

**STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS**

DIVISION DECISION 2010-02

Application A030946
Clear Ridge Mutual Water Association

Table of Contents

1	INTRODUCTION AND OVERVIEW	1
2	BACKGROUND	1
2.1	Project Description	1
2.2	Notice and Summary of Protests	2
2.2.1	California Sportfishing Protection Alliance	2
2.2.2	Department of Fish and Game	2
2.2.3	League of Women Voters	3
2.2.4	Lorri Lockwood	3
2.2.5	Carolyn Motzel	3
2.2.6	Carmel River Steelhead Association	3
2.2.7	John and Jeanette Otter	4
2.2.8	Sierra Club, Ventana Chapter	4
2.2.9	California Coastal Commission	4
2.3	Answers to Protests	4
3	STAFF ANALYSIS AND PROTEST RESOLUTION.....	5
3.1	Availability of Unappropriated Water and Cumulative Impact Analysis	5
3.2	Protest Issues and Resolution	7
3.2.1	Department of Fish and Game Protest Resolution	7
3.2.2	Interbasin Transfer of Water	8
3.2.3	Prior Rights and Related Issues	9
3.2.4	Further Fisheries Studies.....	9
3.2.5	Field Investigation	10
4	CALIFORNIA ENVIRONMENTAL QUALITY ACT	13
5	SUMMARY AND CONCLUSIONS	14

1 INTRODUCTION AND OVERVIEW

In this decision, the State Water Resources Control Board's (State Water Board) Division of Water Rights (Division), pursuant to Water Code section 1345 et seq., considers and conditionally approves water right application A030946 filed by Clear Ridge Mutual Water Association (Applicant). Application A030946 is a minor application as defined by Water Code section 1348.

This Division Decision is based on a review of all available information. This information includes an evaluation of the hydrologic characteristics of the water sources and the availability of water to supply the proposed project, the beneficial uses of the proposed water diversion, the protestants' claims, and the potential impacts on prior water rights and public trust resources. The Division concludes that unappropriated water is available for the proposed appropriation and that, as conditioned, approval of the application will not adversely affect public trust resources or instream beneficial uses. Accordingly, a water right permit should be issued, subject to the terms and conditions contained in the Order portion of this decision.

2 BACKGROUND

2.1 Project Description

The Applicant serves 42 properties located on Pfeiffer Ridge and Clear Ridge in the Big Sur area of Monterey County. The Applicant's source of water is an offset well situated approximately 45 feet from the southwest bank of the Big Sur River in Monterey County. From the time the well was originally developed in 1972, the Association believed it had a right to divert water based on the theory that the water appropriated was percolating groundwater such that, under California law, the diversion of water was not subject to the State Water Board's permitting authority and a water right permit was not required. On March 9, 1999, as a product of a complaint investigation, the Division determined that the Applicant's well was extracting underflow of the Big Sur River and that a water right permit was in fact required.

As a consequence, on March 31, 1999, the Applicant filed water right Application A030946 with the State Water Board. Application A030946 was subsequently amended and was accepted on September 17, 1999. The Applicant requested the right to divert up to 1.2 cubic feet per second (cfs) of water from January 1 to December 31 from the underflow of the Big Sur River with a maximum annual diversion of 140 acre-feet (af). Water would be used for domestic use, irrigation of 40 acres of orchard and row crops, and fire protection purposes. On November 1, 2002, the Applicant requested to amend Application A030946 to reduce the proposed rate and amount of diversion to 0.058 cfs of water with a maximum annual diversion of 42 acre-feet, and remove irrigation as a purpose of use. Water would be diverted to storage for domestic water supply and fire protection purposes for a total of 42 lots situated within an 835 acre place of use. The amount of water requested is consistent with Monterey County requirements for parcels in unincorporated rural areas. As discussed below, this application is considered a minor project as defined by Water Code section 1348.

The Applicant's Place of Use is both within and outside the watershed area of the Big Sur River. Residences west of Pfeiffer Ridge and along Clear Ridge are in drainage basins that empty into Sycamore Canyon or drain directly to the Pacific Ocean. Seven of the Applicant's properties east of Pfeiffer Ridge are within the Big Sur River watershed. No new water facility construction is proposed as part of this project. The application seeks to recognize a water appropriation system in operation since 1972 which now serves 38 residences. Four additional parcels within the service area are vacant although three have existing water meters. Up to 4 new residences could be added, and the system could serve property upgrades (caretaker units, vacation homes converted to full time residences). On April 24, 2001, the Monterey County Department of Health issued a building moratorium on new connections and additional units in compliance with the federal Surface Water Treatment Rule, which they have indicated they will lift pursuant to resolution of the water rights issues identified in Application A030946.

2.2 Notice and Summary of Protests

On June 9, 2000, the Division issued a public notice of Application A030946 in accordance with Water Code sections 1300 et seq. The Division received the following protests:

Protestant	Basis of Protest	Date of Protest
California Sportfishing Protection Alliance	Public Trust	June 30, 2000
Department of Fish and Game	Public Trust	July 3, 2000
League of Women Voters	Public Trust	July 10, 2000
Lorri Lockwood	Public Trust	July 17, 2000
Carolyn Motzel	Public Trust, Prior Rights	July 17, 2000
Carmel River Steelhead Association	Public Trust	July 17, 2000
John and Jeanette Otter	Public Trust	July 21, 2000
Sierra Club	Public Trust	July 24, 2000
California Coastal Commission	Public Trust	July 28, 2000

2.2.1 California Sportfishing Protection Alliance

On June 30, 2000, Robert Baiocchi, representative of the California Sportfishing Protection Alliance (CSPA), protested on the basis that approval of the application would result in reduced flows in the Big Sur River, potentially resulting in impacts to aquatic and riparian species. The protest indicated that the location of the point of diversion and place of use may impact steelhead trout (*Oncorhynchus mykiss*) and red-legged frog (*Rana aurora draytonii*). No protest dismissal terms were provided. Chris Shutes subsequently replaced Mr. Baoicchi as CSPA's representative.

2.2.2 Department of Fish and Game

On July 3, 2000, the Department of Fish and Game (DFG) protested on the basis that approval of the application would result in reduced flows in the Big Sur River, potentially resulting in impacts to aquatic and riparian species. The protest indicated that the location of the point of diversion and place of use may impact steelhead trout, red-legged frog and tidewater goby (*Eucyclogobius newberryi*). No protest dismissal terms were provided.

2.2.3 League of Women Voters

On July 10, 2000, Robin Tokmakian, representative of the League of Women Voters of the Monterey Peninsula, protested on the basis that approval of the application would result in reduced flows in the Big Sur River, potentially impacting aquatic and riparian species, including steelhead trout. This protest also objects to the application on the grounds that it causes an interbasin transfer of water that is inconsistent with the Local Coastal Program and the Big Sur Coast Land Use Plan (LUP). The protest indicated that it may be dismissed if the Applicant limits its diversion and use of water to the project area within the Big Sur River watershed, and prepares an Environmental Impact Report (EIR) that requires diversions to be consistent with the protection of aquatic and riparian species.

2.2.4 Lorri Lockwood

On July 17, 2000, Lorri Lockwood protested on the basis that approval of the application would result in reduced flows in the Big Sur River, potentially impacting steelhead and other aquatic and riparian species. She also claimed that the project water was being used outside of the watershed in violation of riparian rights. Ms. Lockwood advised that the State Water Board consult with the National Marine Fisheries Service (NMFS) to take measures to restore the habitat of threatened steelhead and that an EIR should be prepared. No specific protest dismissal terms were provided.

2.2.5 Carolyn Motzel

On July 17, 2000, Alexander Hubbard, representative of Carolyn Motzel, protested on the basis that approval of the application would result in reduced flows in the Big Sur River, potentially impacting aquatic and riparian species, including steelhead trout. The protest alleges that approval of the application would harm prior rights held by the protestant, whose well is located approximately 100 feet downstream of the Applicant's well. In addition, the protestant claims that many of the parcels being served are located in the adjacent Sycamore Canyon watershed, and that such out-of-watershed exports are prohibited under the Big Sur Coast LUP and watershed of origin provisions contained in the Water Code.

To avoid injury to prior rights, the protestant offers several protest dismissal terms including restricting pumping during drought periods and other low river flow periods and requesting assurances from the Applicant that the well will not interfere or damage the protestant's well and existing water system. The protest indicates that it may be dismissed if diversions are restricted during low flow periods to protect aquatic and riparian species and if the Applicant completes an EIR that evaluates the effect of diversions on aquatic and riparian species, including steelhead trout.

2.2.6 Carmel River Steelhead Association

On July 17, 2000, Roy Thomas, representative of the Carmel River Steelhead Association, protested on the basis that approval of the application would result in reduced flows in the Big Sur River, potentially impacting aquatic and riparian species, including steelhead trout. The protestant also claims that the project proposes a diversion of Big Sur River water to the Sycamore Canyon watershed, constituting an unauthorized interbasin transfer of water to a foreign watershed. No protest specific dismissal terms were provided.

2.2.7 John and Jeanette Otter

On July 21, 2000, John and Jeanette Otter protested on the basis that approval of the application would result in reduced flows in the Big Sur River, affecting steelhead and their riparian habitat. The protestants claim that a Coastal Development Permit is required for interbasin transfers of water. The protestant recommended the following protest dismissal terms: 1) no interbasin transfers of water except in times of flooding, to protect pumps and homes in the Big Sur River floodplain and; 2) pump from the river or underflow only for emergency fire suppression or temporary mitigation of a contaminated water source in either basin.

2.2.8 Sierra Club, Ventana Chapter

On July 24, 2000, Gillian Taylor, representative of the Ventana Chapter of the Sierra Club, protested on the basis that approval of the application would result in impacts to steelhead trout, red-legged frog, and tidewater goby. The protestant offered protest dismissal terms that required the Applicant to agree to terms and conditions set forth in the *Draft Guidelines for Maintaining Instream Flows to Protect Resources Downstream of Water Diversion in Mid-California Coastal Streams* (Draft Guidelines), dated June 17, 2002, which were developed by the NMFS and the DFG.

2.2.9 California Coastal Commission

On July 28, 2000, the California Coastal Commission protested on the basis that approval of the application would result in reduced flows in the Big Sur River and that out of watershed exports are prohibited under the Big Sur Coast LUP unless an exception is met. The protestant did not offer specific protest dismissal terms, but requested that the Applicant conduct additional studies to determine that the diversion would not harm aquatic and riparian species, and requested that the Applicant ensure that the project is consistent with Big Sur Coast LUP.

2.3 Answers to Protests

On December 22, 2000, the Applicant filed its answers to the above protests with the Division. The Applicant contended that 1) the Big Sur River upstream and downstream of the Applicant's diversion well has a steady year-round flow; 2) various fisheries studies show that Big Sur River continues to support a healthy steelhead population and that steelhead populations in the small, permanent streams of the Big Sur Coast have remained in good condition; 3) under California law, water use for domestic purpose is given the highest priority over other uses; and, 4) the State Water Board does not have jurisdiction to review issues relating to compliance or noncompliance with the Monterey County's local regulations and policies, and that the provisions of the Big Sur Coast LUP regarding interbasin transfers apply only to new developments and not to the Applicant's service of water to its existing members.

3 STAFF ANALYSIS AND PROTEST RESOLUTION

Water Code section 1347 delegates to the Division the authority to act on minor, protested water right applications, such as Application A030946, after conducting a field investigation. A minor application is an application to divert no more than three cfs or to store no more than 200 acre-feet per annum (afa). (Wat. Code, section 1348.) The Division may approve a minor, protested application if the Division determines that water is available for appropriation, taking into consideration the amount of water needed to satisfy senior water right holders and, whenever it is in the public interest, the amount of water required to remain in the source for recreation, fish and wildlife, and other instream beneficial uses of water.

(Wat. Code, sections 1201, 1243, 1243.5, 1258.) In evaluating a water right application, the State Water Board or Division also must ensure the protection of public trust uses, including fish and wildlife habitat, whenever feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.)

3.1 Availability of Unappropriated Water and Cumulative Impact Analysis

Division staff reviewed the Water Availability Analysis/Cumulative Flow Impairment Index¹ (WAA/CFII) report prepared by Fall Creek Engineering and contained in Appendix B of the Initial Study, prepared by Gilchrist and Associates. Since the existing project uses a year-round diversion season for domestic use, the report examines water availability and cumulative impacts during both the high flow season of December 15 to March 31, as well as the low flow months of April to October.

Water Availability. The WAA/CFII report finds that over a 54-year period of record during the season of December 15 through March 31, the unimpaired flow of the Big Sur River amounts to approximately 52,605 af at the point of diversion, while senior existing and pending water rights demand is approximately 432 af. Therefore, during the December 15 through March 31 period, on average, approximately 52,173 af of water is subject to appropriation at the point of diversion. In the lowest flow month of September, an average of 1,014 af of water flows past the point of diversion. Approximately 19 percent of this water is claimed by senior existing and pending water rights, leaving the remainder subject to appropriation. The maximum amount of water the Applicant is authorized to divert per month amounts to less than 4 af under the proposed diversion schedule (see section 3.2.1). Division staff concurs with the report's conclusions and finds that sufficient water is available to supply the amount requested under Application A030946.

Cumulative Impacts Assessment. The WAA/CFII report also analyzes the cumulative hydrologic impact of the proposed diversion on the Big Sur River watershed. The analysis was prepared with reference to the Draft Guidelines. The NMFS and the DFG promulgated the Draft Guidelines in order to restore and protect anadromous salmonids in several northern California coastal watersheds. The Draft Guidelines are not regulations, and they are not binding on the State Water Board. The Draft Guidelines are, however, evidence of measures necessary to protect fishery resources. Thus, the Division's practice has been to consider the Draft Guidelines on a case-by-case basis. Although the project itself is outside of the geographic scope of the Draft Guidelines, their general methodology was applied as a reasonable means to assess points of potential adverse cumulative impact in this coastal watershed. Since the

¹ Under the Draft Guidelines, the Cumulative Flow Impairment Index (CFII) is the ratio of the total watershed demand above a particular point of interest as measured during the period of October 1 to March 31, to the total unimpaired water supply above that same point, as measured during the period of December 15 to March 31.

project has a year-round diversion season for domestic use, in addition to analyzing potential cumulative impacts during the December 15 to March 31 supply season provided under the Draft Guidelines, the extent of monthly cumulative impacts during the respective low flow months of April to October was also examined. Although the specific environmental impact thresholds presented in the Guidelines were not strictly applied, they were nonetheless considered as relevant to the analysis of potential impacts.

Three points of interest (POI) were selected in consultation with the DFG. POI 1 is on the Big Sur River immediately below the Applicant’s well. POI 2 is on the Big Sur River immediately below Statement of Water Diversion and Use S015408 held by the Department of Parks and Recreation (Andrew Molera State Park). POI 3, approximately 3 miles downstream of POI 1, is the point on the Big Sur River immediately upstream of the point of tidal influence or the point of transition from fresh water to brackish water and below the “old well” of water right Application A030166 of James J. Hill. Seasonal runoff for the Big Sur River watershed at particular POIs was estimated by adjusting a 54-year historical record of United States Geological Survey (USGS) gaged data for the Big Sur River for differences in drainage area and mean annual precipitation. The results showed that the project’s diversion is insignificant (less than 1 percent) at all points of interest compared to the available water supply during December 15 through March 31² (see Table 1).

Table 1. CFII Results for December 15 through March 31

Position	Demand acre-feet	Supply	CFII %
Calculated on the basis of existing water diversions			
POI 1	129.54	52,605	0.25
POI 2	138.34	55,162	0.25
POI 3	163.34	55,399	0.29
Calculated on the basis of existing and pending water diversions			
POI 3	523.34	55,399	0.94

The season of diversion, as noted above, is year-round. Based on consultations between the State Water Board and the DFG, it was determined that similar cumulative flow calculations should be performed on a monthly basis for the remaining diversion months of April to October. This part of the analysis was performed to assess the potential impact of the project’s diversions during low flow months. During these months, the cumulative impact of all diversions at or upstream of POI 1 and POI 2 varies from 0.36 to 3.33 percent (see Table 2).

Table 2. CFII Results During the Low Flow Months (%)³ Excluding Demand of A030166

	April	May	June	July	August	September	October
POI 1	0.36	0.76	1.38	2.14	2.91	3.32	2.91
POI 2	0.36	0.76	1.38	2.15	2.91	3.33	2.91
POI 3 ⁴	0.41	0.84	1.57	2.37	3.21	3.79	3.21

² Under Draft Guidelines criteria, the impact of diversions resulting in a CFII which is less than 5 percent are considered to be insignificant.

³ Monthly CFII's representing percentage impairment were calculated based on the ratio of demand to supply above a particular point of interest during each low flow month.

⁴ Does not include demand from pending application A030166.

As mentioned above, POI 3 is located immediately upstream of the point of tidal influence and immediately downstream of the point of diversion for A030166. A030166 requests approval to divert up to 1,615 afa for irrigation and, as currently amended, the application specifies a monthly irrigation requirement with a maximum diversion of 230 af in any month. The CFII results shown in Table 3 are based on a permit being issued for the full amount requested by Application A030166.

Table 3. CFII Results During the Low Flow Months (%)⁵ Including Demand of A030166

	April	May	June	July	August	September	October
POI 1	0.36	0.76	1.38	2.14	2.91	3.32	2.91
POI 2	0.36	0.76	1.38	2.15	2.91	3.33	2.91
POI 3	1.60	3.87	8.91	13.67	16.45	19.07	12.72

These results suggest that, although the indicated potential impacts at POI 1 and 2 would be insignificant year-round under Draft Guidelines criteria (CFII less than 5 percent), a potentially significant cumulative impact could occur at POI 3 during the months of June through October if a permit is issued for Application A030166. However, the Applicant's implementation of the mitigating permit terms will reduce potential harm caused by Application A030946 at POI 3 to a less than significant level (see section 3.2.1, below).

3.2 Protest Issues and Resolution

3.2.1 Department of Fish and Game Protest Resolution

Since the time that protests were initially filed for Application A030946, the Applicant has been successful in resolving only the DFG protest. On January 9, 2009, a site meeting was held between the Applicant and representatives from the DFG and the NMFS to identify potential concerns and to develop mitigation measures. The DFG had previously expressed concerns regarding the potential environmental impact of the Applicant's withdrawal from the offset well on fisheries and other environmental resources during drought or low flow periods. On April 28, 2009, the DFG submitted a letter to the Division proposing specific terms under which it would withdraw its protest to Application A030946. In the letter, the DFG noted that as a result of the Applicant's decision to reduce the maximum rate of withdrawal from 1.2 cfs to 0.058 cfs, and to reduce the maximum annual diversion limit from 140 af to 42 af, the DFG would no longer request the preparation of an EIR for the project. Protest dismissal terms from the DFG were agreed to by the Applicant, were included in the Mitigated Negative Declaration and Initial Study, and will be included in the permit as follows:

- *The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed a maximum instantaneous rate of 0.058 cubic foot per second to be diverted from January 1 to December 31 of each year. The maximum amount diverted under this permit shall not exceed 42 acre-feet per year.*
- *The rate of diversion shall be restricted during low Big Sur River flows to less than 1% of the gaged flow measured by the United States Geological Survey stream gage 11143000*

⁵ Monthly CFII's representing percentage impairment were calculated based on the ratio of demand to supply above a particular point of interest during each low flow month.

located in Pfeiffer-Big Sur State Park, in accordance with the Application A030946 flow bypass compliance plan dated June 10, 2008 on file with the Division. When the gaged flow is equal to or below 3 cfs, the entire flow of the Big Sur River will be bypassed and no water shall be diverted under this permit. Permittee shall also limit diversions as follows:

- When the gaged flow is greater than 3 cfs and less than or equal to 4 cfs, the diversion shall not exceed a maximum 24 hour average rate of 0.03 cfs.*
- When the gaged flow is greater than 4 cfs and less than or equal to 5 cfs, the diversion shall not exceed a maximum 24 average hour rate of 0.04 cfs.*
- When the gaged flow is greater than 5 cfs and less than or equal to 6 cfs, the diversion shall not exceed a maximum 24 hour average rate of 0.05 cfs.*
- When the gaged flow is 6 cfs and greater, the well diversion rate will be the pump's maximum capacity of 0.058 cfs.*

- The State Water Resources Control Board reserves jurisdiction over this permit to modify, delete, or add minimum flow requirements or related criteria for the protection of fish and wildlife and the maintenance of recreation in the Big Sur River should (1) additional fishery studies be conducted in the Big Sur River, or (2) unforeseen adverse impacts occur to the fishery or recreation in the Big Sur River. Action by the State Water Resources Control Board will be taken only after notice to interested parties and opportunity for hearing.*

- To protect instream resources, any and all diversion shall occur from the existing subterranean well. There shall be no direct diversion from surface water flow of the Big Sur River under the exercise of any basis of right. Any device or contrivance which prevents, impedes, or tends to prevent or impede the passage of aquatic resources upstream or downstream shall be prohibited as a means to divert or store water.*

- Permittee shall allow representatives of the State Water Resources Control Board and other parties as may be authorized from time to time by the said State Water Resources Control Board, reasonable access to project works to determine compliance with the terms of this permit.*

3.2.2 Interbasin Transfer of Water

Several of the protests were based on the Applicant's service to parcels within the Sycamore Canyon Watershed, allegedly in violation of local land use plans, or county or federal requirements. In particular, several protestants contended that the Applicant's service of water to parcels outside the Big Sur River watershed conflicts with policies governing interbasin transfers, or out-of-watershed exports, in the Big Sur Coast LUP. The Applicant responded that the provisions of the Big Sur Coast LUP regarding interbasin transfers apply only to new developments and not to the Applicant's service of water to its existing members. Moreover, the Mitigated Negative Declaration and Initial Study find that the project does not conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project adopted for the purpose of avoiding or mitigating an environmental effect. To ensure that the Applicant obtains all other required permits, including any relating to interbasin transfers of water, the following term will be included in the permit as follows:

- *Permittee shall obtain all necessary federal (including United States Army Corps of Engineers Section 404), state and local agency permits and approvals required by other agencies prior to construction and diversion and use of water. Copies of such permits and approvals shall be forwarded to the Deputy Director for Water Rights.*

3.2.3 Prior Rights and Related Issues

The protest filed by Carolyn Motzel was based in part on an assertion of prior rights based on Small Domestic Use Registration D031117R, filed on August 23, 2000. Water Code section 1450 provides that any application properly made gives to the applicant a priority of right as of the date of the application until such application is approved or rejected. (See also Wat. Code, section 1228.4, subd. (a) [providing that priority of right for a small domestic use registration is the date of the completed registration].) Since A030946 has a priority date of September 17, 1999, D031117R is junior to the application and cannot support a protest claim based on prior rights.

The protest filed by Lorri Lockwood raised issues relating to the right of the Applicant to access the diversion well under the terms of the current easement. A dispute over the right of access over lands is not cause for denial of a water right application. (Cal. Code Regs., tit. 23, section 777.) This basis for protest is rejected because it does not present an issue within the State Water Board's jurisdiction. (*Ibid.*)

In addition, a senior water right application (A030166) is pending downstream of the project. Although the applicant for A030166 is not a protestant, the Division must consider the amount of water needed to satisfy senior water right holders. If approved, A030166 may have different minimum flow requirements than the Applicant (A030946). To ensure that the downstream senior water right holder does not have to reduce its diversions to make up for the Applicant's diversions, the Division will include the following permit term reserving jurisdiction to coordinate the minimum flow conditions of the two permits, if both permits are granted:

- *The State Water Resources Control Board reserves jurisdiction over this permit to modify, delete, add, or otherwise coordinate minimum flow requirements or related criteria for the protection of fish and wildlife in the Big Sur River as necessary to accommodate downstream senior water rights. Action by the State Water Resources Control Board will be taken only after notice to interested parties and opportunity for hearing.*

3.2.4 Further Fisheries Studies

Several of the protests and comments contained requests that the issuance of a permit be postponed until the DFG completes an Instream Flow Incremental Methodology (IFIM) study on the Big Sur River. The study is currently in progress, but it may be at least a year before the results will be finalized, the study subjected to peer review, and the results available to the State Water Board. Therefore, in accordance with the Applicant's protest dismissal agreement with the DFG, and the continuing authority of the State Water Board, the following term will be incorporated into any permit prepared pursuant to A030946, substantially as written in the Mitigated Negative Declaration and Initial Study as follows:

- *The State Water Resources Control Board reserves jurisdiction over this permit to modify, delete, or add minimum flow requirements or related criteria for the protection of fish and wildlife and the maintenance of recreation in the Big Sur River should (1) additional fishery studies be conducted in the Big Sur River, or (2) unforeseen adverse impacts occur to the fishery or recreation in the Big Sur River. Action by the State Water Resources Control Board will be taken only after notice to interested parties and opportunity for hearing.*

3.2.5 Field Investigation

On July 19, 2010, the Division issued a Notice of Field Investigation for Application A030946 pursuant to Water Code section 1345 et seq., to provide the Applicant and protestants an opportunity to resolve the outstanding protests. The notice provided that the purpose of the investigation was to seek protest resolution and to receive information to substantiate protest claims. The notice requested, pursuant to Water Code section 1334, that the protestants who do not believe that the information contained in the proposed Mitigated Negative Declaration and Initial Study would not adequately resolve his or her protest provide substantial evidence that, despite the information and conclusion contained in the proposed Mitigated Negative Declaration and Initial Study, the proposed appropriation would not be in the public interest, would adversely affect public trust uses, or would have an adverse environmental impact. The following persons participated in the August 18, 2010 field investigation:

Carolyn Shearer	Applicant
John Gilchrist	Applicant's Environmental Consultant
Peter Haase	Applicant's Engineering Consultant
Steve Beck	Board Member, Clear Ridge Mutual Water Association
Lorri Lockwood	Protestant
Werner Motzel, Jr.	Representing Carolyn Motzel, Protestant
Brian LeNeve	Representing Carmel River Steelhead Association, Protestant
Brian Erlandsen	Representing Department of Fish and Game, Protestant
Janet Goldsmith	Representing James J. Hill (Application A030166), Interested Person
Bob Baiocchi	Representing California Water and Fisheries Unlimited, Interested Person
Hank Smith	Representing California Coastal Rivers, Interested Person

The Applicant provided a brief description of the project and the following discussion focused on exploring ways to resolve the remaining protests.

Brian Erlandsen, on behalf of the DFG, mentioned some concerns regarding specific wording of certain permit terms that were included in the DFG's protest resolution letter. Mr. Erlandsen also referenced the ongoing IFIM study by the DFG and indicated that any decision on Application A030946 should wait for the results of the study to be released. Division staff indicated that the term (see section 3.2.4), reserving jurisdiction to the State Water Board to revise minimum flow requirements, as contained in the DFG's protest resolution agreement with the Applicant, was adequate to address this concern.

Lorri Lockwood submitted a copy of the grant deed issued to the Applicant's predecessors in interest and questioned the Applicant's right to use the easement where the diversion well is located. Ms. Lockwood also claimed that the Applicant has numerous wells on its property such that they shouldn't need to divert from Big Sur River. With respect to environmental issues, Ms. Lockwood questioned the accuracy of the precipitation and flow data and the assumptions used in the Initial Study and WAA/CFII report. Ms. Lockwood referenced language in various studies in support of her request for higher flows for steelhead trout, and she referenced the ongoing IFIM study by the DFG and indicated that any decision on Application A030946 should wait for the results of the study to be released. Ms. Lockwood also submitted a copy of her amended complaint to Application A030946, filed on June 10, 1999. Peter Haase, on behalf of the Applicant, responded that the methodology used in the WAA/CFII report was based on conservative assumptions. The protest filed by Lorri Lockwood was not resolved in the course of the field investigation.

Werner Motzel, on behalf of Carolyn Motzel, did not discuss environmental issues raised in the protest, but focused on the potential effect Application A030946 would have on his well, which is approximately 50 feet downstream of the Applicant's well. Mr. Motzel filed an application for a Small Domestic Use Registration with the State Water Board on August 23, 2000, and D031117R was issued on February 27, 2001. Staff indicated to Mr. Motzel that priority is based on the date of filing of a water right application, and as a result, D031117R would be junior to any permit issued pursuant to Application A030946. Mr. Motzel also expressed concern about the Applicant serving certain parcels that were outside the Big Sur River watershed in Sycamore Canyon and suggested that well water from Sycamore Canyon be used instead. Steve Beck, on behalf of the Applicant, indicated that the Applicant had drilled wells in Sycamore Canyon but they did not produce sufficient amounts of water. Mr. Motzel indicated that he would hire a hydrologist to determine what effect, if any, the pumping from the Clear Ridge well has on his own well, and that he would prefer any action on Application A030946 be delayed until he was satisfied that the Applicant's well will not have any deleterious effects on his well. The protest filed by Carolyn Motzel was not resolved in the course of the field investigation.

Brian LeNeve, on behalf of the Carmel River Steelhead Association, indicated that his primary concern was steelhead trout and the restoration of the fishery in the Big Sur River. Mr. LeNeve expressed his concern that the river is over-appropriated and that it historically supported a much larger steelhead fishery. Mr. LeNeve indicated that he believes the use of the USGS gage to plan bypass flows is flawed and there needs to be a gage further down the river and that the permit should not be issued until the results of the IFIM study by the DFG is complete. The protest filed by the Carmel River Steelhead Association was not resolved in the course of the field investigation.

Of the interested persons attending, Janet Goldsmith recommended that the riparian term in the proposed Mitigated Negative Declaration be modified to place an overall cap on all of the Applicant's diversions, whether appropriative or riparian. Clear Ridge has not claimed any riparian rights to date and the Division has not investigated the possibility of such a claim. Nonetheless, in the event such a claim arises, a term regarding riparian rights is included in this order. Ms. Goldsmith indicated that priority should still be given to the senior pending water right filing for Application A030166, and she also mentioned that she has concerns regarding the 1 af per household water use factor that is being used to develop an annual diversion limit for Application A030946.

A complete report dated August 18, 2010 describing the field investigation is on file with the Division. No protests were resolved as a result of the investigation.

At the conclusion of the field investigation, Division staff requested that participants submit any new information that they would like Division staff to consider when preparing the Division Decision. The Division received information from two of the protestants and one interested person.

Lorri Lockwood, a protestant, submitted extensive comments, in part, requesting preparation of an EIR and a new WAA, questioning the assumptions and analyses already conducted, and seeking additional information about groundwater wells in the Sycamore Canyon watershed. She also submitted additional information regarding the geology of the watershed and provided a letter from Dr. Douglas Smith, a registered geologist and professor at California State University, Monterey Bay, regarding Big Sur River surface flows in the vicinity of the Applicant's point of diversion, which also included a recommendation from Dr. Smith for further investigation of the hydrology of the area prior to issuance of a permit. In addition, Ms. Lockwood requested a delay in permit approval pending the results of the DFG IFIM study.

Ms. Lockwood asserts that uncertainty in the relationship between flow at the USGS gage and the Applicant's point of diversion could lead to unforeseen and unintended impacts to the stream system if the USGS gage reading is higher than actual flow downstream. To avoid these impacts, the DFG proposed bypass flow requirements that relate specifically to low-flow conditions. This bypass flow requirement is included as an enforceable condition of the permit. Additionally, DFG is conducting an instream flow study on the Big Sur River. The permit for this project is conditioned such that this new information can be used to modify the bypass flow requirement in the event that the existing bypass flow requirement is determined to be inadequate. Accordingly, the concerns raised by Ms. Lockwood are addressed with the inclusion of mitigation discussed in the IS/MND. As conditioned, approval of the application will not result in significant impacts to the stream system.

Werner Motzel, a protestant, submitted comments that requested a delay in permit approval pending the results of the DFG IFIM study, requested higher bypass flow requirements at the USGS gage in order to preserve surface flows at the Applicant's point of diversion, and requested that the Applicant provide clarification regarding the Applicant's well depth and provide assurance that Applicant's well will not impact the quantity or potability of water at the Motzel's well. As discussed in the IS, groundwater pumping, if excessive, may have an adverse affect on water quality by increasing natural salinity conditions in the lagoon, and shifting the seawater wedge upstream. However, the Applicant's well has a relatively minor effect on Big Sur River flows in all but the lowest flow periods. As discussed above, during the low flow periods, the permit is conditioned such that the Applicant must cutback or curtail diversions entirely to avoid impacts to biological resources. This condition should afford adequate incidental protection to the flow and potability at the Motzel's well. As conditioned, approval of this application will not result in significant impacts to the flow and potability of water at the Motzel's well.

Bob Baiocchi, an interested person, reiterated his previous concerns, including the need for an EIR because the Mitigated Negative Declaration and Initial Study did not adequately disclose the cumulative impacts of the diversion to aquatic resources and their habitat. As explained herein, the WAA/CFII report analyzed the cumulative hydrologic impact of the proposed diversion on the Big Sur River watershed. As conditioned, approval of the application will not result in significant impacts to the stream system.

4 CALIFORNIA ENVIRONMENTAL QUALITY ACT

In general, the California Environmental Quality Act (CEQA) applies to discretionary projects that public agencies approve or propose to be carried out. (Pub. Resources Code, section 21080, subd. (a).) The Applicant's project is a discretionary project as defined in CEQA. (Pub. Resources Code, section 21065; Cal. Code Regs., tit. 14, section 15357.) Therefore, CEQA applies to the Division's action on A030946. The State Water Board is the lead agency. (Pub. Resources Code, section 21067.)

On November 21, 2005, the Division executed a Memorandum of Understanding (MOU) with the Applicant and the consulting firm Fall Creek Engineering for the preparation of environmental and WAA/CFII analyses needed to support the Division's environmental review pursuant to CEQA. On August 16, 2007, Gilchrist and Associates, subcontracting for Fall Creek Engineering, submitted an Administrative Draft Initial Study for the proposed project, for Division review and comment.

As part of an informal CEQA consultation process, a copy of the draft WAA/CFII report was also forwarded to the DFG and the NMFS for review and comment. Based on input from these agencies, the scope of the WAA/CFII was revised to include an analysis of cumulative hydrologic impacts during low flow months. On June 10, 2008, the Applicant submitted a plan describing the equipment and facilities to be used and the specific procedures the Applicant will follow to ensure compliance with the bypass terms of the permit. The plan will be incorporated into any permit prepared pursuant to Application A030946, substantially as written in the Mitigated Negative Declaration and Initial Study.

On June 18, 2010, the Division circulated the proposed Mitigated Negative Declaration and Initial Study in accordance with the requirements of the CEQA. (Pub. Resources Code, section 21092.) By letter dated June 14, 2010, the permit terms contained in these documents were accepted by the Applicant. Comments were received from protestants Lorri Lockwood, the Carmel River Steelhead Association, Monterey County Department of Health, the Ventana Chapter of the Sierra Club, the California Coastal Commission and Carolyn Motzel. These comments generally reiterated concerns expressed previously in their respective protests, on the issues of potential environmental impacts to steelhead trout, red-legged frog, tidewater goby and riparian habitat, as well as non-environmental concerns including inter-basin transfers of water and prior rights. An additional comment letter was received from the Monterey County Department of Health in support of the Division issuing a permit pursuant to Application A030946. The public comment period for the proposed Mitigated Negative Declaration ended on July 19, 2010. The Division has considered the comments received, and based on the complete record determined that the mitigation measures contained in the Mitigated Negative Declaration would adequately reduce potential environmental effects to less than significant levels.

The following are the identified potential significant impacts and mitigation measures:

1. **Biological Resources.** Potential adverse affects to steelhead trout, red-legged frog and southwest pond turtle may be caused if high withdrawal rates from the project well were utilized during low river flow conditions. The Division will reduce potential impacts to insignificant levels by including the DFG-recommended permit terms listed above (See Section 3.2.1), including a specific limitation on rates of withdrawal during low flow periods.

2. **Cultural Resources.** Although no new facility construction is proposed that would result in ground disturbance, there is the possibility that subsurface archeological deposits could be present and accidental discovery could occur. The Division will include a term in any permit issued pursuant to Application A030946 to address the possibility of uncovering buried archeological deposits. The term directs the permittee to cease project activities within 100 feet of any find that should occur and to notify the Chief of the Division of Water Rights. The applicant shall then be required to retain a professional archeologist to evaluate the find and recommend appropriate mitigation. If human remains are encountered, all project-related disturbance within 100 feet of the find shall be halted and the County Coroner notified. If the coroner determines the remains are Native American, the Native American Heritage Commission shall be notified.
3. **Noise Reduction.** The project could expose nearby persons to noise in excess of ambient levels. The pumps and the pump house should be insulated with noise reduction materials as required by the Monterey County General Plan. The Division will therefore include a term requiring that the pumps and pump house be insulated with noise reduction materials within 120 days of permit issuance.

Prior to adopting this decision, the Division adopted a Mitigated Negative Declaration. The mitigation terms identified in the Mitigated Negative Declaration will be incorporated into the water right permit issued for this project and are also contained in the Order portion of this decision. The State Water Board will subsequently submit the Mitigated Negative Declaration and Notice of Determination to the State Office of Planning and Research.

5 SUMMARY AND CONCLUSIONS

The Division has evaluated and considered all of the available information concerning water right Application A030946, including: 1) availability of unappropriated water; 2) the Applicant's proposed diversion and use of water; 3) senior water rights; and, 4) potential impacts on public trust resources.

Based on a review of all of the information, the Division concludes that there is unappropriated water available to supply water right Application A030946. The proposed beneficial use of water is in the public interest. As conditioned, approval of the application will not adversely affect senior water rights, or public trust or instream beneficial uses. As part of the approval of Application A030946, the protests of the California Sportfishing Protection Alliance, the Department of Fish and Game, the League of Women Voters, Lorri Lockwood, Carolyn Motzel, the Carmel River Steelhead Association, John and Jeanette Otter, the Sierra Club, and the California Coastal Commission are dismissed. Application A030946 should be approved subject to the terms and conditions specified in the Order below.

ORDER

IT IS HEREBY ORDERED that Application A030946 is approved, and Permit 21272 shall be issued subject to prior rights and subject to the following terms and conditions:

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed a maximum instantaneous rate of 0.058 cubic feet per second to be diverted from January 1 to December 31 of each year. The maximum amount diverted under this permit shall not exceed 42 acre-feet per year.
2. The rate of diversion shall be restricted during low Big Sur River flows to less than 1% of the gaged flow measured by the United States Geological Survey stream gage 11143000 located in Pfeiffer-Big Sur State Park, in accordance with the Application A030946 flow bypass compliance plan dated June 10, 2008 on file with the Division of Water Rights. When the gaged flow is equal to or below 3 cubic feet per second (cfs), the entire flow of the Big Sur River will be bypassed and no water shall be diverted under this permit. Permittee shall also limit diversions as follows:
 - o When the gaged flow is greater than 3 cfs and less than or equal to 4 cfs, the diversion shall not exceed a maximum 24 hour average rate of 0.03 cfs.
 - o When the gaged flow is greater than 4 cfs and less than or equal to 5 cfs, the diversion shall not exceed a maximum 24 average hour rate of 0.04 cfs.
 - o When the gaged flow is greater than 5 cfs and less than or equal to 6 cfs, the diversion shall not exceed a maximum 24 hour average rate of 0.05 cfs.
 - o When the gaged flow is 6 cfs and greater, the well diversion rate will be the pump's maximum capacity of 0.058 cfs.
3. Permittee shall document Big Sur River flows to meet bypass requirements by monitoring the United States Geological Survey stream gage 11143000 located in Pfeiffer-Big Sur State Park. If this gage is rendered inoperable, permittee shall be responsible for repair and maintenance of said gage unless/until another agency or party accepts responsibility. Permittee shall implement all provisions of the Application A030946 flow bypass compliance plan dated June 10, 2008 on file with the Division of Water Rights.
4. Construction work and complete application of the water to the authorized use shall be prosecuted with reasonable diligence and completed by December 31, 2020.
5. Permittee shall install and maintain devices satisfactory to the Division of Water Rights to measure the instantaneous rate of diversion and cumulative quantity of water diverted under this permit. A record of such measurements shall be maintained by the permittee, and made available to interested parties upon reasonable request. This flow and diversion data shall be maintained for the life of the project and submitted to the Division of Water Rights with the Progress Report by Permittee and to the Department of Fish and Game upon reasonable request.

6. The Permittee shall obtain all necessary federal (including United States Army Corps of Engineers Section 404), state and local agency permits and approvals required by other agencies prior to construction and diversion and use of water. Copies of such permits and approvals shall be forwarded to the Deputy Director for Water Rights.
7. In order to reduce noise impacts, the pumps and pump house shall be insulated with noise reduction materials within 120 days of permit issuance.
8. To protect instream resources, any and all diversion shall occur from the existing subterranean well. There shall be no direct diversion from surface water flow of the Big Sur River under the exercise of any basis of right. Any device or contrivance which prevents, impedes, or tends to prevent or impede the passage of aquatic resources upstream or downstream shall be prohibited as a means to divert or store water.
9. Should any buried archeological materials be uncovered during project activities, such activities shall cease within 100 feet of the find. Prehistoric archeological indicators include: obsidian and chert flakes and chipped stone tools; bedrock outcrops and boulders with mortar cups; ground stone implements (grinding slabs, mortars and pestles) and locally darkened midden soils containing some of the previously listed items plus fragments of bone and fire affected stones. Historic period site indicators generally include: fragments of glass, ceramic and metal objects; milled and split lumber; and structure and feature remains such as building foundations, privy pits, wells and dumps; and old trails. The Deputy Director for Water Rights shall be notified of the discovery and a professional archeologist shall be retained by the Permittee to evaluate the find and recommend appropriate mitigation measures. Proposed mitigation measures shall be submitted to the Deputy Director for Water Rights for approval. Project-related activities shall not resume within 100 feet of the find until all approved mitigation measures have been completed to the satisfaction of the Deputy Director for Water Rights.
10. If human remains are encountered, then the Permittee shall comply with Section 15064.5 (e) (1) of the California Environmental Quality Act Guidelines and the Health and Safety Code Section 7050.5. All project-related ground disturbance within 100 feet of the find shall be halted until the county coroner has been notified. If the coroner determines that the remains are Native American, the coroner will notify the Native American Heritage Commission to identify the most-likely descendants of the deceased Native Americans. Project-related ground disturbance, in the vicinity of the find, shall not resume until the process detailed under Section 15064.5 (e) has been completed and evidence of completion has been submitted to the Deputy Director for Water Rights.
11. The State Water Resources Control Board reserves jurisdiction over this permit to modify, delete, or add minimum flow requirements or related criteria for the protection of fish and wildlife and the maintenance of recreation in the Big Sur River should (1) additional fishery studies be conducted in the Big Sur River, or (2) unforeseen adverse impacts occur to the fishery or recreation in the Big Sur River. Action by the State Water Resources Control Board will be taken only after notice to interested parties and opportunity for hearing.

12. The State Water Resources Control Board reserves jurisdiction over this permit to modify, delete, add, or otherwise coordinate minimum flow requirements or related criteria for the protection of fish and wildlife in the Big Sur River as necessary to accommodate downstream senior water rights. Action by the State Water Resources Control Board will be taken only after notice to interested parties and opportunity for hearing.
13. Based on the information contained in the Division of Water Rights files, riparian water has not been used on the place of use. Diversion of water is not authorized under this permit if in the future the Permittee diverts water under riparian right. With the Deputy Director for Water Rights' approval, Permittee may use water under the basis of riparian right on valid lands within the authorized place of use, provided that Permittee submits reliable evidence to the Deputy Director for Water Rights quantifying the amount of water that Permittee likely would have used under the basis of riparian right absent the appropriation authorized by this permit. The Deputy Director for Water Rights is hereby authorized to approve or reject any proposal by Permittee to use water under the basis of riparian right on the place of use authorized by this permit.
14. The amount authorized for appropriation may be reduced in the license if investigation warrants.
15. Progress reports shall be submitted promptly by Permittee when requested by the State Water Resources Control Board until a license is issued.
16. Permittee shall allow representatives of the State Water Resources Control Board and other parties as may be authorized from time to time by the said State Water Resources Control Board, reasonable access to project works to determine compliance with the terms of this permit.
17. Pursuant to Water Code sections 100 and 275, and the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of State Water Resources Control Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

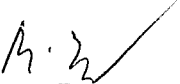
The continuing authority of the State Water Resources Control Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to eliminating waste of water and to meeting the reasonable water requirements of Permittee without unreasonable draft on the source. Permittee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the State Water Resources Control Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the State Water Resources Control Board also may be exercised by imposing further limitations on the diversion and use of water by Permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the State Water Resources Control Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution Article X, Section 2; is consistent with the public interest; and is necessary to preserve or restore the uses protected by the public trust.

18. The quantity of water diverted under this permit and under any license issued pursuant thereto is subject to modification by the State Water Resources Control Board if, after notice to Permittee and an opportunity for hearing, the State Water Resources Control Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the State Water Resources Control Board finds that (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.
19. This permit does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this water right, Permittee shall obtain authorization for an incidental take prior to construction or operation of the project. Permittee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this permit.
20. Permittee shall maintain records of the amount of water diverted and used to enable the State Water Resources Control Board to determine the amount of water that has been applied to beneficial use pursuant to Water Code section 1605.

21. No work shall commence and no water shall be diverted, stored or used under this permit until a copy of a stream or lake alteration agreement between the Department of Fish and Game and the Permittee is filed with the Division of Water Rights. Compliance with the terms and conditions of the agreement is the responsibility of the Permittee. If a stream or lake agreement is not necessary for this permitted project, the Permittee shall provide the Division of Water Rights a copy of a waiver signed by the Department of Fish and Game.

STATE WATER RESOURCES CONTROL BOARD


Barbara Evoy, Deputy Director
Division of Water Rights

Dated: **DEC 06 2010**