



June 15, 2011

Mr. Paul Murphey
Division Water Rights
State Water Resources Control Board
Post Office Box 2000
Sacramento, California 95812

Via Electronic Mail Only:
pmurphey@waterboards.ca.gov

Dear Mr. Murphey,

Policy Statement re: El Sur Ranch Water Rights Application No. 30166
Draft Environmental Impact Report

Thank you for the opportunity to comment on this matter. As an adjacent landowner, California State Parks (CSP) submits these comments.

Past Unpermitted/Illegal Actions Affecting Existing Conditions. The use of a baseline that is based on applicant's unpermitted diversions is problematic. Typically, it is acceptable to use the current environmental setting at the time of a lead agency's determination of environmental effects. In *Riverwatch v. County of San Diego*, the court held that an agency generally has no duty to evaluate the impacts of existing illegal activities when approving a new project. (*Riverwatch* (1999) 76 Cal.App.4th 1428 [91 Cal.Rptr.2d 322].) The court reasoned that "in general preparation of an EIR is not the appropriate forum for determining the nature and consequences of prior conduct of a project applicant." (*Id.* at 1452).

However, the Department of Fish and Game ("DFG") is correct in recognizing that the rationale supporting the holding in *Riverwatch* 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." (*Id.*)

The situation with the proposed project is different from that of the facts in *Riverwatch*. The enforcement agency would be the State Water Resources Control Board ("SWRCB"), the same agency in charge of preparing the Draft Environmental Impact Report ("DEIR"). As DFG points out, 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 or file an application for the appropriative water right. The applicant chose to file an application. The fact that the SWRCB did not pursue enforcement actions which would have precluded 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. The SWRCB's own reasoning supports this position. The *Garrapata* decision (Decision 1639) discusses at length the policy behind the determination of the proper CEQA baseline. Even though *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 the decision, 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.3d 301, 308-10 [162 Cal.Rptr. 30, 35-561 [the Legislature intended to vest the SWRCB with "expansive 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, 7681 ["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 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 diversions 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.

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 resources."

The SWRCB maintains considerable discretion in how they implement CEQA, as long as they do not prejudicially abuse their discretion by making decisions without substantial evidence or not proceeding in a manner required by the law. (*Save our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 120 [104 Cal.Rptr.2d 326].) As it relates to determination of the proper baseline, courts have confirmed that lead agencies maintain discretion about how to define existing conditions that constitute the CEQA baseline, subject to normal CEQA standards. (*Id.*) By adopting a baseline which includes the unpermitted and illegal diversion of water, the SWRCB may undermine its own "ability to require modification to the project to avoid adverse affects on the water resources."

Salinas Valley Protestants (WR2001-07) further clarifies the opinion in *Garrapata* in the context of September Ranch, a lower court case involving the determination of the proper CEQA baseline:

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].)

While the discussion relates to the setting of a baseline for determining whether a project would qualify for a categorical exemption as an existing facility, the same standards should be applied in determining the baseline against which the effects of the proposed project are addressed.

Currently, under the "No Project/No Permit Alternative" mentioned in the DEIR, the SWRCB will exercise its enforcement capabilities to require that the El Sur Ranch not divert water to which it does not currently have a valid water right if 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. CSP supports DFG's recommendation that the SWRCB utilize as the CEQA baseline that portion of the diversion which is legal at the rate established pursuant to Water Code § 1003. Failure to do so would lead to an inaccurate evaluation of the effects of the proposed project, and undermines the policies and intent of both CEQA and the Water Code.

Reasonableness of Water Diversion and Use/Public Trust Resources. Article X, Section 2, of the California Constitution, which applies to all water rights, prohibits the waste of water, requires reasonableness of use, method of use, and method of diversion for all uses of water. (Cal. Const. Art. X, § 2.) Whether the use is reasonable and beneficial ordinarily is a question of fact. (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal. 3d 339, 354 [158 Cal. Rptr. 350, 599 P.2d 656]; *Jordan v. City of Santa Barbara* (1996) 46 Cal. App. 4th 1245, 1268 [54 Cal. Rptr. 2d 340]; *United States v. State Water Resources Control Bd.* (1986) 182 Cal. App. 3d 82, 130, fn. 24 [227 Cal.Rptr. 161].) The Legislature has declared a policy of the State that the conformity to a use, method of use, or method of diversion of water by local custom may be considered a factor in the determination of the reasonableness of use. (Water Code § 100.5.) A "beneficial use" is not equivalent to a "reasonable use," the fact that a use may be beneficial to riparian land is not sufficient by itself unless the use is also

"reasonable." (*Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal. 2d 132, 143 [60 Cal. Rptr. 377, 429 P.2d 889].)

Decisions about the allocation of water resources have to consider the effects of water use on fish and wildlife, recreation, aesthetics, and other public trust resources. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 [189 Cal.Rptr. 346, 658 P.2d 709].) *Audubon* requires the SWRCB to balance potential value to society against the impact on trust resources, and "the action which will feasibly protect public trust values must be implemented." (*Id.*) This obligation is independent of any baseline determination, impact analyses or mitigation which might be applied to a project subject to review under CEQA. (*Id.*) The current law in regards to the public trust doctrine in California is further described in *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674 [39 Cal.Rptr.3d 189]. There, Justice Robie issued a landmark decision that considered what the California Supreme Court meant in saying that public trust uses are to be protected "whenever feasible." (*Id.*)

In *State Water Resources Control Bd. Cases*, the plaintiffs contended that conflicts between public trust values and competing water uses must be resolved in favor of public trust protection whenever possible. (*Id.*) Even though Justice Robie disagreed, noting that the California Supreme Court contemplated that the SWRCB could approve appropriations of water "despite foreseeable harm to public trust uses," Justice Robie was clear in recognizing that the State still had to preserve those uses "so far as consistent with the public interest." (*Id.* at 778.) Justice Robie concluded that "in determining whether it is feasible to protect public trust values like fish and wildlife in a particular instance, the State Water Resources Control Board must determine whether protection of those values, or what level of protection, is consistent with the public interest." (*Id.*)

The Big Sur River provides valuable habitat for several special-status species, and is designated by the Endangered Species Act ("ESA") as a critical habitat for the federally threatened, and state species of special concern, steelhead. It also provides habitat for designated sensitive species such as western pond turtle, and the federally threatened/state species of special concern, California red-legged frog. For these reasons, DFG has expressed concern that the proposed project may result in direct and cumulative adverse impacts to these valuable resources. As such, the aforementioned issues present a significant public interest that requires particular or exceptional measures be employed to insure that such public trust resources be made generally available and should therefore be carefully conserved. Because of this, the SWRCB should take special care in including terms and conditions, such as requiring flow monitoring to ensure El Sur Ranch bypasses enough flow to ensure adequate adult passage, and juvenile rearing for steelhead, and maintain water quality in the zone of influence of the El Sur Ranch wells and downstream in the lagoon, in any water right permit issued to El Sur Ranch. The DFG identifies such terms and conditions that can reasonably be expected to protect public trust resources. In addition, pursuant to Water

Code § 100.5, the SWRCB should take local custom (the request is more than twice as much as the recommended water duty identified in the Water Code for irrigation of uncultivated areas of land, and twice the typical application rate for riparian pasture lands given in the April 3, 1992 SWRCB investigation report) into consideration when issuing the permit.

The DEIR provided by the SWRCB 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." Application of the SWRCB's responsibilities to only those effects which are above CEQA does not meet the standards set forth in *Audubon*. The DEIR also fails to provide any section 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 trust values.

As the DFG points out, 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. CSP and DFG 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 acknowledge some degradation of public trust resources as a result of historic use of water (some non-riparian and not permitted, and some riparian). In particular, sections 4.2 and 4.3 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 cumulate effect of project pumping on aquatic resources." As a result, both DFG and CSP recommend 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.

In summary, the biological importance of the instream flows, as well as the fact that the proposed application greatly exceeds the irrigation requirement that others have either measured in the Monterey County area for pastures or cited as being considered not wasteful, require that the SWRCB incorporate into the water right permit specific conditions to ensure adequate flow in the river.

Instream Flows. The Big Sur River is one of twenty-two priority streams, as identified in 2008. Pursuant to Public Resource Code ("PRC") § 1000-10005, the DFG is mandated to "identify and list those streams and watercourses throughout the state for which minimum flow levels need to be established in order to assure the continued viability of stream-related fish and wildlife resources." The DEIR failed to provide adequate data to fulfill DFG's obligations for the Big Sur River and, as such, DFG began

an instream flow study in 2009. The study is currently underway and scheduled to be complete with a final project report in August 2012. Once complete, the permit should have a bypass flow condition for fish and wildlife, and public trust protection, which specifies the dates and amount of flow which the diversions must maintain as a minimum bypass flow. DFG maintains that standard language commonly utilized by the SWRCB, which reflects the findings of the DFG instream flow studies, would be appropriate to this stream.

Failure of DEIR to Identify “Feasible” Project Alternatives. An agency cannot satisfy its CEQA obligations simply by “considering” the environmental impacts of a proposed project. (*Burger v. County of Mendocino* (1975) 45 Cal.App.3d 322, 326 [119 Cal.Rptr. 568] (stating that lead agency failed to comply with CEQA because “although the resolution recites that the board ‘has made a full consideration’ of the EIR, it nowhere refers in any way to the adverse environmental effects clearly pointed out by that report. It nowhere suggests that such adverse effects in fact are nonexistent, nor does it point, even in generality, to overriding economic or social values of the motel”).) CEQA contains a substantive mandate that public agencies not approve projects with significant environmental effects if “there are feasible alternatives or mitigation measures” that can substantially lessen or avoid those effects. (*Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal. 4th 105, 134 [65 Cal. Rptr. 2d 580]; PRC § 21002.) “CEQA compels government first to identify the significant environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives.” (*Sierra Club v. State Board of Forestry* (1994) 7 Cal. 4th 1215, 1233 [32 Cal. Rptr. 2d 19].)

The SWRCB’s EIR “must produce information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned.” (*San Bernardino Valley Audubon Society v. County of San Bernardino* (1984) 155 Cal. App. 3d 738, 750-751 [202 Cal. Rptr. 423].) “An EIR for any project subject to CEQA review must consider a reasonable range of alternatives to the project, or to the location of the project which (1) offer substantial environmental advantages over the project proposal...; and (2) may be ‘feasibly accomplished in a successful manner’.” (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 566 [276 Cal. Rptr. 410].) Factors which should be taken into account in the determination of “feasibility” include “...site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdictional boundaries (projects with a regionally significant impact should consider the regional context), and whether the proponent can reasonably acquire, control, or otherwise have access to an alternative site....” (CEQA Guidelines § 15126.6(a)(1).)

As DFG notes, the SWRCB failed to provide an analysis of any alternative as to their consistency with Water Code, the Coastal Act, and the California Code of Regulations;

Paul Murphey
June 15, 2011
Page Seven

the Big Sur Local Coastal Plan; the ESA; and/or the sensitivity of the site. In addition, the EIR must also address the responsibility of the SWRCB to consider public trust resources before approving a water right application; to implement only an approval which would feasibly protect public trust resources; and determine that all uses of water conform to the standard of reasonable use. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 [189 Cal.Rptr. 346, 658 P.2d 709].)

The No Project/No Permit Alternative is inadequate because it fails to provide provisions for the protection of public trust resources. (*Id.*) The No Change in Existing Practices/Historic Diversions Alternative is inadequate because it has not been evaluated to determine if it is consistent with Water Code and the Coastal Act, has all required coastal permits, and would provide protections required by *National Audubon Society v. Superior Court*. As such, the SWRCB must identify one or more alternatives to the proposed project which would be consistent with the provisions of the Water Code and the Coastal Act, the ESA, PRC § 10000 et seq., other appropriate statutes and regulations, as well as providing for protection of public trust resources.

If you have any questions or concerns regarding these comments, I can be reached at (916) 651-8772 or by email at ktobias@parks.ca.gov.

Sincerely,



Kathryn J. Tobias
Senior Staff Counsel

cc: Mat Fuzie, Superintendent, Monterey District