23 CCR § 354.34(b)(2) and (f)(3)

3. **Ensure accurate detection of impacts on drinking water users and DACs:**⁹⁹ 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 must be constructed to meet these standards, ensure that the GSP contains a concrete plan to fund and construct new representative monitoring wells 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. The GSP should also show how it will monitor for impacts to domestic well users.
4. **Identify baseline contaminant levels at each monitoring well:** 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:**¹⁰⁰ 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, and nonregulatory programs such as SB 200, the SWRCB's needs assessment and the GAMA program, in order to build better regional understanding of 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 communities¹⁰¹ and avoid disparate impacts on protected groups.¹⁰² The GSP must also concretely outline how each objective and the overall sustainability goal will be achieved.¹⁰³ 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.¹⁰⁴

⁹⁹ 23 CCR § 354.34(b)(2) and (f)(3)

¹⁰⁰ 23 CCR § 354.34(e)

¹⁰¹ Water Code § 10723.2.

¹⁰² Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (1).

¹⁰³ Water Code § 10727.2(b)(2).

¹⁰⁴ Water Code § 10727.2(b)(1).

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

The GSP states that the “first priority” of the GSA is to “develop projects to augment the water supply,” and it will only employ management actions or programs “if project development is not able to achieve the sustainability required to meet the interim milestones.”¹⁰⁵ The GSP lays out details about many projects focused on capturing and recharging surface water. The GSP also includes its back-up management actions, which include demand reduction programs, data collection, outreach and enforcement programs. Given the high variability in surface water supplies expected as a result of climate change,¹⁰⁶ the GSA must also immediately begin demand reduction strategies in order to reach the subbasin’s sustainability goal by 2040, as required by SGMA.¹⁰⁷

Despite the hundreds of wells that will be dewatered if the GSA reaches its minimum thresholds, the GSP does not contemplate a program to mitigate or protect against impacts to drinking water wells. This demonstrates that the GSA has not considered the interests of beneficial users including domestic well owners and disadvantaged communities and has not committed to managing groundwater sustainably as required by SGMA.¹⁰⁸ The resulting impact from the proposed sustainable management criteria will likely lead to disparate impacts on protected groups pursuant to state and federal law.¹⁰⁹

¹⁰⁵ North Fork Kings GSP pg. 6-2, adopted December 18, 2019.

¹⁰⁶ 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.

¹⁰⁷ Water Code § 10727.2(b)(1).

¹⁰⁸ Water Code sec. 10723.2.

¹⁰⁹ 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].

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 conversations with scholars, 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:**¹¹⁰ 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, or fail to prevent, disproportionately more dry wells and contaminated water for residents of color than for white residents in the GSP area.

K. Plan Implementation Section is Inadequate

GSP implementation must continue to consider the interests of all beneficial user groups and engage a diversity of stakeholders. The GSA has not specified a public engagement plan for its GSP implementation, when critical decisions will continue to be made about which projects and management actions to implement, how to design these projects and actions, and potential modifications to the GSP. Absent this information, DWR cannot evaluate when and whether the plan is likely to achieve sustainable groundwater management, so DWR cannot approve the plan.

¹¹¹

¹¹⁰ Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

¹¹¹ Water Code § 10733(a); 23 CCR 355.4(b).

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. **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.
2. **Notice:**¹¹² 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.¹¹³
3. **Translation of materials:**¹¹⁴ 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.
4. **Interpretation:**¹¹⁵ 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.
5. **Accessible workshops:** Ensure that the GSP states that ongoing engagement will include workshops held at accessible times and locations for disadvantaged community residents.
6. **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. The GSA should ensure that the Rural Communities Advisory Committee is able to give meaningful advice to the board, and that the board considers the DAC representatives' and the RCAC's opinions on all matters.
7. **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.
8. **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

¹¹² Government Code § 54954(a).

¹¹³ Government Code sec. 7296.2.

¹¹⁴ Government Code sec. 7296.2.

¹¹⁵ Government Code sec. 7296.2.

management actions, and development and adoption of the programs to assist with impaired wells.

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

L. 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.”¹¹⁶ 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.”¹¹⁷ 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.”¹¹⁸

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

¹¹⁶ Water Code § 10733.4(b)(3).

¹¹⁷ Water Code § 10721(d).

¹¹⁸ 23 CCR § 357.4.

Plan relate to those undesirable results, based on information described in the basin setting.¹¹⁹

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.¹²⁰

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.

¹¹⁹ 23 CCR § 357.4.

¹²⁰ *See* 23 CCR § 354.18(c)(3).

M. 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 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.”¹²¹ 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.”¹²² 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.¹²³

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.”¹²⁴ The doctrine applies to all water users, regardless of basis of water right, and all water rights and methods of diversion.¹²⁵ A determination of reasonableness of a use “cannot be resolved in vacuo isolated from statewide considerations of transcendent importance.”¹²⁶

DWR and the Water Board must ensure that GSPs’ water allocations are consistent with the reasonable and beneficial use doctrine.¹²⁷ In doing so, DWR and the Board must follow the

¹²¹ AB 1739 (2014).

¹²² Water Code § 10720.5(b).

¹²³ 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.”].

¹²⁴ 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.”].

¹²⁵ *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 367, 372; *Light v. State Water Resources Control Board*, (2014) 226 Cal. App. 4th 1463, 1479.

¹²⁶ *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 140.

¹²⁷ 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].

Legislature’s directive to prioritize domestic use of water resources over irrigated agriculture¹²⁸ and ensure that SGMA implementation furthers the human right to safe and affordable drinking water¹²⁹ — 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.”¹³⁰

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.¹³¹ 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.¹³² 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

¹²⁸ 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 .

¹²⁹ Water Code § 106.3.

¹³⁰ *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.”].

¹³¹ *Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 844.

¹³² *Id.* at 856-62.

protect public trust uses whenever feasible.”¹³³ The court also specifically held that SGMA does not supplant the requirements of the common law public trust doctrine.¹³⁴

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.¹³⁵ Further, certain rivers like the San Joaquin River have been declared navigable in statute.¹³⁶

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.

~~~~~

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.<sup>137</sup> 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,

Amanda Monaco

---

<sup>133</sup> *Id.* at 865.

<sup>134</sup> *Id.* at 862-870.

<sup>135</sup> 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].

<sup>136</sup> *Harb. & Nav. Code s. 105* [affirmatively declaring the San Joaquin River to be navigable “between its mouth and Sycamore Point.”].

<sup>137</sup> Attached as Exhibit B.

## Leadership Counsel for Justice and Accountability