

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2014-**

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In the Matter of the Petition for Reconsideration of the  
**STANFORD VINA RANCH IRRIGATION COMPANY**  
Regarding State Water Board Order WR 2014-0022-DWR,  
Curtailment Order in the Matter of Diversion of Water From Deer Creek Tributary to the  
Sacramento River in Tehama County

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**ORDER DENYING RECONSIDERATION**

**BY THE BOARD**

**1.0 INTRODUCTION**

Stanford Vina Ranch Irrigation Company (“Petitioner” or “Stanford Vina”)<sup>1</sup> petitioned the State Water Resources Control Board (“State Water Board” or “Board”) for reconsideration of State Water Board [Order WR 2014-0022-DWR](#) (“Order 2014-0022”),<sup>2</sup> a June 5, 2014, order curtailing diversions from Deer Creek unless and until the minimum flows set by drought emergency regulations in California Code of Regulations, title 23, section 877 were met.<sup>3</sup> Order 2014-0022 was in effect for approximately three weeks. Petitioner states that Order 2014-0022 was not supported by substantial evidence, was adopted by procedurally inadequate means, and contains error in law. Petitioner failed to support its allegations by a statement of points and authorities in support of legal issues, as is required under section 769, subdivision (c). Instead, Petitioner appended to the petition a series of letters submitted to the Board and the Office of

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<sup>1</sup> Petitioner refers to its name alternatively as “Stanford Vina Ranch Irrigation Company” and “Stanford-Vina Ranch Irrigation Company.” This order uses a non-hyphenated spelling, as this is the spelling used in the majority of the submitted documents, including a consent decree entered by the Tehama County Superior Court.

<sup>2</sup> Petitioner also purports to request reconsideration for two additional actions. Petitioner seeks reconsideration of drought emergency regulation adopted on May 22, 2014. Water Code section 1122 does not provide for reconsideration of quasi-legislative actions. Furthermore, the petition for reconsideration was received more than 30 days after May 22, 2014. Therefore, reconsideration of this action is denied. Petitioner also seeks reconsideration of a proposed draft enforcement action, notice of which was mailed on June 12, 2014. Because the action is only proposed, not taken, reconsideration is inappropriate and is also denied.

Administrative Law (OAL) at various points throughout the process of adoption, review, and implementation of sections 877-879.1. It is unclear what arguments Petitioner intends to have support reconsideration of Order 2014-0022, as many of the contentions were expressed prior to issuance of that order in a context that does not apply to the current situation and the petition for reconsideration purports to address additional State Water Board actions for which a petition for reconsideration is inappropriate. For this reason, the petition for reconsideration is denied. Petitioner also failed to notice the petition for reconsideration to interested parties, and failed to request meaningful relief, as required under section 769.

The drought may still be ongoing in Fall 2014 and additional curtailment orders are likely to be issued on Deer Creek under section 877 unless Petitioner reaches a voluntary agreement with National Marine Fisheries Service (NMFS) and the California Department of Fish and Wildlife (CDFW) as described under section 878.2 or section 877, subdivision (c). Therefore, this order attempts to provide general responses to the broad concerns Stanford Vina has raised concerning issuance of curtailment orders under section 877, even though the exact contours of Petitioner's arguments are not meaningfully articulated or supported with evidence and authority and it is unclear where Petitioner raises legal concerns on reconsideration as opposed to simply expressing disagreement with the State Water Board's actions and proposed actions. Broadly, Petitioner alleges: that the drought emergency regulation constitutes a condemnation of property without the appropriate procedures or authority and require compensation; that the regulation's findings of waste and unreasonable use and public trust needs required an evidentiary hearing prior to adoption; that the public trust does not apply to lands within the Stanford Vina's service area; that the proper method to undertake actions affecting water rights on Deer Creek is reopening a consent decree in *Stanford Vina Ranch Irrigation Company v. Dicus* ("Consent Decree") (Superior Court Tehama County 1923) (unnumbered), and that there is or was time to undertake such an action; that the rulemaking was procedurally inadequate and did not meet the authority, necessity, clarity and consistency standards for approval by OAL; that there is no emergency; that Stanford Vina acts as trustee for the water rights of certain unnamed riparian owners for whom notice was insufficient; that certain decisions regarding implementation of the flows after issuance of the challenged order suffer from evidentiary or due process flaws; and

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<sup>3</sup> All further references are to California Code of Regulations, title 23, unless otherwise noted.

that Stanford Vina has proposed a physical solution to improve temperatures and fish passage with less water, but has been unable to receive regulatory approval to implement that alleged solution, which involves altering the streambed.

To the extent Petitioner's allegations and arguments can be understood, they lack merit and would be denied even if the petition were not procedurally inadequate and moot.

## **2.0 GROUND FOR RECONSIDERATION**

Any interested person may petition the State Water Board for reconsideration of a decision or order within 30 days on any of the following grounds:

- (a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) [t]he decision or order is not supported by substantial evidence;
- (c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) [e]rror in law.

(§ 768.)

Among other requirements, a petition must specify the specific board action for which the petitioner requests reconsideration, "the reason the action was inappropriate or improper," "the specific action which petitioner requests," and contain "a statement that copies of the petition and accompanying materials have been sent to all interested parties." (§ 769, subd. (a)(2), (4)-(6).) Additionally, "a petition shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition." (§ 769, subd. (c).)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).) The State Water

Board may elect whether or not to hold a hearing on the petition for reconsideration. Here, the petition does not include a request for a hearing.

### 3.0 BACKGROUND

The year 2013 was the driest calendar year since California began keeping record approximately 150 years ago. Governor Brown issued a proclamation declaring a state of emergency due to the drought on January 17, 2014. While rains in early 2014 mitigated the severity of the drought to some extent, the water year continues to be one of the driest on record. On March 1, 2014, the Governor signed into law a package of legislation designed to address the drought emergency through various means, including granting the State Water Board the authority under certain circumstances to adopt emergency regulations that address the waste and unreasonable use of water and certain other issues. (See amended Wat. Code, § 1058.5.) On April 25, 2014, the Governor issued a second proclamation which exempted the adoption and implementation of any such regulations from the requirements of the California Environmental Quality Act, Public Resources Code sections 21000 et seq.

Mill, Deer and Antelope Creeks in Tehama County are three tributaries to the Sacramento River. The watersheds of all three creeks have been identified as high priority watersheds for recovery of the Central Valley spring-run Chinook salmon (*O. tshawytscha*) and the California Central Valley Steelhead (*Oncorhynchus mykiss*), both of which are listed as threatened under the federal Endangered Species Act. Of the five spawning tributaries with highest importance to the Central Valley spring-run Chinook Salmon, these three do not have storage facilities with the capacity to regulate flows. Instead, flows on these three tributaries are determined by natural flow and significant diversions. All three tributaries are typically completely diverted at some point during the irrigation season. In all three tributaries, the largest diversions occur in the flatter, downstream reaches where the lands are most arable. Optimal holding and spawning habitat is in the higher reaches, above the diversions. Consequently, ensuring that minimum flows continue in the lowest reaches of the tributaries for a relatively brief period of time during the spring and fall migration periods has a comparatively large impact on salmonid survival.

Deer Creek contains one of only three remaining self-sustaining populations (Lindley et al., 2007)<sup>4</sup>. Deer Creek has been identified as critical habitat for the survival of Central Valley spring-run Chinook salmon (National Marine Fisheries Service, 2014)<sup>5</sup>. Furthermore, evidence suggests that lack of sufficient water below diversions tends to truncate or conclude the spring migration period (Cramer and Hammack 1952, Mill Creek data cited in Terraqua 2013)<sup>6</sup>. This is especially evident in dry or drought years, when an earlier seasonal recession of streamflow results from diversions of most or all streamflow during May or June. In addition, high temperatures in low flow periods can be stressful or fatal to fish, or can inhibit passage further. In May and June, both adult Central Valley spring-run Chinook salmon and juveniles are migrating through the lower reaches of Deer Creek, with the adults moving upstream, and juveniles downstream. Drought conditions and/or passage limitations during this period have the potential to impact abundance of two consecutive year classes of fish. The population of Central Valley spring-run Chinook salmon has suffered significant decline in recent years, thus demographic and genetic risks due to small population size is considered to be high (National Marine Fisheries Service 1998)<sup>7</sup>.

Deer Creek has 50 diverters known to the State Water Board. The considerable majority of the natural flow is diverted in the lower reaches of Deer Creek by two diverters: Stanford Vina and Deer Creek Irrigation District.

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<sup>4</sup> Lindley S.T., R.S. Schick, E. Mora, P.B. Adams, J.J. Anderson, S. Greene, C. Hanson, B.P. May, D.R. McEwan, R.B. MacFarlane, C. Swanson, and J.G. Williams, "Framework for Assessing Viability of Threatened and Endangered Salmon and Steelhead in the Sacramento-San Joaquin Basin," 2007. San Francisco Estuary and Watershed Science Volume 5, Issue 1 (February 2007), California Bay-Delta Authority Science Program and the John Muir Institute of the Environment, Article 4.

<sup>5</sup> National Marine Fisheries Service, 2014. "Final Recovery Plan for Sacramento River Winter-Run Chinook Salmon, Central Valley Spring-Run Chinook Salmon, and the Distinct Population Segment of Central Valley Steelhead." West Coast Region, Sacramento, CA.

<sup>6</sup> Cramer and Hammack, 1952. Salmon Research at Deer Creek, Calif. U.S. Department of the Interior, Fish and Wildlife Service. Washington, D.C.  
Terraqua, 2013. Optimizing Management of The Nature Conservancy's Water Rights and Land on Mill Creek for Sustainable Fish Habitat Restoration: Status and Trend of Anadromous Fish in Mill Creek. Terrestrial and Aquatic Applied Research and Management, Memorandum to The Nature Conservancy, July 23, 2013.

<sup>7</sup> National Marine Fisheries Service, 1998. "Factors Contributing to the Decline of Chinook Salmon: An Addendum to the 1996 West Coast Steelhead Factors for Decline Report." Portland, Oregon: Protected Resources Division.

In accordance with Government Code section 11346.1, subdivision (a)(2), on May 13 and 14, 2014, the State Water Board provided notice of a proposed draft regulation to establish minimum flow requirements on three tributaries to the Sacramento River which the National Marine Fisheries Service and the California Department of Fish and Wildlife designated as high priority streams for the survival of the threatened Central Valley spring-run Chinook salmon and threatened California Central Valley steelhead. These are Deer Creek (from which Petitioner diverts), Mill Creek and Antelope Creek, all in Tehama County. In addition to the text of the proposed regulation and the notice document, the State Water Board circulated a digest of information describing the reasons for proposing the regulation and listing the sources relied upon in its analysis. The State Water Board received nine timely comment letters on the proposed regulation prior to the public meeting, including one by Petitioner.

On May 20 and 21, the State Water Board held a public meeting during which the State Water Board heard from State Water Board staff, staff of the National Marine Fisheries Service and the California Department of Fish and Wildlife, and 13 public commenters, including individual irrigators and their representatives, irrigation districts, water purveyors and others. State Water Board members engaged both agency staff and the general public in extensive discussion concerning the proposed regulation, and made several changes to the proposed regulation as a result of public comments. Petitioner and other water rights holders on Deer Creek were among those who commented before and during the State Water Board meeting. The State Water Board adopted the regulation on May 21, 2014.

On May 22, 2014, Petitioner submitted a letter alleging that the notice period for the regulation was inadequate, as the State Water Board made changes in the text of the proposed regulation prior to adoption. The State Water Board's Chief Counsel responded to the letter on May 30, 2014.

On May 23, 2014, OAL circulated the regulation for a second round of comments pursuant to Government Code section 11349.6, and received comment letters from nine stakeholders, including a letter to from Petitioner. OAL subsequently approved the drought emergency

regulation and filed it with the Secretary of State on June 2, 2014, as sections 877 through 879.2 of title 23 of the California Code of Regulations.

On June 5, 2014, the Deputy Director of the Division of Water Rights at the State Water Board (Deputy Director) issued Order 2014-0022 implementing the emergency regulation on Deer Creek. By this date, voluntary agreements covering substantially all of the water diverted in Mill and Antelope Creeks had been reached among the various diverters, the California Department of Fish and Wildlife and the National Marine Fisheries Service, obviating the need for action under section 877, subdivision (c) in those watersheds. (Compare memoranda from Executive Director Thomas Howard to State Water Board Members regarding NMFS and CDFW Voluntary Drought Agreements on Mill and Antelope Creeks (June 4, 2014, [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/docs/mill\\_deer\\_antelope\\_creeks/mill\\_agreement.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/mill_deer_antelope_creeks/mill_agreement.pdf); [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/docs/mill\\_deer\\_antelope\\_creeks/antelope\\_agreement\\_updated.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/mill_deer_antelope_creeks/antelope_agreement_updated.pdf), last visited Sept. 11, 2014) with the memorandum from Executive Director Thomas Howard to State Water Board Members regarding NMFS and CDFW Voluntary Drought Agreements on Deer Creek (June 4, 2014, [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/docs/mill\\_deer\\_antelope\\_creeks/deer\\_agreement.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/mill_deer_antelope_creeks/deer_agreement.pdf), last visited Sept. 11, 2014).) Order 2014-0022 required all 50 diverters in Deer Creek known to the State Water Board, including Petitioner, to bypass 50 cubic feet per second (cfs) of water or full natural flow without diversion, whichever is less, before diverting any excess water in order of water right priority. The requirement was to be in effect until June 30, 2014, or until the Deputy Director suspended the curtailment order, with an additional provision for the Deputy Director to reduce the required bypass flows to 20 cfs under certain conditions. After a member of Stanford Vina's Board of Directors refused personal service of the order, an employee received service on June 6, 2014. (Affidavit and Proof of Service, Scott Willems, June 6, 2014.)

On June 12, 2014, the Deputy Director reduced the required bypass flows to 20 cfs. Also on that date, the Assistant Deputy Director for Water Rights at the State Water Board (Assistant Deputy Director) sent a draft cease and desist order (CDO) to Petitioner with a cover letter explaining the

intent to enforce against Petitioner for alleged violation of Order 2014-0022 and for unlawful diversion.

Petitioners submitted a ‘Response to State Water Resources Control Board Regarding Emergency Regulations for Curtailment – Deer Creek’ dated June 12, which indicates an intent to comply with the fishery bypass requirements of Order 2014-0022. All recipients of a curtailment order are required respond with a certification of compliance within 5 days of issuance. (§ 879.) Petitioner’s submittal appears to be both a response to Order 2014-0022, as it references a response timeline required from that order, and also a response to the actions taken by the Deputy Director and Assistant Deputy Director on June 12.

The State Water Board received Stanford Vina’s petition for reconsideration and a hearing request on the proposed draft CDO on July 3, 2014.

#### **4.0 CONTENT OF PETITION FOR RECONSIDERATION**

The petition for reconsideration consists of a three page letter entitled “petition for reconsideration” and a series of four attachments. The letter states that Petitioner requests reconsideration of three actions: (1) adoption of the above-referenced emergency regulation; (2) issuance of Order 2014-0022; and (3) the June 12, 2014 issuance of “Order WR 2014-00XX-DWR threatening commencement of Enforcement Action ENF001023 and enclosing a draft cease and desist order.”

Petitioner states that it is seeking reconsideration based on the following causes: “irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing,” “the decision or order is not supported by substantial evidence” and “error in law.” (Petition, citing § 768, subdivisions (a), (b), (d).) For a description of the reasons why the Board’s actions are inappropriate and improper, Petitioner refers, without elaboration, to a series of letters Petitioner submitted to the State Water Board and sometimes other agencies at various points during the adoption and implementation of the drought emergency regulation.



The specific actions Petitioner requests are that the Board “vacate its decisions to approve the Regulations, Curtailment Order and Draft CDO and compensate Stanford-Vina and its shareholders for damages incurred as a result of the improper actions undertaken.”

As noted above, Petitioner attached four letters to the petition for reconsideration. It is difficult to ascertain what statements in the four letters attached to the petition for reconsideration are meant as policy statements disagreeing with adoption of the emergency regulation, and which are legal objections intended to support the grounds for reconsideration. The summary below constitutes the State Water Board’s best interpretation as to the arguments in each document.

Exhibit A is a May 19, 2014 letter to the State Water Board as well as representatives from the National Oceanic and Atmospheric Association [National Marine Fisheries Service], and the California Department of Fish and Wildlife, sent as a comment on the proposed adoption of the drought emergency regulation. The letter objects to any adoption of “Emergency Regulation 877”<sup>8</sup> without:

(1) first holding a full evidentiary hearing in regard to the reasonableness of use of water, and as to whether the agricultural use is wasteful, (2) without compliance with the eminent domain law of California, and (3) the SWRCB [State Water Board] obtaining an amendment or Supplemental Judgment in the Adjudication of water in the respective creeks by the Tehama County Superior Courts without applying to that Court for such an amendment.

(Exh. A, p. 2)<sup>9</sup> It additionally asserts that “public trust uses are not applicable and not reserved upon Mexican Land Grant originated property in California” which it states Stanford Vina’s lands are (Exh. A, p. 4). Much of the letter then discusses these basic arguments. The rest of the letter appears to be policy statements and exhortations. Attached to the letter is an unsigned, undated declaration “of some Board Member of Stanford Vina Ranch Irrigation Company” with information on Stanford Vina and its irrigation needs, a description of the town of Vina and its water needs and resources, information on past interactions with CDFW and NMFS regarding

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<sup>8</sup> It is unclear whether Petitioner intends this to refer to the entirety of the emergency regulation, i.e. section 877 through 879.2, or solely to section 877.

<sup>9</sup> This document refers to each letter attached to the petition by Exhibit number, and uses the pagination in the letter itself. Attachments to individual letters are noted as such.

fisheries, and statements regarding the potential impacts of the proposed regulation. Also attached is a copy of the Consent Decree.

Exhibit B is a May 22, 2014 letter to the State Water Board asserting that the emergency regulation must be re-noticed before submittal to OAL, because the regulation language ultimately adopted by the Board included amendments made at the public meeting.

Exhibit C is a May 28, 2014 letter to OAL and the State Water Board alleging that the proposed emergency regulation “fail[s] to satisfy the procedural and substantive requirements of the Administrative Procedure Act” and that OAL must therefore disapprove it. (*Id.*, p. 1.) This letter restates Exhibit B’s assertion that the changes made to the proposed regulation at the Board’s adoption hearing required re-noticing to the public under Government Code section 11234.1, and asserts that the rulemaking record does not contain specific information on the purpose of adoption and on why the provisions of the regulation are necessary for that purpose, as required by Government Code § 11349.9, subdivision. (b). (Exh. C, pp. 2-5.) The letter then alleges that the regulation fails to meet four of the OAL standards for approval in Government Code section 11349: authority, consistency, necessity, and clarity. (Exh. C, pp. 5-20.) Exhibit C alleges that the Board lacked authority to adopt the regulation as Water Code section 1058.5 and gubernatorial executive orders do not authorize protection of the public trust or public interest, which it argues are distinct from waste and unreasonable use; that the Board cannot declare water use unreasonable by regulation; and that the Board improperly cited Water Code section 1058. (Exh. C, pp. 5-10.) It alleges inconsistency with several existing laws and regulations, including generally: the water right priority system, judicial water rights decrees, the law of waste and unreasonable use, the public trust doctrine, due process, and constitutional protections against taking of property under the California and federal constitutions. (Exh. C, pp. 10-15.) Exhibit C alleges the regulation is not necessary to prevent waste and unreasonable use of water because: the regulation redefines waste and unreasonable use; the supporting documents circulated with the notice of the proposed drought emergency regulation do not indicate that the minimum flow requirements are necessary; and the availability of voluntary agreements to achieve the same goals indicate that the regulation is not necessary. (Exh. C, pp. 15-18.) The letter asserts that the regulation is impermissibly vague in section 878.1, subdivision (b)(1)(B),

regarding availability of other sources of water under the Health and Safety exemption, regarding whether Deputy Director approval of voluntary agreements in section 878.2 is discretionary, and regarding the respective roles of the Executive Director and the Deputy Director in substituting voluntary agreements for application of the emergency regulation. (Exh. C, pp. 18-19.) Finally, it asserts that the description of the regulations is unclear because it does not sufficiently account for changes in the regulations adopted at hearing. (Exh. C, p. 20.)

Exhibit D is a response to paragraph 5 of Order 2014-0022, which requires certification of the response taken by a water user or water right holder to issuance of a drought emergency curtailment order, pursuant to section 879. Exhibit D alleges that the Board had insufficient facts to reduce the minimum flow requirements in Order 2014-0022 (Exh. D, p. 2); that there is no emergency as there is time for a hearing prior to October 2014 and the presence of anadromous fish and the potential for drought have been known in the past (Exh. D, pp. 2-3); and that notice of curtailment is insufficient because Stanford Vina holds riparian water rights in trust for certain landowners who did not receive individual notice (Exh. D, p. 3). Most of the rest of Exhibit D concerns Petitioner's future compliance with Order 2014-0022's pulse and bypass flows, and does not appear to raise additional legal arguments. (Exh. D, pp. 3-6.)

## **5.0 ANALYSIS**

### *5.1 The Petition for Reconsideration is Fatally Inadequate*

Stanford Vina's petition for reconsideration is inadequate in several respects. First, the petition purports to request reconsideration of three actions: approval of the drought emergency regulation on May 21, 2014; issuance of Order 2014-0022 on June 5; and the June 12 issuance of a proposed draft CDO and a letter informing Petitioner of an intent to undertake enforcement action. Adoption of regulations is a quasi-legislative action, not a decision or order subject to reconsideration under Water Code section 1122. Additionally, even were adoption of regulations subject to reconsideration under Water Code section 1122, the petition for reconsideration would be barred as untimely, as it was not received within 30 days of approval of the emergency regulation on May 21, 2014. The issuance of a proposed draft CDO is also not a decision or order subject to reconsideration under Water Code section 1122, as it is only a proposed action. Stanford Vina has requested a hearing on the proposed draft CDO, as provided for under Water

Code section 1834, subdivision (b). For these reasons, the petition as it relates to the action on May 21, 2014 is denied as untimely and inappropriate for reconsideration. The petition as it relates to the action on June 12, 2014 is denied as unripe and inappropriate for reconsideration.

Second, none of the requested relief actions that Petitioner specifies under section 769, subdivision (a)(5) are appropriate. Petitioner “requests that the State Water Board vacate its decisions to approve the Regulations, Curtailment Order and Draft CDO and compensate Stanford-Vina and its shareholders for damages incurred as a result of the improper actions undertaken by the State Water Board and its staff.” (Petition, p. 2, second para. 4.) Even if the request for reconsideration of adoption of the drought emergency regulation were timely and appropriate under Water Code section 1122, the drought emergency regulation has been approved by OAL and codified into the California Code of Regulations, and would not be affected by a decision to “vacate” the Board’s approval of the regulations. (See Administrative Procedure Act, Government Code sections 11340 et seq.) Order 2014-0022 is no longer in effect; a decision to vacate approval of it would accordingly have no effect. The proposed CDO is also not in effect: there is no approval to vacate. Petitioner has not requested, much less supported, any specific sum nor detailed any alleged damages for its compensation request.

Third, Petitioner has failed to notice interested parties regarding the petition for reconsideration, as required under section 769, subdivision (a)(6). Multiple parties commented on the adoption of the drought emergency regulation with written comment letters to the State Water Board and to OAL, and many appeared at the adoption hearing in front of the Board. Order 2014-0022 applies not only to Petitioner, but also to 49 other diverters on Deer Creek, including Deer Creek Irrigation Company with whom Petitioner must coordinate diversions in order to assure compliance with the Consent Decree and Order 2014-0022. The contact information for these diverters is included as Attachment A to Order 2014-0022. Yet, Petitioner claims “Stanford-Vina does not believe that this petition is required to be sent to any other parties.”<sup>10</sup> The petition for reconsideration is denied for failure to notice interested parties.

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<sup>10</sup> Interestingly, Petitioner claims that the Board’s notice of Order 2014-0022 was procedurally inadequate because it was delivered to the Stanford Vina Ranch Irrigation Company and not to each individual landowner to whom Stanford Vina delivers water. It is unclear how Petitioner can claim it “does not believe that [its] petition is required [footnote continues on next page]

Fourth, Petitioner failed to include a memorandum of points and authorities in support of its legal arguments, as required under section 769, subdivision (c). The petition alleges three causes for reconsideration, procedural irregularity, evidentiary insufficiency and legal error. However, Petitioner did not attach an analysis of Order 2014-0022 articulating the types of procedural, evidentiary and legal errors with citations to authority on the standards the State Water Board ostensibly failed to meet. Instead, Petitioner attached a grouping of four letters submitted to the State Water Board and other agencies during the drought emergency regulation approval process and as a response to Order 2014-0022. As described above, the letters are a mix of policy exhortation and legal argument, and it is difficult to discern the difference, particularly given the paucity of legal citations and standards provided. Petitioner makes no attempt to describe what, if any, arguments made regarding the adoption or approval of the regulation apply to reconsideration of Order 2014-0022, or survive approval of the regulation by OAL and codification of the regulation. Some arguments are or appear to be made to other agencies and it is unclear whether or how Petitioner intends these to be part of the petition for reconsideration. For example, Exhibit A contains a section heading related to NMFS's liability for take, and Exhibit C is framed entirely as an argument to OAL against approval of the proposed drought emergency regulation. Some of the letters refer to sections of the proposed regulation that do not appear to be at issue in Order 2014-0022 (e.g. voluntary agreement provisions in sections 877, subdivision (c) and 878.2), or to future actions outside Order 2014-0022's scope (e.g. October 2014 flows). Exhibit D, the only letter written after issuance of Order 2014-0022, does not articulate any perceived weakness of the Order itself or its issuance, nor does it articulate any argument as to how any of the perceived weaknesses it does assert regarding the underlying emergency regulation relate to Order 2014-0022. The Board denies the petition for failure to comply with section 769, subdivision (c). Additionally, because Petitioner fails to articulate an argument linking the previously-submitted letters to the causes for reconsideration, Petitioner has failed to raise substantial issues related to the causes for reconsideration, and the State Water Board additionally denies the petition on that ground. (See section 770.)

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to be sent to any other parties" as required by section 769, subdivision (a)(6), but at the same time suggest that the Board's notice to Stanford Vina, as a right holder under the consent decree, as a trustee for those it delivers water to, as a diverter of water, or otherwise, was not adequate.

*5.2 Even if the Petition were Adequate, it Would Fail on the Merits, Insofar as the Issues Raised by the Petition can be Discerned*

*5.2.1 Order WR 2014-0022-DWR was Based on Substantial Evidence*

Petitioner asserts that Order 2014-0022 is not supported by substantial evidence. (Petition, p. 2, para. 4.) However, Stanford Vina does not address the information in Order 2014-0022 regarding the basis for the order.

Order 2014-0022 describes the background situation and makes findings supporting the requirement that all water right holders in the Deer Creek watershed bypass minimum fishery flows described in section 877, subdivision (c)(2). Order 2014-0022 describes the statewide drought situation and the executive orders that call for extraordinary measures to address the effects of the drought, including effects on listed species. (See *Id.* at Background paras. 1-3.) Order 2014-0022 describes the emergency regulation adopted for “Curtailed of Diversions due to Insufficient Flow for Specific Fisheries” and its goals, including the minimum migration flows and timeframes established for threatened salmonids in section 877, subdivision (c)(2). (*Id.*, Background paras. 6, 7, 13, 14, 15.) It additionally cites flow measurements below Petitioner’s point of diversion that are significantly lower than those minimum regulatory flows, and describes weather forecast information that suggests that the flows are likely to drop further. (*Id.*, Background para. 11.) Order 2014-0022 makes several findings related to issuance of a curtailment order under the drought emergency regulation. (*Id.*, Findings, para. 1-5.) Adoption of the drought emergency regulation itself, under which Order 2014-0022 was issued, was supported by a 47-page Finding of Emergency in compliance with Government Code section 11346.1, including more than five pages of citations to additional supporting documentation.

It is unclear what parts of Order 2014-0022 Petitioner is challenging as unsupported by substantial evidence, or what information Petitioner suggests is missing from an analysis of whether the emergency regulation applies. Exhibit D characterizes the evidence regarding the Deputy Director’s June 12 action to reduce minimum base flows to 20 cfs based on the absence of adult migratory salmonids as “rumor,” “informal ‘hunches’” and “hearsay.” (*Id.*, p. 2.) While

the letter is not clear, it appears to argue that the Deputy Director should not rely on reports from the CDFW or NMFS, which are actively monitoring Deer Creek salmonid runs under their mandate to protect listed species. Section 877, subdivision (c)(2) provides for coordination with the CDFW and NMFS regarding information to determine presence of listed fish and timing and duration of pulse flows. To the extent that Petitioner is suggesting that use of information from fisheries agencies charged with protecting listed species fails to meet the “substantial evidence” standard for agency decisions under the drought emergency regulation, or that the State Water Board must send staff to personally inspect all waterways in the state rather than relying on gauge data and information reported by other state agencies, the State Water Board rejects this contention. (See Wat. Code, § 187 [requiring state agency coordination to avoid duplication of effort].) Further, the reduction in flows for which Petitioner makes these allegations is not part of Order 2014-0022, and therefore not part of the petition for reconsideration.

Exhibit C to the petition argues that there is insufficient evidence of necessity of the regulation for purposes of OAL approval in part because Attachment 12 to the regulatory Digest states that the minimum base flows established in section 877 have “generally ... been found” to permit fish passage and include the National Marine Fisheries Service’s interpretation of what pulse flows “should be.” (Exh. C, p. 17.) While this is the only part of the petition for reconsideration that cites specific evidence on which the regulation relies, it is not raised in the context of Order 2014-0022 or in the context of a substantial evidence argument. To the extent that this is intended as a substantial evidence argument in the context of the petition for reconsideration, the Board disagrees that the cited language in NMFS memorandum somehow invalidates the recommendations. In adopting the regulation the Board considered and relied on a host of studies regarding fish migration on Mill, Deer and Antelope Creeks, as well as more general information on fishery needs and population, and discussed the proposed flows at length with Board staff, representatives from NMFS and DFW, as well as commenters at the public meeting. This information provides substantial evidence regarding the flow targets adopted in section 877.

To the extent that Petitioner is asserting that facts relied on in issuing Order 2014-0022 are insufficient because they were not raised in a formal adjudicative hearing, as opposed to the procedures set forth in section 877, Petitioner cites no authority, and the Board can find none, for

the underlying assumption that substantial evidence is possible only in the context of a formal evidentiary hearing. In fact, the opposite is true. (*City of Santa Cruz v Local Agency Formation Com.* (1978) 76 Cal.App.3d 381, 388-89; *Mohilef v. Janovici* (1996) 51 Cal.App.4<sup>th</sup> 267.) The Board rejects such contention.

Here, the Board noticed its proposed regulation as required under Government Code section 11346.1, circulated a document that included references and attachments with the underlying evidence supporting the regulation and articulating the rationale for adoption. The Board held a public hearing at which Petitioner's counsel and other diverters on Deer Creek made presentations to the Board. OAL approved the drought emergency regulation. Order 2014-0022 was later issued per the procedures outlined in the regulation, which Petitioner does not dispute. Petitioner does not contest the primary facts of temperature, flow data or fish presence upon which Order 2014-0022 relies.

#### *5.2.2 Issuance of Order 2014-0022 was Procedurally Proper*

Petitioner does not appear to allege that issuance of Order 2014-0022 failed to follow the procedures set forth in section 877.

Rather, it appears that Petitioner believes that some or all of a number of perceived procedural shortcomings by the State Water Board or OAL in notice, adoption and approval of the emergency regulation serve to invalidate either the regulation itself or orders under the regulation. Petitioner has not provided an authority for this proposition or a standard under which to measure the extent to which any of the alleged procedural violations have survived adoption of the regulation by the State Water Board or approval by OAL, and which would affect the validity of implementation of the regulation in Order 2014-0022.

Nevertheless, the State Water Board finds the broad concerns Petitioner raises lack merit, even where they lack sufficient specificity to raise a substantial issue as identified below.

#### *5.2.2.1 The State Water Board was not required to hold an evidentiary hearing prior to adopting the emergency regulation*



Petitioner alleges repeatedly, or offers arguments that appear to rely on the assumption, that the drought emergency regulation itself or the determinations in the regulation regarding reasonableness required holding a prior evidentiary hearing. (E.g, Exh. A, pp. 2-3, 5-6; Exh. C, pp. 13-15; Exh. D, pp. 2-3.) This assertion appears to either be related to the fact that the regulation involves the doctrine of waste and unreasonable use or related to Petitioner's allegation that the regulation effects a taking, as further discussed in section 5.5.2.2, below.

The adoption of unreasonable use regulations is a quasi-legislative, rather than a quasi-adjudicative action. (See *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4<sup>th</sup> 1463, 1495.) Adversarial evidentiary hearings are not required for quasi-legislative decisions. (*Franchise Tax Board v. Superior Court* (1950) 36 Cal.2d 538, 549.) The State Water Board has complied with the statutory process for adoption of emergency regulations in Government Code section 11346.1, as evidenced by both the materials submitted to OAL and OAL's ultimate approval of the regulation. This process balances the need for public input and notice with the need to act quickly in emergency situations requiring urgent action. The State Water Board issued notice and circulated the proposed regulatory text and a Finding of Emergency more than the five days prior to submittal to OAL, exceeding the minimum requirements in Government Code section 11346.1. In addition to receiving written comments, the State Water Board held a public meeting over two days to receive and consider public comment, including comments by Petitioner. OAL then circulated the proposed regulation for a second five day comment period, and received and considered comments, including those of Petitioner. Petitioner has actively participated in the statutory process set forth for emergency regulations; this process does not include an evidentiary hearing.<sup>11</sup>

Despite Petitioner's statements to the contrary, the State Water Board has the authority to balance uses under the waste and unreasonable use doctrine by regulation. (*Light v. State Water Res. Cntrl. Bd.* (2014) 226 Cal.App.4<sup>th</sup> 1463, 1484 [“...the Board's grant of authority to ‘exercise the ... regulatory functions of the state’ ([Wat. Code,] § 174) necessarily includes the

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<sup>11</sup> Petitioner has also submitted a request for hearing regarding the draft CDO alleging violations of Order 2014-0022 and unlawful diversions. A hearing must be held before any individualized enforcement action can be taken, if a hearing is requested and there are material issues of fact in dispute. (Wat. Code, § 1834.)

power to enact regulations governing the reasonable use of water.”].) Both the State Legislature and Governor specifically contemplated such action in this drought year, as evidenced by the amendments to Water Code section 1058.5 that went into effect on March 1, 2014 as part of drought response legislation and the Governor’s April 15, 2014 drought proclamation. The legislative amendments specifically grant the State Water Board the authority to adopt emergency regulations addressing waste and unreasonable use and the Governor’s Executive Order specifically directs the Board to use this authority where appropriate. The State Water Board finds no merit in the suggestion that taking regulatory action for waste and unreasonable use is improper or that this quasi-legislative action requires an evidentiary hearing.

Petitioner does not appear to allege that a hearing was required before issuance of Order 2014-0022, or that the State Water Board failed to follow the regulatory procedures for issuance of curtailment orders in section 877.

*5.2.2.2 The Emergency Regulation does not constitute an exercise of eminent domain or a taking of property in violation of the 5<sup>th</sup> Amendment of the United States Constitution or Article 19(a) of the California Constitution.*

Petitioner asserts that the State Water Board should have followed the procedures for asserting eminent domain (Code Civ. Proc., §§ 1245.210 et seq) in adopting the drought emergency regulation because the regulation otherwise would effect an unlawful taking of property. Petitioner relies on two federal cases for this proposition: *Tulare Lake Basin Water Storage District v. United States* (Fed. Cl. 2001) 49 Fed.Cl. 313 and *Casitas Municipal Water Storage v. United States* (no citation provided). (Exhibit A, p. 7.)

However, Petitioner fails to explain, how government action to prevent the diversion or use of water *in an unreasonable manner* can be a taking, when a water right does not include a right to unreasonable use. A taking necessarily involves the acquisition for public use of private property. However, water rights in California are not like real property rights, and by their very nature are “limited and uncertain.” (*People v. Murrison* (2002) 101 Cal.App.4th 349, 359.) All water rights are subject to the requirements of the reasonable use doctrine, among other

limitations. (See *United States v. State Water Resources Control Board* (1986) 182 Cal. App. 3d 82, 105-106.)

The reasonable use doctrine of Article X, section 2 of the California Constitution imposes an “overriding constitutional limitation” on all water rights in California. (*Id.* at 105-106.) This provision is expressly declared to be “self-executing,” meaning that water rights must at all times be exercised in a manner consistent with mutable standards of reasonableness. (Cal. Const., Art. X, § 2; see also *People ex rel. State Water Resources Control Board v. Forni (Forni)* (1976) 54 Cal.App.3d 743,750, citing *Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 567. [“What is a beneficial use, of course, depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.”].) All water rights are subject to the continuing authority of the State Water Board to prevent waste and unreasonable use. (*United States v State Water Resources Control Board, supra*, 182 Cal.App.3d at 129.)

What constitutes an unreasonable use of water, method of use or method of diversion depends upon the facts and circumstances of each case, and varies as facts and circumstances change. (*Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 140.); *Environmental Defense Fund, Inc. v. East Bay Municipal Utility Dist.* (1980) 26 Cal.3d 183, 194.) Uses of water that would otherwise be considered reasonable may subsequently become unreasonable in light of changed factual and legal circumstances, such as, for example, during a severe drought where the water source in question provides one of the best opportunities for recovery of a listed endangered or threatened species. (*E.g. Forni, supra*, 54 Cal.App.3d at p.750). The California courts have uniformly held that, because there is no property right in an unreasonable use of water, a water user can never obtain a vested right to use water in a manner inconsistent with Article X, section 2 of the California Constitution. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351); *Joslin, supra*, 67 Cal. 2d at 144-145; *Imperial Irr. Dist.v. State Wat. Res. Cntrl. Bd* (1990) 225 Cal.App.3d 548, 563-64.)

The state is not required to undertake an eminent domain proceeding or to otherwise compensate a water right holder for a property interest that water right holder does not have. (*American Pelagic Fishing Co., L.P. v. U.S.* (Fed.Cir. 2004) 379 F.3d 1363, 1572.)

In fact, the *Casitas Municipal Water Storage v. United States* litigation Petitioner references finds that a requirement to reduce diversions that was the result of a State Water Board decision regarding the public trust would *not* constitute a taking:

Should the SWRCB [State Water Board] ultimately find that flows of 50 cfs or more are necessary to protect the steelhead, then any prospect plaintiff may have had for pursuing a takings claim in this court will be eliminated. . . . [W]e would view such a pronouncement by the Board as a determination that the public trust doctrine strikes the balance between consumptive and environmental needs in this case in favor of the fish. That conclusion would be enough for defendant to succeed in a background principles of state law defense under *Lucas* [*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)] (*Lucas*, it should be remembered, counsels that a plaintiff possesses no property right in a use that could have been prevented under background principles of state law.)

(*Casitas Mun. Water Dist. v. U.S.* (Fed. Cl. 2011) 102 Fed.Cl. 443, 473-74 aff'd, (Fed. Cir. 2013) 708 F.3d 1340 [footnote omitted].) As discussed above, the doctrine of waste and unreasonable use is a background principle of state law for purposes of a takings claim. This case is a later decision by the same judge in the same court that decided *Tulare Lake Basin Water Storage District v. United States* (Fed. Cl. 2001) 49 Fed.Cl. 313, the other federal case Petitioner cites.

### 5.2.2.3 *The State Water Board had the authority to promulgate regulations affecting water rights subject to a judgment in Tehama County Superior Court*

Petitioner asserts that it was procedural error to adopt the minimum flows by emergency regulation rather than by petitioning to reopen the Consent Decree, *Stanford Vina Ranch Irr. Co. v. Dicus* (November 27, 1923) in Tehama County Superior Court. attached to Exhibit A. That judgment accepts a consent decree concerning the water rights of some of the water users in the Deer Creek watershed, including Petitioner. (*Id.*) Petitioner asserts that the Consent Decree is “conclusive as to the rights of all existing claimants upon the stream system” under Water Code section 2773. (Exhibit D.) Water Code section 2773 applies only to decrees issued as part of a

statutory adjudication under Water Code section 2500 et seq, and is inapposite to the issues under reconsideration.<sup>12</sup>

The Consent Decree established the method for division of the waters of Deer Creek, as among the parties, at specific points of diversion. Petitioner fails to cite to any specific language in the Consent Decree that indicates that the judgment binds any party outside the signatories to the Consent Decree, or that the Tehama County Superior Court acted to preclude the State Water Board from exercising future regulatory jurisdiction over the subject water rights subject. The State Water Board understands the Consent Decree to settle questions of apportionment and water use as among the parties, and sees no reason that the general rule of concurrent jurisdiction over water rights should not apply here. (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 359-360 [statutory action by State Water Board not barred by prior decree]; *National Audubon Society v. Superior Court* (1903) 33 Cal.3d 419, 426 [discussing concurrent jurisdiction].)

The Consent Decree establishes the “final settlement and determination *between the Plaintiff and said Defendants*” of the rights to divert and use the waters of Deer Creek. (Consent Decree, p. 12, par. XIV [italics added].) It assigns to Plaintiff (Petitioner, here) 65 percent of the natural flow of the creek at a certain point, and 35 percent to Defendants and to George and Lyndon Baker, who were not part of the Consent Decree. (*Id.* at pp. 10-11, pars. XI, XII.) The Consent Decree further provides for changes in the apportionment between the Plaintiffs and Defendants should the Bakers’ portion turn out to be greater than anticipated. (*Id.* at p. 13, par. XVIII.) The 1923 Consent Decree predated adoption of the 1928 constitutional amendment establishing the reasonable use doctrine as applicable to all water rights, and did not address the doctrine of waste and unreasonable use, or address the needs of public trust uses, including endangered species protection. (Cal. Const., Art. X, § 2.) Petitioner offers no explanation how a Consent Decree determining the relative rights of several diverters could exempt those diversions from the

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<sup>12</sup> Even if section 2773 were applicable, it would not bar a later State Water Board proceeding to prevent waste or unreasonable use. As discussed in Section 5.2.2.2 of this Order, no one can obtain a vested right to waste or unreasonable use, and what constitutes waste or unreasonable use changes as conditions change.

ongoing requirement of reasonableness contained in Article X, section 2 of the California Constitution.

Additionally, Petitioner articulates no argument why a consent decree would remove the water rights it concerns from the effect of State Water Board regulation. The judicial branch does not exercise quasi-legislative authority, and it is unclear why an assertion of jurisdiction would affect quasi-legislative actions by the State Water Board. Inasmuch as the Board's quasi-legislative action created a generally-applicable rule in the listed watersheds regarding the reasonableness of affected diversions that does not affect the *relative* rights of the parties to the Consent Decree, it is unclear, and Petitioner does not explain, how the Consent Decree could protect those diversions from application of that rule.

#### *5.2.2.4 OAL Approval of the Regulation was Proper*

5.2.2.4.1 Changes to the emergency regulation adopted at a public meeting did not require recirculation of the adopted regulation prior to submittal to OAL

Petitioner asserts that changes to the emergency regulation required recirculation prior to submission to OAL, because Government Code section 11346.1, subdivision (a)(2), requires an agency to circulate "specific language proposed to be adopted" five working days before submittal to OAL. (Exhs B, C pp 2-4.) Petitioner alleges that the language changes made to the text at the public meeting, which Petitioner's counsel attended, were somehow inadequately noticed or "kept secret" until submittal to OAL. (Exh. C, pp. 3-4.) Petitioner states that the regulation adopted at the meeting was not "sufficiently related" to the circulated text and that the changes made at the public meeting were not "nonsubstantial" under Gov. Code section 11346.8, subdivision (c) and California Code of Regulations, title 1, sections 40 and 42. (Exh. B.)

As the State Water Board's Chief Counsel explained in a letter to address the concerns raised in Exhibit B on May 29, 2014, the State Water Board's notice prior to the Board meeting was sufficient:

The State Water Board's notice suffices under Government Code, section 11346.1, subdivision (a)(2). First, the notice and specific language of the proposed emergency regulation was provided more than five days before submission to OAL. Second, as

emergency regulations the board's action was not subject to the additional procedure you identify in Government Code section 11346.8, subdivision (c). (Gov. Code, § 11346.1, subd. (a)(1).) Third, the minor revisions to the regulation which the State Water Board adopted at a public meeting before approving the proposed regulations did not change the subject of or issues addressed by the regulations. Therefore, notice of the previously circulated proposed regulation were sufficient. (See *Schenley Affiliated Brands Corp. v. Kirby* (1971) 21 Cal.App.3d 177, 193; 2 Cal.Jur.3d Admin. Law, § 282.)

OAL, the agency with interpretive authority over the sections of the Government Code relating to adoption and approval of regulations, submitted the regulations to the Secretary of State for filing after receiving Petitioner's Exhibit C. OAL appears to agree that the regulations were properly circulated. This determination supports the conclusion that the Board complied with the requirements of the Government Code for adoption and submittal of emergency regulations.

Furthermore, Petitioner articulates no argument as to the effect of any alleged circulation defect after OAL has approved the regulation and filed it with the Secretary of State. Petitioner also does not articulate whether it believes that the perceived notice deficiency has somehow "infected" Order 2014-0022, as Petitioner merely attached the comment letter making this argument to OAL to the petition for reconsideration. Because Order 2014-0022 complies with section 877 and Petitioner did not timely dispute the adoption of section 877 (nor has Petitioner shown an error regardless of timeliness, as described above), Petitioner has not substantiated any cause for reconsideration of Order 2014-0022 based on this theory.

#### *5.2.2.4.2 The State Water Board's rulemaking record has sufficient information on the purpose of the regulation*

Petitioner alleges in Exhibit C that the rulemaking record does not meet the standards of Government Code section 11349.1 and California Code of Regulations, title 1, section 10, because it does not contain a statement of purpose, information explaining why each provision is necessary and "only contains the most generalized statements of need" on pages 16-18 of the emergency regulation digest circulated on May 13, 2014. (*Id.*, p. 5.) Petitioner does not explain what level of specificity it believes Government Code 11349.1, requires, why the 57 page explanatory Digest is not a sufficient statement of purpose and explanation of the purpose and necessity of the regulation, or what about pages 16-18 it finds to be unsatisfactory. Petitioner

also articulates no link between the alleged deficiencies and Order 2014-0022. Given the paucity of information concerning Petitioner's actual concerns, the State Water Board cannot answer them here, except to note that OAL does not appear to share the Petitioner's procedural concerns and that the regulations and Digest adequately address the purpose of the emergency regulation.

As above, Petitioner fails to explain the effect it believes this alleged failure has after submittal of the regulation to the Secretary of State, or how it substantiates any cause for reconsideration under section 768.

*5.2.2.4.3 Water Code sections 1058 and 1058.5 provide proper authority for adoption of the emergency regulation*

Petitioner argues that the State Water Board improperly provides a citation to the State Water Board's general authority to adopt regulations under Water Code section 1058 as well as its specific authority to adopt drought emergency regulations under Water Code section 1058.5. (Exh. D, p. 10.) Petitioner does not further explain why the adopted emergency regulation is not properly part of the "reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties under the [water] code," as permitted under Water Code section 1058, in addition to falling under the more specific grant of regulatory authority under Water Code section 1058.5. Petitioner also states that the State Water Board did not follow the procedural requirements for adoption of regulations under Water Code section 1058, but fails to explain what procedures it believes the Board should have pursued. Nor does Petitioner explain what, if any, effect the alleged error would have since submission of the emergency regulations to the Secretary of State by OAL, or on the issuance of Order 2014-0022.

Petitioner further alleges that the State Water Board improperly relied on the grant of authority to adopt drought emergency regulations under Water Code section 1058.5, as the regulation addresses "public trust" not "waste and unreasonable use." (Exh. D, pp. 6-9.) Water Code section 1058.5, as amended in drought emergency legislation that went into effect on March 1, 2014, authorizes a streamlined OAL review where the State Water Board adopts emergency regulations to address "waste, unreasonable use, unreasonable method of use and unreasonable method of diversion" in certain drought years, including the 2013-2014 water year. As explained



further in section 5.3.2, below, the reasonable use doctrine includes analysis of the impact of a particular water use on all water uses, including public trust uses. Therefore, reliance on Water Code section 1058.5 for the Board's adoption of a rule addressing the reasonableness of the subject diversions in consideration of competing public trust uses was proper.

#### *5.2.2.4.4 State Water Board has established necessity*

Petitioner alleges that the emergency regulation fails to meet the standard of "necessity" for OAL approval purposes. (Exh. C, pp. 15-18.) Petitioner again leaves unasserted any argument regarding the relevance of the "necessity" standard for OAL review purposes to the emergency regulation after filing with the Secretary of State or its relevance to Order 2014-0022.

Petitioner argues that the regulation does not meet the "necessity" standard in part because Appendix 12, p. 56, in the Emergency Regulation Digest "simply declares" certain flow goals to be the minimum flows needed "without citation to any support" and contains other statements regarding what NMFS believes the minimum flows "should be." (Exh. C, p 17.) Petitioner suggests that this expression of professional opinion by the agency charged with protection of endangered species is "no more than the agencies' wishes," apparently because those recommendations are written in the conditional. (*Id.*) Petitioner makes no mention of other information in the record establishing necessity, including a host of studies listed on pages 36-41 of the Finding of Emergency (May 22, 2014). To the extent that this argument is presented seriously, rather than as rhetorical flourish, the State Water Board disagrees; Petitioner cannot reasonably contend that there isn't substantial evidence in the record by turning a blind eye to that evidence.

Petitioner further alleges that section 878.2, which allows the Deputy Director to approve voluntary agreements as an alternative to meeting flow requirements "clearly indicates that regulations are unnecessary." (Exh. C, pp. 17-18.) Petitioner has made clear that it prefers not to be subject to regulation, a preference echoed by other diverters in the affected watersheds at the Board meeting where the emergency regulation was adopted. However, the status quo prior to the Board's initiation and consideration of regulatory action was failing to protect affected listed species. Many diverters in Deer, Mill and Antelope Creeks have entered into voluntary

agreements to achieve the same fisheries protection purposes as the emergency regulation. However, at the time of notice of the regulation, no diverters had entered into such agreements to provide urgently needed flows for endangered species, even though the critical migration periods for the Central Valley spring-run Chinook salmon had already begun. By the time of implementation of the regulation, the diverters of substantially all of the flow on Mill and Antelope Creek had entered into such agreements. At the public meeting where the Board adopted the emergency regulation, at least one water right holder stated that the potential for adoption of a regulation was the impetus for negotiating with fisheries agencies regarding a voluntary agreement. Petitioner cannot and does not show how alternative voluntary compliance with the goals of the regulation makes the regulation itself unnecessary.

Petitioner suggests that migration of threatened salmonids could be enhanced with lower flows, if Petitioner were able to alter the channel of certain riffles in Deer Creek. (“Declaration” attached to Exh. A, para. 55 and Exh. D, p. 6.) However, Petitioner states that permission to alter the stream channel has been denied. (*Id.*) The denial of permission necessary to alter the natural streambed establishes that this is not a viable option. Petitioner offers no studies or expert opinion on its proposed alternative, or any explanation of why the fishery agencies have not approved the request to alter the channel. Representatives from another diverter on Deer Creek, Deer Creek Irrigation District, presented more specific information on the potential for stream alteration at the Board meeting where the emergency regulation was adopted. The Board considered this information before adopting the regulation, concluding that this was not a viable alternative to the regulation. Deer Creek Irrigation District has since entered into a voluntary agreement with the fishery agencies that does not rely on channel modification.

#### 5.2.2.4.5 *The emergency regulation is not impermissibly vague*

It is unclear whether Petitioner intends the allegations regarding OAL’s statutory approval requirements regarding clarity may extend beyond the OAL-approval context to raise a constitutional or other, unspecified vagueness challenge. Petitioner alleges in Exhibit D, pp. 18-20, that the emergency regulation is vague, but fails to identify how the alleged vagueness is relevant to Order 2014-0022, and fails to meet the heavy burden to demonstrate that the regulation is “impermissibly vague in all of its applications.” (*Hotel & Motel Ass’n of Oakland v.*

*City of Oakland* (9th Cir. 2003) 344 F.3d 959, 972.) Courts are particularly reluctant to find a statute vague on its face where a regulated entity can, as here, “clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.” (*Concerned Dog Owners of California v. City of Los Angeles* (2011) 194 Cal. App. 4th 1219, 1231.) Additionally, Petitioner has articulated no manner by which the sections regarding the availability of other water sources under the Health and Safety exception or about the roles of the Deputy Director and Executive Director vis-a-vis voluntary agreements has any impact on Order 2014-0022.

#### *5.2.2.5 The State Water Board Provided Sufficient Notice of Order 2014-0022*

Petitioner purports to give “notice” that it acts only as a trustee of the riparian rights of certain unnamed riparian landowners in trust, and that therefore individualized notice to those riparian owners of curtailment was required, but not received. (Exh. D, p. 3.) Petitioner provides no information on how such notice pertains to the petition for reconsideration.

However, the State Water Board urges Petitioner to note California Code of Regulations, title 23, section 877, subsection (d)(1), which discusses the notice requirements for an initial curtailment order under the drought emergency regulation: “Initial curtailment orders will be mailed to each water right holder or the agent of record on file with the Division of Water Rights. The water right holder or agent of record is responsible for immediately providing notice of the order(s) to all diverters exercising the water right.” The Consent Decree names Stanford Vina as the water right holder for its diversions. Insofar as Petitioner claims to be the Trustee for riparian rights held in trust, it is the agent of record and Petitioner is responsible for providing notice to all of the such water right owners to whom it delivers water.

#### *5.2.2.6 The Current Drought Constitutes an Emergency, and Required Emergency Regulatory Action*

Exhibit D states that there are no grounds for emergency action because the presence of salmon and steelhead in Deer Creek have been known for years and because there is adequate time for a different, non-emergency process prior to October 2014 (when some of the additional flow requirements of section 877 could take effect). (*Id.* at pp. 2-3.) Additionally, and without citation, Petitioner states: “‘Emergency’ is defined as a condition that cannot be anticipated in

reasonable human experience. A drought is not such a condition.” (*Id.* at p. 3.) It is unclear whether these paragraphs are intended as legal argument or as policy commentary.

For the purposes of adopting emergency regulations under Water Code section 1058.5, an emergency regulation is appropriate during specified dry years, or when the Governor has declared a drought state of emergency. This statute also clearly establishes that emergency regulations to adopt waste and unreasonable use regulations are an appropriate response to those conditions. As noted in the materials provided to interested parties and to OAL, at least one of the conditions under which section 1058.5 allows use of the emergency regulation process was present at the time the emergency regulation was adopted – “a period for which the Governor has issued a proclamation of a state of emergency under the California Emergency Services Act.” (Wat. Code, § 1058.5.) This temporary, emergency process does not substitute for any other, longer-term actions that may be contemplated or underway on Deer Creek.

### *5.2.3 The Emergency Regulation Is Not Inconsistent With Other Law*

The petition for reconsideration states that the causes for reconsideration include “error in law” as described under section 768, subdivision (d). Petitioner has presented no guidance as to which of the various contentions in the various letters it submitted raise errors in law, as opposed to procedural concerns. This order construes Petitioner’s contentions as alleging an “inconsistency” with existing law for OAL approval purposes to be those which can most clearly be distinguished as alleging legal error rather than procedural concerns.<sup>13</sup> Additionally, Petitioner’s allegations regarding the applicability of public trust to Mexican land grant lands do not appear to be procedural, and are addressed here. To the extent that Petitioner intends to raise any additional error in law arguments apart from the procedural issues discussed above, such allegation cannot be discerned.

#### *5.2.3.1 The Emergency Regulation Does Not Disregard the Water Rights Priority System*

Petitioner asserts that the drought emergency regulation disregards the water right priority system. (Exh. C, pp. 11-12.) First, it alleges that the Health and Safety provisions improperly

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<sup>13</sup> The exception is the discussion of the effect of the Consent Decree, discussed above.

disregard the rule of priority. Second, it refers to statements by a Board member made at the public meeting adopting the emergency regulation as suggesting that the regulation gives public trust uses of water a “super-senior” priority. Petitioner asserts that this would be in contravention of *National Audubon Society’s* mandate that public trust interests are not part of the water right priority system.

Section 878.1, subdivision (b) states: “Given the essential nature of water in sustaining human life, use even under a more senior right for any other purpose when domestic and municipal supplies required for minimum health and safety needs cannot be met is a waste and unreasonable use.” The regulation then elaborates on a process for self-certification or approval by the Deputy Director for a limited, conditional exception to a curtailment order for minimum health and safety needs, where no alternative supplies are available. Anyone continuing to divert under the exception provided in section 878.1 must submit monthly reports under section 879, subdivision (b) that describe compliance or lack thereof with water use limitations, conservation and efficiency efforts, efforts to obtain alternate water, and other criteria.

This provision does allow for a situation in which a more senior diverter may have to curtail diversions even while some amount of diversion continues under a more junior water right in order to meet minimum health and safety needs. Sufficient water for human consumption and sanitation is a human right in California. (Wat. Code, § 106.3.) Additionally, as the regulation recognizes, there may be other instances in which curtailment of a water right would threaten public health or safety. The regulation provides a framework under which to consider limited exceptions to curtailment orders on a case-by-case basis, where allowing the water to be used for other purposes would constitute a waste and unreasonable use. Here, where no other water is available for health and safety needs, cutting off diversions for the minimum amounts needed to protect those health and safety needs would in fact contravene the human right to water for human consumption and sanitation. When those needs cannot be met because of diversion for other uses, the State Water Board has found those other diversions are unreasonable.

The State Water Board agrees that the priority system is a critical component of water law. However, certain overarching legal principles can override strict adherence of the water right

priority system. *El Dorado Irrigation District v. State Water Resources Control Board (El Dorado)* (2006) 142 Cal. App. 4th 937, 965-66 states as much, citing reasonable use, public trust, and legislative declarations of priority as examples. The change in priority is constrained, however: “the subversion of a water right priority is justified only if enforcing that priority will in fact lead to the unreasonable use of water or result in harm to values protected by the public trust.” (*Id.* at 967.) The situation addressed by the emergency regulation is just such a situation, where strictly enforcing the rule of priority would lead to an unreasonable use of water, and therefore the rule of priority must yield to other principles. The Health and Safety provision of the emergency regulation is a clear exercise of the Board’s waste and reasonable use authority and follows the legislative mandate that access to water for human consumption and sanitation is a human right.

Petitioner’s second point - that the minimum flows set by the regulation violate the priority system by setting a “super-priority” for certain public trust needs - is similarly unsupported and unpersuasive. While the regulation establishes that during this critical drought year diversions that would interfere with minimal necessary endangered species migration flows are unreasonable, it at the same time requires that curtailment occur in order of water right priority.<sup>14</sup> As such, the curtailment process contained in the emergency regulation directly follows the rule set out in *El Dorado*. This is true both for the regulation itself and Order 2014-0022’s implementation of the regulation, which Petitioner does not directly challenge.

#### *5.2.3.2 The Emergency Regulation and Order 2014-0022 Do Not “Rewrite” the Unreasonable Use Doctrine*

Petitioner asserts that the emergency regulation “collapse[s] the distinction” between the doctrines of waste and unreasonable use and the public trust. Petitioner’s arguments regarding this issue are difficult to understand, but Petitioner apparently believes that it is impermissible to make determinations of reasonableness regarding water uses that consider uses protected by the

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<sup>14</sup> The exceptions to this are the previously-discussed exception for minimum health and safety diversions, and any deviations from priority agreed to by diverters on a watershed level as described in section 878.2. As stated in the Digest, voluntary agreements can assist in situations where “strict application of the priority system can have harsh consequences for many water users that depend on diversions for water uses that are important on a personal, local, regional and statewide level.”

public trust. While it is true that the doctrines have a separate history, it does not follow that public trust uses may not be considered in a decision regarding unreasonable use. All uses, including public trust uses, are subject to reasonableness. (*National Audubon Society v. Superior Court* (1983) 33 Cal. 3d 419, 442). A host of decisions recognize public trust uses in the reasonableness context. (See, e.g. *California Trout, Inc. v. State Water Res. Cntrl. Bd.* (1989) 207 Cal.App.3d 585, 622-23 [fishery flow requirements]; *United States v. State Water Res. Cntrl. Bd.* (1986) 182 Cal. App. 3d 82, 130 [water quality standards]; *Light v. State Water Res. Cntrl. Bd.* (2014) 226 Cal.App.4<sup>th</sup> 1463, 1472-73 [fish habitat].) Public trust uses have already been determined to be very much a part of a reasonableness determination, despite Petitioner's apparent contentions to the contrary.

The Board carefully examined the current situation and balanced the competing uses of water in reaching its decision to adopt the emergency regulation. (See *Joslin v. Marin Mun. Wat. Dist.* (1967) 67 Cal.2d 132, 140 [“what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved *in vacuo* isolated from state-wide considerations of transcendent importance”].) The Board had before it information on all uses under water right permits, licenses and statements in all three watersheds subject to the regulation. Public commenters, including Petitioner's counsel, provided additional oral and written information on water use in Deer Creek, and the Board actively engaged with the commenters. Additionally, the Board had before it information on the status of the threatened species, the severity of the current drought, the physical characteristics of Deer, Mill and Antelope Creeks, the importance of Mill, Deer and Antelope Creeks to species survival and recovery, the importance of protecting the early and late migrators in a salmonid population, and other factors relating to fishery migration needs. The emergency regulation was adopted after careful balancing of the various uses of the waters of Deer Creek, and the Board finding that in this extreme drought it would be unreasonable to put to other uses (except minimum human health and safety needs) above the minimum, “belly-scraping” amount of water needed for migration by threatened salmonids in these high priority streams for recovery of the species. Such a decision is well within the State Water Board's broad powers to prevent unreasonable use. (*Fullerton v. State Water Resources Control Board* (1979), 90 Cal.App.3d 590, 603 [“to carry out the necessary balancing process, the statutes have provided the Board with maximum flexibility to consider the competing

demands of flows for piscatorial purposes and diversions for agricultural, domestic, municipal or other uses”]; *United States v. State Water Resources Control Board*, *supra*, 182 Cal.App.3d 82, 130 [“the Board’s power to prevent unreasonable methods of use should be broadly interpreted to enable the Board to strike the proper balance”].)

#### *5.2.3.3 The Doctrines of Waste and Unreasonable Use and Public Trust Apply to Water Use in California, including on Mexican Land Grant Lands.*

Citing *Summa Corp v. California State Lands Comm’n (Summa)* (1984) 466 U.S. 198, Petitioner argues that the public trust doctrine is inapplicable on the lands served by Stanford Vina, as the service area consists of former Mexican land grant lands – lands annexed under the Treaty of Guadalupe de Hidalgo, and patented under the Act of March 3, 1851. (Exhs. A at p 4, C p. 14-15.) In *Summa*, the Court held that California could not enter and dredge a lagoon for which the underlying title had been patented under the Act of March 3, 1851. The Court characterized a public trust easement to enter and dredge a lagoon as being so great a property infringement that it would derogate the confirmed fee interest; since California did not intervene in the proceedings to assert the public trust easement, it could not assert the easement later as against the title confirmed under the Act of March 3, 1851. As Petitioner notes, *Summa* is essentially a preclusion case.

Petitioner did not include copies of any land grant patents, and the actual patents were not available on the Bureau of Land Management’s website. However, Petitioner does not allege and the summary of patent information on the Bureau of Land Management’s website does not indicate that the patents addressed any questions related to water rights. Likewise, the Report of the Surveyor General of the State of California from August 1, 1884 to August 1, 1886, a copy of which was attached to Petitioner’s original letter of May 19, 2014, but not attached to the petition for reconsideration, also fails to mention water rights. Petitioner fails to explain how a patent process that is silent on the question of water rights would preclude California from exercising its public trust authority, or its California Constitution, Article X, section 2 authority, to protect instream flows. Moreover, unlike the public trust easement in the bed and banks of navigable waters, the State’s public trust and reasonable use responsibilities in water are more in the nature of regulatory authority than land title. (See generally *State v. Superior Court (Underwriters at*



*Lloyd's of London*) (2000) 78 Cal.App.4th 1019 [The State of California owns the waters of the state in a regulatory, supervisory sense, not in a proprietary sense].) Petitioner cites no authority for the proposition that *Summa* bars the exercise of state regulatory authority.

## **5.0 CONCLUSION**

Stanford Vina's petition for reconsideration is denied because it fails to conform to the requirements for a petition for reconsideration. Two of the three Board actions it seeks to challenge are inappropriate for a petition for reconsideration under Water Code section 1122. The petition for reconsideration fails to request meaningful relief, and Petitioner failed to notice interested parties. Additionally, Petitioner failed to include a memorandum of points and authorities, instead relying on re-submittal of four letters sent at differing points during the process of adopting, codifying and implementing the drought emergency regulation. The applicability of these letters to the current process remains unexplained. The State Water Board will not reconsider its adoption of the emergency regulation, issuance of Order 2014-0022, or the issuance of a notice of the intent to undertake an enforcement proceeding, as the petition for reconsideration fails to meet the requirements for a petition for reconsideration and fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations, for the reasons described above.

Additionally, to the extent that Petitioner's arguments in the letters can be understood, they are unpersuasive and it appears they fail on the merits. The State Water Board finds that the challenged actions were appropriate and proper.

**ORDER**

**IT IS HEREBY ORDERED THAT** the petition for reconsideration is denied.

**CERTIFICATION**

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 23, 2014.

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Jeanine Townsend  
Clerk to the Board

DRAFT