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May 15, 2020

**Re: Recommendations for DWR and SWRCB Action Regarding the North Kings GSA 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 Kings GSA area have the most to gain and the most to lose from SGMA implementation in the region. Communities like Britten Avenue, South Central

and Three Palms 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 Kings Groundwater Sustainability Agency (GSA) has not adequately done so in this GSP. As described below, the GSP is likely to cause 43% of wells to go dry in the subbasin[1] and puts domestic wells at risk of contamination from many unmonitored drinking water contaminations, 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 evalue 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."[2] 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.[3] 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.[4] 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,[5] and that they "consider the interests of" an enumerated list of all types of

[1] Focused Technical Review, p. 4, attached as Exhibit A.
[2] Water Code § 106.3(a)
[3] Water Code § 106.3(b)
[4] Attached as Exhibit B.
[5] 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."].

beneficial users, including disadvantaged communities on domestic wells and community water systems.[6] 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.[7] 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.[8] DWR and the SWRCB must evaluate GSPs in accordance with all of these and other relevant legal obligations.

Unfortunately, the North 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 North Kings GSP according to our Human Right to Water Scorecard. Our review shows that the Draft 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.[9]

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[6] Water Code § 10723.2.

[7] 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].

[8] Gov. Code § 12900 et seq.

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

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

The GSP must contain all of the elements set forth in the GSP regulations. However, this GSP omits critical data and information to comply with the GSP regulations. As discussed below, the GSP lacks required information and analyses, including an analysis of the significance and reasonableness of sustainable management criteria, the description of the water budget, and more. Therefore, the GSP fails to "include[] the information required by [SGMA] and [its accompanying regulations]," and is thus inadequate.[10] These inadequacies prevent DWR from being able to determine that the GSP will likely achieve its sustainability goal.[11] Given these deficiencies, we ask DWR not to approve the plan.

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

The North 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.[12] In addition, 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.[13]

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.

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[10] 23 CCR § 355.4(a)(2).
[11] Water Code § 10733(a); 23 CCR § 355.4(b).
[12] 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].
[13] Gov. Code § 12900 et seq.

"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."[14]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.[15] Similarly, communities of color in the Central Valley are disproportionately impacted by groundwater contamination.[16]

Consistent with these studies, this GSP will cause disproportionate negative impacts on communities of color reliant on small water systems and domestic wells. North Kings GSA spans a portion of Fresno County including the City of Fresno and surrounding communities. Fresno County contains at least 93 disadvantaged unincorporated communities (DUCs), many of which are within the boundaries of the GSA.[17] Approximately 50% of Fresno County's total population are people of color, compared to 67% of people living in Fresno County DUCs.[18] As an example, Malaga is 89.9% Hispanic or Latino according to the most recent American Communities Survey data.[19] Though specific Census data is not available for Three Palms Mobile Home Park or the Britten Avenue neighborhood, our experience working with both communities suggests similar population demographics. The Reverse Triangle, which contains several disadvantaged unincorporated communities, Flamingo Mobile Home Park, Daleville, as well as numerous residences, is disproportionately populated by people of color compared to the City and County as a whole, with 72% of residents identifying as Hispanic or Latino and an additional 7% identifying as Asian American, Native American or other non-white.

As explored 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. This will cause severe harm to residents' health and daily lives, as well as permanent impacts on residents' finances and living situations.

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[14] 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.

[15] *Id. at p. 6.*

[16] *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.

[17] 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].

[18] Id. at pp. 25, 30.

[19] Data available at https://data.census.gov/cedsci/, accessed on May 14, 2020.

Additionally, the GSP contains no measures to mitigate these impacts. Therefore, because the GSP is likely to have significant negative impacts on households reliant on small water systems and domestic wells, and because the people reliant on small water systems and domestic wells are disproportionately people of color, the GSP is likely 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.[20] "'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."[21] "'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."[22] 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.[23]

If a GSP is unlikely to achieve its self-selected sustainability goal, DWR cannot approve the plan.[24] 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.[25] Likewise, a plan that cannot achieve sustainable groundwater management has failed to set a valid sustainability goal, in violation of SGMA.[26] 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.[27]

In addition to defining undesirable results, GSPs must quantify benchmarks for groundwater conditions, or "minimum thresholds," that may cause undesirable results if exceeded.[28] GSPs

[20] Water Code § 10733(a).
[21] Water Code § 10721(u).
[22] Water Code § 10721(v).
[23] Water Code § 10721(x).
[24] Water Code § 10733(a).
[25] Water Code § 10721(v).
[26] Water Code § 10721(u).
[27] 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.").
[28] 23 CCR 354.28(a).

must include "an explanation of how the Agency has determined that basin conditions at each minimum threshold will avoid undesirable results for each of the sustainability indicators."[29] A GSP's determination of when an undesirable result will occur must be based on analysis of when adverse impacts become "significant" and "unreasonable."[30]

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.[31] Failure to consider the interests of a category or categories of beneficial users is itself grounds for DWR to decline to approve a plan.[32] 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.[33]

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

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[29] 23 CCR 354.28(b)(2).
[30] 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."].
[31] Water Code § 10723.2.
[32] Water Code § 10723.2; 23 CCR 355.4(b) ["The Department shall evaluate a Plan … to determine whether the Plan … complies with the Act …."].
[33] 23 CCR 355.4(b)(4).
[34] California Gov. Code § 54954.1

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.[35]

In addition, GSAs must also adhere to the specific public participation and inclusivity requirements laid out in SGMA. As discussed above, SGMA requires that a GSA "shall consider the interests of all beneficial uses and users of groundwater," which expressly includes "[h]olders of overlying rights" and "[d]isadvantaged communities, including, but not limited to, those served by private domestic wells or small community water systems."[36] 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."[37] The GSA thus must engage "diverse social, cultural, and economic elements of the population within the basin."[38] 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.[39]

The GSA conducted several workshops and attended a number of community meetings in the GSP area to speak about GSP development. The GSA held a workshop in West Park, which is a disadvantaged community. However, the GSA did not conduct workshops that were accessible and noticed to residents in Britten Avenue, Three Palms, and neighborhoods in and around West Fresno as well as the broader South Fresno community. We were not able to proactively connect the GSA with residents in these communities because the GSA chose not to fund our collaboration on community engagement of disadvantaged communities in the area.

The GSA had a representative from Del Rey, a disadvantaged community, on the GSA board, and had one representative from an environmental justice organization on the Advisory Committee. The GSA partnered with Self-Help Enterprises to conduct some outreach, but did not support our organization's engagement in the GSP formation process. The Draft GSP incorrectly states that our organization "directly or indirectly" represented disadvantaged communities "on the North Kings GSA Board of Directors."[40] However, we did not have a vote on the board, and were not able to engage with the GSP process consistently due to our lack of funding. While we were invited to be a part of the GSA's outreach committee, our capacity to engage in GSP development was hindered because the North Kings GSA denied our request for a support letter which would have allowed us to be active participants in this process.

[35] Bilingual Services Act, Gov. Code, §§ 7293, 7295.
[36] Water Code § 10723.2.
[37] 23 CCR 354.10(d).
[38] Guidance Document for Groundwater Sustainability Plan; Stakeholder Communication and Engagement, p. 1.
[39] 23 CCR 355.4(b)(4).
[40] North Kings GSA GSP p. 2-37, adopted November 21, 2019

The North Kings GSA did not adequately consult with disadvantaged communities in the GSP area, and did not adequately incorporate their feedback into the GSP. To the best of our knowledge, the North Kings GSA never conducted outreach to the communities we work with in the GSA area. The GSA conducted outreach in Northern Fresno and West Park, but did not reach out to many other communities in disadvantaged areas in and around Fresno. The GSA did not write a support letter to approve our Prop 1 funding to work on community engagement in the GSP area, so we were not able to collaborate with the GSA to engage communities in Britten Avenue, Three Palms, and neighborhoods in and around West Fresno as well as the broader South Fresno community.

The North Kings GSA did not provide translation at its meetings. The translation that was provided was provided and paid for by Self-Help Enterprises.

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

1. **Description of DAC engagement:** Ensure that the GSP specifically identifies how DAC beneficial users were engaged in the planning process.
2. **Notice:**[41] Ensure that the GSA provided clear notice to the public about GSA meetings to develop the GSP, posted in ways that all stakeholders were made aware of the meetings, and translated into all languages spoken by at least 5 percent of the public served by the agency, who do not speak English or are unable to effectively communicate in English.[42]
3. **Translation of materials:**[43] Ensure that the GSA translated materials into all languages spoken by at least 5 percent of the public served by the agency, who do not speak English or are unable to effectively communicate in English.
4. **Interpretation:**[44] Ensure that the North Kings GSA provided interpretation services at board meetings, committee meetings and workshops into all languages spoken by at least 5 percent of the public served by the agency, who do not speak English or are unable to effectively communicate in English.

[41] Government Code § 54954(a).
[42] Government Code sec. 7296.2: Dymally-Alatorre Bilingual Services Act, stating that local agencies providing services to the public must provide translated materials and interpretation when it serves a substantial number of non-English-speaking people. The law defines a "substantial number of non-English-speaking people" as "members of a group who either do not speak English, or who are unable to effectively communicate in English because it is not their native language, and who comprise 5 percent or more of the people served by the statewide or any local office or facility of a state agency." This is because "effective maintenance and development of a free and democratic society depends on the right and ability of its citizens and residents to communicate with their government and the right and ability of the government to communicate with them."
[43] Government Code sec. 7296.2.
[44] Government Code sec. 7296.2.

5. **Accessible workshops:** Ensure that the North Kings GSA hosted workshops held at accessible times and locations for disadvantaged community residents.
6. **DAC representation on advisory committee:** Ensure that the North Kings GSA developed the GSP with an advisory committee that contained representatives from DACs.
7. **Partnership with local community based organizations:** Ensure that the North Kings GSA partnered with community based organizations and nonprofits on outreach and engagement.
8. **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 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,[45] and must be based on an analysis of what are "significant" and "unreasonable" impacts.[46] These policy decisions must also avoid disparate impacts on protected groups pursuant to state and federal law.[47] 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."[48] GSAs must also describe the "processes and criteria relied upon to define undesirable results."[49] 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

[45] Water Code § 10723.2.
[46] 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."].
[47] Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).
[48] 23 CCR § 354.26.
[49] 23 CCR § 354.26.

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.

As it is currently written, North Kings GSA's undesirable result for groundwater levels will not be triggered until "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."[50]

This definition implies that it is feasible for beneficial users to continuously install new wells until essentially the bottom of the basin is reached or until the water quality exceeds available treatment technologies, and that any condition short of that does not constitute an undesirable result. This undesirable result does not "consider the interests of" the impact of this policy on disadvantaged communities on domestic wells or shallower community water system wells, who will not be able to drill a new productive well if their wells go dry. Similarly, the GSA clearly did not base its undesirable results definition on an analysis of whether these impacts are "significant and unreasonable." Given that there are 8,300 domestic well users in the GSA, and many of those wells and shallow community wells serve households in disadvantaged communities in the GSA area, this policy will disproportionately negatively affect these communities, and will cause disparate impacts under state civil rights law. This policy therefore violates the GSA's obligations under SGMA and state civil rights law.

Further, Section 4.2.1.2 of the draft GSP states that the "[w]ater level declining below the minimum threshold in one of the GSA's indicator wells in the monitoring network will be considered significant…with the monitoring network having indicator wells represent large areas, the exceedance of the minimum threshold at just one well location is significant based on how the basin has determined the minimum thresholds…The water level decline to this point would potentially be significant to the stakeholders in the proximity of this indicator well and warrant further evaluation by the NKGSA and potential action."[51] This statement is unclear as it shows a disconnect between the undesirable result for chronic lowering of water levels and the definition of minimum threshold exceedances that trigger action by the North King GSA.

Lastly, the GSA dismisses its responsibility for any well going dry by stating that SGMA does not require the GSA to maintain current water levels or prevent any wells from going dry that it only requires the GSA to stabilize and correct groundwater level decline.[52] Additionally, the GSA states that until water levels have been stabilized and the basin has reached sustainability,

[50] North Kings GSA GSP p. 4-4, adopted November 21, 2019
[51] North Kings GSA GSP p. 4-6, adopted November 21, 2019
[52] North Kings GSA GSP p. 4-5, adopted November 21, 2019

the GSA will not view a well going dry as an undesirable result.[53] As discussed above, under state law, it is in fact the GSA's responsibility to ensure that it has fully considered whether these impacts to these beneficial user groups are "significant and unreasonable," and that it does not cause a disparate impact on protected groups pursuant to state civil rights law.

### *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."[54]

The GSA has set its measurable objectives "based on the historical decline in each indicator well within the monitoring network, and an incremental mitigation used to determine the future water levels."[55] The GSA explained that "[t[he incremental mitigation for correction was selected based on the understanding that correcting decades of overdraft will take many years and implementation is dependent on many factors, including development of funding, project development, environmental and permit compliance, correction by neighboring GSAs, and basins that impact the Kings Basin."[56] These factors are not quantified, and it is not clear how the GSA weighed these factors. Furthermore, the measurable objectives were not based on an analysis of what impacts to all types of beneficial users are "significant and unreasonable." The GSP includes a brief analysis showing that 12% of domestic wells will be impacted at the measurable objective.[57] This analysis was done after repeated requests by environmental justice organizations, but was not integrated into the measurable objectives.

Therefore, the GSA has not presented the information relied upon to create the measurable objectives, and does not base these measurable objectives on whether impacts to beneficial users are "significant and unreasonable." Nor do these measurable objectives show how they will ensure that the GSA reaches its sustainability goal by 2040.

### *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."[58] SGMA requires GSAs to analyze both the

[53] North Kings GSA GSP p. 4-5, adopted November 21, 2019
[54] 23 CCR § 354.30(a)
[55] North Kings GSA GSP p. 4-4 and p. 4-18, adopted November 21, 2019
[56] North Kings GSA GSP p. 4-19, adopted November 21, 2019
[57] North Kings GSA GSP p. 4-13, adopted November 21, 2019
[58] 23 CCR § 354.28.

significance and reasonableness of proposed minimum thresholds,[59] and minimum thresholds must have the purpose of avoiding "significant and unreasonable" impacts on beneficial users.[60] The GSA's determination of what is "significant and unreasonable" must consider the impacts on all types of beneficial users, including disadvantaged communities.[61] For groundwater levels specifically, GSAs must place minimum thresholds for each monitoring site at the level "that may lead to undesirable results."[62] 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."[63]

The GSA has set its minimum thresholds "based on historic rate of decline, the proposed mitigation rate and enough operational flexibility to maintain delivery during a 5-yr drought."[64] Essentially, a 5-year drought depth based on the 2012-2016 drought was added below each measurable objective to form the minimum threshold. Furthermore, the minimum thresholds were not based on an analysis of what impacts to all types of beneficial users are "significant and unreasonable." The GSP includes a brief analysis showing that 32% of domestic wells will be impacted at the measurable objective.[65] This analysis was done after repeated requests by environmental justice organizations, but was not integrated into the measurable objectives.

This decline in groundwater levels will severely harm those on domestic wells. Based on our Focused Technical Review of the North Kings GSP, attached as Exhibit A, we find that many wells are located outside of a 1.5-mile radius from monitoring wells, and approximately 43% of these domestic wells would be expected to be fully dewatered and an additional 14% of these wells would be expected to be partially dewatered at the minimum thresholds in the GSP.[66] Many of these wells are likely to be located in communities of color that are low income, and are less likely to be able to address these impacts.

Therefore, the GSA has not presented the information relied upon to create the minimum thresholds, and does not base these minimum thresholds on whether impacts to beneficial users are "significant and unreasonable." These minimum thresholds are likely to cause a disparate impact on communities of color, and do not uphold the Human Right to Water.

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[59] 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).
[60] 23 CCR § 354.26.
[61] Water Code § 10723.2.
[62] 23 CCR § 354.28.
[63] 23 CCR § 354.28.
[64] North Kings GSA GSP p. 4-11, adopted November 21, 2019
[65] North Kings GSA GSP p. 4-13, adopted November 21, 2019
[66] Focused Technical Review, p. 4, attached as Exhibit A.

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. **Thorough evaluation of 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,[67] measurable objectives and minimum thresholds,[68] 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:**[69] 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.[70] 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:**[71] 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:**[72] 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 the GSA took the results of the well impact assessment to the public through meetings, workshops, or Advisory Committees, and together with stakeholders decided how to change sustainable

[67] 23 CCR § 354.26(c)
[68] 23 CCR § 354.28(b)(4)
[69] Water Code § 10723.2
[70] 23 CCR § 354.26.
[71] 23 CCR § 354.38(e)(3)
[72] 23 CCR § 354.10(d); DWR Guidance Document for Groundwater Sustainability Plans: Stakeholder Communication and Engagement, p.1.

management criteria to protect drinking water, or other programs to implement to mitigate these impacts.

5. **Avoid disparate impact:**[73] Ensure that the measurable objectives and minimum thresholds for groundwater levels are established in such a way that prevents a disproportionately negative ("disparate") 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.

### F. 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.[74] Recharge projects could also have severe impacts on groundwater quality by facilitating water percolation on land contaminated with years of pesticide, herbicide, fungicide, and fertilizer application and/or by releasing natural contaminants like uranium into groundwater.[75] 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,[76] based on a determination of

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[73] Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

[74] *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.

[75] 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."]; Jurgens, Bryant C., et al. "Effects Of Groundwater Development On Uranium: Central Valley, California, USA," Groundwater 48.6 p. 913 (2010), available at https://ngwa.onlinelibrary.wiley.com/doi/abs/10.1111/j.1745-6584.2009.00635.x; "Groundwater Quality In The Sustainable Groundwater Management Act (SGMA): Scientific Factsheet on Arsenic, Uranium, and Chromium," available at https://d3n8a8pro7vhmx.cloudfront.net/communitywatercenter/pages/293/attachments/original/1559328800/Groundwater_Quality_in_SGMA_Scientific_factsheet_on_arsenic__uranium__and_chromium.pdf?1559328800

[76] Water Code § 10721(w)(4); 23 CCR § 354.28(c)(4).

what is a "significant and unreasonable" impact on all beneficial users, including domestic well users and disadvantaged communities.[77] This GSP does not meet those requirements.

### a. The Undesirable Results for Groundwater Quality 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."[78] GSAs must also describe the "processes and criteria relied upon to define undesirable results."[79] 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 GSP identifies nitrate as NO3, arsenic, dibromo-chloropropane, 1,2,3-TCP, methyl tert-butyl ether, uranium, tetrachloroethylene, trichloroethylene, and hexavalent chromium as contaminants of concern for the North Kings GSA.[80] For its undesirable result, the North Kings GSA states that the "undesirable results determinations will be based on the aggregated effect of: 1) the degradation of water quality to excess of MCLs (i.e. California potable water standards) where concentrations of chemicals of concern have a recent history of being below MCLs; and 2) a statistically significant increase in groundwater degradation where concentrations of chemicals of concern have a recent history of being above MCLs. The occurrence of an undesirable result will be defined as 15% of the representative monitoring wells having reached either of these two criteria for two consecutive years at the same wells."[81]

This is an unreasonably lax threshold, is not based on an analysis of the significance and reasonableness of impacts on beneficial users, and is likely to cause a severe impact on protected groups. By the time 15 percent of representative wells show increases in contamination for two consecutive years, it is more than likely that a high percentage of vulnerable drinking water users will be experiencing severe, long-term drinking water contamination problems before the undesirable result is triggered. North Kings GSA has included inadequate information or criteria to explain how groundwater uses will be impacted if this undesirable result is reached, and therefore does not set forth adequate information to justify this decision.

[77] Water Code §§ 10727.2(d)(2); 10721(x)(4)
[78] 23 CCR § 354.26.
[79] 23 CCR § 354.26.
[80] North Kings GSA GSP, Table 4-8, adopted November 21, 2019
[81] North Kings GSA GSP pg. 4-31, adopted November 21, 2019

### b. The Measurable Objectives for Groundwater Quality 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."[82] In determining the measurable objectives, the GSA must consider the interests of all beneficial user groups and avoid disparate impacts on groups protected under state civil rights law,[83] and must base their measurable objectives on an analysis of both the significance and reasonableness of this measurable objective.[84]

The GSP states that,

> "where concentrations of the chemicals of concern have a recent history of being below MCLs, the measurable objective is to maintain water quality at potable water standards, or in other words, below MCLs for the chemicals of concern. In situations where monitoring network wells (either existing or future wells) have a recent history of being above MCLs for contaminants of concern, the measurable objective is for the wells to maintain stable or improving groundwater quality trends in regard to the identified chemicals of concern.[85]"

However, the GSP does not identify what the actual quantitative water quality measurable objectives are at each representative monitoring well. Without this information, there is no way to know what the impact will be on surrounding groundwater users. Therefore these measurable objectives cannot have been based on an analysis of the impact on beneficial users in the GSP area. Furthermore, these measurable objectives do not show how the GSA will reach its sustainability goal in 2040, and may create disparate impacts on protected groups.

### c. The Minimum Thresholds for Groundwater Quality are Inadequate

GSAs must place groundwater quality minimum thresholds for each monitoring site at the level "that may lead to undesirable results."[86] Under the SGMA regulations, the GSA should 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."[87]

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[82] 23 CCR § 354.30(a)
[83] Water Code § 10723.2; Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).
[84] 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).
[85] North Kings GSA GSP pg. 4-39, adopted November 21, 2019
[86] 23 CCR § 354.28.
[87] 23 CCR § 354.28.

The GSP states that "[t]he publicly available groundwater quality data from selected representative wells will be obtained annually and either compared against MCL values, if recent historical data has indicated chemicals of concern were initially below MCLs, or evaluated for groundwater quality trends with respect to the chemicals of concern utilizing appropriate statistical methods, such as the Mann-Kendall trend test."[88] However, the GSP does not identify what the actual quantitative water quality minimum thresholds are. Without this information, there is no way to know what the impact will be on surrounding groundwater users. Therefore these minimum thresholds cannot have been based on an analysis of the impact on beneficial users in the GSP area.

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 MOs and MTs at all representative monitoring wells for all of the following contaminants:**[89]
    a. Contaminants with primary drinking water standards,
    b. PFOs/PFOAs and chrome-6, which are contaminants known to be very harmful to human health, AND
    c. Contaminants like Uranium which are known to increase due to groundwater management practices.
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

[88] North Kings GSA GSP pg. 4-36, adopted November 21, 2019
[89] 23 CCR § 354.34(b)(2) and (f)(3)

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 be affected by the undesirable results,[90] measurable objectives and minimum thresholds.[91]
6. **Implement DAC and drinking water user input into SMC:**[92] Ensure that the GSP discusses how stakeholder input from DAC community members was considered in the development of URs, MOs, and MTs.
7. **Incorporate new drinking water data into SMC:**[93] 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:**[94] Ensure that the minimum thresholds for groundwater quality are established in such a way that prevents a disproportionately negative impact on communities of color in the GSP area; for example, the GSP should ensure that the same MT methodology across the GSP area will lead to disproportionately more wells go dry for residents of color than for white residents.

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

GSAs must monitor impacts to groundwater for drinking water beneficial users,[95] including disadvantaged communities on domestic wells,[96] and must avoid disparate impacts on protected groups pursuant to state law.[97]

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

[90] 23 CCR § 354.26(c)
[91] 23 CCR § 354.28(b)(4)
[92] 23 CCR § 354.10(d); DWR Guidance Document for Groundwater Sustainability Plans: Stakeholder Communication and Engagement, p.1.
[93] 23 CCR § 354.38(e)(3)
[94] Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).
[95] 23 CCR § 354.34
[96] Water Code § 10723.2.
[97] Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

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."[98] The GSA must also make decisions about the monitoring network in a way that considers the interests of all beneficial users.[99]

The GSP acknowledges that the GSA has insufficient data for unincorporated areas on domestic wells, but does not propose a substantial plan to fill that data gap. They propose a suite of options to fill the data gap, but do not commit to any of them. Additionally, they do not include a substantive timeline as to when this data gap will be filled and instead elected to include a general 2025 deadline, by which they will "either collect information on these wells or identify other wells to be used instead".[100]

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:**[101] Ensure that the groundwater level monitoring network includes *representative* monitoring wells *in or near DACs*, and placed in a way that detects impacts to the *vast majority* of drinking water users in the GSP area. If new monitoring wells are required, ensure that the GSP contains a concrete plan to fund and construct new representative monitoring wells within the first year of GSP implementation to ensure that vulnerable communities' drinking water resources are monitored. The plan to improve the monitoring network should include testing of domestic wells in the interim as wells are constructed.
2. **Clearly show representative monitoring well locations in relation to DACs:**[102] Ensure that the representative monitoring wells (RMWs) for groundwater levels are presented on maps and in tables that identify which set of MTs/MOs will be applied to which RMWs, and that these maps clearly identify the locations of DACs, small water systems and other sensitive users.

[98] 23 CCR § 354.34(c)(1)(A)
[99] 23 CCR § 354.34(b)(2)
[100] North Kings GSA GSP p. 5-6, adopted November 21, 2019
[101] 23 CCR § 354.34(b)(2) and (f)(3)
[102] 23 CCR § 354.34(b)(2) and (f)(3)

3. **Identify and address other drinking water data gaps:**[103] Ensure that the GSP clearly identifies any other gaps in data regarding impacts to drinking water users, and that the GSP contains a clear plan to fill data gaps regarding impacts to drinking water users. The GSP explains how it will fill some monitoring data gaps, but does not ensure that these gaps will capture impacts on all drinking water users, particularly disadvantaged communities.

### b. Groundwater Quality Monitoring

SGMA regulations require that GSPs create a groundwater quality monitoring network that will "collect sufficient spatial and temporal data from each applicable principal aquifer to determine groundwater quality trends for water quality indicators, as determined by the Agency, to address known water quality issues."[104]

The representative monitoring network will be relying on selected public wells to monitor for groundwater quality.[105] As stated in Section 5.5.1 of the draft GSP, "publicly available groundwater quality data from selected representative wells will be obtained annually and evaluated against sustainable management criteria."[106] The GSP has no discussion regarding access agreements for water quality representative monitoring wells. Therefore, we understand that the North Kings GSA plans to rely solely on water quality data collected by other agencies for monitoring compliance with groundwater quality sustainable management criteria. While these wells will integrate existing public water system monitoring into the GSA's monitoring network, it will not capture the impact of groundwater management activities on groundwater quality for domestic wells and disadvantaged community water systems.

The GSP shows that there are many known contamination plumes in the GSA area.[107] Since domestic wells are most vulnerable to groundwater contamination, and least able to treat harmful drinking water contaminants, the GSA must ensure that its monitoring network captures groundwater quality impacts on domestic wells. Based on the information presented in the draft GSP, the North Kings GSA has no control over or access to the water quality representative monitoring wells. Choosing to only include public well data impacts the North Kings GSA's ability to adequately address contamination when it is detected and gives the GSA no oversight of how, when, and to the degree of accuracy, the monitoring is occuring.

[103] 23 CCR § 354.38(e)(3)
[104] 23 CCR § 354.34(c)(4)
[105] North Kings GSA GSP p. 5-15, adopted November 21, 2019
[106] North Kings GSA GSP p. 5-15, adopted November 21, 2019
[107] North Kings GSA GSP Figure 2-7 p. 2-20, adopted November 21, 2019

Finally, in the GSP, the North Kings GSA states that there are no data gaps in regards to groundwater quality.[108] However, concentrations of DBCP and TCP exceeding MCLs are present in the area near the shared border of Clovis and Fresno, and this area does not appear to be sufficiently covered by the proposed water quality monitoring network. In general, the location of the water quality representative monitoring wells appear to be inconsistent with concentrations of contaminants of concern over MCLs as identified in Figures 3-29 through Figure 3-34 of the GSP. The GSA must expand its monitoring network to cover this area where contamination exists and could increase or spread.

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

1. **Ensure that the GSP plans to measure the following contaminants at all representative monitoring wells:[109]**
    a. Contaminants of concern with primary drinking water standards
    b. PFOs/PFOAs and chrome-6, which are contaminants known to be very harmful to human health
    c. Contaminants like Uranium which are known to increase due to groundwater management practices
2. **Clearly describe how the GSA will monitor for drinking water impacts:** Ensure that the GSP includes a description of how the GSA will monitor groundwater contamination that could affect drinking water in the GSA area. Ensure that the representative monitoring wells (RMWs) for groundwater quality are presented on maps and in tables, and that the maps of RMWs clearly identify the locations of DACs, small water systems and other sensitive users.
3. **Ensure accurate detection of impacts on drinking water users and DACs:[110]** 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.

[108] North Kings GSA GSP p. 5-20, adopted November 21, 2019
[109] 23 CCR § 354.34(b)(2) and (f)(3)
[110] 23 CCR § 354.34(b)(2) and (f)(3)

4. **Identify baseline contaminant levels:** Ensure that the GSP identifies the current contaminant levels, MTs and MOs at each RMW, so that it is clear to the public how the contamination will change at each RMW site.
5. **Frequent testing:** Ensure that the groundwater quality monitoring network tests for contaminants of concern frequently, in a way that avoids persistent drinking water contamination. Testing should be done monthly.
6. **Collaboration with other agencies:**[111] Ensure that the GSP explains how the GSA(s) will share data with and collaborate with other groundwater quality regulatory programs, such as ILRP, IRWM, and CV SALTS, in order to build better regional understanding of groundwater quality issues and better respond to groundwater quality impacts caused by groundwater management.

## H. Projects and Management Actions Are Inadequate

The GSA must consider the interests of all beneficial users including domestic well owners and disadvantaged communities[112] and avoid disparate impacts on protected groups.[113] The GSP must also concretely outline how each objective and the overall sustainability goal will be achieved.[114] 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.[115]

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

The projects and management actions set forth in the GSP does not demonstrate a path towards achieving sustainability goals in the plan, as significant management actions will not be fully implemented until five years before the GSA must achieve its sustainability goals. The GSA has not demonstrated how it has considered the interests of beneficial users including domestic well owners and disadvantaged communities.[116] The resulting impact from the proposed sustainable

[111] 23 CCR § 354.34(e)
[112] Water Code § 10723.2.
[113] Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).
[114] Water Code § 10727.2(b)(2).
[115] Water Code § 10727.2(b)(1).
[116] Water Code sec. 10723.2.

management criteria will likely lead to disparate impacts on protected groups pursuant to state and federal law.[117]

The GSA has not shown how it has considered the interests of all beneficial users including domestic well owners, in choosing which projects to adopt and does not show how these projects will benefit protected groups.

Many of the projects listed in the GSP are recharge projects and surface water projects. Augmenting groundwater and surface water supply is important to diminishing overdraft, but in order to ensure long-term sustainability the GSA must also reduce groundwater demand in the GSA area. Given the increased climate variability from climate change, surface water supplies will not be reliable in the future.[118] The GSP lists possible allocation and other demand reduction strategies, but explicitly states that such actions are not "anticipate[d]...at this time."[119] The GSA must not rely so heavily on recharge and in lieu recharge, and must prioritize management actions such as groundwater allocations, crop conversion, pumping limits, and more.

Furthermore, despite the fact that 43% of drinking water wells may go dry at the GSP's groundwater levels minimum thresholds, and drinking water contamination is likely to occur from changing pumping patterns, the GSA does not have a plan for preventing or mitigating these impacts. Given these impacts, and the lack of a program to mitigate or prevent these impacts, the GSP will likely cause disparate impacts, and has not considered all beneficial users in determining what "significant and unreasonable" impacts it will allow.

Additionally, the draft GSP states that "[e]ach agency within the NKGSA will be responsible for implementing its own projects to reach sustainability."[120] This policy decision is overly burdensome to some agencies in the GSA that are comprised majorly by low income communities, like Biola Community Services District and Del Rey Community Services District,

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[117] 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].

[118] IPCC, 2018: Impacts of 1.5ºC 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., Mazdiyasni, 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.

[119] North Kings GSA GSP p.6-18, adopted November 21, 2019

[120] North Kings GSA GSP p. 7-1, adopted November 21, 2019

which are dependent on groundwater for their critical drinking water needs, yet may not have the ability to pay for expensive projects and management actions to protect their local drinking water supplies.

The GSA has included a suite of management actions that the board can choose to adopt in order to ensure that the subbasin is sustainable by 2040.[121] While some of the management actions proposed could help protect drinking water needs in the basin, the GSA is not committing to any actions.

### 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:**[122] 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 disproportionately more dry wells and contaminated water for residents of color than for white residents in the GSP area.

[121] North Kings GSA GSP pg. 6-12, adopted November 21, 2019
[122] Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

## I. Plan Implementation Section is Inadequate

GSPs must include a planning and implementation horizon[123] and must show how the sustainability goal will be achieved by 2040.[124] GSP implementation must continue to consider the interests of all beneficial user groups and engage a diversity of stakeholders. The proposed plan implementation is insufficient in regards to public engagement/outreach and does not contain adequate information regarding annual reporting or the potential to make amendments to the GSP. Absent this information, DWR cannot evaluate when and whether the plan is likely to achieve sustainable groundwater management, so DWR cannot approve the plan.[125]

The GSA states that it will continue to engage the public during the implementation of the process, but fails to state how it will engage stakeholders in the process.[126] Public engagement has been a critical component to the SGMA implementation process and must continue to be in the GSP implementation process. However, as the Draft GSP is currently written, it is unclear how and when reconsiderations can be proposed. Additionally, in the annual report outline proposed by the GSA, stakeholder engagement and outreach efforts are not included in any of the key sections.[127]

Through its GSP, the GSA must establish processes by which it will seek and incorporate feedback from the public on an ongoing basis through direct outreach to disadvantaged communities and public workshops that are held at convenient locations and times and accessible in multiple languages. The GSA should include DAC representatives on the Advisory Committee so that their voices can be as strong as other beneficial user groups. Additionally, proposed reconsiderations must be publicly noticed and circulated for public review and comment prior to final adoption.

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.

[123] Water Code § 10727.2.(c)
[124] Water Code § 10727.2(b)(1).
[125] Water Code § 10733(a); 23 CCR 355.4(b).
[126] North Kings GSA GSP pg. 7-1, adopted November 21, 2019
[127] North Kings GSA GSP pg. 7-5, adopted November 21, 2019

2. **Notice:**[128] 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.[129]
3. **Translation of materials:**[130] 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:**[131] 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 include more representatives of DACs on the Advisory Committee so that their voices can be as strong as other beneficial user groups.
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 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.

## J. 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

[128] Government Code § 54954(a).
[129] Government Code sec. 7296.2.
[130] Government Code sec. 7296.2.
[131] Government Code sec. 7296.2.

implementation of the groundwater sustainability plans for the entire basin."[132] 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."[133] 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."[134]

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

> (A) Groundwater elevation data, supported by the quality, frequency, and spatial distribution of data in the monitoring network and the monitoring objectives as described in Subarticle 4 of Article 5.
>
> (B) A coordinated water budget for the basin, as described in Section 354.18, including groundwater extraction data, surface water supply, total water use, and change in groundwater in storage.
>
> (C) Sustainable yield for the basin, supported by a description of the undesirable results for the basin, and an explanation of how the minimum thresholds and measurable objectives defined by each Plan relate to those undesirable results, based on information described in the basin setting.[135]

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.

[132] Water Code § 10733.4(b)(3).
[133] Water Code § 10721(d).
[134] 23 CCR § 357.4.
[135] 23 CCR § 357.4.

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.[136]

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.

## K. 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

[136] *See* 23 CCR § 354.18(c)(3).

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."[137] 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."[138] As discussed in detail above, the GSP allows continued overdraft above the safe yield of the basin, such that drinking water

[137] AB 1739 (2014).
[138] Water Code § 10720.5(b).

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.[139]

### *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."[140] The doctrine applies to all water users, regardless of basis of water right, and all water rights and methods of diversion.[141] A determination of reasonableness of a use "cannot be resolved in vacuo isolated from statewide considerations of transcendent importance."[142]

DWR and the Water Board must ensure that GSPs' water allocations are consistent with the reasonable and beneficial use doctrine.[143] In doing so, DWR and the Board must follow the Legislature's directive to prioritize domestic use of water resources over irrigated agriculture[144] and ensure that SGMA implementation furthers the human right to safe and affordable drinking water[145] — 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

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[139] *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."].
[140] 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."].
[141] Peabody v. Vallejo (1935) 2 Cal.2d 351, 367, 372; Light v. State Water Resources Control Board, (2014) 226 Cal. App. 4th 1463, 1479.
[142] Joslin v. Marin Municipal Water Dist. (1967) 67 Cal.2d 132, 140.
[143] 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].
[144] 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 .
[145] Water Code § 106.3.

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."[146]

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.[147] 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.[148] Under *ELF*, the Public Trust doctrine imposes an affirmative and independent obligation to consider the public trust that applies to DWR's decisions regarding submitted GSPs, imposing a legal duty on DWR to not only consider the potential adverse impacts of groundwater extractions on navigable waterways but also "to protect public trust uses whenever feasible."[149] The court also specifically held that SGMA does not supplant the requirements of the common law public trust doctrine.[150]

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.[151] Further, certain rivers like the San Joaquin River have been declared navigable in statute.[152]

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

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[146] *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."].

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

[148] *Id.* at 856-62.

[149] Id. at 865.

[150] *Id.* at 862-870.

[151] *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].

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

approve the GSP without evaluating impacts to public trust resources and protecting public trust uses whenever feasible. Specifically, DWR must (1) identify any public trust resources within the basin; (2) identify any public trust uses within the basin; (3) identify and analyzing potential adverse impacts of groundwater extractions on public trust resources and uses; and (4) determine the feasibility of protecting public trust uses and protect such uses whenever feasible.

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DWR cannot approve the GSP because it fails to protect access to drinking water. We welcome the opportunity to discuss our concerns with the Department of Water Resources and the State Water Resources Control Board. Furthermore, we urge DWR to review this and all other GSPs according to the Human Right to Water Scorecard, as we have done in this letter.[153] 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 and Nataly Escobedo Garcia
Leadership Counsel for Justice and Accountability

[153] Attached as Exhibit B.