

STATE OF CALIFORNIA  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD

**DIVISION OF WATER RIGHTS**

**ORDER WR 2023-0067-EXEC**

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In the Matter of the Petitions for Reconsideration of

**STANFORD VINA RANCH IRRIGATION COMPANY, LOS MOLINOS MUTUAL  
WATER COMPANY, PEYTON PACIFIC PROPERTIES, LLC, AND DEER CREEK  
IRRIGATION DISTRICT**

Regarding State Water Board Orders

WR 2021-0089-DWR, Curtailment Order in the Matter of Diversion of Water from Mill  
Creek Tributary to the Sacramento River in Tehama County,

WR 2021-0090-DWR, Curtailment Order in the Matter of Diversion of Water from Deer  
Creek Tributary to the Sacramento River in Tehama County,

WR 2022-0169-DWR, Curtailment Order in the Matter of Diversion of Water from Mill  
Creek Tributary to the Sacramento River in Tehama County, and

WR 2022-0170-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 PETITIONS FOR RECONSIDERATION**

BY THE EXECUTIVE DIRECTOR<sup>1</sup>

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<sup>1</sup> State Water Board Resolution No. 2012-0061 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of a petition for reconsideration of a water right curtailment

## 1.0 INTRODUCTION

On October 19, 2021, Stanford Vina Ranch Irrigation Company (Stanford Vina)<sup>2</sup>, Los Molinos Mutual Water Company (Los Molinos), and Peyton Pacific Properties, LLC (Peyton Pacific) (hereinafter referred to collectively as Joint Petitioners) petitioned the State Water Resources Control Board (State Water Board or Board) for reconsideration of State Water Board Order WR 2021-0089-DWR (Order WR 2021-0089) and State Water Board Order WR 2021-0090-DWR (Order WR 2021-0090) (collectively, the 2021 curtailment orders), two orders issued on October 11, 2021 that curtailed diversions from Mill and Deer Creeks, respectively, unless and until the minimum flows set by drought emergency regulations in California Code of Regulations, title 23, section 876.5, subdivision (c) were met.<sup>3</sup> On September 1, 2022 and October 14, 2022, Joint Petitioners also petitioned the State Water Board for reconsideration of State Water Board Order WR 2022-0169-DWR (Order WR 2022-0169) and WR 2022-0170-DWR (Order WR 2022-0170) (collectively, the 2022 curtailment orders), two orders issued on October 7, 2022, that curtailed diversions from Mill and Deer Creeks, respectively, unless and until the minimum flows set by drought emergency regulations in California Code of Regulations, title 23, section 876.5, subdivision (c) were met. On November 4, 2022, Deer Creek Irrigation District (DCID) separately submitted a petition for reconsideration of the 2022 curtailment orders. Because the petitions raise substantially similar arguments regarding the emergency regulations and curtailment orders, this order considers them together.

The Joint Petitioners also request reconsideration of the adoption of the 2021 Emergency Regulation on September 22, 2021, under State Water Board Resolution No. 2021-0038 (2021 Resolution) and of the adoption of the 2022 Emergency Regulation on August 17, 2022, under State Water Board Resolution No. 2022-0030 (2022 Resolution). As explained in Section 5.1, the emergency regulations are not a water right decision or order subject to reconsideration by the Board. Accordingly, the petitions for reconsideration of the emergency regulations should be dismissed. However, the arguments raised by Joint Petitioners regarding the emergency regulations overlap with arguments regarding the curtailment orders. For this reason, the issues raised in relation to the emergency regulations are addressed in this order.

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order falls within the scope of the authority delegated under Resolution No. 2012-0061. Accordingly, the Executive Director has the authority to refuse to reconsider the petition for reconsideration, deny the petition, or set aside or modify the curtailment orders on reconsideration.

<sup>2</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>3</sup> Unless otherwise noted, all citations are to title 23 of the California Code of Regulations.

The Joint Petitioners argue the State Water Board adopted the emergency regulations and issued the 2021 and 2022 curtailment orders without sufficient process, that the emergency regulations and the 2021 and 2022 curtailment orders were not supported by substantial evidence, and that the State Water Board made various errors in law.<sup>4</sup> DCID argues that Order WR 2022-0170 was not supported by substantial evidence. The petitions are denied for the following reasons. First, all three of the petitions submitted by Joint Petitioners fail to meet the requirements of Section 769: the Joint Petitioners fail to support their allegations with a statement of points and authorities and failed to adequately notice the petitions for reconsideration to interested parties. Second, as described in detail below, the Joint Petitioners' and DCID's arguments fail on the merits. The State Water Board's adoption of the emergency regulations and the curtailment orders was procedurally proper, the emergency regulations and curtailment orders were supported by substantial evidence, and the State Water Board appropriately applied the doctrines of reasonable use and public trust in adopting the emergency regulation and curtailment orders. To the extent that any issues are not addressed in this order, they are not substantial issues that merit reconsideration.

## **2.0 GROUNDS FOR RECONSIDERATION**

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

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

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<sup>4</sup> Joint Petitioners raise other arguments that are not tied to one of the causes for reconsideration under section 768: that the California Department of Fish and Wildlife (CDFW) has abandoned operation, maintenance, and repair of its fish ladders and screens on Deer Creek, which are necessary for fish migration; and that the State is using the emergency regulations to breach a 1990 agreement with Los Molinos, in which CDFW and the California Department of Water Resources (DWR) agree to provide Los Molinos with groundwater in exchange for Los Molinos foregoing diversions for the purpose of enhancing fishery flows in Mill Creek. Joint Petitioners' failure to reach agreement on a memorandum of understanding with CDFW to operate and maintain fish ladders and screens is outside of the State Water Board's control. Likewise, the State Water Board cannot resolve a contractual dispute between Joint Petitioners and CDFW and DWR. The State Water Board encourages Joint Petitioners to work with CDFW and DWR to find a resolution to these concerns raised in the petitions.

(§ 768.)

A petition must specify the board action for which the petitioner requests reconsideration, “the reason the action was inappropriate or improper,” “the specific action which petitioner requests,” and must 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.” (*Id.*, subd. (c).)

A petition for reconsideration must be timely filed within 30 days of the decision or order at issue. (§ 768.) 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 may deny the petition if the 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 to hold a hearing on the petition for reconsideration.

The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the Board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Association v. State Personnel Board* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151; State Water Board Order WQ 98-05-UST at pp. 3-4.)

### **3.0 BACKGROUND**

#### **3.1 Drought Emergency**

In 2021 and 2022 the State of California was in the midst of a severe, pervasive drought. Within the Sacramento-San Joaquin Delta watershed, conditions were extraordinarily dry; together, water years 2020 and 2021 were the second driest two-year period on record. Although there were large precipitation events in the fall of 2021 and late spring storms in 2022, precipitation patterns for water year 2022 remained well below normal, resulting in the driest January through April period on

record based on precipitation. Pervasive heat further exacerbated the impact of low precipitation.<sup>5</sup>

On May 10, 2021, Governor Gavin Newsom issued a Proclamation of a State of Emergency for the Sacramento-San Joaquin Delta watershed, which includes Mill and Deer Creeks, because of drought conditions (May 2021 Proclamation). The May 2021 Proclamation found the extreme drought conditions through much of the State to present urgent challenges, including the risk of water shortages in communities, greatly increased wildfire activity, diminished water for agriculture production, degraded habitat for many fish and wildlife species, threat of saltwater contamination of large fresh water supplies conveyed through the Sacramento-San Joaquin Delta, and additional water scarcity if drought conditions continue into 2022.

To ensure critical instream flows for species protection in the Sacramento-San Joaquin Delta watershed, the May 2021 Proclamation directed the State Water Board and CDFW to evaluate the minimum instream flows and other actions needed to protect salmon, steelhead, and other native fishes in critical stream systems and to work with water users and other parties on voluntary measures to implement those actions if possible. If voluntary measures were not sufficient, the proclamation directed the State Water Board in coordination with CDFW to consider emergency regulations to establish minimum drought instream flows. The May 2021 Proclamation also suspended the environmental review required by the California Environmental Quality Act for the purposes of approving drought emergency regulations.

### **3.2 Mill and Deer Creeks**

This order provides a brief summary of some of the key points regarding the hydrogeography, diversion patterns, and biological and ecological importance of Mill and Deer Creeks. For more detailed information, please see the Informative Digests circulated as part of public notice on September 16, 2021, and August 5, 2022, as required under Government Code section 11346.5, subdivision (a)(3), which are hereby incorporated.

Mill and Deer Creeks in Tehama County are two tributaries to the Sacramento River that support multiple self-sustaining natural populations of anadromous salmonids. Mill and Deer Creeks have been identified as high priority tributaries for the protection and recovery of wild populations of Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha*) and California Central Valley steelhead (*Oncorhynchus*

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<sup>5</sup> See Department of Water Resources, *Water Year 2021: An Extreme Year* (September 2021) <[https://water.ca.gov/-/media/DWR-Website/Web-Pages/Water-Basics/Drought/Files/Publications-And-Reports/091521-Water-Year-2021-broch\\_v2.pdf](https://water.ca.gov/-/media/DWR-Website/Web-Pages/Water-Basics/Drought/Files/Publications-And-Reports/091521-Water-Year-2021-broch_v2.pdf)>.

*mykiss*), both of which are listed as threatened under the federal Endangered Species Act (ESA). Spring-run Chinook salmon are also listed as threatened under the California ESA. Mill and Deer Creeks are two of the three remaining tributaries of the Sacramento River that support self-sustaining populations of the Central Valley spring-run Chinook salmon.<sup>6</sup> Mill and Deer Creeks also support fall-run Chinook salmon and late fall-run Chinook salmon. Flows in the lower reaches of these tributaries are determined by natural flow and diversions. Diversions can be significant at times, particularly during the irrigation season. Both tributaries have been at least partially adjudicated, with approximately 22 active rights on Mill Creek and 43 on Deer Creek, though the adjudications did not provide for minimum flow requirements necessary to protect fish and wildlife public trust resources. Both creeks are typically completely dewatered by diversions at some point during the irrigation season. Optimal holding and spawning habitat is in the high-elevation reaches of both creeks, upstream of the major points of diversion. Consequently, ensuring that minimum flows are provided in the lower reaches of the tributaries and to the confluence with the Sacramento River during salmonid migration periods has a comparatively large impact on salmonid migration and survival.

Mill Creek has been identified as critical habitat for Central Valley spring-run Chinook salmon and California Central Valley steelhead.<sup>7</sup> Upper Mill Creek provides ideal cold water holding pools and spawning habitat for Central Valley spring-run Chinook salmon and California Central Valley steelhead. Flow records show that diversions in lower Mill Creek have the potential to entirely eliminate streamflow from June to September in a normal water year, and also at other times of year in drought conditions. Lindley et al. (2007) classified the Mill Creek salmon population as having a moderate risk of extinction; however, in recent years, the abundance of the Mill Creek population has been in steep decline, and the extinction risk may be trending toward moderate to high.<sup>8</sup> The largest diverter in the Mill Creek watershed is Los Molinos.

Deer Creek has been identified as critical habitat for Central Valley spring-run Chinook salmon and California Central Valley steelhead.<sup>9</sup> Evidence suggests that lack of sufficient water below diversions tends to truncate or prematurely end the spring migration period. This is especially evident in dry or drought years, when an earlier

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<sup>6</sup> Lindley et al., *Framework for Assessing Viability of Threatened and Endangered Salmon and Steelhead in the Sacramento-San Joaquin Basin* (2007) San Francisco Estuary & Watershed Science 5(1), <http://escholarship.org/uc/item/3653x9xc>.

<sup>7</sup> Endangered and Threatened Species; Designation of Critical Habitat for Seven Evolutionarily Significant Units of Pacific Salmon and Steelhead in California, 50 C.F.R. § 226.211, 70 Fed. Reg. 52488 (Sept. 2, 2005).

<sup>8</sup> National Marine Fisheries Service, 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 (2014).

<sup>9</sup> *Id.*

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 are considered to be high.<sup>10</sup> A considerable majority of the natural flow is diverted in the lower reaches of Deer Creek by two diverters: Stanford Vina and DCID.

### **3.3 Emergency Regulations**

Water Code section 1058.5 authorizes the State Water Board to adopt emergency regulations in certain drought years, or when the Governor proclaims a drought state of emergency, to prevent the unreasonable use of water, to require curtailment of diversions when water is not available under the diverter's priority of right, or to require monitoring and reporting of diversion or use. Emergency regulations adopted under Water Code section 1058.5 remain in effect for up to one year and may be renewed. (Wat. Code, § 1058, subd. (c).)

On September 1, 2021, the State Water Board released for public review and comment a preliminary draft of the proposed emergency regulation to establish minimum passage flows for Central Valley spring-run Chinook salmon and California Central Valley steelhead on Mill Creek and Deer Creek during critical migratory periods. 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 2021 Emergency Regulation and listing the sources relied upon in its analysis. The Board received eleven timely comment letters on the proposed regulation prior to the public meeting, including comment letters submitted by Stanford Vina, Los Molinos, and Peyton Pacific Properties, LLC.

In accordance with Government Code section 11346.1, subdivision (a)(2), on September 16, 2021, the State Water Board provided notice of the proposed emergency rulemaking.

On September 22, 2021, 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 (NMFS) and CDFW, and nine public commenters, including individual

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<sup>10</sup> National Marine Fisheries Service, Factors Contributing to the Decline of Chinook Salmon: An Addendum to the 1996 West Coast Steelhead Factors for Decline Report (1998).

irrigators and their representatives, irrigation districts, water purveyors, and other stakeholders. State Water Board members engaged both agency staff and the general public in extensive discussion concerning the proposed regulation. Stanford Vina, Los Molinos, Joint Petitioners' counsel, and other stakeholders were among those who commented before and during the State Water Board meeting.

The State Water Board adopted the 2021 Emergency Regulation on September 22, 2021. The 2021 Emergency Regulation was approved by the Office of Administrative Law and went into effect upon filing with the Secretary of State on October 4, 2021.

Section 876.5 of the 2021 Emergency Regulation states that the State Water Board has determined that it is an unreasonable use of water under Article X, section 2 of the California Constitution to continue diversions that would cause or threaten to cause flows to fall beneath the drought emergency minimum flows, unless the diversion is for a non-consumptive use, or it is necessary for minimum human health and safety needs. The 2021 Emergency Regulation explains that the drought emergency minimum flows "may be less than otherwise desirable minimum flows for fisheries protection, but have been developed to ensure bare minimum instream flows for migratory passage during the drought emergency, given the extreme nature of the current drought and the drought impacts to these fisheries." (Cal. Code Regs., tit. 23, § 876.5, subd. (c).)

Section 876.5, subdivision (b) of the 2021 Emergency Regulation authorizes the Deputy Director of the Division of Water Rights (Division) to issue a curtailment order upon a determination that without curtailment of diversions, flows are likely to be reduced below the drought emergency minimum flows. Based on recent stream flow data at certain DWR gages on Mill and Deer Creeks, along with forecasts for future precipitation events, the Deputy Director issued Order WR 2021-0029 and Order WR-2021-0090 on October 11, 2021, requiring all water right holders and claimants diverting from the Mill and Deer Creek watersheds to cease or reduce their diversions beginning October 15, 2021 to ensure the drought minimum flows specified in section 876.5 subdivision (c) are satisfied through June 30, 2022.

On August 5, 2022 the State Water Board issued a Notice of Proposed Emergency Rulemaking for the revision and readoption of the 2021 Emergency Regulation. The State Water Board held a public meeting on August 17, 2022, during which the State Water Board heard from State Water Board staff, staff of NMFS and CDFW, and two commenters, including Joint Petitioners' counsel. The State Water Board also considered written comments submitted before the meeting, including comment letters submitted by Peyton Pacific, Los Molinos, Stanford Vina, and DCID.



The State Water Board adopted the 2022 Emergency Regulation on August 17, 2022. The 2022 Emergency Regulation was approved by the Office of Administrative Law and went into effect upon filing with the Secretary of State on September 21, 2022. Section 876.5, subdivision (b) of the 2022 Emergency Regulation authorizes the Deputy Director of the Division to issue a curtailment order upon a determination that without curtailment of diversions, flows are likely to be reduced below the drought emergency minimum flows. Based on then recent stream flow data at certain DWR gages on Mill and Deer Creeks, along with forecasts for then future precipitation events, the Deputy Director issued Order WR 2022-0169 and Order WR 2022-0170 on October 7, 2022, requiring water right holders and claimants diverting from the Mill and Deer Creek watersheds to cease or reduce their diversions beginning October 15, 2022, to ensure the drought minimum flows specified in section 876.5 subdivision (c) are satisfied through June 30, 2023.

#### **4.0 CONTENT OF PETITIONS FOR RECONSIDERATION**

The Joint Petitioners' 2021 petition for reconsideration consists of a five-page letter entitled "petition for reconsideration," two pages of which are a list of eleven exhibits. The letter states that Joint Petitioners request reconsideration of three actions: (1) adoption of the 2021 Emergency Regulation on September 22, 2021; (2) issuance of the 2021 Resolution on September 22, 2021, which adopted the emergency regulation; and (3) the issuance of Order WR 2021-0029 and Order WR 2021-0090 on October 11, 2021.

Joint Petitioners state that they are 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." (October 19, 2021 petition, p. 2 citing § 768, subdivisions (a), (b), (d).) For a description of the reasons why the Board's actions are inappropriate and improper, Joint Petitioners refer, without elaboration, to eleven attached exhibits. These are letters that were submitted to the State Water Board, and sometimes other agencies, at various points in September 2021, during the adoption and implementation of the drought emergency regulation. Some of the letter exhibits themselves include voluminous attachments, primarily of other letters. Because the petition specifically purports to include certain, but not all, attachments to the various letters, this order assumes that the attachments not so listed are not intended to be included in the petition.

The specific actions Joint Petitioners request are that the Board "vacate its decisions to adopt, approve, and issue the Resolution, Regulations, and Curtailment Orders" and

compensate Joint Petitioners for “damages incurred as a result of the improper actions undertaken.”

As noted above, Joint Petitioners attached a series of letters as exhibits to the petition for reconsideration. It is difficult to ascertain what statements in the eleven letters attached to the petition for reconsideration are meant as policy statements disagreeing with adoption of the emergency regulation, which are related to the State Water Board’s challenged actions, and which are legal objections intended to support the grounds for reconsideration. The summary of each of the eleven documents is below, including, where applicable, the State Water Board’s best interpretation of arguments. To the extent that the petition intended to raise different arguments, such arguments are not adequately articulated and are denied for failure to raise a significant issue.

Reconsideration Exhibit 1 is a September 21, 2021 letter from Jackson Minasian of Minasian, Meith, Soares, Sexton & Cooper, LLP (Joint Petitioners’ counsel) to the State Water Board as well as representatives from NMFS, and CDFW, sent as a comment on the proposed adoption of the 2021 Emergency Regulation, and also purporting to address the 2021 curtailment orders. The letter asserts that a physical solution of channel modification is required under Article X, Section 2 of the California Constitution to maximize beneficial uses. (Recon. Exh. 1, pp. 2-3). It further asserts that an evidentiary hearing on the reasonableness of water use is required under the due process requirements of the state and federal constitutions. (Recon. Exh. 1, pp. 3-5). It then states that the adoption of regulations is an adjudicative action, and that the proposed instream flow requirements constitute a physical taking of real property. (Recon. Exh. 1, pp. 6-7.) The letter further asserts that the 2021 Emergency Regulation violates Article X, Section 2 of the California Constitution by not properly balancing uses, and that the 2021 Emergency Regulation constitutes a public project subject to hearing and compensation requirements. (Recon. Exh. 1, pp. 7-11). The letter argues that the 2021 Emergency Regulation conflicts with the adjudication of Mill and Deer Creek water rights. (Recon. Exh. 1, pp. 10-11). Under a heading alleging that the 2021 Emergency Regulation and the then-unwritten 2021 curtailment orders violate public trust authorities, the letter asserts that the public trust doctrine does not apply on Mexican Land Grant lands, that the Board is conflating reasonableness and the public trust doctrine, and that application of the public trust doctrine requires compensation. (Recon. Exh. 1, pp. 11-13). Although it was written prior to adoption of the 2021 Emergency Regulation, the letter also asserts that the Board has failed to comply with Government Code section 11346.1, subdivision (b), which relates to a finding of emergency conditions (Recon. Exh. 1, pp. 13-14). It then asserts that the Board fails to adhere to the rule of priority. (Recon. Exh. 1, p. 14). The letter goes on to assert that the 2021 Emergency Regulation will harm water users at critical irrigation times.(Recon.

Exh. 1, pp. 14-15). The letter then asserts that there is no evidence for two aspects of the 2021 Emergency Regulation: the prohibition on flood irrigation of lawns during the drought and the lack of an exemption from curtailment in the order of priority for minimum stockwatering amounts. (Recon. Exh. 1, pp. 15-16). The letter then asserts that the Board's failure to produce records under a purported July 8, 2021 request prevented Stanford Vina and Los Molinos from being able to comment, affected the Board's ability to properly consider the 2021 Emergency Regulation, and "confirms" a lack of evidentiary support for the proposed Regulation and orders. (Recon. Exh. 1, p. 16) The letter goes on to argue that the successful migration of spring-run Chinook salmon in spring 2021, and the voluntary efforts that supported it were not properly accounted for in the proposed regulation, and that they prove that no regulation is necessary. (Recon. Exh. 1, pp. 16-18). The letter closes with the assertion that water users have been unable to sufficiently comment on the proposed regulation ("and orders"). (Recon. Exh. 1, pp. 18-19.)

Reconsideration Exhibit 2 is a September 8, 2021 letter from Joint Petitioners' counsel writing on behalf of Los Molinos to the State Water Board commenting on the preliminary draft of the 2021 Emergency Regulation, and including six exhibits that are copies of certain communications between Joint Petitioners and counsel and various state and federal agencies from March to July of 2021. The September 8, 2021 letter asserts that Los Molinos' comments on the preliminary draft of the 2021 Emergency Regulation are hindered by not having received additional records from the State Water Board or CDFW. (Recon. Exh. 2, pp. 1-2). Section A of the letter notes that Los Molinos has not received a Notice of Water Unavailability, as was sent to many lower priority rights in the Sacramento-San Joaquin Delta watershed, and expresses dissatisfaction with the prospect of curtailment for fishery needs without compensation. (Recon. Exh. 2, p. 2). Section B of the letter further notes that this regulation is similar to emergency regulations adopted in the 2014-2015 drought requiring curtailment of diversions due to insufficient flow for specific fisheries in Mill, Deer, and Antelope Creeks and asserts that such regulation is routine rather than unprecedented. (Recon. Exh. 2, pp. 2-5). Section B further describes unresolved efforts to address fishery protection needs through non-emergency means—specifically a proposal for multi-benefit channel restoration. It references certain communications regarding potential drought-specific and non-emergency efforts on Mill and Deer Creeks, asserts that passage flows are not achievable even with curtailment because of channel sedimentation, and requests commitment to resolve this process rather than adopting emergency regulations. Section C of Exhibit 2 additionally notes that adult Chinook salmon returns in spring of 2021 on Mill and Deer Creeks were successful, and occurred after voluntary pulse flows coordinated with fishery agencies. It asserts that this success, combined with the long-standing nature of diversions on the stream and

continued native fishery, demonstrates that emergency measures are not needed, and make the diverters “victims of their own success.” (Recon. Exh. 2, pp. 5-6). Section C of Exhibit 2 further states that the context of the current regulations is different than that of the 2014 and 2015 draft regulations that were upheld in that the 2021 Emergency Regulation singles out Stanford Vina and Los Molinos, the actions are adjudicative in nature, and that there is “overreliance” on emergency regulations.

Reconsideration Exhibit 3 is a September 8, 2021 letter from Joint Petitioners’ counsel, writing on behalf of Stanford Vina commenting on the preliminary draft of the 2021 Emergency Regulation issued on September 1, 2021. The comment letter includes nine exhibits that are copies of certain communications between Joint Petitioners and counsel and various state and federal agencies from February to July of 2021. The arguments are essentially the same as in Exhibit 2, but the comment letter discusses Stanford Vina’s diversions in Section A and includes three additional communications as attachments for the Section B arguments.

Reconsideration Exhibit 4 is a September 7, 2021 comment letter to the State Water Board’s Mill and Deer Creek drought email address from Bailey and Amy Peyton of Peyton Pacific discussing their ranch, the effect of curtailment, and the insufficiency of the ranch’s wells to sustain the cattle. It requests that the Board take the cattle and ranch’s needs into account.

Reconsideration Exhibit 5 is a September 16, 2021 letter from Joint Petitioners’ counsel to the State Water Board’s Mill and Deer Creek drought email address, stating that Stanford Vina and Los Molinos cannot submit timely, complete comments because the State Water Board, CDFW, and NMFS have not provided all documents requested under the Public Records Act (PRA) and its federal analogue, the Freedom of Information Act.

Reconsideration Exhibit 6 is a September 15, 2021 letter from Joint Petitioners’ counsel, writing on behalf of Los Molinos and Stanford Vina, to various staff at NMFS describing communications regarding a Freedom of Information Act request, with attachments.

Reconsideration Exhibit 7 is a September 2, 2021 letter from Joint Petitioners’ counsel to various staff at the State Water Board expressing concern that the preliminary draft comment deadline was short and included a holiday weekend, that the Board’s comment notice was the first time Joint Petitioners’ counsel received notice of the request for emergency regulation, and that the ability to comment might be hampered because of the lack of response to a PRA request purported to have been submitted on

July 8, 2021. It requests expedited disclosure of records. Exhibit 7 includes a copy of the PRA request.

Reconsideration Exhibit 8 is a second copy of Exhibit 5.

Reconsideration Exhibit 9 is a September 17, 2021 letter to Tina Bartlett at CDFW from Dustin Cooper in the law offices of Joint Petitioners' counsel, writing on behalf of Los Molinos and Stanford Vina. The letter describes Los Molinos and Stanford Vina's voluntary coordination measures with CDFW and the number of returning adult spring-run Chinook salmon in 2021, and asserts that voluntary measures are in place, working and sufficient. It states that the measures have not been found insufficient for the purposes of Governor Newsom's May 2021 Proclamation regarding fish flows. It further states that CDFW and the State Water Board have sufficient funding and regulatory flexibility to implement "multi-benefit channel restoration," citing the May 2021 Proclamation and Senate Bill No. 170 (2021-2022 Reg. Sess.), which, if signed into law, would allocate specific funding to the California Natural Resources Agency and to the Wildlife Conservation Board.

Reconsideration Exhibit 10 is a September 2, 2021 letter to Cathy Markinkevage and Howard Brown at the NMFS Central Valley Office from Joint Petitioners' counsel. Like Exhibit 7, it expresses concern that the preliminary draft comment deadline was short and included a holiday weekend, that the Board's comment notice was the first time Joint Petitioners' counsel received notice of the request for emergency regulation, and that the ability to comment might be hampered because of the lack of response to a request for records purported to have been submitted on July 9, 2021, but for which the firm had received no record of receipt and no response. It requests expedited disclosure of records. Exhibit 10 includes a copy of the request for public records.

Reconsideration Exhibit 11 is a September 2, 2021 letter to Tina Bartlett at CDFW from Joint Petitioners' counsel. Like Exhibits 7 and 10, it expresses concern that the preliminary draft comment deadline was short and included a holiday weekend, that the Board's comment notice was the first time Joint Petitioners' counsel received notice of the request for emergency regulation, and that the ability to comment might be hampered because of the lack of response to a request for records. The letter states that the request was submitted on July 8, 2021, to CDFW, and that the firm had received confirmation of receipt, but as yet no records. It requests expedited disclosure of records. Exhibit 11 includes a copy of the request for public records.

Joint Petitioners submitted two petitions for reconsideration in 2022: the first, submitted on September 1, 2022, requests reconsideration of the 2022 Resolution, 2022

Emergency Regulation, and 2022 curtailment orders (which had not yet been issued); the second, submitted on October 14, 2022, requests reconsideration of Order WR 2022-0169 and Order WR-2022-0170. The October 14, 2022 petition states that presence of steelhead in Clear Creek and Battle Creek is not evidence that steelhead will be present in Deer or Mill Creek or will attempt migration when the curtailment takes effect on October 15, 2022, and that presence is a necessary criterion for issuing the curtailment orders. The October 14, 2022 petition also states that there is no hydrologic basis for the curtailment orders, because impaired flows below Stanford Vina's dam are approximately 40 cfs, which is not low. Both the September 1, 2022 and October 14, 2022 petitions reiterate arguments made in Reconsideration Exhibit 1 that California law requires implementation of a physical solution, that an evidentiary hearing on the reasonableness of water use is required under the due process requirements of the state and federal constitutions, that public trust doctrine does not apply to former Mexican Land Grant lands and waters, and that the State Water Board is violating Government Code section 11356.1, subdivision (b). The petitions also state that the State Water Board provided insufficient notice and opportunity to comment on the 2022 Emergency Regulation. The petitions assert that CDFW has abandoned operation, maintenance, and repair of its fish ladders and screens on Deer Creek, which are necessary for fish migration. The letter argues that the State is using the emergency regulations to breach a 1990 agreement with Los Molinos, in which CDFW and DWR agreed to provide Los Molinos with groundwater in exchange for Los Molinos foregoing surface water diversions for the purpose of enhancing fishery flows in Mill Creek. The petitions state that CDFW claims because the emergency regulations require minimum instream flows in Mill Creek, Los Molinos is not entitled to groundwater pumping credits for instream flows under the 1990 agreement. Finally, the petitions state that water is available for diversion under Joint Petitioners' senior water rights.

Joint Petitioners' September 1, 2022 petition includes five exhibits. The September 1, 2022 petition Exhibits 1 through 3 are the same as Reconsideration Exhibits 1 through 3 attached to the 2021 petition and described above.

The September 1, 2022 petition Exhibit 4 is the same as Reconsideration Exhibit 9 attached to the 2021 petition, described above.

The September 1, 2022 Exhibit 5 (hereinafter "Reconsideration Exhibit 12") is an August 10, 2022 comment letter to the State Water Board commenting on the Notice of Proposed Emergency Rulemaking from Joint Petitioners' counsel. The letter expresses concern that the comment deadline following the Notice of Proposed Emergency Rulemaking was too short to comprehensively comment on the emergency regulation. It states that there is no emergency on Deer Creek or Mill Creek, pointing to fish return

numbers in 2021 and 2022, and asserts that hydrologic conditions in 2022 have been favorable on both Mill and Deer Creeks. The letter reiterates claims regarding CDFW's failure to operate, maintain and repair fish ladders and screens on Deer Creek and the State's breach of a 1990 agreement with Los Molinos, also described in the petitions summarized above.

Joint Petitioners' October 14, 2022 petition includes the same five exhibits also included in the September 1, 2022 petition (October 14, 2022 Recon. Exh. 1-5). Exhibit 6 attached to the October 14, 2022 petition is the September 1, 2022 petition.

DCID's petition presents the arguments also made by Joint Petitioners that the presence of steelhead in Clear Creek and Battle Creek is not evidence that steelhead are present in Deer Creek and that flow conditions below Stanford Vina Dam are approximately 40 cubic feet per second, which is not extremely low.

## **5.0 DISCUSSION**

### **5.1 DCID'S Petition**

DCID argues that the evidence supporting the 2022 curtailment orders' finding of fish presence is insufficient.

Section 876.5 of the 2022 emergency regulation establishes drought emergency minimum flow requirements necessary for the migratory passage of state and federally listed Central Valley spring-run Chinook salmon and federally listed California Central Valley steelhead. The schedule of minimum flow requirements is conditioned on the presence of the listed species in either adult or juvenile life stages. The Deputy Director of the Division may issue a curtailment order upon a determination that without curtailment of diversions flows are likely to be reduced below the drought emergency flows. Finding 2 of Order WR 2022-0169 states that the conditions under which the drought emergency minimum flows apply are in effect and likely to continue. (p. 4.)

On October 6, 2022, CDFW sent a memorandum to the Executive Director of the State Water Board stating that "[b]ased on relevant current and historic steelhead monitoring data...[CDFW] believes Mill and Deer Creek steelhead are present in the Sacramento River and other Upper Sacramento River tributaries..." (p. 2.) The memorandum describes the evidence for this conclusion. (p. 2.) The memorandum describes CDFW's current monitoring that indicates Central Valley steelhead have begun migration and are present in the Sacramento River, ready to enter Mill and Deer Creeks following the restoration of minimum adult fish passage flows, as they have entered tributaries farther upstream. CDFW operates fyke traps on the Sacramento River between river miles 74.6 and 78.5 near Knights Landing,

downstream of the confluence with Mill and Deer Creeks. The memorandum states that between August 15, 2022 and September 23, 2022, four Central Valley steelhead were captured in the fyke traps. In addition, CDFW operates and reviews video monitoring on Clear and Battle Creeks, Sacramento River tributaries with sufficient steelhead passage flows year-round, that are located upstream of Deer and Mill Creeks. CDFW observed 3 Central Valley steelhead entering Clear Creek and 3 Central Valley steelhead entering Battle Creek from August 15 to September 19, 2022, and from August 18 to September 19, 2022, respectively. Because Clear and Battle Creeks are upstream of Deer and Mill Creeks, the presence of steelhead is significant because it indicates that the fall migration period into tributaries on the Upper Sacramento River has begun. Central Valley steelhead were present and would migrate to Mill and Deer Creeks if there are sufficient flows.

The memorandum also explains that historic Central Valley steelhead monitoring data show that adult Central Valley steelhead “are present in significant numbers in the Upper Sacramento River as early as August, with [Central Valley] steelhead numbers at [Red Bluff Diversion Dam] increasing substantially after mid-September. This historic data strongly suggests that [Central Valley] steelhead would be present in the Sacramento River on or before October 15 and would enter the tributaries following the restoration of sufficient flows in Deer and Mill Creeks.” (p. 2.)

DCID does not provide alternate evidence or explain why CDFW’s conclusion that Central Valley steelhead have begun migration and are present to enter Mill and Deer Creeks upon the restoration of minimum flows is incorrect.

DCID also appears to interpret Section 876.5, subdivision (c) of the 2022 emergency regulation to allow the Deputy Director to issue curtailment orders if Central Valley steelhead or spring-run Chinook salmon are present *in* Mill and Deer Creeks. The regulation does not include that limitation—it only specifies that the fish are “present”—and construing the regulation to incorporate that limitation would be contrary to the scientific basis for the regulation: Central Valley steelhead and spring-run Chinook salmon are unable to migrate into Mill and Deer Creeks when flows are too low. Thus, the regulation allows curtailments if Central Valley steelhead or spring-run Chinook salmon are present where they are ready to migrate into Mill and Deer Creeks if flows are restored. The State Water Board interprets the 2022 emergency regulation to allow the Deputy Director to issue curtailment orders if Central Valley steelhead or spring-run Chinook salmon have been observed in the area nearby Mill or Deer Creek, and the migratory period for spring-run Chinook salmon or Central Valley steelhead has begun. CDFW’s memorandum presents evidence that Central Valley steelhead have begun migrating and have been observed nearby in Butte and Clear Creeks. The State Water Board’s interpretation is consistent with the purpose of the regulation and only allows



curtailments when Central Valley steelhead or spring-run Chinook salmon are present to use the water, recognizing the variable timing of migratory periods.

DCID's petition is therefore dismissed.

## **5.2 Joint Petitioners' Petitions**

### **5.2.1 The Joint Petitioners' Petitions for Reconsideration Are Fatally Inadequate**

Joint Petitioners' 2021 and 2022 petitions for reconsideration are inadequate in several respects. First, the petitions fail to meet the requirements of petitions for reconsideration set forth in Section 769.<sup>11</sup> Joint Petitioners failed to include a memorandum of points of authorities in support of their legal arguments, as required under section 769, subdivision (c). The October 19, 2021 petition alleges three causes for reconsideration: procedural irregularity, insufficient evidence, and error in law. The 2022 petitions additionally allege a fourth cause for reconsideration: that there is relevant evidence, which in the exercise of reasonable diligence, could not have been produced. The petitions did not include an affidavit or declaration under penalty of perjury stating that additional evidence is available that was not presented to the Board and the reason it was not presented in support of this claim, as is required under section 769, subdivision (b). As described in Section 4.0, Joint Petitioners did not submit an analysis of Orders 2021-0089 and 2021-0090. Instead, Joint Petitioners submitted a group of letters in 2021 and 2022 that were previously submitted to the State Water Board and other agencies during the period prior to adoption of the emergency regulations. It is difficult to discern which arguments apply to the curtailment orders, rather than the emergency regulations or the 2021 and 2022 Resolutions. In addition, it is unclear how letters to other agencies bear on the Board's adoption of the emergency regulations and curtailment orders. For example, Reconsideration Exhibit 10 requests production of records from NMFS pursuant to a Freedom of Information Act request. A memorandum of points and authorities would clarify the arguments and provide the relevant support. The petitions for reconsideration are denied for failure to include a memorandum of points and authorities. Relatedly, to the extent the petitions and reconsideration exhibits

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<sup>11</sup> Joint Petitioners also failed to notice interested parties regarding the petition for reconsideration as required under section 769, subdivision (a)(6). All three of Joint Petitioners' petitions were sent to DCID, CDFW, NMFS and the State Water Board's Division of Water Rights. However, as published in Attachment A to each curtailment order, Order 2021-0089 was issued to 22 water rights with seven owners, and Order 2021-0090 was issued to 43 water rights with 15 owners. In 2022, again as listed in Attachment A to each curtailment order, Order 2022-0169 was issued to 22 water rights with seven owners, and Order 2022-0170 was issued to 43 water rights with 15 owners. Joint Petitioners state that the "Petitioners do not believe that this petition is required to be sent to any other parties." Yet, a similar failure to include relevant parties was among the procedural deficiencies that led to a denial of reconsideration of curtailment orders in the 2014 drought. (State Water Board Order WR 2014-0028, p. 13). That denial was issued to Stanford Vina, represented by Joint Petitioners' counsel.

fail to raise substantial issues related to the cause for reconsideration, the petitions are dismissed.

Second, the petitions request relief that is not available under a petition for reconsideration. The October 19, 2021 petition requests that the Board “vacate its decisions to adopt, approve, and issue the Resolution, Regulations, and Curtailment Orders” and that the Board “compensate Petitioners for damages incurred as a result of the improper actions undertaken by the State Water Board and its staff.” (October 19, 2021 petition, p. 5.) The September 1, 2022 petition similarly requests that the Board “compensate Petitioners for damages and attorney fees incurred as a result of improper actions undertaken by the State Water Board and its staff.” The October 14, 2022 petition reiterates this request. Compensation is not an available remedy for a petition for reconsideration. (Wat. Code, §§ 1122-1123.) Even if it were, Joint Petitioners have not requested, much less supported, any specific sum nor detailed any alleged damages for its compensation.

Third, the emergency regulations (including the 2021 and 2022 Resolutions, which adopted the emergency regulations) are not an action subject to reconsideration. Water Code sections 1120 through 1126 provide for administrative reconsideration and judicial review of quasi-judicial water right decisions and orders, not quasi-legislative approvals, such as the adoption of drought emergency regulations to provide minimum flows on Mill and Deer Creeks. (State Water Board Order WR 2014-0028, p. 1, fn. 2 [“Water Code section 1122 does not provide for reconsideration of quasi-legislative actions.”]; see also Wat. Code, § 1126, subds. (b) & (c) [providing for judicial review of water right decisions or orders pursuant to section 1094.5 of the Code of Civil Procedure]; *Stanford Vina Ranch Irrigation Company v. State of California* (2020) 50 Cal.App.5th 976, 996–997 [interpreting section 1126 to require judicial review pursuant to section 1094.5 of all quasi-adjudicative decisions relating to state water law].) Because issues raised by the Joint Petitioners regarding the emergency regulations may overlap with issues regarding the curtailment orders, the issues raised regarding the emergency regulations are addressed below.

## **5.2.2 Issuance of the Curtailment Orders Was Procedurally Proper**

### **5.2.2.1 State Water Board Was Not Required to Hold an Evidentiary Hearing Prior to Adoption of the Emergency Regulation or the Issuance of Orders WR 2021-0089, WR 2021-0090, WR 2022-0169, and WR 2022-0170**

Joint Petitioners claim that they are entitled to an evidentiary hearing to challenge the determination that their use and diversion of water is unreasonable.

The emergency regulations make the determination that “it is an unreasonable use under Article X, Section 2 of the California Constitution to continue diversions that would

cause or threaten to cause flows to fall beneath the drought emergency minimum flows...” (Cal. Code Regs., tit. 23, § 876.5.) Joint Petitioners’ argument fails on the merits. The court in *Stanford Vina Ranch Irrigation Company v. State of California* ruled that due process does not require the Board to hold an evidentiary hearing before “engaging in the *legislative* function of promulgating a regulation defining diversions of water under certain emergency circumstances to be per se unreasonable,” stating that “[s]uch a requirement would turn the regulatory process on its head.” (*Stanford Vina, supra*, 50 Cal.App.5th at 1004.)

The State Water Board, in adopting the emergency regulations, made the determination at a public meeting that diversions below the drought emergency minimum flows are unreasonable, and did so with the benefit of all the information regarding anticipated impacts that was contained in the petitions for reconsideration. The curtailment orders implemented this determination. The petitions do not allege that the curtailment orders improperly implemented the emergency regulations. The petitions fail to raise any factual challenge to the curtailment orders requiring a hearing.

#### **5.2.2.2 The Emergency Regulations Do Not Constitute an Exercise of Eminent Domain or a Taking of Property in Violation of the 5th Amendment of the United States Constitution or Article 19(a) of the California Constitution**

Joint Petitioners argue that the emergency regulations constitute a “taking” of Joint Petitioners’ property rights requiring just compensation. (Recon. Exh. 1, pp. 6-7.) Joint Petitioners raised the same argument regarding the 2014 and 2015 drought emergency regulations for curtailment of diversions due to insufficient flows for specific fisheries in Mill, Deer, and Antelope Creeks. The State Water Board rejected this argument in Order WR 2014-0028, reasoning that “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.)” (Order WR 2014-0028, pp. 19-20.)

The court in *Stanford Vina Ranch Irrigation Company v. State of California* agreed, upholding the State Water Board’s 2014 and 2015 emergency regulations on Antelope, Mill, and Deer Creeks against a challenge brought by Stanford Vina. The court stated that “Stanford Vina possessed no vested right to divert water from Deer Creek in contravention of the emergency regulations” and “since there was and is no property right in an unreasonable use, there has been no taking or damaging of property by the

deprivation of such use and, accordingly, the deprivation is not compensable” [quoting *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 145]. (*Stanford Vina, supra*, 50 Cal.App.5th at 1007.)

### **5.2.2.3 The State Water Board Has the Authority to Promulgate Regulations Affecting Water Rights Subject to a Judgment in Tehama County Superior Court**

Joint Petitioners assert that it was a procedural error for the State Water Board to adopt minimum flows by emergency regulation rather than by petitioning to amend the adjudications of Mill and Deer Creeks. *Stanford Vina* raised the same argument regarding the 2014 drought emergency regulation for Mill, Deer, and Antelope Creeks. The State Water Board rejected this argument in Order WR 2014-0028, explaining that the consent decree, *Stanford Vina Ranch Irr. Co. v. Dicus* (November 27, 1923), “settle[s] questions of apportionment and water use as among the parties” but “predated adoption of the 1928 adoption of the 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.)” (Order WR 2014-0028, pp. 21-22.)

The court in *Stanford Vina Ranch Irrigation Company v. State of California* affirmed the State Water Board’s understanding, finding that *Stanford Vina*’s adjudicated right “is limited by the rule of reasonableness” and the prior judicial decree “does not prevent the Board from adopting regulations and issuing curtailment orders to prevent an unreasonable use of water under article X, section 2.” (*Stanford Vina, supra*, 50 Cal.App.5th at 1007.)

### **5.2.2.4 The State Water Board Provided Notice Beyond Legal Requirements**

Joint Petitioners appear to argue that the State Water Board gave inadequate notice of and opportunity to comment on the emergency regulations. (See Recon. Exhs. 1, 7, 10, 11.) In fact, the State Water Board provided notice and opportunity to comment on the proposed emergency regulations beyond what is required by law. Joint Petitioners do not make any arguments regarding notice and opportunity to comment on the curtailment orders.

Government Code section 11346.1, subdivision (a)(2) requires that the adopting agency send a notice of the proposed emergency regulation, including the specific language to be adopted and the finding of emergency, at least five working days before submitting the emergency regulation to the Office of Administrative Law. The State Water Board released a preliminary draft of the proposed 2021 Emergency Regulation on September 1, 2021, with comments due on September 8, 2021. The State Water Board then released the proposed 2021 Emergency Regulation on September 10, 2021, with

comments due on September 16, 2021. Although not required to do so by law, the State Water Board gave stakeholders two opportunities to review the draft proposed 2021 Emergency Regulation text and provide comments. The State Water Board then gave notice of the proposed emergency rulemaking on September 16, 2021, held a public meeting on September 22, 2021, and submitted the 2021 Emergency Regulation to the Office of Administrative Law on September 24, 2021, in accordance with Government Code section 11346.1, subdivision (a)(2).

In 2022 the State Water Board again provided more than adequate notice of and opportunity to comment on the proposed emergency regulation. On August 5, 2022, the State Water Board released the Notice of Proposed Emergency Rulemaking and the draft 2022 Emergency Regulation, which included only minor amendments to the 2021 Emergency Regulation, with comments due on August 11, 2022. The State Water Board held a public meeting on August 16, 2022, and submitted the 2022 Emergency Regulation to the Office of Administrative Law on September 12, 2022, in accordance with Government Code section 11346.1, subdivision (a)(2).

Joint Petitioners also claim that their ability to comment on the draft emergency regulations was hampered by having not yet received additional records under the Public Records Act. Joint Petitioners cite no authority for the proposition that the provision of additional materials, beyond what is required under Government Code section 11346.1, is necessary to adequately comment on the proposed regulation. Moreover, the State Water Board and Joint Petitioners have engaged in extensive discussions and coordination prior to the adoption of the emergency regulations. As described in the Informative Digests, the State Water Board, in coordination with CDFW and NMFS, held meetings with stakeholders in spring 2021 to discuss possible measures needed to protect threatened fish species in the Mill and Deer Creek watersheds. Petitioners were well aware that emergency regulations would be considered in 2021, especially as they had been implemented previously in 2014 and 2015 under severe drought conditions, and had many opportunities to raise any issues and concerns with the State Water Board. In the midst of the continuing drought, State Water Board staff held meetings in February 2022 with stakeholders, including Los Molinos, Stanford Vina, CDFW, and NMFS to discuss possible voluntary interim and long-term solutions for both Mill and Deer Creeks. CDFW and NMFS recommended re-adoption of the 2021 Emergency Regulation in April and June 2022. Petitioners were aware long before the Notice of Emergency Rulemaking that emergency regulations would again be considered in 2022.

Finally, it is worth noting that the emergency regulations closely mirror the emergency regulations adopted in 2014 and 2015. As noted above, Stanford Vina, one of the Joint Petitioners, unsuccessfully challenged the adoption and implementation of that regulation, with California's Third Appellate District issuing a final decision in 2020, and

the United States Supreme Court denying Stanford Vina's petition for certiorari in February of 2021. The similarity of the regulations, parties and counsel, and the temporal proximity of the drought periods and the challenge to the 2014 Emergency Regulation, further weaken the argument that Joint Petitioners did not have sufficient opportunity to prepare comments on the 2021 and 2022 Emergency Regulations.

### **5.2.3 The Emergency Regulations Are Supported by Substantial Evidence**

Joint Petitioners argue that the provisions of the emergency regulations prohibiting flood irrigation of lawns and failing to exempt stockwatering needs from the 2021 Emergency Regulation were not supported by substantial evidence.

The Informative Digests explain the rationale for the emergency regulations prohibiting inefficient domestic lawn watering irrigation practices in the Mill Creek and Deer Creek watersheds. State Water Board staff have observed inefficient domestic landscaping practices within the Los Molinos service area. In addition, State Water Board Vice Chair D'Adamo noted in the September 22, 2021 meeting that after spending time in the Mill and Deer Creek watershed and surrounding farmland, she observed flood irrigation of both turf and pasture. (State Water Resources Control Board, Transcript of September 22, 2021 meeting, Agenda Item 5, p. 163.) There are several alternatives to flood irrigation of domestic lawns that could be implemented. The emergency regulations define inefficient surface water use for domestic lawn watering to mean the application of more than 18.5 gallons per day per 100 square feet, which is the quantity identified in California Code of Regulations, title 23, section 697 as reasonably necessary to support a new water right application. Joint Petitioners do not argue or provide evidence that flood irrigation of domestic lawns is a reasonable use of water during drought conditions.

In response to a question at the September 22, 2021 meeting about why no stockwatering exemption was included in the 2021 Emergency Regulation, in contrast to the emergency regulations applicable to the Scott and Shasta Rivers, Board staff explained that a stockwatering exemption is not needed for Mill and Deer Creeks. The emergency regulations for the Scott and Shasta Rivers included an exemption because stockwatering constitutes the majority of water use in that watershed. In contrast, in 2018 only one water right claimed stockwatering use in Mill Creek, and only four in Deer Creek. These water rights constitute three users in total. Moreover, Board staff concluded that based on the hydrology of the watershed and seniority of those water rights, those users would have water available for stockwatering. (State Water Resources Control Board, Transcript of September 22, 2021 meeting, Agenda Item 5, pp. 148-49.) Thus, the Board reasonably concluded that no exemption for stockwatering was necessary in the Mill and Deer Creek watersheds. The State Water Board received one request for an exception from curtailment orders in 2021 for the protection of

livestock. With additional time to consider the unique features of the Mill and Deer Creek watersheds, the State Water Board crafted a narrow exception (in contrast to the overly broad exception requested in 2021 by Joint Petitioners) that addressed the specific needs in the watershed. The 2022 Emergency Regulation included an amendment to allow the Deputy Director of the Division to approve a petition for limited diversions to provide water for livestock survival during a scheduled pulse flow if no other water is available (e.g., from stockponds, groundwater wells, or hauled water).

### **5.2.3.1 The Emergency Regulations Meet Requirements of Government Code section 11346.1**

Joint Petitioners allege that the Board cannot meet the requirements of Government Code section 11346.1, subdivision (b), because the Board cannot make the required finding that the adoption of the emergency regulations is necessary to address an emergency. (Recon. Exh. 1, p. 13.)

Joint Petitioners do not take into account the Board's authority under Water Code section 1058.5, subdivision (a), which authorizes the State Water Board to adopt an emergency regulation during a period for which the Governor has issued a proclamation of a state of emergency based on drought conditions. Notwithstanding 11346.1 and 11349.6 of the Government Code, any findings of emergency by the Board in connection with the adoption of an emergency regulation are not subject to review by the Office of Administrative Law. (Wat. Code, § 1058.5, subd. (b).) Joint Petitioners also do not engage with the evidence provided in the Informative Digests, which describe in detail the exceptional drought conditions existing across California, characterized by extremely low precipitation and low runoff efficiency. The 2021 Informative Digest discusses that as of September 2021, the entire state of California was experiencing moderate to exceptional drought, with 88 percent of California experiencing extreme to exceptional drought. Within the Sacramento-San Joaquin Delta watershed, conditions were exceptionally dry; together water years 2020 and 2021 were the second driest two-year period on record, behind only water years 1976-1977. The 2022 Informative Digest describes how after three consecutive years of low precipitation, 97 percent of California was experiencing severe drought, with 60 percent of California experiencing extreme drought. Both Informative Digests also explain that the drought conditions combined with diversions in Mill and Deer Creek have resulted in adverse instream habitat conditions for threatened salmonid species with instream flow dropping between the critical minimum flow levels necessary for salmonid migration. Joint Petitioners argue that because drought is recurring in California, the Board should have addressed fishery conditions through non-emergency actions since the 2014-2016 drought. (Recon. Exh. 1, p. 13.) As petitioners are aware,

CDFW is conducting evaluations to recommend long-term flows in Deer<sup>12</sup> and Mill Creeks<sup>13</sup> and has released draft flow recommendations for Mill Creek that are significantly higher than the drought emergency minimum instream flows.<sup>14</sup> The emergency regulations and the 2021 and 2022 curtailment orders are temporary, emergency actions adopted in response to the May 2021 Proclamation finding exceptional drought conditions, and do not substitute for a long-term instream flow requirement.

Joint Petitioners additionally allege that the instream flow requirements established by the emergency regulations are “unnecessary and unsupported.” (October 19, 2021 Recon. Exh. 1, p. 17.) To come to this conclusion, Joint Petitioners rely on two pieces of evidence to support their argument that diversions on Mill and Deer Creeks are not harmful to fish migration: (1) 2021 fish passage numbers; and (2) a declaration by two biologists associated with FishBio. The State Water Board considered recommendations from CDFW and NMFS in determining the minimum instream flows. The Informative Digests provide justification for the emergency minimum instream flows based on those recommendations, which take into account the data considered in development of the 2014 and 2015 drought emergency regulations and other data such as Mill and Deer Creek fishery and streamflow monitoring data collected after 2015. Joint Petitioners claim that emergency regulations cannot be reasonably necessary based on “the spectacular fishery return numbers on Mill and Deer Creeks” in spring 2021, which Petitioners acknowledge was “one of the driest years on record.” (Recon. Exh. 1, p. 14.) The 2022 petitions similarly state that the “fish return numbers in 2021 and 2022 have been excellent.” (September 1, 2022 petition, p. 5; October 14, 2022 petition, p. 6.) At the September 22, 2021 State Water Board meeting, a representative of NMFS explained that the spring 2021 fish return numbers represent adults that are the result of previous wet conditions. NMFS measures extinction risk via abundance over at least a three-year period, not just a single year of data. Moreover, the trend in extinction risk shows a more accurate portrait of species health; the extinction risk of the threatened species on Mill Creek is trending toward moderate to high. The fish return data from spring 2021 that petitioners argue show the 2021 Emergency Regulation was unnecessary in fact reinforces the importance of instream flows, as the majority of the fish counted came back earlier in the spring of 2021 when flows were higher. (State Water Resources Control Board, Transcript of September 22, 2021 meeting, Agenda Item 5, pp. 140-143.) In addition, Mill and Deer Creek Chinook salmon and steelhead population sizes have decreased substantially in recent decades. GrandTab data

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<sup>12</sup> California Department of Fish and Wildlife, Instream Flow Evaluation: Temperature and Passage Assessment for Salmonids in Deer Creek, Tehama County (2017).

<sup>13</sup> California Department of Fish and Wildlife, Instream flow evaluation: Temperature and Passage Assessment for Salmonids in Mill Creek, Tehama County (2017).

<sup>14</sup> California Department of Fish and Wildlife, Draft Instream Flow Criteria Mill Creek, Tehama County (2018).



(2023)<sup>15</sup> produced by CDFW show that although the number of spring-run Chinook salmon and steelhead adult returners to Mill and Deer Creek was higher in 2021 compared to some other recent years, the population sizes remain lower than historical levels. In addition, adult spring-run Chinook salmon escapement to Mill and Deer Creeks in 2022 was lower than in 2021 and historical levels.

Joint Petitioners also allege that the emergency regulations and curtailment orders are contrary to the May 2021 Proclamation and appear to argue that the success of voluntary measures of water users on Mill and Deer Creeks in spring 2021 demonstrates that the emergency regulations and curtailment orders were unnecessary. (Recon. Exh. 1, pp. 16-17.) No agreements for voluntary solutions were in place at the time the Board adopted the emergency regulations, despite a series of meetings and follow-up communications with Joint Petitioners and other diverters in the watersheds, fisheries agencies, and Board staff. The emergency regulations were crafted to allow diverters to implement voluntary measures as an alternative to curtailment orders. Diverters may implement an agreement with NMFS and CDFW that provides watershed-wide protection for the fishery in place of State Water Board-issued curtailment orders: some of the Joint Petitioners, DCID, and other water users successfully negotiated such agreements in the last drought. Diverters may also propose other local cooperative solutions, such as voluntary agreements to coordinate diversions or share water. (Cal. Code Regs., tit. 23, § 878.4.)

#### **5.2.3.2 Petitioner's Asserted Physical Solution Is Not Required by Law**

Joint Petitioners claim that a physical solution of channel restoration and critical riffle rehabilitation within Mill and Deer Creeks is required by law, citing *City of Lodi v. East Bay Municipal Utility District* (1936) 7 Cal.2d 316. (Recon. Exh. 1, p. 2-3.) Petitioners' reliance on *City of Lodi v. East Bay Municipal Utility District* is inapposite. In that case, the City of Lodi (City) brought suit against East Bay Municipal Utility District (District) and the Pacific Gas and Electric Company (PG&E), because the District's and PG&E's diversions from the Mokelumne River for junior water storage projects would lower the groundwater table, harming the City's prior rights, which the court specifically found to be exercised in a reasonable manner in light of the circumstances. The trial court ordered large releases from the District's reservoir in order that a small amount of this release would infiltrate and thereby support the City's groundwater basin. The rest of the water from the large release remained unused. The Supreme Court of California found that the trial court's order "would result in an unjustifiable and unreasonable waste which should be avoided if a practical physical solution may be found." (*Id.* at 343.) The

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<sup>15</sup> Available: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=84381>

Court relied in part on time available to craft a physical solution in light of “the fact that there is no immediate danger to the City of Lodi’s water right.” (*Id.* at 342.)

No authority requires the State Water Board to impose a physical solution to accommodate a water use that is unreasonable in a drought emergency, rather than by curtailing such unreasonable uses of water. As the petitions acknowledge, Joint Petitioners’ proposed solution would require several regulatory approvals and permits before it could be implemented, as well as time for implementation, assuming that the measures were approvable. In addition, the identified physical solution would not be expected to provide the same level of minimum protection as the emergency regulations. Given the numerous regulatory requirements for the proposed physical solution and the need to provide an appropriate level of minimum protection for migrating salmonids, the Board reasonably concluded that Joint Petitioners’ proposal was not a viable substitute for the emergency regulations and curtailments orders in responding to the drought emergency.

#### **5.2.4 The State Water Board Appropriately Balanced Beneficial Uses in the Emergency Regulations**

Joint Petitioners argue that the Board failed to balance public trust uses and that “[p]rohibiting a use or diversion as unreasonable when it conflicts with public trust uses conflates Article X, section 2 and the public trust doctrine.” (Recon. Exh. p. 7-8, 11-12.)

Joint Petitioners raised a similar claim regarding the 2014 Emergency Regulation. As explained in Order WR 2014-0028, “[a]ll uses, including public trust uses, are subject to reasonableness.” (Order WR 2014-0028, p. 31, citing *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 442.)

In adopting the emergency regulations, the State Water Board carefully considered the beneficial uses of water in the Mill and Deer Creek watersheds. (See *Joslin v. Marin Mun. Wat. Dist.* (1967) 67 Cal.2d 132, 140). The Board considered the uses claimed and reported under water right permits, licenses, and statements in the Mill and Deer Creek watersheds, public comments, including by Joint Petitioners about their water use, status of the threatened species, severity of the current drought, the physical characteristics of Deer and Mill Creeks, the importance of Deer and Mill 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 regulations provide only a minimum, “belly scraping” amount of water needed for migration by threatened salmonids, not the amount of water needed for long-term protection of the species. The Informative Digests acknowledge that both CDFW and NMFS have new information since the 2014-2015 drought suggesting that higher flows than those established in the emergency regulations are needed for the long-term

protection of juvenile and adult salmonids. The State Water Board concluded that the emergency regulations were necessary to balance beneficial uses under exceptional drought conditions and would protect fish migration while minimizing impacts to other beneficial uses of water. Because the State Water Board balanced all the beneficial uses of water, not just the public trust uses, in the Mill and Deer Creek watersheds, the Board did not conflate the public trust doctrine and Article X, section 2.

Joint Petitioners also make a policy argument that the emergency regulations will leave landowners without irrigation water to sustain their crops and livestock during critical irrigation periods. (Recon. Exh. p. 14.) While this policy argument does not relate to one of the causes for reconsideration under Section 768, to the extent this argument goes to the balancing of beneficial uses, they were considered by the Board in balancing beneficial uses in the Mill and Deer Creek watersheds. As explained further in Section 5.2.3, the Board concluded that a stockwatering exemption was not necessary in 2021, given the water uses in Mill and Deer Creek watersheds, but added flexibility to address stockwatering needs during pulse flows to the 2022 Emergency Regulation based on comments received during the 2022 Emergency Regulation comment period and with additional time to consider the unique features of the Mill and Deer Creek watersheds.

### **5.2.5 The Public Trust Doctrine Applies to Water Use on Mexican Land Grant Lands**

Joint Petitioners assert that the public trust doctrine cannot be applied to former Mexican Land Grant lands and waters, relying on *Summa Corp v. California State Lands Comm'n* (1984) 466 U.S. 198. Joint Petitioners claim that Deer and Mill Creeks, Stanford Vina lands, and lands within Los Molinos, are patented Mexican Land Grant lands, and that the public trust doctrine does not apply unless California reserved a public trust interest in the patent proceedings. (Recon. Exh. 1, p. 11.)

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; because 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.

Joint Petitioners included as attachments to Reconsideration Exhibit 1 a number of documents describing the land served by Stanford Vina Ranch Irrigation Company, including Bureau of Land Management records, historical documents, and an excerpt of a book about the history of the Los Molinos Land Company. None of the documents indicate that the patent discussed water rights. Joint Petitioners do not 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.

Order WR 2014-0028 rejected this same argument. Explaining why *Summa* does not apply, the order states that “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].)” (Order WR 2014-0028, p. 33). As in the 2014 petition for reconsideration, Joint Petitioners fail to explain how a patent could preclude California from exercising its public trust authority to protect instream flows and cite no authority for the proposition that *Summa* bars the exercise of state regulatory authority.<sup>16</sup>

### **5.2.6 The Emergency Regulations Do Not Disregard the Water Rights Priority System**

Joint Petitioners assert that the State Water Board “is violating the rule of priority by declaring all Deer and Mill Creek diversions unreasonable and ordering them to cease without accounting for the relative priorities of Deer Creek water rights which differ by type of water right and priority date.” (Recon. Exh. 1, p. 14.)

The State Water Board considered a similar argument in Order WR 2014-0028, explaining that while the priority system is a critical component of water law, “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

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<sup>16</sup> In addition, the trial court opinion in *Stanford Vina* also rejected Joint Petitioners’ argument, explaining that Stanford Vina’s reliance on *Summa* was misplaced. *Summa* held that the State acquires no public trust easement in *lands* to which title was confirmed under the Land Act of 1851, unless such interest was asserted in the patent proceedings. The trial court explained, “[g]iven the nature of the public trust interest at stake, it makes no difference whether the State reserved a public trust easement in the Stanford Vina lands. Failure to do so may prevent the State from asserting certain public trust interests relating to title of the submerged lands covered by the Mexican Land Grants, but it does not prevent the State from asserting public trust interests in the fish within the creek. The Supreme Court’s decision in *Summa Corp.* simply does not apply here.” (*Stanford Vina Ranch Irrigation Company v. State of California* (Sup. Ct. Sacramento County, 2017, No. 34-2014-80001957).) Trial court opinions are not precedential, and this order does not treat the opinion as binding. But a trial court opinion may be considered to the extent its legal reasoning is persuasive. This order concludes that the trial court’s explanation on this issue is persuasive.

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 regulations 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.” (Order WR 2014-0028, p. 30.)

The court in *Stanford Vina* found that the Board did not violate the rule of priority in adopting almost identical drought emergency regulations in 2014 and 2015, reasoning that “the Board in this case did not subvert the rule of priority by imposing a condition on a senior appropriator that it did not also impose on more junior appropriators.” (*Stanford Vina, supra*, 50 Cal.App.5th at 1007.) Explaining that the rule against unreasonable use applies to all water rights, regardless of priority, the court concluded that “the Board was well-within its authority to determine diversions that threatened to violate the emergency minimum flow requirements constituted an unreasonable use of water. *Stanford Vina*’s senior water rights did not exempt its diversions from curtailment.” (*Id.*) The 2021 and 2022 Emergency Regulations similarly do not impose any condition on a senior appropriator that is not also imposed on junior appropriators. The 2021 and 2022 curtailment orders implementing the emergency regulations specifically require curtailment in the order of water right priority.

### **5.2.7 The Curtailment Orders Are Supported by Substantial Evidence**

Joint Petitioners reiterate the argument made by DCID that there is no evidence that steelhead are present in Deer Creek. The arguments raised by Joint Petitioners are addressed in Section 5.1 and are therefore dismissed.

## **6.0 CONCLUSION**

Joint Petitioners’ petitions for reconsideration are dismissed because they fail to meet the requirements for a petition for reconsideration. The emergency regulations are not an action subject to reconsideration. Joint Petitioners failed to include a memorandum of points and authorities, to notice interested parties, and to request meaningful relief. The petitions fail to raise substantial issues related to the causes of reconsideration set forth in section 768 of the State Water Board’s regulations. Additionally, to the extent that Joint Petitioners’ arguments in the petitions and exhibits can be understood, they are unpersuasive and fail on the merits.

DCID’s petition is dismissed because Order WR 2022-0170 was supported by substantial evidence for the reasons stated above.

The State Water Board finds that the challenged actions were appropriate and proper.

## **ORDER**

**IT IS HEREBY ORDERED THAT** the petitions for reconsideration are denied.



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Eileen Sobeck

Executive Director

**December 22, 2023**

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Date