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

June 3, 2020

Re: Recommendations for DWR and SWRCB Action Regarding the Kern Groundwater Authority 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 Kern Groundwater Authority GSA have the most to gain and the most to lose from SGMA implementation in the region. Communities like Arvin 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 Kern Groundwater Authority GSA has not adequately done so in this GSP. As described below, the GSP will likely allow drinking water to be contaminated by existing contaminant plumes, is likely to allow wells to go dry, and has no clear plan to help 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."[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 Kern Groundwater Authority GSA did not 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 Kern Groundwater Authority 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]

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[5] Water Code § 10723.2.

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

[7] Gov. Code § 12900 et seq.

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

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

The GSP must contain all of the elements set forth in the GSP regulations. However, this GSP omits critical data and information to comply with the GSP regulations. As discussed below, the GSP lacks required information and analyses, including among other things critical data regarding the consideration of drinking water impacts on disadvantaged communities and protected groups, sustainable management criteria that consider impacts on all beneficial users, and projects and management actions that address significant and unreasonable impacts to beneficial users. The GSP also fails to demonstrate how its proposed policies and activities will achieve its sustainability goal, which SGMA requires.[9] 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 Kern Groundwater Authority GSA and DWR must ensure that the GSP does not cause disparate impacts on protected groups, and must prioritize drinking water as an essential pillar of their groundwater sustainability plan. The GSP does not comply with these requirements.

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]

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[9] Water Code sec. 10727.2(b)(2)
[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.

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."[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. There are at least 105 disadvantaged unincorporated communities (DUCs) within Kern County, many of which will be impacted by this GSP.[17] Approximately 55% of the population of Kern County DUCs are people of color, slightly higher than the approximately 51% of the population of the County overall who are people of color. Many of the communities we work with and that are most susceptible to falling groundwater levels and groundwater pollution, however, are nearly 100% Latino. For example, according to the most recent American Communities Survey data, Lamont is 95% Hispanic or Latino.[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 these impacts. Therefore, because the GSP is likely to have significant negative impacts on households reliant on small water systems and domestic wells, and because the people reliant on small water systems and domestic wells are disproportionately people of color, the GSP is likely

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[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. 29,32 (2013), available at https://www.policylink.org/resources-tools/california-unincorporated-mapping-disadvantaged-communities-in-the-san-joaquin-valley; *see also* Kern County General Plan, Housing Element, Chapter 7 (April 2016), available at https://psbweb.co.kern.ca.us/planning/pdfs/he/KCHE_2015.pdf..

[18] Data available at https://data.census.gov/cedsci/, accessed on June 2, 2020.

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 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 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

[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).
[28] 23 CCR 354.28(b)(2).

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 failed wells thus may have irreparable impacts on community cohesion. These impacts are inconsistent with the very concept of sustainable groundwater management.

As explained below, the GSA has not based their policy determinations on an analysis of what impacts are "significant" and "unreasonable," and have 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.[33] GSAs are also subject to the requirements of the Bilingual Services Act, which requires a public agency to provide interpretation and translate materials into all languages for which there is a "substantial" number of people who it serves who speak that language.[34]

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[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).

[33] California Gov. Code § 54954.1

[34] Bilingual Services Act, Gov. Code, §§ 7293, 7295.

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."[35] 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."[36] GSAs thus must engage "diverse social, cultural, and economic elements of the population within the basin."[37] 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.[38]

The GSA did not adequately consider the input of disadvantaged communities, either at the GSA level or the member agency level. First, the GSA itself did not adequately engage residents of disadvantaged communities in the GSP creation process. The KGA GSA held regular GSA meetings at times that were not accessible to residents working during the day, so many beneficial user groups could not be adequately represented.

The GSA held several public workshops, but the feedback from these workshops, from meetings and from written comments was not incorporated into the GSP. We submitted a comment letter to the KGA GSA in June 2019 and presented this same letter verbally to the KGA board on June 26, 2019. At this meeting we expressed our initial concerns about GSP development and shared recommendations to ensure the protection of vulnerable water users. Among other things, we asked for the GSP to set protective sustainable management criteria to protect drinking water access in disadvantaged communities, ensure the GSP development process be reflective of all beneficial users by monitoring all primary drinking water contaminants, and to engage with DAC residents. These comments were not incorporated into the GSP or the GSP development process. We repeated these same concerns and recommendations in our comment letter on the final public draft of the GSP.

The GSA had a communications plan and an online Stakeholder Survey that was available most of the GSP development period, but the survey was only in English and was only available online, thereby limiting the opportunity for diverse input from non-English speakers and those without regular access to the internet. The survey was also not promoted outside the KGA agencies' existing networks in an authentic and intentional way to reach all beneficial users including disadvantaged communities. While the GSA worked with Self-Help Enterprises to

[35] Water Code § 10723.2.
[36] 23 CCR 354.10(d).
[37] Guidance Document for Groundwater Sustainability Plan; Stakeholder Communication and Engagement, p. 1.
[38] 23 CCR 355.4(b)(4).

provide interpretation at workshops, it did not provide interpretation at its board meetings. It also did not provide translated materials at its meetings.

Additionally, the decision-making structure of the GSA created barriers to public engagement. Instead of being able to learn about GSP development and provide feedback at GSA meetings, stakeholders also had to engage with a myriad of local member agencies, which all had separate meetings, to fully understand GSP development. The KGA GSP states that, "[t]o capture the intent of SGMA as legislation better served under local control, KGA member agencies played a vital role in the development of this GSP. This process included communication and outreach at the local level, with each KGA member agency engaging with its beneficial users to gather vital input, data, and feedback to ensure the success of this GSP and individual management area plans."[39] However, this decision-making structure meant attending member agency meetings and GSA meetings to understand GSP development, which is overly burdensome to most stakeholders who do not have adequate time in their schedules to attend so many regular meetings.

This burdensome process is compounded by the fact that GSA meetings were held during work hours, and member agencies' websites did not provide adequate notice or agendas for GSP-related meetings. The GSP states that "each KGA member agency engag[ed] with its beneficial users to gather vital input, data, and feedback to ensure the success of this GSP and individual management area plans."[40] However, our organization and residents we work with in Arvin had serious barriers to actively participating in GSP development through their local member agency.

The member agency that has jurisdiction over residents we work with in the GSA area, the Arvin-Edison Water Storage District ("Arvin-Edison WSD"), states in its Management Plan, a chapter of the GSP, that it considered disadvantaged communities by engaging representatives of the Arvin CSD, which contains disadvantaged community residents; by creating a Stakeholder Communication and Engagement Plan; and by "welcom[ing] public participation" at stakeholder workshops, Arvin-Edison WSD board meetings, Arvin CSD board meetings, KGA GSA events and meetings, a stakeholder survey, letters to landowners, and small or one-on-one meetings with individual stakeholders.[41] However, as a community-based organization working directly with residents in the GSA area, we were not included in these conversations until August 15, 2019 when we attended the Arvin- Edison WSD Board meeting where they presented their GSP chapter to its board for approval. Residents we work with did not have any knowledge of the GSP development process in the Arvin-Edison Management Area. We have collaborated with many GSAs to develop more effective outreach materials and procedures for ensuring

[39] Kern Groundwater Authority GSP, p. 37, dated January 2020.
[40] Kern Groundwater Authority GSP, p. 37, dated January 2020.
[41] Arvin-Edison Water Storage District Management Area GSP, p. 3-4, dated December 2019.

disadvantaged community involvement, but it was very difficult to follow the structure of KGA. This made it difficult to relay accurate and complete information to community residents and properly engage them with the topic.

Additionally, during GSP implementation the Arvin WSD's website contained no information on SGMA or GSP meetings. We understand from conversations with staff that the agency sent notices to its list serv, but there was no way to sign up for the list serv on the website, and without knowing when and where meetings are occuring the public could not go to a meeting to sign up and be added to the interested parties list serv. A representative from Arvin CSD brought regular updates to a community meeting, but no meeting notices or agendas about GSP development meetings were published in any publicly available format. This public process did not comply with the Brown Act, the Bilingual Services Act, or the requirements under SGMA.

After we submitted our comments on the draft GSP, including the Arvin-Edison Management Area chapter of the GSP, representatives from Arvin CSD reached out to us to discuss our concerns about their public process and the substance of their portion of the GSP. The representatives from Arvin CSD expressed their commitment to public participation and drinking water needs of the residents of Arvin, and agreed to consider our feedback on improved public participation practices. Since then, Arvin WSD huas updated its website and included a link to sign up for its interested parties listserv. But these efforts, taking place after GSP development was largely complete, did not inform the GSP.

The GSA's public participation process and its choice to delegate GSP development to member agencies did not ensure a transparent and inclusive process for developing the GSP. The public engagement process for this GSP was therefore inadequate. At a minimum, an adequate process must include the following elements, which were not present here:

1. **Notice:**[42] 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.[43]

[42] Government Code § 54954(a).

[43] 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."

2. **Translation of materials:**[44] 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.
3. **Interpretation:**[45] Ensure that the GSA provided interpretation services at board meetings, committee meetings and workshops for all languages spoken by at least 5 percent of the public served by the agency, to allow those who do not speak English or are unable to effectively communicate in English to effectively participate.
4. **Meaningful DAC representation on advisory committee:** Ensure that the GSA developed the GSP with an advisory committee that contained representatives from DACs, such that DAC representatives' voices were not drowned out by the overwhelming majority of another interest group.
5. **DAC representation on GSA boards and Coordination Committee:** Ensure that the GSA developed the GSP with GSA boards and a Coordination Committee that contained representatives from DACs.
6. **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,[46] and must be based on an analysis of what are "significant" and "unreasonable" impacts.[47] These policy decisions must also avoid disparate impacts on protected groups pursuant to state and federal law.[48] 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

[44] Government Code sec. 7296.2.
[45] Government Code sec. 7296.2.
[46] Water Code § 10723.2.
[47] 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."].
[48] Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

groundwater."[49] GSAs must also describe the "processes and criteria relied upon to define undesirable results."[50] 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 KGA GSP defines undesirable results for groundwater levels as "when the minimum threshold for groundwater levels are exceeded in at least three (3) adjacent management areas that represent at least 15% of the Subbasin or greater than 30% of the Subbasin (as measured by each management area)."[51] Neither the KGA GSP nor the Kern Subbasin Coordination Agreement contain an analysis of how what the concrete impacts would be on beneficial users from reaching these undesirable results, including how many wells could go dry, or a process by which beneficial users were consulted in order to determine whether these potential impacts were "significant and unreasonable."

The undesirable result could allow for more than 30% of the territory in the subbasin to exceed its minimum thresholds for groundwater levels before this undesirable result is triggered. This standard allows localized impacts across the subbasin area, which would cause significant and unreasonable impacts to beneficial users of groundwater for drinking and other domestic purposes. There is no justification for dividing the GSA area up into arbitrary management areas and then defining undesirable results as occurring only where three ***adjacent*** management areas exceed minimum thresholds. In short, the GSP allows domestic and small community wells to be dewatered.

Because the undesirable result for groundwater levels allows significant and unreasonable impacts, the GSP is inadequate.

b. The Measurable Objectives for Groundwater Levels are Inadequate

The SGMA regulations require the GSA 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."[52]

The GSA has not demonstrated that it evaluated how the proposed measurable objectives would contribute to the overall sustainable yield of the Kern Subbasin, which is approximately 324,326

[49] 23 CCR § 354.26.
[50] 23 CCR § 354.26.
[51] Kern Groundwater Authority GSP, p. 170, adopted January 2020.
[52] 23 CCR § 354.30(a)

acre-feet per year, according to the GSP,[53] or maintain sustainability over the implementation and planning horizon.

c. The Minimum Thresholds for Groundwater Levels are Inadequate

The groundwater levels sustainable management criteria set by a GSA must be the point that, "if exceeded, may cause undesirable results."[54] SGMA requires GSAs to analyze both the significance and reasonableness of proposed minimum thresholds,[55] and minimum thresholds must have the purpose of avoiding "significant and unreasonable" impacts on beneficial users.[56] The GSA's determination of what is "significant and unreasonable" must consider the impacts on all types of beneficial users, including disadvantaged communities.[57] For groundwater levels specifically, GSAs must place minimum thresholds for each monitoring site at the level "that may lead to undesirable results."[58] 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."[59]

The GSP's minimum thresholds were not established in a way that considered the interests of beneficial users including domestic well owners and disadvantaged communities, and the resulting minimum thresholds cause significant and unreasonable impacts on the most vulnerable beneficial users. The GSA delegated the task of creating the sustainable management criteria to member agencies, and in the process, did not ensure that the resulting policies complied with the law. The resulting impact from the proposed sustainable management criteria will likely lead to disparate impacts on protected groups pursuant to state and federal law.

The KGA GSA did not ensure that minimum thresholds created by member agencies considered the interests of all beneficial user groups, or prioritize the security of drinking water in the subbasin, in developing minimum thresholds. For example, the Arvin-Edison Management Area GSP did not consider the impact on drinking water users in setting its minimum thresholds. The AEWSD Management Area Draft GSP details how it calculated historical water lows and divided the Management Area into four "Sustainability Criteria Zones" based on historical low groundwater levels and agency jurisdiction, and how it adjusted the minimum thresholds to protect the canal that brings surface water to farmers.[60] However, it did not evaluate or consider

[53] Kern Groundwater Authority GSP, p. 151, dated January 2020.
[54] 23 CCR § 354.28.
[55] 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).
[56] 23 CCR § 354.26.
[57] Water Code § 10723.2.
[58] 23 CCR § 354.28.
[59] 23 CCR § 354.28.
[60] Arvin-Edison Water Storage District Management Area GSP, p. 124, dated December 2019.

how many wells could go dry from its proposed minimum thresholds, or adjust for effects on drinking water. Figures 2-5, 2-6 and 2-7 show all of the domestic wells, public supply wells, and communities dependent on groundwater in the GSA area.[61] The GSA therefore knows the number and location of all drinking water wells, but has chosen not to evaluate what the impacts will be to these wells at the minimum thresholds, and whether those impacts are significant and unreasonable. Therefore the GSA did not consider impacts on drinking water beneficial users, or ensure the protection of drinking water as the highest beneficial use of water, despite having all the information it needed to conduct such a drinking water impact analysis.

The GSP does not show that the impact to beneficial users was evaluated. It lays out the process by which the minimum thresholds and measurable objectives were approved, states that the GSA had workshops about the sustainable management criteria and that these items "appeared as discussion items" at the GSA board meetings, but does not show that the GSA considered the impacts on beneficial users.[62] The GSP contains no evaluation of impacts on beneficial users from reaching these sustainable management criteria, and the GSA's decisions regarding sustainable management criteria were not based on an evaluation of the impacts to beneficial users' access to groundwater resources.

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

1. **Evaluate the drinking water impact:** 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,[63] measurable objectives and minimum thresholds,[64] 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:**[65] 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.[66] Therefore the GSP must explicitly state how the GSA considered

[61] Kern Groundwater Authority GSP, pg. 26-28, dated January 2020.
[62] Kern Groundwater Authority GSP, p. 177, dated January 2020.
[63] 23 CCR § 354.26(c)
[64] 23 CCR § 354.28(b)(4)
[65] Water Code § 10723.2
[66] 23 CCR § 354.26.

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:**[67] 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:**[68] 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 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:**[69] Ensure that the measurable objectives and minimum thresholds for groundwater levels are established in such a way that prevents a disparate impact from occurring on protected classes 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.[70] 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.[71] A groundwater market is also likely to cause geographic concentrations of

[67] 23 CCR § 354.38(e)(3)
[68] 23 CCR § 354.10(d); DWR Guidance Document for Groundwater Sustainability Plans: Stakeholder Communication and Engagement, p.1.
[69] Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).
[70] *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.
[71] 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

pumping that increases the likelihood of contaminant plume migration, putting drinking water resources at risk. Oil and gas impacts on groundwater should also be analyzed, since Kern County is one of the largest producers of oil and gas, and reports show oil and gas activities can severely impact groundwater quality.[72]

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 only monitors and regulates one contaminant of concern despite its express knowledge that many other more harmful drinking water contaminants exist in its GSP area, which could be impacted by groundwater usage and activities. The GSA's sustainable management criteria for groundwater quality are inadequate.

b. The Undesirable Results Determination for Groundwater Quality Is Inadequate

Undesirable results are the point at which "significant and unreasonable" impacts on beneficial users caused by degraded groundwater quality. The SGMA regulations require GSAs to justify their undesirable results by including the "[p]otential effects on the beneficial uses and users of groundwater."[75] GSAs must also describe the "processes and criteria relied upon to define undesirable results."[76] The undesirable result cannot have a disparate impact on protected groups pursuant to state civil rights law.

Like the undesirable result for groundwater levels, the proposed definition of undesirable results for degraded water quality are "when the minimum threshold for groundwater levels are exceeded in at least three (3) adjacent management areas that represent at least 15% of the

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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

[72] Jackson, Robert B., and DiGuilio, Dominic C., Impact to Underground Sources of Drinking Water and Domestic Wells from Production Well Stimulation and Completion Practices in the Pavillion, Wyoming, Field, Environ. Sci. Technol. 2016, 50, 8, 4524-4536; see also references cited in *Six ways oil and gas development can contaminate land and water (and what to do about it),* by Adam Peltz and Nichole Saunders, Environmental Defense Fund Blogs, found at http://blogs.edf.org/energyexchange/2017/12/29/six-ways-oil-and-gas-development-can-contaminate-land-and-water-and-what-to-do-about-it/ , last viewed November 26th, 2019.

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

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

[75] 23 CCR § 354.26.

[76] 23 CCR § 354.26.

Subbasin or greater than 30% of the Subbasin (as measured by each management area)."[77] As with the groundwater levels undesirable results, it is not clear what the impacts from reaching this undesirable result will be on beneficial users, and neither the KGA GSP nor the Kern Subbasin Coordination Agreement contain an analysis of how what the concrete impacts would be on beneficial users from reaching these undesirable results, including how many wells could go dry. Instead of being formed through a process in which beneficial users were consulted in order to determine whether these potential impacts were "significant and unreasonable," the process of defining undesirable results in the Kern subbasin seems to be an arbitrary determination of what is "significant and unreasonable."

The water quality undesirable results will allow significant and unreasonable impacts in localized areas and/or for short to medium periods of time. Given that more than 30% of the territory in the subbasin will be allowed to exceed its minimum thresholds for groundwater quality before this undesirable result is triggered, the GSP allows drinking water users to be impacted by drinking water contamination caused by GSA policies and activities. The definition of undesirable results therefore sets a very low inadequate bar for plan failure, and must be modified to ensure that drinking water is protected within the basin.

Because the undesirable results for groundwater quality allow significant and unreasonable impacts on sources of drinking water, DWR cannot approve the GSP.

b. The Minimum Thresholds and Measurable Objectives 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."[78] 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."[79] Measurable objectives must lead to compliance with the GSA's sustainable yield by 2040.

The GSP briefly states that each member agency established the minimum thresholds and measurable objectives for their management area, mentions that in many cases groundwater levels serve as a proxy for groundwater quality, lists the minimum thresholds and measurable objectives established by each member agency in Table 3-1, and states that more information can be found in the management area GSPs.[80] For several management areas, Table 3-1 does not list which contaminants are being monitored for compliance with the proposed minimum thresholds

[77] Kern Groundwater Authority GSP, p. 172, dated January 2020.
[78] 23 CCR § 354.28.
[79] 23 CCR § 354.28.
[80] Kern Groundwater Authority GSP, p. 179, dated January 2020.

and measurable objectives. Many management areas have used groundwater levels as a proxy for groundwater quality.

Groundwater levels are not a proxy for groundwater quality, and failure to set adequate minimum thresholds or measurable objectives to protect against discharge of all primary and secondary drinking water contaminants during recharge activities and/or activities that cause shifting contaminant plumes renders the GSP inadequate.

As in the case of groundwater levels, it is clear that the GSA has not considered the potential impact on drinking water users, in particular disadvantaged communities that are less able to afford solutions to treat contaminated drinking water. This has resulted in minimum thresholds and measurable objectives like those in the Arvin GSP, which will only be monitoring for compliance with sustainable management criteria in one well location, and has set the minimum threshold at the drinking water MCL for the contaminant, and the measurable objective at 75% of the MCL. The member agency is only monitoring for compliance with arsenic standards, despite the agency's knowledge of the existence of "nitrate...total dissolved solids (TDS), boron, iron and manganese...within or near the Arvin-Edison Management Area above drinking water standards and/or agricultural water quality goals."[81]

The lack of sufficient groundwater quality sustainable management criteria in areas like Arvin means that the GSP allows drinking water pollution that will be disproportionately felt by disadvantaged communities that are less able to afford treatment solutions. This significant and unreasonable impact is not adequate under SGMA or state and federal law prohibiting policy from resulting in disparate impact. The GSA has not conducted an analysis of how the minimum thresholds and measurable impacts could impact critical drinking water resources, and therefore has not considered the interests of all beneficial user groups, particularly drinking water users.

The GSA has also not specified what actions will be taken if water contamination approaches minimum thresholds, or how minimum thresholds will be triggered. Member agencies such as the Arvin-Edison WSD have not specified this in their plans. The GSA should ensure that minimum thresholds will be triggered after one test shows a violation of an MCL or a trend toward an MCL. The GSA must require that member agencies specify what actions they will take if groundwater quality approaches minimum thresholds, what point or measurement will trigger this action, and how impacted residents will be informed. The GSA must also ensure GSA-wide consistency on when minimum thresholds are triggered and what actions are taken in response, in order to protect drinking water across the GSA area.

[81] Arvin-Edison Water Storage District Management Area Plan, p. 80, dated December 2019.

Because the minimum thresholds and measurable objective fail to consider all beneficial users and cause significant and unreasonable impacts, the GSP is inadequate and DWR cannot approve it.

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:**[82]
    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, 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

[82] 23 CCR § 354.34(b)(2) and (f)(3)

wells) are likely to be be affected by the undesirable results,[83] measurable objectives and minimum thresholds.[84]

6. **Implement DAC and drinking water user input into sustainable management criteria:**[85] Ensure that the GSP discusses how stakeholder input from DAC community members was considered in the development of undesirable results, measurable objectives and measurable objectives.
7. **Incorporate new drinking water data into sustainable management criteria:**[86] 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:**[87] 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 not lead to disproportionately more wells going 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,[88] including disadvantaged communities on domestic wells,[89] and must avoid disparate impacts on protected groups pursuant to state law.[90]

As discussed below, The GSA's monitoring network does not comply with SGMA regulations, and fails to capture drinking water impacts to disadvantaged communities and domestic wells. Specifically, the GSP lacks representative monitoring wells in areas of the subbasin where drinking water users may be particularly vulnerable to groundwater supply and quality issues, leaving the GSA with no ability to measure and avoid significant and unreasonable impacts to those users. The monitoring wells are also monitored two infrequently to timely detect and prevent falling groundwater levels and/or contamination.

[83] 23 CCR § 354.26(c)
[84] 23 CCR § 354.28(b)(4)
[85] 23 CCR § 354.10(d); DWR Guidance Document for Groundwater Sustainability Plans: Stakeholder Communication and Engagement, p.1.
[86] 23 CCR § 354.38(e)(3)
[87] Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).
[88] 23 CCR § 354.34
[89] Water Code § 10723.2.
[90] Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

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

The insufficiency of the representative monitoring network renders the GSP inadequate.

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."[91] The GSA must also make decisions about the monitoring network in a way that considers the interests of all beneficial users.[92]

The GSP here presents a map of its groundwater levels monitoring wells,[93] but does not show what aquifers the wells are monitoring, and where monitoring wells are in relation to disadvantaged communities on domestic wells and small community water systems. As such, it is not possible for the public or DWR to determine whether there is a sufficient density of wells to collect representative measurements and detect and prevent significant and unreasonable impacts on beneficial users.

The monitoring network for groundwater levels is therefore inadequate and will not detect significant and unreasonable impacts to disadvantaged communities. 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:**[94] 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:**[95] Ensure that the representative monitoring wells (RMWs) for groundwater levels are presented on maps and in tables that identify which set of minimum thresholds and measurable

[91] 23 CCR § 354.34(c)(1)(A)
[92] 23 CCR § 354.34(b)(2)
[93] Kern Groundwater Authority GSP, Figure 3-3, p. 186-189, dated January 2020.
[94] 23 CCR § 354.34(b)(2) and (f)(3)
[95] 23 CCR § 354.34(b)(2) and (f)(3)

objectives will be applied to which RMWs, and that these maps clearly identify the locations of DACs, small water systems and other sensitive users.

3. **Identify and address other drinking water data gaps:**[96] 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."[97]

The groundwater quality monitoring network does not adequately capture impacts on drinking water users. For example, in the case of the Arvin GSP, the member agency will only monitor for compliance with its minimum threshold and measurable objective for arsenic once a year in one well, ACSD Well #14, which is one of the wells that provide drinking water to the community of Arvin.[98]

First, measuring for Arsenic only once a year does not provide the member agency or the GSA with frequent enough information to detect and respond to severe drinking water contamination in a reasonable amount of time. If the member agency's management actions, projects, or decisions to let groundwater decline increase drinking water contamination for families in the management area, the member agency could go a whole year without detecting these impacts. Meanwhile, it will not be responsive to the drinking water impacts from other contaminants which it may have moved or increased from its activities. Instead, the member agency must measure for all contaminants of concern every month.

Second, only measuring for compliance with arsenic measurable objectives and minimum thresholds does not protect against increases in other contaminants that exist in other parts of the management area (boron, nitrates, TDS, 123-TCP, iron and manganese). These contaminants could extend, move or increase due to groundwater management activities and pumping patterns. The Arvin GSP does plan to monitor for these contaminants in seven other wells outside of Arvin,[99] but has not set minimum thresholds and measurable objectives for these wells, and does

[96] 23 CCR § 354.38(e)(3)
[97] 23 CCR § 354.34(c)(4)
[98] Arvin-Edison Water Storage District Management Area Plan, p. 144, dated December 2019.
[99] Arvin-Edison Water Storage District Management Area Plan, p. 144-145, dated December 2019.

not have plans to do so. Without standards against which to compare detected levels of contaminants, and concrete commitments to preventing increased contamination, inclusion of these monitoring networks are meaningless.

Furthermore, Arvin is currently experiencing 123-TCP contamination that threatens the health of Arvin residents, so the GSP must monitor for compliance with 123-TCP standards in particular. In order to ensure that member agencies are detecting new contaminant plumes that could impact drinking water quality, the GSA must ensure that these representative monitoring wells monitor for all contaminants with primary drinking water standards, as well as contaminants known to increase with groundwater management activities such as uranium.[100] The GSA must also ensure that all representative monitoring wells are held to minimum thresholds and measurable objectives, measure the extent and spread of known contaminant plumes, and are able to measure the groundwater levels at the depth at which the drinking water wells are screened.

Third, the well that was chosen, ACSD Well #14, was chosen because it does not have contaminants that are known to exist in wells in the northern part of the management area, which are not currently in use by Arvin CSD, according to our conversation with Arvin-Edison WSD staff at the Kern Subbasin Open House on September 26th, 2019. Avoiding monitoring contaminated areas is inappropriate and fails to ensure that groundwater management activities and pumping do not aggravate existing contamination. The GSA should ensure that the member agency instead monitors for all existing contaminants at minimum throughout the area and especially in areas where contamination is known to exist, and sets minimum thresholds and measurable objectives that apply to all monitoring wells.

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:[101]**
    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

[100] Smith et al., "Overpumping Leads to California Arsenic Threat," Nature Communications (June 2018) [arsenic discharge from clay correlated with overpumping]; Jurgens et al., "Effects of Groundwater Development on Uranium" (November 2010) [strong correlation between high bicarbonate irrigation and recharge water and leaching of uranium from shallow sediments to groundwater].
[101] 23 CCR § 354.34(b)(2) and (f)(3)

2. **Clearly describe how the GSA will monitor for drinking water impacts:** Ensure that the GSP includes a description of how the GSA(s) will monitor groundwater contamination that could affect drinking water in the GSA area. Ensure that the representative monitoring wells (RMWs) for groundwater quality are presented on maps and in tables, and that the maps of RMWs clearly identify the locations of DACs, small water systems and other sensitive users.
3. **Ensure that the GSP plans to measure the following contaminants at all representative monitoring wells:**[102]
    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
4. **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.
5. **Ensure accurate detection of impacts on drinking water users and DACs:**[103] 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 at least as an interim measure as wells are constructed.
6. **Identify baseline contaminant levels:** Ensure that the GSP identifies the current contaminant levels, minimum thresholds and measurable objectives at each RMW, so that it is clear to the public how the contamination could change at each RMW site.
7. **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.
8. **Collaboration with other agencies:**[104] Ensure that the GSP explains how the GSA 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

[102] 23 CCR § 354.34(b)(2) and (f)(3)
[103] 23 CCR § 354.34(b)(2) and (f)(3)
[104] 23 CCR § 354.34(e)

SWRCB's needs assessment and the GAMA program, in order to build better regional understanding of groundwater quality issues, commit to clear roles, 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[105] and avoid disparate impacts on protected groups.[106] The GSP must also concretely outline how each objective and the overall sustainability goal will be achieved.[107] The projects and management actions set forth in the GSP do not demonstrate a plan for achieving sustainability goals, 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.[108]

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. The GSA has not demonstrated how they have considered the interests of beneficial users including domestic well owners and disadvantaged communities.[109] The resulting impact from the proposed sustainable management criteria will likely lead to disparate impacts on protected groups pursuant to state and federal law.[110]

The GSA has allowed member agencies like the Arvin-Edison WSD to rely heavily on increasing use of surface water.[111] This places the majority of the plan's success on surface water resources, which are variable and may not be able to be procured. The GSA must ensure that member agencies implement demand reduction strategies from the beginning to ensure that the

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[105] Water Code § 10723.2.
[106] Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).
[107] Water Code § 10727.2(b)(2).
[108] Water Code § 10727.2(b)(1).
[109] Water Code sec. 10723.2.
[110] 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].
[111] Arvin-Edison Water Storage District Management Area Plan, p. 153-154, dated December 2019.

GSP is on a path to sustainability within the statutory time period. The GSA will not achieve its sustainability goals if water use is not limited through fully-implemented demand reduction requirements immediately. The chosen management actions undermine the likelihood that the basin will reach its sustainability goal by 2040, as required by SGMA.[112]

Despite the fact that drinking water wells may go dry at the GSP's groundwater levels minimum thresholds, and the fact that drinking water contamination is likely to occur because of changing pumping patterns and recharge activities, the GSA does not have a plan for preventing or mitigating these impacts. Furthermore, the GSA's description of projects does not include a description of any potential negative impacts on beneficial uses of water, such as groundwater contamination, and how such impacts will be mitigated and monitored.

A critical problem with the structure of the GSA is that member agencies are not required to share the cost or responsibility for critical GSA-wide projects. Many more financially powerful agricultural and water banking member agencies could and should be part of a strategy to protect drinking water resources in the GSA area as a whole, especially given that they use much larger quantities of groundwater and their continued pumping will likely lead to dry wells and groundwater contamination issues for the most vulnerable homes in the GSA area. Given that California has recognized drinking water as a human right, and the importance of drinking water that we all experience in our own lives, the GSA member agencies should collectively come together to ensure that no family has to go days, months or years without safe tap water in their home. The Arvin GSP contains two projects for treating water quality in Arvin, but these projects were already under way and fully funded so should not be included in the GSP. The GSP has no overall drinking water protection program to protect residents against dry wells and contaminated drinking water from its policies and groundwater management activities.

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.

[112] Water Code § 10727.2(b)(1).

2. **Establish a clear and proactive plan for demand reduction.** Demand reduction should be implemented immediately.
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:**[113] Ensure that the GSP's projects and management actions, taken as a whole, prevent a disproportionately negative impact 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.

I. Plan Implementation Section is Inadequate

GSPs must include a planning and implementation horizon[114] and must show how the sustainability goal will be achieved by 2040.[115] GSP implementation must continue to consider the interests of all beneficial user groups and engage a diversity of stakeholders. The GSP's plan implementation section 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.[116]

The GSA's Communications and Engagement plan states that "[d]uring the implementation phase, communication and engagement efforts will be shifted to educational and informational awareness of the requirements and processes for reaching groundwater sustainability. Active involvement of all stakeholders is encouraged during this phase, and public notices are required for any public meetings and prior to imposing, and later increasing, any fees."[117] It is concerning that this statement communicates that the public will not be engaged in decisions about projects and management actions, annual reports, five year updates, or potential modifications to the sustainable management criteria and monitoring network. The public must be engaged in in all decisions about GSA policies and activities, to ensure that impacts to all beneficial users are considered.

[113] Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).
[114] Water Code § 10727.2.(c)
[115] Water Code § 10727.2(b)(1).
[116] Water Code § 10733(a); 23 CCR 355.4(b).
[117] Kern Groundwater Authority GSP, Appendix E, pg. I-6, dated January 2020.

The GSA does not include commitments to provide translated, accessible notice about agency meetings and decisions. The GSA does not commit to providing interpretation and translated materials at workshops and board meetings, or creating an Advisory Committee with representation from disadvantaged communities. The GSP also lacks a commitment to working with local community-based organizations to ensure effective outreach and engagement of disadvantaged communities.

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:**[118] 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.[119]
3. **Translation of materials:**[120] 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:**[121] 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 an advisory committee and a GSA Board containing representatives from DACs. The GSA must include representatives on the the GSA board, and should include representatives from DACs on all advisory committees such that their voices can be as strong as other beneficial user groups.

[118] Government Code § 54954(a).
[119] Government Code sec. 7296.2.
[120] Government Code sec. 7296.2.
[121] Government Code sec. 7296.2.

7. **Partnership with local community based organizations:** Ensure that the GSP states that ongoing engagement will include partnership between the 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 meaningful outreach to DACs and incorporate feedback before approving operating budgets and enacting groundwater fees.

J. 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." (emphasis added.) 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 the GSP, it must be consistent with the Human Right to Water, and separately, DWR must consider the human right on review of GSP. Because the GSP 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."[122] 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."[123] 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.[124]

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

[122] AB 1739 (2014).
[123] Water Code § 10720.5(b).
[124] *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."].

reasonable and beneficial use thereof in the interest of the people and for the public welfare."[125] The doctrine applies to all water users, regardless of basis of water right, and all water rights and methods of diversion.[126] A determination of reasonableness of a use "cannot be resolved in vacuo isolated from statewide considerations of transcendent importance."[127]

DWR and the Water Board must ensure that GSP's water allocations are consistent with the reasonable and beneficial use doctrine.[128] In doing so, DWR and the Board must follow the Legislature's directive to prioritize domestic use of water resources over irrigated agriculture[129] and ensure that SGMA implementation furthers the human right to safe and affordable drinking water[130] — 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."[131]

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[125] 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."].

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

[127] Joslin v. Marin Municipal Water Dist. (1967) 67 Cal.2d 132, 140.

[128] 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].

[129] 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 .

[130] Water Code § 106.3.

[131] *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."].

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.[132] 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.[133] 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."[134] The court also specifically held that SGMA does not supplant the requirements of the common law public trust doctrine.[135]

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.[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.

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DWR cannot approve the GSP because it fails to protect beneficial users and access to drinking water. We welcome the opportunity to further 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.[137] We hope to successfully work with the GSA, 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 the GSP adhere to the

[132] *Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 844.
[133] *Id.* at 856-62.
[134] Id. at 865.
[135] *Id.* at 862-870.
[136] *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].
[137] Attached as Exhibit B.

standards in the Human Right to Water Scorecard, and that these standards are followed during GSP implementation.

Sincerely,

Jasmene del Aguila and Amanda Monaco

Leadership Counsel for Justice and Accountability