

Memorandum

To: Mr. Edward Anton
State Water Resources Control Board
Division of Water Rights
Post Office Box 2000
Sacramento, CA 95812-2000
Fax: (916) 341-5400

Date: April 21, 2003

Attention Kyriacos C. Kyriacou

Copy, original signed by:

From : **Robert W. Floerke, Regional Manager**
Department of Fish and Game - Central Coast Region, Post Office Box 47, Yountville, California 94599

Subject: Comments on the Preparation of the Draft Environmental Impact Report for Water Right Application 30166 by El Sur Ranch to Appropriate Water from Big Sur River Subterranean Stream, Monterey County

The Department of Fish and Game (DFG), acting as both a Trustee and Responsible agency under the California Environmental Quality Act (CEQA), commented on the Notice of Preparation (NOP) for a Draft Environmental Impact Report (DEIR) for Water Right Application (WA) 30166. That WA, submitted by the El Sur Ranch, requests an appropriation of 1,800 acre-feet annually (afa) from the underflow of the Big Sur River for use on 292 acres of pasture on the El Sur Ranch in Monterey County. DFG listed several concerns in its comments regarding the effects of the proposed appropriation on the environment and requested that these concerns be addressed in the DEIR (see attached).

To evaluate the effects of the project on the quantity and quality of water in the Big Sur River and the aquatic and terrestrial resources affected by the project, DFG recommended that the DEIR include various new studies and review of previous studies. Our agency stated that it would be critical to analyze the quantity and quality of water remaining in the stream after this proposed diversion as well as other diversions within the watershed that were assessed. To that end, we requested that this analysis address the effects of the diversion on water quality parameters including temperature, salinity, dissolved oxygen and other parameters which may be

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influenced by the diversion. We also expressed concerns about the deficiencies in the report entitled *El Sur Ranch Hydrologic Investigation*, an analysis of the river prepared by Jones and Stokes Associates (JSA) in April 1999 and requested that the deficiencies identified by DFG be addressed.

Within the past two weeks, DFG has had conversations with Mr. Kyriacos Kyriacou, the SWRCB contact for this project, and Mr. Rieger, a consultant working on the fisheries issues for the preparation of the DEIR. From those conversations, DFG became aware that the DEIR is scheduled for completion by May, 2003. Based only on the topics discussed during those conversations, DFG has the following concerns in regard to the DEIR.

First, except for a January 10, 2003 letter from the SWRCB to DFG requesting historical studies relevant to the Big Sur River fisheries, there has been no consultation or contact with our agency during the preparation of this DEIR. At no time has DFG been contacted concerning study plans or adequate mitigation measures for identified impacts. While such contact is not a CEQA requirement, per se, previous discussions with SWRCB provided for a coordination process during the CEQA review process to ensure that issues were adequately addressed during document preparation. DFG believes that inadequacies in some assessments for this project could be addressed through a consultation process. In particular, water quality parameters within the estuary appear to have been inadequately assessed, especially in light of our specific NOP recommendations and previous responses from the National Marine Fisheries Service (NMFS) and Janet Goldsmith, the applicant's attorney, on this topic.

Second, impacts to aquatic resources (as discussed with Mr. Rieger by phone), prompted both inter-agency and intra-agency discussion and concerns. Patricia Anderson, the DFG fisheries biologist assigned to this project, will be contacting Mr. Rieger to discuss some of these issues specific to fishery impacts. However, it again appears that some of these concerns would profit from pre-consultation with the appropriate agencies.

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Third, and of particular concern, is the setting of the CEQA environmental baseline so as to mask the impacts of an ongoing illegal diversion and prevent an appropriate environmental assessment according to the intent of CEQA. It appears that the existing environment or baseline has been established based on current unauthorized diversions occurring at the project site that are in apparent violation of Section 1052 of the Water Code. This ongoing violation is not only being allowed to continue but is being used to set an artificial environmental baseline for the project during its CEQA review. In effect, using a baseline that includes the proposed diversions allows this project to be assessed in such a way as to avoid any impacts over those currently present and, as such, circumvents the intent of CEQA review to disclose the impacts of the project. In essence, the project can be said to have no impacts above the existing baseline. Section 15125 of the CEQA Guidelines states that existing environmental conditions at the time the Notice of Preparation (NOP) is published will "normally" constitute the baseline environmental conditions against which significant impact will be determined. This language, "normally," was inserted to guard against an artificial manipulation of the environmental baseline that would serve to circumvent a true impact analysis. Here, an ongoing illegal diversion is certainly not a "normal" situation, but one that calls for an adjustment of the baseline in order to accurately conduct the environmental review and satisfy the intent of CEQA. By studying historical data, DFG believes that the baseline can be set to simulate pre-project conditions.

Allowing illegal diversions to continue during the time between submission of a water right application and the time that environmental review commences, masks significant impacts and allows Section 1052 trespass. DFG's position is that illegal diversions must not be included in baseline environmental review and the illegal diversion should cease immediately.

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In closing, DFG requests a site visit prior to the beginning of the DEIR comment period as well as the coordination of contacts and consultations through DFG's Yountville office to assure appropriate staff response. We hope that this memorandum will help clarify some of the shortcomings in both the CEQA process and the information being collected so that our agency can adequately analyze the effects of the proposed project. Should you have any questions regarding our comments, please contact Linda Hanson, Environmental Scientist, at (707) 944-5562; or Scott Wilson, Habitat Conservation Supervisor, at (707) 944-5584.

Attachment

cc: See next page

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