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June 3, 2020

**Re: Recommendations For DWR And SWRCB Action Regarding The Kern River Groundwater Sustainability Agency 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 River GSA area have the most to gain and the most to lose from SGMA implementation in the region. Communities like Fuller Acres, Lamont, and

Weedpatch 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 River GSA has not adequately done so in this GSP. As described below, the GSP is likely to cause up to 250 wells to go dry in the subbasin and puts domestic wells at risk of contamination from many unmonitored drinking water contaminations, with little funding allocated to help address drinking water impacts. Our recommendations below show how the GSA could improve its GSP to avoid disparate impacts on protected groups and ensure that it is treating all beneficial users equitably

The Department of Water Resources (DWR) and the State Water Resources Control Board (SWRCB) must evaluate GSPs according to the Human Right to Water, and ensure that the GSPs comply with SGMA, the GSP regulations, and state and federal civil rights law, among other laws and regulations. In 2012, California recognized the Human Right to Water, codifying “the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.”<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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,<sup>4</sup> and that they “consider the interests of” an enumerated list of all types of

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<sup>1</sup> Water Code § 106.3(a)

<sup>2</sup> Water Code § 106.3(b)

<sup>3</sup> Attached as Exhibit B.

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

beneficial users, including disadvantaged communities on domestic wells and community water systems.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> DWR and the SWRCB must evaluate GSPs in accordance with all of these and other relevant legal obligations.

Unfortunately, the Kern River GSA did not meaningfully include disadvantaged communities’ needs, or avoid a disparate impact, and the GSP is incomplete and does not comply with SGMA and other applicable state laws. As noted above, we reviewed the Kern River 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.<sup>8</sup>

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<sup>5</sup> Water Code § 10723.2.

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

<sup>7</sup> Gov. Code § 12900 et seq.

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

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

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

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

The Kern River 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.<sup>11</sup> In addition, the state’s Fair Employment and Housing Act guarantees all Californians the right to hold and enjoy housing

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<sup>9</sup> 23 CCR § 355.4(a)(2).

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

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

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

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

Consistent with these studies, this GSP will cause disproportionate negative impacts on communities of color reliant on small water systems and domestic wells. There are at least 105 disadvantaged unincorporated communities (DUCs) within Kern County, many of which will be impacted by this GSP.<sup>16</sup> 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.<sup>17</sup>

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

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

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

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

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

<sup>16</sup> Flegel et al., “California Unincorporated: Mapping Disadvantaged Communities in the San Joaquin Valley,” p. 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](https://psbweb.co.kern.ca.us/planning/pdfs/he/KCHE_2015.pdf).

<sup>17</sup> Data available at <https://data.census.gov/cedsci/>, accessed on May 22, 2020.

these impacts. Therefore, because the GSP is likely to have significant negative impacts on households reliant on small water systems and domestic wells, and because the people reliant on small water systems and domestic wells are disproportionately people of color, the GSP is likely to cause disparate impacts on protected classes.

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

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

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

In addition to defining undesirable results, GSPs must quantify benchmarks for groundwater conditions, or “minimum thresholds,” that may cause undesirable results if exceeded.<sup>26</sup> GSPs must include “an explanation of how the Agency has determined that basin conditions at each

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<sup>18</sup> Water Code § 10733(a).

<sup>19</sup> Water Code § 10721(u).

<sup>20</sup> Water Code § 10721(v).

<sup>21</sup> Water Code § 10721(x).

<sup>22</sup> Water Code § 10733(a).

<sup>23</sup> Water Code § 10721(v).

<sup>24</sup> Water Code § 10721(u).

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

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

minimum threshold will avoid undesirable results for each of the sustainability indicators.”<sup>27</sup> A GSP’s determination of when an undesirable result will occur must be based on analysis of when adverse impacts become “significant” and “unreasonable.”<sup>28</sup>

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

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 have 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.<sup>32</sup> GSAs are also subject to the requirements of the Bilingual Services Act,

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

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

<sup>29</sup> Water Code § 10723.2.

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

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

<sup>32</sup> California Gov. Code § 54954.1

which requires a public agency to provide interpretation and translate materials into all languages for which there is a “substantial” number of people who it serves who speak that language.<sup>33</sup>

In addition, GSAs must also adhere to the specific public participation and inclusivity requirements laid out in SGMA. As discussed above, SGMA requires that a GSA “shall consider the interests of all beneficial uses and users of groundwater,” which expressly includes “[h]olders of overlying rights” and “[d]isadvantaged communities, including, but not limited to, those served by private domestic wells or small community water systems.”<sup>34</sup> The emergency regulations similarly require that a GSP summarize and identify “opportunities for public engagement and a discussion of how public input and response will be used.”<sup>35</sup> GSAs thus must engage “diverse social, cultural, and economic elements of the population within the basin.”<sup>36</sup> The regulations recognize that failure to engage adequately with a diverse cross-section of the public undermines the likelihood that a GSP will avoid undesirable results and meet its sustainability goal.<sup>37</sup>

The Kern River GSA made critical decisions about GSP development at its bi-monthly Plan Managers meetings and its KRGSA Board Meetings. However, the Plan Managers meetings were not open to the public, and this prevented the public from being included in key policy decisions. For example, the GSA determined the GSP’s Measurable Objectives and Minimum Thresholds in this space without public input until it reached the KRGSA board meeting for final review and approval. This means that the public had no opportunity for its input to be meaningfully considered in the crafting of sustainable management criteria. In addition, the KRGSA board meetings were held during work hours, making them inaccessible for individuals working during the day. Therefore, there was not an accessible means for the public to meaningfully participate in key aspects of decision-making in this process.

The GSA did host an open house and at least one workshop in Lamont; however, this venue did not solicit feedback from all beneficial user groups and did not lead to a plan that “considers the interests of” all of these groups. Active community participation should have taken place during the entire GSP creation process in communication with local community-based organizations and community groups. Additionally, public input from all beneficial user groups should have shaped the GSA’s critical policy decisions, including decisions about sustainable management criteria, projects, and management actions. The impacts the GSP allows to drinking water users noted below provides further support for the conclusion that drinking water users’ input was not meaningfully obtained or adequately incorporated into the GSP.

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<sup>33</sup> Bilingual Services Act, Gov. Code, §§ 7293, 7295.

<sup>34</sup> Water Code § 10723.2.

<sup>35</sup> 23 CCR 354.10(d).

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

<sup>37</sup> 23 CCR 355.4(b)(4).

Although the GSA did provide interpretation services and translated materials at the Lamont workshop, the GSA's board meetings did not include interpretation services. Lack of translation and translated materials at board meetings meant that all members of the public and impacted beneficial users could not participate meaningfully in decisions about their groundwater resources.

The GSA board now consists of the City of Bakersfield, ID4, and Kern Delta Water District. This is not a full reflection of all beneficial users within the GSA who will be impacted by decisions made by this board. Especially with the GSA's decision to cover significant white areas through a memorandum of understanding (MOU) after the county's decision to withdraw from the GSP development process, the GSA should have ensured that disadvantaged communities and other beneficial users in Kern County white areas were represented on the GSA board. The GSA did not have an advisory committee, so it did not include disadvantaged communities in any level of governance.

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

1. **Description of DAC engagement:** Ensure that the GSP specifically identifies how DAC beneficial users were meaningfully engaged in the planning process.
2. **Notice:**<sup>38</sup> Ensure that the GSA provided clear notice to the public about GSA meetings to develop the GSP, posted in ways that all stakeholders were made aware of the meetings, and translated into all languages spoken by at least 5 percent of the public served by the agency, who do not speak English or are unable to effectively communicate in English.<sup>39</sup>
3. **Translation of materials:**<sup>40</sup> Ensure that the GSA translated materials into all languages spoken by at least 5 percent of the public served by the agency, who do not speak English or are unable to effectively communicate in English.

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<sup>38</sup> Government Code § 54954(a).

<sup>39</sup> Government Code sec. 7296.2: Dymally-Alatorre Bilingual Services Act, stating that local agencies providing services to the public must provide translated materials and interpretation when it serves a substantial number of non-English-speaking people. The law defines a "substantial number of non-English-speaking people" as "members of a group who either do not speak English, or who are unable to effectively communicate in English because it is not their native language, and who comprise 5 percent or more of the people served by the statewide or any local office or facility of a state agency." This is because "effective maintenance and development of a free and democratic society depends on the right and ability of its citizens and residents to communicate with their government and the right and ability of the government to communicate with them."

<sup>40</sup> Government Code sec. 7296.2.

4. **Interpretation:**<sup>41</sup> Ensure that the GSAs 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.
5. **Meaningful DAC representation on an advisory committee:** Ensure that the GSAs 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.
6. **DAC representation on GSA board:** Ensure that the GSA developed the GSP with a GSA board that contained representatives from DACs.
7. **Public Comment Period:** Ensure that the GSA provided a robust public comment period of at least 60 days, with opportunity for the public to discuss comments and proposed agency responses with staff and the GSA before GSP approval.
8. **Incorporation of stakeholder input:** Ensure that the GSP explicitly describes how stakeholder input was incorporated into the GSP process and decisions, including sustainable management criteria and all projects and management actions.

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

Water budgets must contain an accounting and assessment of the total annual volume of groundwater and surface water entering and leaving the basin, including historical, current and projected water budget conditions, and the change in the volume of water stored.<sup>42</sup> DWR regulations also require that the historical water budget “start with the most recent available information.”<sup>43</sup> In order to meet a GSA’s sustainability goal, a GSA must accurately estimate current and future groundwater usage. A GSP’s sustainable yield must also be “calculated over a base period representative of long-term conditions in the basin.”<sup>44</sup>

Based on our Focused Technical Review, the GSP does not conform to this regulation. The water budget calculations are incomplete.

First, the GSA must provide more information on how it chose the forecasting period, and change it if it does not contain sufficient variability. The GSP restricts the number of years included in the forecast and therefore does not incorporate sufficient variability into its analysis. The 50-year forecasting period for future water budgets is built using three sequences of hydrologic data from 1995 to 2014.<sup>45</sup> This approach is described as replicating the “average hydrologic conditions” in the basin over the full historic record. But the fact that long-term

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<sup>41</sup> Government Code sec. 7296.2.

<sup>42</sup> 23 CCR § 354.18.

<sup>43</sup> 23 CCR 354.18(c)(2)(B).

<sup>44</sup> Water Code § 10721(w).

<sup>45</sup> Final GSP Kern River Groundwater Sustainability Agency, Table 4-13 p.4-37, January 2020

annual precipitation is average over the 50-year forecasting period does not provide any information about the spread of those years.<sup>46</sup> Further, we are concerned that the GSA may have ignored time periods with low annual precipitation in order to artificially increase the budget, despite the fact that drought conditions are projected to be more frequent in the future.

Additionally, the GSP has not adequately accounted for inflows and outflows. As the GSP acknowledges, the “checkbook” method for calculating groundwater inflows and outflows simplifies the hydrogeologic system.<sup>47</sup> Water flows from high to low head, and ignoring the subsurface flows into and out of the basin runs the risk of over-estimating the amount of water available to be reclaimed. Based on the C2VSimFG-Kern Model results, it appears that over long-term planning horizons that bridge wet and dry hydrologic cycles, subsurface flows into the Plan Area are more or less in balance — that is, it is not continuously losing water to adjacent jurisdictions (or continuously gaining it).<sup>48</sup> If a neighboring GSA manages groundwater in such a way that the net flow of groundwater is consistently leaving the Plan Area, the “checkbook” approach will need to be updated to include losses to neighboring aquifers. If agencies do not account for these subsurface outflows, and reclaim the total amount they recharged, they will be transferring the negative impact of those subsurface outflows to other groundwater users.

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

#### **F. The GSP’s Sustainable Management Criteria For Groundwater Levels Are Not Adequate**

The sustainable management criteria for groundwater levels must be made after considering the interests of all beneficial user groups, including disadvantaged communities reliant on domestic wells and community water systems,<sup>49</sup> and must be based on an analysis of what are “significant” and “unreasonable” impacts.<sup>50</sup> These policy decisions must also avoid disparate impacts on protected groups pursuant to state and federal law.<sup>51</sup> As discussed below, the GSP does not meet these requirements.

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<sup>46</sup> Final GSP Kern River Groundwater Sustainability Agency, p.4-37 to 4-38, January 2020

<sup>47</sup> Final GSP Kern River Groundwater Sustainability Agency, p.4-20, dated January 2020

<sup>48</sup> Final GSP Kern River Groundwater Sustainability Agency, p.4-37, dated January 2020

<sup>49</sup> Water Code § 10723.2.

<sup>50</sup> Water Code § 10721(x); 23 CCR 354.28(b); *see also* Cal. Dep’t Water Res., *Draft Best Management Practices for the Sustainable Management of Groundwater* 6 (Nov. 2017) [“GSAs must consider and document the conditions at which each of the six sustainability indicators become significant and unreasonable in their basin, including the reasons for justifying each particular threshold selected.”]; *id.* 8 [“The GSP must include an analysis and written interpretation of the information, data, and rationale used to set the minimum threshold.”].

<sup>51</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

Kern River GSA has proposed three different management areas: Urban, Agricultural, and Banking,<sup>52</sup> and the way in which sustainable management criteria have been developed puts communities in the Agricultural area in particular at risk of lack of drinking water supply. The sustainable management criteria also put drinking water users in the Urban management area at risk of depletion of drinking water because of the way that the nearby Agricultural minimum thresholds are set.

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

Undesirable results are the point at which groundwater conditions cause “significant and unreasonable” impacts on beneficial users. The SGMA regulations require GSAs to justify their undesirable results by including the “[p]otential effects on the beneficial uses and users of groundwater.”<sup>53</sup> GSAs must also describe the “processes and criteria relied upon to define undesirable results.”<sup>54</sup> These determinations must be made based on an analysis of when decreasing groundwater levels will cause results that are either “significant” or “unreasonable” in light of the context of the basin and the real-world circumstances on the ground. The undesirable results determination does not comply with these requirements because it is unsupported by analysis, it is too vague, and it does not show how the GSA considered the interests of beneficial users in shaping its conclusions.

In the Agricultural management area, undesirable results will be triggered only after 40% of the representative monitoring sites exceed minimum thresholds for two consecutive years.<sup>55</sup> The GSP states that an undesirable result for groundwater levels in the Urban Management Area is triggered after any well exceeds the minimum threshold for three consecutive months. The GSA did not conduct any analysis of how beneficial users, particularly disadvantaged communities on domestic wells and small community water systems, will be impacted by water levels reaching these levels. Therefore it cannot have considered the interests of all beneficial users in the GSA area.

Furthermore, the undesirable results for groundwater levels will allow significant and unreasonable impacts on sources of drinking water to occur. This is for at least two reasons. First, by defining undesirable results as triggered only after 40% of the monitoring sites exceed minimum thresholds, the GSP allows localized impacts on communities within the Agricultural Management Area without triggering the undesirable result. Communities and households could be severely impacted long before the 40% threshold is met. Second, requiring that representative monitoring sites exceed for two consecutive years masks seasonal impacts as well as impacts that persist for less than two years. It would be significant and unreasonable to allow domestic and

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<sup>52</sup> Final GSP Kern River Groundwater Sustainability Agency, pg 5-3, dated January 2020

<sup>53</sup> 23 CCR § 354.26.

<sup>54</sup> 23 CCR § 354.26.

<sup>55</sup> Final GSP Kern River Groundwater Sustainability Agency, pg 5-10, January 2020

small community wells to go dry for months at a time — even a relatively short impact on drinking water will likely require well replacement, a reliance on bottled water, and other significant measures that low-income households typically cannot afford.

Because the undesirable results are inadequate, DWR cannot approve the GSP.

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

The SGMA regulations require GSAs to set measurable objectives that “achieve the sustainability goal for the basin within 20 years of Plan implementation and...continue to sustainably manage the groundwater basin over the planning and implementation horizon.”<sup>56</sup>

The GSA defines the measurable objectives in the Agricultural Management Area as the average of the selected minimum threshold and the highest groundwater level observed during the historical Study Period.<sup>57</sup> The GSA has not evaluated how this groundwater elevation will affect disadvantaged communities on domestic wells and small community water systems, whose critical drinking water resources will be most impacted by a decline in groundwater levels.

The Kern River GSA defines the groundwater levels measurable objective for the Urban Management Area as the average of the high water level of the historical Study Period (typically 1998) and the minimum threshold in each GSP monitoring well.<sup>58</sup> Based on our Focused Technical Review attached, we estimate that at a minimum, six domestic wells will go dry under the proposed measurable objective.

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

The groundwater levels sustainable management criteria set by a GSA must be the point that, “if exceeded, may cause undesirable results.”<sup>59</sup> SGMA requires GSAs to analyze both the significance and reasonableness of proposed minimum thresholds,<sup>60</sup> and minimum thresholds must have the purpose of avoiding “significant and unreasonable” impacts on beneficial users.<sup>61</sup> The GSA’s determination of what is “significant and unreasonable” must consider the impacts on all types of beneficial users, including disadvantaged communities.<sup>62</sup> For groundwater levels specifically, GSAs must place minimum thresholds for each monitoring site at the level “that may lead to undesirable results.”<sup>63</sup> Under DWR regulations, the GSA must provide a description

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<sup>56</sup> 23 CCR § 354.30(a)

<sup>57</sup> Final GSP Kern River Groundwater Sustainability Agency, p.5-15, dated January 2020

<sup>58</sup> Final GSP Kern River Groundwater Sustainability Agency, p.5-15, dated January 2020

<sup>59</sup> 23 CCR § 354.28.

<sup>60</sup> Water Code § 10721(x); 23 CCR 354.26(a), (b), 354.28(b); see also Cal. Dep’t Water Res., Draft Best Management Practices for the Sustainable Management of Groundwater 6, 8 (Nov. 2017).

<sup>61</sup> 23 CCR § 354.26.

<sup>62</sup> Water Code § 10723.2.

<sup>63</sup> 23 CCR § 354.28.

of “the information and criteria relied upon to establish minimum thresholds,” an explanation of how the proposed minimum thresholds will “avoid undesirable results,” and “how minimum thresholds may affect the interests of beneficial uses and users of groundwater.”<sup>64</sup>

The GSA has set its minimum thresholds in the Agricultural Management Area at 50 feet and 20 feet below the historical low water levels of representative GSP monitoring wells, and this minimum threshold will only be triggered after minimum thresholds have been violated for two consecutive years.<sup>65</sup> This standard allows significant and unreasonable impacts to beneficial users, particularly those reliant on small community water systems and domestic wells, by masking localized impacts and impacts that persist for less than two years. Because this minimum threshold allows significant and unreasonable impacts, it is inadequate.

The minimum thresholds for the Urban Management Area are also inadequate.<sup>66</sup> The GSA has set its minimum thresholds in the Urban Management Area at the historical low water level as measured in representative GSP monitoring wells, as shown on Tables 5-2a and 5-2b. This minimum threshold is triggered when a representative monitoring well exceeds this threshold for three consecutive months.<sup>67</sup> Based on our Focused Technical Review, a minimum of seven wells will go dry under the proposed minimum threshold. The GSA has not conducted this type of analysis, and therefore it has not considered the significance or reasonableness of impacts on all beneficial user groups.

Finally, the Urban Management Area’s sustainable management criteria will not be achievable due to the much less protective sustainable management criteria in the surrounding Management Areas. The Agricultural and Banking management areas, which have less protective minimum thresholds and measurable objectives, are right next to the Urban management area and will affect the Urban management area’s ability to comply with its own groundwater levels minimum thresholds and measurable objectives. The Urban area’s undesirable results are triggered when one minimum threshold is violated for more than three months; meanwhile, for the neighboring Agricultural Management Area, undesirable results for groundwater levels will be triggered only after 40% of the minimum thresholds have been exceeded at representative monitoring sites for two consecutive years.<sup>68</sup>

Additionally, the flexibility of the Agricultural Management Area’s minimum thresholds are likely to cause the Urban Management Area to violate its minimum thresholds. While the Urban

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<sup>64</sup> 23 CCR § 354.28.

<sup>65</sup> Final GSP Kern River Groundwater Sustainability Agency, p.5-10 dated January 2020

<sup>66</sup> We note that GSA staff told us at the workshop in Lamont on November 6, 2019, we understand that the GSA will apply Urban Management Area minimum thresholds and measurable objectives to the communities of Lamont and Fuller Acres. However, this is currently not reflected in writing in the GSP, which instead applies Agricultural Management Area minimum thresholds to both communities.

<sup>67</sup> Final GSP Kern River Groundwater Sustainability Agency p.5-14, January 2020

<sup>68</sup> Final GSP Kern River Groundwater Sustainability Agency p.5-10, January 2020

area's minimum thresholds are at historical low water levels, the Agricultural area's minimum thresholds are at 50 feet and 20 feet below the historical low water levels, which are already much lower than the historical low water levels in the Urban area. Further, the Agricultural area's minimum threshold will only be triggered after minimum threshold have been violated for two consecutive years,<sup>69</sup> whereas the Urban minimum threshold will be triggered after only three months. If the GSA allows groundwater levels to drop towards the minimum thresholds in the Agricultural area, it is hard to see how the Urban minimum thresholds will not be continuously violated by water flowing towards the Agricultural area of the GSA area, leaving the Urban area without a reliable source of drinking water. The separate treatment of these two management areas is not based on hydrogeologic conditions, but instead on the overlying land use. Allowing groundwater levels to fall in the Agricultural Management Area will undermine groundwater management in the Urban Management Area.

The groundwater levels sustainable management criteria for this GSP are therefore inadequate. At a minimum, adequate groundwater levels sustainable management criteria in all management areas 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,<sup>70</sup> measurable objectives and minimum thresholds,<sup>71</sup> 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:**<sup>72</sup> The GSA must analyze “when significant and unreasonable effects ... are caused by groundwater conditions occurring throughout the basin,” taking into account the beneficial users of groundwater and the basin's specific circumstances.<sup>73</sup> Therefore the GSP must explicitly state how the GSA considered drinking water impacts in shaping undesirable results, measurable objectives and minimum thresholds for groundwater levels; for example, the GSP could state how its well impact analysis supported setting stricter measurable objectives and minimum thresholds near at-risk communities.

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<sup>69</sup> Final GSP Kern River Groundwater Sustainability Agency p.5-10, January 2020

<sup>70</sup> 23 CCR § 354.26(c)

<sup>71</sup> 23 CCR § 354.28(b)(4)

<sup>72</sup> Water Code § 10723.2

<sup>73</sup> 23 CCR § 354.26.

3. **Incorporate new drinking water data into sustainable management criteria:**<sup>74</sup> Ensure that the GSP includes a description of how data gaps and uncertainties of its drinking water well impact assessment will be addressed and serve to reassess the sustainable management criteria, projects and management actions in accordance with new data.
4. **Implement DAC and drinking water user input into sustainable management criteria:**<sup>75</sup> 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:**<sup>76</sup> 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.

### **G. The GSP Fails To Adequately Address Groundwater Quality Through Its Sustainable Management Criteria for Groundwater Quality**

GSA activities and policies could cause increased contamination in many ways. For example, the proposed timeline for implementation of demand reduction may allow for continued pumping which may create an increase in naturally occurring contaminants and/or migration of contaminant plumes.<sup>77</sup> 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.<sup>78</sup> A groundwater market is also likely to cause geographic concentrations of

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<sup>74</sup> 23 CCR § 354.38(e)(3)

<sup>75</sup> 23 CCR § 354.10(d); DWR Guidance Document for Groundwater Sustainability Plans: Stakeholder Communication and Engagement, p.1.

<sup>76</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

<sup>77</sup> 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>.

<sup>78</sup> See Fakhreddine et al., Protecting Groundwater Quality In California, Management Considerations For Avoiding Naturally Occurring And Emerging Contaminants (2019), available at <https://www.edf.org/sites/default/files/documents/groundwater-contaminants-report.pdf> [“Recharging water, even clean water, into a previously uncontaminated aquifer can potentially alter the existing geochemistry and hydrology and subsequently cause the release of geogenic contaminants from soils and sediments.”]; Jurgens, Bryant C., et al. “Effects Of Groundwater Development On Uranium: Central Valley, California, USA,” Groundwater 48.6 p. 913 (2010), available at <https://ngwa.onlinelibrary.wiley.com/doi/abs/10.1111/j.1745-6584.2009.00635.x>; “Groundwater Quality In The Sustainable Groundwater Management Act (SGMA): Scientific Factsheet on Arsenic, Uranium, and Chromium,” available at

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

SGMA charged GSAs with the responsibility to protect water quality from further degradation due to groundwater management practices, and requires GSAs to establish sustainable management criteria to prevent degraded groundwater quality,<sup>79</sup> based on a determination of what is a “significant and unreasonable” impact on all beneficial users, including domestic well users and disadvantaged communities.<sup>80</sup> 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. It also fails to clearly define its undesirable results, minimum thresholds or measurable objectives for groundwater quality, so the public and DWR cannot evaluate their impact on beneficial users in the GSP area.

#### **a. The Sustainable Management Criteria and “Contaminants of Concern” for Groundwater Quality Are Inadequate**

Instead of incorporating protection of all drinking water quality standards into the GSP, the Kern River GSA limits its constituents of concern to Arsenic, despite acknowledging in the Basin Setting chapter that the subbasin contains plumes of other contaminants such as total dissolved solids, nitrate, 1,2,3-TCP, and pesticides.<sup>81</sup> The GSA therefore will not be able to detect and prevent increases or expansion of harmful drinking water contaminants from its groundwater management activities. The resulting impact from the proposed sustainable management criteria will likely lead to disparate impacts on protected groups, in conflict with state and federal law, because the area will likely experience groundwater contamination impacts, and those least able to fund treatment solutions are Latino communities reliant on domestic wells and small community water systems in the GSA area.<sup>82</sup>

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[https://d3n8a8pro7vhmx.cloudfront.net/communitywatercenter/pages/293/attachments/original/1559328800/Groundwater\\_Quality\\_in\\_SGMA\\_Scientific\\_factsheet\\_on\\_arsenic\\_uranium\\_and\\_chromium.pdf?1559328800](https://d3n8a8pro7vhmx.cloudfront.net/communitywatercenter/pages/293/attachments/original/1559328800/Groundwater_Quality_in_SGMA_Scientific_factsheet_on_arsenic_uranium_and_chromium.pdf?1559328800)

<sup>79</sup> Water Code § 10721(w)(4); 23 CCR § 354.28(c)(4).

<sup>80</sup> Water Code §§ 10727.2(d)(2); 10721(x)(4)

<sup>81</sup> Final GSP Kern River Groundwater Sustainability Agency p.3-35 to 3-41, January 2020

<sup>82</sup> Gov. Code § 11135 [“No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.”]; Gov. Code § 65008 [Any discriminatory action taken “pursuant to this title by any city, county, city and county, or other local governmental agency in this state is null and void if it denies to any individual or group of individuals the enjoyment of residence, land ownership, tenancy, or any other land use in this state...”]; Government Code §§ 12955, subd. (l) [unlawful to discriminate through public or private land use practices, decisions or authorizations].

Kern River GSA has not shown how it has considered the interests of beneficial users including domestic well owners and disadvantaged communities in shaping groundwater quality sustainable management criteria.<sup>83</sup> This GSP fails to incorporate performance measures and management criteria with respect to contaminants that impact human health, including those contaminants with established primary drinking water standards.

Since the GSP allows significant and unreasonable impacts caused by increased groundwater contamination, the GSP fails to conform with SGMA.

#### **b. The Undesirable Result 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.”<sup>84</sup> GSAs must also describe the “processes and criteria relied upon to define undesirable results.”<sup>85</sup> The undesirable result cannot have a disparate impact on protected groups pursuant to state civil rights law.

The undesirable results for the Urban and Agricultural management areas will allow significant drinking water contamination. In the Urban Management Area, the undesirable result for arsenic will only be triggered when a well exceeds the minimum threshold after three consecutive months<sup>86</sup> and in the Agricultural Management Area that borders the Urban Management Area, the undesirable result for arsenic will only be triggered after 40% of wells in the Urban Management Area exceed the minimum threshold for 4 consecutive years.<sup>87</sup> By the time an undesirable result is triggered and addressed, it is more than likely that a high percentage of vulnerable drinking water users will be experiencing severe, long-term drinking water contamination problems before the undesirable result is triggered.

Because the undesirable results for groundwater quality were not developed in consideration of the interests of beneficial users, and because they mask both localized and medium-term impacts (up to 4 years), the GSP’s determination of undesirable results is inadequate.

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<sup>83</sup> Water Code § 10723.2.

<sup>84</sup> 23 CCR § 354.26.

<sup>85</sup> 23 CCR § 354.26.

<sup>86</sup> Kern River Groundwater Sustainability Plan Handout, p.3

<sup>87</sup> Kern River Groundwater Sustainability Plan Handout, p.3

### **c. The Minimum Thresholds and Measurable Objectives for Groundwater Quality Are Inadequate**

GSA must place groundwater quality minimum thresholds for each monitoring site at the level “that may lead to undesirable results.”<sup>88</sup> 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.”<sup>89</sup>

The GSA did not consider what the impact of its groundwater quality minimum thresholds would be on drinking water users. As discussed above, the minimum thresholds for groundwater quality in the Urban Management Area are at the historical low groundwater levels, and the measurable objective is the average of the minimum threshold and the high water level in the representative monitoring well during the historical Study Period under average hydrologic conditions. In the Agricultural Management Area, the minimum threshold for most of the Management Area is 50 feet below the historic low water level, and the measurable objective is the average of the high groundwater level during the historical Study Period and the MT. All of these groundwater quality sustainable management criteria were based on the connection with groundwater levels. The GSA included no analysis of how it considered the impact of these policies on drinking water users, and our own analysis shows that the GSP allows many beneficial users to be exposed to significant and unreasonable levels of groundwater pollution.

Because the minimum thresholds are not protective of sources of drinking water, DWR cannot approve the GSP.

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:<sup>90</sup>**
  - a. Contaminants with primary drinking water standards,
  - b. PFOs/PFOAs and chrome-6, which are contaminants known to be very harmful to human health, AND
  - c. Contaminants like uranium, arsenic and nitrate which are known to increase due to groundwater management practices.

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<sup>88</sup> 23 CCR § 354.28.

<sup>89</sup> 23 CCR § 354.28.

<sup>90</sup> 23 CCR § 354.34(b)(2) and (f)(3)

2. **Ensure that the GSP triggers a violation of a minimum threshold after *one* test shows that there has been an increase in contamination since January 1st, 2015.** Once the minimum threshold is reached, the GSA must start the evaluation of whether groundwater management activities or groundwater pumping have caused the increase, or whether the increase was caused by other factors such as natural fluctuation, testing inaccuracy, or activities outside the purview of the GSA. If the increase was caused by groundwater management activities or groundwater pumping, the GSA must immediately stop increasing the contamination and remediate.
3. **Immediately remediate any contamination caused by groundwater conditions since 2015:** The GSA must immediately remediate any increased contamination caused by groundwater management policies or activities (including lack of adequate regulation of pumping) since 2015. The GSA must begin remediation immediately upon establishing causation. The GSA must remediate contamination within two years, or as soon as technologically and hydrologically possible, whichever is faster. Design and implementation of remediation measures must be done in partnership with all groundwater users, primarily disadvantaged communities. The GSA must also clearly identify funding sources for remediation, and identify a timeline for procuring those funds.
4. **Strive to remediate existing drinking water contamination:** Ensure that the GSA will strive to remediate drinking water contaminants that exceeded the MCL before 2015 wherever feasible, through projects, management actions and policies.
5. **Evaluate the drinking water impact:** Ensure that the GSP includes an analysis of how drinking water wells (municipal wells, community water system wells, and domestic wells) are likely to be affected by the undesirable results,<sup>91</sup> measurable objectives and minimum thresholds.<sup>92</sup>
6. **Implement DAC and drinking water user input into sustainable management criteria:**<sup>93</sup> 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:**<sup>94</sup> Ensure that the GSP includes a description of how data gaps and uncertainties of its drinking water well impact assessment will be addressed and serve to reassess the sustainable management criteria, projects and management actions in accordance with new data.
8. **Avoid disparate impact:**<sup>95</sup> Ensure that the minimum thresholds for groundwater quality

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<sup>91</sup> 23 CCR § 354.26(c)

<sup>92</sup> 23 CCR § 354.28(b)(4)

<sup>93</sup> 23 CCR § 354.10(d); DWR Guidance Document for Groundwater Sustainability Plans: Stakeholder Communication and Engagement, p.1.

<sup>94</sup> 23 CCR § 354.38(e)(3)

<sup>95</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

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.

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

GSA's must monitor impacts to groundwater for drinking water beneficial users,<sup>96</sup> including disadvantaged communities on domestic wells,<sup>97</sup> and must avoid disparate impacts on protected groups pursuant to state law.<sup>98</sup>

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 detect and prevent significant and unreasonable impacts to those users. The monitoring wells are also monitored too infrequently to timely detect and prevent falling groundwater levels and/or contamination. The lack of adequate monitoring will make it impossible for the GSA to monitor drinking water to prevent undesirable results, undermining the likelihood that the basin will achieve sustainable groundwater management.

The insufficiency of the representative monitoring network 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."<sup>99</sup> The GSA must also make decisions about the monitoring network in a way that considers the interests of all beneficial users.<sup>100</sup>

The GSP states that current existing monitoring networks will be utilized to monitor groundwater levels, and include an illustration of the monitoring wells in Figure 6-1.<sup>101</sup> We observe that there are wells next to both Fuller Acres and Lamont, but it is unclear whether these will detect groundwater levels at the level at which the two communities' wells procure water. It is also unclear whether the monitoring network has representative monitoring wells in all clusters of

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<sup>96</sup> 23 CCR § 354.34

<sup>97</sup> Water Code § 10723.2.

<sup>98</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (I).

<sup>99</sup> 23 CCR § 354.34(c)(1)(A)

<sup>100</sup> 23 CCR § 354.34(b)(2)

<sup>101</sup> Final GSP Kern River Groundwater Sustainability Agency p.6-15, January 2020

domestic wells and all small community water systems in the GSA. In order to adequately protect drinking water for these users, the GSA must include such wells in its representative monitoring network, and ensure that the wells are constructed to detect groundwater levels in the aquifers upon which drinking water users are dependent.

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

1. **Ensure accurate detection of impacts on drinking water users and DACs:**<sup>102</sup> Ensure that the groundwater level monitoring network includes *representative* monitoring wells *in or near DACs*, and placed in a way that detects impacts to the *vast majority* of drinking water users in the GSP area. If new monitoring wells are required, ensure that the GSP contains a concrete plan to fund and construct new representative monitoring wells within the first year of GSP implementation to ensure that vulnerable communities' drinking water resources are monitored. The plan to improve the monitoring network should include testing of domestic wells in the interim as wells are constructed.
2. **Clearly show representative monitoring well locations in relation to DACs:**<sup>103</sup> 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 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:**<sup>104</sup> Ensure that the GSP clearly identifies any other gaps in data regarding impacts to drinking water users, and that the GSP contains a clear plan to fill data gaps regarding impacts to drinking water users. The GSP explains how it will fill some monitoring data gaps, but does not ensure that these gaps will capture impacts on all drinking water users, particularly disadvantaged communities.

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

SGMA regulations require that GSPs create a groundwater quality monitoring network that will “collect sufficient spatial and temporal data from each applicable principal aquifer to determine groundwater quality trends for water quality indicators, as determined by the Agency, to address known water quality issues.”<sup>105</sup>

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<sup>102</sup> 23 CCR § 354.34(b)(2) and (f)(3)

<sup>103</sup> 23 CCR § 354.34(b)(2) and (f)(3)

<sup>104</sup> 23 CCR § 354.38(e)(3)

<sup>105</sup> 23 CCR § 354.34(c)(4)

The GSP fails to monitor key drinking water contaminants that it knows are water quality issues in the GSA area. The GSP states that total dissolved solids and nitrates are under active management through other programs, and describes those programs.<sup>106</sup> However, there is no description of how Kern River GSA will make the determination of how its management has caused impacts to groundwater quality. The GSA does not mention how it will monitor other contaminants that are known to be present in the GSA area, such as pesticides.<sup>107</sup> In regards to 1,2,3-TCP, the GSP states that “[Public TCP concentration] data will be compiled periodically and reviewed by the KRGSA to ensure that management actions do not exacerbate the extent of TCP in groundwater,” yet the GSA neglects to clarify how often this data will be compiled and how the GSA will determine that its actions and policies caused impacts to 1,2,3-TCP concentrations in groundwater.<sup>108</sup>

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

- 1. Ensure that the GSP plans to measure the following contaminants at all representative monitoring wells:<sup>109</sup>**
  - a. Contaminants of concern with primary drinking water standards
  - b. PFOs/PFOAs and chrome-6, which are contaminants known to be very harmful to human health
  - c. Contaminants like uranium, arsenic and nitrate which are known to increase due to groundwater management practices
- 2. Clearly describe how the GSA will monitor for drinking water impacts:** Ensure that the GSP includes a description of how the GSA will monitor groundwater contamination that could affect drinking water in the GSA area. Ensure that the representative monitoring wells (RMWs) for groundwater quality are presented on maps and in tables, and that the maps of RMWs clearly identify the locations of DACs, small water systems and other sensitive users.
- 3. Ensure accurate detection of impacts on drinking water users and DACs:<sup>110</sup>** Ensure that the groundwater level monitoring network includes *representative* monitoring wells *in or near DACs*, and placed in a way that detects impacts to the *vast majority* of drinking water users in the GSP area. If new monitoring wells are required, ensure that the GSP contains a concrete plan to fund and construct new representative monitoring wells within the first year of GSP implementation to ensure that vulnerable communities’ drinking

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<sup>106</sup> Final GSP Kern River Groundwater Sustainability Agency p.6-10 to 6-13, January 2020

<sup>107</sup> Final GSP Kern River Groundwater Sustainability Agency p.3-37, January 2020

<sup>108</sup> Final GSP Kern River Groundwater Sustainability Agency p.3-38 to p.3-39, January 2020

<sup>109</sup> 23 CCR § 354.34(b)(2) and (f)(3)

<sup>110</sup> 23 CCR § 354.34(b)(2) and (f)(3)

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.

4. **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.
5. **Frequent testing:** Ensure that the groundwater quality monitoring network tests for contaminants of concern frequently, in a way that avoids persistent drinking water contamination. Testing should be done monthly.
6. **Collaboration with other agencies:**<sup>111</sup> 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 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.

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

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

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.<sup>115</sup>

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

The projects and management actions set forth in the GSP do not demonstrate a path towards achieving sustainability goals in the plan. The GSA has not demonstrated how it has considered the interests of beneficial users including domestic well owners and disadvantaged communities.

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<sup>111</sup> 23 CCR § 354.34(e)

<sup>112</sup> Water Code § 10723.2.

<sup>113</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (1).

<sup>114</sup> Water Code § 10727.2(b)(2).

<sup>115</sup> Water Code § 10727.2(b)(1).

<sup>116</sup> The resulting impact from the proposed sustainable management criteria will likely lead to disparate impacts on protected groups pursuant to state and federal law.<sup>117</sup>

In light of the impacts on disadvantaged communities from the policy decisions discussed above, the GSP must include Projects and Management Actions that protect disadvantaged communities from the drinking water impacts that will occur from the GSA's policy decisions. We commend the GSA for including a consolidation project for six small water systems in the northeast area of the GSA for the first phase of projects,<sup>118</sup> However, this project alone does not meet the needs of all the other disadvantaged communities in the GSA. Additionally, a project for possible water exchange will not lead to the benefits the GSP lists, namely improving water quality for disadvantaged communities.<sup>119</sup> The feasibility of these exchanges is speculative at best due to institutional, legal, and permitting barriers that would need to be overcome.<sup>120</sup>

Many of the projects and management actions are geared towards maximizing water supply, but only two projects discuss direct benefits to disadvantaged communities. Stating that the implementation of the GSA's projects will collectively improve drinking water quality for disadvantaged communities without including substantial information on how the projects will actually achieve this is misleading and an overrepresentation of what the projects benefits.<sup>121</sup> Last, 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.

### **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:

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<sup>116</sup> Water Code sec. 10723.2.

<sup>117</sup> Gov. Code § 11135 [“No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.”]; Gov. Code § 65008 [Any discriminatory action taken “pursuant to this title by any city, county, city and county, or other local governmental agency in this state is null and void if it denies to any individual or group of individuals the enjoyment of residence, land ownership, tenancy, or any other land use in this state...”]; Government Code §§ 12955, subd. (l) [unlawful to discriminate through public or private land use practices, decisions or authorizations].

<sup>118</sup> Final GSP Kern River Groundwater Sustainability Agency p.7-10, January 2020

<sup>119</sup> Final GSP Kern River Groundwater Sustainability Agency p.7-12, January 2020

<sup>120</sup> Final GSP Kern River Groundwater Sustainability Agency p.7-13, January 2020

<sup>121</sup> Final GSP Kern River Groundwater Sustainability Agency p.7-1, January 2020

1. **Include a Drinking Water Well Impact Mitigation Program:** Ensure that the GSP contains a drinking water protection program to prevent impacts to drinking water users and mitigate the drinking water impacts that occur. Please reference the Framework for a Drinking Water Well Impact Mitigation Program that our organization developed with the Community Water Center and Self-Help Enterprises for more details, a draft of which is attached as part of the Human Right to Water Scorecard in Exhibit B.
2. **Establish a clear and proactive plan for demand reduction.** Demand reduction should be 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:**<sup>122</sup> 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.

#### **J. Plan Implementation Section is Incomplete Because it Does not Contain Adequate Plans for Community Engagement**

GSPs must include a planning and implementation horizon<sup>123</sup> and must show how the sustainability goal will be achieved by 2040.<sup>124</sup> 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.<sup>125</sup>

Although the GSP includes a KRGSA Communication and Engagement Plan,<sup>126</sup> this plan only includes communications and engagement efforts done before the adoption of the GSP, and fails to include what efforts will be made to ensure ongoing active engagement throughout the implementation of the GSP. The Plan Implementation Chapter contains no information as to

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<sup>122</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

<sup>123</sup> Water Code § 10727.2.(c)

<sup>124</sup> Water Code § 10727.2(b)(1).

<sup>125</sup> Water Code § 10733(a); 23 CCR 355.4(b).

<sup>126</sup> Final GSP Kern River Groundwater Sustainability Agency Appendix F, January 2020

how the GSA will proactively and consistently engage the public during the implementation process, how the public will be noticed of all implementation activities and potential changes to the plan, how the public will be engaged during the Annual and 5-Year update, and how the GSA will incorporate culturally appropriate practices, such as translation and interpretation, in all future activities. As a public agency, the GSA must establish processes by which it will seek and incorporate feedback from the public on an ongoing basis. It must do so through direct outreach to disadvantaged communities, collaboration with local community-based nonprofits, and public meetings or workshops that are held in locations and at times that are accessible to all beneficial user groups, with presentations and materials translated into all threshold languages.<sup>127</sup> Additionally, proposed changes to the plan must be publicly noticed and circulated for public review and comment prior to final adoption .

The plan implementation chapter also does not provide concrete timelines for GSP implementation. 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:**<sup>128</sup> Ensure that the GSP states that ongoing engagement will include clear notices about GSA meetings and workshops that are posted in ways that all stakeholders were made aware of the meetings, and translated into all languages spoken by at least 5 percent of the public served by the agency, who do not speak English or are unable to effectively communicate in English.<sup>129</sup>
3. **Translation of materials:**<sup>130</sup> Ensure that the GSP states that ongoing engagement will include translation of materials into all languages spoken by at least 5 percent of the public served by the agency, who do not speak English or are unable to effectively communicate in English.
4. **Interpretation:**<sup>131</sup> Ensure that the GSP states that ongoing engagement will include interpretation services provided at board meetings, committee meetings and workshops

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<sup>127</sup> Bilingual Services Act, Gov. Code, §§ 7293, 7295: a public agency must provide interpretation and translate materials into all languages for which there is a “substantial” number of people that it serves who speak that language.

<sup>128</sup> Government Code § 54954(a).

<sup>129</sup> Government Code sec. 7296.2.

<sup>130</sup> Government Code sec. 7296.2.

<sup>131</sup> Government Code sec. 7296.2.

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 Board containing representatives from DACs. The GSA should include representatives on 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.
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.

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

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

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

It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.

It is often incorrectly stated that this section is not binding. This is a misnomer for several reasons. First, § 106.3(b) expressly states in that “[a]ll relevant state agencies, including the department, the state board, and the State Department of Public Health, *shall* consider this state 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.”<sup>132</sup> The text of SGMA further notes that “[n]othing in this part, or in any groundwater management plan adopted pursuant to this part, determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights.”<sup>133</sup> As discussed in detail above, the GSP allows continued overdraft above the safe yield of the basin, such that drinking water wells (especially domestic wells) will continue to go dry, infringing upon the rights of overlying users of groundwater. DWR cannot approve the GSP until it is revised to protect the rights of

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<sup>132</sup> AB 1739 (2014).

<sup>133</sup> Water Code § 10720.5(b).

residents of disadvantaged communities and/or low-income households who hold overlying rights.<sup>134</sup>

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

The “reasonable and beneficial use” doctrine is codified in the California Constitution. It requires that “the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.”<sup>135</sup> The doctrine applies to all water users, regardless of basis of water right, and all water rights and methods of diversion.<sup>136</sup> A determination of reasonableness of a use “cannot be resolved in vacuo isolated from statewide considerations of transcendent importance.”<sup>137</sup>

DWR and the Water Board must ensure that GSPs’ water allocations are consistent with the reasonable and beneficial use doctrine.<sup>138</sup> In doing so, DWR and the Board must follow the Legislature’s directive to prioritize domestic use of water resources over irrigated agriculture<sup>139</sup> and ensure that SGMA implementation furthers the human right to safe and affordable drinking water<sup>140</sup> — both statewide considerations of transcendent importance. In other words, a GSP that allows use of water for irrigation at the expense of use of water for domestic purposes is not consistent with the reasonable and beneficial use doctrine.

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

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<sup>134</sup> See also Water Code § 10723.2 [The groundwater sustainability agency shall consider the interests of all beneficial uses and users of groundwater... [including] Domestic well owners.”].

<sup>135</sup> Cal Const, Art. X § 2; see also Water Code § 100; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 105 [“...superimposed on those basic principles defining water rights is the overriding constitutional limitation that the water be used as reasonably required for the beneficial use to be served.”].

<sup>136</sup> *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 367, 372; *Light v. State Water Resources Control Board*, (2014) 226 Cal. App. 4th 1463, 1479.

<sup>137</sup> *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 140.

<sup>138</sup> Water Code § 275 [“The department and board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state”]; *Light*, 226 Cal.App.4th at 1482-83 [same].

<sup>139</sup> Water Code § 106 [“It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation”]; *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 103 .

<sup>140</sup> Water Code § 106.3.

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

The public trust doctrine applies to the waters of the State, and establishes that “the state, as trustee, has a duty to preserve this trust property from harmful diversions by water rights holders” and that thus “no one has a vested right to use water in a manner harmful to the state’s waters.”<sup>141</sup>

The public trust doctrine has recently been applied to groundwater where there is a hydrological connection between the groundwater and a navigable surface water body.<sup>142</sup> In *Environmental Law Foundation v. State Water Resources Control Board* (“*ELF*”), the court held that the public trust doctrine applies to “the extraction of groundwater that adversely impacts a navigable waterway” and that the government has an affirmative duty to take the public trust into account in the planning and allocation of water resources.<sup>143</sup> Under *ELF*, the Public Trust doctrine imposes an affirmative and independent obligation to consider the public trust that applies to DWR’s decisions regarding submitted GSPs, imposing a legal duty on DWR to not only consider the potential adverse impacts of groundwater extractions on navigable waterways but also “to protect public trust uses whenever feasible.”<sup>144</sup> The court also specifically held that SGMA does not supplant the requirements of the common law public trust doctrine.<sup>145</sup>

Notably, the public trust doctrine applies to both currently navigable surface water bodies and surface water bodies that were historically navigable at the time of statehood.<sup>146</sup>

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

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<sup>141</sup> *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 106; *see also Nat’l Audubon Soc’y v. Superior Court* (1983) 33 Cal.3d 419, 426 [“before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.”].

<sup>142</sup> *Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 844.

<sup>143</sup> *Id.* at 856-62.

<sup>144</sup> *Id.* at 865.

<sup>145</sup> *Id.* at 862-870.

<sup>146</sup> *See San Francisco Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202, 232 citing *Western Oil & Gas Asso. v. State Lands Com.* (1980) 105 Cal.App.3d 554, 562 [“When California became a state in 1850 it succeeded to sovereign ownership of various tidelands and submerged lands under the terms of common law trust doctrine... .”]; *PPL Montana, LLC v. Montana* (2012) 565 U.S. 576, 592 [“For state title under the equal-footing doctrine, navigability is determined at the time of statehood...and based on the ‘natural and ordinary condition’ of the water.”] [internal citation omitted].

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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.<sup>147</sup> 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 standards in the Human Right to Water Scorecard, and that these standards are followed during GSP implementation.

Sincerely,

Jasmene del Aguila, Nataly Escobedo Garcia and Amanda Monaco

Leadership Counsel for Justice and Accountability

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<sup>147</sup> Attached as Exhibit B.