

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

DIVISION DECISION 2015-0001

In the Matter of License 13868 (Application 30497B)

Clint Eastwood and Margaret Eastwood Trust

**DECISION CANCELING PROTESTS, REVOKING A WATER RIGHT,
AND ISSUING WATER RIGHTS**

SOURCE: Carmel River (Subterranean Stream)

COUNTY: Monterey

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 INTRODUCTION

This decision of the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) approves a Petition for Change from Clint Eastwood and Margaret Eastwood Trust (Eastwood Trust) to issue separate licenses on License 13868 (Application 30497B) and make changes to the Point of Diversion, Purpose of Use, and Place of Use for the two new water rights (Licenses 13868A and 13868B).

Water rights on the Carmel River have been the subject of multiple State Water Board hearings, resulting in a State Water Board Decision and a number of State Water Board Orders, which are described below, in sections 1.2 – 1.5.

1.1 Water Right License 13868 (Application 30497B)

In 1995, John and Michael Odello (Odello Brothers) sold the property known as the Coast Ranch, where farming had occurred for decades, to the Eastwood Trust. On October 23, 1995, the Eastwood Trust filed Application 30497 with the Division. On March 5, 1997, Permit 20905 was issued for Application 30497. On July 24, 2001, Permit 20905 was split by revoking Permit 20905 and issuing Permit 20905A (Application 30497A) to the Big Sur Land Trust and Permit 20905B (Application 30497B) to the Eastwood Trust. On November 1, 2012, License 13868 was issued for Permit 20905B.

License 13868 authorizes the Eastwood Trust to divert up to 0.45 cubic foot per second (cfs) of water from the subterranean stream of the Carmel River, from January 1 through December 31, for a maximum of 131.8 acre-feet per year (afy) of water. Water is diverted under License 13868 from two wells, and is authorized to be used for the purpose of irrigation in a place of use consisting of 99 acres of land located within the Carmel River watershed on a property known as the Eastwood/Odello Ranch, part of the original Coast Ranch. Of the two wells, the Eastwood/Odello No. 1 well was destroyed in a flood in January 1998 and has not been restored, thus all diversion of water under License 13868 occurs from the Eastwood/Odello No. 2 well.

1.2 State Water Board Decision 1632 and Claims of Existing Rights

On July 6, 1995, the State Water Board issued Decision 1632 that approved Application 27614 of the Monterey Peninsula Water Management District (District).

According to the State Water Board's hearing records for Decision 1632, the Odello Brothers protested Application 27614 because of potential injury to their claimed riparian right, pre-1914 appropriative right, and overlying groundwater right for the diversion of water to irrigate a place of use of 134 acres. In support of their protest, the Odello Brothers reported a diversion of up to 540 afy under their claim of riparian right. The administrative record for Decision 1632 did not provide sufficient information for the State Water Board to support the pre-1914 appropriative claim, therefore that portion of the protest was dismissed. The portion of the protest based on a claim of overlying groundwater right was also dismissed as a result of a determination that the water flowing through the Carmel River alluvium constitutes a subterranean stream and not percolating groundwater.

Decision 1632 recognized the existing applications, or potential applications, of certain diverters in the Carmel River, including the Odello Brothers. This recognition was provided to allow for the opportunity to acquire post-1914 water right applications with a priority senior to any right issued pursuant to Application 27614 for certain diverters using established quantities of water who may have had questionable rights to the use of water or who wished to make a use of water which could not be provided under existing water rights. Decision 1632 granted the Odello Brothers a priority senior to any right issued pursuant to Application 27614, provided that an application was filed by December 29, 1995. Consistent with this determination, for the Odello Brothers, Decision 1632 reserved 195.9 afy for future appropriation. Before the December 29, 1995 deadline, the Odello Brothers sold the Coast Ranch to the Eastwood Trust. The Eastwood Trust subsequently filed Application 30497 on October 23, 1995. The reversal of priority between any rights issued pursuant to Applications 30497 and 27614 is subject to the regulatory requirement that a person who claims an existing right to the use of water shall be granted a permit or license to appropriate no more water than is needed over that which is available under the existing right to meet the beneficial use requirements of the project. (Cal. Code Regs., tit. 23, § 731(a).)

On June 30, 2010, the Eastwood Trust submitted a Statement of Water Diversion and Use (Statement). The Statement, recorded as S021602 in the State Water Board's records, claims a riparian and pre-1914 appropriative right to water diverted from one of the points of diversion included in License 13868 (Well No. 2) and used for irrigation of a place of use that includes portions of the place of use for License 13868.

1.3 Application 27614 and Related Rights

As a result of Decision 1632, Permit 20808 was issued for Application 27614 on October 25, 1995, authorizing the District to divert up to 24,000 afy of water by storage at New Los Padres Reservoir and 42 cfs of water by direct diversion from numerous extraction wells along the Carmel River from December 1 of each year to May 31 of the succeeding year. Permit 20808 was amended on January 6, 1999.

On September 12, 2003, the District filed a petition to amend Permit 20808, requesting changes to points of diversion, place of storage, season of diversion and various permit terms, including issuance of separate permits. The petition was submitted to facilitate the Aquifer Storage and Recovery (ASR) project in the Seaside Groundwater Basin, a joint project between the District and the California American Water Company (Cal-Am). As part of the operations agreement for the ASR, the District and Cal-Am agreed to hold Permit 20208A jointly. On November 30, 2007, the State Water Board issued Order WR-2007-0042-DWR approving the requested changes, thereby revoking Permit 20808 and issuing Permits 20808A and 20808B.

On July 3, 2008, the District petitioned the State Water Board to split Permit 20808B and implement other changes in order to proceed with phase two of the ASR. By Order dated November 30, 2011, the State Water Board approved the requested changes, thereby revoking Permit 20808B and issuing new Permit 20808B and Permit 20808C, with Permit 20808C held jointly by the District and Cal-Am.

In addition to its water rights stemming from Decision 1632, Cal-Am was issued Permit 21330 (Application 30215A) on October 4, 2013 for the diversion of up to 1,488 afy from the Carmel River at San Clemente Dam and from extraction wells in the Carmel River subterranean stream, during the season of December 1 of each year to May 31 of the succeeding year. For the protection of fisheries, wildlife and other instream uses in the Carmel River, Term 14 of Permit 21330 provides that diversion under the permit is subject to specific minimum mean daily instream flow requirements as referenced to the Carmel River Highway 1 bridge stream gage. Cal-Am also holds pre-1914 claims of right (1,137 afy), claims of riparian right (60 afy) and License 11866 (Application 11674A) for the storage of up to 3,030 afy at Los Padres Reservoir.

1.4 Water Rights Order WR 95-10

The State Water Board issued Order WR 95-10 on July 6, 1995, arising out of complaints filed against Cal-Am alleging that Cal-Am did not have the legal right to divert water from the Carmel River and that its diversions were adversely affecting the river's public trust resources. The State Water Board concluded that Cal-Am did not have the legal right for about 10,730 afy of the water it was diverting from the Carmel River (about 69 percent of the water being supplied to Cal-Am water users), and that Cal-Am's diversions were having an adverse effect on public trust resources. Among other things, Order WR 95-10 directed Cal-Am to: 1) diligently proceed to obtain valid bases of right for its diversion and use of water from the Carmel River; and, 2) minimize harm to public trust resources by reducing the quantities diverted from the Carmel River and obtain alternative sources of supply.

1.5 Water Rights Order WR 2009-0060

On October 20, 2009, the State Water Board noted that Cal-Am's current diversions from the Carmel River exceeded its appropriative water rights by approximately 10,730 afy. By Order WR 2009-0060 (the Cal-Am CDO), the State Water Board ordered Cal-Am to cease and desist from its unlawful diversions by December 31, 2016, and be subject to a schedule and specific conditions. In particular, Condition 2 of the Cal-Am CDO provides:

Cal-Am shall not divert water from the Carmel River for new service connections or for any increased use of water at any existing service addresses resulting from a change in zoning or use. Cal-Am may supply water from the river for new service connections or for any increased use at existing service addresses resulting from a change in zoning or use after October 20, 2009, provided that any such service had obtained all necessary written approvals required for project construction and connection to Cal-Am's water system prior to that date.

In addition, the Cal-Am CDO provides in Ordering Condition 3(a)(1) that, starting on October 1, 2009, Cal-Am shall not divert more water from the river than the base of 10,978 afy and shall reduce diversions by 5 percent or 549 afy. Ordering Condition 3(a)(5) further provides that:

Small projects. Water produced from new sources developed pursuant to Condition ... [5]¹ of this order shall be subtracted from the base.

¹ Condition 3(a)(5) actually refers to Condition 4. However, this reference is a typographical error, and the correct reference is to Condition 5.

Condition 5 provides that:

Cal-Am shall implement one or more small projects that, when taken together, total not less than 500 afa to reduce unlawful diversions from the river. Within 90 days of entry of this order, Cal-Am shall identify to the Deputy Director for Water Rights the projects that it will implement and shall implement the projects within 24 months of entry of this order. ... To the maximum practicable extent, small projects shall be operated to reduce illegal diversions from the river during the months when surface flow in the river begins to go dry and through the months when surface flow in the river disappears below river mile 6.5.

2.0 2013 PETITION FOR CHANGE

On June 21, 2013, the Eastwood Trust filed a Petition for Change for License 13868 with the State Water Board, requesting that License 13868 be revoked and split into two new licenses (Licenses 13868A and 13868B), and requesting changes to the points of diversion, purpose of use, and place of use. The purpose of these changes, as indicated by the June 21, 2013 Petition for Change, was to:

- 1) provide potable water for municipal purposes to existing legal lots of record within the parts of Cal-Am's service area that are within the Carmel River watershed or the City of Carmel-by-the-Sea, through new connections or increased uses of water at existing service addresses;
- 2) protect and enhance the Carmel River and associated environment by dedicating a portion of the existing water right to instream uses and donating the property associated with the irrigated place of use to a non-profit entity or government agency to restore it to natural floodplain habitat; and,
- 3) provide a supplemental water supply to Cal-Am on an interim basis, to help Cal-Am meet its obligations under State Water Board Order WR 95-10.

The June 21, 2013 Petition for Change was amended by letter dated October 2, 2013.

The amended 2013 petition proposed that License 13868A include the existing components of License 13868 with a reduction in the rate of direct diversion and amount diverted per year, the addition of three points of diversion, the addition of municipal as a purpose of use, and the addition of portions of the water service areas of Cal-Am and the City of Carmel-By-The-Sea to the place of use. Diversion of water for the new municipal purpose of use would occur exclusively from the new points of diversion, which consist of three existing Cal-Am wells² (Rancho Cañada No. 2, Cypress No. 2 and Pearce), and would be distributed through Cal-Am's existing conveyance system to water users on existing lots of record within the additional place of use. The reduction in the rate of direct diversion and amount diverted per year was based on calculations of the amount of water consumptively used as a result of beneficial use consistent with the terms of License 13868.

Proposed License 13868B, as requested by the amended 2013 petition, would dedicate water to instream use in the Carmel River. The license would not have any active diversion points. The proposed place of use would be the Carmel River from a point on the Carmel River corresponding with Eastwood/Odello Well No. 2 for License 13868 to a point on the Carmel River corresponding with the confluence of the Carmel River and the Pacific Ocean. The proposed purpose of use would be Preservation and Enhancement of Fish and Wildlife and of Riparian Vegetation. The rate of direct diversion and amount diverted per year was based on calculations of the difference between the face value, maximum rate of direct diversion and maximum amount diverted per year, and the amount of water consumptively used as a result of beneficial use consistent with the terms of License 13868.

² Although Cañada No. 2 was identified in the petition, the correct name for the well is Rancho Cañada No. 2.

A summary of each proposed license under the amended 2013 petition follows.

License 13868A

- 1) Ownership: The Eastwood Trust would form a limited liability company (LLC) for the purposes of holding and administering the license and entering into subscription agreements³
- 2) Points of Diversion: two irrigation wells from License 13868 and the addition of three municipal wells
- 3) Purpose of Use: irrigation, municipal
- 4) Place of Use: In addition to the 99-acre place of use under License 13868, License 13868A also seeks to include 16,595 acres of additional Carmel River Watershed acreage within the Cal-Am service area, and 526 acres within the City of Carmel
- 5) Rate of Diversion: Not to exceed 0.37 cfs
- 6) Diversion Amount: Not to exceed 85.6 afy
- 7) Diversion Season: January 1 through December 31

License 13868B

- 1) Ownership: No change.
- 2) Point of Diversion: one well from License 13868 (Eastwood/Odello No. 2 well)
- 3) Purpose of Use: Preservation and Enhancement of Fish and Wildlife and of Riparian Vegetation
- 4) Place of Use: The Carmel River from a point corresponding with Eastwood/Odello Well No. 2 (upper limit) to the confluence of the Carmel River and the Pacific Ocean (lower limit)
- 5) Rate of Use: Not to exceed 0.08 cfs
- 6) Use Amount: Not to exceed 46.2 afy
- 7) Season: January 1 to December 31

2.1 Summary of Protests

On December 31, 2013, the Division issued a public notice of the change petition in accordance with Water Code sections 1300 et seq. Table 1 lists the protests that were received.

Table 1. Protests of the June 21, 2013 Petition for Change

Protestant	Basis of Protest	Date of Protest
Richard Morat	Public Trust	January 6, 2014
Roy Thomas	Public Trust	January 17, 2014
Carmel River Steelhead Association	Public Trust	January 29, 2014
National Marine Fisheries Service	Public Trust	January 30, 2014
California Department of Fish and Wildlife	Public Trust	January 30, 2014

³ On May 27, 2015, Alan Lilly (Agent for the Eastwood Trust) indicated that the 'Malpaso Water Company, LLC' had been formed for this purpose.

2.1.1 Richard Morat

Richard Morat filed a protest based on the concern that the changes would have adverse environmental impacts to the Carmel River and estuary. The concern included allegations that the use of water for municipal instead of irrigation would reduce return flows, questions regarding the validity of the quantification of water use under the existing license, allegations that pumping of Carmel River subterranean flow only to return it to the surface flow may be detrimental to the Carmel River, and a statement that no action should be taken until a comprehensive plan for recovery of the endangered species is developed, adopted and implementation assured.

2.1.2 Roy Thomas

Roy Thomas filed a protest based on the concern that the change petition will affect flows in the Carmel River downstream of the new points of diversion, thereby reducing public trust values of the Carmel River. The protest also alleged that further diversions from the Carmel River will produce ever more serious adverse environmental impacts.

2.1.3 Carmel River Steelhead Association

The Carmel River Steelhead Association (CRSA) filed a protest based on the concern that moving the point of diversion upstream could have negative impacts on steelhead trout (*Onchorynchus mykiss*), California red-legged frog (*Rana draytonii*), and riparian vegetation, and that approving the petition would allow new hook-ups to the Cal-Am water system, contrary to State Water Board Orders WR 95-10 and WR 2009-0060. CSRA additionally expresses concern regarding the calculation of the amount of water used under the right, as it does not compare to the amount of water used by future vegetation on the original place of use.

2.1.4 National Marine Fisheries Service

The National Marine Fisheries Service (NMFS) filed a protest on several grounds. The primary concern was that proposed new points of diversion are within or near potential habitat for steelhead, and could therefore expose the species and their habitat to potential impacts. These potential impacts, in turn, increase the likelihood of 'take' as defined under the Endangered Species Act. The protest also expressed the concern that multiple diversions can cumulatively cause adverse impacts to listed salmonids and that granting the petition in the context of other existing water right permits and licenses and the water already being pumped at the three Cal-Am wells, poses a risk to flow-dependent habitats. Finally, the protest raises concern about moving a point of diversion upstream when the river is fully appropriated for most of the year.

2.1.5 California Department of Fish and Wildlife

The California Department of Fish and Wildlife (CDFW) filed a protest based on the concern that approval of the petition may result in direct and cumulative adverse impacts to fish and wildlife resources of the Carmel River. The protest also asserted that the proposed project violates the intent of State Water Board Order 95-10 and WR 2009-0060 in that the project does not reduce the amount of water Cal-Am is illegally diverting from the Carmel River, prior to using water for new service connections. CDFW also expresses concern with the use of water on the irrigated place of use during restoration to natural habitat.

2.2 Field Investigation

Water Code section 1704.3 grants the Division of Water Rights the authority to issue a decision on minor protested water right petitions after conducting a field investigation. A minor petition for change is any petition which does not involve direct diversions in excess of three cfs or storage in excess of 200 afy. (Wat. Code, § 1704.4.)

On March 10, 2014, the Division issued a Notice of Field Investigation for the 2013 petition to change License 13868, to provide the Eastwood Trust and protestants an opportunity to resolve the outstanding protests. The Notice indicated that the purpose of the investigation was to seek protest resolution and for the parties to present information in support of their protest claims. A field investigation took place in the offices of the Monterey Peninsula Water Management District at 5 Harris Ct, Monterey, CA on April 2, 2014.

The results of the field investigation were considered as part of this decision, along with other information in the petition record. A memorandum dated June 11, 2015 describing the field investigation is on file with the Division.

3.0 2015 PETITION FOR CHANGE

On January 27, 2015, the Eastwood Trust filed a second Petition for Change for the project. The 2015 petition mirrored the amended 2013 petition, except that it requested an additional change in the points of diversion for proposed License 13868A by adding a proposed Eastwood/Rancho Cañada well to License 13868A. The proposed well would be located 86 feet from Cal-Am's existing Rancho Cañada No. 2 well, and is intended to be the primary point of diversion for municipal purposes. The second petition was submitted in accordance with a protest-dismissal agreement with CDFW, and the additional point of diversion is also a contingency of the later protest-dismissal agreement with NMFS.

The State Water Board will not ordinarily require that notice be given for a Petition for Change in cases where the proposed change does not have the potential to impair the water supply of other legal users of water or instream beneficial uses. (Cal. Code Regs., tit. 23, § 795.) The second petition proposes the installation of a new well in close proximity to one of the existing points of diversion proposed for addition to License 13868A included in the notice for the amended 2013 petition. Because there are no known legal users of water or tributary sources between the existing well and the new well, the second petition does not have the potential to impair the water supply of other legal users of water as compared to the amended 2013 petition. In addition, the change implements the environmentally superior alternative identified in the draft Environmental Impact Report (EIR) for the petition, and stems from protest resolution terms and negotiations with CDFW and NMFS. Therefore, the change requested by the second petition does not have the potential to impair instream beneficial uses as compared to the 2013 petition. Therefore, the State Water Board did not require additional notice for the second petition.

Additionally, on May 22, 2015, the Eastwood Trust agreed to commit to use a minimum amount of water diverted for municipal purposes under the split license to offset Cal-Am's unlawful diversions in the time period following approval of the petition and any necessary approvals by the Monterey Peninsula Water Management District. Specifically, the Eastwood Trust agreed to use all municipal diversions to offset Cal-Am's existing unlawful diversions in 2015, to use 50 af for this purpose in 2016 and to use 25 af for this purpose in 2017.

4.0 CRITERIA FOR APPROVING THE PROPOSED CHANGE

The petitions submitted by the Eastwood Trust request that two separate licenses be issued for License 13868, and that the points of diversion, purpose of use, and place of use be changed for each of the two separate licenses. In addition, for proposed License 13868B, the Eastwood Trust requests that the changes be made for the purpose of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water.

California Code of Regulations, title 23, section 836 provides that a licensee may request issuance of separate licenses when the place of use for a license is divided into two or more ownerships and each of the owners succeeds to a separate interest in the license. Water Code section 1700 provides that a licensee may change the point of diversion, place of use, or purpose of use from that specified in the

license. Water Code section 1707 authorizes the use of the change petition provisions of Water Code section 1700 et seq. to add the purposes of preserving or enhancing wetland habitat, fish and wildlife resources, or recreation in, or on, the water.

In order to issue separate licenses, the existing license must be revoked. (Cal. Code Regs., tit. 23, § 836, subd. (a).) Before approving a petition submitted pursuant to Water Code section 1700, the State Water Board must find that the proposed change will neither in effect initiate a new right nor injure any other legal user of water. (Wat. Code, § 1702; Cal. Code Regs., tit. 23, § 791.) Under Water Code section 1707, the State Water Board must find that the proposed change will not increase the amount of water the person is entitled to use, will not unreasonably affect any legal user of water, and otherwise meets the requirements of the Water Code. Additionally, the State Water Board must analyze potential changes to ensure that they comport with public interest and reasonableness requirements, and must consider impacts to the public trust. (Cal. Const. Art. X, § 2; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419; *U.S. v. State Water Resources Control Board* (1986) 182 Cal.App.3d. 82.)

License 13868 was properly established with the State Water Board. Since the issuance of License 13868 on November 1, 2012, the Eastwood Trust has continued to beneficially use the water, according to annual reports submitted by the Eastwood Trust to the State Water Board. License 13868 is a “wrap-around” right, meaning that the Eastwood Trust claimed an existing right. (Cal. Code Regs., tit. 23, § 731.) Here, the Eastwood Trust claimed both riparian and pre-1914 appropriative rights to serve the place of use described in License 13868. The water right licenses issued by this Order limits the total water diversion available to serve the place of use to the limits in the license, and requires that any transfer of water rights be subject to State Water Board approval authority. This condition shall continue to apply. This means that the amount of water available after the license split will be reduced if water is diverted under the claimed prior rights for the Eastwood/Odello property (the original place of use of Permit 20905).

The Eastwood Trust has indicated that future plans for the irrigated place of use for proposed License 13868A may include a reduction or cessation of irrigation as natural habitat is restored as part of the Carmel River Floodplain Restoration and Environmental Enhancement (CRFREE) Project jointly proposed by the Big Sur Land Trust and the County of Monterey. The project involves the planned removal of portions of levees along the north and east portions of License 13868’s place of use for irrigation and construction of a causeway for Highway 1 along the west portion of License 13868’s place of use for irrigation. Because irrigation of the irrigated place of use for proposed License 13868A may be required to establish native vegetation, the Eastwood Trust retained irrigation as a purpose of use and the irrigated place of use in the water right. After construction of the project, the irrigated place of use will be fallowed in order to allow for Carmel River flood flows to be redirected into this new floodplain to allow for enhanced ecological function and improved flood protection.

Fallowing of land may result in some consumptive use of water despite the lack of active surface irrigation, depending on the depth to the subterranean stream of the Carmel River underlying License 13868’s place of use for irrigation, the types of vegetation established on the land, and other factors. Consumptive use of water in this manner may need to be subtracted from any diversions or dedications under the two new licenses and any claimed existing right. Conversely, increasing the floodplain surface area and allowing the Carmel River to overtop its banks may also increase groundwater recharge due to a number of factors, including slower flow rates that may increase the time for water to have the opportunity to percolate into the underlying aquifer.

In order to understand the potential for the CRFREE Project to consumptively use the subterranean streamflow of the Carmel River, the Eastwood Trust shall submit the proposed plan within 180 days of issuance of License 13868A for restoration of the floodplain consistent with the CRFREE Project, and the State Water Board shall retain the authority to reopen the licenses to condition them further, if necessary.

Thus, as conditioned, the proposed change will not initiate a new right or expand an existing right.

4.1 No Injury or Unreasonable Affect to Any Other Legal Users of Water

To support a finding that the proposed change will not injure or unreasonably affect any other legal users of water, the water subject to change or that may be dedicated for instream purposes must not exceed the consumptive amount⁴ used in the past, thereby decreasing the amount of water that would have been removed from the system absent the proposed change. Any water diverted but not consumptively used will return to the source, either in the form of surface runoff or subsurface percolation, and will therefore be available to other legal users of water.

The Eastwood Trust has provided documentation to quantify the amount of water that, as a proportion of the total amount authorized for diversion under License 13868, is consumptively used when water is applied in accordance with the terms and conditions of License 13868 (Table 2). The Eastwood Trust has proposed to redirect the full amount of water consumptively used to serve municipal customers. The Eastwood Trust has indicated that this transition from irrigation to municipal use will likely occur over a few years, as customers for the municipal water are identified and the necessary approvals are obtained. In the interim, irrigation of the current place of use for License 13868 will continue.

Table 2. License 13868 Estimated Long-term Mean Monthly Consumptive Use

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
Quantity (af)	2.8	2.9	4.0	6.4	9.4	11.0	11.1	10.8	9.5	8.4	5.5	3.8	85.6

The proposed change includes adding points of diversion upstream of the current points of diversion for License 13868. Diverting water pursuant to the proposed License 13868A at the additional upstream points of diversion has the potential to injure or unreasonably affect any other legal users of water, as it has the potential to reduce the amount of flow in a greater stream reach. Therefore the 2013 petition included an evaluation of the effects of moving groundwater extraction of 85.6 afy of consumptively used water from the current Eastwood/Odello No. 2 well to the existing Cal-Am wells. The analysis found that extraction of all of the 85.6 afy of groundwater from the well located at the furthest upstream location (Berwick No. 8 well) would increase drawdown at that well by 9.7 percent. By contrast, the analysis found that extraction of all of the 85.6 afy of groundwater from the well located at the furthest downstream location (Rancho Cañada No. 2 well) would increase drawdown at that well by 1.9 percent. With the 2015 petition, the Eastwood Trust added a new well (Eastwood/Rancho Cañada well), to be installed approximately 86 feet from the Rancho Cañada No. 2 well, whereby all of the 85.6 afy of groundwater extraction would normally occur. The Eastwood Trust provided additional analysis that determined that extraction of all of the 85.6 afy of groundwater from the new Eastwood/Rancho Cañada well would result in almost immeasurable changes to the drawdown modeled at the Rancho Cañada No. 2 well (1.9 percent), but would likely result in a slight decrease in the drawdown at the Carmel River because the new well would be located farther away from the Carmel River than the Rancho Cañada No. 2 well.

In addition, the Eastwood Trust has proposed to dedicate the amount of water applied for irrigation but not consumptively used to instream uses, thereby making the water unavailable for diversion by other legal users of water with priority junior to Application 30497. Under normal operating conditions, diversion and use of water under License 13868 has historically consumed only a portion of the total amount of water applied for irrigation, with the remainder of this natural flow abandoned and available for use by other legal users of water. The Eastwood Trust proposes to dedicate up to 0.08 cfs for a maximum of 46.2 afy to instream beneficial uses under new License 13868B. With the petition, the Eastwood Trust included recommended monthly rates for water dedicated. However, after Division staff analysis, the rates were slightly increased to bring the monthly dedication quantities closer to the petitioned annual amount (Table

⁴ The amount of water diverted and beneficially used is the measure of a water right. However, the amount of this water that is consumed, or ultimately lost from the stream system, can be a smaller number.

3). These flows shall remain in situ and shall not be later recovered under any other appropriative water right with a priority junior to License 13868B.

Table 3. License 13868B Proposed Quantity for Instream Flow Dedication

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
Rate (cfs)	0.04	0.04	0.05	0.07	0.08	0.08	0.08	0.08	0.08	0.07	0.055	0.04	---
Quantity (af)	2.5	2.2	3.1	4.2	4.9	4.8	4.9	4.9	4.8	4.3	3.1	2.5	46.2

The Eastwood Trust’s proposal to dedicate this amount of water has the potential to result in harm to downstream appropriative right holders or claimants. According to the records of the State Water Board, there is one point of diversion downstream of License 13868. At this point of diversion (known as the “A Well”) the District diverts water under Permits 20808B and 20808C (Applications 27614A and 27614B, respectively) from the subterranean stream of the Carmel River. Both the Eastwood Trust’s Eastwood/Odello Well 2 and the District’s A Well are located approximately 300 feet from the Carmel River, with the District’s A Well located approximately 1,000 feet, in a downstream direction, from the Eastwood Trust’s Eastwood/Odello Well 2. The analysis provided by the Eastwood Trust for proposed License 13868A found that diversion of an equivalent amount of water will result in less of an impact for wells located further downstream in the watershed. In addition, the District has submitted a letter to the State Water Board in support of the Eastwood Trust’s proposed changes, including dedication of water. Therefore, due to the location of the two wells near the bottom of the Carmel River watershed, the proximity of both wells to each other, and the right-holder’s support of the proposed change, the State Water Board has determined that dedication of water by the Eastwood Trust will not result in injury to the District.

4.2 State Water Board Decision 1632 and Reversal of Priority with Application 27614

License 13868 was issued pursuant to Permit 20905B (Application 30497B), which was split from Permit 20905 (Application 30497). Condition 10 of Decision 1632 provides that any right issued pursuant to Application 30497, including License 13868, has a priority senior to any right issued pursuant to Application 27614. This reversal of priority is void if the Eastwood Trust diverts more water under a combination of (1) any right issued pursuant to Application 30497 and (2) any existing right exercised for the place of use included in any right issued pursuant to Application 30497. This requirement was included to protect existing diverters who use water only within the Carmel River watershed against Application 27614, which proposed the use of Carmel River water outside of the watershed⁵. When Permit 20905 was issued pursuant to Application 30497, a condition was added to clarify that the reversal of priority only applies to water diverted and used, in compliance with the terms and conditions of the right, within the Carmel River watershed. With the current petitions, the Eastwood Trust has proposed to use water within a portion of the City of Carmel-by-the-Sea service area, portions of which are outside of the Carmel River watershed. Therefore, the Eastwood Trust must record and report the amount of water used outside of the Carmel River watershed, as those amounts will not be subject to the reversal of priority provided by Condition 10 of Decision 1632.

License 13868A (Application 30497B01) and License 13868B (Application 30497B02) will include the same reversal of priority subject to the same conditions as included in License 13868. The proposed change will not adversely affect any rights issued pursuant to Application 27614, provided that the amount of water diverted by the Eastwood Trust, in combination with the amount of water diverted under any other right issued pursuant to Application 30497 or any existing right for the same place of use included in any right issued pursuant to Application 30497, does not exceed the combined face value of any rights issued pursuant to Application 30497.

⁵ See Section 1.2 of this Order for more discussion of Decision 1632.

5.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Under the California Environmental Quality Act (CEQA), the State Water Board is the lead agency for preparation of environmental documentation for the project.

A Notice of Preparation (NOP) for the draft EIR was circulated to a project-specific mailing list and to the State Clearinghouse. The 30-day NOP comment period commenced on March 4, 2014 and ended on April 2, 2014. The State Water Board also posted the NOP for the draft EIR to its website. The State Water Board held a scoping meeting on April 2, 2014 to receive oral and written comments on the NOP. The NOP and comments received are included in Appendix A of the draft EIR. The State Water Board considered oral and written comments received during the scoping period in preparing the draft EIR.

A public Notice of Availability (NOA) of the draft EIR was mailed to adjacent landowners and interested parties on October 30, 2014, and was posted in the Office of the County Recorder, County of Monterey on October 30, 2014. In addition, the NOA was also physically posted in several locations near the location of the project, including on State Route 1 near Palo Corona Regional Park, Carmel Valley Road at Via Mallorca, Carmel Valley Road at Williams Ranch, and Carmel Valley Road at Prado Del Sol. The Notice of Completion for the draft EIR was filed with the State Clearinghouse on October 30, 2014. The draft EIR was circulated to the State Clearinghouse, to federal, state, and local agencies, and to organizations and individuals that had expressed interest in receiving the draft EIR. The draft EIR public review period commenced on October 31, 2014 and ended on December 15, 2014.

On May 29, 2015, the State Water Board provided proposed written responses to all public agencies that commented on the draft EIR. The State Water Board received no suggested revisions to the proposed responses.

As disclosed in the final EIR, approval of the individual well alternative has the potential to result in significant effects based on erosion from well and pipeline construction, and based on the potential for introducing hazardous substances into the environment during well and pipeline construction. With implementation of best management practices in construction, impacts will be minimized to a less-than-significant level. This mitigation measure has been included as Condition 18 to new License 13868A. This condition requires that, prior to commencement of construction, the Eastwood Trust will submit a construction plan including best management practices to minimize erosion and to prevent the accidental release of a potentially hazardous material from entering the environment. Upon completion of construction, the Eastwood Trust must report on implementation of the measures, and on any breaches.

Therefore, changes or alterations have been incorporated into the project which mitigate or avoid the significant effects on the environment of erosion and hazardous materials during construction. (See Pub. Resources Code, § 21081, subd. (a)(1).)

On July 3, 2015, the State Water Board certified the final EIR. The Board finds that, on the basis of the whole record, there is no substantial evidence that the State Water Board's approval of the petitions will have a significant effect on the environment.

The State Water Board reviewed and considered the information in the final EIR prior to issuance of this order, and the final EIR reflects the State Water Board's independent judgment. The State Water Board will issue a Notice of Determination within five days of the date of this order.

6.0 PROTEST RESOLUTION AND STAFF ANALYSIS

6.1 Carmel River Steelhead Association

On March 31, 2014, Carmel River Steelhead Association submitted a letter to the State Water Board withdrawing its protest.

6.2 California Department of Fish and Wildlife

On December 8, 2014, the Eastwood Trust and the CDFW entered into an agreement whereby the CDFW would withdraw the protest provided specific terms were included in Licenses 13868A and 13868B. The terms of the agreement included a reduction in the rate of diversion under License 13868B, and the construction of a new well connected to the Cal-Am water system for municipal diversions only. The State Water Board will include the terms from the agreement in Licenses 13868A and 13868B.

6.3 National Marine Fisheries Service

On March 12, 2015, the Eastwood Trust and the NMFS entered into an agreement whereby the NMFS would withdraw its protest to the petition provided specific terms were included in Licenses 13868A and 13868B. The terms of the agreement included a reduction in the rate of diversion to 0.16 cfs under License 13868B, and the construction of a new well connected to the Cal-Am water system for municipal diversions only. The State Water Board will include the terms from the agreement in Licenses 13868A and 13868B.

6.4 Richard Morat

The concerns expressed in this protest, identified by underline, have been addressed as follows:

- 1) The changes proposed would have adverse environmental impacts to the Carmel River and estuary.

This question is one of the central questions in the draft EIR, and is the subject of a January 10, 2014 memorandum from Balance Hydrologics, Inc., the January 13, 2014 letter from HDR and the final EIR. These documents describe why the proposed changes will not adversely affect the Carmel River and estuary. Furthermore, the floodplain restoration to be enabled by this project will provide environmental benefits to the river and ecosystem by enhancing native riparian and wetland habitat.

Additionally, changes to the project since lodging of this protest have further reduced the already insignificant effects on public trust values. In protest dismissal agreements with NMFS and CDFW, the Eastwood Trust agreed to move forward with the most environmentally protective alternative evaluated in the draft EIR by using a new pump downstream of the existing Cal-Am facility for municipal purposes, shortening the affected reach. The Eastwood Trust has also agreed to put a significant portion of the proposed municipal diversions toward offsetting Cal-Am's unlawful diversions in the first years after project approval. These actions further diminish potential effects to the environment.

- 2) The use of water for municipal purpose instead of irrigation would affect Carmel River public trust resources due to reduction in return flows since water would be exported from the watershed for use.

The total annual evapotranspiration associated with the current diversion and use is 85.6 af/year: this is the amount already being lost from the watershed under current practices – the remainder of the water currently diverted under the water right and that eventually returns to the system, will

be left in situ to support instream benefits. (See, e.g., Response to Protest by Eastwood Trust, March 7, 2014; EIR.) There will be no net impacts on the water balance of the Carmel River system, even if there are no return flows to the Carmel River from the 85.6 af/year that will be diverted and used for municipal purposes. Furthermore, it is unlikely that the return flows to the system would be zero, as some municipal use is anticipated within the Carmel River system.

- 3) The existing quantification of water use under the license should be carefully evaluated to ensure that the number is real.

State Water Board staff carefully reviewed the April 15, 2013 Davids Engineering technical memorandum, "Odello Ranch Crop ET and ET of Applied Water Estimates," Attachment 2 to Eastwood change petition, and did not identify any mathematical or other errors in the petition attachment. No evidence indicates that the license itself was incorrectly quantified at the time of issuance or had become subject to forfeiture.

- 4) Pumping of Carmel River subterranean flow only to return it to the surface flow may be detrimental to water temperatures and thermal stratification, if any, of the Carmel River estuary.

This issue stems from a misunderstanding of the instream flow dedication, as this project does not involve such pumping. Instead, the instream flow portion of the license will remain unpumped, supporting instream flows in the river. Ultimately, the project involves less pumping than under current conditions, due to the instream flow dedication of a portion of the licensed water right.

- 5) The impacts to endangered and threatened species deserves consultation and no action should be taken until a comprehensive plan for recovery of the endangered species is developed, adopted and implementation assured.

The State Water Board received input from both the National Marine Fisheries Service and the California Department of Fish and Wildlife regarding this project, and has adopted measures into the license that the fishery agencies required in order to drop their protests to the petition. Insofar as the comment is referring to consultation under section 7 of the federal Endangered Species Act, this is not a project subject to such consultation, as it is not a project undertaken by a federal agency. NMFS has developed a recovery plan for the South-Central California Steelhead, which identifies steps to assist in recovery of the species: approval of this petition is not contrary to this plan, and plan implementation does not require that projects making minor changes in habitat be put on hold until other elements identified in the plan are implemented. The January 10, 2014 memorandum from Balance Hydrologics, Inc. and the January 13, 2014 letter from HDR show that the project will not have any significant effects on fish or wildlife resources in the Carmel River. Additionally, the EIR does not identify any significant impacts to steelhead based on the change petition.

6.5 Roy Thomas

Allegations expressed in this protest, identified by underline, have been addressed as follows:

- 1) The change petition will affect flows in the Carmel River downstream of the new points of diversion and related public trust values.

This issue is addressed in the January 10, 2014 memorandum from Balance Hydrologics, Inc. and the January 13, 2014 letter from HDR. This issue is also addressed in the EIR. These documents show that the project will not have any significant effects on fish or wildlife resources in the Carmel River. Additionally, changes to the project since lodging of this protest have further reduced the already insignificant effects on public trust values. In protest dismissal agreements with NMFS and CDFW, the Eastwood Trust agreed to move forward with the most

environmentally protective alternative evaluated in the EIR by a new pump downstream of the existing Cal-Am facility, shortening the affected reach. The Eastwood Trust has also agreed to put a significant portion of the proposed municipal diversions toward offsetting Cal-Am's unlawful diversions in the first years after project approval. These actions further diminish potential effects in the reach upstream of the existing point of diversion.

2) Further diversions from the Carmel River will produce ever more serious adverse environmental impacts.

License 13868 is an existing water right, which is capped in the amount of water found by investigation to have been previously put to beneficial use. Accordingly, no increase in diversion will occur as a result of the petition: instead, a portion of the water will be dedicated to instream flows. The point of diversion for some of the water will move upstream, but the affected reach is small, as is the impact of the change on the biological functioning of the river. The issue of potential instream impacts, including cumulative impacts, was evaluated in the resources identified in 1), and found not to have a significant impact.

7.0 PUBLIC TRUST

In addition to any obligation the State Water Board may have under CEQA, the State Water Board has an independent obligation to consider the effect of the change on public trust resources and to protect those resources where feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 [189 Cal.Rptr. 346, 658 P.2d 709].) As described in the EIR and above, the change will not significantly adversely effect instream resources, and will enable a restoration project that will enhance public trust resources. Therefore, approval of the project is not contrary to the State Water Board's public trust responsibilities.

8.0 PUBLIC INTEREST

The State Water Board may only undertake water right actions where such actions are not contrary to the public interest. (*U.S. v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82.) The public has a strong interest in using the waters of the state to the fullest extent possible, and the state designates domestic use as the highest priority use of waters. (Cal. Const., art. X, § 2; Wat. Code § 106.) Additionally, the change petition is part of a larger project of floodplain restoration for the purpose of enhancing riparian and wetland habitat, which also furthers statewide policy in favor of "no net loss" of wetlands and of increasing state wetlands. (Statewide Wetland Conservation Policy, 1993.) These factors militate in favor of approving the change petition.

However, State Water Board Order WR 2009-0060 (the Cal-Am CDO) contains certain prohibitions and precedential language regarding distribution of water to new service connections within Cal-Am's service area, given the extent of unlawful diversions from the Carmel River that Cal-Am uses for existing service connections. In determining whether to issue license amendments for a project that anticipates distributing water to new service connections in Cal-Am's service area, it is necessary to evaluate whether the Cal-Am CDO would bar the proposed project, and, if not, whether precedential language in the Cal-Am CDO indicates that the change should be barred as contrary to the public interest, despite the public interest factors weighing in favor of approval.

The new-service connection ban is in Condition 2 of the Cal-Am CDO:

Cal-Am shall not divert water from the Carmel River for new service connections or for any increased use of water at existing service addresses resulting from a change in zoning or use. Cal-Am may supply water from the river for new service connections or for any increased use at existing service addresses resulting from a change in zoning or use after October 20, 2009,

provided that any such service had obtained all necessary written approvals required for project construction and connection to Cal-Am's water system prior to that date. (*Id.* at p. 57.)

This condition relates to diversions Cal-Am makes from the Carmel River. As the license changes at issue are under the Eastwood/Odello water rights, not the rights of Cal-Am, this condition does not serve to directly bar distribution of other diverters' water.

Similarly, conditions 3 and 5 of the Cal-Am CDO, which require Cal-Am to seek out new sources of small supply to offset unlawful diversions even as the company pursues large supplies, also apply to Cal-Am's actions. (See pp. 2-3, above, for text of conditions.) They similarly do not necessarily bar the sale of water from other entities to Cal-Am subscribers.

As the project is not barred by the ordering conditions of the Cal-Am CDO, it is necessary to next consider whether the proposed project may be reconciled with precedential language in the Cal-Am CDO which indicates an intent to require that peninsula communities first apply new sources of water to reduce unlawful diversions from the Carmel River, prior to using them for new growth. (See, e.g., Cal-Am CDO, pp. 40-41, 54, 56; But see *id.* at pp. 50-54 [allowing a new sources of water to be used for growth in Pebble Beach, without requiring it to completely supplant existing unlawful diversions].) Here, the Eastwood Trust has agreed to commit a substantial amount of the water for municipal use that would be made available through this license change to offset unlawful diversions by Cal-Am in the first three years after license approval: all municipal water would be used to reduce Cal-Am's unlawful diversions in 2015, at least 50 af would be used for that purpose in 2016, and at least 25 af would be used for that purpose in 2017. Additionally, the floodplain restoration project enabled by the license amendments will serve to ultimately help the fishery, the riparian habitat and the hydrology of the lowest stretch of the river itself recover from the effect of the unlawful diversions. This combination of direct offsets to Cal-Am's unlawful diversions and action to address the long-term negative effects of the unlawful diversions on the environment distinguish this project from the general language regarding applying water to growth on the peninsula, and make approval of the project consistent with the public interest.

9.0 STATE WATER BOARD AUTHORITY

Pursuant to Resolution 2012-0029, the State Water Board has delegated the authority to the Deputy Director of Water Rights to issue decisions and amended licenses on minor change petitions. The Deputy Director for Water Rights has redelegated this authority in her absence to senior staff, pursuant to redelegation order dated July 6, 2012.

10.0 CONCLUSION

The Eastwood Trust has complied with the requirements for modification of License 13868. For the reasons stated above, the State Water Board finds that the petitions for change will neither in effect initiate a new right, increase the amount of water the Eastwood Trust is entitled to use, nor injure or unreasonably affect any other legal user of water. Furthermore, the State Water Board finds that the proposed project is not contrary to the public interest, and that approval of the project conforms with the State Water Board's public trust responsibilities. The proposed modifications should therefore be granted.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT:

1. The protests of the CDFW, the NMFS, Richard Morat, and Roy Thomas are dismissed.
2. License 13868 (Application 30497B) is revoked.
3. Licenses 13868A and 13868B are issued for Applications 30497B01 and 30497B02, respectively, subject to the conditions included therein.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY:

Barbara Evoy, Deputy Director
Division of Water Rights

Dated: JUL 03 2015