STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

DIVISION DECISION 99-01
DD 99-01

GARRAPATA WATER COMPANY
GARRAPATA CREEK WATERSHED
MONTEREY COUNTY

APPLICATION 29664

September 24, 1999

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DIVISION OF WATER RIGHTS DECISION 99-01

GARRAPATA CREEK WATER COMPANY

APPLICATION 29664

1.0 INTRODUCTION AND OVERVIEW

The State Water Resources Control Board (SWRCB), Division of Water Rights (Division) has reviewed the Water Right application of the Garrapata Water Company (Company) to divert 35 acre-feet per annum (afa) of water from the Garrapata Creek subterranean stream for domestic use within its service area.

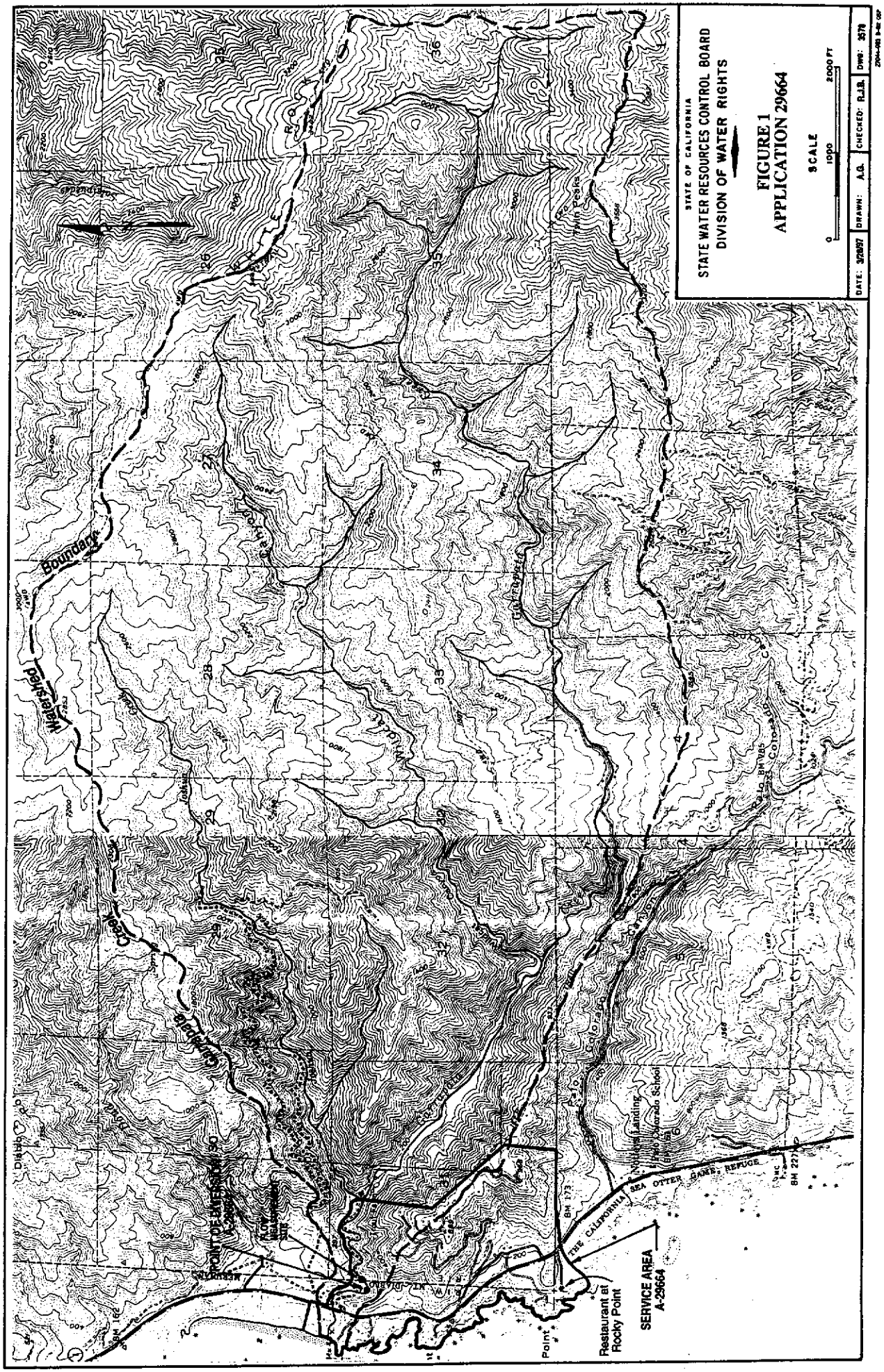
The Garrapata Creek watershed is located about 10 miles south of the city of Carmel in Monterey County and encompasses an area of about 10 square miles. Figure 1 is a location map that shows the Garrapata Creek watershed, the location of the well used by the Company, the location of the area served by the Company, and other features in the area.

The review of this application has involved a lengthy process which included the distribution of a notice of the application and submittal of protests by interested persons, a field investigation, distribution of a staff analysis, submittal of objections to the staff analysis, a lawsuit by the Company against the SWRCB, a SWRCB hearing related to the jurisdictional aspects of the diversion, adoption of a decision on these the jurisdictional issues (D-1639), petitions for reconsideration of that decision, adoption of an order denying the petition for reconsideration and the issuance of this Division decision.

This Division decision is based on a review of all available information, including an evaluation of the hydrology of Garrapata Creek, the beneficial use of the water diverted, the public trust resources within the watershed and the potential impact of the Company's diversions on the public trust resources. As described in this decision, the Division has determined that a water right permit should be issued for this application, for diversion of up to 35 afa, with the inclusion of the following terms that are designed to protect the public trust resources within the Garrapata Creek watershed:

> ***Visible surface flow*** The Company shall bypass visible surface flow downstream of its diversion, whenever there is visible surface flow upstream of the Company's well.
>
> ***Monitoring and reporting*** The Company must retain documents that demonstrate compliance with this term and notify the Division of any violation.

The Division has determined that this project is categorically exempt from the requirements of the California Environmental Quality Act (CEQA), for the reasons set forth in this decision.


STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS
FIGURE 1
APPLICATION 29664
SCALE
0
1000
2000 FT
DATE: 3/28/97
DRAWN: A.G.
CHECKED: R.J.B.
DWG: 3578
Watershed
Boundary
Creek
Restaurant at Rocky Point
SERVICE AREA
A-29664
THE CALIFORNIA SEA OTTER GAME REFUGE
Notters Landing
Colorado School
Twin Peaks
Point

2.0 BACKGROUND

2.1 Application/Project

In February 1990, the Company submitted an application (A29664) to appropriate unappropriated water from the Garrapata Creek subterranean stream to the SWRCB. The application requested a water right permit for year-round direct diversion of 72,000 gallons per day (0.11 cubic feet per second (cfs)), not to exceed 81 afa. The application requested a water right permit to cover municipal/domestic water use within the Company's service area. Water is diverted by means of a 40 foot deep well located immediately adjacent to the creek, about 1,500 feet from the mouth of the creek. By letter dated June 18, 1999, the Company requested that the water right application be modified from 81 to 35 afa. The Division concludes that diversion of 35 afa is a reasonable estimate of current annual water use by the Company.

The existing water supply system has been in operation since 1962 and has diverted water from the Garrapata Creek subterranean stream during that entire period of time. The Company filed its articles of incorporation with the state on October 13, 1961. On July 17, 1962 the Public Utilities Commission issued its Opinion and Order Granting a Certificate of Public Convenience and Necessity to the Company. The State Board of Health issued a Water Supply Permit on April 9, 1963. The Company has invested considerable funds on the development of the water supply system. No other feasible sources of water are available in the immediate area.

2.2 Notice/Protests

On January 3, 1992, the Division issued a notice of this application in accordance with section 1300 of the Water Code. Three protests were filed to Application 29664. Two parties submitted protests based on injury to prior rights. The parties resolved those two protests. The California Department of Fish and Game (DFG) filed a protest to Application 29664 which alleges that cumulative impacts of water diversions within the Garrapata Creek watershed are causing low flows in the creek. The protest does not specifically allege that the Company is or may be adversely impacting fish and wildlife resources in Garrapata Creek.

2.3 Field Investigation and Staff Analysis

The Company and the DFG were unable to resolve the issues raised by the DFG protest. Accordingly, Division staff conducted an on-site field investigation with the parties on January 27, 1997, in accordance with Water Code section 1345.[1]

Following the field investigation, Division staff prepared a Staff Analysis dated May 1997, that summarized the results of the staff investigation. The Staff Analysis recommended that a water right permit be issued to the Company, with the inclusion of terms that would require the Company to develop and implement water conservation measures when the flow in the stream dropped to certain levels.

---

[1] Application 29664 is a minor protested application as defined in Water Code section 1348 and is subject to procedures specified in Water Code sections 1345-1347. The procedures for processing minor protested applications were amended by SB 849, Stats. 1997, ch 323, effective January 1, 1998.

The Staff Analysis was distributed to interested parties by cover letter by the Division Chief, dated May 16, 1997.

On June 14, 1997, the Company filed an objection to the Staff Analysis and requested a hearing before the SWRCB in accordance with Water Code sections 1346 and 1347 in effect at that time. DFG also submitted a letter dated June 26, 1997; however, that letter was not submitted within the 30 day time requirement. DFG's letter expressed concerns regarding the permit terms recommended in the Division's Staff Analysis but did not object to the Staff Analysis and did not request a hearing.

In a separate but related action, on October 17, 1997, the National Marine Fisheries Service (NMFS) added steelhead to the list of threatened species, in accordance with the federal Endangered Species Act (ESA), in the area that encompasses the Garrapata Creek watershed.

By letter dated November 24, 1997, the Division advised the Company that the recent designation of steelhead as an endangered species would probably require the preparation of a draft Environmental Impact Report to determine the potential impacts associated with the Company's application. In addition, the Division advised the Company that it would need to sign a Memorandum of Understanding with the Division and would be obligated to pay all costs associated with the preparation of the environmental document. Finally, the Division advised the Company that the appropriate environmental document would have to be prepared before the SWRCB could schedule a hearing on the Company's objections to the Staff Analysis. It is this letter that resulted in the filing of a petition for writ of mandate against the SWRCB by the Company.

2.4 Lawsuit

On December 24, 1997, the Company filed a petition for writ of mandate with the Monterey County Superior Court (M 39441) (Court). The Company requested that the Court direct the SWRCB to determine that the Company's project is exempt from CEQA.

On October 13, 1998, the Court entered a judgment granting a peremptory writ of mandate which requited the SWRCB to set aside its action of November 24, 1997, and to grant the Company a hearing on at least the jurisdictional issue of whether the SWRCB has permitting authority over the Company's diversion.

By letter dated October 27, 1998, Mr. Walter Pettit, Executive Officer of the SWRCB advised the Company that the Division's letter dated November 24, 1997 is set aside and that the SWRCB would hold a hearing in accordance with the judgment of the Court.

2.5 SWRCB Hearing

The SWRCB held a hearing in Sacramento on February 1 and 2, 1999 to comply with the judgment granting a peremptory writ of mandate entered by the Court. A notice of the hearing

was distributed to interested parties on October 28, 1998. The hearing notice identified the following key issues to be addressed at the hearing:

1. At the point of diversion by the Company, is the water in the alluvium of the valley of Garrapata Creek part of a subterranean stream flowing through a known and definite channel?

2. Is the Company's project exempt from the CEQA?

On June 17, 1999, the SWRCB adopted Decision-1639 (D-1639) on the key issues raised at the hearing. The SWRCB concluded that:

1. The water in the alluvium of the valley of Garrapata Creek is part of a subterranean stream flowing through known and definite channels.

2. The diversion of water from the Garrapata Creek subterranean stream is within the permitting authority of the SWRCB.

3. The project as originally described in the Company's Application 29664 is not exempt from CEQA.

4. If the Company were to modify its project to limit the amount of water in its application to existing use, the project may be exempted from CEQA under the categorical exemption for existing facilities.

Two parties (e.g., DFG and Cal Trout) submitted petitions for reconsideration of D-1639, in accordance with California Code of Regulations, title 23, § 768. At the September 1, 1999 board meeting, the SWRCB adopted Order #99-08 denying the petitions for reconsideration.

3.0 HYDROLOGY

3.1 General

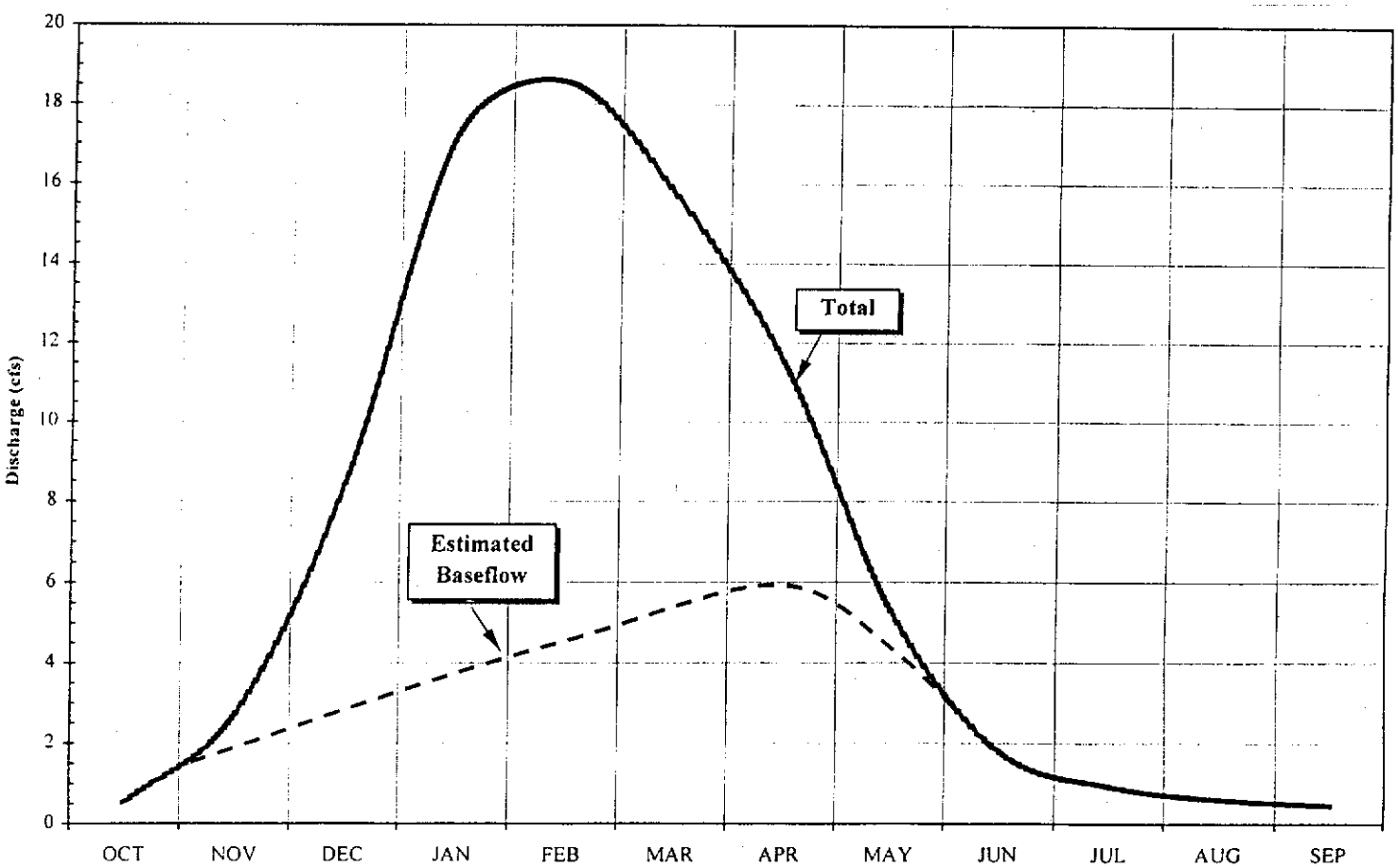
The streamflow of Garrapata Creek is typical of other central coastal streams. The creek has higher flows in the winter and lower flows in the summer. There is substantial variation in the annual, seasonal and daily streamflow, depending on the amount of precipitation within the watershed. Garrapata Creek is a perennial stream and has summer flow, even during drought years. Similar to many other coastal streams, Garrapata Creek has a shallow alluvial aquifer associated with the surface stream. Decision 1639 determined that groundwater in the alluvial aquifer is a subterranean stream. The fact that the surface flow in the creek has never been observed to dry up indicates that the alluvial aquifer is fully recharged year round.

3.2 Estimated Annual Runoff

As described in the Staff Analysis dated May 1997, Division staff estimated the average annual impared runoff of Garrapata Creek to be approximately 4,668 afa. That estimate was based on a comparison to recorded streamflow data from the adjacent Big Sur watershed, an evaluation of

anecdotal streamflow measurements taken in Garrapata Creek between 1988 and 1996 and an analysis of existing diversions within the watershed. During the SWRCB hearing, Dr. Johnson, a hyrogeologist, presented testimony on behalf of the Company relating to the hydrology of Garrapata Creek and estimated the total annual impared runoff to be 5,000 and 5,200 afa, using two methods. The annual discharge estimated by Division staff (4,668 afa) is virtually the same as the discharge estimated by Johnson (5,000 and 5,200 afa). Figure 2 below is a hydrograph showing the estimated average streamflow for Garrapata creek.

Figure 2
Estimated Average Annual Total Discharge and Baseflow of Garrapata Creek



In hydrologic modeling, streamflow is frequently divided into two components - - runoff and baseflow. The runoff component is the surface flow that occurs during or immediately following a rainstorm. The baseflow component consists of the contributions from surface flow, from spring and seeps, and the contributions from groundwater released from bank and channel storage. The baseflow of Garrapata creek is estimated to be 1,900 afa. The quantity of surface flow during the low-flow summer period depends, almost entirely, on the amount of baseflow.

As indicated in Figure 2, Garrapata creek has flows of approximately 18 cfs during the peak winter runoff period and has flows of approximately 0.5 cfs during the low-flow summer period.

There are very few diversions of water from Garrapata Creek. Division records indicate that there are 10 recorded diversions with total maximum water rights of approximately 500 afa upstream of the Company's diversion. The actual amount of water diverted in any year is often much less than these maximum water rights. Since the existing diversions are for minor amounts of water, the existing flow regime in the creek is comparable to the unimpaired or natural flow conditions.

The Company's well is located 1,500 feet from the ocean. Consequently, the Company's pumping/diversions can only affect the quantity of flow in the 1,500-foot long section of Garrapata Creek between the well and the mouth of the creek and may also affect the quantity of flow in the lagoon located at the mouth of the creek.

3.3 Flow during summer months

The quantity of surface flow during the low-flow summer months is particularly important for the protection of public trust resources. In addition to the estimates of discharge and the estimated hydrographics there is other information that indicates that Garrapata Creek is a perennial stream and has summer flow, even during drought years:

- During the hearing, Mr. Layne, representing the Company, stated that, based on personal observations, the creek has always had flow during the summer, even during the 1976/77 drought, which was an extraordinarily severe drought.

- Cole Weston, who is 85 years old and has lived in the area his entire life, stated that the stream always has flow.

- In the PUC application filed in 1962 Mr. Layne stated that in 1961, an extraordinary dry year, water was flowing in the creek at the rate of approximately two cfs.

- Mr. Layne stated that flow was 14 cfs in July 1997.

- A trout farm existed near mouth of creek (see figure 1) for many years, which indicates water of acceptable quality and quantity is available on a year-round basis.

Dr. Williams, presented testimony at the SWRCB hearing on behalf of DFG. Dr. Williams took several streamflow measurements, as indicated in Table 1 below in areas upstream from the Company's well. These data indicate that Garrapata Creek has surface flow during the summer months.

Table 1
Measurements of Streamflow in Garrapata Creek

Date	Streamflow (cfs)
10-21-88	0.26
08-12-89	0.14
09-08-90	0.05
12-14-91	0.26
09-26-92	0.17
10-20-96	0.52

Mr. Layne performed calculations to determine the effect of pumping from the Company's well on the depletion of the surface flow. Mr. Layne's calculations show that the stream depletion caused by pumping 81 afa would reduce the depth of the water in the stream by 0.008 foot. An accurate assessment of the impact of groundwater pumping on streamflow only can be determined by performing detailed expensive aquifer testing with streamflow measurements.

4.0 PUBLIC TRUST RESOURCES

The following provides a discussion relating to the public trust resources within the Garrapata Creek Watershed.

4.1 Steelhead

On October 17, 1997, the NMFS added steelhead to the list of threatened species in the area that encompasses Garrapata Creek watershed, in accordance with the federal ESA. Steelhead are an anadromous fish. That means that they are born in the stream, migrate to the ocean where the live as an adult and then migrate back to their stream of birth to spawn and repeat the life cycle.

Maintaining steelhead populations in good condition requires the proper combination of several factors which include flow, water temperature, water quality, geomorphology (or condition of the streambed), riparian habitat, cover, food and absence of barriers to fish passage. The flow regime in the stream is particularly important for the successful production of fish. Ideally, the flow regime would replicate the natural flow regime, with high flow in the fall and winter to assist in the upstream migration, spawning and incubation of the young steelhead. During the summer it is important to maintain adequate flow, of acceptable temperature and dissolved oxygen levels, to provide suitable habitat for steelhead rearing. Adequate flow is also important for the maintenance of riparian habitat which in turn, provides a riparian canopy to maintain lower water temperatures and to provide a food supply. As described in section 3.2, there are very few diversions from Garrapata Creek (total diversions excluding the Company's is 0.36 cfs and storage is non-consumptive). According the flow regime is a natural one and is adequate to maintain steelhead in good condition.

During the 1999 SWRCB hearing, DFG submitted evidence relating to the condition of the steelhead in the 1,500-foot long stream reach between the Company's well and the mouth of the creek and in the lagoon. This evidence included a stream survey conducted by DFG staff in 1990 and two surveys conducted by DFG in 1998, immediately prior to the SWRCB hearing.

In 1990 the DFG conducted a survey to assess the condition of the fishery resources throughout the entire Garrapata Creek watershed. The summary report prepared by DFG staff states that steelhead are generally in good condition throughout the watershed and the lower portion of Garrapata Creek below the Company's point of diversion. DFG concluded that the major problems impacting fishery resources are due to sedimentation from the granitic soils resulting from past logging practices and improper road grading, not stream depletion caused by the Company pumping its well.

On November 6, 1998, DFG conducted an on-site field investigation to observe stream habitat conditions prior to the SWRCB hearing. DFG staff estimated the flow to be 4 cfs and the water depth to be 1½ to 2 feet deep in the vicinity of the Company's point of diversion. Photographs accompanying the DFG exhibit indicate that the creek is approximately 10 to 20 feet wide. DFG staff stated that steelhead habitat looked to be in fair condition. Steelhead were observed in the stream section between the point of diversion and the lagoon. According to DFG, lagoons can be more productive for steelhead rearing than the stream itself. Water depth in the lagoon was relatively deep. DFG staff stated that they observed many steelhead in the upper end of the lagoon, ranging in size from 3 to 10 inches.

On November 24, 1998, DFG conducted an electroshock survey of Garrapata Creek about 0.25 mile upstream of the Highway 1 bridge, near the Company's point of diversion. The electroshock sample was conducted in a pool about 100 yards long. A total of 18 steelhead were surveyed ranging in length from 77 to 135 mm. (i.e., about 3 to 4 inches). DFG stated that all steelhead that were examined were in good condition. Photos submitted with the DFG exhibit indicate that the stream reach is about 10 to 20 feet wide.

Although DFG has conducted several surveys of steelhead and other fishery resources, DFG did not submit specific recommendations for a flow regime or other measures needed to protect, preserve or enhance steelhead or other public trust resources, nor did they show the need for any measures. All of the evidence in the record shows that steelhead are in good condition at or below the Company's point of diversion, from which the Company has been diverting water since 1962.

On coastal streams a sand bar will usually develop at the mouth of the stream which can prevent the upstream migration of steelhead. Frequently, substantial rainfalls, with high stream flows, are needed in the late fall/winter in order to breech the sandbar and allow the steelhead to migrate upstream. Because of the topography of Garrapata Creek, these peak flows are not as important for breeching the sandbar as in other comparable coastal streams. In their 1998 survey, DFG stated that the mouth of the stream was open prior to significant winter rains, which indicates that sand bar remained open throughout the entire year. Dr. John Williams also

testified that the beach at the mouth of Garrapata Creek is relatively narrow and at a low elevation (i.e. close to sea level.), and, consequently, steelhead can move into the lagoon relatively easily during high tides.

4.2 Red Legged Frog

On May 20, 1996, the U.S. Fish and Wildlife Service (USFWS) added the red-legged frog to the list of threatened species in the area that encompasses Garrapata Creek, in accordance with the federal ESA. The red-legged frog usually lives along the margins of a stream and generally prefers ponds and relatively slow moving water. This flow regime is in contrast to the flow regime preferred by steelhead.

It is uncertain whether red-legged frogs are found within the Garrapata Creek watershed. During the 1999 hearing, Steve Herrera, an Environmental Specialist with the Division, testified that during a site visit in 1998 he saw a frog but could not confirm the species. DFG staff testified that Garrapata Creek provides habitat that is suitable for red-legged frogs. DFG staff also testified that they have not conducted any surveys to confirm the presence of red-legged frogs along Garrapata Creek. DFG said that the proper protocol for confirming the presence of red-legged frogs requires substantial time and resources and DFG has not conducted those studies.

4.3 Riparian Habitat

The flow in the creek is important for maintaining the riparian habitat in good condition. Maintaining the riparian habitat in good condition, in turn, is important to preserving the steelhead and other public trust resources. During the past ten years, Division staff and DFG staff have conducted several on-site inspections of Garrapata Creek. During those site inspections, the habitat within the riparian corridor, below the Company's well, appeared to be in good condition and provided a dense canopy over the creek.

4.4 Other Species

During the SWRCB hearing, some information was submitted relating to southwestern pond turtle and tidewater gobies. There is no evidence in the Division's files to determine whether southwestern pond turtles or tidewater gobies are present in the watershed and/or whether the Company's pumping would have any impact on the habitat needed to maintain these species in good condition.

4.5 Conclusions

In order to protect steelhead, the riparian habitat and other public trust resources within the lower portion of Garrapata Creek, the Division will limit the rate of diversion to 0.11 cfs and require that the Company bypass visible surface flow in the lower portion of Garrapata Creek when there is visible flow 100 yards upstream of the Company's well.

Requiring the Company to bypass visible surface flow in the lower portion of Garrapata Creek should provide sufficient flow - - both surface and subsurface flow - - to maintain the riparian habitat in good condition. Maintaining visible surface flow, coupled with the subterranean

stream of Garrapata Creek, should also insure the presence of some pools in the stream, which are important for steelhead rearing, even during drought years.

5.0 WATER AVAILABILITY

5.1 General

To issue a water right permit, the Division must find that unappropriated water is available to supply the applicant. (Wat. Code §1375 (d).) Unappropriated water includes water that has not been either previously appropriated or diverted for riparian use. (Wat. Code §1202.) The Division must also consider the effect of the proposed diversion on public trust resources and attempt, where feasible, to avoid or minimize harm to those resources. (National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 426 [189 Cal. Rptr. 346, 349].)

When acting on water right applications, the Division must determine whether water is available for appropriation. The determination of water availability must take into consideration impacts to other legal water users and public trust resources, the quantity of water needed to satisfy downstream prior rights, and the quantity of water needed to protect public trust resources.

5.2 Annual Runoff

As indicated in section 3.2 above, there is approximately 5,000 acre-feet of runoff each year. The Company's water right permit would allow diversion of 35 afa, or less than 1% of the total annual runoff.

5.3 Flows needed to protect fish

As stated in section 4.1, the steelhead in Garrapata Creek appear to be in good condition while the diversion by the Company has occurred since 1962. Specific streamflow for Garrapata Creek have not been recommended by DFG. However, fish and the riparian corridor downstream of the Company's point of diversion need a continuous flow of water to maintain pools and to water the riparian habitat. It appears that this continuous flow, even during the summer months has existed in the past. In order to ensure that the Company continues to allow this flow to pass, the Company's water right permit should be conditioned to limit the rate of diversion to 0.11 cfs and to require the Company to bypass at all times visible surface flow whenever it is diverting water and there is visible surface flow 100 yards upstream of the Company's well.

5.4 Peak Flows

Peak flows that occur in the fall/winter may be important for breaching the sand bar at the mouth of the creek and for maintaining suitable geomorphological conditions in the creek below the Company's diversion. Since the Company would divert at a rate of 0.11 cfs, the Company's diversion would have no significant impact on peak flows.

5.5 Impact to prior rights

There is one other known well downstream of the Company's well that is diverting water under a claim of riparian right to the State Park ranger's residence for domestic use. No injury has been

claimed by the downstream diverter due to the Company's diversion. Accordingly, the Division finds that there is no harm to prior rights caused by the Company's diversion.

5.6 Conclusions

Sufficient water is available for appropriation by the Company and to protect prior rights and to provide adequate flow to maintain fish and other public trust resources in good condition.

6.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

In general, CEQA applies to discretionary projects, which are proposed to be carried out or approved by public agencies. (Pub. Resources Code §21080(a).) The Company's Application 29664 is a discretionary project as defined in CEQA. (Pub. Resources Code §21065; Cal. Code Regs., tit. 14, §15357.) Therefore, CEQA applies to the Division's action on Application 29664. The SWRCB is the lead agency. (Pub. Resources Code §§21067, 21080.1, 21165; Cal. Code of Regs., tit. 14, §15050.)

The CEQA Guidelines include a categorical exemption for existing facilities. (Cal. Code Regs., tit. 14, §15301.) Section 15301 describes existing facilities, which are exempt as:

> "[T]he operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographic features, involving <u>negligible or no expansion of use</u> beyond that existing at the time of the lead agency's determination." (Emphasis added.)

The baseline for determining whether the existing facilities exemption applies is the time the agency determines CEQA applicability to its action on the project, not the effective date of CEQA. (*Bloom v. McGurk* (1994) 26 Cal.App.4th 1370 [31 Cal.Rptr.2d 914, 918]; Cal. Code Regs., tit. 14, §15301.)

The amount of water applied for in Application 29664 (35 afa) is the existing water use of the Company. The Division concludes that CEQA applies to approval of Application 29664 and further concludes that Application 29664 is categorically exempt as an existing facility because there is no expansion of use beyond that existing at the present time.

The CEQA Guidelines contain exemptions to the categorical exemptions to CEQA. (Cal.Code Regs., tit. 14, §15300.2.) Subdivision (c) of section 15300.2 applies where "there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." According to CEQA, a "significant effect on the environment" is defined as "a substantial, or potentially substantial, adverse <u>change</u> in the environment." (Pub. Resources Code §21068 (emphasis added). See also Cal. Code of Regs., tit. 14, §15382.) "Environment" is defined in CEQA and the Guidelines as "the physical conditions which exist within the area which will be affected by a proposed project including...fauna...." (Pub. Resources Code §21060.5; Cal. Code Regs., tit. 14, §15360.) According to *Bloom, supra,* and section 15301 of

the CEQA Guidelines, the baseline for analyzing change in the environment is the time of the Division's determination. This decision makes that determination. There is no evidence in the record that operations of the Company will be altered in a manner that could adversely affect the environment. Accordingly, by definition, there cannot be a significant effect on the environment because there is no change in the environment.

The mere existence of "unusual circumstance" does not necessarily preclude the applicability of a categorical exemption. Rather, there must be a reasonable possibility of a significant effect as a result of the unusual circumstance. Thus, the presence of a threatened species does not preclude use of a categorical exemption if there will be no effect on the species or its habitat, or any potential effect would be beneficial. Here, there is no evidence of any change in the environment caused by unusual circumstances because both the steelhead and the Company's diversion are part of the existing environment. Nor is there any evidence that the Company's diversion is causing a significant adverse impact on the steelhead in Garrapata Creek. (See section 4.1 above.) Therefore, the Division concludes that the exception to the exemption does not apply, and the Division's action on the Company's application is categorically exempt from CEQA.

7.0 CONCLUSIONS

The Division concludes that the Company's existing diversion of 35 afa is both reasonable and beneficial. There are no feasible alternative sources of water available to the Company. The Company has spent considerable funds on the development of the existing water supply system. The Company has diverted water from Garrapata Creek for over 37 years. Substantial development has taken place based on the reliance on this source of water to meet existing needs. Consequently, approval of this application is in the public interest.

The Division has evaluated the hydrology of Garrapata Creek and the amount of water available for appropriation. The Division finds that Garrapata Creek has an average annual runoff of about 5,000 afa at the Company's point of diversion. The Company's diversion of 35 afa represents less than 1 percent of the average annual runoff. Based on a review of all available information, the Division also concludes that Garrapata Creek is perennial stream and has surface flow throughout the year, even during drought years.

The Division has also evaluated the potential impact of the Company's diversions on steelhead and other public trust resources. The Company's well could only affect the flow regime in the 1,500 foot long stretch of stream downstream of the well and the inflow into the lagoon. Since the Company has an existing diversion, approval of this water right application would have no discernable impact on the flow regime that has existed in the lower stretch of the creek for the past 37 years. Based on a review of all available information, including the results of stream surveys conducted by DFG, the Division concludes that the steelhead in the lower portion of Garrapata Creek are in good condition. In addition, the lagoon provides habitat for steelhead and the DFG survey determined that there were numerous steelheads in the lagoon in good condition.

The Company's existing diversions have no significant impact on peak flows that are essential in coastal streams in order to breech the sand bar at the mouth of the stream and to maintain suitable geomorphological conditions in the stream reach downstream of the Company's well. Since the company diverts by means of a well, the Company's diversion would not create a barrier to fish passage and would not cause entrainment or entrapment of fish, which is a common problem with surface diversions.

It should be noted that there is relatively little development in the area (i.e. 10 recorded diversions with total maximum water rights of 500 afa, or roughly 10 percent of the average annual outflow). Consequently, the flow in the creek is close to the natural or unimpaired flow conditions. Development within the watershed has probably had little impact on the flow regime, or other factors, that are important for maintaining steelhead in good condition which include water temperature, water quality, erosion, sedimentation, geomorphology, riparian habitat.

There is insufficient information available to determine whether the red legged frog and southwestern pond turtle are present in the lower portion of Garrapata Creek, what flow regime is necessary to protect those species and whether the Company's diversions would have any measurable effect on those species.

To further insure this diversion will not have an adverse effect on steelhead, the riparian habitat and other public trust resources within the lower portion of Garrapata Creek, the Division will require that the Company bypass visible surface flow in the lower portion of Garrapata Creek whenever it is diverting and there is visible surface flow 100 yards upstream of the Company's well. Requiring the Company to bypass visible surface flow in the lower portion of Garrapata Creek should provide sufficient flow - - both surface and subsurface flow - - to maintain the riparian habitat in good condition. Bypassing visible surface flow, coupled with the subterranean stream of Garrapata Creek, should also insure that this diversion does not affect the presence of some pools in the stream, which are important for steelhead rearing, even during drought years.

The Division will include Standard Permit Term 12 in the water right permit, which provides the SWRCB with continuing authority to modify the Company's water permit in order to protect public trust resources. Should the DFG or other parties develop additional information in the future relating to the flow regime or other measures which may be needed to protect steelhead or other public trust resources, the SWRCB could modify the Company's permit after notice and an opportunity to be heard.

The Company is required to comply with all applicable provisions of the state and federal Endangered Species Acts. The Company may need to obtain a "take" permit from NMFS and/or the USFWS, if it appears that a "take" will occur. Such permits may contain additional terms and conditions.

8.0 ORDER

It is hereby ordered that a water right permit should be issued to the Garrapata Water Company for diversion of 35 afa, with the inclusion of the standard and the special terms described below:

1. Term 5a (modified) – The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 35 afa to be diverted from January 1 to December 31 of each year. The rate of the diversion shall not exceed 0.11 cfs.

2. Standard Term 22 – This permit shall not be construed as conferring upon permittee right of access to the point of diversion.

3. Term 47 (modified) – Permittee shall install and properly maintain a meter, satisfactory to the Chief of the Division, which is capable of measuring the instantaneous rate of diversion in gallons per minute and the cumulative quantity of water diverted in gallons. The meter shall be conveniently located so as to be accessible for reading by the SWRCB or its designated representative.

   Permittee shall record the cumulative meter readings approximately the first of each month. Meter readings shall be supplied to the SWRCB with the annual progress report submitted to the SWRCB by permittee.

4. For the protection of public trust resources of Lower Garrapata Creek, the permittee shall allow visible flow in Garrapata Creek downstream of the point of diversion. If visible flow does not exist in Garrapata Creek, downstream of the point of diversion, the permittee shall cease diversions or augment the stream flows to ensure a visible flow exists. This term does not apply if the permittee can document that 100 yards upstream of the point of diversion there is no visible flow.

5. The permittee shall maintain written records regarding the observations of visible flow both upstream and downstream of the point of diversion. Observations shall be made on a weekly basis during the period June 1 to October 30 and made available to the Division upon request. If visible flow does not exist at any time, the frequency of observations shall be on a daily basis until visible surface flow exists for at least 14 consecutive days. In the event of a violation of this term, the permittee shall immediately notify the Chief of the Division of Water Rights.

ALL PERMITS ISSUED BY THE STATE WATER RESOURCES CONTROL BOARD ARE SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

(A) Permittee shall maintain records of the amount of water diverted and used to enable SWRCB to determine the amount of water that has been applied to beneficial use pursuant to Water Code section 1605.

(B) The amount authorized for appropriation may be reduced in the license if investigation warrants.

(C) Progress reports shall be submitted promptly by permittee when requested by the SWRCB until a license is issued.

(D) Permittee shall allow representatives of the SWRCB and other parties, as may be authorized from time to time by said SWRCB, reasonable access to project works to determine compliance with the terms of this permit.

(E) Pursuant to California Water Code sections 100 and 275, and the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of SWRCB in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

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

The continuing authority of the SWRCB also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the SWRCB

determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution Article X, Section 2; is consistent with the public interest; and is necessary to preserve or restore the uses protected by the public trust.

(F) The quantity of water diverted under this permit and under any license issued pursuant thereto is subject to modification by the SWRCB if, after notice to the permittee and an opportunity for hearing, the SWRCB finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the SWRCB finds that (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

(G) This permit does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this water right, the permittee shall obtain an incidental take permit prior to construction or operation. Permittee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this permit.

This permit is issued and permittee takes it subject to the following provisions of the Water Code:

Section 1390. A permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code), but no longer.

Section 1391. Every permit shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article and the statement that any appropriator of water to whom a permit is issued takes it subject to the conditions therein expressed.

Section 1392. Every permittee, if he accepts a permit, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any permit granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by

any permittee or by the holder of any rights granted or acquired under the provisions of this division (of the Water Code) or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State, of the rights and property of any permittee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).

9/24/99
Date

Harry M. Schueller, Chief
Division of Water Rights
State Water Resources Control Board