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*[sent via email]*

September 16th, 2019

**Re: Comments on Mid Kaweah GSA Draft Groundwater Sustainability Plan**

Dear Mid Kaweah GSA Advisory Committee Members and Board Members:

Leadership Counsel for Justice and Accountability works alongside low income communities of color in the San Joaquin Valley and the Eastern Coachella Valley. As is most relevant here, we work in partnership with community leaders in the communities of Matheny Tract, Soult's Tract and Lone Oak Tract to advocate for local, regional and state government entities to address their community's needs for the basic elements that make up a safe and healthy community, including: safe and affordable drinking water, affordable housing, effective and safe transportation, efficient and affordable energy, green spaces, and clean air.

We have been engaged in the Sustainable Groundwater Management Act (SGMA) implementation process because most of the communities with which we work are wholly dependent on groundwater for their drinking water supplies, and many have already experienced groundwater quality and supply issues. Communities we work with have not been included in decision-making about their precious water resources, and their needs are not at the forefront of such decisions. In 2012, California recognized the Human Right to Water for domestic purposes, and required that state agencies consider this human right in their activities. State law also requires that GSAs avoid disparate impacts on protected classes. SGMA's requirements for a transparent and inclusive process, presents an opportunity in the context of groundwater management to meaningfully include disadvantaged communities in decision-making, and to create groundwater management plans that understand their unique vulnerabilities, are sensitive to their drinking water needs, and avoid causing disparate negative impacts on low-income communities of color.

We submit these comments to elevate our concerns that the Mid Kaweah Groundwater Sustainability Agency's (GSAs) Draft of its Groundwater Sustainability Plan (Draft GSP) does not adequately analyze or incorporate input from disadvantaged communities and domestic wells, and will create a disparate impact on protected classes unless modified to effectively protect drinking water resources for disadvantaged communities.

We include herein our comments with respect to deficiencies in the Draft GSP as well as recommendations for improvements. We have also attached a Focused Technical Review of the drinking water impacts of the current Draft GSP. We conducted the Focused Technical Review in collaboration with Self-Help Enterprises, with whom we work closely in the region.

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**The Draft GSP is Incomplete, and Must Include Additional Information In Order to be Reviewed by the Public**

The Draft GSP omits critical data, and does not give DWR or the public sufficient information to evaluate compliance with state law or the impact of the plan on beneficial users. Specifically, the Draft GSP has not clearly evaluated the impact of the plan on domestic well users and disadvantaged communities, which are likely to cause a disparate impact on protected groups pursuant to state civil rights law. Further, the GSP has not committed to a clear program to address those impacts. The GSP also does not contain sufficient information on groundwater contamination in the GSA area, and does not clearly show how the actions of the other GSAs in the subbasin will achieve sustainability throughout the subbasin. The GSA also does not provide adequate information about the plan for continued public engagement during GSP implementation. More information about each of these gaps in data and information is included below.

The GSP cannot be adopted until this key information is made available to the public. The GSA must incorporate this information into the Draft GSP before the Draft GSP can be effectively reviewed by the public or by DWR.

**The Draft GSP Will Have Disparate Impacts on Residents in the MKGSA Subbasin Unless Modified to Protect Domestic Well Users and Disadvantaged Communities**

Mid Kaweah GSA must prioritize drinking water as an essential pillar of the proposed groundwater sustainability plan. The Draft GSP will cause significant, unreasonable and disparate impacts on protected groups as a result of the sustainability goals that it has set, and has not committed to a concrete plan to prevent or mitigate those impacts.

Under SGMA, the GSA is tasked with managing groundwater in a way that does not cause “significant and unreasonable impacts” to the beneficial uses and users of groundwater in the subbasin. The GSA’s activities cannot avoid impacts only on certain types of beneficial users; under SGMA it must “consider the interests of” an enumerated list of all types of beneficial users, including domestic well users and disadvantaged communities on domestic wells and community water systems.<sup>1</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

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<sup>1</sup> Water Code § 10723.2.

under, any program or activity that is conducted, operated, or administered by the state.<sup>2</sup> In addition, the state's Fair Employment and Housing Act guarantees all Californians the right to hold and enjoy housing without discrimination based on race, color, or national origin.<sup>3</sup> Lastly, the Department of Water Resources is required to consider the Human Right to Water in its evaluation of the GSA's proposed Groundwater Sustainability Plan, so the drinking water impacts of the GSP are of utmost importance in its approval.<sup>4</sup>

Small disadvantaged communities of color within the San Joaquin Valley are disproportionately impacted by unsustainable groundwater use, falling groundwater tables, dry drinking water wells, subsidence, and water quality degradation.<sup>5</sup> As described in more detail below, and analyzed in the attached Focused Technical Review, domestic well users are de minimis pumpers in the GSA area, but the policies proposed in the Draft GSP for managing groundwater levels and groundwater quality will likely fully or partially dewater approximately 86% of domestic wells,<sup>6</sup> creating a disproportionate impact on domestic well users. Water quality will not be monitored in proximity to private domestic wells, since drinking water contaminants will only be tested for compliance where more than 50% of the pumping around a representative monitoring well is for drinking water purposes. Furthermore, the GSA has proposed a potential program to assist domestic well users and small systems with addressing these impacts, but the program is not concrete or detailed and the GSA board has not committed to implementing the program. The negative impacts discussed in this letter, which will be allowed by the Draft GSP and may not be addressed through an effective drinking water protection program, will likely be disproportionately felt by low income communities of color, and are thus discriminatory on the basis of race, color, ancestry, and national origin.

In order to prevent disparate impacts, the Mid Kaweah GSA must reassess the GSP's potential disparate impacts and include robust and proactive policies, projects, and management actions to protect vulnerable disadvantaged communities and the projected 85% of domestic wells from

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<sup>2</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>3</sup> Gov. Code § 12900 et seq.

<sup>4</sup> Water Code § 106.3.

<sup>5</sup> Feinstein et al., "Drought and Equity in California" (January 2019); Balazs et al., "Social Disparities in Nitrate Contaminated Drinking Water in California's San Joaquin Valley," *Environmental Health Perspectives*, 19:9 (September 2011); Balazs et al., "Environmental Justice Implications of Arsenic Contamination in California's San Joaquin Valley," *Environmental Health Perspectives*, 11:84 (November 2012); Flegel et al., "California Unincorporated: Mapping Disadvantaged Communities in the San Joaquin Valley" (2013).

<sup>6</sup> Focused Technical Review, p. 4.

disparate impacts.<sup>7</sup> The sections below provide recommendations on some ways that the GSA could do so.

### **Basin Setting Lacks Information on Drinking Water Issues and Groundwater Quality**

The SGMA regulations require GSPs to include “[g]roundwater quality issues that may affect the supply and beneficial uses of groundwater, including a description and map of the location of known groundwater contamination sites and plumes.”<sup>8</sup> The Draft GSP does not contain information about groundwater quality issues, or a map of known groundwater contamination sites and plumes. This information is critical to ensuring that beneficial users are not harmed by increased groundwater contamination resulting from the GSA’s groundwater management activities. This information is particularly important for domestic well owners and small disadvantaged communities on small community water systems, whose drinking water supply is most vulnerable to groundwater contamination. Without such information, the GSA cannot measure the impact of groundwater contamination, and therefore cannot protect the drinking water needs of these vulnerable groups.

To effectively consider the interests of these types of beneficial users, and avoid a disparate impact on protected groups pursuant to state civil rights law, Mid Kaweah GSA must:

- Include information on groundwater quality issues that may affect the supply and beneficial uses of groundwater, including a description and a map of the location of known groundwater contamination sites and plumes.
- Include adequate information regarding past, current and potential drinking water issues affecting small disadvantaged communities and domestic well users in the GSA area, including drinking water contamination, dry wells, and other drinking water supply and quality issues.

### **Monitoring Network Does Not Monitor Impacts On Domestic Well Users**

Pursuant to 23 CCR § 354.34, GSAs must monitor impacts to groundwater for drinking water beneficial users, particularly domestic well users and disadvantaged communities,<sup>9</sup> and must avoid disparate impacts on protected groups pursuant to state law.<sup>10</sup>

The monitoring network as described in the Draft GSP fails to capture drinking water impacts on domestic wells. Representative monitoring wells are the only wells that the GSA will use to measure its compliance with its sustainable management criteria. The Draft GSP establishes two types of representative monitoring wells in the groundwater quality monitoring network: wells that will monitor for only three contaminants of concern that are harmful for agricultural production, and wells that will monitor for ten additional drinking water contaminants. The Draft GSP states that representative monitoring wells will only monitor for agricultural contaminants when over 50% of “pumping” nearby is for agriculture. This means that none of the

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<sup>7</sup> Focused Technical Review, p. 2.

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<sup>9</sup> Water Code § 10723.2.

<sup>10</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (I).

representative monitoring wells will capture groundwater quality or supply impacts to domestic wells outside of public water systems. It is also unclear whether the water quality monitoring wells will capture impacts to domestic wells across the GSA areas because the GSP does not include well construction information for a majority of the water quality representative monitoring wells, so the public and DWR cannot evaluate whether the wells are sampling at the depths of the zones used for drinking water purposes by domestic well users and community water systems in the GSA area.<sup>11</sup>

The GSA mentions that it may conduct domestic well sampling, which could be added into the groundwater quality monitoring network data. This program, if implemented effectively and if enough wells are tested with adequate frequency, could ensure that domestic wells are also being monitored for compliance with minimum thresholds. In order to avoid drinking water contamination from groundwater management activities, the GSA should include this program in its Management Actions, and provide a clear timeline and strategy for developing and implementing this program.

As the attached Focused Technical Report 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.<sup>12</sup> The GSP must demonstrate how the monitoring network will be able to monitor for impacts to beneficial users in this area.

In developing this monitoring network, the GSA has not considered the interests of this beneficial user group and is likely to cause a disparate impact on the protected groups dependent on domestic wells.

The insufficiency of the monitoring network poses a significant threat to the validity of the Plan at large, and therefore must be addressed immediately. The GSA must do the following:

- Improve groundwater quality monitoring network to include monitoring wells in the western portion of the GSA area, ensuring that impacts to domestic wells and water systems in this area are monitored for compliance with groundwater quality goals.
- Monitor for compliance with drinking water contaminants across all representative monitoring wells.
- All representative monitoring wells for groundwater quality must test for all Title 22 contaminants.
- The GSA must invest in constructing more dedicated monitoring wells and needs to explain how they plan to transition current wells in the monitoring network into dedicated monitoring wells.
- Include a domestic well sampling program in the GSP's Management Actions, and provide a clear timeline and strategy for developing and implementing this program.

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<sup>11</sup> Focused Technical Report, p. 6.

<sup>12</sup> Focused Technical Report, p. 5.

## **Management Areas Put Drinking Water Resources for Disadvantaged Communities and Domestic Well Users at Risk**

The SGMA regulations allow GSAs to establish Management Areas “based on differences in water use sector, water source type, geology, aquifer characteristics, or other factors,” for the purpose of identifying “different minimum thresholds, measurable objectives, monitoring, or projects and management actions.”<sup>13</sup> However, it may not do so in a way that causes disparate impacts on a group protected by state civil rights law, or has not adequately “considered the interests of” all types of beneficial users.

The Management Areas that the GSA proposes to establish will likely have disproportionately negative impacts on domestic well users and disadvantaged communities. The Draft GSP states that the GSA will establish Management Areas along to the borders of local water and irrigation districts within the GSA, so that each district can manage groundwater its own jurisdiction. However, some districts are only accountable to the needs of agricultural pumping, and do not have representation of drinking water users on their boards. For example, Tulare Irrigation District will be managing a wide area that includes small communities and domestic well owners; however, the irrigation district’s board and clientele only reflect agricultural pumping needs. Additionally, East Tulare Villa, a disadvantaged community that depends on drinking water from the City of Tulare, is not included in the same management area as the City of Tulare, which does not allow effective protection of the community’s water resources. Therefore this division of Management Areas means that all beneficial users’ interests will not be considered in the management of areas where drinking water and agricultural pumping interests are present, and will likely lead to disparate impacts on protected groups.

Instead, a tool for protecting drinking water for disadvantaged communities and domestic wells is creating Management Areas around clusters of domestic wells and around disadvantaged communities, with a buffer around the area where the vulnerable drinking water users are located, and setting more protective groundwater quality and groundwater levels minimum thresholds in those areas. This ensures that there are no localized impacts to drinking water resources from groundwater levels dropping or from contaminant plumes being drawn towards large quantities of groundwater pumping.

Therefore, we recommend that the GSA:

- Form Management Areas around clusters of domestic wells and around disadvantaged communities in the GSA area, with a buffer around the area where the vulnerable drinking water users are located, and set groundwater quality and groundwater levels minimum thresholds that will protect drinking water resources in those areas.

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<sup>13</sup> 23 CCR § 351

## **Sustainability Goal Does Not Comply with SGMA**

GSA must establish a sustainability goal that “culminates in the absence of undesirable results within 20 years.”<sup>14</sup> Undesirable results are the point at which there are “significant and unreasonable impacts” from the six sustainability indicators set out in SGMA: chronic lowering of groundwater levels, reduction of groundwater storage, seawater intrusion, degraded water quality, land subsidence, depletions of interconnected surface water.<sup>15</sup> Also fundamental to SGMA is the obligation that GSAs must “consider the interests of” an enumerated list of beneficial users, including “holders of overlying groundwater rights, including...domestic well owners” and “disadvantaged communities, including, but not limited to, those served by private domestic wells or small community water systems.”<sup>16</sup> Therefore, the sustainability goal must be based on impacts from the six sustainability indicators, particular with respect to the impacts that they will have on beneficial users.

However, instead of basing on impacts from any of the six sustainability indicators on beneficial users, the Kaweah subbasin sustainability goal focuses primarily on “the viability of existing enterprises of the region,” the “water needs of existing enterprises,” and local plans that create “economic and population growth.” This sustainability goal focuses on water for industry, is counter to the intent of SGMA, and frustrates the goals of the law because it does not take into account the needs of or “significant and unreasonable” impacts on all types of beneficial users in the GSA area.

This sustainability goal should not focus on economic growth, but rather must consider the interests of all beneficial user groups in the GSA area. The sustainability goal therefore must have co-equal goals of preserving water resources for many uses, including drinking water, environmental, urban, and agricultural.

Their discussion of the Sustainability Goal also focuses on augmenting supply, and only implementing Management Actions “where necessary.” Even if all projects are implemented and sustainable management criteria are complied with in the plan, many vulnerable drinking water users will still be impacted, and the GSA has not committed to implementing its domestic well and small systems management action. Instead, the GSA should focus simultaneously on projects and management actions to ensure sustainability and protect drinking water resources.

Furthermore, the means by which the GSA states it will achieve this sustainability goal, through a “glidepath” approach, is geared towards protecting agricultural interests, and is likely to have severe impacts on the drinking water resources of domestic well users.

The sustainability goal states that it will be reached by the combined efforts of all three GSAs. However, the coordination agreement does not clearly show how the sustainability goal will be achieved, or how actions by other GSAs in the subbasin could impact the Mid Kaweah GSA area. However, given that 86% of domestic wells are already at risk of full or partial dewatering from the GSA’s proposed minimum thresholds, we know that groundwater users in the Mid

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<sup>14</sup> 23 CCR § 354.24

<sup>15</sup> Water Code § 10721(w).

<sup>16</sup> Water Code § 10723.2.

Kaweah GSA cannot afford to be further impacted by overpumping in neighboring GSAs. Therefore, we recommend that the We further recommend that the Mid Kaweah GSA set a clear sustainability goal for its own local GSA area, and ensure that the coordination agreement with the other Kaweah subbasin GSAs does not negatively impact its sustainability goal.

In order to have a sustainability goal that complies with SGMA and avoids disparate impacts on protected groups under state law, the Mid Kaweah GSA must:

- Agree on a subbasin-wide sustainability goal that protects all types of beneficial users equitably, avoiding disparate impacts on protected groups.
- Work with Kaweah Subbasin GSAs to clearly define how their combined actions will achieve sustainability, and include a thorough explanation of this collective effort in the coordination agreement or each GSP.
- Set a clear sustainability goal for its own local GSA area.
- Ensure that the coordination agreement with the other Kaweah subbasin GSAs does not negatively impact the Mid Kaweah GSA's local sustainability goal.
- Use the numerical groundwater model to evaluate the change in water levels at representative monitoring wells through 2040, both with and absent of the proposed Projects and Management Actions, and relative to the proposed measurable objectives and minimum thresholds.
- Use the above analysis to show how all types of beneficial users in the GSA area will be impacted by the proposed glidepath approach.
- Ensure that projects and management actions are implemented simultaneously, in order to equitably protect all beneficial users' groundwater needs.

### **The Draft 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 domestic well users and disadvantaged communities.<sup>17</sup> These policy decisions must also avoid disparate impacts on protected groups pursuant to state and federal law.<sup>18</sup>

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

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<sup>17</sup> Water Code § 10723.2.

<sup>18</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (I).

Furthermore, the Draft GSP does not show how the sustainable management criteria for groundwater levels will comply with the sustainability goal to “preserve the quality of life or support population growth.”

### ***Undesirable Result***

Undesirable results are the point at which “significant and unreasonable” impacts on beneficial users caused by declining groundwater levels. 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>19</sup> GSAs must also describe the “processes and criteria relied upon to define undesirable results.”<sup>20</sup>

The Draft GSP’s undesirable results for groundwater levels are inadequate because significant and unreasonable impacts will occur without triggering an undesirable result. The Draft GSP states that “one-third of the representative monitoring sites in all three GSA jurisdictions combined exceed their respective minimum threshold water level elevations.”<sup>21</sup> Violating one-third of the minimum thresholds of the entire subbasin’s representative monitoring wells would have unreasonably severe impacts on domestic well users, particularly given that reaching the minimum thresholds in the Mid Kaweah GSA alone would dewater 71% of domestic wells in the Mid Kaweah GSA area and partially dewater an additional 15% of domestic wells.<sup>22</sup> The Draft GSP acknowledges the serious financial impact of having to drill deeper wells, well failures, and the increased energy costs of pumping water from lower depths, but the undesirable result for groundwater levels does not prevent either of these impacts.<sup>23</sup> Furthermore, the vast majority of wells the GSA would allow to go dry before triggering plan failure would be overwhelmingly upon domestic well users and disadvantaged communities, causing a disparate impact in violation of state law. In order to avoid these disparate impacts, the GSA must change the undesirable result or define its own local undesirable result to prevent widespread drinking water impacts to protected groups in the GSA area.

In order to avoid a violation of state civil rights law and avoid causing significant and unreasonable impacts as required by the SGMA, the GSA must:

- Include a local undesirable results definition that makes it clear that the GSA will locally define and address an undesirable result within its service area and protect beneficial users of groundwater.

### ***Minimum Thresholds***

The groundwater levels sustainable management criteria set by the GSAs must be the point that, “if exceeded, may cause undesirable results.”<sup>24</sup> Therefore it must have the purpose of avoiding

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<sup>19</sup> 23 CCR § 354.26.

<sup>20</sup> 23 CCR § 354.26.

<sup>21</sup> Mid Kaweah GSA Draft GSP p. 3-5, dated July 2019.

<sup>22</sup> Focused Technical Report, p. 4. Our analysis shows a much larger impact on domestic wells than the evaluation of well impacts in the Draft GSP.

<sup>23</sup> Mid Kaweah GSA Draft GSP p. 3-8, dated July 2019.

<sup>24</sup> 23 CCR § 354.28.

“significant and unreasonable” impacts on beneficial users caused by declining groundwater levels.<sup>25</sup> For groundwater levels specifically, GSAs must place minimum thresholds for each monitoring site at the level “that may lead to undesirable results.”<sup>26</sup> Under the SGMA regulations, the GSA should provide a description of “the information and criteria relied upon to establish minimum thresholds,” an explanation of how the proposed minimum thresholds will “avoid undesirable results,” and “how minimum thresholds may affect the interests of beneficial uses and users of groundwater.”<sup>27</sup> The GSA must also consider that drinking water use has been recognized as the “highest use of water” by the California legislature, and should consult with stakeholders to ensure that the minimum threshold is set in such a way as to guarantee the human right to drinking water to all individuals in the subbasin.<sup>28</sup>

The Mid Kaweah GSA’s approach to setting minimum thresholds does not “consider the interests of” drinking water beneficial users. The GSA’s proposed 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 contains an evaluation of well impacts that shows that 21% of wells will go dry, but our analysis shows a much larger impact: taking into account well screen intervals on domestic wells in the GSA, the attached Focused Technical Report 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.<sup>29</sup> 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. Since domestic well users are de minimis pumpers and are not part of this aquifer-depleting pumping, this will be 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.

In order to show that it has considered impacts on domestic well users and disadvantaged communities, and ensure that it is not causing a disparate impact on groups protected from such impact by state civil law, the GSA must conduct an analysis of how many wells will be impacted by reaching this minimum threshold, in particular domestic wells and small community system wells in disadvantaged communities. It should also quantify the increased pumping costs associated with the increased lift at the projected water levels. Then, it must measure whether the impacts to wells and household finances are “significant and unreasonable” by consulting with domestic well owners and disadvantaged communities. If its current choice of minimum threshold will cause a disparate impact or cause significant and unreasonable impacts to these beneficial user groups, it must modify its minimum threshold to comply with its legal obligations.

The Mid Kaweah GSA must set minimum thresholds that consider the interests of drinking water beneficial users and do not create a disparate impact on protected groups by doing the following:

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<sup>25</sup> 23 CCR § 354.26.

<sup>26</sup> 23 CCR § 354.28.

<sup>27</sup> 23 CCR § 354.28.

<sup>28</sup> Water Code § 106.

<sup>29</sup> Focus Technical Report, p. 4.

- Accurately evaluate the number of wells that will be impacted should water levels reach the proposed minimum thresholds, taking into account their well screen depth, and the increased pumping costs associated with the increased lift at the projected water levels.
- Consider drinking water impacts in shaping minimum thresholds, and ensuring that protected groups are protected from disparate and disproportionately negative impact.
- The GSA must show how it has considered the needs of all beneficial users, including drinking water users, in setting its minimum thresholds, by publishing the above analysis in the GSP and showing how it consulted with domestic well users and disadvantaged communities to set a minimum threshold that avoids significant and unreasonable impacts to their beneficial user groups.
- In order to protect drinking water users, the GSAs should place the minimum threshold at a level above where the shallowest domestic well is *screened* in each Threshold Area.
- Provide a robust drinking water protection program to prevent impacts to drinking water users and mitigate drinking water impacts that occur.

### ***Measurable Objectives***

The SGMA regulations require the GSA to set measurable objectives and interim milestones that “achieve the sustainability goal for the basin within 20 years of Plan implementation and to continue to sustainably manage the groundwater basin over the planning and implementation horizon.” Measurable objectives must be more ambitious than the minimum thresholds, and must be the point at which the GSA has determined that it will not exceed its sustainable yield, and therefore avoid “significant and unreasonable” impacts on beneficial users.

The GSA has taken 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 has not evaluated how this groundwater elevation will affect domestic well users and disadvantaged communities, whose critical drinking water resources will be impacted by a decline in groundwater levels. In fact, the attached Focused Technical Report 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.

In order to show that it has considered impacts on domestic well users and disadvantaged communities, and ensure that it is not causing a disparate impact on groups protected from such impact by state civil law, the GSA must conduct a complete analysis of how many wells will be impacted by this measurable objective, in particular domestic wells and small community system wells in disadvantaged communities. It should measure whether the impacts to wells are “significant and unreasonable” by consulting with domestic well owners and disadvantaged communities. If its current measurable objective will cause a disparate impact or cause

significant and unreasonable impacts to these beneficial user groups, it must modify its measurable objective to comply with its legal obligations.

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.

The GSA must include the following in its Draft GSP to bring its measurable objectives into compliance with law:

- The GSA must clarify how its measurable objectives will achieve the sustainable yield.
- The GSA must analyze how many wells will be fully or partially dewatered at the groundwater elevation of the proposed measurable objective.
- The GSA must show how it has considered the needs of all beneficial users, including drinking water users, in setting its measurable objectives, by publishing the above analysis in the GSP and showing how it consulted with domestic well users and disadvantaged communities to set a measurable objective that avoids significant and unreasonable impacts to their beneficial user groups.

### **The Draft GSP Fails to Adequately Address Groundwater Quality**

SGMA charged GSAs with the responsibility to protect water quality through groundwater management,<sup>30</sup> and requires that the GSA consider the interests of all beneficial users including domestic well users and disadvantaged communities.<sup>31</sup> This Draft 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, and in doing so, fails to conform with the requirements of SGMA. The Draft GSP leaves drinking water users in the subbasin vulnerable to increased drinking water contamination from the GSA's groundwater management activities or from the lack of adequate groundwater management in the subbasin. The 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>32</sup> Furthermore, as described in more detail below, the monitoring network for groundwater quality does not monitor or manage groundwater impacts for any domestic wells. 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.<sup>33</sup>

#### ***Minimum Threshold***

GSAs must place groundwater quality minimum thresholds for each monitoring site at the level “that may lead to undesirable results.”<sup>34</sup> Under the SGMA regulations, the GSA should provide a

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<sup>30</sup> Water Code § 10721(w)(4); 23 CCR § 354.28(c)(4).

<sup>31</sup> Water Code §§ 10727.2(d)(2); 10721(x)(4)

<sup>32</sup> Water Code § 10723.2.

<sup>33</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (l).

<sup>34</sup> 23 CCR § 354.28.

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>35</sup> The GSA must also consider that drinking water use has been recognized as the “highest use of water” by the California legislature,<sup>36</sup> and should consult with stakeholders to ensure that the minimum threshold is set in such a way as to guarantee the human right to drinking water to all individuals in the subbasin.

The Draft GSP does not protect domestic wells from drinking water contamination resulting from groundwater management activities. The Draft GSP states that the number of contaminants of concern (COC) monitored at each representative monitoring well will vary by the “dominant use” of groundwater around each representative monitoring well, and that the “dominant use” is measured as “more than 50% of the pumping” around the well. Since agricultural pumping will always dominate domestic well pumping, this means that no representative monitoring wells outside of cities and community water systems will monitor for drinking water contaminants. This leaves the vast majority of domestic wells in the GSA area unmonitored and unprotected from groundwater quality impacts. This policy decision has not considered the interests of this beneficial user type, and will cause a disparate impact on protected groups pursuant to state civil rights law. The GSA should instead monitor for drinking water contaminants at all representative monitoring wells.

Another concern is that there are only 4 representative monitoring wells detecting contamination from groundwater management activities outside of the cities of Tulare and Visalia.<sup>37</sup> This will allow for contamination to occur undetected in these areas, where domestic well users and disadvantaged communities depend on groundwater for their vital drinking water resources. The GSA must immediately increase the number of representative wells in these areas of the GSA in order to avoid a disparate impact on protected groups

Also, the proposed 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. The GSA only proposes to monitor for compliance with MCLs for six drinking water contaminants of concern “where applicable”: arsenic, nitrate, chrome-6, DBCP, 123-TCP, and PCE.<sup>38</sup> The GSA does not present a rationale to justify why these six drinking water contaminants were chosen, and why it chose not to monitor for other drinking water contaminants. This Draft GSP allows the GSA to conduct groundwater management in a way that contaminates domestic wells, and allows the GSA to cause increased contamination from other drinking water contaminants. It also allows the GSP to cause increased contamination in other drinking water contaminants known to increase from groundwater management activities, such as uranium.<sup>39</sup> As written, the groundwater quality minimum threshold puts all drinking

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<sup>35</sup> 23 CCR § 354.28.

<sup>36</sup> Water Code § 106.

<sup>37</sup> Draft GSP, p. 4-14.

<sup>38</sup> Draft GSP, p. 3-6

<sup>39</sup> Smith et al., “Overpumping Leads to California Arsenic Threat,” *Nature Communications* (June 2018) [arsenic discharge from clay correlated with overpumping]; Jurgens et al., “Effects of Groundwater Development on

water at risk of contamination from drinking water contaminants that are not included in the six contaminants of concern. The impacts of this contamination will be particularly felt by domestic wells, which are most vulnerable to drinking water contamination, and are not going to be monitored for compliance with any drinking water contamination that may result from the GSA's groundwater management activities.

The GSA must therefore monitor for compliance with drinking water contaminants in all areas where drinking water wells are present, including domestic wells. The GSA must monitor for compliance with MCLs for all primary drinking water contaminants, hexavalent chromium and PFOSs/PFOAs (both of which are known to cause serious health impacts but do not have MCLs currently), as well as for contaminants that are known to increase due to groundwater pumping and groundwater management activities such as uranium.<sup>40</sup>

It is unclear when groundwater quality minimum thresholds will be triggered. We know that another GSA in the subbasin requires ten years of data before a minimum threshold for groundwater quality will be triggered. The Mid Kaweah GSP seems to communicate that a minimum threshold at a representative monitoring well will be triggered when a contaminant violates the MCL, and the GSA finds that its groundwater management activities were the cause of the increased contamination, and that the GSA will “coordinate [its] activities such that they do not result in an exceedance of any MCL.”<sup>41</sup> The GSP must clarify how these minimum thresholds will be triggered, and must require an immediate response to an MCL violation. If the GSA waits ten years to find a minimum threshold violation, that policy will likely result in communities experiencing many years of severe drinking water contamination before the GSA corrects groundwater pumping that is pulling a contaminant plume into their drinking water supply, halts recharge or irrigation activities causing uranium discharges or nitrate flushing, or curbs groundwater pumping that is causing an increase in groundwater contamination (e.g., arsenic discharge from clay).<sup>42</sup> The communities most vulnerable to these types of drinking water impacts are domestic well owners and disadvantaged communities, and this policy will likely result in a disparate impact on protected groups under state civil rights law. Therefore the GSA must ensure that a minimum threshold violation will be found when a single test finds an MCL violation, and a correlation is found with the GSA's groundwater management activities.

To bring the groundwater quality minimum thresholds into compliance with SGMA and state civil rights law, the GSA must:

- Monitor for compliance with all established primary drinking water standards, hexavalent chromium, and PFOSs/PFOAs, at *all* representative monitoring wells, as well as

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Uranium” (November 2010) [strong correlation between high bicarbonate irrigation and recharge water and leaching of uranium from shallow sediments to groundwater].

<sup>40</sup> Id.

<sup>41</sup> Draft GSP, p. 5-12.

<sup>42</sup> Smith et al., “Overpumping Leads to California Arsenic Threat,” Nature Communications (June 2018) [arsenic discharge from clay correlated with overpumping]; Jurgens et al., “Effects of Groundwater Development on Uranium” (November 2010) [strong correlation between high bicarbonate irrigation and recharge water and leaching of uranium from shallow sediments to groundwater].

contaminants that are known to increase with groundwater management activities, such as uranium.

- Ensure that all representative monitoring wells are measuring for concentrations of the contaminants of concern, including all drinking water contaminants, every month.
- Ensure that minimum thresholds will be triggered after one test shows a violation of the MCL, and clarify this trigger process in the GSP.
- Immediately plan for, fund and construct new representative monitoring wells or evaluate existing wells to ensure that representative monitoring wells are monitoring for impacts to domestic well users outside of the cities of Tulare and Visalia.
- Implement a Drinking Water Observation Plan to trigger GSA action when contamination spikes occur. Please see more information about the types of projects that could be implemented when a Drinking Water Observation Plan is triggered in our comments about Projects and Management Actions.

### ***The Proposed 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>43</sup> GSAs must also describe the “processes and criteria relied upon to define undesirable results.”<sup>44</sup> The undesirable result cannot have a disparate impact on protected groups pursuant to state civil rights law.

The Mid Kaweah GSA has defined a groundwater quality undesirable result as “one-third of all Subbasin designated water quality monitoring sites exhibit a minimum threshold exceedance, and those exceedances are all associated with GSA actions.”<sup>45</sup> Like the 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 minimum thresholds of the entire subbasin’s representative monitoring wells would have unreasonably severe impacts on drinking water users. 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. The GSP states that the GSA discussed these impacts with Advisory Committee members, but it cannot have held an informed discussion because it did not have data on the actual potential impact to beneficial users. In order to avoid these disparate impacts, the GSA must change the undesirable result or define its own local undesirable result to prevent widespread drinking water impacts to protected groups in the GSA area.

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<sup>43</sup> 23 CCR § 354.26.

<sup>44</sup> 23 CCR § 354.26.

<sup>45</sup> Draft GSP, p. 3-6.

In order to comply with SGMA and state civil rights law, the GSA must:

- Define its own local interpretation of the subbasin’s undesirable result.
- Consider the impact of its undesirable impact on all types of beneficial users in the GSA area by evaluating the potential groundwater quality impact to beneficial users. Publish this analysis in the GSP, and show how it was used to define the undesirable results.
- Ensure that this undesirable result does not cause a disparate impact on protected groups under state civil rights law.

### **Projects and Management Actions**

The GSA must consider the interests of beneficial users including domestic well owners and disadvantaged communities<sup>46</sup> and avoid disparate impacts on protected groups.<sup>47</sup> In light of the impacts on domestic well users and disadvantaged communities from the policy decisions discussed above, the GSP must therefore 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 on the attached Focused Technical Report, 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. Because the GSP as written will cause a disparate impact on protected groups, and does not consider the interests of domestic well users or disadvantaged communities, the GSP must include projects to prevent and mitigate those impacts.<sup>48</sup>

The Draft 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.

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’s Board of Directors has not committed to doing this program, and does not define how the assistance measures will be implemented or funded. Before adoption, the Mid Kaweah GSA must clearly commit to projects and management actions to prevent disparate impacts on vulnerable water users, and have defined timelines for those projects.

The Draft GSP’s potential groundwater extraction allocation program also raises

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<sup>46</sup> Water Code § 10723.2.

<sup>47</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (I).

<sup>48</sup> Gov. Code § 11135; Gov. Code § 65008; Government Code §§ 12955, subd. (I).

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.

In order to prevent disparate impacts on protected groups, and show that it has considered the interests of all beneficial users including domestic well users and disadvantaged communities, the GSA should consider the following projects and management actions:

- ***Clearly Commit to a Drinking Water Protection Program for the Mid Kaweah GSA Service Area:***
  - The GSP contains a potential program to assist domestic well owners and small water systems obtain solutions to drinking water issues in the GSA area. This is a step in the right direction, but needs a more solid commitment and a defined scope and proposed activities. We recommend some parameters for a potential program below, and are glad to work with the GSA on shaping an effective program for preventing drinking water impacts from declining groundwater levels, increased groundwater contamination, and subsidence.
  - We recommend that the GSA consider the following factors in approving such a program:
    - Eligible activities in the program should include: drilling of new wells or deepening wells if homes' wells go dry due to declining groundwater levels, increased energy costs from pumping from deeper depths,<sup>49</sup> assistance in connecting to larger water systems.
    - Any project funded by the program must be guided by the residents or communities that are recipients of program benefits. Community input into a project will ensure project success, by learning from resident experience and knowledge to shape a project that will best suit their drinking water needs.
    - The GSA must ensure that the program is accessible for all residents who may need its assistance. The program should work with local agencies and organizations to spread information about the program, should not require residents to opt in to the program, and the GSA must provide translated materials regarding the program.<sup>50</sup>
    - Such a program must be proactive, rather than reactive. We recommend that Mid Kaweah GSA implement a Drinking Water Observation Plan (DWOP) that will serve as a warning system so that the GSA is aware of when wells are going dry, or when wells are going to become

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<sup>49</sup> Recent research has concluded that "in the Tulare Lake area, with an average well depth of 120 feet, pumping would require 175 kWh per acre-foot of water. In the San Joaquin River and Central Coast areas, with average well depths of 200 feet, pumping would require 292 kWh per acre-foot of water."

<sup>50</sup> Gov. Code, §§ 7293, 7295

contaminated from groundwater management activities, so it can take action to prevent drinking water impacts before they occur. This DWOP should trigger proactive measures wherein the GSA should act before wells lose production capacity or before wells become contaminated, to ensure that community members are not left without access to safe and reliable drinking water.

- Wherever possible, and whenever it is the community’s preference, the GSA should strive to assist residents on domestic wells and small community water systems with connecting to larger drinking water systems. If consolidation is not possible, the GSAs should support the deepening of wells, installation of treatment facilities or POE/POU treatment in homes and offset the increased energy costs for pumping water from a lower level. In the interim, the GSA should collaborate with local and state agencies to provide emergency bottled water for consumption and sanitary purposes.
- **Recharge Basins In or Near Disadvantaged Communities and Domestic Well Clusters:** The Mid Kaweah GSA should replicate projects like the Okieville project throughout the GSA area wherever DACs and clusters of domestic wells exist. The GSA should opt for these kinds of recharge projects with health co-benefits over on-farm recharge, which is likely lead to accelerate groundwater contamination.
- **Require Basin-Wide Metering, Particularly for Large-Scale Production Wells:** The GSP establishes that one of the Management Actions that it will undertake is a study on different options to measuring groundwater extraction. We recommend that the GSA prioritize basin-wide metering of all extractors that are not de minimis extractors. In order to ensure achievement of the GSA’s sustainability goal by 2040, and compliance with its sustainable management criteria, GSAs are prescribed the authority to meter all production wells in the subbasin,<sup>51</sup> and metering is the only mechanism by which the GSA can procure accurate groundwater extraction data. Without this precise data, the GSA cannot create an accurate water budget. Therefore, the GSA must utilize the authority vested by the state to meter non-de minimis pumpers, fill data gaps and protect vulnerable domestic water users from groundwater decline.<sup>52</sup>
- **Establish Pumping Buffer Zones:** For areas vulnerable to declining water levels and loss of production capacity, Mid Kaweah GSA should adopt management actions that establish geographical protection areas (buffer zones) by establishing bans, pumping limitations or community-specific management areas around disadvantaged communities

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<sup>51</sup> California Water Code section 10727.4 states that “a groundwater sustainability plan shall include, where appropriate and in collaboration with the appropriate indices” include “efficient water management practices...for the delivery of water and water conservation methods to improve the efficiency of water use.”

<sup>52</sup> Section 10725.8 (a) - A groundwater sustainability agency may require through this groundwater sustainability plan that the use of every groundwater extraction facility within the management area of the groundwater sustainability agency be measured by a water-measuring device satisfactory to the groundwater sustainability agency.”

and domestic well clusters. In order to implement this policy, the Mid Kaweah GSA can consider incentivizing or requiring the fallowing of fields around disadvantaged communities, or protective water conservation projects. This practice will protect shallow or vulnerable wells from the impacts of over-pumping and cones of depression. Furthermore, this buffer must be protective enough to ensure that disadvantaged communities and residents reliant on domestic wells do not experience localized impacts from nearby pumping activities. This action should not be used to allow more pumping elsewhere in the subbasin, and needs to be coupled with a strong demand reduction policy across the basin.

- ***Support Water System Consolidations:*** The GSA must help fund a consolidation projects to connect nearby residents on wells to a larger water system that can treat the water, or pay for other water filtration solutions.

### ***Broad Considerations for Projects and Management Actions***

The following elements must be incorporated into the Projects and Management Actions section of the GSP in order to avoid a disparate impact on protected groups in the GSA area:

- ***Timelines:*** Projects benefiting disadvantaged communities must contain specific timelines and commitments to ensure achievement of sustainability and protection of drinking water resources for disadvantaged communities. Implement projects to benefit disadvantaged communities in a reasonably timely manner, and concurrently with projects that benefit other beneficial users, so as to avoid disparate impacts on groups protected under state civil rights law.
- ***Information Accessibility:*** Detailed information on projects must be available to the public online, as appendices to the GSP, and in a public workshop during a public comment period. In reading the shortlist projects descriptions, we had several questions about project details, which could be easily answered by providing more information on the projects. In order to better inform stakeholders on these projects and why they are being prioritized over others, more information on these projects needs to be made available, both in the plan and through more opportunities for in-person public comment.
- ***Multi-Benefit Projects:*** Encourage multi-benefit projects such as wetlands restoration or stormwater drainage ponds that would eliminate flooding and increase groundwater recharge in disadvantaged communities.
- ***Funding Projects:*** Although there are multiple short-term funding sources to leverage for SGMA-related projects, the Mid Kaweah GSA operating budget must be a reliable source of funding over the long-term of GSP implementation, and the GSA cannot rely on grant funding for long-term projects and programs that benefit disadvantaged communities. Furthermore, any proposed assessments that will pay for projects may not place a disproportionate financial burden on disadvantaged communities.

## **Draft GSP Does not Contain Adequate Plans for Community Engagement in Plan Implementation**

Public outreach has been a critical part of the SGMA implementation process and will continue to be critical in implementing the GSP. The first chapter of the Draft 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. does not contain adequate information regarding the plan implementation schedule and public process, annual reporting, or the potential to make amendments to the GSP. In the annual report outline proposed by the GSA, public outreach is not included in any of the key sections. 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.

The GSP must establish processes by which it will seek and incorporate feedback from the public on an ongoing basis through direct outreach to disadvantaged communities and public workshops that are held at convenient locations and times and accessible in multiple languages. Additionally, proposed reconsiderations must be publicly noticed and circulated for public review and comment prior to final adoption.

To ensure that the GSP is implemented properly, the GSA must do the following:

- The GSA must include a plan for public outreach for the GSP implementation process. This plan should include translation services in order to meaningfully consult with and consider the interest of all beneficial users. Workshops and meetings must be at an accessible time and locations for all stakeholders
- The GSA must include public outreach as part of the annual reporting.
- The GSA must budget for public outreach. The budget should include translation services in order to meaningfully consult with and consider the interest of all beneficial users.
- Clarify in the GSP that the plan may be modified as data becomes available, and that the GSA will seek and accept feedback from the public on an ongoing basis throughout plan implementation.
- Clarify that any modification to the GSP must be in writing, noticed and provide sufficient time for public review and feedback.

## **Other Legal Considerations**

### ***The Draft GSP Threatens to Infringe on 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>53</sup> The test of SGMA further notes

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<sup>53</sup> AB 1739 (2014).

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>54</sup> As discussed in detail above, the Draft 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 on the rights of overlying users of groundwater. The GSP must be revised to protect the rights of residents of disadvantaged communities and/or low-income households who hold water rights to groundwater.

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

The “reasonable and beneficial use” doctrine, to which SGMA expressly must comply,<sup>55</sup> 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.” (Cal Const, Art. X § 2; *see also 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.”].)

The reasonable and beneficial use doctrine applies here given the negative impacts of the Draft 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 Draft GSP authorizes waste and unreasonable use, it conflicts with the reasonable and beneficial use doctrine and the California Constitution.

### ***The Draft 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>56</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>57</sup> In *Environmental Law Foundation*, 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

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<sup>54</sup> Water Code § 10720.5(b).

<sup>55</sup> Water Code § 10720.1(a).

<sup>56</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>57</sup> *Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 844.

water resources.<sup>58</sup> The court also specifically held that SGMA does not supplant the requirements of the common law public trust doctrine.<sup>59</sup> In contrast to these requirements, the Draft 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.

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The GSP must protect the area's most vulnerable drinking water users, and we welcome the opportunity to discuss our recommendations to ensure compliance with state law. We hope to continue to collaborate with GSA staff and consultants to ensure that the Mid Kaweah GSA's final GSP protects drinking water for disadvantaged communities and domestic well owners in the GSA area. We are also in communication with the Department of Water Resources about current GSP development activities in the San Joaquin Valley, and hope to successfully work with GSAs, communities and DWR to ensure that groundwater management is equitable and sufficiently protective of vital drinking water resources.

Sincerely,

/s/

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Leadership Counsel for Justice and Accountability

CC:

Amanda Peisch-Derby  
Senior Engineer, Department of Water Resources

Encl:  
Focused Technical Review

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<sup>58</sup> *Id.* at 856-62.

<sup>59</sup> *Id.* at 862-870.