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State Water Resources Control Board

April 11, 2025

**Re: El Sur Ranch Status Conference Hearing – Status Conference Ruling re CEQA Environmental Baseline and Alternative Analysis Requirements**

**TO ALL PARTIES:**

On January 31, 2025, the AHO asked the parties to submit Status Conference Statements addressing whether the incorporation of El Sur Ranch’s unauthorized diversions into the environmental baseline of the Administrative Recirculated Draft Environmental Impact Report (Admin Draft) is either “misleading or without informative value to decision-makers and the public.” (AHO Letter Re Comments and Further Direction Regarding Administrative Draft of Recirculated Environmental Impact Report (Jan. 31, 2025), at p. 1 (January 31 Letter)); Cal. Code Regs., tit. 14, § 15125, subd. (a)(2).) The parties were also directed to brief whether the Recirculated Draft Environmental Impact Report (Recirculated DEIR) to be released for public comment should “consider and evaluate an alternative where diversions authorized by the water right Permit are limited to a maximum annual water use of 2.5 acre-feet per acre.” (January 31 Letter.) The AHO later provided more detailed comments on the Admin Draft in a letter dated March 14, 2025 (AHO Letter Re Comments on the Administrative Draft Recirculated Environmental Impact Report (Mar. 14, 2025) (March 14 Letter).)

The AHO received status conference statements from El Sur Ranch, California Department of Fish and Wildlife (CDFW), California Coastal Commission (CCC), and California Department of Parks and Recreation (CDPR). During the status conference, the participants addressed the issues identified in the AHO’s January 31 and March 14 letters. In this ruling, the AHO finds that the State Water Resources Control Board (State Water Board) should not require the preparation of a new baseline analysis, directs El Sur Ranch to provide further detail regarding the no project alternative, and provides further direction regarding comments 31 and 32 of the AHO’s March 14 Letter. This ruling also directs El Sur Ranch to prepare the Recirculated Draft Environmental Impact Report for public release by July 1, 2025, and sets a further status conference for June 25, 2025.

**A. El Sur Ranch Must Update the Admin Draft's No Project Alternative Analysis but Is Not Required to Modify the Environmental Baseline to Exclude Its Unauthorized Diversions.**

From 1985-2004, El Sur Ranch diverted an average of 857 acre-feet of water (AF) per year from the Big Sur River without a permit. To continue irrigating its non-riparian pastureland with Big Sur River water, El Sur Ranch seeks approval of Application 30166, which would authorize the diversion of up to 1,320 AF per year (AFY) for irrigation and the construction of a 404 AF reservoir. The Admin Draft evaluates the effects of approving Application 30166 against a baseline that includes El Sur Ranch's unauthorized diversions from 1985-2004.

Protestants argue that the use of the current baseline is inappropriate because "when the proposed project is evaluated against a baseline that essentially already includes the proposed project, it appears far smaller in scale than it is in reality." (CCC Status Conference Statement (March 21, 2025) at 3; see also CDFW Status Conference Statement (March 21, 2025) at 2:17-23.) El Sur Ranch asserts that State Water Board staff previously approved the use of a baseline that includes El Sur Ranch's historical, unauthorized diversions more than a decade ago, and that the decision to rely on a baseline that includes unauthorized diversions is well supported by California law. (El Sur Ranch Status Conference Statement (March 21, 2025) at 3:13-16.) El Sur Ranch also points to the significant time and costs that have gone into the Admin Draft's preparation, and the resulting costs and delay if the State Water Board requires a change in the environmental baseline. (*Id.* at 7:1-7.)

The AHO appreciates both Protestants' and El Sur Ranch's positions with respect to the environmental baseline. As explained in detail below, the AHO finds that all of the parties' concerns can be accommodated by providing more detail and quantitative analysis in the Recirculated DEIR's no project alternative analysis.

The CEQA Guidelines provide that the environmental baseline should normally be the physical environmental conditions that exist at the time the notice of preparation is published. (Cal. Code Regs. tit. 14, § 15125, subd. (a).) A lead agency may use projected future conditions as the "sole baseline for analysis only if it demonstrates with substantial evidence that use of existing conditions would be either misleading or without informative value to decision-makers and the public." (*Id.* at subd. (a)(2).) California courts have repeatedly rejected arguments that lead agencies may be required to use a baseline based on projected future conditions when existing conditions incorporate illegal activity. (See *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1452-1453 [rejecting argument that "EIR should have developed an

environmental baseline which accounted for the prior illegal activity”]; *Fat v. County of Sacramento* (2007) 97 Cal.App.4th 1270, 1278–1280 [rejecting argument that lead agency abused its discretion by relying on existing conditions baseline that incorporated illegal activity]; *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 370–371, [lead agency did not abuse its discretion by relying on existing conditions baseline that incorporated allegedly unauthorized playground].)

Although the cases cited above did not evaluate a lead agency’s exercise of discretion to rely on an environmental baseline that excluded unpermitted activities, a 2013 California Supreme Court decision suggests that such activities are better addressed in an environmental impact report’s discussion of the no project alternative. (See *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority (Neighbors)* (2013) 57 Cal.4th 439, 454.) In *Neighbors*, the California Supreme Court held that a lead agency has discretion to omit an analysis of a project’s impacts on existing environmental conditions and substitute a baseline consisting of projected future conditions only if it shows that “an existing conditions analysis would be misleading or without informational value.” (*Id.* at 457.) In doing so, the Court explained that an environmental impact report’s no project alternative will typically provide the information necessary for decisionmakers and the public to compare the impacts of approving the proposed project with the impacts of not approving the proposed project. (*Id.* at 454; Cal. Code Regs., tit. 14, § 15126.6, subd. (e).)

In response to the AHO’s request during the April 1 status conference, CDFW and CCC provided comments regarding the sufficiency of the Admin Draft’s no project alternative. These parties argue that although the Admin Draft’s no project alternative analysis contains general, qualitative statements that address the impacts of approving El Sur Ranch’s project, a more quantitative analysis would better allow the State Water Board to compare the impacts of approving the proposed project with the impacts of not approving the proposed project. (See *Neighbors, supra*, 57 Cal. 4th at 454, 461 [“The expectation of change may make it important for the agency to *also* examine impacts under future conditions” in the discussion of the no project alternative.]; Cal. Code Regs., tit. 14, § 15126.6, subd. (e).)

The AHO agrees that a more quantitatively detailed no project alternative analysis would provide valuable information to the State Water Board and the public regarding the impacts of the proposed project. The development of such additional detail should also be significantly less burdensome and prolonged than requiring wholesale changes to the Admin Draft’s environmental baseline. Accordingly, the AHO declines to require changes to the Admin Draft’s environmental baseline and instead orders that the Admin Draft’s no project alternative be revised to include more detail and quantitative analysis.

In doing so, El Sur Ranch should consider including prior calculations of river flows from the 2009 Draft Environmental Impact Report's no project alternative analysis. (See CCC Letter re No Project/No Permit Alternative for El Sur Ranch Water Right Application 30166 DEIR (Apr. 4, 2025), at p. 1.) To the extent possible, the no project alternative analysis should also quantify:

- The impacts of the no project alternative on steelhead passage during periods of low flows as compared to the bypass flow requirements in the proposed project,
- The level of erosion likely to occur as a result of the No Project alternative, including reduced erosion due to decreased irrigation runoff, increased erosion due to decreased vegetative cover, and any necessary actions that El Sur Ranch would take to address erosion,
- Any changes in nutrient load runoff resulting from modifications to the Ranch's pasture fertilization processes and cattle operations under the No Project Alternative.

The AHO recognizes that the current procedural context makes it challenging to engage in the collaborative, iterative process between a lead agency and an applicant that should occur in the preparation and revision of a CEQA document. The AHO strongly encourages El Sur Ranch, CDFW, and CCC to work cooperatively to ensure that the CEQA document for this proceeding contains a robust no project alternative analysis.

**B. The Recirculated DEIR Should Include an Alternative that Analyzes Environmental Impacts of Diversions Limited to 2.5 AFY per Acre.**

If the Board finds that Water Code section 1004 applies to Application 30166, El Sur Ranch's diversions will be limited to a maximum annual water use of 2.5 AFY per acre. Because the Board has not yet made a final determination about whether Water Code section 1004's limits apply to El Sur Ranch's proposed project, the parties disagree as to whether the EIR should analyze an alternative that includes section 1004's limitation. At the April 1 status conference, El Sur Ranch argued that the Recirculated DEIR should not include such an alternative because the project objectives could not be met if limited to water use of 2.5 AFY per acre. (2025-04-01 El Sur Ranch Status Conference Recording, at 16:50-17:36.) Protestants, by contrast, claim that an EIR's alternatives analysis do not meaningfully address feasible alternatives or mitigation measures if they ignore legal requirements. (Email Correspondence from John Buse (April 4, 2025).) They also argue that because the Board has not finally determined whether Water Code § 1004 applies, analyzing an alternative that limits El Sur Ranch's diversions to 2.5 AFY per acre supports informed decision making. (CDFW Status Conference Statement

(March 21, 2025) at 3:16-17; CDPR Status Conference Statement (March 21, 2025) at 1.)

Alternatives chosen for inclusion in the EIR must: (1) be potentially feasible, (2) attain, to some degree, the basic objectives of the project, and (3) avoid or lessen any significant effects of the project. (Cal. Code Regs. tit. 14, § 15126.6.) A “feasible” alternative is one that is “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.” (Cal. Code Regs. tit. 14, § 15364; *see also, Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 937 [explaining that regulatory limitations are central to an EIR’s analysis of feasible alternatives].) As one court summarized, “the key to the selection of the range of alternatives is to identify alternatives that meet *most* of the project’s objectives but have a reduced level of environmental impacts.” *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089 [emphasis added].

Here, Water Code § 1004 is a legal requirement that may affect the amount of water that the State Water Board can authorize for diversion under Application 30166. All parties appear to agree that the Recirculated DEIR should acknowledge this potential limitation in some way. (See 2025-04-01 El Sur Ranch Status Conference Recording, at 16:50-17:36.)

The AHO agrees and finds that the best way of acknowledging Water Code § 1004’s potential limitation is by including it as a project alternative. And based on the Admin Draft, El Sur Ranch’s assertion that such a limitation is necessarily inconsistent with the proposed project’s objectives appears premature. The Admin Draft describes the proposed project’s objectives as: (1) continued appropriation of water; (2) continued diversion and beneficial use of water for irrigation of 246 acres of pasture for cattle grazing; and (3) continued economic use of the land for agricultural purposes and grazing of cattle. (DEIR at R.6-1.) A permit authorizing the use of 2.5 AFA per year clearly satisfies the first objective and may meet the second and third objectives under certain conditions. An alternative limited by Water Code § 1004 may also reduce several potentially significant impacts identified in Table 3-1 of the document. (See e.g., Admin DEIR at pp. R.3-10, R.3-22.)

Accordingly, the AHO directs El Sur Ranch to include an alternative limiting the Ranch’s use of water to 2.5 AFY per year in the Recirculated DEIR. If El Sur Ranch concludes that such a limitation prohibits the continued use of its pasture for cattle grazing under all conditions, or fails to reduce any potentially significant impacts, it should describe and support those conclusions in the alternative analysis.

**C. The Recirculated DEIR Should Address AHO Comments 31 and 32.**

On March 14, 2025, the AHO provided comments on the DEIR. (AHO March 14 Letter.) These included comments 31 and 32, which noted that the DEIR should include an evaluation of a specific project alternative. (*Id.* at Attachment 1, p. 8.) During the April 1 Status Conference, El Sur Ranch’s consultant suggested that the proposed alternative would not mitigate any significant impacts of the project. (2025-04-01 El Sur Ranch Status Conference Recording at 40:59:33-1:00:35.)

The CEQA guidelines state that the alternatives analysis shall focus on alternatives “which are capable of avoiding or substantially lessening any significant effects of the project.” (Cal. Code Regs., tit. 14, §15126.6, subd. (b).) The regulations also require an EIR to identify any alternatives the lead agency initially considered but ultimately rejected from detailed consideration and inclusion in the alternatives analysis section. (Cal. Code Regs., tit. 14, §15126.6, subd. (c).)

The AHO orders El Sur Ranch to revise the Admin Draft to address the ability of the alternative proposed in AHO comments 31 and 32 to avoid or substantially lessen any significant impacts of the project. If El Sur Ranch determines that the suggested alternative does not accomplish that goal, the Recirculated DEIR should explain why the AHO’s recommended alternative was considered but ultimately rejected from detailed consideration and inclusion in the alternatives analysis section. (See *id.*)

**D. Next Status Conference and Deadline for Submission of Recirculated DEIR.**

Based on El Sur Ranch’s representation at the April 1 Status Conference, the AHO directs El Sur Ranch to submit a Recirculated DEIR for public comment no later than July 1, 2025. This deadline constitutes a request for information under Water Code § 1275, and the failure to meet this deadline may result in cancellation of Application 30166. The deadline for comments on the Recirculated DEIR shall be August 19, 2025.

The AHO sets a further status conference for this matter for **June 25, 2025 at 8:30 a.m.** The parties shall meet and confer to discuss the hearing schedule, the scope of the hearing, the issues the hearing should address, and a general outline of the evidence the parties propose to submit for a hearing on Application 30166, and submit a joint status conference statement addressing these issues no later than **June 16, 2025**. The joint statement may also address any other issues the parties wish to bring to the AHO’s attention

Sincerely,

/s/ Sam Bivins

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Attachment 1 – Service List

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