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

Re: Stanford Vina Ranch Irrigation Company's Comments on SWRCB Proposed Emergency Regulations for Curtailment of Diversions on Certain Sacramento River Tributaries; OAL File No. 2014-0523-05E

These comments are submitted on behalf of Stanford Vina Ranch Irrigation Company in response to the State Water Resources Control Board's (SWRCB) proposed emergency drought regulations for Antelope, Mill, and Deer Creeks (title 23, California Code of Regulations (C.C.R.) §§ 877, 878, 878.1, 878.2, 879, 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 in other areas with less reliable water supplies to mitigate the effects of drought. 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. 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, resulting to catastrophic economic and societal impacts to SVRIC and the community of Vina in Tehama County. 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, and ¶ 17 of the Governorôs unnumbered Executive Order dated April 25, 2014. Both ¶ 17 of the Executive Order and § 1058.5 of the Water Code authorize the SWRCB to promulgate emergency regulations to, *inter alia,* ñprevent the waste, unreasonable use, or unreasonable method of diversion of waterò or ñ to require curtailment of diversions when water is not available under the diverterôs priority of right.ò The SWRCBôs issuance of emergency regulations is governed by Government Code §§ 11346.1, 11349.5 and 11349.6, all as modified by Water Code § 1058.5. Because the regulations themselves and the SWRCBôs 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 Violated Mandatory Public Notice Requirements.

OAL is required by law to disapprove the SWRCBôs proposed emergency regulations ñif it determines the agency failed to comply with [Government Code] Section 11346.1.ò (Gov. Code § 11349.6(b).) The SWRCB failed to comply with the public notice requirements imposed by § 11346.1(a)(2), and thus OAL must disapprove the proposed emergency regulations.

On May 13 & 14, 2014, the SWRCB issued notice of proposed emergency regulations.

A copy of the proposed regulatory language was included with the notice, along with a limited amount of additional supporting information. The SWRCB held a meeting on May 20th and 21st to consider the proposed emergency regulations and receive public comments. Changes were made to the originally proposed language via ñChange Sheet #1ò, which was circulated during the May 20th portion of the Board meeting. Among other things, Change Sheet #1 added a requirement that parties wishing to divert water for ñminimum health and safety needsò must submit a petition to the Deputy Director before such a diversion could be approved. (Change Sheet #1 at 1 (unnumbered).) These changes were only available in hard copy to those physically present at the SWRCB meeting, and were not distributed to the public or made publicly available by email or on the internet.

Additional changes to the proposed regulations were made via ñChange Sheet #2ò which added a requirement that mandatory minimum flows be suspended within 5 days of the end of the relevant fish migration, rather than leaving that decision to the Deputy Directorôs discretion, as originally proposed. Change Sheet #2 was made available to some but not all of the public in attendance at the meeting on May 21st, and was not distributed to the public at large, or made available by email or on the internet.

The most substantial changes to the proposed regulations were made at the end of the May 21st session. These changes were not incorporated in any change sheet and copies of the amendments were not made available to the public. SWRCB staff briefly presented this third set of changes via overhead projector during the meeting and read them aloud a single time. These amendments contained the most significant changes: Among other things, the 5-day deadline for suspending mandatory minimum flows implemented in Change Sheet #2 was reduced to a single business day and a poorly worded provision was added that granted the SWRCB Executive Director discretion to decide whether the voluntary agreements entered into between the governmental agencies responsible for the fish species and the water rights holders would sufficiently protect the fish, and thus whether the mandatory minimum flows would be in effect at all. This third set of changes was never released to the public. During the two-day period between May 21st when the SWRCB approved the amended regulatory language and May 23rd

when the amended proposed regulations were submitted to OAL, the SWRCB kept secret the specific proposed language it intended to submit; the language was not revealed to the public until OAL posted it on its website just before the close of business on May 23ð the last day before the long holiday weekend.

Government Code section 11346.1(a)(2) states:

> *At least five working days before submitting an emergency regulation to [OAL]*, the adopting agency shall, except as provided in paragraph (3), send a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. The notice shall include both of the following:
>
> (A) The *specific language proposed to be adopted*.
>
> (B) The finding of emergency required by subdivision (b).

(Emphases added.)

Government Code § 11349.6(b) mandates that OAL ñ*shall* disapprove the emergency regulations if . . . it determines the agency failed to comply with Section 11346.1.ò (Emphasis added.) Compliance with § 11346.1(a)(2) is simple: The SWRCB was required only to ñsend a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency,ò which notice must include ñ[t]he *specific language* proposed to be adopted,ò no less than five working days before submitting the emergency regulations to OAL. (Gov. Code § 11346.1(a)(2) [emphasis added].) However, the SWRCB did not circulate the specific language it proposed to be adopted *at all* prior to submitting it to OAL, let alone give such notice 5 working days prior to submittal. The requirement was simple, the SWRCBôs noncompliance is clear and irrefutable, and the outcome is mandatoryð OAL *must* disapprove the proposed emergency regulations.[1]

[1] By operation of Government Code § 11346.1(a)(1), Government Code § 11346.8(c) does not apply to emergency regulations. Thus, there is absolutely no exception to the requirement that ñthe specific language proposed to be adoptedò be circulated for 5 working days prior to submission to OAL. And even if § 11346.8(c) did apply to emergency regulations (and it does not), the SWRCB still could not circumvent the requirement that the exact language to be

B. The Record Submitted in Support of the Rulemaking Lacks Required Components.

Government Code § 11349.6(b) requires OAL to disapprove proposed emergency regulations if they do not meet the standard for ñnecessity.ò 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 ñstatement of the specific purpose of each adoptionò and ñinformation explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision.ò 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 ñCurtailment of Diversions due to Insufficient Flow for Specific Fisheries Emergency Regulations Digest,ò May 13, 2014, at pp. 16-18 (unnumbered).) The proposed emergency regulations should be disapproved because the SWRCB has failed to explain the specific purpose and 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 SWRCBôs proposed emergency regulations ñif it determines that the regulation fails to meet the standards set forth in [Government Code] Section 11349.1.ò (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

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adopted be circulated for 5 working days. Section 11346.8(c) only permits changes to the originally circulated language without a new notice if the changes are ñ(1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action.ò Therefore, even if those exceptions applied to emergency regulation procedures, they would not exempt the substantial, unforeseeable changes made during the May 20th and 21st SWRCB meeting.

proposed emergency regulations fail to meet any of the standards, OAL ñ*shall* disapproveò them. (Gov. Code § 11349.6(b) [emphasis added].) The SWRCBôs proposed emergency regulations for ñCurtailment of Diversions Based on Insufficient Flow to Meet All Needsò 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 ña California constitutional or statutory provision which expressly permits or obligates the agency to adopt . . . the regulationò or one that ñgrants 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.ò (1 C.C.R § 14(a).) The SWRCBôs 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 SWRCBôs ñinterpretation alters, amends or enlarges the scope of the power conferred upon itò; (B) SVRIC and others challenge the SWRCBôs alleged authority; and (C) ña judicial interpretation of a provision of law cited as óauthorityô or óreferenceô contradicts the SWRCBôs interpretation. ñ (*Id.* at subd. (c)(1).) Through these proposed emergency regulations, the SWRCBôs 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 SWRCBôs authority to promulgate these emergency regulations.

1. Section 1058.5 and the Governorôs 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 Governorôs April 25, 2014, Executive Order, at ¶ 17, authorize the SWRCB to issue emergency regulations ñto prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water.ò 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 ñpublic trustò interests in water was well-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 (ñ*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.ò 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 diverterôs 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 Governorôs April 25, 2014, executive order used the same

language in its directive to the SWRCB. (Governorôs 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 public trust interests, it could have done so explicitly. Other sections of the Water Code and the Governorôs drought proclamation make specific mention of ñthe public interestò and of ñpublic trust uses.ò (E.g., Water Code § 1335(d); Governorôs 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 Governorôs April 25 Executive Order Do Not Authorize SWRCB to Redefine ñWaste and Unreasonable Useò.

The SWRCB was not authorized to redefine established concepts in water law so that they would fall under its regulatory authorization; its reliance on Water Code § 1058.5 as authorization to redefine ñwaste and unreasonable useò is totally misplaced. (See proposed § 877, ñAuthorityò 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 diverterôs 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 ñservice of public trust interestsò into § 1058.5ôs authorization by defining any perceived impingement on public trust interests to be ñwaste and unreasonable use of water.ò (Proposed § 877 (ñThe 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 flowsò as established in the proposed emergency regulations.).) By redefining some of the terms included in § 1058.5ôs grant of authority (waste and unreasonable use) to include a term that was purposefully excluded from that authorization (serving public trust uses), the SWRCB is clearly attempting to circumvent facial limitations to § 1058.5ôs 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 ñpublic trust usesò and ñthe public interestò).) 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 or in his April 25 executive order. The SWRCBôs attempt to shoehorn the protection of public trust interests into § 1058.5ôs grant of authority is a thinly veiled attempt to make an end-run around § 1058.5ôs and the April 25 executive orderôs clear and deliberate limitations.

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 ñunreasonableò in the absence of an evidentiary hearing and particularized factual findings. ñWhat 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*.ò (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 139 (emphasis added).) ñThe question of reasonable use or reasonable method of use of water constitutes a factual issue . . . .ò (*SWRCB v. Forni* (1976) 54 Cal.App.3d 743, 754.) The SWRCB cannot declare a useð or, as in this case, all consumptive uses in a particular watershedð to be unreasonable without holding a hearing and establishing the factual circumstances that make each individual diverterôs use ñunreasonable.ò 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 ñpolicy statement.ò (*Forni*, 54 Cal.App.3d at 752.)

4. The Proposed ñAuthorityò Citations are Incorrect.

The SWRCBôs ñAuthorityò citations are incorrect because they include Water Code § 1058 as a source of the Boardôs authority to issue these emergency regulations. The SWRCB cannot conflate its general regulatory authority with the specific and circumscribed authority to issue emergency regulations, as 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 Governorôs April 25 executive order.

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

Consistency ñmeans being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.ò (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.

It is important to remember that water rights are vested property rights. ñAs such, they cannot be infringed by others or taken by government action without due process and just compensation.ò (*United States v. SWRCB* (1986) 182 Cal.App.3d 82, 101 [citations omitted].) SVRIC and its shareholders 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 SWRCBôs 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 ñhas long been the *central principle in California water law*.ò (*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 effectively extends to any diversion needed for ñpublic safetyò, subject only to the Deputy Directorôs unfettered discretion. (See proposed § 878.1(d)(6).)

In addition, during the May 20th SWRCB hearing on the proposed regulations, Board Member DôAdamo suggestedð and SWRCB staff agreedð that the Boardôs 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 Courtôs 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 ñinto account in the planning and allocation of water resourcesò 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, ñEvery effort . . . must be made to respect and enforce the rule of priority.ò (*Id.*) Indeed, the regulatory authorizations themselves specifically limit the SWRCBôs emergency regulatory curtailment authority to ñcurtailment of diversions *when water is not available under the diverter's priority of right*.ò (Wat. Code § 1058.5(a)(1); Governorôs Executive Order, unnumbered, April 25, 2014, ¶ 17.) It is the SWRCBôs 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. <u>The Proposed Emergency Regulations Ignore the Governing Judicial Water Rights Decrees.</u>

As to Deer Creek, whose water rights, like Mill Creekôs, were adjudicated in Tehama County Superior Court, ñ[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.ò (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 constitutionôs 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 (ñ*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.ò Emphases added.).) These regulations represent a wholesale reconfiguration of the law, combining the two theories into a single idea.

The Legislature has declared that ñthe use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.ò (Water Code § 106.) Without an evidentiary hearing finding SVRICôs or any other water right holderôs irrigation practices to be inefficient, unreasonable, or wasteful, the SWRCBôs proposed emergency regulations upend the Legislatureôs declared policy by declaring instream, public trust 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 holderôs 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 ñthe circumstances in each particular case.ò (*Joslin*, 67 Cal.2d at 139.) Such a determination of reasonableness requires an adjudication by the Board or by a superior court with attendant due process. (See, e.g., *IID I*, 186 Cal.App.3d at 1168-69.)

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 or quasi-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 simply because such processes are ñcumbersomeò in the opinion of the SWRCB.

2. The Application of the Public Trust Doctrine to SVRICôs 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, U.S. Department of the Interior, issued Land Patent Nos. CACAAA002833 and CACAAA001106 for that land. Under the Supreme Courtôs holding in *Summa Corp.*,

ñCalifornia cannot at this late date assert its public trust easement overò the land served by SVRIC, because SVRICôs shareholdersô (the landownersô) ñpredecessors-in-interest had their interest[s in the land] confirmed without any mention of such an easement in proceedings taken pursuant to the Act of 1851.ò (*Summa Corp.*, 466 U.S. at 209.) Because the public trust doctrine has no applicability to the land served by SVRIC, 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).) Because the SWRCB is seeking to take and damage the landownersô water rights without any hearing, 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 state and the Federal constitutions.

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

Proposed regulations meet the necessity standard only if ñthe 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.ò (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, ñCurtailment of Diversions due to Insufficient Flow for Specific Fisheries Emergency Regulations Digestò, May 13, 2014.)

Further, in order to meet the necessity standard, the record of the rulemaking must include a ñstatement of the specific purpose of each adoptionò and ñinformation explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision.ò (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 ñCurtailment of Diversions due to Insufficient Flow for Specific Fisheries Emergency Regulations Digestò, May 13, 2014, at pp. 16-18 (unnumbered).)

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 SWRCBôs redefinition of ñwaste and unreasonable useò to include uses that may affect purported public trust interests is a wholesale departure from existing law. Thus, the SWRCBôs 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 necessary to implement the constitutional provision because the SWRCB is now reinterpreting that 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 ñwaste and unreasonable use of water,ò *but for* the regulationsô new definition of that phrase as including any uses that could affect public trust interests.

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

Further, the SWRCBôs own supporting documents indicate that the minimum flow requirements are not strictly necessary. While some flow goals are simply declared (without citation to any support) to be the ñminimum flows neededò, others have only ñgenerally . . . been foundò to permit fish passage, and still others are no more than the agenciesô wishes about what flows ñshould beò. (See ñCurtailment of Diversions due to Insufficient Flow for Specific Fisheries Emergency Regulations Digestò, May 13, 2014, Attach 12, at p. 56.) Unequivocal scientific support for the ñnecessityò of these flows is absent from the rulemaking record.

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

The SWRCBôs 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 SWRCB meeting that ñas long as there are [voluntary] agreements, [the Boardmember did not] see the need for going forward with the regulations.ò (Remark of Boardmember DôAdamo, 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 threat of Endangered Species Act liability 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.ò 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 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 clarityð they are not ñwritten or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.ò (Gov. Code §§ 11349(c), 11349.6(b).) A regulation does not meet the standard for clarity if ñthe regulation can, on its face, be reasonably and logically interpreted to have more than one meaningò or if ñthe language of the regulation conflicts with the agency's description of the effect of the regulation.ò (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(b)(1)(B) allows junior water rights to take priority over more senior water rights if, *inter alia*, ñall other alternate sources of potable water have been usedò and no ñother potable water is available.ò 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 ñall . . . alternate sources,ò 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 flurry of ill-conceived, last-minute amendments to the proposed regulations introduced significant uncertainties and internally inconsistent language. For instance, voluntary agreements between landowners and the agencies with jurisdiction over the fish species were originally subject to review and approval by the SWRCBôs Deputy Director for the Division of Water Rights (Deputy Director). However, the provisions describing the Deputy Directorôs

standard of review are completely contradictory. Proposed § 878.2 first states that ñ[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.ò (Emphasis added.) However, the very next sentence states that ñ[t]he Deputy Director's approval *may be subject to any conditions . . . that the Deputy Director determines to be appropriate*.ò (*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 ñappropriate.ò 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 SWRCBôs 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 watershedð completely independent (and without any mention) of the Deputy Directorôs quasi-ñmandateò to approve the same agreements. OAL is required to disapprove these confusing, internally contradictory regulations because they are so unclear that they cannot ñbe easily understood by those persons directly affected by them.ò (Gov. Code § 11349(c).)

2. The Language of the Proposed Regulations Conflicts with the SWRCBôs Description of the Regulationsô Effects.

The SWRCBôs description of the proposed regulationsô effects conflicts with the language of the proposed regulations. This mismatch is largely the result of the SWRCBôs failure to comport with due processð had the agency complied with Government Code § 11346.1(a)(2) and given notice of, circulated, and described the actual language it proposed to adopt, rather than an early draft, it may have avoided this conflict. However, the SWRCBôs description of the regulationsô effects conflicts with the regulatory language, so OAL is required to disapprove the proposed emergency regulations. (Gov. Code § 11349(c), 11349.6(b); 1 C.C.R. § 16(a)(1), (a)(2).)

The SWRCB described the effects that would occur if an earlier version of the proposed regulations were adopted. (ñCurtailment of Diversions due to Insufficient Flow for Specific Fisheries Emergency Regulations Digest,ò May 13, 2014, at pp. 25-33.) However, more than a week after issuing that analysis, the SWRCB significantly amended the proposed regulations, to the extent that descriptions of their effects no longer matched the proposed regulatory language. For instance, the description of the effects of proposed § 877 (which in fact is mostly justifications for the regulation, rather than a description of its effects) fails completely to mention that the proposed minimum flows would not be effective unless the SWRCBôs Executive Director determines that voluntary agreements do not cover enough of the diversions. (Compare proposed § 877(c) with Emergency Regulations Digest at pp. 25-32.) In sum, the SWRCBôs last-minute amendments to the regulations, along with its failure to comply with Government Code § 11346.1(a)(2), prevented the proposed regulations from meeting the standard for clarity, and OAL is now required to disapprove the proposed 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, such as the Supreme Court's conclusive holding that public trust requirements cannot be imposed on land patented under the Act of March 3, 1851, 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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