

Memorandum

To: Ms. Victoria Whitney, Chief
State Water Resources Control Board
Division of Water Rights
Post Office Box 2000
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Date: June 30, 2006

Attention Mr. Paul Murphey
Project Manager

From: Robert W. Floerke, Regional Manager ***COPY – Original signed by Cindy Catalano for***
Department of Fish and Game - Central Coast Region, Post Office Box 47, Yountville, California 94599

Subject: Water Right Application No. 30166, El Sur Ranch, Monterey County - Notice of Preparation, Draft Environmental Impact Report (DEIR), SCH# 2006061011

Department of Fish and Game (DFG) has reviewed the Initial Study (IS) prepared by the State Water Resources Control Board (SWRCB) regarding Water Right Application (WA) No. 30166 for the El Sur Ranch (ESR), Monterey County, California. DFG is a Trustee Agency and potentially a Responsible Agency pursuant to CEQA, and as such, we offer the following comments on the proposed project as it relates to fish and wildlife resources of interest to DFG.

The project proposes to divert on a year-round basis, with a maximum direct diversion quantity of 1,615 acre-feet per annum (afa), with a twenty-year rolling average not to exceed 1,200 afa, from two wells near the mouth of the Big Sur River for irrigating 267 acres of pasture land out of a 292-acre place of use. The rate of diversion is proposed as a maximum instantaneous rate of 5.84 cubic-feet per second (cfs) with a running 30 day diversion average rate of 5.34 cfs

DFG has already provided comments, dated November 6, 2002, to the SWRCB regarding the issuance of a previous Notice of Preparation (NOP) for this project application (attached). The previous project was substantially the same (proposing instead to divert 1,800 afa for the irrigation of 292 acres of land as the currently proposed project. Therefore, our concerns remain the same and our previous comments are incorporated by reference.

In addition to concerns which we expressed in response to the previous NOP, as summarized below in Section 1, we have additional concerns based on review of the IS which was released with this NOP. First, the project description as provided in the IS does not entirely address the scope of the proposed project. Second, we are very concerned that the SWRCB has utilized assumptions contained in the ESR 2005 Technical Reports submitted by the applicant, rather than conclusions supported by data, to assess impacts and to support potential mitigation measures in the IS. DFG has provided recommendations for information needed to fully understand the impacts of the

proposed diversion and to identify appropriate and meaningful mitigation measures. Third, we remain concerned about the CEQA baseline which the SWRCB has assumed for this project as stated in the IS. Detailed comments can be found in Section 2 below.

Section 1: Summary of Previously Stated Concerns

As a result of issuance of a NOP in 2002, DFG provided a detailed response identifying our concerns regarding the proposed project and information needed to adequately assess impacts and identify appropriate mitigation measures. We have attached our previous letter to the SWRCB, dated November 6, 2002.

In May 2004, ESR proposed to conduct an "Interim Monitoring Plan" to study instream impacts from the diversion. At that time, SWRCB requested DFG to review the plan and to provide comments on whether the proposed study would provide the information necessary to adequately assess the instream effects of pumping on the Big Sur River. DFG provided comments to the SWRCB in a memo dated July 9, 2006, requesting specific modifications to the plan; the study moved forward without the requested modifications resulting in significant and predicted data gaps. The completed fisheries study, provided by the applicant in May 2005, and referred to as the biological section of the ESR 2005 Technical Reports, was deficient in information needed to fully identify potential effects of pumping on instream conditions.

DFG provided comments to the SWRCB regarding all three sections of the ESR 2005 Technical Reports in a memo dated September 16, 2005 (attached). DFG also contracted for additional technical review of the hydrogeologic section and when those comments were provided to DFG in a memo dated December 16, 2005, we transmitted them to the SWRCB on December 22, 2005, with a summary memo.

We have attached the five referenced memos and request that these previous comments also be incorporated into this response to the current NOP. In addition, we would like to reiterate the previously identified twelve areas of interest that should be addressed as part of an EIR for the proposed project. Briefly, those are:

1. The status of sensitive resources known to occur in the vicinity of the diversion, including seven sensitive species (three Federally listed) and one sensitive natural community.
2. Whether the proposed diversion would have significant impacts on the sensitive resources at the diversion site, and measures identified which would avoid or minimize impacts to public trust resources.
3. The status of sensitive resources potentially occurring at the place of use of the diverted water, including ten sensitive species (four State or Federally listed) and one sensitive natural community.

4. Potential impacts to the place of use from the application of 1,615 af of water, such as acceleration of seabluff retreat and coastal erosion, increased runoff that can lead to erosion and sedimentation, alteration of habitats, and decline of associated species.
5. Whether the proposed project would have significant impacts on the sensitive resources at the place of use, and measures identified which would avoid or minimize impacts to public trust resources.

Additionally, we requested specific information to address the effect that the proposed diversion would have on the flows of the Big Sur River, and resources supported by those flows, including:

6. A water availability analysis, including a water budget which would address water availability and water consumption in the watershed, and propose defensible flow reservations for the various trust resources dependent on the riverine environment. The water analysis should be stratified by five water year types (Wet, Above Normal, Median/Average, Below Normal/Dry and Critically Dry); and segregated base on 20 percent-40 percent-60 percent-80 percent exceedence flows.
7. A fisheries flow analysis, acceptable to DFG and the National Marine Fisheries Service, to be conducted in order to define flows necessary to support public trust resources.
8. Analysis addressing the effects the diversion has on water temperature, riparian health and canopy, salinity, and other water quality parameters which may be influenced by the diversion.

In addition, this request for water diversion appears to be far in excess of that which is considered a beneficial use, potentially constituting waste (which is prohibited by California law); that the request was far in excess of the historic (and unpermitted) use of the wells; and that the request may not be consistent with Conservation Easements and/or conveyance documents for the property. We asked that the SWRCB determine both the appropriate level of such a request and establish a baseline so that impacts of the proposed diversion could be evaluated. Toward this end, we requested information to establish historic use and baseline:

9. Information needed to establish baseline use should include data such as parcel and water right conveyances, easements, well logs, water meters, or electrical bills demonstrating water use, or other information that would clarify historic use and basis for any riparian rights.
10. Consistency with the terms and conditions of any conservation easement placed over the ESR lands; and terms and conditions which may have been placed at the

time of conveyance of Department of Parks and Recreation (DPR) lands from Frances Molera to The Nature Conservancy and from The Nature Conservancy to DPR.

11. Full disclosure of the location of all water use, including whether any portion of this will require an out-of-basin transfer.
12. Identification of any portion of the proposed place of use which is subject to an existing riparian right.

We believe the twelve areas to be pertinent to the currently proposed project, and request that these issues be addressed in the DEIR.

After review of the ESR Technical Reports provided by the applicant, we believe them to be only partially responsive to 5 of the 12 areas of interest we have identified. The ESR Technical Reports include significant data gaps and we believe that some of the conclusions presented in the ESR Reports are not supported by data. We also do not believe that a previous submittal by the applicant, a 1999 report by Jones & Stokes Associates, can be relied upon to support impact analysis and/or identification of appropriate mitigation measures for this project. Comments related to DFG review of these documents are attached.

Section 2: Comments Based on Review of the IS Released with the NOP

Comments Concerning the Project Description

The diversion proposed for this project may significantly affect the quantity and quality of water in the Big Sur River, including subterranean flows, and impact resources that are dependent on the riverine environment. In addition, place of use impacts on, and adjacent to, the lands being flood irrigated must be evaluated. To allow this to occur there first must be an adequate project description. The project has been revised but the description and environmental setting in the IS does not provided a clear description of the activities proposed to allow adequate information to be used in our review. DFG requests that the following information be included in the DEIR:

Without a clear description of where water is being applied, it is impossible to assess potential impacts to the irrigated pasture land, Swiss Gulch, the unnamed tributary, and other areas that may be disclosed to be sensitive. DFG requests full disclosure of the location of all water use and suggests that inclusion of a map providing the following information would help clarify the text description.

- The total acreage of the parcel(s) within the project area.
- The acreage of land being flood irrigated within each pasture block . (It is assumed that it is less than the total acreage of the parcels. However, the map provided in the

IS appears to show the entire parcel(s) as the place of use for flood irrigation including watercourses, riparian areas and dunes. If this is the case, then additional biological impacts associated with flood irrigation of these areas would need to be disclosed. If they are not intended for irrigation, the size of the Place of Use should be adjusted accordingly.)

- The acreage of land within the land parcel(s) that is not being flood irrigated (for example the acreage of: 1) The Swiss Gulch watershed; 2) the watershed of the unnamed tributary to the Pacific Ocean; 3) the tailwater pond; 4) the sea bluff and sand dune area; and 5) the berms between the pastures).
- A clear delineation of the acreage of lands receiving water under the riparian claim and lands which will receive water under this water application. The SWRCB previously determined that the riparian area within the land parcel(s) was 90 acres but the revised application has reduced the area to 25 acres. Clear mapping which identifies pertinent watershed boundaries will clarify this discrepancy.

The project described should be the whole of the action. In this case, water to serve riparian lands, while not subject to the water right application, is being diverted to serve the place of use from the same set of wells. Disclosure of all water to be diverted from the wells is necessary to allow adequate assessment of the full potential impacts of this project.

The project description discloses that water used to flood irrigate the upper border strips flows to lower ones, but it does not disclose where the water from the lower border strips flows. The DEIR should disclose how and where the tailwater discharges from the site. The IS also does not disclose sufficient information about the existing tailwater pond. This pond and how it functions should be fully described. This allows disclosure of any impacts to water quality or to the cliffs due to release of tailwater from that pond. This disclosure is necessary to understand and assess any potential erosion problems and determine appropriate erosion control measures.

The IS discloses that the pastures are annually fertilized but did not elaborate on how this was done, what types of chemicals were used, and what methods were used to ensure that these chemicals are not being discharged in tailwater to waters of the State. This information should be included in the DEIR.

The ESR project wells are clearly described, but the IS states that the New Well was not intended to significantly increase pumping, water use, or to be used to irrigate lands in addition to the Place of Use. However, there is no information provided that the "old well" once pumped at the combined rate of the both wells (as described on Page 2-7 of the IS). As presented, it appears that the use of both wells at maximum capacity now exceeds the historical pumping rate and that the use of the "new well" now allows pumping during the lowest flow season when salt water intrusion would have curtailed pumping at the old well.

If there is to be a claim that these two wells have not increased the pumping/water use or extended the season of pumping, the validation of those claims needs to be included in the DEIR (see also our comments below on CEQA baseline).

In addition, the historical (and current) use of water is limited to the period of April 15 to October 15; a request to divert out of the river year-round constitutes a new period of use (October 16 to April 14) with its own set of potential impacts. Winter drought exacerbated by diversion has the potential for numerous adverse effects. In a dry year, diversion during the period of October to April can be detrimental to fish passage; it is also the season for root growth for many plants in this system. The DEIR should address impacts of a project which would divert year-round, addressing the season of diversion in conjunction with quantity of diversion. Winter diversions should not be considered a less than significant impact unless data supports that conclusion.

The IS mentions but does not adequately describe the other wells in the well field. If information regarding these wells are to be used in further analysis or discussions within the DEIR, which we recommend, then their characteristics also need to be included in the Project Description. The effects of pumping from all wells should be included in a discussion of cumulative effects.

Comments Concerning Information to be Collected for the DEIR

General Comments

We recommend that the SWRCB; 1) Identify information needed to support the impact analysis and identification of appropriate mitigation measures; 2) identify information gaps; and 3) then collect or contract to collect the information needed. We are very concerned that the SWRCB retain control over the type and scope of information needed, in consultation with the applicant, the trustee and responsible agencies, and in consideration of public input. We are concerned that information which has been previously provided directly by the applicant may not meet the needs of the CEQA process. This results in delays that benefit neither the applicant nor the permitting process.

Our previous experience with the "Interim Monitoring Plan" indicates that recommended information was not collected by the applicant, in spite of review and comment by DFG as to how the work plan could be revised to meet our needs. Instead, considerable time and effort was spent by the applicant on a study which had predictable data gaps and which addressed issues which were outside the proposed and reviewed scope of work. We are very concerned that the SWRCB has utilized unsupported assumptions contained in the ESR Technical Reports for impact assessment, as well as to formulate potential mitigation measures. This only serves to obfuscate the issues and delay the process.

Comments on Hydrogeological Issues

We have provided an analysis of the utility of the ESR hydrogeological information, as well as recommendations for additional specific information that we believe are necessary to quantify potential impacts from the proposed water diversion, in the attached memo from Mr. Kit Custis, June 28, 2006. We recommend that the SWRCB provide the necessary oversight, with the input of the Trustee and Responsible agencies, to insure that the scope of work and data collected will meet our collective needs and expedite completion of the CEQA process.

In summary, Mr. Custis' memo identifies gaps in the hydrogeologic and hydrology data, and recommends specific information be collected and analyzed in order to determine impacts, the available waters, and to assist in selection of type, location and timing for monitoring water quality, quantity and flow data. The specific recommendations are related to the need for: 1) Ground water and surface water hydraulic head data along both sides of the river; 2) hydraulic conductivity data on the streambed; 3) information concerning the quantity of ground water upwelling into the river; 4) the influence of saltwater influx on upwelling ground water; 5) water level and water quality data for ground water outside the pumping well field; 6) data on the changes in surface water flow rates from water quality stations #6 to #12; 7) a longitudinal profile of the river channel; and 8) a review of historic aerial photos and topographic maps to assess changes in channel morphology and its relationship to the movement of groundwater. Please see the attached memo, dated June 28, 2006, for more detail.

Comments on Water Availability Analysis

Water Code requires that water be available for diversion. However, a comparison of water to be diverted to water available on a mean annual basis is an insufficient approach for the analysis required to provide protection of the public trust. Diversion for crop irrigation is likely to be highest when the stream flows are lowest. Therefore, the analysis must address seasonal water availability and water consumption in the watershed, and include defensible seasonal flow reservations (protective bypass flows) for the various trust resources dependent on the riverine environment.

DFG recommends that this analysis be done at least at the monthly level. An adequate analysis must consider both seasonal and year-type variation so any water analysis should also be linked to water-year type variation. DFG recommends that the information be stratified by five water year types (Wet, Above Normal, Median/Average, Below Normal/Dry and Critically Dry); and segregated base on 20 percent-40 percent-60 percent-80 percent exceedence flows.

Comments on the General Information Related to Water Flow Requirements

The seasonal flow reservations (protective bypass flows) should assure that both water quality and quantity to support sensitive life stages of aquatic resources are being bypassed. This can be accomplished with a fisheries flow analysis that is acceptable to

DFG and the National Marine Fisheries Service. It should be conducted to define flows necessary to provide passage, maintain habitat, and protect water quality during the entire diversion season (which has been requested to be altered from a historic April to October regime to a year-round diversion).

It appears from our review that the IS has repeated the assumption of the ESR Technical Reports that pumping has no effect on instream flows or water quality regardless of the pumping rate or natural flow condition. There is no data provided to support that conclusion. DFG has previously recommended that the effects of pumping and changes in those effects due to different pumping regimes (including having the pump off for a period that allows recovery) be addressed in a way that clearly distinguishes conditions due to pumping from those that naturally occur. Those comments can be found in correspondence provided to the SWRCB dated July 9, 2004, and September 16, 2005 (attached). They are incorporated by reference into this letter and are summarized below.

Comments Related to Impacts to Passage

The IS states that the ESR 2005 study “implied continuous habitat connectivity where no physical disruption in migration would have occurred.” A stream can exhibit shallow connectivity without providing passage. Not enough information was provided in the ESR Report to support a claim that passage could occur during the summer rearing period nor did the Report make that assertion directly. Additional data will need to be provided to address this issue.

Additionally, diversion during the winter months should not be considered a de minimus impact since winter diversion for crop irrigation are likely linked to periods of low rainfall and corresponding low flow levels in the river. Low flows in the winter can affect species ability to migrate and any impacts must be disclosed and mitigated.

Comments Related to Impacts to Water Quality

Analysis should also address the effects of this diversion on water temperature, dissolved oxygen (DO), riparian health and canopy, salinity, and other water quality parameters which may be influenced by the diversion. An appropriate analysis of the quantity and quality of water remaining in the stream (as surface flow) after the proposed diversions (under both riparian and appropriative rights) is critical in assessing the type and magnitude of impacts to sensitive resources.

Additionally, the IS repeats the Technical Reports’ claims that reduced dissolved oxygen levels appear to be unrelated to the project. Data was only collected when the pumps were operating so there is no data to support this claim or the additional claim that pumping actually reduces low levels of DO and improves water quality. Continuous DO monitoring and data collection during various pumping regimes is needed to support such claims and its collection was recommended to fill this data gap in our previous communications with ESR and the SWRCB.

Comments Related to the Impacts to Available Habitat.

Impacts of pumping on the availability of aquatic habitat have not yet been addressed. While a small change in stage height was reported during the 2004 study, an assessment of impacts to flows and, in turn, on available aquatic habitat is not available. Biological sample is reported to have only occurred when the pump was operational allowing no comparison between natural flow conditions and pumping periods. Data needs to be collected, analyzed and made available concerning impacts of pumping as compared with the natural condition to adequately assess pumping impacts to flow, availability of habitat at the stream margin, and water quality.

Comments Related to the Impacts due to the Excessive Application of Water

Department of Water Resources has compiled information intended for planning and determining irrigation efficiencies for various crops in different hydrographic areas. A clear project description, including the acreage that will actually be irrigated, will provide a basis for comparison of the requested water use of this project to that being used in other similar projects in the same hydrographic areas. This information should be made available in the DEIR.

Our agency continues to maintain that even the estimated six af per acre is far in excess of that necessary for the proposed beneficial use of pasture irrigation and may constitute waste, unreasonable use, or unreasonable method of use. This has the potential to be particularly egregious in the winter if irrigation were to be applied as suggested with a year-round request for diversion. Excessive application has the potential for a range of adverse biological effects. These potentially significant effects result from the fact that: 1) Irrigation water applied under appropriative rights for this project moves diverted water out of the basin (since excess tail water flows to the ocean or into other watercourses), which does not allow excess water to flow back to the Big Sur River to support resources there; and 2) excess water application and the resulting run off threatens adverse water quality and erosional impacts to the seas cliffs and watercourses within, and outside, the project area where tailwater is being released.

Although the IS proposed erosion control measures to mitigate for any excessive runoff of tail water, DFG recommends avoiding this impact by requiring the application of the appropriate amount of water as the superior mitigation in terms of resource protection.

Comments Concerning the CEQA Baseline

The IS details the information that the SWRCB used to determine the CEQA baseline for this project, which is "the point above which the project's contributory impacts are evaluated." We are concerned about several aspects of the determination of the baseline, but in particular, we are very concerned that the SWRCB has used a period of unpermitted use to set the baseline. The New Well was constructed and put into use without either a permit or review under CEQA, after dates which are used to define an

“ongoing project” exempt from CEQA (PRC 21169; CEQA Guidelines 15261). Failure to get a water right further excludes the new well as an exempted project since they must be “otherwise legal and valid” (PRC 21169). The new well served to increase the amount of water diverted over and above that of the old well, which could be regarded as “pre-CEQA,” but nonetheless, was still operating without a valid water right.

As stated in the IS, the period selected for establishing the pumping baseline does not capture the years of lowest water use. As such, it sets a higher baseline, decreasing the level of impacts which are being evaluated, as well as the level of impacts which would need to be mitigated to protect public trust.

In addition, the historical use of water is during the period of April 15 to October 15; a request to divert out of the river year-round constitutes a new period of use (October 16 to April 14). We believe that the season of use is also pertinent to designation of the baseline, in addition to the overall volume of water, and both should be analyzed regarding impacts which have the potential to occur with year-round diversion.

DFG has provided the SWRCB with specific comments regarding informational needs in previous correspondence; we suggest that these and other documents pertinent to this project’s impacts be made available for public review on the SWRCB website.

Thank you for the opportunity to provide you with our concerns regarding this project. Should you have questions regarding our comments, please contact Ms. Linda Hanson, Staff Environmental Scientist, at (707) 944-5562; or Ms. Deborah Hillyard, Staff Environmental Scientist, at (805) 772-4318.

Attachments:

cc: See next page

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e☒: w/Custis Memorandum only
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LH/DH/pm

Attachments:

- Memo to DFG from Mr. Kit Custis, June 28, 2006
- Memo to SWRCB from DFG, December 22, 2005
- Memo to DFG from Mr. Kit Custis, December 16, 2005
- Memo to SWRCB from DFG, September 16, 2005
- Memo to SWRCB from DFG, July 9, 2004
- Memo to SWRCB from DFG, April 21, 2003
- Memo to SWRCB from DFG, November 6, 2002