June 3, 2020

Re: Recommendations for DWR and SWRCB Action Regarding the Mid Kaweah GSA Groundwater Sustainability Plan

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

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

Disadvantaged communities in the Mid Kaweah GSA area have the most to gain and the most to lose from SGMA implementation in the region. Communities like Matheny Tract, Lone Oak
Tract and Souls Tract 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 and pay higher electricity costs and pay higher operating costs such as electricity or to install, afford, 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 Mid Kaweah GSA has not adequately done so in this GSP; as described below, the GSP allows 86% of domestic 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.

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

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

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\(^1\) Water Code § 106.3(a)

\(^2\) Water Code § 106.3(b)

\(^3\) Attached as Exhibit B.

\(^4\) Water Code § 10727.8(a) (“The groundwater sustainability agency shall encourage the active involvement of diverse social, cultural, and economic elements of the population within the groundwater basin prior to and during the development and implementation of the groundwater sustainability plan.”).
systems. 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. 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. DWR and the SWRCB must evaluate GSPs in accordance with all of these and other relevant legal obligations.

Unfortunately, the Mid Kaweah GSA did not take advantage of the opportunity to protect the drinking water resources relied upon by disadvantaged communities or low-income households, or avoid disparate impacts, and the GSP is incomplete and does not comply with SGMA and other applicable state laws. As noted above, we reviewed the Mid Kaweah 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.

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5 Water Code § 10723.2.
6 Gov. Code § 11135 [“No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.”]; Gov. Code § 65008 [Any discriminatory action taken “pursuant to this title by any city, county, city and county, or other local governmental agency in this state is null and void if it denies to any individual or group of individuals the enjoyment of residence, land ownership, tenancy, or any other land use in this state…”]; Government Code §§ 12955, subd. (l) [unlawful to discriminate through public or private land use practices, decisions or authorizations].
7 Gov. Code § 12900 et seq.
8 Attached as exhibits are certain documents, studies and analysis supporting these comments, which we request be incorporated into the record.
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A. The GSP Does Not Comply with SGMA Because It Lacks Required Information

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

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

The Mid Kaweah 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.11 In addition, the state’s Fair

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9 23 CCR § 355.4(a)(2).
10 Water Code § 10733(a); 23 CCR § 355.4(b).
11 Gov. Code § 11135 ("No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state."); Gov. Code § 65008 [Any discriminatory action taken “pursuant to this title by any city, county, city and county, or other local governmental agency in this state is null and void if it denies to any individual or group of individuals the enjoyment of residence, land ownership, tenancy, or any other land use in this state...”]; Government
Employment and Housing Act guarantees all Californians the right to hold and enjoy housing without discrimination based on race, color, or national origin.12

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

Consistent with these studies, this GSP will cause disproportionate negative impacts on communities of color reliant on small water systems and domestic wells. There are at least 114 disadvantaged unincorporated communities (DUCs) within Tulare County, 5 of which will be impacted by this GSP.16 Approximately 82% of the population of Tulare DUCs are people of color, significantly higher than the approximately 58% of the population of the County overall who are people of color. As an example, according to the most recent American Communities Survey data, Matheny Tract is 88.5% Hispanic or Latino.17

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 potentially permanent impacts on residents’ finances and living situations. While the GSP commits to exploring potential drinking water impact mitigation measures in the future, the GSP has not committed to any concrete, funded measures for mitigating the impacts of its policy decisions. Since the GSP allows wells to go dry, and worse, contains no concrete or binding measures to mitigate all of

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12 Gov. Code § 12900 et seq.
14 Id. at p. 6.
these impacts, 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 causes 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.18 “‘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.”19 “‘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.”20 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.21

If a GSP is unlikely to achieve its sustainability goal, DWR cannot approve the plan.22 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.23 Likewise, a plan that cannot achieve sustainable groundwater management has failed to set a valid sustainability goal, in violation of SGMA.24 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.25

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

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18 Water Code § 10733(a).
19 Water Code § 10721(u).
20 Water Code § 10721(v).
21 Water Code § 10721(x).
22 Water Code § 10733(a).
23 Water Code § 10721(v).
24 Water Code § 10721(u).
25 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.”).
26 23 CCR 354.28(a).
minimum threshold will avoid undesirable results for each of the sustainability indicators.”27 A GSP’s determination of when an undesirable result will occur must be based on analysis of when adverse impacts become “significant” and “unreasonable.”28

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

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

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

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

As public agencies, GSAs are subject to the requirements of the Brown Act, which requires transparency of public agencies through notice of meetings and prior posting of agendas, posting of meeting minutes after meetings, and public access to meeting materials upon request by a member of the public.32 GSAs are also subject to the requirements of the Bilingual Services Act,

27 23 CCR 354.28(b)(2).
28 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.”].
29 Water Code § 10723.2.
30 Water Code § 10723.2; 23 CCR 355.4(b) [“The Department shall evaluate a Plan … to determine whether the Plan … complies with the Act ….”].
31 23 CCR 355.4(b)(4).
32 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.\textsuperscript{33}

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.”\textsuperscript{34} The emergency regulations similarly require that a GSP summarize and identify “opportunities for public engagement and a discussion of how public input and response will be used.”\textsuperscript{35} GSAs thus must engage “diverse social, cultural, and economic elements of the population within the basin.”\textsuperscript{36} The regulations recognize that failure to engage adequately with a diverse cross-section of the public undermines the likelihood that a GSP will avoid undesirable results and meet its sustainability goal.\textsuperscript{37}

The Mid Kaweah GSA had a Stakeholder and Communications Plan, which it sent to our organization and others for feedback and additions, some of which were incorporated. The GSP describes how it engaged stakeholders including disadvantaged communities.\textsuperscript{38} The Mid Kaweah GSA placed stakeholders into either of three groups that determined their level of engagement: collaboration, consulted, and informed. City agencies and agricultural agencies featured heavily in the collaboration and consulted groups, while the public and disadvantaged communities were included in the informed group.\textsuperscript{39} The GSP also states that stakeholders from DACs have been provided with the opportunity to provide feedback during GSA meetings. The GSA did host one workshop in partnership with Self-Help Enterprises for domestic well owners in Okieville/Highland Acres, however, no community residents or domestic well owners were present.\textsuperscript{40} Interpretation and translated materials were not provided at GSA meetings, or at Kaweah Subbasin Management Team meetings where key decisions about GSP development were made for the three subbasin GSPs.

The Mid Kaweah GSA did not include a DAC representative on its board. The GSA’s Advisory Committee did contain representation from environmental justice organizations, environmental interests, agriculture, urban water systems, and other interests. The GSA discussed issues such as the sustainable management criteria and mitigation program with the Advisory Committee. After

\textsuperscript{33} Bilingual Services Act, Gov. Code, §§ 7293, 7295.
\textsuperscript{34} Water Code § 10723.2.
\textsuperscript{35} 23 CCR 354.10(d).
\textsuperscript{36} Guideline Document for Groundwater Sustainability Plan; Stakeholder Communication and Engagement, p. 1.
\textsuperscript{37} 23 CCR 355.4(b)(4).
\textsuperscript{40} Mid Kaweah GSA Final GSP, p. 353, published January 31st, 2020.
the public comment period on the final GSP, the GSA talked through the concerns voiced in comment letters with the advisory committee, and came up with concrete recommendations for the GSA board to act on in the first five years of GSP implementation. After we voiced our concerns with lack of compliance with SGMA and related laws during the public comment period, the Advisory Committee discussed these and other issues raised during the public comment period. The discussion with the Advisory Committee and the Board was one of the most open and productive discussions of concerns that we witnessed in our monitoring of GSP development in the San Joaquin Valley.

Unfortunately, however, despite this discussion, the GSA did not make the key changes necessary for the GSP to adequately protect drinking water users. Evaluation of drinking water impacts, modifications to sustainable management criteria, and implementing a drinking water mitigation program were not incorporated into the plan, but were rather slated for consideration after plan adoption. Therefore, the final adopted GSP did not address issues of noncompliance with SGMA and related state and federal law.

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

1. **Notice**: Ensure that the GSA provided clear notice to the public about GSA meetings to develop the GSP (including board meetings, workshops and Kaweah subbasin coordination meetings), 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.

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41 Agenda and Meeting Minutes, Mid Kaweah GSA Advisory Committee, November 5th, 2019, found at https://1e9875cc-fed9-417a-a220-06688759d310.filesusr.com/ugd/55be79_12d2bf34165b458197835094238e0a4.pdf.

42 Mid Kaweah GSA Final GSP, p. 7-44 and 7-45, published January 31st, 2020, and Staff Report for the Mid Kaweah GSA Board Meeting, December 18th, 2020, found at https://1e9875cc-fed9-417a-a220-06688759d310.filesusr.com/ugd/55be79_26dfe6f6b063f47c8906ae387d9568821.pdf [Advisory Committee – Report by Committee Chair, i. Consideration of Draft GSP Comments – Recommended Responses, B. Wilbur provided a PowerPoint presentation for the Board’s review and consideration. He discussed the prioritization of the comments, the review process, and the individual comment themes for which Committee recommendations are being made. With no public comment forthcoming it was moved by S. Nelsen, seconded by Vice Chair Martin and unanimously carried, to accept the recommended comment responses from the Advisory Committee for incorporation into the GSP. Specifically, the GSA board adopted measures to: make clarifications regarding the water budget in the GSP; improve data on drinking water impacts before the next 5-year plan assessment, report these improved data in each annual report, and make any warranted changes to the plan at each 5-year plan assessment; improve the domestic and small system assistance program by completing well identification within three early years of implementation, register wells, and provide mitigation through financial assistance, and state a preference for connecting current domestic well users to a public water system if feasible; and look into including SWRCB guidance and adding more contaminants for groundwater quality monitoring.]

43 Government Code § 54954(a).
served by the agency, who do not speak English or are unable to effectively communicate in English.44

2. **Translation of materials:**45 Ensure that the GSA translated materials at all meetings and workshops (including board meetings, workshops and Kaweah subbasin coordination meetings) into all languages spoken by at least 5 percent of the public served by the agency, who do not speak English or are unable to effectively communicate in English.

3. **Interpretation:**46 Ensure that the GSA provided interpretation services at board meetings, committee meetings, Kaweah subbasin coordination meetings and workshops for all languages spoken by at least 5 percent of the public served by the agency, to allow those who do not speak English or are unable to effectively communicate in English to effectively participate.

4. **DAC representation on GSA board:** Ensure that the GSA developed the GSP with a Board that contained representatives from DACs.

5. **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.47 DWR regulations also require that the historical water budget “start[] with the most recent available information.”48 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.”

The GSP does not conform to these requirements. It is not clear how domestic well water use was calculated, and the water budget does not show that it has accounted for population growth. Furthermore, Appendix 2A, which the GSP states contains further information on the water

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44 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.”

45 Government Code sec. 7296.2.

46 Government Code sec. 7296.2.

47 23 CCR § 354.18.

48 23 CCR 354.18(c)(2)(B).
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, and must be based on an analysis of what are “significant” and “unreasonable” impacts. These policy decisions must also avoid disparate impacts on protected groups pursuant to state and federal law. As discussed below, the GSP does not meet these requirements.

a. The Undesirable Result for Groundwater Levels are Inadequate

Undesirable results are the point at which groundwater conditions cause “significant and unreasonable” impacts on beneficial users. The SGMA regulations require GSAs to justify their undesirable results by including the “[p]otential effects on the beneficial uses and users of groundwater.” GSAs must also describe the “processes and criteria relied upon to define undesirable results.” 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 Kaweah subbasin GSAs have defined groundwater quality undesirable results as occurring when one-third of all Kaweah Subbasin designated water levels monitoring sites exhibit a minimum threshold exceedance, and those exceedances are all associated with GSA actions. This definition of undesirable results is inadequate because significant and unreasonable impacts on drinking water will occur without triggering an undesirable result. Significant and

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49 Water Code § 10723.2.
50 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.”].
52 23 CCR § 354.26.
54 Mid Kaweah GSA Final GSP, p. 3-6, published January 31st, 2020
unreasonable impacts of vast numbers of dry drinking water wells would occur long before groundwater levels reach minimum thresholds in one-third of the subbasin’s representative monitoring wells. Therefore this undesirable result determination does not avoid significant and unreasonable impacts on drinking water users, and is not based on an analysis of circumstances that would occur on the ground.

Furthermore, of the wells the GSP would allow to become contaminated before triggering plan failure, the vast majority are domestic wells providing drinking water to low-income households and disadvantaged communities, causing a disparate impact in violation of state law.

b. The Measurable Objectives for Groundwater Levels are Inadequate

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

To establish the measurable objectives, the GSA took the 2006-2016 trend line and set the measurable objective for 2040 at the groundwater elevation reached by the trend line in 2030. The GSA did not consider impacts to beneficial users in developing these measurable objectives, or ensure that it would prevent significant and unreasonable results.

In fact, the attached Focused Technical Review that we commissioned (attached as Exhibit A) shows that approximately 64% of domestic wells in the GSA area will be dewatered if groundwater levels reach the measurable objectives, and an additional 9% of domestic wells will be partially dewatered. The GSA cannot therefore have considered the interests of this beneficial user group in determining its measurable objectives, and is likely to have a disparate impact on a protected group if it pursues this course of action.

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

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.” SGMA requires GSAs to analyze both the significance and reasonableness of proposed minimum thresholds, and minimum thresholds

55 23 CCR § 354.30(a)
56 Mid Kaweah GSA Final GSP, p. xxiv, published January 31st, 2020
57 23 CCR § 354.28.
must have the purpose of avoiding “significant and unreasonable” impacts on beneficial users. The GSA’s determination of what is “significant and unreasonable” must consider the impacts on all types of beneficial users, including disadvantaged communities. For groundwater levels specifically, GSAs must place minimum thresholds for each monitoring site at the level “that may lead to undesirable results.” Under DWR regulations, the GSA must provide a description of “the information and criteria relied upon to establish minimum thresholds,” an explanation of how the proposed minimum thresholds will “avoid undesirable results,” and “how minimum thresholds may affect the interests of beneficial uses and users of groundwater.”

The Mid Kaweah GSA’s approach to setting minimum thresholds does not evaluate whether “significant and unreasonable” impacts will occur on beneficial users. The GSP states that the GSA discussed these impacts with Advisory Committee members, and Advisory Committee members “considered the impacts recently experienced in the last historic drought from 2012 to 2016,” but it did not hold an informed discussion as it did not have data on the actual potential impact to beneficial users from reaching proposed minimum thresholds.

The GSA’s minimum thresholds would allow the current rate of pumping (established by the trend from 2006 to 2016) to continue at least until 2040, and possibly after 2040. The GSA conducted a passing overview of how groundwater elevation will affect domestic well users and disadvantaged communities, concluding that “between 4 percent and 32 percent of the wells in Hydrogeologic Zone 2, where most small-system and domestic wells within MKGSA are located, may experience reduction or loss of production capacity by 2040 if water levels were to continue downward as they have historically.” However, this evaluation was done after the sustainable management criteria were already determined. The GSA’s analysis also failed to take into account well screen depths. Our analysis shows a much larger impact: taking into account well screen intervals on domestic wells in the GSA, the attached Focused Technical Review shows that 71% of the domestic wells in the GSA will be fully dewatered at the minimum threshold, and an additional 15% will be partially dewatered. The GSA has therefore chosen to allow large amounts of pumping to occur at the potential expense of up to 86% of the domestic wells in the GSA area. This will cause a disproportionately negative impact on domestic users, the majority of whom belong to a group protected by state civil rights law. This therefore will cause a disparate impact in violation of state civil rights law.

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60 Water Code § 10723.2.
61 23 CCR § 354.28.
62 23 CCR § 354.28.
63 Mid Kaweah GSA Final GSP, p. 5-7, published January 31st, 2020
64 Mid Kaweah GSA Final GSP, p. 5-4, published January 31st, 2020
65 Mid Kaweah GSA Final GSP, p. 5-7, published January 31st, 2020
The groundwater levels sustainable management criteria for this GSP are therefore inadequate. At a minimum, adequate groundwater levels sustainable management criteria must include the following elements, which are not present here:

1. **Evaluate the drinking water impact of all sustainable management criteria:** Ensure that the GSP includes an analysis of how many drinking water wells (municipal wells, community water system wells, and domestic wells) might go fully or partially dry if groundwater levels reach the undesirable results,\(^{67}\) measurable objectives and minimum thresholds,\(^{68}\) including a map of wells that will go fully and partially dry at the measurable objectives and minimum thresholds. Ensure that the GSP includes estimates of the increased pumping costs from additional lift needed to pump water from lower elevations if the undesirable results, measurable objectives and minimum thresholds were to be reached.

2. **Avoid significant and unreasonable impacts to drinking water users in creating sustainable management criteria:**\(^{69}\) The GSA must analyze “when significant and unreasonable effects ... are caused by groundwater conditions occurring throughout the basin,” taking into account the beneficial users of groundwater and the basin’s specific circumstances.\(^{70}\) Therefore the GSP must explicitly state how the GSA considered drinking water impacts in shaping undesirable results, measurable objectives and minimum thresholds for groundwater levels; for example, the GSP could state how its well impact analysis supported setting stricter measurable objectives and minimum thresholds near at-risk communities.

3. **Incorporate new drinking water data into sustainable management criteria:**\(^{71}\) Ensure that the GSP includes a description of how data gaps and uncertainties of its drinking water well impact assessment will be addressed and serve to reassess the sustainable management criteria, projects and management actions in accordance with new data.

4. **Implement DAC and drinking water user input into sustainable management criteria:**\(^{72}\) Ensure that the GSP discusses how stakeholder input from DAC community members was considered in the development of undesirable results, measurable objectives and minimum thresholds. For example, the GSP could state how 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

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\(^{67}\) 23 CCR § 354.26(c)

\(^{68}\) 23 CCR § 354.28(b)(4)

\(^{69}\) Water Code § 10723.2

\(^{70}\) 23 CCR § 354.26.

\(^{71}\) 23 CCR § 354.38(e)(3)

\(^{72}\) 23 CCR § 354.10(d); DWR Guidance Document for Groundwater Sustainability Plans: Stakeholder Communication and Engagement, p.1.
management criteria to protect drinking water, or other programs to implement to mitigate these impacts.

5. **Avoid disparate impact:** 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 communities of color in the GSP area. For example, the GSP should ensure that the same minimum threshold methodology across the GSP area will not lead to disproportionately more wells going dry for residents of color than for white residents.

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

GSA activities and policies could cause increased contamination in many ways. For example, the proposed timeline for implementation of demand reduction may allow for continued pumping which may create an increase in naturally occurring contaminants and/or migration of contaminant plumes. 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. A groundwater market is also likely to cause geographic concentrations of 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 based on a determination of what is a “significant and unreasonable” impact on all beneficial users, including domestic well users and disadvantaged communities. The GSA’s undesirable results allow for significant and unreasonable impacts to drinking water users, are not based on an evaluation of whether impacts

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76 Water Code § 10721(w)(4); 23 CCR § 354.28(c)(4).
77 Water Code §§ 10727.2(d)(2); 10721(x)(4)
to all beneficial users are significant and unreasonable, and leave domestic well users outside of urban areas unprotected from drinking water contamination.

a. The “Contaminants of Concern” Being Monitored for Groundwater Quality Sustainable Management Criteria Are Inadequate

The GSP does not protect domestic wells from drinking water contamination resulting from groundwater management activities. First, the GSA’s choices to only monitor for select drinking water contaminants, shown in Table 5-3 pasted below, shows that areas where the dominant use is for public drinking water supply will have sustainable management criteria for 10 drinking water contaminants, and areas where the dominant use is agriculture will have sustainable management criteria for 13 agricultural contaminants. The GSA does not present a rationale to justify why these ten drinking water contaminants were chosen, and why it chose not to monitor for other drinking water contaminants. The GSP therefore also does not prevent increased contamination from other drinking water contaminants known to increase from groundwater management activities, such as uranium.

Second, the GSA’s choice to monitor for different contaminants based on the “dominant” surrounding groundwater use put rural communities on domestic wells at risk of increased drinking water contamination. The GSP states that the number of contaminants of concern monitored at each representative monitoring well will vary by the “dominant” use of groundwater around each representative monitoring well, and that the dominant is measured as “more than 50% of the pumping” around the well.78 Since the volume of agricultural pumping will nearly always far exceed nearby domestic well pumping, this means in practice that no representative monitoring wells outside of cities and community water systems will monitor for drinking water contaminants. Table 5-3, pasted for reference below, shows that areas where the dominant use is for public drinking water supply will have sustainable management criteria for 10 drinking water contaminants, and areas where the dominant use is agriculture will have sustainable management criteria for 13 agricultural contaminants. The GSA’s choice to set sustainable management criteria for different contaminants depending on the dominant surrounding groundwater use leaves the vast majority of domestic wells in the GSA area unmonitored and unprotected from drinking water contamination. These policy decisions have not considered the interests of this beneficial user type, and will cause a disparate impact on protected groups pursuant to state civil rights law.

78 Mid Kaweah GSA Final GSP, p. 5-11, published January 31st, 2020
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.” GSAs must also describe the “processes and criteria relied upon to define undesirable results.” The undesirable result cannot have a disparate impact on protected groups pursuant to state civil rights law.

The Kaweah Subbasin GSAs have defined a groundwater quality undesirable result as occurring when one-third of all Subbasin designated water quality monitoring sites exhibit a minimum threshold exceedance, and those exceedances are all associated with GSA actions. Like the

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81 Mid Kaweah GSA Final GSP, p. 3-6, published January 31st, 2020.
groundwater levels minimum threshold, this definition of undesirable results is inadequate because significant and unreasonable impacts will occur without triggering an undesirable result. Violating water quality standards in one-third of the entire subbasin’s representative monitoring wells would have unreasonably severe impacts on drinking water users. The GSP states that the GSA discussed these impacts with Advisory Committee members, but it did not facilitate an informed discussion as it did not have data on the actual potential impact to beneficial users. Therefore this undesirable result determination does not avoid significant and unreasonable impacts on drinking water users, and is not based on an analysis of circumstances that would occur on the ground. Furthermore, the vast majority of wells the GSA would allow to become contaminated before triggering plan failure would be overwhelmingly upon domestic well users and disadvantaged communities, causing a disparate impact in violation of state law.

c. The Measurable Objectives for Groundwater Quality are Inadequate

The GSA has proposed to set the measurable objectives at representative monitoring sites at 75% of the MCLs or agricultural WQOs for the constituents of concern. It is important to note again that the representative monitoring sites are only in public water systems, so this leaves all individuals and communities on private domestic wells without protection. Furthermore, since representative monitoring wells are public supply wells, they will not capture groundwater contamination impacts in shallow aquifers where private domestic wells are located. The GSA did not evaluate how many wells will likely exceed drinking water standards when the representative monitoring sites reach 75% of the relevant MCL, so it has not evaluated whether “significant and unreasonable” impacts will occur to all beneficial users.

d. The Minimum Thresholds for Groundwater Quality Are Inadequate

GSAs must place groundwater quality minimum thresholds for each monitoring site at the level “that may lead to undesirable results.” 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.”

The minimum threshold is not sufficient to protect against significant and unreasonable impacts to drinking water, because it does not protect against all primary drinking water contaminants, and does not protect any drinking water users outside of areas served by public supply wells. The GSP states that “minimum thresholds shall be set at the MCLs or the Agricultural WQOs, whichever is applicable at the representative monitoring site.” As explained above, the GSA’s

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83 23 CCR § 354.28.
84 23 CCR § 354.28.
choice of contaminants to monitor, and its choice to monitor different contaminants based on the dominant surrounding groundwater use puts sources of drinking water at risk of contamination from contaminants that are not included in the six contaminants of concern and/or that are not monitored in a certain area. The impacts of this contamination will be particularly felt by those reliant on domestic wells, which are most vulnerable to drinking water contamination, and are not regularly monitored for compliance with any drinking water contamination that may result from the GSA’s groundwater management activities.

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

2. **Ensure that the GSP triggers a violation of a minimum threshold after one test shows that there has been an increase in contamination since January 1st, 2015.** Once the minimum threshold is reached, the GSA must start the evaluation of whether groundwater management activities or groundwater pumping have caused the increase, or whether the increase was caused by other factors such as natural fluctuation, testing inaccuracy, or activities outside the purview of the GSA. If the increase was caused by groundwater management activities or groundwater pumping, the GSA must immediately stop increasing the contamination and remediate.

3. **Immediately remediate any contamination caused by groundwater conditions since 2015:** The GSA must immediately remediate any increased contamination caused by groundwater management policies or activities (including lack of adequate regulation of pumping) since 2015. The GSA must begin remediation immediately upon establishing causation. The GSA must remediate contamination within two years, or as soon as technologically and hydrologically possible, whichever is faster. Design and implementation of remediation measures must be done in partnership with all groundwater users, primarily disadvantaged communities. The GSA must also clearly identify funding sources for remediation, and identify a timeline for procuring those funds.

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86 23 CCR § 354.34(b)(2) and (f)(3)
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, measurable objectives and minimum thresholds.

6. **Implement DAC and drinking water user input into sustainable management criteria:** 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:** 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:** Ensure that the minimum thresholds for groundwater quality are established in such a way that prevents a disproportionately negative impact on communities of color in the GSP area. For example, the GSP should ensure that the same minimum threshold methodology across the GSP area will not lead to disproportionately more wells going dry for residents of color than for white residents.

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

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

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

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...

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87 23 CCR § 354.26(e)
88 23 CCR § 354.28(b)(4)
89 23 CCR § 354.10(d); DWR Guidance Document for Groundwater Sustainability Plans: Stakeholder Communication and Engagement, p.1
90 23 CCR § 354.38(e)(3)
with no ability to detect and prevent significant and unreasonable impacts to those users. The GSA must prioritize measures to address these data gaps and add more representative monitoring wells.

\textit{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.”\textsuperscript{92} The GSA must also make decisions about the monitoring network in a way that considers the interests of all beneficial users.\textsuperscript{93}

The monitoring network is not sufficient to protect drinking water resources and comply with the requirements. Such a monitoring network must, at a minimum, contain the following elements:

1. \textbf{Ensure accurate detection of impacts on drinking water users and DACs:}\textsuperscript{94} Ensure that the groundwater level monitoring network includes \textit{representative} monitoring wells \textit{in or near DACs}, and placed in a way that detects impacts to the \textit{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. \textbf{Clearly show representative monitoring well locations in relation to DACs:}\textsuperscript{95} Ensure that the representative monitoring wells (RMWs) for groundwater levels are presented on maps and in tables that identify which set of minimum thresholds and measurable 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. \textbf{Identify and address other drinking water data gaps:}\textsuperscript{96} Ensure that the GSP clearly identifies any other gaps in data regarding impacts to drinking water users, and that the GSP contains a clear plan to fill data gaps regarding impacts to drinking water users. The GSP explains how it will fill some monitoring data gaps, but does not ensure that these gaps will capture impacts on all drinking water users, particularly disadvantaged communities.

\textsuperscript{92} 23 CCR § 354.34(c)(1)(A)
\textsuperscript{93} 23 CCR § 354.34(b)(2)
\textsuperscript{94} 23 CCR § 354.34(b)(2) and (f)(3)
\textsuperscript{95} 23 CCR § 354.34(b)(2) and (f)(3)
\textsuperscript{96} 23 CCR § 354.38(e)(3)
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.”

First, representative monitoring wells will not capture drinking water impacts to communities and families on domestic wells. The GSP establishes two types of representative monitoring wells in the groundwater quality monitoring network: wells that will monitor for only contaminants of concern that are harmful for agricultural production, and wells that will monitor for ten drinking water contaminants. The GSP states that representative monitoring wells will only monitor for agricultural contaminants when over 50% of surrounding groundwater use is for agriculture. This means that none of the representative monitoring wells outside of public water systems will capture increases in drinking water contamination, leaving domestic wells and rural communities at risk of increased drinking water contamination due to GSA activities.

Second, many of the public supply wells listed in Table 4-6 are screened far below the shallow depths at which domestic wells in the GSA area are screened. Therefore the representative wells that are capturing drinking water impacts will not be testing groundwater quality at the levels relevant to domestic wells.

Third, another significant concern is that there are only 4 representative monitoring wells detecting contamination from groundwater management activities outside of the cities of Tulare and Visalia. As the Focused Technical Review in Exhibit A shows, the water quality monitoring network does not cover a large portion in the west of the GSA area, which includes at least 200 domestic wells and several public water systems for DACs and schools. This is not nearly enough in terms of spatial density for the monitoring network to detect impacts on drinking water in the unincorporated areas of the GSA, and will allow contamination to occur undetected in these areas where domestic well users and disadvantaged communities depend on groundwater for their vital drinking water resources.

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:**

   a. Contaminants of concern with primary drinking water standards

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97 23 CCR § 354.34(c)(4)
98 23 CCR § 354.34(b)(2) and (f)(3)
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(s) will monitor groundwater contamination that could affect drinking water in the GSA area. Ensure that the representative monitoring wells (RMWs) for groundwater quality are presented on maps and in tables, and that the maps of RMWs clearly identify the locations of DACs, small water systems and other sensitive users.

3. **Ensure accurate detection of impacts on drinking water users and DACs:** Ensure that the groundwater level monitoring network includes representative monitoring wells in or near DACs, and placed in a way that detects impacts to the vast majority of drinking water users in the GSP area. If new monitoring wells are required, ensure that the GSP contains a concrete plan to fund and construct new representative monitoring wells within the first year of GSP implementation to ensure that vulnerable communities’ drinking water resources are monitored. The plan to improve the monitoring network should include testing of domestic wells at least as an interim measure as wells are constructed.

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:** 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 and avoid disparate impacts on protected groups. The GSP must

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99 23 CCR § 354.34(b)(2) and (f)(3)
100 23 CCR § 354.34(e)
101 Water Code § 10723.2.
also concretely outline how each objective and the overall sustainability goal will be achieved.\textsuperscript{103} 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.\textsuperscript{104}

\textit{a. The Projects And Management Actions Are Inadequate, Do Not Protect Drinking Water For Disadvantaged Communities, And Will Likely Cause Disparate Impacts.}

The projects and management actions set forth in the GSP does not demonstrate a path towards achieving sustainability goals in the plan. The GSAs have not demonstrated how they have considered the interests of beneficial users including domestic well owners and disadvantaged communities.\textsuperscript{105} The resulting impact from the proposed sustainable management criteria will likely lead to disparate impacts on protected groups pursuant to state and federal law.\textsuperscript{106}

Particularly in light of the impacts on domestic well users and disadvantaged communities from the policy decisions discussed above, the GSP must include Projects and Management Actions that protect domestic well users and disadvantaged communities from the drinking water impacts that will occur from the GSA’s policy decisions. As noted above and in the attached Focused Technical Review, the minimum thresholds for groundwater levels put more than 86% of domestic wells in the GSA area at risk of full or partial dewatering, and the groundwater quality sustainability goals leave domestic wells unprotected from increased contamination. Furthermore, the GSP cannot create a disparate impact on protected groups pursuant to state law. Without proactive policies and projects to mitigate forthcoming disparate impacts, communities and homes belonging to protected groups based on race, national origin and ethnicity will experience a disproportionately negative impact in violation of state civil rights law. As a result, the GSP will cause a disparate impact on protected groups and does not consider the interests of domestic well users or disadvantaged communities, and thus is inadequate.

\textsuperscript{103} Water Code § 10727.2(b)(2).
\textsuperscript{104} Water Code § 10727.2(b)(1).
\textsuperscript{105} Water Code sec. 10723.2.
\textsuperscript{106} 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].
The GSP’s chapter on Projects and Management Actions contains two projects that may help protect against disparate impacts, but those projects as written are not sufficient to prevent disparate impacts. The recharge basin next to Okieville is a positive step in the right direction towards protecting Okieville’s drinking water supply and quantity, but this project must be subject to CEQA review and include frequent groundwater monitoring for all primary drinking water contaminants, in order to ensure that it does not negatively impact drinking water supplies for nearby residents.

The Small Systems/Domestic Well Owner Assistance program could help prevent disparate impacts and show that the GSA has considered the interests of domestic well owners and small systems, but the GSA has not committed to implementing this program, and does not define specific assistance measures or how they will be funded. Before approval of the GSP, the Mid Kaweah GSA must clearly make an enforceable commitment to projects and management actions to comply with SGMA and prevent disparate impacts on vulnerable water users, and commit to defined and prompt timelines for those projects.

The GSP’s potential groundwater extraction allocation program also raises concerns from the perspective of domestic well users and disadvantaged communities. Such a scheme could negatively impact critical drinking water resources if the GSA does not ensure that small systems, in addition to domestic wells, are exempt from pumping restrictions that limit access to an adequate supply of drinking water and allow for communities to grow and thrive.

\hspace{1cm} b. Minimum Requirements for Projects and Management Actions

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

1. **Include a Drinking Water Well Impact Mitigation Program:** Ensure that the GSP contains a drinking water protection program to prevent impacts to drinking water users and mitigate the drinking water impacts that occur. Please reference the Framework for a Drinking Water Well Impact Mitigation Program that our organization developed with the Community Water Center and Self-Help Enterprises for more details, a draft of which is attached as part of the Human Right to Water Scorecard in Exhibit B.

2. **Establish a clear and proactive plan for demand reduction.** Demand reduction should be 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.**  

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 Inadequate

GSPs must include a planning and implementation horizon and must show how the sustainability goal will be achieved by 2040. 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.

The first chapter of the GSP contains a brief description of community engagement during GSP implementation, stating that the GSA will continue notifying the public through email, postings, and social media about GSA board and committee meetings, and the GSA will do additional presentations as resources allow. This section does not contain adequate information regarding the plan implementation schedule and public process, annual reporting, or the potential to make amendments to the GSP. The GSP does note that the GSA will be open to collaboration with partner organizations for presentations as they were during the planning phase. In the annual report outline proposed by the GSA, public outreach is not included in any of the key sections. The GSP also does not mention if they will be providing translation, interpretation and further important resources during public meetings that ensure accessibility and inclusivity during the implementation phase. Additionally, in the initial GSP implementation budget, there is no budget set aside for public outreach. This engagement is not enough to ensure that all beneficial user groups are considered, or that a wide diversity of stakeholders are included in GSP implementation decisions.

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108 Water Code § 10727.2(c).
109 Water Code § 10727.2(b)(1).
110 Water Code § 10733(a); 23 CCR 355.4(b).
111 Mid Kaweah GSA Final GSP, p. 8-1, published January 31st, 2020
112 Mid Kaweah GSA Final GSP, p. 5-4, published January 31st, 2020
The GSP acknowledges that a water supply shortage is expected, however, it states that projects and management actions such as demand reduction or increasing water supply will be considered in the future.\textsuperscript{113} Because there is no clear timeline and commitment of a demand reduction program being implemented, waiting too long into the future may exacerbate the critical overdraft in the sub-basin. No project and management actions in the GSPs implementation timeline are reflective of the need to reduce overall demand proactively. Instead, the GSP will be considering implementing a groundwater allocation program and water market within the first 5 years of implementation.\textsuperscript{114}

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:**\textsuperscript{115} 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.\textsuperscript{116}

3. **Translation of materials:**\textsuperscript{117} 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:**\textsuperscript{118} Ensure that the GSP states that ongoing engagement will include interpretation services provided at board meetings, committee meetings and workshops into all languages spoken by at least 5 percent of the public served by the agency, who do not speak English or are unable to effectively communicate in English.

5. **Accessible workshops:** Ensure that the GSP states that ongoing engagement will include workshops held at accessible times and locations for disadvantaged community residents.

\textsuperscript{113} Mid Kaweah GSA Final GSP, p. 123, published January 31st, 2020
\textsuperscript{114} Mid Kaweah GSA Final GSP, p. 7-47, published January 31st, 2020
\textsuperscript{115} Government Code § 54954(a).
\textsuperscript{116} Government Code sec. 7296.2.
\textsuperscript{117} Government Code sec. 7296.2.
\textsuperscript{118} Government Code sec. 7296.2.
6. **DAC representation on advisory committee and board:** Ensure that the GSP states that ongoing engagement will include advisory committees and Boards containing representatives from DACs. The GSA should include DAC representatives on the GSA board, and should include representatives from DACs on the advisory committee 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 Coordination Agreement Is Inadequate**

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

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

(A) Groundwater elevation data, supported by the quality, frequency, and spatial distribution of data in the monitoring

119 Water Code § 10733.4(b)(3).
120 Water Code § 10721(d).
121 23 CCR § 357.4.
network and the monitoring objectives as described in Subarticle 4 of Article 5.

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

(C) Sustainable yield for the basin, supported by a description of the undesirable results for the basin, and an explanation of how the minimum thresholds and measurable objectives defined by each Plan relate to those undesirable results, based on information described in the basin setting.\(^{122}\)

Finally, “[t]he coordination agreement shall explain how the Plans implemented together, satisfy the requirements of the Act and are in substantial compliance with this Subchapter.”\(^{123}\)

Here, the Kaweah Subbasin Coordination Agreement submitted with the GSP does not comply with these requirements. As an initial matter, the Coordination Agreement is submitted only by GSAs in the subbasin, rather than the entire basin as required by SGMA. Additionally, while the Coordination Agreement does contain a “preliminary” water budget, it fails for the same reasons discussed above with respect to the GSP water budget.

With respect to coordinated implementation of the GSPs, the Coordination Agreement states that “[f]urther discussions among the Parties must occur after adoption of GSPs concerning mutual responsibilities in achieving the Subbasin’s Sustainable Yield by 2040, or as may be otherwise extended by DWR per Water Code §10727.2 (b) (3) once further data is obtained.”\(^{124}\) This despite the estimated safe yield set forth in Appendix 3 and the apportionment of groundwater resources shown in Table 3.1. The GSPs have data and estimates from which specific management actions and projects can be planned and implemented. However, the Coordination Agreement does not commit any of the GSPs to any specific actions or projects to keep any one GSP within their agreed upon apportionment, or which would require the GSPs together to stay within the estimated safe yield for the basin. Putting off the hard conversations regarding mutual responsibilities to achieve sustainable yield is not an adequate explanation of how “the Plans implemented together, satisfy the requirements of” SGMA.

In addition, the Coordination Agreement defines “undesirable results” as occurring “when one-third of the representative monitoring sites in all three GSA jurisdictions combined exceed

\(^{122}\) 23 CCR § 357.4.
\(^{123}\) 23 CCR § 357.4.
\(^{124}\) 23 CCR § 357.4.
their respective minimum threshold water level elevations.” As discussed above, this approach allows for regional and localized “hot spots” where falling water tables and/or groundwater contamination cause significant and unreasonable impacts on beneficial users, without triggering the undesirable result. This definition does not conform with SGMA’s requirement that the GSAs in the subbasin coordinate to sustainably manage groundwater resource and avoid undesirable results to beneficial users. Local control only goes so far before conflicting with the text and spirit of SGMA and implementing regulations.

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

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

a. The GSP Conflicts With Water Code § 106.3.

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

It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and 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 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.” 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.” As discussed in detail above, the GSP allows continued overdraft above the safe yield of the basin, such that drinking water wells (especially domestic wells) will continue to go dry, infringing upon the rights of overlying users of groundwater. DWR cannot approve the GSP until it is revised to protect the rights of residents of disadvantaged communities and/or low-income households who hold overlying rights.

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

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125 AB 1739 (2014).
126 Water Code § 10720.5(b).
127 See also Water Code § 10723.2 [The groundwater sustainability agency shall consider the interests of all beneficial uses and users of groundwater… [including] Domestic well owners.”].
reasonable and beneficial use thereof in the interest of the people and for the public welfare.”128 The doctrine applies to all water users, regardless of basis of water right, and all water rights and methods of diversion.129 A determination of reasonableness of a use “cannot be resolved in vacuo isolated from statewide considerations of transcendent importance.”130

DWR and the Water Board must ensure that GSP’s water allocations are consistent with the reasonable and beneficial use doctrine.131 In doing so, DWR and the Board must follow the Legislature’s directive to prioritize domestic use of water resources over irrigated agriculture132 and ensure that SGMA implementation furthers the human right to safe and affordable drinking water133 — both statewide considerations of transcendent importance. In other words, a GSP that allows use of water for irrigation at the expense of use of water for domestic purposes is not consistent with the reasonable and beneficial use doctrine.

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

d. The GSP Conflicts with the Public Trust Doctrine

The public trust doctrine applies to the waters of the State, and establishes that “the state, as trustee, has a duty to preserve this trust property from harmful diversions by water rights holders” and that thus “no one has a vested right to use water in a manner harmful to the state's waters.”134

128 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.”].
131 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].
132 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.
133 Water Code § 106.3.
134 United States v. State Water Resources Control Bd. (1986) 182 Cal.App.3d 82, 106; see also Nat'l Audubon Soc'y v. Superior Court (1983) 33 Cal.3d 419, 426 [“before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.”].
The public trust doctrine has recently been applied to groundwater where there is a hydrological connection between the groundwater and a navigable surface water body. 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. 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.” The court also specifically held that SGMA does not supplant the requirements of the common law public trust doctrine.

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.

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

DWR cannot approve the GSP because it fails to protect access to drinking water. We welcome the opportunity to 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. 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

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136 Id. at 856-62.
137 Id. at 865.
138 Id. at 862-870.
140 Attached as Exhibit B.
Human Right to Water Scorecard, and that these standards are followed during GSP implementation.

Sincerely,

Blanca Escobedo and Amanda Monaco
Leadership Counsel for Justice and Accountability