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December 14, 2009

Paul Murphey
Hearings & Special Projects

Division of Water Rights
State Water Resources Control Board
Sacramento, CA
pmurphey@waterboards.ca.gov

**RE: El Sur Ranch, Water Rights Application No. 30166
Draft Environmental Impact Report**

Dear Mr. Murphey:

On behalf of the Center for Biological Diversity (“CBD”), Ventana Wilderness Alliance, Los Padres Forest Watch, the Ventana Chapter of the Sierra Club, Friends of the River, and the California Sportfishing Protection Alliance, we respectfully submit the attached comments on the Draft Environmental Impact Report for Water Rights Application No. 30166, for El Sur Ranch (“El Sur” or “Applicant”), in Monterey County, California. These comments also reflect the input of Big Sur riparian resident Lorri Lockwood and Carmel area residents MaryAnn Mathews, and Brian LeNeve.

I. Introduction and Summary of Concerns

As explained below, approval of this critically flawed DEIR would violate CEQA and the California Water Code.

We are deeply concerned that the SWRCB has yet to bring an enforcement action against the project applicant, despite the Board’s awareness of at least 20,000 acre-feet of illegal diversions since 1992, which equates to 17 years of violating the permitting requirements of the California Water Code. The evidence contained in this DEIR moreover proves the amount and length of the violation. While we understand that the Board has limited resources to enforce against illegal diversions, the scope and breadth of these violations demand accountability and enforcement. It is also clear that El Sur has used the water rights application process to delay remedial action and avoid culpability. The Board’s failure to enforce against this matter encourages project applicants to delay applications indefinitely in order to escape liability in the interim. We ask that the Board issue a proposed Penalty and Draft Cease-and-Desist Order regarding this violation, and hold a hearing on making this order permanent. We also request pursuant to California Water Code that the SWRCB conduct a hearing on the approval of this DEIR.

The proposed appropriation will adversely impact the Big Sur River. A portion of the Big Sur River is in the National Wild & Scenic Rivers System. The river is also a major feature of Andrew Molera State Park and Los Padres National Forest. The Forest Service considers the Big Sur River to be an "Area of High Ecological Significance" where a number of ecologically significant features overlap (Southern California Mountains and Foothills Assessment, USDA Forest Service, 1999, pg. 352). Such areas

are considered key parts of California's ecological heritage requiring public and agency awareness and effective stewardship. The Big Sur River is a major stream that flows unimpeded to the ocean, with a high level of ecological integrity and aquatic habitat with few invasive non-native species. Endangered steelhead can spawn in the river, which also supports populations of endangered California red-legged frog and sensitive foothill yellow-legged frog and Pacific giant salamander. Appropriating and diverting more water from the Big Sur River will further degrade the river's extensive natural values and ecological integrity.

The Water Board's determination of jurisdiction, and of illegal diversions by El Sur, compelled Applicant to apply for a water rights permit in the first place. Yet the Board is now asked to abdicate the very public trust responsibilities it so vigorously propounded. This DEIR and the associated water rights application are El Sur Ranch's attempt to legitimize decades of illegal water diversions from the Andrew Molera State Park. Before the El Sur ranch began illegally diverting water, the Big Sur River was once a spawning run for steelhead. However, El Sur's illegal diversions destroyed the run.

The El Sur Ranch Water Rights Appropriation DEIR lacks crucial and required information that would enable the SWRCB and the public to make an informed decision. In fact, the DEIR is so fundamentally flawed that its likely rejection by the SWRCB should be seen as yet another intentional delay tactic by El Sur. Likewise, if this DEIR is approved despite such glaring inadequacies, the likelihood of its being rejected by the courts is so great that the Board may reasonably expect years of additional delay.

Key omitted information in this DEIR includes:

- Development and conservation agreements between El Sur, Monterey County, and the California Coastal Commission, for easements and residential and hospitality development on the Ranch, including but not limited to the County of Monterey Agreement 3030 (Nov. 13, 1984) Larry Seeman Associates' DEIR for El Sur Ranch Dedication and Development Agreement with County of Monterey, Ordinance 3030 of Nov. 13, 1984., or development permit #3-85-12 which is currently used for ongoing development.
- Reports and studies used to demonstrate that the project satisfies the State's obligations concerning the Public Trust Doctrine.
- Discussion of the water rights protests, including those by State Parks, California Sportfishing Protection Alliance and Cal. Department of Fish & Game.
- Information on the Three Springs source that provided water to Molera Ranch and is now controlled by El Sur.

The DEIR ignores multiple conservation agreements for which the Applicant has received millions of dollars, makes no mention of the luxury residences and 100-room hotel planned for the property, and fails to include the Three Springs water source in any

if its calculations. The DEIR also substitutes government information with the self-produced “studies” that unsurprisingly reach the opposite conclusions. The mitigation measures suggested are both impossible to enforce and do nothing to offset the impacts of the proposed project. Likewise, the monitoring requirements fail because they do not require reporting on the monitoring to the Board. The baseline used in the DEIR—the average historical amount already diverted by the ranch—does not even approach legality. Thus the DEIR’s measure of impacts is limited to the difference between the amount already diverted and the maximum allowable for pasture production. The analysis thus utterly fails to accurately describe and analyze the project’s impacts and is useless for determining proper avoidance and/or mitigation measures.

The EIR is entirely premised on the applicant’s apparent desire to appropriate water for pasture irrigation. Yet the applicant’s place of use already has sufficient access to piped-in well water and Three Springs water for pasture irrigation, without adding a single appropriated drop. This is the same water, in fact, that irrigated the Molera Ranch prior to its conversion into state parkland.

The DEIR ignores the far more likely goal of the project: to provide water for future development. It ignores decades of attempts to develop the property, despite the existence of development agreements with government agencies, and despite the lack of any other conceivable purpose that would require sustained flows at the level requested in the application. Remarkably, the DEIR fails to even consider development as a likely *impact* of the issuance of the water rights permit, even though it is entirely foreseeable and an obvious cumulative impact.

The water availability analysis used to support the Ranch’s conclusions is critically flawed. Assuming low-flow conditions and including the (otherwise omitted) riparian diversions, the river is already fully appropriated.

Finally, the endangered steelhead population is not “large and healthy” as the DEIR states. The DEIR glosses over the protests by the Department of Fish and Game and State Parks even though new studies provide no evidence to contradict decades of decline of the steelhead spawning run.

II. Inadequate Project Description

A. Inadequate Background and History

The applied-for diversions are merely the latest salvo in a decades-long effort by El Sur Ranch to take water from Andrew Molera State Park.

No Explanation for Amendments to Water Rights Applications

The “project background and overview” correctly notes that the original application was filed in July 1992, but other than noting that the amendment is contained in an appendix, does not explain what happened to that original application and how and why it was modified in 2005 and 2006. DEIR p.3-1. While the DEIR reveals that protests were filed by numerous parties, it does not inform what was wrong with the old application, nor how the revised applications satisfy these protests.

Delay and Board Leniency Unexplained

The DEIR does nothing to explain why it has taken applicant 17 years to reach this stage of the application process (the Board’s average estimate is around 4 years), nor does it explain how so many years of illegal diversions has not resulted in penalties and injunctive action by the Board.

Inadequate Discussion of Water Rights Protests

Other than mentioning their existence, the DEIR does not go into detail about the water rights protests that first blocked the water rights application in 1992. Importantly, the DEIR ignores that the protests have not been resolved by the subsequent reports. The protests claimed that the Big Sur River was being de-watered by the unauthorized diversions, and that El Sur ranch used excessive amounts to irrigate pastureland. The studies used in the DEIR do not in any manner contradict these assertions, but rather place irrelevant qualifiers on them. For example, the DEIR explains away the river’s de-watering, claiming that the combination of groundwater and subterranean streams invalidates claims of dewatering due to applicant’s diversions. Even if there is groundwater mixed with a subterranean stream at the two points of diversions, the withdrawal of 1,600 AFY is still a diversion and not as a groundwater extraction. And will still remove the 1,600 AFY from the available water for the river. The DEIR then suggests it was faulty calculations by State Parks that did not take into account drought years. Yet if the de-watering calculations by State Parks did indeed use data from dry years, there is no reason that dry years will not continue or increase, as has been the case.

Nature Conservancy

While the SWRCB only asserted jurisdiction in 1992, the illegal diversions by El Sur Ranch date back to the 1965 land grant by Francis Molera that was held in trust for five years by the Nature Conservancy. Under the agreement, both the land and the resources underlying that land, including the subterranean portion of Big Sur River, should be protected from outside development. These restrictions on use are still in place, but are not discussed in the EIR.

No Extra-Appropriative Right from Easement

In the DEIR, the 1982 easement is cited that purports to give El Sur an extra-appropriative right to the water requested, even beyond the riparian right granted by the Board. (see DEIR p.2-13) If such an extra-appropriative right actually existed, however, then El Sur would not need to file the application to appropriate water. It is precisely the fact that the SWRCB determined that the Ranch's easement does not give it an appropriative right that the permit was (and is) required.

Conservation Easement

The Project applicant was paid by the state to maintain scenic conservation values on the El Sur ranch property. There is no mention of this easement in the DEIR. (See Attachment X)

Monterey County "Big Sur River Protection Waterway Management Plan"

The DEIR fails to address that this Monterey county plan requires that for adult fish migration the water in Big Sur River must be 0.6 feet in depth with 25% of the total stream width, 10% of which is contiguous. As Brian LeNeve points out in his comments, Page 61 of the California Sport Fishing Regulations states that the Big Sur River shall be closed to fishing when flows are inadequate to provide safe fish passage. The regulations then set the flow requirement at 40cfs measured at the U.S.G.S. gauging station. These restrictions are missing from the flow and diversion requirements set forth in the DEIR.

Coastal Development Agreement

Project applicant also entered into a coastal development agreement with the California Coastal Commission that would have permitted construction. The DEIR does not assess this development as a clearly foreseeable impact of approving the water rights application for El Sur Ranch. (See Attachment X)

Endangered Species Act Restrictions

The DEIR correctly reveals that the Big Sur River is designated as Critical Habitat for steelhead under the federal Endangered Species Act. DEIR at p. 4.3-25. But the DEIR fails to adequately discuss what impact such designation has on the Project and/or future permit requirements. Although Critical Habitat designation does not directly impose restrictions on private landowners, federal agencies are prohibited from taking actions that could result in the destruction or "adverse modification" of the designated critical habitat. Federal permits, including permits under the Clean Water Act, Clean Air Act, and Endangered Species Act, are all federal "actions" subject to this restriction. The DEIR fails to adequately discuss the various federal permits the Project (and future foreseeable impacts of the project, like land development) would require.

In addition, the Project's impact on designated Critical Habitat is an impact of the Project that should be analyzed under CEQA regardless of the likelihood of federal permitting requirements being implicated.

Riparian Rights Holders

The EIR likewise omits many riparian water users that use Big Sur River, which has the effect of making the river appear not fully appropriated. However, when these other riparian users are taken into account, including unpermitted riparian diverters and that of the federal reserved water rights for endangered species, there is little, if any, water remaining to appropriate. *See* DEIR 5-2 (Table). It is the goal of the DEIR to take into account all diversions, even if those diversions are unpermitted and/or unlisted riparian diversions. Finally, the water rights reserved for Los Padres National Forest have not been included.

Big Sur Wild & Scenic River and Fully Appropriated Stream Status

This comment is provided by Steve Evans of Friends of the River:

The EIR fails to recognize that the Big Sur River is protected in the National Wild & Scenic Rivers System. Although the river segment protected in the system is upstream of the proposed diversion site, increased diversions could harm the protected values of the designated river, including migrating steelhead. As a practical matter, the State Water Resources Control Board has a standing policy designating federal and state Wild & Scenic Rivers as fully appropriated streams (Order WR 98-08, section 5j, pg. 26). The EIR fails utterly to consider impacts on the upstream Wild & Scenic River segment or the fact that the Big Sur River is, under Water Board policy, a fully appropriated stream. In addition, federal designation comes with a federally reserved water right to implement the river protection purposes of the National Wild & Scenic Rivers Act. The EIR fails to consider how the proposed water rights allocation will impact the federally reserved water right (in this case, held by the U.S. Forest Service).

B. Improper Baseline and Measure of Reasonable Use

Baseline Problems

The DEIR acknowledges that government agencies are concerned by the "use of historical diversion rates as the environmental baseline for purposes of determining potential impact on hydrological conditions and aquatic resources." DEIR p.3-3. Despite these concerns, this DEIR does not revise the baseline. The DEIR's use of such a high baseline diversion level renders an evaluation of environmental impacts useless when compared to a "no project" situation, for the "no project" situation assumes the unpermitted diversions will continue unchecked.

The DEIR uses the Ranch's historical diversion average as the baseline to assess impacts of the proposed project. Thus the impacts reflect "the difference between baseline diversions for El Sur Ranch irrigated pasture and diversions that would occur under the proposed project." DEIR p.4.1-5. The DEIR calculates this figure to be 343 AFY averaged over 20 years; for a 1600+ AFY diversion, only 343 AFY are considered as impacts. Even using the false standards of the DEIR, with a baseline set at the historical diversion rate ca. 850 AFY, this would still leave nearly 800 AFY as the project impact, more than twice than the paltry 343 AFY measurement. In other words, impacts described in the DEIR are limited to those caused by the difference between what El Sur already pumps and the maximum which it could pump in the future if the maximum amount of water requested for appropriation is approved. Likewise, any impacts resulting from the Ranch's current diversions, including the destruction of the steelhead spawning run, are logically omitted. This is a totally inappropriate measure of impacts, because the application is not for the mere difference between current and future use, but the entire amount under illegal diversion by El Sur.

Under the no-project scenario, the only water El Sur is entitled to is its riparian right, which is a tiny fraction of the appropriative right at issue here. Any water above the riparian amount, *i.e.* all of the water at issue here, is currently diverted illegally and should not be included in the baseline.

Reasonable Use Problems

The reasonable, beneficial use of water, and prevention of its waste, are fundamental water principles required by Art. 10, Section 2 of the California Constitution. Unfortunately, the EIR confuses "reasonable use" with "any use whatsoever," arguing that the reasonable use standard for the pasture is the theoretical *maximum* of what could be used to irrigate pasture. El Sur justifies its wasteful irrigation methods by noting that, by DWR's estimates, similar practices actually use more water for "similar locations and conditions." DEIR p.2-16. While this observation may demonstrate that other operations are *more* wasteful, it fails to prove that El Sur is in any way using its illegal diversions reasonably or beneficially. It also fails to consider whether the other locations are irrigating animal pasture.

A separate reasonable use issue is why the applicant requires appropriated water from these wells, period, when the pastureland in question is already connected to the groundwater well irrigation system as well as the Three Springs source. There is no suggestion that the groundwater and Three Springs sources are insufficient; in fact, El Sur ignores these other sources as if they didn't exist. Yet if these other sources are already connected and capable to supply the pasture with sufficient water, how, then, is the amount requested in this Application to be considered "reasonably used"?

C. Inadequate Description of Applicant's Existing Water Use, Rights, and Sources

Current Illegal Status Ignored

The EIR does not explain that the current diversions are illegal, and that El Sur has operated these wells illegally without a water rights appropriation permit for literally decades. Moreover, El Sur has successfully used the permitting process to delay permit consideration for 27 years, dragging their feet in order to preserve the status quo. Yet the Water Code makes clear that there can be no unpermitted diversions. Unequivocally and unapologetically, El Sur has violated the Water Code since 1982, when the SWRCB made its jurisdictional determination over the subterranean source. The ongoing violation is for the difference between the riparian right determined by the SWRCB and the amount actually withdrawn by El Sur during the 27-year interim. In fact, the table of historical withdrawals listed in the permit application provides yearly proof of the extent of the illegal diversions. CBD formally requests that SWRCB staff conduct an investigation into bringing an enforcement action, and if appropriate, to issue a Draft Cease-and-Desist Order and Proposed Penalty as soon as possible.

Riparian Rights Improperly Excluded

The applicant improperly conflates El Sur's existing riparian water right with the appropriative right permit application. The EIR explains that the amount of water requested in the El Sur Water Rights Application "includes water needed to irrigate the application's claimed existing riparian 25 acres." DEIR 2-17. This means that El Sur has requested water for the same area twice, as El Sur has already been awarded riparian rights by the SWRCB in 1992. Granting additional use as part of this application would be a classic example of "double dipping." The DEIR explains that this application has nothing to do with riparian water rights, DEIR p. 2-18, so the corresponding amount should not have been included in what is purely an appropriative right being permitted.

Use of Three Springs Omitted

The agreement between El Sur and the California Department of Parks to use water from the Three Springs location on the north end of the property should provide sufficient water for the pastures, and the DEIR makes no effort to demonstrate otherwise. The Three Springs source was used by Molera Ranch to irrigate its pastures prior to it becoming a park, and thus the Three Springs source is connected by a network to the pasture lands in the POU. There is no mention of this source in the DEIR. (See Three Springs Agreement).

Efficiency Equated with Under-Irrigation

The DEIR admits that the ranch was more efficient in past years with its water use, albeit apparently unconsciously, and actually uses this as a reason to increase the water appropriation. DEIR, p.2-19. The DEIR reasons that a year with high irrigation efficiency should be interpreted as a year of under-irrigation. In other words, the application bases its requested entitlement on the maximum amount that could have been used. DEIR 2-22 (“maximum historical diversions have occurred in 1997 and 1984, respectively”). This conclusion gets the beneficial use analysis exactly backward, and undermines the very concept of “efficiency.” The admission of historical “high irrigation efficiency” is empirical evidence that the pasture requires a small fraction of the amount requested in this Water Rights Application.

Leaching Requirement Lacks Fish Impacts

The DEIR’s discussion of leaching correctly identifies increases salinity in the water. DEIR p.2-22. This increase can endanger plant and animal life, yet this impact is ignored in the “leaching requirement” description, particularly in regards to how changing salinity levels can impact steelhead spawning.

False Equation of Irrigation Requirements with Diversion Requirements

The DEIR attempts to map the “irrigation diversion requirement” but then assumes in Table 2-3 that the irrigation needs for El Sur Ranch are 100% synonymous with the need for water diversions, when this is clearly not the case, as there are multiple ground wells already drawing irrigation water on the property. Again, the DEIR omits any mention here of the Ranch’s use of Three Springs water and of its extensive and interconnected groundwater wells.

D. Inadequate Analysis of Current Conditions and Impacts of Diversion

Although the EIR mentions several reports that were supposed to assess the impacts of the diversions on the Big Sur River, these reports lack sufficient historical comparisons to provide any real insight into the status of the river before and after the pumping. Along with setting a baseline too high to consider actual harm, these reports serve to confuse and mislead.

Steelhead

For example, Table 4.3-5 compares the number of steelhead observed in 2004 and 2007. Yet the appropriate measures for steelhead population should be before and after El Sur began pumping from the old and new wells.

The EIR assumes the results of these environmental studies remain valid even though the requested appropriation is far greater than any historical use. The EIR passes off the addition of 400+ AFY above any historical withdrawal by concluding that years in

which there was “high irrigation efficiency” were actually years of “under-irrigation.”
DEIR p. 2-22

Adequacy of Flow in Big Sur River

The amount of water present above and below the point of diversion is not a useful measure of the health of the steelhead spawning run. The fact that some fish appear to be numerous and healthy below the points of diversions likewise does not analyze the loss of the endangered steelhead spawning run, nor assesses the potential to mitigate the impacts and restore the run to its pre-pumping condition.

Impacts of Flow on Fish Passage

Additional impacts on steelhead are described by Brian LeNeve of the Carmel River Steelhead Association, who also criticizes the DEIR’s conclusion of adequate water supplies for adult and juvenile steelhead passage:

“Impact 4.3-1 Adult fish passage. Keep in mind that steelhead are a federally threatened species and that minimum requirements will not recover the species, we must have optimal conditions. The EIR uses the convoluted measurement of 0.6 feet of water over a certain distance for adult fish passage. This is unworkable because after every heavy rain event the stream bed changes so you cannot use a particular cfs as a minimum unless you measure the stream bed after each storm and then on pumping days. CA Dept of Fish and Game has the responsibility for steelhead in a CEQA document and they have already stated that it takes 40cfs to move adult fish safely so no pumping should take place when the U.S.G.S. gauging station is below 40cfs. The EIR states that the normal migrating period for steelhead is Dec. to May yet their own surveys show adult steelhead in the river in Oct. so the 40cfs should extend from Oct. to May.

“Even if one uses the convoluted riffle measurement, the EIR on page 4.3-36 and 4.3-37 states that with 12 cfs many transects did not meet the riffle criteria. At two dates in October of 2006 flow rates of 24cfs and 21cfs was not enough to meet the criteria. Yet under the baseline allowable pumping the ranch could still operate the pumps, remove more water and lower the riffle even more. This would result in “take” under the ESA by altering a stream bed. If 24cfs resulted in riffles that were below the criteria for adult passage then the 40cfs as listed by DFG would be a fair amount so as not to have to re-measure each riffle after each rain.

“Impact 4.3-2 Juvenile fish passage. (keep in mind that juveniles are also steelhead and federally protected.) The EIR again uses the convoluted measurement of 0.5 feet of water over a certain distance. Again this is unworkable for the same reasons listed above.

“If we use the same ratio for juvenile passage (.0.6” for adults and 0.5” for juveniles) then no pumping should occur when the U.S.G.S. gauging station is below 36cfs. As most of the ranch pumping occurs in the summer this is critical. Even if the DFG requirements are not accepted the ranch cannot say they can pump their baseline amounts as their baseline amount resulted the river going dry in 1990 resulting in the lawsuit in 1992. The summer pumping must relate to juvenile fish passage and not to some pre-determined amount. Table A on page 4.3-38 shows allowing baseline pumping to continue regardless of water conditions. In dry and critically dry years between the months June, July, August, and September under the baseline pumping regime the ranch would be allowed to pump an average of over 28% of the flow. This is the worst time to divert water from fish and unacceptable. A baseline pumping regime does not take into consideration what conditions are on the river. While on page 4.3-29 the EIR established a minimum depth of water as 0.5 feet on their summary of facts for Impact 4.3-2 on page 4.2-40 the EIR has lowered the depth requirement to 0.3 feet and even then they found that pumping violated the riffle rule, so a depth of 0.5 feet would be even harder to maintain if at all.

“Page 6-7 and 6-8 state that baseline pumping, (not increased pumping) lowers the river by 2” and enough that the shallower riffles did not meet the criteria of 0.3 feet. (Note again the EIR lowers the juvenile passage criteria from 0.5 feet to 0.3 feet.) The only alternative that meets the fish passage limits is the “No Pumping alternative.”

Under any alternative no pumping should be allowed or could be allowed under ESA rules when juvenile fish could not migrate and that appears to be around 36cfs.”

Inadequate Surveys of Biological Resources

The following comments on Biological Resources are provided by Julie Anne Hopkins, a wildlife biologist and botanist and former career scientist with the United States Bureau of Land Management:

Two visits were conducted by consultants to survey biological resources: The first on November 2, 2005 to Andrew Molera State Park (i.e. not the place of use) and the second on July 21, 2006 on a guided ranch tour for "reconnaissance-level" overview. Both visits occurred outside of plant flowering and avian breeding seasons. Additional visits should be conducted during flowering plant season and avian breeding seasons (March through June); without such visits, the biological surveys are not reliable and incomplete.

Misuse of California Natural Diversity Database (“CNDDDB”)

The California Natural Diversity Database (“CNDDDB”), while an excellent resource, is only as accurate as the data input. Since the El Sur Ranch is privately owned,

the inputs for El Sur have been supplied by the Ranch itself. Given the existing knowledge of endangered and threatened plant and animal species in the El Sur vicinity, including the adjacent Molera State Park, it is highly questionable whether there have been thorough and timely biological surveys conducted by qualified biologists. Without qualified experts and timely surveys, there is a conspicuous absence of Rare Species Reports to California Department of Fish and Game for inclusion in the CNDDDB. Surveys for known listed species that could occur on El Sur Ranch should be conducted by qualified biologists, and the results included in both the CNDDDB and the EIR.

Lack of Support for Biological Conclusions.

The DEIR fails to include the biological reports by prior consulting agencies (Hanson Environmental, 2004, 2006, 2007 and M. Green and Associates, 2007), both of which the current DEIR relies upon.

Due to the lack biological field visits at appropriate seasons, reliance on applicant-supplied information in the CNDDDB, and the lack of supporting documentation, the "likelihood of occurrence" decision for potential and occurring species is arbitrary for both aquatic and terrestrial plant and animal species.

The federal- and state-endangered California condor (*Gymnogyps californianus*) warrants in-depth consideration regarding potential use of local foraging habitat. The Ventana Wildlife Society ("VWS"), lead organization for the reintroduction of the condor on the Big Sur coast, is not on the list of addressees. This lack of notice to the VWS further exacerbates the likelihood that endangered species have not been considered.

Likewise, the Western/Southwestern Pond Turtle has not been inadequately addressed. Outdated records and reliance on self-supplied information in the CNDDDB, coupled with inadequate recent field visits, are cited in the DEIR. Further research and surveys are needed to determine the effects that water withdrawal and (both cumulative and foreseeable) upland habitat modification will have on this sensitive species.

Finally, inadequate research and surveys have been conducted for the presence and potential effects to known bat species in the vicinity of the project.

Public Trust Impacts

The DEIR claims that a series of reports funded by the project applicant serve to allay concerns about the ongoing damage to public trust resources. This is incorrect. The river was de-watered due to El Sur's unsustainable historical diversions, and it is only because the DEIR's baseline was set so high that the diversions do not appear to have such impacts, for implicitly the public trust resources (primarily the steelhead spawning run) was already destroyed. Likewise, the studies referenced in Section 4.2 of the DEIR

all measure the impacts of additional diversions, and not the historical condition of the spawning run. The mitigation measures should be focused in protecting and restoring those resources, not on preserving and exacerbating the abysmal status quo.

Limitations of Studies

The DEIR itself acknowledges serious limitations of the studies' conclusions, including only one trial run for each pumping conditions, which make the conclusions "not necessarily indicative of the more critical conditions that would occur during a critical or dry year;" meaning that "in general, these studies do not provide for a means to correlate diversion effects on the Big Sur River or groundwater conditions." DEIR at pp. 4.2-46 and 4.2-47. Studies that do not correlate effects on Big Sur River or groundwater cannot possibly serve as appropriate evidence for impacts cause by water diverted by El Sur. As previously mentioned, the effects of diversions on streamflows are also inappropriately based on the difference between historical diversions and the proposed average diversions under the permit.

Missing Cumulative Impacts

A Cumulative Impacts Analysis in an Environmental Impact Report must assess the impacts of the proposed project combined with reasonably foreseeable impacts from past, present and future activities. This DEIR does not correctly account for cumulative impacts, in no small part because the document does not consider the impacts of the full amount of appropriated water requested, but rather considers only the impacts of the difference between the amount already diverted illegally, and the amount it could deliver under the permit. (DEIR p. 5-9). Until the full amount requested is considered as an impact, the analysis is fundamentally flawed and does not pass muster under CEQA.

Along the same lines, the cumulative impacts should include the combined total appropriated amount requested and the total riparian diversions in operation; such a calculation is impossible because the DEIR lacks a complete listing of riparian diverters.

Third, if the project baseline is wrongly set at the historical average diversion level, then the cumulative impacts should assess the additional diversions in this project combined with the historical diversion level. In this manner, at least some part of the DEIR would assess the total impacts of El Sur's diversions.

Fourth, resulting low flow, low dissolved oxygen and high temperatures are clear proximate and cumulative impacts that must be discussed together for their combined effects on habitat and steelhead fish passage. Whether or not El Sur's diversions by themselves cause the low flow and high temperatures, these problems are well-documented and should be analyzed (and mitigated).

Finally, cumulative impacts should include the expected residential and commercial development in the area spearheaded by El Sur, including a discussion of the development agreements, the fire suppression and municipal water requirements for those developments, and how those fire suppression and municipal water requirements would be met without using the water diverted from Big Sur River.

Missing Growth-Inducing Impacts

Separately, the DEIR neither evaluates the probability of development nor transfer of the water as a growth-inducing impact. Yet if the appropriate right is awarded, development is a near-certainty due to development agreements already in place. These diversions fit both CEQA definitions of growth-inducing impacts, as it would (a) generate direct effects on employment and (b) encourages expansion of development into a pristine area. The proof of using the well sources for development is in the development agreements, as there is no other source that meets the gallons-per-minute minimums for fire protection.

Inaccurate Water Quality Assessment

As noted in our discussion of fish passage above, the DEIR does acknowledge critical low flow caused by pumping, resulting in blocking fish spawning upstream (and/or fish swimming upstream to spawn) in Big Sur River. DEIR 5-5 (Impact 4.3-10). Instead of mitigating this impact, however, the document merely acknowledges what the government agencies have been arguing for years: that low flows mean “large segments of the steelhead population could be at risk.” Id.

The DEIR’s discussion of temperature changes are also rendered useless by setting an inappropriate baseline for measurement. If the actual 1600AFY were measured, then the analysis would reveal significant temperature changes in low-flow periods due to the project applicants’ diversions.

Likewise, dissolved oxygen is not mitigated by inclusion of an aeration system, for the seemingly obvious reason that the system cannot aerate water that is not flowing and indeed non-existent. Moreover, if the water level has fallen below 10cfs at the Fish and Wildlife gauge, then the ability to aerate the water to improve the dissolved oxygen content is totally irrelevant, because the steelhead will be unable to . Moreover, even the DEIR acknowledges “the overall feasibility of such a study is unclear.” The proper mitigation for this impact is to reduce pumping in low-flow conditions.

Inappropriate No-Project Alternative

The alternatives analysis in Chapter 6 of the DEIR is fundamentally flawed because of the presumption that under a “No Project” situation the ranch would continue to pump at its previous rates. DEIR p.6-2. The SWRCB is aware that El Sur’s current

use of Big Sur River water— of the entire amount not considered riparian—constitutes an ongoing illegal diversion in violation of the Water Code. Therefore it would be, by definition, illegal for El Sur to continue diverting this amount if the permit is denied. As noted elsewhere in these comments, the most appropriate “no project alternative” is the Board’s issuance of a Cease-and-Desist Order and Proposed Penalty on the existing illegal diversion, and a total cut-off of any water not considered a riparian right by the Board.

CBD is aware of certain “no project” exceptions, such as for re-licensing of hydropower dams, that may consider a continued unpermitted condition as a “no project” alternative, even though the continued presence of the project would be illegal. However, the dam example is exceptional because of the distant causal connection between denying a dam’s permit renewal and actual removal of the dam. Moreover, prior to the re-permitting, the “no project” dam was presumptively permitted and legal. In contrast, here the diversions have been illegal since 1982, and the pumping can be reduced with the mere turn of a dial. Therefore the DEIR has no excuse for assuming the historical diversion rate as the “no project alternative.”

Lack of Riparian-Only Alternative

The DEIR omits a critical alternative in its analysis that would only deliver the riparian allowance already determined by the SWRCB, and would rely on groundwater and Three Springs sources for the rest. This omission makes the alternatives analysis incomplete, as it is the only alternative that correctly balances the riparian rights of the ranch with the interests of the Molera State Park.

E. Misleading Discussion of Project Goals

One of the great mysteries of the Water Rights Application and DEIR is why a pasture with more-than-sufficient water supply requires an additional 1,600 AFY of water with a guaranteed minimum pumping rate of 5.34 CFS and 30-day running average flow of 2,400 GPM. DEIR p. 2-17. Answering this mystery is not helped by the DEIR’s omission of discussion of Three Springs, which already supplies water to the pastures under a separate agreement, nor is it helped by the omission of the long-standing development agreements for this land.

The Project Applicant commissioned numerous studies to reach conclusions at direct odds with earlier reports, state and federal agencies, and common sense. Incredibly, one of the reports actually concludes that flood irrigation is an “efficient and appropriate” means of irrigating pasture land. DEIR at 2-16. As explained above, the “efficiency” designation is awarded based on comparisons to even greater flood irrigation by other Ranches. Drawing a conclusion of “efficiency” is one that only a flood irrigator of pastureland could reach. Yet even the flood irrigation employed by El Sur fails to

account for the amount of water requested, as historical use hovered around 60% of the amount requested.

The DEIR makes no mention of the decades-long struggle by the Hill family to create residential and hotel development on its El Sur Ranch property. This omission is particularly important since fire suppression requirements are the most likely reason that El Sur would need guaranteed GPM's as specified in the EIR. Big Sur resident Lorri Lockwood observed that the LSA report and DEIR for County of Monterey Agreement 3030, which Hill signed Nov. 13, 1984, states:

"Site 8 would receive its domestic and fire protection water supply from an existing well in the Molera grazing area to be deeded to the ranch. This well supplies 1200-2200 gpm....An additional backup well supplying 20 gpm would be available should the need arise."

LSA p. 95.

III. Inadequate Mitigation

CEQA mandates mitigation for environmental impacts. However, the project appears to have confused "mitigate" with "react to disaster." While offering nothing to the State Park to actually offset the diversions, the proposed project's "mitigation" is to cut-off of pumping in extreme low flow conditions. DEIR p.3-6. This does not offset the withdrawals' long-term, sustained impacts on the Big Sur River, and thus does not qualify as mitigation.

The El Sur diversions have caused low flows in the Big Sur River that have historically impeded Steelhead spawning. Mitigation measures should therefore function to improve year-round adult and juvenile fish passage in Big Sur River, but fail to do so:

Discussion of Impacts and Mitigation

1. The requirement that the pumps reduce pumping when the river reaches a certain level is a too-little, too-late approach that does nothing to promote recovery of the steelhead spawning run in the Big Sur River. DEIR p.3-5; impact 4.2-2.
2. A proper mitigation measure in this instance would be to provide State Parks with veto control over any withdrawals subject to successful spawning of steelhead in the river.

3. The DEIR incorrectly assumes that no mitigation is required for impacts to the lagoon, when losing the lagoon is and has been a very significant impact. DEIR p. 6-6; impact 4.2-3.
4. The mitigation measures for monitoring and reporting of erosion do not provide for penalties or any other incentive for the project applicant to comply, nor do the measures require submitting actual reports to the SWRCB. These flaws render the monitoring ineffective; the lack of reporting requirements ensure hiding any potential violation in the files of the “Applicant or operations manager.”

Finally, mitigation measures must be included to limit maximum withdrawals below the GPM required for fire protection, require that no water from this permit be moved from these pastures, and require that no water from these sources will ever qualify as fire protection sources for new development.

IV. Conclusion

For the foregoing reasons, we request that approval of the EIR be denied. In the alternative, we request that the Board conduct a hearing on approval of this environmental document. Finally, we request that the Board conduct an investigation into bringing an enforcement action against the applicant for nearly three decades of illegal diversions and systemic delays. Because the El Sur Water Rights Application requests permitting only for diversions above and beyond its (unpermitted) historical diversion rate dictates that the baseline diversion level remains unpermitted regardless of the outcome of the WRA. Given the proof provided by this DEIR, a Draft Cease-and-Desist Order and Proposed Penalty should be the logical next step. Thank you for your time and consideration.

Sincerely,

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Center for Biological Diversity

Tom Hopkins
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