

Memorandum

Date: December 14, 2009

Exhibit DF6-C-59
19 pages

To: Mr. Paul Murphey
Division Water Rights
State Water Resources Control Board
Post Office Box 2000
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Subject: El Sur Ranch Water Right Application No. 30166 Draft Environmental Impact Report

Staff of the Department of Fish and Game (DFG and the Department) have reviewed the Draft Environmental Impact Report (DEIR) for the El Sur Ranch Water Right Application No. 30166. The applicant has requested to divert water from two wells located in Andrew Molera State Park which tap into the underflow of the Big Sur River, to irrigate 267 acres of pasture land in support of the Ranch's cattle operation. The application requests that diversions be allowed year-round (January 1 through December 31). The applicant has proposed that the diversion be subject to several limitations, including 1,615 acre feet (AF) total annual diversion; 20 year running average of no more than 1,200 acre feet annually (AFA); seasonal limitations of no more than 230 AF each calendar month and no more than 735 AF total, between July 1 and October 31; and maximum diversion rates of 5.84 cubic feet per second (cfs) instantaneous and 5.34 cfs 30-day running average. The applicant's request in total is the "Project" which is being evaluated in the DEIR.

This letter provides comments on the draft document, including the *project itself as well as the project description* utilized in the DEIR; *compliance with California Environmental Quality Act (CEQA)*, and use of an appropriate *CEQA baseline*; the State Water Resources Control Board's (SWRCB) responsibilities to address *public trust resources* associated with the water sought to be appropriated, as distinct from responsibilities under CEQA; *identification of information* needed for the Board to make an informed decision on the application, which would protect public trust resources; and suggests *alternatives and conditions* which we recommend the SWRCB consider and adopt. The Department's major areas of concern follow; detailed comments regarding particular sections of text in the DEIR are included as attachments.

DFG Authorities

DFG Authorities

CEQA Authority: The Department is a Trustee Agency with the responsibility under CEQA for commenting on projects that could impact botanical and wildlife resources. Pursuant to Fish and Game Code Section 1802, the Department has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species. As a Trustee Agency for fish and wildlife resources, the Department is responsible for providing, as available, biological expertise to review and comment on environmental documents and impacts arising from project activities, as those terms are used under CEQA. In addition, for those projects which require a subsequent discretionary permit from the Department, it is a Responsible Agency.

California Endangered Species Act (CESA) Compliance: The Department has regulatory authority over projects that could result in the "take" of any species listed by the State as threatened or endangered, pursuant to Fish and Game Code section 2081. If the Project could result in the "take" of any species listed as threatened or endangered under CESA, the Department may need to issue an Incidental Take Permit (ITP) for the Project.

CEQA requires a Mandatory Finding of Significance if a project is likely to substantially impact threatened or endangered species (Pub. Resources Code §§ 21001{c}, 21083, tit. 14 Cal. Code Regs. §§15380, 15064, 15065.) Significant impacts of the project must be avoided or mitigated to less than significant levels; CEQA does allow the Lead Agency to make and support a Statement of Overriding Considerations (SOC) for significant and unmitigable impacts. However, the CEQA Lead Agency's SOC does not eliminate the Project proponent's obligation to comply with Fish and Game Code section 2081, under which impacts to State-listed threatened and endangered species must be "minimized and fully mitigated". In other words, a SOC cannot apply to impacts to State-listed threatened and endangered species. Compliance with CESA does not automatically occur based on local agency project approvals or CEQA compliance; consultation with the Department is warranted to ensure that the identified project meets CESA's permit issuance criteria, and project implementation does not result in the unauthorized "take" of a State-listed species.

Incidental "take" authority is required prior to engaging in "take" of any plant or animal species listed under CESA. Plants listed as threatened or endangered under CESA cannot be addressed by methods described in the Native Plant Protection Act. No direct or indirect disturbance, including translocation, may legally occur to State-listed species prior to the applicant obtaining incidental "take" authority in the form of an ITP or its equivalent.

Fully Protected Species: The Fish and Game Code identifies several categories of species which are "fully protected," that is, no "take" of these species is authorized, except for necessary scientific research including efforts to recover species. Any actions taken as part of specified mitigation for a project, as defined in Section 21065 of the Public Resources Code, does not qualify as "necessary scientific research."

Fully protected species have the potential to occur on the proposed Project site. The applicant and the SWRCB should work with the Department to identify measures to be

implemented to preclude "take" from occurring. The Department recommends that such measures be identified prior to certification of the EIR, required as Project conditions, and included in a Memorandum of Understanding between the applicant and the Department.

Stream Alteration Activities: The Department, as a Responsible Agency under CEQA, has regulatory authority with regard to stream diversion activities that could adversely affect any fish or wildlife resource. For any activity that will divert or obstruct the natural flow of a river or stream, the Department may require a Stream Alteration Agreement (SAA), pursuant to Section 1600 et seq. of the Fish and Game Code. Before issuing a SAA, the Department is required to independently make a determination of environmental effects pursuant to CEQA.

Diversion of the natural stream flow and activities associated with installing any new or repairing existing pipelines across Swiss Canyon require El Sur Ranch to submit a notification pursuant to Fish and Game Code section 1602. The Department will review the notification and determine if there are resources at risk associated with the diversion activities, and whether an SAA will be required.

Water Rights: The Department, as Trustee and Responsible Agency, is consulted by the SWRCB during the water rights permit application process to provide terms and conditions designed to protect fish and wildlife prior to appropriation of the State's water resources. Certain fish and wildlife resources are reliant upon aquatic ecosystems, which in turn are reliant upon adequate flows of water. The Department therefore has a material interest in assuring that adequate water flows within streams for the protection, maintenance and proper stewardship of those resources. The Department provides, as available, biological expertise to review and comment on environmental documents and impacts arising from project activities.

The Department protested El Sur Ranch's Water Right Application 30166 based on its proposal to divert from the underflow of the Big Sur River, 1,615 acre feet of water annually at a maximum rate of diversion of 5.84 cfs. The Department is concerned that the diversion will result in direct and cumulative adverse impacts to the resources of the river by reducing instream flow and water availability needed to maintain fish and wildlife habitat within and adjacent to the river. Dismissal terms were withheld at the time of the Department's protest in part because an environmental document had not yet been prepared pursuant to CEQA. The Department recommended that an EIR be prepared to fully disclose the direct and cumulative effects of El Sur Ranch's diversions from the river. Specific protest dismissal terms will be provided following review of an environmental document acceptable to the Department.

Previous input to SWRCB from DFG

The Department previously provided input to SWRCB in response to its Notice of Preparation (NOP) in a letter dated June 30, 2006, which includes a supporting memorandum from Mr. Kit Custis dated June 28, 2006; that letter incorporates by reference the Department's response to a previous NOP, in a letter dated November 6, 2002, which includes a supporting memorandum from Steve Reynolds of the Department of Conservation, dated October 4, 2001. That was followed by a letter requesting clarification of the CEQA baseline, dated April 21, 2003. Additionally, per the SWRCB's request, the Department provided detailed comments to

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an August 24, 2007 Technical Memorandum prepared by SWRCB's consultants that described the proposed project description and CEQA baseline for this project; the Department's letter with those requested comments was dated November 15, 2007. It does not appear that many of the Department's comments, which were provided to guide development of this DEIR, have been incorporated into the current CEQA document. The Department's previous letters are attached and hereby incorporated by reference. This letter may reiterate some of the major comments from the previous letters, but the letters are included in their entirety so that they are recognized as part of the record for this project, and so the State Board can answer the previously unaddressed comments.

Additionally, the Department, at the request of the SWRCB, has provided extensive comments on the technical information provided by the applicant. The DEIR has utilized, as supporting information in preparation of this DEIR, the applicant-provided information without including the Department's comments and concerns provided to assist the SWRCB and the public evaluate the information and conclusions that support much of the impact analysis in the DEIR. The information provided by the applicant had numerous factual and interpretive errors and unsupported conclusions, some of which have been utilized in analyzing the effects of the proposed project.

The Department's comments are included in four memoranda to the SWRCB which are dated December 22, 2005, including a supporting memorandum from Kit Custis, Department of Conservation, dated December 16, 2005; December 7, 2005; September 16, 2005; and July 9, 2004. The Department attaches and incorporates by reference the above-mentioned letters. This letter may reiterate some of the major comments from the previous letters, but the letters are included in their entirety so that they are recognized as part of the record for this project, and so the State Board can answer the previously unaddressed comments. These comments should have been part of the application, as required by Water Code section 1260 (j) which states in part that the application should contain "*All data and information reasonably available to applicant or that can be obtained from the Department of Fish and Game concerning the extent, if any, to which fish and wildlife would be affected by the appropriation.*" It is not clear why this information was not included in the DEIR.

The Proposed Project and Project Alternatives

The project proposed in the DEIR is not clearly identified, and confounds impact analysis required under CEQA. The proposed project is the issuance of a water right permit to allow the appropriation of water from the Big Sur River to maintain irrigated pasture on the El Sur Ranch. The DEIR states that "[t]he total quantity and rate of water diversion requested under the water right application, as amended October 17, 2006, is for use on 267 irrigated acres within the 292-acre project site, and includes water needed to irrigate the applicant's claimed existing riparian 25 acres." The DEIR also states that "[a]lthough the pending application denotes the Ranch's claimed riparian right, the SWRCB's approval authority is limited to the appropriative water right sought in the Ranch's application."

Additionally, the SWRCB initially determined in their April 12, 1992 letter to the applicant regarding the overall status of their water rights, that the El Sur Ranch's riparian right was

limited to 90 acres; this document indicates that the SWRCB may have accepted the applicant's assertion that the area subject to riparian right is 25 acres. This is a large discrepancy, and has implications for the nature and amount of the appropriative right which is being sought; the actual acreage of the applicant's riparian right should be definitively determined by the SWRCB.

Although the project description, including Table 2-4, notes that 25 (and perhaps as many as 90) acres of the Place of Use (POU) are subject to a riparian right, the DEIR does not identify how diverted flows from the Big Sur River are allocated into a "riparian" portion and an "appropriated" portion which is subject to the terms and conditions of the permit (and, ultimately, license) granted by the SWRCB. The impact analysis does not distinguish between impacts attributed to water being diverted from the riparian portion of the POU, and those attributed to the water diverted under an appropriative right. Additionally, there is no discussion regarding how diversions exercised under the applicant's riparian right would be addressed (either included or excluded) within the terms and conditions of limits on the requested diversions under the appropriative right.

In addition to the difficulties inherent in trying to distinguish those impacts which are attributable to the appropriated water (which is the proposed action that qualifies this as a CEQA "project"), there are difficulties with other aspects of the project and project description that have resulted in the analysis of impacts being incomplete, inaccurate or inappropriate. The Department recommends that the SWRCB more clearly identify the project which is the subject of the SWRCB's action, and analyze the proposed project, and any alternatives, in consideration of applicable statutes, regulation, policy and case law. Many of the shortcomings of the DEIR lie with the failure of the document to identify those aspects of the proposed project which are not consistent with Water Code and regulations and/or would not result in protection of public trust resources; and proceeding with the analysis of a project which could not be permitted. Additionally, the discussion of alternatives should focus on alternatives to the project which are capable of avoiding or substantially lessening any significant effects of the project, "even if their alternative would impede to some degree the attainment of the project objectives, or would be more costly" (CCR, Title 14, section 15126.6(b)). The Department does not believe that the alternatives discussed in the DEIR meet the requirements of CCR, Title 14, section 15126.6(b), and that none of the alternatives, possibly including the No Project/No Permit Alternative, would reduce impacts to public trust resources and/or could be permitted under existing statutes, regulation, policy and case law.

Public Trust Resources

The SWRCB has an independent obligation to address public trust resources, as required by the 1983 Supreme Court decision in *National Audubon Society v. Superior Court of Alpine County*; this decision requires the SWRCB to balance potential value to society against the impact on trust resources, and, as stated in the DEIR, "the action which will feasibly protect public trust values must be implemented" (Appendix F). This obligation is independent of any baseline determination, impact analyses or mitigation which might be applied to a project subject to review under CEQA.

The DEIR identifies as a standard of significance any project element which would "[s]ubstantially decrease the amount of streamflow such that there would be a potential for impacts to other public trust resources such as river function, riparian vegetation and lagoon functions" (page 4.2-43). Application of the SWRCB's responsibilities to only those effects which are above CEQA does not meet the standards set forth in *Audubon*. Additionally, there does not appear to be any section of the DEIR which actually discusses what public trust resources would be subject to this independent obligation; nor any descriptions, standards, thresholds or any other such analysis or requirements which would clarify how the SWRCB actually considered such resources and identified a project or project alternative, including appropriate limits on allowable diversions, which would feasibly protect public trust values.

The DEIR does not evaluate the significance of potential impacts to public trust resources which are below the "baseline" established by the DEIR, nor offer any specific measures which would mitigate the adverse affects. We believe that these could be significant and potentially unmitigable, except by reducing the diversion and enforcing limits on pumping, both instantaneously and on a seasonal basis. The DEIR does state that the historic use of water, some non-riparian and not permitted, and some riparian, has contributed to overall degradation of public trust resources. Sections 4.2 and 4.3, in particular, acknowledge that previous significant impacts may have occurred during past diversions, stating that "the effect of baseline pumping on stream hydrology, water quality, and, particularly, fish passage in critically dry conditions, serves to magnify any adverse cumulative effect of project pumping on aquatic resources." The Department recommends that the SWRCB clearly identify what impacts have resulted from historic pumping, including that which is not permitted, in order to identify specific limits that would protect public trust resources.

Project Description

The project description is not described in enough detail to allow for an accurate understanding of what exactly is being proposed. The entire project description includes the applicant's suggestions regarding limitations on maximum annual diversion amount, average annual diversion amount, seasonal maximum diversion amount, seasonal monthly maximum diversion amount, and two different maximum rates of diversion, one which is instantaneous, and one which is a 30-day running average.

According to Water Code section 1260 et seq., the application must identify the nature and amount of the proposed use, the proposed point(s) of diversion, the type of the diversion works, and the proposed place of use, and must provide sufficient information to demonstrate a reasonable likelihood that the unappropriated water is available for the proposed appropriation. Additionally, the application must include "[a]ll data and information reasonably available to applicant or that can be obtained from the Department of Fish and Game concerning the extent, if any, to which fish and wildlife would be affected by the appropriation, and a statement of any measures proposed to be taken for the protection of fish and wildlife in connection with the appropriation."

The application-suggested limitations on diversion amounts and rates could be regarded as the applicant's "statement of any measures proposed to be taken for the protection of fish

and wildlife in connection with the appropriation". However, the applicant, despite numerous written recommendations from the Department, did not incorporate the Department's recommendations regarding the need for in-stream flow requirements and details of studies which would quantify instream flow requirements for the protection of fish and wildlife in connection with the appropriation. Additionally, the SWRCB has not included in the DEIR the numerous comments from the Department regarding the reliability and value of the information which was provided by the applicant in support of the application. The Department does not believe that the applicant's suggested limits would result in meaningful protection of fish and wildlife resources. These measures are typically terms and conditions which the SWRCB determines in consultation with the Department, and requires as enforceable conditions of the permit. The Department recommends that, should a permit be issued for this application, the SWRCB adopt limits on amount and rates of diversion, based on facts related to the size of the POU and reasonable use of the water for irrigated pasture; incorporate specific terms and conditions, including required bypass flows, which would protect public trust resources; and identify specific thresholds meaningful for public trust resources which can be reasonably monitored and enforced.

CEQA Baseline

The Department is concerned that the baseline utilized in the DEIR is incorrect and consequently, has not accurately analyzed the impacts of the proposed project. The Department previously provided extensive comments detailing alternative methods for determining the baseline as opposed to using the date of issuance of the NOP, or the baseline utilized by the DEIR, which is based on an unpermitted use by the applicant. There is relevant case law and pertinent decisions made by the SWRCB that address the issue of CEQA baseline.

In *Riverwatch v. the County of San Diego* (1999) 76 Cal.App.4th 1428[91 Cal.Rptr.2d 322], the courts reversed a lower court decision, resulting in a ruling that the CEQA baseline should not include prior illegal activities. However, the rationale supporting that determination was based on the particular circumstances of the case: the lead agency was not the agency charged with enforcement actions to address the illegal activities, and the decision states that "[t]he real difficulty we see in requiring the development of earlier baselines is the burden it would impose on the drafters in determining the nature of any prior illegality", because the site was the subject of enforcement actions by another agency; and that "definitive evidence of prior illegality will most likely come in the form of the acts of enforcing agencies and that use of an early baseline by a separate agency preparing an EIR may either interfere, conflict or unfairly amplify such enforcement action".

With the proposed project, the enforcement agency would be the SWRCB, the same agency in charge of preparing the DEIR. The SWRCB, when it informed the applicant that an appropriative right was needed for at least part of the water being diverted out of the Big Sur River, asked the applicant to cease diversions not addressed under the riparian right (the actual acreage of which is in question) or file an application for the appropriative water right. The SWRCB could have, and should have, required both. The failure of the SWRCB to pursue enforcement actions which would preclude unpermitted and illegal diversions from the Big Sur

River should not justify the use of that unpermitted activity to form the baseline for analysis of the effects of the action before the SWRCB.

Decisions by the SWRCB have supported this position. The *Garrapata decision* (Decision 1639) discusses at length the baseline to be used for determination of whether a project would be exempt from CEQA, based on various criteria which would support partial or full "vesting" of a project. The SWRCB has already determined that the current water right application is not exempt under CEQA as an existing facility, hence the development of the current CEQA document. Although *Garrapata* relates to whether a project would be exempt from CEQA, the same concepts of "vesting" apply to the determination of the CEQA baseline. In Decision 1639, the SWRCB states:

Ordinarily, the SWRCB would be reluctant to apply the existing facilities exemption in a case where facilities have been constructed and diversion of water has been initiated without first obtaining a water right permit. Applying the existing facilities exemption to existing, unauthorized diversions would encourage applicants to initiate diversions without first obtaining water right permits, undermining the policies of both CEQA and the Water Code. (See generally *People v. Shirokow* (1980) 26 Cal.Rptr.3d 301, 308-10 [162 Cal.Rptr. 30, 35-36] [the Legislature intended to vest the SWRCB with "extensive powers to safeguard the scarce water resources of the state", but the SWRCB's ability to carry out its statutory mandates is impaired to the extent that there are unsanctioned uses]; *Friends of Mammoth, supra*, 8 Cal.3d 247, 259 [104 Cal.Rptr. 761, 768] ["the Legislature intended [CEQA] to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language"]. We do not believe that applying the existing facilities exemption would undermine those policies under the circumstances presented in this case, where a project construction was completed before CEQA and the applicant apparently did not know that a water right permit was required. Nor has there been any change or expansion in place of use or purpose of use since CEQA was enacted. Applying the categorical exemption under these limited circumstances would not provide any incentive for appropriators to initiate new diversions or increase existing diversion in the hopes of circumventing environmental review or undermining the SWRCB's ability to require modifications to the project to avoid adverse affects on water resources.

This project does not meet the limited circumstances which apply to *Garrapata*: the project was not completed prior to CEQA, and there has been a change to the point of diversion, as well as a request to increase the amount of the diversion over the unpermitted level of use. Although the Old Well was completed prior to the enactment of CEQA, it was moved and rebuilt after that date; the construction of the New Well and the placement of an easement by the Department of Parks and Recreation (DPR) over state park lands was determined to be a project under CEQA, but categorically exempt. The project which was considered did not include the granting of an appropriative water right, as DPR is not the agency which has the authority to do so; only the SWRCB can approve an appropriative right. While the Department does not imply that the applicant knew that a water right was required, or that they knowingly installed new wells in the hopes of circumventing CEQA, the Department does believe that the installation and unpermitted use has resulted in "undermining the SWRCB's ability to require modifications to the project to avoid adverse affects on the water

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resources". The establishment of the CEQA baseline is determined by the state lead agency, and by adopting a baseline which includes the unpermitted and illegal diversion of water, the SWRCB itself is undermining its own "ability to require modification to the project to avoid adverse affects on the water resources".

In *Salinas Valley Protestants* (WR2001-07), the SWRCB reiterated and further clarified their opinion in *Garrapata*, discussing the issue of determination of existing facilities in the context of *September Ranch*, a lower court case addressing the setting of CEQA baseline for the analysis of impacts:

In fact, the SWRCB has not used conditions as they exist at the time of approval of the CEQA baseline when considering issuance of a permit for pre-existing but unauthorized diversions. Ordinarily, the baseline for applying the existing facilities exemption is the time the SWRCB determines the CEQA applicability, not the effective date of CEQA. (*Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1314 [3] Cal.Rptr. 914, 918[.] As the SWRCB recognized in Decision 1639 (In the matter of Application 29664 of Garrapata Water Company), however, this approach would not be appropriate in cases involving after the fact permitting. "Applying the existing facilities exemption to existing, unauthorized diversion would encourage applicants to initiate diversions without first obtaining water right permits, undermining the policies of both CEQA and the Water Code." (SWRCB Decision 1639 at 31.) The September Ranch court expressed similar concerns about setting the CEQA baseline based on water use rates that occur after a project is proposed, but before it is approved, because "[i]t was in [the applicant's] interests to elevate water production in order to establish as high a baseline as possible." (*September Ranch, supra*, 87 Cal.App.4th at ___[104 Cal.Rptr.2d at 346].)

Although the discussion relates to the setting of a baseline for determination of whether a project would qualify for a categorical exemption as an existing facility, the same standards can and should be applied in determining the baseline against which the effects of the proposed project are addressed; and, in fact, *Salinas Valley Protestants* decision utilizes *September Ranch*, which applies to the CEQA baseline utilized for determination of project impacts, to support its conclusions.

For the purposes of CEQA review of this application, the CEQA baseline should be set at pre-project conditions, specifically at the point that the SWRCB determined the applicability of CEQA. The Department believes that the failure of the SWRCB to analyze the effects of the entire project, including all proposed diversions to which the applicant does not have a legal entitlement, undermines the policies of both CEQA and the Water Code, and serves to abrogate the SWRCB's responsibilities to require modifications to the project to avoid adverse affects on the water resources.

The DEIR identifies a "No Project/No Permit Alternative", the purpose of which is to "allow decision makers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project". The No Project/No Permit Alternative would set the amount of water available to be used within the ranch at 75AFA (based, presumably, on

3AFA times the 25 acres of riparian land which the Ranch claims), which would be provided through the existing riparian right; and this water would only be available for use on the acres of the El Sur Ranch irrigated pasture that are located with the Big Sur River watershed (variously determined to be 25 or 90 acres). The No Project/No Permit Alternative clearly states that "[t]he denial of the water right application would require that pumping of the subterranean flow of the Big Sur River for non-riparian pasture cease" and the result of which would be that "non-riparian portions of the irrigated pasture would lose their source of irrigation water". The No Project/No Permit Alternative does not clearly identify the mechanism by which this would happen; however, presumably this would be a voluntary action on the part of the applicant, for which the failure to act would be enforceable by the SWRCB under its existing authorities. It is not clear to the Department why the SWRCB has not exercised its enforcement capabilities to require that the El Sur Ranch not divert water to which it does not currently have a valid water right, but has instead deferred action until such time as the application is denied.

Because the applicant does not currently have a valid right to divert flows from the Big Sur River to irrigate non-riparian portions of the irrigated pasture, and the SWRCB can cause the El Sur Ranch to cease if no permit is issued, it stands to reason that the historic non-riparian diversion is not permitted, and not otherwise legal. The Department recommends that the SWRCB utilize as the CEQA baseline that portion of the diversion which is legal, i.e. the identified riparian right to irrigate those pasture lands within the Big Sur River watershed (the actual amount of which should be determined by the SWRCB), at the rate established pursuant to Water Code section 1004, which specifies that no more than 2 ½ acre feet per year be considered "useful or beneficial" in the irrigation of uncultivated land. To utilize another baseline which includes the unpermitted historic use does not allow the SWRCB to accurately evaluate the effects of the proposed project, and undermines the policies and intent of both CEQA and Water Code.

Information Utilized to Support CEQA Analysis

Insufficient information to inform decision making: The Department has attached detailed comments on the information provided by the applicant regarding hydrology and water quality, in the form of a Memorandum from Mr. Kit Custis, who has also reviewed previous evaluations of technical information provided by the applicant; and detailed comments prepared by Department staff regarding the DEIR, including biological information which was utilized in impact analysis and determination of the significance of potential impacts of the proposed project. The information provided by the applicant, and utilized in the DEIR, does not provide sufficient information to adequately characterize potential impacts to resources by the proposed project, or to public trust resources in general; does not provide sufficient information to analyze the significance of potential impacts to resources by the proposed project, or to public trust resources in general; and therefore cannot adequately identify measures that would mitigate impacts to a level of less than significant.

The Department's detailed comments are attached and hereby incorporated by reference. The Department is particularly concerned about the lack of information to support identification of measures which would protect instream flows sufficient to protect steelhead (*Oncorhynchus mykiss*), of which the South/Central California Coast ESU is federally listed as

Threatened. The DEIR provides some measures intended to require sufficient flows in the Big Sur River during the lower flowing months of July to October, but focuses on historic percentiles of flow during dry and critically dry years; additionally, the Department believes that the low flow months, to which low-flow bypass flows would be applied, should include the period of June through November. The measures proposed by the applicant are not sufficient to support instream flows sufficient to protect steelhead, and other associated river resources; in particular, we do not concur with the Standards of Significance related to depths required for passage for adult or juvenile steelhead or temperature and DO thresholds. Additionally, there is no information provided to determine whether flows December to May are sufficient to support instream flows protective of steelhead, and measures proposed to do so may not be sufficient.

Much of the information provided by the applicant, as well as measures which are proposed to be protective of public trust resources, is based on average flows, average amounts of diversion and/or average rates of diversion. For steelhead, and for a number of the resources which have the potential to be affected by the proposed diversion, an average value is much less important than the instantaneous flow, instantaneous amount of diversion and/or instantaneous rate of diversion. The Department does not believe that an impact analysis which relies on averages is sufficient to detect and describe biologically meaningful impacts to public trust resources; nor would mitigation measures which rely on daily, monthly or annual averages as a threshold for initiating corrective actions which are intended to protect such resources be effective at a level meaningful to the resources.

Our position is supported in *County of Amador v. El Dorado County Water Agency* (1999) 76. Cal.App.4th 931., in which the EIR's discussion of baseline conditions consisted of month-end lake levels for the three lakes. It failed to explain how those lake levels were maintained, the historical duration and timing of the water releases, and the impacts on fishery resources and recreational uses. The court found that the lake level figures alone were insufficient to describe the existing water release program, and noted that "this is not a case involving conflicting expert opinions about historical operation". The court in *County of Amador* underscored the "importance of an adequate baseline description, for without such a description, analysis of impacts, mitigation measures and project alternative becomes impossible."

The applicant provided information from an instream flow study utilizing the Thompson Method, which was the basis of the DEIR impact analysis of water and stream resources. The Department suggested, as early as 2002, to the SWRCB and the applicant that Instream Flow Incremental Methodology (IFIM) or equivalent be utilized to establish instream flows adequate to maintain habitat for steelhead. The applicant did not choose to utilize the recommended methodology, and subsequently did not incorporate recommended actions into the proposed study plan. Additionally, the information provided by the applicant, which was utilized for impact analysis for the DEIR, does not provide data on all of the parameters required to do an evaluation per the Thompson method.

The Department's review has concluded this work is not adequate to address instream flow needs. As a result, the Department is taking the lead for field investigations related to the lower Big Sur River, and work is currently underway. The study plan, entitled Habitat and

Instream Flow Relationships for Steelhead in the Big Sur River, Monterey County, September, 2009 (attached) outlines the approach and methods that will be used by the Department and collaborators. The primary objective of the Department's study is to develop scientific information on the relationships between flow and available stream habitats, to determine what flows are needed to maintain healthy conditions for fish and wildlife. Relationships between flow and habitat will be developed for critical life stages of steelhead, spawning, rearing, and migration.

Results of this study will provide instream flow recommendations to provide adequate long term protection, maintenance, and stewardship of riverine Public Trust Resources. Several stream reaches will be evaluated, including a comparison of the physical habitat characteristics of stream reaches investigated in 1994, and the lagoon reach. Specialized investigation of the lagoon and potential impacts will include salinity-based estuary inflow methods and approaches. Salinity distribution, relative to depth and substrate, is one of the primary factors determining production and distribution of lagoon flora and fauna. This study is consistent with, and undertaken to be in compliance with, requirements of Public Resources Code (PRC) sections 10000-10006. Provisions of PRC section 10002 require that the SWRCB consider streamflow requirements when acting on a water right application, per Water Code section 1257.5, once they have been submitted by the Department.

The Department's instream flow study is anticipated to be completed in 2011. The Department recommends interim instream flows be implemented until the study is complete, and more specific flows can be recommended.

Deferred mitigation: Three mitigation measures require development of plans in the future, which would not be subject to the public review required under CEQA, and because they are deferred to the future, it cannot be determined if they would, in fact, reduce potentially significant effects to a level of less than significant. The three plans are (1) an Irrigation Water Management Plan, identified in MM 4.2-2; (2) an Erosion Control and Operations Management Plan, identified in MM 4.2-4; and (3) a "detailed flow monitoring and operations plan, identified in MM 4.3-1 and MM 4.3-2, to be incorporated into the IWMP required by MM4.2-2. Additionally, the DEIR, in Table A of MM 4.2-2, has specified conditions, which would be incorporated in the Irrigation Water Management Plan, under which the rate of pumping would be tied to flows at the USGS gauge 7 miles upstream of the project site. There is not sufficient detail provided to fully understand how the proposed limits on pumping rates would be implemented (in particular, how the diversion rates would be measured or enforced, and the unit of time of the rate of diversion, i.e. instantaneous, daily average, monthly average, etc.), and whether the limits would in fact protect public trust resources including steelhead. The Department believes these limits are unnecessarily complicated and insufficient to protect public trust resources.

CEQA Guidelines (Section 15126.4 (a)(1)(B)) stipulate that it is not appropriate to defer feasible mitigation measures to a future date. Additionally, the courts have repeatedly not supported conclusions that impacts are mitigable when essential studies, and therefore impact assessments, and/or development of mitigation measures are incomplete (*Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d. 296; *Gentry v. City of Murrietta* (1995) 36 Cal. App. 4th 1359; *Endangered Habitat League, Inc. v. County of Orange*(2005) 131 Cal. App. 4th 777). It is

not clear how the SWRCB can make findings that all potential impacts to biological resources would be mitigated to a level of less-than-significant when the actual mitigation measures have yet to be developed and/or determined feasible and capable of successful implementation. The DEIR does not demonstrate that the Project's potential impacts to sensitive plants and animals can be mitigated to less than significant levels, given the absence of measures which would need to be subsequently deemed feasible.

Subterranean stream

The DEIR should acknowledge the requirements of SWRCB's Decision 1639 that defines four physical conditions needed for a subterranean stream flowing through a known and definite channel. The DEIR should then demonstrate that these conditions are met at the point of diversion of the El Sur Ranch wells. The SWRCB should, as part of the CEQA and/or water rights permit process, make a finding that the El Sur Ranch wells divert ground water from a subterranean stream flowing through a known and definite channel.

Proposed alternative

If a baseline were utilized which does not include the unpermitted non-riparian diversions, the Department believes that all of the proposed alternatives, with the possible exception of the No Project/No Permit Alternative, would result in significant and potentially unmitigable impacts, to the Big Sur River including associated species and habitats, and potentially to the POU. Irrespective of the standards utilized to evaluate the potential effects of the project pursuant to CEQA, the Department does not believe that any of the proposed alternatives, possibly including the No Project/No Permit Alternative, will adequately protect public trust resources. However, alternative(s) can be identified which would allow for the reasonable and beneficial use of water on irrigated pasture, if specific terms and conditions were applied to protect public trust resources, meaningful monitoring was required; and the project objectives were met, as identified in the DEIR. The project objectives are:

- Allow for the appropriation of water from the Big Sur River for use on the El Sur Ranch through issuance of an appropriative water right permit, consistent with the SWRCB's responsibility to consider water availability, the public interest, the protection of fish, wildlife, and public trust resources, water quality, prior legal water rights, and to condition the appropriation as necessary;
- allow for the continued diversion and beneficial use of water for irrigation of 267 acres of pasture for cattle grazing (the Department notes that this amount should be verified); and
- continue economic use of the land for agricultural purposes and grazing of cattle consistent with Monterey County Zoning Ordinance, Coastal Implementation Plan, and the Monterey County General Plan.

The water right, in particular the allowable annual diversion and the rate of diversion, as well as terms and conditions which would limit the amount and rate of diversion, should be

predicated on several assumptions, primarily (1) the verification of the acreage which is currently irrigated pasture, not including those areas which are not suitable, including but not limited to: dunes, tailwater pond, outfall, access roads, irrigation canals and Swiss Canyon; (2) verification of what portion of the irrigated pasture is within the Big Sur River watershed, and therefore riparian and not a part of an appropriation; (3) verification that the water duty identified in regulations regarding the amount of water considered reasonably necessary is 1 cfs per 80 acres (California Code of Regulations (CCR), Title 23, Section 697(a)(1)); and (4) identification of what would constitute reasonable, useful and beneficial purposes of the diverted water when applied to the uncultivated pasture of the POU, up to a maximum of 2 ½ AFA per year. While that figure (2 ½ AFA) is less than that which has historically been diverted without permits, comparable sites in coastal Monterey typically utilize 2 AFA for irrigated pasture; cultivated crops in coastal Monterey County, including strawberries, vegetables and field flowers, use 2 to 3 AFA.

The Department recommends that the annual diversion be based on a formula which would multiply the acres of irrigated pasture subject to the appropriated water right, multiplied by the AFA appropriate to local conditions, not to exceed 2 ½ AFA, as specified in Water Code section 1004. The Department does not support bifurcation of the allowable diversion into an "average" and a "maximum" amount; nor do we support an "average" amount, based on a 20-year rolling average, be approved for diversion (see discussion above as this applies to impact analysis). The Department recommends the SWRCB identify an annual allowable diversion amount, which is not subject to averaging over multiple years, and is the maximum allowable each and every year, subject to such limitations as may be imposed via additional terms and conditions.

The applicant has suggested a maximum allowable rate of diversion (in cfs) and an average rate of diversion (in cfs), which could be limited by a complicated set of criteria in dry and critically dry years. The applicant appears to have assumed a duty of 1 cfs per 50 acres, and included their entire irrigated lands (not just the POU subject to an appropriated right), in requesting 5.34 cfs as the allowable average diversion (267 acres/50 acres X 1 cfs/acre = 5.34 cfs). Regulations were promulgated by SWRCB to clarify information to be submitted with a water right application, including "amounts for which to apply"; the amount of water considered reasonably necessary for most portions of California would be a duty of 1 cfs per 80 acres (CCR, Title 23, section 697(a)(1)).

We believe the duty of 1 cfs per 80 acres is more appropriate than that proposed by the applicant. The regulations allow for a greater rate of diversion for a lesser time period for any 30-day period, so long as there is no interference with other users, and it is specified in the permit (CCR, Title 23, section 697(a)(2)). The applicant has requested a maximum rate of diversion of 5.84 cfs; however, the DEIR has indicated that the ESR pumps are capable of pumping at a combined rate of 7.9 cfs. As we have noted above, the instantaneous rate of diversion (as opposed to daily, monthly, annual rate) is critical to maintaining sufficient bypass flows; and, it is important to note, it is difficult to determine the instantaneous rate of diversion, let alone regulate it. The Department recommends that the SWRCB identify an average rate of diversion which is consistent with the duty recommended in 697(a)(1) of 1 cfs per 80 acres; additionally, that the SWRCB require a meter be installed on both wells which would measure

and record for both wells, the time of day of pumping, and the instantaneous and cumulative diversion rates, to determine if the diversion rate(s) specified in the permit were being observed. Additionally, whatever rate is permitted (including any specified maximum rate), the Department recommends that terms and conditions be applied to require the applicant to maintain sufficient bypass flows which would be biologically meaningful to the public trust resources of the Big Sur River.

The analysis in the DEIR compares effects of the applicant's proposed project to that which has been occurring on an unpermitted basis; the terms and conditions identified in Mitigation Measure 4.2-2 proposed to reduce diversion rates (not amounts) to address potentially significant effects. This would not address the protection of public trust resources; in fact, no information has been provided that previous, unpermitted diversions were not having a significant adverse effect on public trust resources, and the limitations which are recommended in MM 4.2-4 would not require bypass flows, or other wise insure maintenance of steelhead habitat. Additionally, the thresholds identified in MM 4.2-2 are based on an unnecessarily complicated set of criteria related to percentile of dry and critically dry flow rate percentiles; if the ever-changing thresholds were to be exceeded, the diversion rate would be adjusted, again according to an unnecessarily complicated sliding scale of allowable diversion rates.

The Department recommends a more direct approach than is identified in the DEIR; specifically, that the allowable annual diversion (in AF), as well as the average and maximum rate of pumping (in cfs), be conditioned by criteria which would maintain bypass flows sufficient to protect fish, wildlife, and public trust resources. The specific terms the Department recommends would assume that the rate of diversion is the maximum permitted rate, and implement limitations on pumping (i.e. cessation of pumping, not just modification of the pumping rate) when the gauge indicates that habitat requirements for steelhead and other public trust resources would be impaired. The water rights permit should require cessation of diversion whenever the flows drop below the bypass requirement. The pumps would either be on or off, which can be easily monitored, rather than allowing varying rates of diversion, which could be impossible to monitor or enforce.

The thresholds for turning the pumps off would be based on maintaining flows which would protect habitat for steelhead and other public trust resources. Ideally, a stream gauge would be located in the vicinity of the project, and IFIM or similar methodology would have determined in-stream flows sufficient to maintain habitat, which would be tied to flows as measured at the gauge. The Department recommends that the SWRCB require installation and maintenance of such a gauge, to be located above the diversion, but below the other numerous diverters in the watershed. The Department is pursuing funding for purchase and installation of a gauge to facilitate ongoing studies; but would like the applicant to maintain the gauge, and should funding not be available to the Department, provide the funds for purchase and installation. While the Department is engaged in completing studies to determine in-stream flow requirements, it is recommended that interim thresholds be tied to the existing USGS gauge. Once more specific recommendations can be made, those recommendations should be tied to flows as measured at the new gauge, and those in-stream flow requirements adopted by the SWRCB for this permit.

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Based on existing information provided by the applicant, including use of the applicant-requested maximum rate of diversion (5.84 cfs), an interim bypass flow for low flow months of June through November can be estimated. The calculations could be modified to accommodate the actual permitted rate in cfs, or the maximum based on actual pump capacity, or whatever rate is determined by the SWRCB to be most protective of resources and practicable given the difficulty of monitoring and enforcing a maximum instantaneous rate of diversion. The DEIR and supporting technical studies don't provide any information on flows needed for maintaining public trust resources during high flow months, December to May. However, an interim high flow bypass requirement can be estimated using the procedures in the December 2007 Draft SWRCB's *Policy for Maintaining Instream Flows in Northern California Coastal Streams*, updated March 14, 2008 (2007 SWRCB Instream Flow Policy). Based on information we have available at this point in time, the Department recommends that the average annual diversion and the maximum annual diversion be conditioned with interim bypass flow requirements of 40 cfs for the months of June through November, as measured at the USGS gauge; and 132 cfs for the months of December through May, as measured at the USGS gauge. Once the Department has completed our studies, we can refine the flow requirements, and calibrate to either a new gauge in the vicinity of the project, or if that is not feasible, to the USGS gauge. Additionally, we suggest that this alternative be combined with the updated infrastructure identified in the Alternative Irrigation Efficiency Alternative. Increased irrigation efficiency would allow the applicant to make better use of the more limited amount and rates of diversion which are proposed under this new alternative and could allow more optimal forage production. Although there are potentially significant effects of updating the irrigation system, the impacts are primarily related to the construction phase, and could likely be lessened over time to a level of less than significant.

Thank you for the opportunity to comment on the DEIR; more detailed comments are attached. Should you have questions about DFG's authorities and responsibilities regarding CESA and CEQA, please contact Deborah Hillyard at (805) 772-4318 or via email at dhillyard@dfg.ca.gov; please direct questions regarding the Department's authorities and responsibilities for water rights and the Lake and Streambed Alteration program to Julie Means, at (559) 243-4014 extension 240 or via email at jmeans@dfg.ca.gov. We remain available to work with the SWRCB to address this application in a fashion which will meet the applicant's objectives, while providing protection warranted for the unique and valuable public trust resources of the Big Sur River

Attachments:

Technical Memo, from Mr. Kit Custis to Dr. Jeffrey Single, December 10, 2009

Detailed comments from California Department of Fish & Game on the DEIR for El Sur Ranch Water Right Application 30166, December, 2009

Memo from Robert Floerke, DFG to Victoria Whitney, SWRCB, dated June 30, 2006, regarding the reissued NOP; including Technical Memorandum from Kit Custis, Department of Conservation, to Linda Hanson, June 28, 2006

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Memo from Robert Floerke, DFG to Kyriacos Kyriacou, SWRCB, dated November 6, 2002, regarding the NOP; including Technical Memorandum from Steve Reynolds, Dept. of Conservation, to Kevan Urquhart, DFG, dated October 4, 2001

Memo from Robert W. Floerke, DFG, to Edward Anton, SWRCB, dated April 21, 2003, follow up to the NOP letter, regarding the CEQA baseline and to request an on-site meeting

Memo from William Loudermilk, DFG, to Victoria Whitney, SWRCB, dated November 15, 2007, regarding the proposed project description and proposed CEQA baseline

Memos from Robert W. Floerke, DFG to Victoria Whitney, SWRCB, September 16, 2005 and December 22, 2005, reviewing technical reports submitted by applicant May, 2005; including Technical Memorandum from Kit Custis, Department of Conservation, to Linda Hanson, DFG, December, 16, 2005

Memo from Robert W. Floerke, DFG, to Victoria Whitney, SWRCB, dated December 7, 2005, which summarizes deficiencies in information requested to analyze the project as of that date

Memo from Robert W. Floerke, DFG, to Victoria Whitney, SWRCB, dated July 9, 2004, which commented on the 2004 interim monitoring plan proposed by the applicant

Study Plan: Habitat and Instream Flow Relationships for Steelhead in the Big Sur River, Monterey County, June, 2009

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