Via Email
DWR-MillDeerDrought@waterboards.ca.gov

September 8, 2021

Members of the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: Preliminary Draft Drought Emergency Regulation for Mill Creek and Deer Creek Watersheds

Dear Chair Esquivel and Members of the Water Board:

The California Farm Bureau ("Farm Bureau") appreciates the opportunity to provide the following comments on the draft Drought Emergency Regulation for the Mill Creek and Deer Creek Watersheds ("Draft Emergency Regulation") recently noticed by the State Water Resources Control Board ("Board").

Farm Bureau is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the State of California and to find solutions to the problems of the farm, the farm home, and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing approximately 37,000 agricultural, associate, and collegiate members in 56 counties, including substantial membership within the watersheds affected by the Draft Emergency Regulation. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources. Farm Bureau also aims to improve the ability of individuals engaged in production agriculture to utilize California's resources to produce food and fiber in the most profitable, efficient, and responsible manner possible guaranteeing our nation a domestic food supply. To that end, Farm Bureau actively participates in state and federal legislative, regulatory, and legal advocacy relating to water rights and use on behalf of its members.

I. Time for Comment and Preliminary Development of Draft Regulation and Planned Water Board Drought Actions to Date

The time for comment on the draft regulation—scarcely one calendar week, with a three-day holiday weekend in between—is far too short, whereas the Board's intent with respect to potential next steps on voluntary agreements or, in the alternative, emergency regulations is at this time insufficiently clear.

II. Identifying Potential Voluntary Actions

As noted in the Board's September 1st, 2021, notice, Governor's Newsom's March 10, 2021, Drought Proclamation directs the Board and the California Department of Fish and Wildlife (CDFW) to "evaluate minimum instream flows and other actions to protect salmon, steelhead, and other native fishes in critical systems" and "work with water users and other parties on voluntary measures to implement those actions." Where voluntary agreements are "not sufficient," the Governor's Proclamation directs the Board, "in coordination with CDFW," "to consider emergency regulations to establish minimum drought instream flows."

As the Board is aware, Mill and Deer Creeks were the subject of emergency regulations in 2014-15. Per the current order, "Mill Creek and Deer Creek have been identified as priority watersheds for sustaining anadromous Central Valley spring-run Chinook salmon (CV SR Salmon) and California Central Valley Steelhead (CCV Steelhead), both native fishes." The current draft regulation allows for potential voluntary cooperative agreements providing for "watershed-wide protection for the fishery" that are "comparable to or greater than" the minimum base and pulse flow set forth in section 876.5 of the draft regulation.

In 2014, part of the Board's justification for the hasty process then employed—making no detailed factual findings on water rights, reasonably balanced protection of competing beneficial uses, or scientific justification—was the drought emergency and the need for expediency. In 2015, however, after a winter when adjustment and reassessment *would* have been possible, the Board instead simply readopted the same regulation, almost unchanged. Now, 6 years later, with little additional process or deliberative effort to search for drought-year solutions which could be reasonably protective of fish but also less impactful for the water users, the Board is again advancing largely the same regulation.

It is our understanding that local water users on Mill and Deer Creek have, since the 2014-15 timeframe, been making voluntary pulse flows available, supporting gravel replenishment, and other voluntary conservation measures for fish, as well as working collaboratively, productively, and in good faith with CDFW, Trout Unlimited, and others. At no time since 2014-15, however, does it appear that the State has made any sustained effort to work with the water users to identify potential alternative, voluntary emergency drought measures to protect fish while better balancing or seeking means to avoid unreasonable impacts on vested water rights and other established beneficial uses in these watersheds. Nor are we aware of any efforts by the State since 2014-15 to re-examine, adjust, or, in any way, attempt to actually "evaluate minimum instream flows and other actions to protect salmon, steelhead, and other native fishes in critical systems."

Small Central Valley tributaries utilized by anadromous fish, like Deer Creek and Mill Creek, have for millennia run virtually or entirely dry by mid-to late-summer in many, if not most, years. Historically, there is both anecdotal and documentary evidence that water users and state fishery agencies worked together through drought emergencies, routinely modifying channel beds to accommodate reasonable fish passage at little to no water cost. Since 2014, however, neither the Board nor CDFW has entertained any apparent consideration of such simple measures as potentially effective and resource-efficient physical means to reasonably bridge competing needs.

More effort should be put into identifying and developing potential voluntary cooperative actions and alternative approaches to avoid draconian consequences for curtailed users—both in the current drought and beyond. Among these actions and approaches, in addition to flow-related actions, the Board, along with CDFW, should consider potential viable 'physical solutions' including channel modification, fish rescue efforts, fish ladder, and diversion updates, and dry-year alternative water sources (including wells).

III. Failure to Balance and Apply Constitutional Standards Equally to Both Instream and Out-of-Stream Uses

For as long as the very senior water rights in these small, rural, and agricultural watersheds have existed—some as far back as the 1840s—anadromous fish have frequented Mill and Deer Creek, in variable numbers year to year, depending on changing conditions in these streams and the dynamic needs and environmental and behavioral responses of these fish. These 150-year-old diversions and their associated land uses have persisted through countless droughts virtually unchanged—and, through it all, so too have these natural fish populations waxed and waned year-to-year, yet always persisted. There is no evidence that the irrigation uses involved are in any way wasteful or non-beneficial and were never so characterized before 2014-15. The underlying rights were perfected long ago and have been diligently, continuously, and responsibly exercised ever since, in a way that makes them closely bound up with the fabric of these communities, as well as the appurtenant lands and associated economic activities and operations that they support. To suddenly declare these most senior of rights "unreasonable" and unavailable for the purposes they have long served, with only a cursory show of public process, could amount to an uncompensated seizure of these rights.

In declaring irrigation and domestic beneficial uses *automatically* "unreasonable uses" in 2014-15, the Board undertook no rigorous or even perfunctory weighing of comparable benefits and harms, and at no point considered the "reasonableness" of preferential fish and wildlife use itself on balance with the other competing uses in the watershed—nor, to date, does it appear that the Board has so done in 2020-21.

To date, neither the Board, nor the CDFW has yet rigorously shown that CDFW's minimum flow recommendations are actually reasonably effective, that they are necessary, balanced, and consistent with water rights, that they are biological or economically justified, reasonably protective of other beneficial uses, or that they are either the only or the best possible way to meet these objectives. The Board has apparently undertaken no retrospective look to confirm the efficacy of the regulation implemented in 2014-15. Fish presence, timing, and temperature effects, for example, are variables that have been in dispute from the beginning—yet, to our knowledge, the Board has yet to present any substantial evidence that the action it took in 2014-15 reasonably achieved the intended purpose, or that the cost at which it came to competing demands and agricultural water rights holders, in particular, was in fact reasonably justified.

The Board's regulation invokes Article X, Section 2 of the California Constitution as the source of its authority to declare these other non-preferred uses *automatically* "unreasonable" uses (See Draft Reg, § 876.5). Elsewhere, in the context of a minimum human and health safety exception, the Draft Regulation foresees that the Deputy Director would, among other requisite findings, determine that allowable minimum human health and safety diversion would be "necessary to further the constitutional policy (again, of Article X, Section 2 of the California Constitution) that the water resources of the state be put to beneficial use to the full extent they are capable, and that waste and unreasonable use be prevented, notwithstanding the effect of the diversions on more senior water rights or instream beneficial uses." (See Draft Regulation, § 878.1, sub. (a)(2).) These same constitutional standards, however, apply to *all* uses of water, including fish and wildlife and public trust uses.

If *all* uses of the state's water resources must be "beneficial," "reasonable," and not "wasteful," so too must these water resources must be also "put to beneficial use to the full extent they are capable." Constitutionally, then, how is it possible to preferentially commit the entire flow of a river to single-use with no examination of the "reasonableness" of that choice in relation to the other uses that are, thereby, entirely deprived of even a proportionate share of the state's limited, and often scare water resources? Constitutionally, there can be no comprehensive application of the "unreasonable" label to irrigation or human health and safety while, at the same time and in times of extreme scarcity, handing a competing fish and wildlife and public trust uses a straight exemption from a "reasonableness" inquiry.

IV. The Board's Action Exceeds Its Authority and Fails to Adequately Fulfill the Board's Statutory Duties

By adopting flow recommendations from the California Department of Fish and Wildlife and the National Marine Fisheries Service into its regulation without examination, the Board's regulation improperly abrogates and delegates the Board's independent authority to consider the public interest, balance and reasonably protect *all* beneficial uses. CDFW and NMFS have endangered species authorities, but do not here invoke them. While the Board alludes to the fact that the fish species of interest are listed species, the Board itself does not purport to be acting in direct accordance with the requirements of state or federal endangered species laws, nor is it the

Board's place or duty to do so. There has been no allegation or demonstration by any party that there is an issue of illegal take, jeopardy to a species in connection with any project, etc.—and indeed, ironically, as the locals have pointed out repeatedly, releasing minimal amounts of water downstream at times when these flows can only serve to potentially draw fish in water at lethal temperatures could, itself, lead to inadvertent take of those same fish. Moreover, the administration of water rights is traditionally considered the prerogative of the states and not subject to preemption under a federal directive, absent a clear congressional directive. The directives of NMFS, therefore, a federal agency constituted under federal law, cannot preempt state water rights where there is, to date, no formal invocation of that federal law.

Finally, while the Board has independent authority to consider reasonable protection of public trust resources in administrating the state's water resources, it may do so only "in the public interest," on balance with other competing demands on the state's water resources, "whenever feasible." This, therefore, amounts to a less rigid standard than that applied under single-purpose state and federal endangered species laws, to the extent the public trust requires measured balancing of competing demands "in the public interest," whereas the federal or state endangered species require no such balancing. By adopting and substituting an endangered species act-like standard for the balancing role under state water quality laws, Article X, Section 2, or the public trust doctrine that is its proper jurisdictional purview, the Board's regulation fails to balance among competing uses and fails to adequately consider the public interest. Moreover, it fails to consider alternative actions and approaches that could reasonably achieve desired fish protections at lower social, economic, and water costs.

Despite years of good faith local cooperation both historically and since the last drought, the problem at this time is that it appears there has been no actual sufficient effort on the part of the State to attempt to develop such a "local cooperative solution." Such efforts could help to meet the State's burden to reasonably balance competing beneficial uses and, also, substantiate that the Board's proposed flow requirements are themselves "reasonable"; to date, however, we are unaware of any such effort. In addition to greater effort overall, therefore, under the rubric of "comparable" protection, in the development of such potential local cooperative solutions, we would also ask that the Board, the CDFW, and NMFS consider potential water-saving physical solutions, both this year and next and in advance of future droughts.

V. Conclusion

The California Farm Bureau thanks the Board for the opportunity to comment on the draft regulation. We look forward to further development of an improved regulation—or, preferably, a set of actions based on alternative local cooperative solutions—that can reasonably protect fish species of interest while, at the same time, reducing the burden on affected agricultural water rights holders in the area.

Very Truly Yours,

Christian C. Scheuring
Managing Counsel
California Farm Bureau