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By email to staff@oal.ca.gov and to daniel.schultz@waterboards.ca.gov

Re: Comments of Stanford Vina Ranch Irrigation Company and Jim Edwards Regarding the SWRCB Proposed Emergency Regulations for Curtailment of Diversions on Certain Sacramento River Tributaries; OAL File No. 2015-0320-06EE

These comments are submitted on behalf of Stanford Vina Ranch Irrigation Company and Mr. Jim Edwards in response to the State Water Resources Control Board's (SWRCB) proposed re-adoption of amended emergency drought regulations for Antelope, Mill, and Deer Creeks (title 23, California Code of Regulations (C.C.R.) §§ 877; 878; 878.1 subds. (b)-(f); 878.2; 879 subds. (a)-(b); 879.1; and 879.2). In short, the proposed regulations fail to satisfy the procedural and substantive requirements of the Administrative Procedure Act; accordingly, the Office of Administrative Law (OAL) must disapprove the proposed regulations.

Background

Stanford Vina Ranch Irrigation Company (SVRIC) is a nonprofit mutual water company located on Deer Creek in Tehama County, California. SVRIC owns conveyance and diversion structures in and connected to Deer Creek, and manages its shareholders' pre-1914 and riparian senior water rights. SVRIC serves approximately 5700 acres of irrigated land. The land is predominately used for permanent plantings including orchards and pasture. Because SVRIC holds senior water rights in an extremely reliable watershed, it has not developed alternative water supplies, such as groundwater, that may be available to mitigate the effects of drought in other areas with less reliable surface water supplies. Even in historically dry periods such as the early 1990s and 1976-1977, SVRIC was able to divert enough water to keep permanent plantings alive.

Jim Edwards owns the Edwards Ranch, which covers several thousand acres of land east of the Sacramento River in Tehama County. Approximately 2,000 acres in the westerly portion of the ranch are irrigated through a system of ditches and pipelines, which are fed principally from a diversion structure located on Antelope Creek. The Edwards Ranch diverts water from

Antelope Creek under both pre-1914 and riparian senior water rights. The irrigated lands include 900 acres of permanent crops (walnuts, almonds, and prunes) and the remainder is used to grow feed or provide pasture for up to 2,000 head of cattle. Even during dry periods, Antelope Creek has been able to provide sufficient water to support the operations on Edwards Ranch.

Now, via emergency regulation and without enough lead time to develop alternative water supplies, the SWRCB proposes to curtail water supplies in a manner that will kill permanent plantings and devastate cattle operations, resulting in catastrophic economic and societal impacts to SVRIC and the Edwards Ranch, and to the small Tehama County communities, such as Vina, which rely on these operations. In addition, the SWRCB failed to satisfy the procedural and substantive requirements for emergency regulations.

Discussion

The emergency regulations were proposed under the ostensible authority of California Government Code § 11346.1, Water Code § 1058.5, ¶ 17 of the Governor's unnumbered Executive Order dated April 25, 2014, and Executive Order No. B-28-14 (Dec. 22, 2014). Both ¶ 17 of the Executive Order and § 1058.5 of the Water Code authorize the SWRCB to promulgate emergency regulations to, *inter alia*, prevent the waste, unreasonable use, or unreasonable method of diversion of water or to require curtailment of diversions when water is not available under the diverter's priority of right. The SWRCB's issuance of emergency regulations is governed by Government Code §§ 11346.1, 11349.1 and 11349.6, and by Water Code § 1058.5. Because the regulations themselves and the SWRCB's actions in proposing them violate these and other applicable statutes and laws, OAL must disapprove them.

I. The SWRCB Failed to Adhere to Applicable Procedural Requirements.

A. The SWRCB Did Not Meet the Prerequisites for a Readoption of the 2014 Tributary Emergency Regulations.

The SWRCB is purporting to readopt these emergency regulations pursuant to Government Code section 11346.1(h). (See Notice of Publication / Regulations Submission (Form 400), Mar. 20, 2015, at 1.) Section 11346.1 of the Government Code only permits readoption of emergency regulations under the following terms:

[OAL] may approve not more than two readoptions, each for a period not to exceed 90 days, of an emergency regulation that is the same as or substantially equivalent to an emergency regulation previously adopted by that agency. Readoption shall be permitted only if the agency has made substantial progress

and proceeded with diligence to comply with subdivision (e).

(Gov. Code § 11346.1(h).)

The SWRCB here is purporting to readopt the emergency regulations for a period of 270 days, and the SWRCB has not made any progress or proceeded with diligence to comply with section 11346.1(e). OAL must therefore deny this readoption for failure to comport with the requirements of section 11346.1(h).

The SWRCB indicates that these regulations will be readopted for a period 270 days. (See Emergency Regulations Digest at 54, 55.) However, the term of any readoption may not exceed 90 days, and only two readoptions are permitted, for a total of 180 days. (Gov. Code § 11346.1(h).) The SWRCB may not, as it purports to do, make a single 270-day readoption of the emergency regulations. OAL must reject any request to readopt the emergency regulations for any period greater than 90 days.

Even if the SWRCB were only seeking a 90-day readoption as permitted by the Government Code, OAL must deny this readoption due to the SWRCB's failure to make any progress or to show any diligence in complying with section 11346.1(e) of the Government Code. Section 11346.1(h) only authorizes OAL to approve a readoption of emergency regulations if the agency has made substantial progress and proceeded with diligence to comply with Sections 11346.2 to 11347.3, inclusive, and to transmit to [OAL] . . . a certification that Sections 11346.2 to 11347.3, inclusive, were complied with . . . (Gov. Code § 11346.1(e), (h).) The SWRCB has failed to make any effort to comply with these mandates, despite having over nine months during which to do so. These statutes establish the basic, minimum procedural requirements for promulgating regulations. Among many other requirements, these statutes required the SWRCB, prior to OAL's approval of a readoption of the emergency regulations, to:

- Provide a description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives (§ 11346.2(b)(4)(A));
- Provide a description of reasonable alternatives to the regulation that would lessen any adverse impact on small business and the agency's reasons for rejecting those alternatives (§ 11346.2(b)(4)(B));
- Provide facts, evidence, documents, testimony, or other evidence on which the agency relies to support an initial determination that the action will not have a significant adverse effect on business (§ 11346.2(b)(5)(A));
- Assess the potential for adverse economic impact on California business enterprises and individuals . . . (§ 11346.3(a));

- Provide notice of the proposed regulation “at least 45 days prior to the hearing and close of the public comment period” (§ 11346.4(a)), which notice shall comply with section 11346.5; and
- Submit a statement to OAL including, among other things, “[a] determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulations, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law,” and “[a]n explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses” (§ 11346.9(a)(4), (a)(5)).

The requirements listed above represent only a fraction of the prerequisites to requesting readoption of an emergency regulation, none of which have been completed or even initiated by the SWRCB prior to this action. The SWRCB has made none of the progress and shown none of the diligence required by section 11346.1(h). Nothing in Water Code section 1058.5(c) supersedes or modifies section 11346.1(h)’s requirements for readoptions. (See Gov. Code § 11346(a) (“This chapter shall not be superseded or modified by any subsequent legislation except to the extent the legislation shall do so expressly.”)) OAL must deny this request for readoption due to the SWRCB’s blatant disregard for the due process requirements attendant to readopting emergency regulations pursuant to section 11346.1(h).

B. The Record Submitted in Support of the Rulemaking Lacks a Showing of “Necessity.”

Government Code § 11349.6(b) requires OAL to disapprove proposed emergency regulations if they do not meet the standard for “necessity.” The necessity standard is described in § 11349(a) and in the California Code of Regulations, title 1, § 10. Section 10(b) of C.C.R. title 1 requires that the record of the rulemaking must include a “statement of the specific purpose of each adoption” and “information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision.” The record submitted in support of these emergency regulations does not include any such statements or explanations, that describe, for instance, why those specific amounts of water are “required” for the survival of the fish, or how those “needs” were balanced against the diverters’ needs and rights to divert water pursuant to their water rights. (See “Curtailed Diversion due to Insufficient Flow for Specific Fisheries Emergency Regulation Digest,” March 12, 2015, at pp. 16-24, 29-37.) The State Board accepted the flow requests of the National Marine Fisheries Service and the

California Department of Fish and Wildlife at face value,¹ without any investigation or modification of the flow amounts, seasons, frequencies, or durations. (*Id.*) No balancing of competing interests occurred. Although information included in the digest would support lower base flow volumes and temperature-based restrictions on the base flow season, that information was arbitrarily and capriciously ignored. (*Id.* at 30 (indicating that sustained minimum temperatures of 67 degrees or more “appeared to halt adult CV SR salmon migration” and that salmonids had successfully migrated up Mill Creek in flows as low as 28 cubic feet per second (cfs)).) The proposed emergency regulations must be disapproved because the SWRCB has failed to explain the specific need for each provision of the regulations.

II. The Proposed Regulations Fail to Meet Substantive Standards of Authority, Necessity, Clarity, and Consistency.

OAL is required by statute to disapprove the SWRCB’s proposed emergency regulations if it determines that the regulation fails to meet the standards set forth in [Government Code] Section 11349.1. (Gov. Code § 11349.6(b).) Section 11349.1 requires that emergency regulations meet six standards: Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. Each of the six standards is defined in Government Code § 11349. If the proposed emergency regulations fail to meet any of the standards, OAL “shall disapprove” them. (Gov. Code § 11349.6(b) [emphasis added].) The SWRCB’s proposed emergency regulations for “Curtailment of Diversions Based on Insufficient Flow to Meet All Needs” violate at least four of the six standards, so Government Code § 11349.6(b) mandates that OAL disapprove them.

A. The Proposed Regulations Do Not Meet the Standard for Authority.

Because SWRCB lacks the authority to adopt these emergency regulations, OAL is required to disapprove them. (Gov. Code §§ 11349(b), 11349.6(b).) Acceptable authority must be in the form of “a California Constitutional or statutory provision which expressly permits or obligates the agency to adopt . . . the regulation” or one that “grants a power to the agency which impliedly permits or obligates the agency to adopt . . . the regulation in order to achieve the purpose for which the power was granted.” (1 C.C.R. § 14(a).) The SWRCB’s interpretation of its own regulatory power is not conclusive or binding upon OAL because the provisions of 1 C.C.R. § 14(c)(1)(A) through (C) apply in this case: (A) the SWRCB’s “interpretation alters, amends or enlarges the scope of the power conferred upon it”; (B) SVRIC and others challenge

¹ The State Board apparently refused to increase pulse flow volumes over those required by the 2014 emergency regulations, as CDFW and NMFS had apparently requested. CDFW and NMFS gave no support for the request for increased pulse flow magnitudes. However, the 100 cfs pulse flow figure requested by CDFW and NMFS in 2014 is likewise unsupported and unexplained.

the SWRCB's alleged authority; and (C) "a judicial interpretation of a provision of law cited as authority or reference contradicts the SWRCB's interpretation." (*Id.* at subd. (c)(1).) Through these proposed emergency regulations, the SWRCB's novel interpretation of its authority would serve to alter, amend, and enlarge the scope of its authority. This new interpretation contradicts previous judicial interpretations of the same authority and, by this public comment, SVRIC challenges the SWRCB's authority to promulgate these emergency regulations.

1. Section 1058.5 and the Governor's April 25 Executive Order Do Not Authorize the SWRCB to Issue Emergency Regulations for the Purpose of Protecting Public Interests or Public Trust Uses.

The SWRCB has exceeded its authority by attempting to issue emergency regulations for the purpose of protecting public trust (fishery) interests when it was not authorized to issue emergency regulations to serve that purpose. Water Code § 1058.5 and the Governor's April 25, 2014, Executive Order, at ¶ 17, authorize the SWRCB to issue emergency regulations "to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water." These authorities did not authorize the SWRCB to issue emergency regulations for the purpose of protecting public trust interests, nor did they authorize the SWRCB to vastly expand the definitions of waste and unreasonable use in order to include serving the public trust as an acceptable regulatory goal. OAL must disapprove the proposed emergency regulations because the SWRCB was never authorized to issue regulations in this area.

The statute and executive order that authorized the SWRCB to issue emergency regulations simply did not authorize the SWRCB to use that authority for the purpose of protecting public trust uses. The scope of "public trust" interests in water was explained in *National Audubon v. Superior Court* (1983) 33 Cal.3d 419. The public trust is intended to preserve among other things, environmental and recreational values. (E.g., *National Audubon*, 33 Cal. 3d at 425.) Historically, and in the cases upon which the SWRCB relies, the prohibition of waste and unreasonable use is separate and distinct from the public trust doctrine. (See, e.g., *Imperial Irrigation District v. SWRCB (IID I)* (1986) 186 Cal.App.3d 1160, 1168 n.12 (*"National Audubon did not involve a charge of unreasonable use under article X, section 2, but rather a claim that use of water is harmful to interests protected by the public trust."* Emphases added.)) Water Code § 1058.5 authorizes the SWRCB to promulgate emergency regulations *only* in order

to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote water recycling or water

conservation, to require curtailment of diversions when water is not available under the diverter's priority of right, or in furtherance of any of the foregoing, to require reporting of diversion or use or the preparation of monitoring reports.

(Water Code § 1058.5(a)(1).) The Governor's April 25, 2014, executive order used the same language in its directive to the SWRCB. (Governor's Executive Order, unnumbered, April 25, 2014, ¶ 17.) Had the Legislature or the Governor intended to authorize the SWRCB to promulgate emergency regulations in order to protect fishery or public trust interests, it could have done so explicitly. Other sections of the Water Code and the Governor's drought proclamation make specific mention of "the public interest" and of "public trust uses." (E.g., Water Code § 1335(d); Governor's Drought Proclamation, January 17, 2014, ¶ 14.) No such language is included anywhere in any grant of emergency regulatory authority to the SWRCB. The proposed emergency regulations must be disapproved because the SWRCB was not authorized to promulgate emergency regulations to serve public trust interests.

2. Section 1058.5 and the Governor's April 25 Executive Order Do Not Authorize SWRCB to Redefine "Waste and Unreasonable Use."

The SWRCB was not authorized to redefine established concepts of California water law in order to expand its regulatory authorization; its reliance on Water Code § 1058.5 as authorization to redefine "waste and unreasonable use" is totally misplaced. (See proposed § 877, "Authority" section.) Section 1058.5 authorizes the SWRCB to issue emergency regulations when needed to achieve one or more of the listed goals:

to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote water recycling or water conservation, to require curtailment of diversions when water is not available under the diverter's priority of right, or in furtherance of any of the foregoing, to require reporting of diversion or use or the preparation of monitoring reports

(Water Code § 1058.5(a)(1).)

The SWRCB shoehorned "service of public trust interests" into § 1058.5's authorization by defining any perceived impingement on public trust interests to be "waste and unreasonable use of water." (Proposed § 877 ("The State Water Resources Control Board has determined that it is a waste and unreasonable use under Article X, section 2 of the California Constitution to continue diversions that would cause or threaten to cause flows to fall beneath the drought emergency minimum flows" as established in the proposed emergency regulations.)) By redefining some of the terms included in § 1058.5's grant of authority (waste and unreasonable use) to include a term that was purposefully excluded from that authorization (serving public

trust interests), the SWRCB is clearly attempting to circumvent facial limitations in § 1058.5's grant of authority, as defined by the Legislature. Had the Legislature intended § 1058.5 to permit the issuance of emergency regulations to protect public trust interests, it could have done so in clear language. (See, e.g., Water Code § 1335(d) (specifically mentioning "public trust uses" and "the public interest").) It did not. Similarly, the Governor chose not to include a directive to protect purported public trust interests in his January 17 emergency drought proclamation, in his April 25 executive order, or in Executive Order No. B-28-14. The SWRCB's attempt to shoehorn the protection of public trust interests into § 1058.5's grant of authority is a thinly veiled attempt to make an end-run around § 1058.5's and the April 25 executive order's clear and deliberate limitations on the SWRCB's emergency regulatory authority.

3. The SWRCB Lacks Authority to Declare Uses of Water to be Unreasonable via Emergency Regulations.

The SWRCB lacks authority to declare uses of water to be "unreasonable" in the absence of an evidentiary hearing and particularized factual findings. "What is reasonable use or reasonable method of use of water is a *question of fact* to be determined *according to the circumstances in each particular case.*" (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 139 (emphasis added).) "The question of reasonable use or reasonable method of use of water constitutes a factual issue . . ." (*SWRCB v. Forni* (1976) 54 Cal.App.3d 743, 754.) The SWRCB cannot declare a use—or, as in this case, all consumptive uses in a particular watershed or group of watersheds—to be unreasonable without holding a hearing and establishing the factual circumstances that make each individual diverter's use "unreasonable." In the absence of a formal adjudicatory action, a SWRCB proclamation defining a use or class of uses to be unreasonable amounts to no more than an unenforceable "policy statement." (*Forni*, 54 Cal.App.3d at 752.) The SWRCB itself was split as to whether it had the authority to adopt these emergency regulations, with one boardmember correctly asserting at the March 17, 2015, SWRCB meeting that the Board lacked such authority.

4. The Proposed "Authority" Citations are Incorrect.

The SWRCB's "Authority" citations are incorrect because they include Water Code § 1058 as a source of the Board's authority to issue these emergency regulations. The SWRCB cannot conflate its general regulatory authority with the specific and circumscribed authority to issue emergency regulations described in § 1058.5. The Board has not followed the procedural requirements applicable to its general regulatory authority under § 1058, so it may only promulgate regulations for the specific, limited purposes enumerated in § 1058.5 and the Governor's April 25 executive order.

B. The Proposed Regulations Do Not Meet the Standard for Consistency with Existing Law.

Consistency means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law. (Gov. Code § 11349(d).) The proposed emergency regulations are a complete departure from 165 years of California water law. In addition, imposing these regulations would violate U.S. Supreme Court precedent and both the Federal and California Constitutions. OAL is therefore required by statute to disapprove the proposed regulations because they are inconsistent with existing statutes, court decisions, and other provisions of law. (See Gov. Code §§ 11349(d), 11349.6(b).)

1. The Proposed Regulations are Fatally Inconsistent with Foundational Principles of California Water Law.

Water rights are vested property rights. As such, they cannot be infringed by others or taken by government action without due process and just compensation. (*United States v. SWRCB* (1986) 182 Cal.App.3d 82, 101 [citations omitted].) SVRIC's shareholders, Mr. Edwards, and their predecessors-in-interest have been exercising their rights to divert water for well over 100 years. The seniority and reliability of their water rights has become integrated into and inseparable from the local economy and community. To upend these property rights and way of life will do irreparable damage. This damage is even more acute and offensive given the SWRCB's infringement of legal and Constitutional protections enjoyed by SVRIC and other water right holders subject to the proposed emergency regulations.

a. The Proposed Emergency Regulations Disregard the Established Water Rights Priority System.

The proposed regulations are inconsistent with the water rights priority system, which has long been the *central principle in California water law*. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243 [emphasis added]; see also Civ. Code § 1414.) Section 878.1 of the proposed regulations would give domestic and municipal uses priority over all other uses, regardless of seniority. This disruption extends to any diversion claimed for public safety. (See proposed § 878.1.)

In addition, during the May 20, 2014, SWRCB hearing on the last iteration of these proposed regulations, Board Member D'Adamo suggested and SWRCB staff agreed that the Board's adoption of these regulations would elevate public trust uses of water to a super-senior priority. All uses that compete with this super seniority are declared unreasonable and wasteful.

This is totally inconsistent with the Supreme Court's long-standing holding that the public trust interests are not a part of the California water rights priority system. (*National Audubon*, 33 Cal.3d at 452.) Instead, public trust interests are to simply be taken "into account in the planning and allocation of water resources" when water rights are initially adjudicated in a quasi-judicial proceeding by the Board or in a proceeding in state court. (*Id.* at 446.)

Moreover, the SWRCB has not explained why the rule of priority must be abandoned by curtailing all diversions in favor of instream uses. The case of *El Dorado Irr. Dist. v. SWRCB* (2006) 142 Cal.App.4th 937, 966, notes that the rule of priority and the rule against unreasonable use of water occasionally clash. However, "Every effort . . . must be made to respect and enforce the rule of priority." (*Id.*) Indeed, the regulatory authorizations themselves specifically limit the SWRCB's emergency regulatory curtailment authority to "curtailment of diversions when water is not available under the diverter's priority of right." (Wat. Code § 1058.5(a)(1); Governor's Executive Order, unnumbered, April 25, 2014, ¶ 17.) It is the SWRCB's duty to make every effort to protect the rule of priority before resorting to emergency regulations that upend the established legal water right priority system.

b. The Proposed Emergency Regulations Ignore the Governing Judicial Water Rights Decrees.

As to Deer Creek, whose water rights, like Mill Creek's, were adjudicated in Tehama County Superior Court, "[t]he decree [entered by the court] is conclusive as to the rights of all existing claimants upon the stream system lawfully embraced in the determination." (Wat. Code § 2773.) The Board cannot change the decreed allocations absent an order from the court (which maintains continuing jurisdiction over these issues) or a formal adjudication under Water Code § 2500 et seq.

c. The Proposed Regulations Rewrite the Law of Waste and Unreasonable Use of Water and the Public Trust Doctrine.

The proposed regulations ignore and attempt to collapse the distinction between the state Constitution's prohibition of waste and unreasonable use of water on the one hand, and the public trust doctrine on the other. As discussed *supra*, these two overarching ideas are totally separate aspects of California water law. (See, e.g., *IID I*, 186 Cal.App.3d at 1168 n.12 ("National Audubon did not involve a charge of unreasonable use under article X, section 2, but rather a claim that use of water is harmful to interests protected by the public trust." Emphases added.)) These regulations represent a wholesale reconfiguration of the law, combining the two theories into a single idea.

The Legislature has declared that “the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.” (Water Code § 106.) Without an evidentiary hearing finding SVRICs, Mr. Edwardss, or any other water right holder’s irrigation practices to be unreasonable or wasteful, the SWRCB’s proposed emergency regulations upend the Legislature’s declared policy by declaring instream environmental uses to be the highest use of water. All other uses, including domestic and irrigation, are declared wasteful and unreasonable without *any* reference to how each water right holder’s water is used.

d. The Proposed Regulations Evade Established Due Process Requirements.

Adoption of the proposed regulations would effect a blanket determination that all uses by an entire class of users are per se unreasonable, without any of the required elements of due process: an evidentiary hearing, an opportunity for stakeholders to be heard, and, most importantly, a factual inquiry guided by “the circumstances in each particular case.” (*Joslin*, 67 Cal.2d at 139.) Such a determination of reasonableness requires an exercise of adjudicatory—not regulatory—authority by the Board or by a superior court, with attendant due process. (See, e.g., *IID I*, 186 Cal.App.3d at 1168-69.) An adjudication of the reasonableness of a particular use of water “is far different in nature and effect from the adoption of a regulation declaring unreasonable the diversion of water from a particular river during a specified season” (*Id.* at 1170-71 citing *SWRCB. v. Forni* (1976) 54 Cal.App.3d 743.) When such a determination is made via regulatory, as opposed to adjudicatory, action the determination amounts to “no more than a policy statement.” (*Id.* citing *Forni*, 54 Cal.App.3d at 752.)

e. The Proposed Regulations Seek to Impose Public Trust Duties on Established Water Rights Without Engaging in the Requisite Balancing of Harms.

This blanket application of public trust requirements to existing water rights, without any of the required balancing of those interests against those of the affected water rights holders, is inconsistent with *National Audubon* and subsequent law. Questions such as what constitutes waste and unreasonable use of water and the quantity of instream flows that may or may not be necessary to protect public trust resources cannot be resolved *in vacuo*, without the benefit of the SWRCB or the superior court conducting an evidentiary hearing to receive and consider evidence and testimony. The State and Federal Constitutions and applicable case law demand that these important questions be considered in an adjudicatory process.

Protecting public trust resources while at the same time respecting long-held property rights to water is not a zero-sum game. Indeed, holding an evidentiary hearing to receive and

consider evidence could have borne this out. For example, creating a low-flow channel in the creeks while coordinating irrigation diversions could have provided adequate instream flows and enough water to keep permanent plantings alive. OAL should not undermine legal requirements and the rule of law and should instead reject these proposed emergency regulations.

2. The Application of the Public Trust Doctrine to SVRIC and Mr. Edwards Water Rights is Inconsistent with U.S. Supreme Court Authority.

Summa Corp. v. California State Lands Comm'n (1984) 466 U.S. 198, holds that the public trust doctrine does not apply to former Mexican land grants annexed under the Treaty of Guadalupe Hidalgo that were patented pursuant to the Act of March 3, 1851 (9 Stat. 632). The land encompassing the area served by SVRIC was patented under the Act, and the General Land Office (GLO), U.S. Department of the Interior, issued Land Patent Nos. CACAAA002833 and CACAAA001106 for that land. The western portion of Edwards Ranch was also patented under the Act, and the GLO issued Land Patent No. CACAAA001373 for that land. Under the Supreme Court's holding in *Summa Corp.*, California cannot at this late date assert its public trust easement over these patented lands, because the predecessors-in-interest to SVRIC shareholders (the landowners) and to Mr. Edwards had their interest[s in the land] confirmed without any mention of such an easement in proceedings taken pursuant to the Act of 1851. (*Summa Corp.*, 466 U.S. at 209.) Because the public trust doctrine has no applicability to the land served by SVRIC or within the western portion of Edwards Ranch, the SWRCB cannot impose these emergency regulations for the purpose of serving public trust interests.

3. These Regulations are Inconsistent with the Federal and California Constitutions.

It is undisputed that the right to reasonably and beneficially use water is a protectable property right. The imposition of the proposed emergency regulations on long-standing water rights is a taking of property without just compensation or due process of law, in violation of the Federal and California Constitutions. Both the Federal and state Constitutions prohibit the government from taking private property for public use without just compensation and due process of law. (U.S. Constitution, 5th Amendment; California Constitution, art. 1, § 19(a).) The California Constitution further requires that, before the state government may take or damage private property, it must first pay just compensation directly to the owner or to the court on behalf of the owner. (Cal. Const., art. 1, § 19(a).) The taking of water by the government with the intention of protecting state and federally listed fish is undeniably a public use of the water, though the burdens fall disproportionately on a small number of Tehama County farmers and ranchers. Because the SWRCB is seeking to take and damage the landowners' water rights

without any adjudicatory proceeding, without any advance deposit, and without even any acknowledgment that compensation is owed to the landowners for their condemned property, these proposed emergency regulations violate both the California and Federal Constitutions and must be rejected.

C. The Proposed Regulations Do Not Meet the Standard for Necessity.

Proposed regulations meet the necessity standard only if “the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the . . . provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record.” (Gov. Code § 11349(a).) The record of the rulemaking proceeding for these emergency regulations lacks substantial evidence to support the need for these emergency regulations, so OAL is required by statute disapprove them. (Gov. Code § 11349.6(b). See generally, “Curtailment of Diversions Due to Insufficient Flow for Specific Fisheries Emergency Regulation Digest,” March 12, 2015.)

Further, in order to meet the necessity standard, the record of the rulemaking must include a “statement of the specific purpose of each adoption” and “information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision.” (1 C.C.R. § 10(b).) The record submitted in support of these emergency regulations does not include any such statements or explanations, and only contains the most generalized statements of need. (See “Curtailment of Diversions Due to Insufficient Flow for Specific Fisheries Emergency Regulation Digest,” March 12, 2015, at pp. 16-24, 29-37)

1. The Record Lacks Substantial Evidence Showing that the Regulations are Necessary.

The record of the rulemaking does not demonstrate, by substantial evidence, that these regulations (particularly the minimum flow requirements) are necessary to implement Cal. Const. art. X, § 2, as the SWRCB claims.² First, as was explained above, the SWRCB’s redefinition of “waste and unreasonable use” to include uses that may affect purported public trust interests is a wholesale departure from existing law. Thus, the SWRCB’s position that the regulations are necessary to implement art. X, § 2 of the California Constitution rests entirely on circular reasoning. The proposed regulations are only deemed “necessary” to implement the Constitutional provision because the SWRCB is now reinterpreting the Constitutional provision

² Water Code § 100 repeats and implements art. X, § 2 of the California Constitution, so references in this comment letter to the Constitutional provision may be deemed to include a reference to the related Water Code provision.

as encompassing the subject matter of the proposed regulations. The subject matter of the regulations (water for public trust purposes) is entirely unrelated to waste and unreasonable use of water, but for the regulations' new definition of that phrase as including any uses that could affect public trust interests.

Further, the SWRCB's own supporting documents indicate that the proposed minimum flow requirements are not what are necessary to achieve the stated purposes (i.e., to protect ESA-listed species). The NMFS memorandum states that these flows are necessary to prevent extirpation of *late-returning* adult spring-run and *late emigrating* juvenile spring-run and steelhead. (NMFS Technical Memorandum at pp. 1-2 (included as Attach. 11 to the Emergency Regulations Digest).) Late returning spring-run and late emigrating juveniles are not evolutionarily significant units they are not defined groups at all. Although the Emergency Regulations Digest, (at p. 20) describes the purpose of these emergency regulations as to protect ESA-listed species, the flow recommendations were developed to protect an amorphous subset of certain listed species the late returning and late emigrating groups. The Digest fails to acknowledge that these recommendations were intended for the benefit of these purported subgroups, rather than for the listed species. The Technical Memorandum warns that, should some late individuals not be able to migrate, diversity of the listed species may be diminished. (*Id.* at p. 2.) Regulations intended to protect against diminished diversity are not the same as regulations intended to protect listed species from imminent extirpation (e.g., Emergency Regulations Digest at p. 22). These proposed regulations go far beyond what is needed to effectuate these regulations' purported goal.

Similarly, the spring/summer base and pulse flow regime imposed in 2014 which was limited to only a portion of June was determined by NMFS to be very successful. (NMFS Technical Memorandum at p. 2.) No justification was provided for now tripling the season during which base and pulse flows are to be provided in 2015, to include April, May, and June. If 2014's one-month flow program was very successful, then a three-month program is surely not necessary to achieve the same purpose this year, and the SWRCB has not attempted to explain why it might be necessary or otherwise justify this increase.

2. Acceptability of Voluntary Agreements to Achieve the Same Goals Clearly Indicates that the Regulations are Unnecessary.

The SWRCB's recognition that voluntary agreements can achieve the same ends as the proposed minimum flow requirements (see proposed § 878.2.) shows that these regulations are not necessary to implement art. X, § 2 of the California Constitution. A member of the SWRCB went so far as to state during the May 20, 2014, SWRCB meeting on last year's iteration of these emergency regulations that as long as there are [voluntary] agreements, [she did not] see the

need for going forward with the regulations.ö (Remark of Boardmember DøAdamo, May 20, 2014 SWRCB Meeting.) Such voluntary agreements can achieve maximum benefit for fish more efficiently than one-size-fits-all regulations, and they are backstopped by the Endangered Species Act to ensure compliance. Given that the same goals can be achieved with more flexibility via voluntary agreements, this emergency regulatory scheme is clearly not ñnecessary.ö Not only do voluntary agreements more effectively achieve the same goals, but they do not resort to the extra-legal procedures that the SWRCB appears to prefer.

The voluntary agreements that CDFW is asking entities to enter in 2015, which would establish flow regimes applicable in lieu of these emergency regulations, differ materially from the emergency regulations, even though they purport to achieve the same result. For instance, pulse flows on Deer and Mill Creeks may last up to 72 hours under the proposed emergency regulations, while the longest possible pulse flow on those creeks under the voluntary agreements would last only 60 hours.³ The voluntary agreements also have specific temperature triggers for reduced flows, which the emergency regulations lack. Pulse flows under the proposed voluntary agreements are limited to once every two weeks, while the emergency regulations do not limit the frequency of pulse flows. Given that CDFW has proposed less stringent requirements in the voluntary agreements than it is now requesting from the SWRCBø emergency regulations, and given that both programs are explicitly intended to produce the same result, the more onerous proposed emergency regulationsø flow prescriptions are not ñnecessaryö to achieve the goal.

Finally, the record before OAL does not include a description of the water right holders that have voluntarily agreed to provide instream flows for fishery protection. As a result, the record fails to establish, by substantial evidence, that such voluntary agreements are inadequate to address the stated need for instream flow. In order to satisfy the necessity standard, the SWRCB must analyze the voluntary agreements and (a) accept them in lieu of emergency regulations as adequate protection of public trust resources or (b) explain on the basis of substantial evidence why the emergency regulations are necessary notwithstanding voluntary efforts.

D. The Proposed Regulations Do Not Meet the Standard for Clarity.

OAL must disapprove the proposed emergency regulations because they lack the required degree of clarityö they are not ñwritten or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.ö (Gov. Code §§ 11349(c), 11349.6(b).) A regulation does not meet the standard for clarity if ñthe regulation can, on its

³ This would occur if a 100 cfs pulse flow was followed by a drop to 20 cfs juvenile flows.

face, be reasonably and logically interpreted to have more than one meaning or if the language of the regulation conflicts with the agency's description of the effect of the regulation. (1 C.C.R. § 16(a)(1), (a)(2).)

1. The Proposed Regulations are Impermissibly Vague and Ambiguous.

The proposed regulations include several patently ambiguous and vague provisions, which require that OAL disapprove them. For instance, proposed § 878.1(c)(1)(B) allows junior water rights to take priority over more senior water rights if, *inter alia*, all other alternate sources of potable water have been used and no other potable water is available. It is completely unclear what constitutes alternate sources or availability. Does this refer only to sources located upon the affected parcel (e.g., wells and storage)? Or does this truly refer to all . . . alternate sources, as the plain language of the regulation would suggest (e.g., deliveries from water trucks; bottled water)? Do expense and financial means come into play? This provision is impermissibly unclear.

Similarly, the provisions describing the Deputy Director's standard of review are completely contradictory. Proposed § 878.2 first states that [t]he Deputy Director *shall* approve the request [for approval of a voluntary agreement] so long as other users of water will not be injured. (Emphasis added.) However, the very next sentence states that [t]he Deputy Director's approval *may be subject to any conditions . . . that the Deputy Director determines to be appropriate.* (*Id.* [Emphasis added].) So while the Deputy Director is mandated to approve any voluntary agreement (and thus excuse the landowner-signatories from curtailment) so long as it does not injure other water users, she is contradictorily authorized to condition her mandatory approval on the inclusion in the agreement of any additional provisions that she deems appropriate. How is it possible that the Deputy Director is mandated to approve any agreement that meets the single statutory criterion, but at the same time enjoys the discretionary authority to require that the parties include additional conditions before she will approve it? And to complicate matters further, the SWRCB's Executive Director, not the Deputy Director, has the discretion to put the minimum flow requirements into effect (proposed § 877(c)) if *he* decides that a voluntary agreement is insufficient to protect a watershed completely independent (and without any mention) of the Deputy Director's quasi-mandate to approve the same agreements. OAL is required to disapprove these confusing, internally contradictory regulations because they are so unclear that they cannot be easily understood by those persons directly affected by them. (Gov. Code § 11349(c).)

2. The Proposed Regulations Fail to Explain How Compliance on Antelope Creek will be Measured.

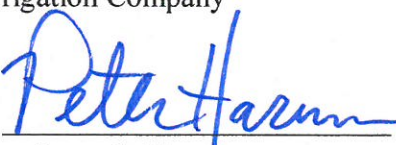
There are no gauging stations to monitor flows in Antelope Creek. Both Deer and Mill Creeks have multiple stream gages. Because there are no such gages on Antelope Creek, there is no way to determine compliance on Antelope Creek, leaving enforcement of these proposed emergency regulations entirely to the whims and caprices of the enforcing agencies. This lack of any explanation of the means of reliable and fair enforcement of the regulations on Antelope Creek demands that OAL reject these emergency regulations.

Conclusion

The emergency regulations should be disapproved because they are procedurally and substantively defective. The SWRCB failed to follow procedural prerequisites prior to transmitting the proposed emergency regulations and rulemaking record to OAL. Additionally, the emergency regulations suffer substantive defects insofar as the SWRCB is attempting to circumvent clearly established limitations on its authority to push through ill-advised “emergency” regulations, and in the process is rewriting California water law, undermining case law precedent, and violating Constitutional protections, such as the prohibitions on taking private property without due process or just compensation. While the SWRCB has chosen not to abide by the statutes, regulations, Constitutional provisions, and judicial precedent that govern these regulations and the emergency regulatory process, OAL’s statutory mandate is clear: The proposed emergency regulations must be disapproved.

Respectfully submitted,

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