

CALIFORNIA COASTAL COMMISSION

CENTRAL COAST DISTRICT OFFICE
725 FRONT STREET, SUITE 300
SANTA CRUZ, CA 95060
PHONE: (831) 427-4863
FAX: (831) 427-4877
WEB: WWW.COASTAL.CA.GOV



W21b

Appeal Filed: 6/30/2010
Action Deadline: None
Staff: Rainey Graeven - SC
Staff Report: 1/19/2018
Hearing Date: 2/7/2018

STAFF REPORT: DE NOVO HEARING

Application Number: A-3-SCO-12-046

Applicant: R. J. Fambrini and Company, Inc.

Project Location: Adjacent to Liddell Creek, downcoast of Bonny Doon Road and approximately 0.2 miles inland from Highway 1 on the Cotoni-Coast Dairies National Monument in the unincorporated north coast area of Santa Cruz County (APN 058-122-13)

Project Description: Replacement agricultural well

Staff Recommendation: Denial

SUMMARY OF STAFF RECOMMENDATION

Santa Cruz County approved a coastal development permit (CDP) authorizing the replacement of an agricultural well within a riparian woodland/environmentally sensitive habitat area (ESHA) located approximately 63 feet from the bank of Liddell Creek near Bonny Doon Road on the Cotoni-Coast Dairies National Monument in the unincorporated and rural North Coast area of Santa Cruz County. On April 16, 2015, the Commission found that the County's action approving the well project raised a substantial issue of conformance with the Santa Cruz County certified Local Coastal Program (LCP), and took jurisdiction over the CDP. Specifically, the Commission found substantial LCP issues with respect to the protection of ESHA and stream resources/habitats. In the time since that action, the property where the well is located changed hands and it is now owned by the United States Bureau of Land Management (BLM) and has since become part of the Cotoni-Coast Dairies National Monument. As a result, although the standard of review for the substantial issue action was the LCP, the standard of review for a

private project on federal land is the Coastal Act, and thus the well is evaluated here against the Coastal Act.

The proposed well is located in a sensitive riparian habitat area associated with Liddell Creek, which constitutes ESHA under the Coastal Act. The proposed project is inconsistent with the Coastal Act because only resource-dependent uses are allowed in ESHA, and an agricultural well is not a resource-dependent use. In addition, there remain outstanding questions related to the well's impact on riparian woodland, groundwater resources, in-stream flows, and sensitive species in and around the creek itself, including with respect to listed Coho salmon and steelhead species – all of which are coastal resources protected under the Coastal Act. The well undoubtedly pulls water from the Creek, but the Applicant has not provided sufficient evidence to date (as requested by Commission staff on multiple occasions) in order for staff to determine the relative degree of impact on Creek resources. Ultimately, the Commission need not resolve these uncertainties on the basis of the limited information provided by the Applicant because the well is fundamentally prohibited in ESHA, which requires its denial no matter the degree of impact.

Even if the well were allowable in that ESHA area, and even if impacts could be found to be insignificant with respect to related coastal resources, the well is also incompatible with restrictions imposed on the use of the site by CDP 3-11-035, the Commission-issued Coast Dairies Land Division CDP (see **Exhibit 9**). In addition, the proposed well is on land owned and managed by BLM as a resource area as part of the Cotoni-Coast Dairies National Monument, and it is unclear whether or even how a well of this sort could be permitted under the federal rules that apply to such national monuments (if the CDP/deed restriction issues could someone be resolved, which is unlikely).

Finally, there may be alternative well sites available to the Applicant that are not located in ESHA, would not result in creek-related impacts, and would not be located on restricted land. However, because the Applicant only attempted to drill at a single alternate site (which did not produce water) alternative well site options (that are not clearly inconsistent with Coastal Act policies) have not been thoroughly explored.

For all of these reasons, the proposed project does not meet the Coastal Act standard for the protection of ESHA (i.e., that only resource-dependent uses are allowed in ESHA, and only when they do not significantly disrupt the habitat), and raises other biological resource questions regarding the project's consistency with Coastal Act requirements related to the protection of in-stream creek flows, biological productivity, groundwater resources, and a range of policies protecting the Liddell Creek and its associated habitats, and therefore must be denied.

For these reasons, staff recommends that the Commission deny a CDP for the proposed project. The motion is found on page 4 below.

TABLE OF CONTENTS

I. MOTION AND RESOLUTION4

II. FINDINGS AND DECLARATIONS4

 A. PROJECT DESCRIPTION/BACKGROUND.....4

 B. PERMITTING/APPEAL HISTORY6

 C. STANDARD OF REVIEW7

 D. ESHA, BIOLOGICAL PRODUCTIVITY & WATER SUPPLY7

 1. Applicable Policies 7

 2. Allowable Uses in ESHA/Impacts to the Riparian Woodland ESHA..... 8

 3. Impacts to In-Stream Flows, Biological Productivity, & Groundwater Water Supply 9

 E. OTHER ISSUES.....12

 F. RESPONSE TO COMMENTS.....17

 G. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)20

APPENDICES

- Appendix A – Substantive File Documents
- Appendix B – Staff Contacts with Agencies and Groups

CORRESPONDENCE

EXHIBITS

- Exhibit 1 – Location Maps
- Exhibit 2 – Site Photos
- Exhibit 3 – Deed Restriction (for the Parcel Containing the Well)
- Exhibit 4 – Well Permits
- Exhibit 5 – Agricultural Well Categorical Exclusion Provisions
- Exhibit 6 – Memorandum from Coastal Commission Senior Staff Ecologist Dr. Jonna Engel
- Exhibit 7 – Applicant’s Biotics Report
- Exhibit 8 – Applicant’s Hydrology Report
- Exhibit 9 – Coast Dairies Land Division CDP Conditions (CDP 3-11-035)
- Exhibit 10 – California Department of Fish and Wildlife Notice of Violation
- Exhibit 11 – State Water Resources Control Board Notice of Violation
- Exhibit 12 – Applicant’s Letter dated September 7, 2017
- Exhibit 13 – City of Santa Cruz Water Department Letter dated September 6, 2017

I. MOTION AND RESOLUTION

Staff recommends that the Commission, after public hearing, **deny** a coastal development permit for the proposed development. To implement this recommendation, staff recommends a **NO** vote on the following motion. Failure of this motion will result in denial of the CDP and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

***Motion:** I move that the Commission approve Coastal Development Permit Number A-3-SCO-12-046 for the development proposed by the applicant, and I recommend a no vote.*

***Resolution to Deny CDP:** The Commission hereby denies Coastal Development Permit Number A-3-SCO-12-046 on the grounds that the development will not be in conformity with the Coastal Act. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures and/or alternatives that would substantially lessen the significant adverse effects of the development on the environment.*

II. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

A. PROJECT DESCRIPTION/BACKGROUND

The proposed project would authorize a replacement agricultural well originally installed under an Emergency CDP (ECDP) issued by Santa Cruz County in 2012.¹ The proposed well is located on the southeast portion of APN 058-122-13, which is owned and managed by the United States Bureau of Land Management (BLM) and is a part of the Cotoni-Coast Dairies National Monument.² The well is used by the Applicant on Fambrini Farm to irrigate land on adjacent agricultural parcels which it leases (APNs 059-011-10, 11 and 13, and 059-012-02 are all owned by the Trust for Public Land)³ totaling some 27 acres of agricultural production.⁴ The proposed

¹ The well was installed under an ECDP in 2012. The Applicant subsequently applied for and secured a follow-up CDP (regular CDP) from the County that was then appealed to the Commission. The Commission found substantial issue in April of 2015, and is currently completing the de novo review of the application. Because the well is physically present, specifics regarding the well are used as applicable in this report, but it is still considered a “proposed” well for CDP application analytic purposes.

² The Commission approved CDP 3-11-035 in 2012 to facilitate the land transfer from the Trust for Public Land (TPL) (through their Coast Dairies and Land Company subsidiary) to BLM. Specifically, TPL initially intended to transfer all of their property inland of Highway 1 (some 6,400 acres) to BLM, but BLM determined that managing land used for agricultural purposes conflicted with BLM’s public land management duties and mission. Thus, TPL/Coast Dairies instead proposed to subdivide the land into parcels with agricultural uses (about 600 acres) and without agricultural uses (about 5,800 acres) where the latter could subsequently be transferred to BLM. Among other things, CDP 3-11-035 allowed for that subdivision, and imposed restrictions on the future use of the properties, with the BLM properties restricted to “open space, grazing, and public recreational access uses and development in a manner consistent with the protection and preservation of coastal resources” only (see **Exhibit 9**).

³ TPL’s agricultural land leased to the Applicant was part of the agricultural properties created by CDP 3-11-035.

well, which has been in operation since 2012, is the third known agricultural well that has existed in this general area (with documented permits),⁵ and it replaced a well that had been installed in 1977 but was low-functioning due to its age and clogging caused by sand, according to the Applicant. The proposed well is vertically oriented, approximately 123 feet deep, and was drilled using the mud rotary drilling method.⁶ The proposed well is located immediately adjacent to the 1977 well (which has been capped), and is in the vicinity of a well drilled in 1988; specifically, the proposed well is positioned approximately 40 feet southeast (downcoast) of Bonny Doon Road and about a quarter-mile inland of Bonny Doon Road's intersection with Highway 1. The well is located approximately 63 feet north of the northern Liddell Creek bank in an area that is surrounded by dense woodland characterized by riparian willow scrub and oaks with dense underbrush. The well is connected to a previously existing pipe; the pipe and then a separate conveyance channel transports the water pumped by the well to a man-made "pond" (which is located on the Applicant's lower agricultural fields) that stores the water for irrigation use at the above-described farming operation on separately-leased lands.

The 1977 capped well, the 1988 well, the proposed well, and the conveyance pipes and channel are all located on the aforementioned BLM land (see **Exhibit 1**). The Applicant does not have any formal, cognizable property right to the well site (i.e., the Applicant does not own or lease the land on which the well resides) or to any of the land on which related infrastructure is located on either side of Liddell Creek. The well and related infrastructure (i.e., the conveyance pipes and channels) are located on BLM property.⁷ The Applicant's actual approximately 27 acres of leased agricultural land is located entirely south of Liddell Creek on TPL-owned land that is adjacent to the BLM land upon which the well is proposed. The Applicant did not have a lease or any formal property right to the well site before the land was transferred to BLM (i.e., from TPL/Coast Dairies), and has not acquired a lease or any formal property rights to the land on which the well resides since the land was transferred to BLM.

⁴ The crops primarily consist of Brussels sprouts, which are irrigated through a traditional sprinkler system, and various organic greens that are irrigated through drip irrigation. The Applicant, R.J. Fambrini and Company, Inc., has been the lessee of this farming site for many decades.

⁵ The three documented wells include a well installed in 1977, another installed in 1988, and the proposed well, which was installed in 2012. All three wells are in relatively close proximity with the proposed well located immediately adjacent to the 1977 well, which has been capped and no longer operates. The 1977 well and the subject well are approximately 63 feet from Liddell Creek, whereas the 1988 well is located over 100 feet from Liddell Creek. Although the Applicant indicates that another well preceded the 1977 well, neither the County nor the Applicant has any records pertaining to that well.

⁶ The mud rotary drilling method consists of the rapid rotation of a drill bit mounted on the end of the drill rod. The drill bit breaks the material at the bottom of the hole into small pieces, which are then removed by pumping drilling fluid (typically water) down through the drill rods and drill bits.

⁷ Prior to BLM ownership and management, Coast Dairies & Land Company owned both the BLM land and the agricultural parcels leased by R.J. Fambrini, Inc. In April of 2014, Coast Dairies granted a portion of its land to BLM, including the land where the well and related infrastructure (i.e., conveyance pipes and channels) are situated. Thus, the land where the well and related infrastructure are located is public land that is managed by BLM. Coast Dairies granted several of its agricultural properties, including the land farmed by the Applicant, to the Trust for Public Land (TPL). The Applicant has leased the agricultural parcels from TPL since the transfer from Coast Dairies to TPL. The Applicant, however, never had a lease from Coast Dairies for the well and conveyance pipes and does not currently have a lease from BLM for same.

See **Exhibit 1** for project location maps. See **Exhibit 2** for photos of the project site (the well) and the agricultural fields the well serves.

B. PERMITTING/APPEAL HISTORY

The 1977 well was identified as being a “replacement well” for agricultural use in both the Coastal Commission CDP (CDP No. A-77-75) and County Well Permit 19553. According to the Applicant, that well gradually deteriorated due to casing collapse, which caused sand to enter the well water, resulting in recurring blockages of the water supply, which in turn required increasingly frequent maintenance of the well to allow for continued irrigation.

In 1988 the Applicant applied to Santa Cruz County to drill a new well to supplement the existing wells on the property (County Well Permit 88-069). The 1988 well permit notes that there were two existing wells in use at the site and indicates that the Applicant was not proposing to decommission either of the existing wells. In addition, per previously adopted agricultural Categorical Exclusion Order (as referenced in LCP Implementation Plan (IP) Section 13.20.073 (see **Exhibit 5**)), certain categories of agricultural development, including the installation of wells for irrigation purposes, are excluded from CDP requirements provided that such facilities are located over 100 feet from any streams or other coastal bodies of water. Because the 1988 well was situated over 100 feet from the creek, the agricultural exclusion was applied and no CDP was required.

In March of 2012, the Applicant once again applied to Santa Cruz County to drill a new well to replace the failing 1977 well. The Applicant originally selected a location over 100 feet from Liddell Creek to drill for a new well (meaning no CDP would be required because of the Categorical Exclusion Order), and the County issued Well Permits 12-083 and 12-084 for drilling a new well and decommissioning the failing 1977 well, respectively. However, the well drilled under Well Permit 12-083 did not reach a water source and was therefore abandoned pursuant to County Well Permit 12-344. Subsequently, in July of 2012, the Applicant proposed drilling a replacement well adjacent to the 1977 failing well where a known water supply was available. However, in order to drill a replacement well adjacent to the 1977 well, which was located approximately 63 feet from northern creek bank of Liddell Creek, the Categorical Exclusion Order did not apply and a CDP was required.

The Applicant therefore applied to the County for an Emergency CDP (ECDP), which the County issued on July 19, 2012. The ECDP allowed for the drilling of a replacement well adjacent to the 1977 failed well, on the basis that the County determined that the time and expense required for new well exploration in areas more than 100 feet from Liddell Creek (which would have been excluded from CDP requirements) would result in severe economic hardship to the Applicant via lost crops due to lack of irrigation.

On October 19, 2012 the Santa Cruz County Zoning Administrator approved the follow-up CDP (County CDP 121185) to recognize the well drilled pursuant to the County’s July 2012 ECDP. On November 11, 2012 the County’s approval was appealed to the Coastal Commission. On April 16, 2015, the Commission found that the County’s action approving the well raised a substantial issue of conformance with the Santa Cruz County certified LCP, and took jurisdiction

over the CDP. Specifically, the Commission found substantial LCP issues with respect to the protection of ESHA and stream resources/habitats.

See **Exhibit 4** for the site's permitting history including: the County's 2012 ECDP (for the subject well), 12-083 (the application for the 2012 replacement well that came up dry); Coastal Zone Exclusion 12-01 (for the 2012 replacement well that came up dry); 12-084 (application for the destruction of the 2012 replacement well that came up dry); 12-345 (application for the destruction of the 1977 well); 88-069 (well permit for the 1988 well); Coastal Commission CDP A-77-75; and County Well Permit 19553 (for the 1977 well).

C. STANDARD OF REVIEW

The project was initially appealed in November of 2012, during which time TPL/Coast Dairies owned the subject parcel where the well is located. Because the project was located on privately owned land at the time of the Commission's Substantial Issue determination, the Santa Cruz County LCP was the standard of review for that action. However, on April 14, 2014, TPL/Coast Dairies transferred the subject property to BLM, thus resulting in shifting the parcel from private property to federally owned land. And on January 12, 2017, President Obama designated BLM's roughly 5,800 acres, including the land on which the well was drilled, as the Cotoni-Coast Dairies National Monument. When the Commission reviews private projects on federal land, such as this one, the standard of review is the Coastal Act.⁸ Thus, the standard of review for this CDP determination is the Coastal Act.

D. ESHA, BIOLOGICAL PRODUCTIVITY & WATER SUPPLY

1. Applicable Policies

The Coastal Act is highly protective of environmentally sensitive habitat areas (ESHAs), biological productivity, and water supply. With respect to the protection of ESHA, the Coastal Act limits development in and around ESHA, and safeguards against the significant disruption of habitat values. In addition, the Coastal Act only allows resource-dependent uses within ESHA. With respect to the protection of biological productivity, the Coastal Act seeks to protect the biological productivity of coastal waters, including creeks, through such means as: 1) maintaining natural buffer areas that protect riparian habitats; 2) preventing the depletion of groundwater supplies; and 3) preventing any significant alteration of surface water flows. Applicable Coastal Act policies include:

***Section 30240.** (a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas. (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

⁸ The Commission relied on the LCP rather than the Coastal Act in making its Substantial Issue determination.

Section 30230. Marine resources shall be maintained, enhanced, and where feasible restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30231. The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface waterflow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

2. Allowable Uses in ESHA/Impacts to the Riparian Woodland ESHA

The Coastal Act standard for the protection of ESHA is explicit – only resource-dependent uses (e.g., habitat restoration, research, trails to access the resource, etc.) are allowable in ESHA. Thus, any non-resource-dependent uses such as an agricultural well are not allowable in ESHA. The Applicant’s biological consultant conducted a site visit in August 2015 and noted in a report (see **Exhibit 7**) that the well site was located within riparian woodland habitat associated with Liddell Creek. The riparian woodland includes an overstory consisting of red alder (*Alnus rubra*), arroyo willow (*Salix lasiolepis*), and red elderberry (*Sambucus racemosa*), and an understory consisting of California blackberry (*Rubus ursinus*), California figwort (*Scrophularia californica*), stinging nettle (*Urtica dioica*), poison hemlock (*Conium maculatum*), and bull thistle (*Cirsium vulgare*) (see **Exhibit 7**).⁹ The Commission’s senior staff ecologist, Dr. Jonna Engel, noted that the overstory and the understory plants that are present at the site are characteristic of riparian habitat, and are common along creeks and streams in the central coast. In this case, the well is located within riparian woodland habitat, which qualifies as ESHA here based on a site-specific determination. Specifically, Dr. Engel also noted that “the habitat that the well was built in is riparian habitat that qualifies as ESHA and building the well in this location caused permanent impacts to this habitat” (see **Exhibit 6** for Dr. Engel’s memorandum).¹⁰

Even if the well was a resource-dependent use, which it is not, it cannot meet other Section 30240 tests either. With respect to the well’s consistency with the second prong of Coastal Act Section 30240(a) (i.e., that ESHA shall be protected against any significant disruption of habitat

⁹ Two of the understory species are non-native species (poison hemlock and bull thistle).

¹⁰ The riparian habitat here constitutes ESHA because it is rare and especially valuable because of its special nature or role in the ecosystem, which could be easily disturbed or degraded by human activities and development. As explained in Dr. Engel’s memorandum (see **Exhibit 6**), although exact estimates do not exist of how much riparian habitat has been lost on the coast, over 90% of riparian habitat has been destroyed in the Central Valley. Furthermore, Dr. Engel indicated that the Liddell Creek native overstory and understory at and near the well site would provide numerous physical and biological functions, including helping to control the flow of sediments, nutrients and other pollutants, stabilizing soil that holds water that can then replenish groundwater supply, and serving as a corridor for wildlife and plant dispersal that maintains biological connectivity.

values), it remains unclear if the well's construction and continued use has significantly disrupted habitat values of the riparian woodland, even though the Commission has requested information from the Applicant on multiple occasions so that this determination can be definitively made. While the well's installation resulted in the permanent loss of 25 square feet of ESHA, the overstory and understory around the well (that had been cleared to install the well) appeared to have successfully grown back by staff's site visit in 2015 (see **Exhibit 2**). The regrowth of the riparian woodland surrounding the well site suggests that the riparian woodland may not have suffered any *significant* disruption of habitat values, but ultimately it is difficult to make this determination given there is no baseline/historic information related to the well site from which to compare. In addition, the site visit took place three years after installation of the well and, based on Dr. Engel's determination that 25 square feet of ESHA was lost permanently, some permanent ESHA loss took place, and there would have been a time of lost ESHA productivity and values as the surrounding area recovered over time after well installation; thus, the well development arguably resulted in significant disruption of ESHA at this site. In any case, because the well was installed in riparian ESHA and the Coastal Act prohibits non-resource-dependent uses within ESHA, the application for the subject well must be denied on this basis alone, and the Commission need not definitively resolve the significance of the riparian habitat impacts issue here in order to support denial of the well at this location.

3. Impacts to In-Stream Flows, Biological Productivity, & Groundwater Water Supply

The Coastal Act protects biological productivity as necessary to maintain optimum populations of marine species. In addition, the Coastal Act seeks to prevent the depletion of groundwater supplies and limits significant alterations of both surface waters and natural streams. In addition to the permanent impacts to 25 square feet of riparian woodland ESHA resulting from the construction of the well, there are also unresolved questions related to the well's impact on the creek's streamflow and potential adverse impacts on the creek's sensitive species (which also constitute potential ESHA impacts),¹¹ and potential adverse impacts to groundwater supplies – despite multiple requests made to the Applicant by the Commission to provide the information so that these determinations could be definitively made. While it is unclear the extent to which in-stream flows, biological productivity, and groundwater supplies have been directly and adversely impacted by the well, it is clear that the well draws water from both the groundwater supply and in-stream flows, which in turn support biological productivity.¹²

In terms of the well's impacts on stream flows, biological productivity and groundwater resources, despite multiple requests, the Applicant has not provided the information necessary to adequately evaluate these issues. Streamflow and groundwater are pivotal to the health of the aquatic and riparian habitats associated with Liddell Creek, and Liddell Creek is also one of the primary sources of water for much of urbanized Santa Cruz County (via the City of Santa Cruz

¹¹ Although only guidance in this application, the Santa Cruz County LCP provides specific direction for Liddell Creek. Specifically, Liddell Creek is in an LCP-designated Water Supply Watershed and is also an LCP-designated Critical Water Supply Stream that the LCP calls out as “currently utilized at full capacity.” These designations then lead to a series of LCP requirements, including that it is the LCP's stated policy to “oppose or prohibit as legal authority allows, new or expanded water diversion from Critical Water Supply Streams,” and to “seek to restore in-stream flows where full allocation may harm the full range of beneficial uses.”

¹² Ultimately these unresolved issues are moot because denial of a CDP here is warranted by the fact that the well constitutes a non-resource-dependent use within ESHA.

Water Department, which has submitted a comment letter opposing the Applicant's well, including on the basis of impacts to its legal water rights to Liddell Creek – see **Exhibit 13**). The Applicant has provided an assessment of the impact of the well using a hydrologic model (see **Exhibit 8**). The output of the model relies on a series of assumptions about the aquifer's characteristics that appear to conflict with actual existing conditions. The Applicant's hydrology report was reviewed by several Commission technical staff with expertise in hydrology, who ultimately determined that the report was inconclusive because its groundwater models assume that an aquifer is homogenous and infinite, when in fact the substrate is layered vertically with highly porous gravel on top and clay underneath, and its width is restricted to the relatively narrow Liddell Creek corridor. In addition, drawdown (i.e., the lowering of the groundwater table during well pumping) was measured to be significant at 13.7 feet of the total gravel aquifer depth of 33 feet (approximately 40% of the aquifer's depth), whereas the model assumes that drawdown is small (e.g., a few percent) compared to the aquifer's thickness or depth.

It is also worth noting that the Applicant's hydrological model output (i.e., the percentage of the extracted water derived from stream depletion) changed significantly simply by modifying a single input, namely the well's distance to the creek. In the first iteration of the model, the well was assumed to be 170.8 feet from the creek. Using this input distance, the report found that only roughly 0.48% of the well water being pumped is from the creek over the course of a continuous 12-hour period, gradually increasing to almost 2% from the creek at the 12th hour of continuous pumping. The rest of the water, presumably, is derived from the assumed infinite and homogeneous aquifer. The Applicant's hydrologist then adjusted the model such that the well was assumed to be 140 feet from the creek. Changing the well's input distance from 170.8 feet to 140 feet shifted the model's output, finding that on average 1.5% of the well water was derived from the creek during a 12-hour period, with nearly 5% derived from the creek at the 12th hour of continuous pumping. The Applicant's hydrologist then again modified the model including changing the well's assumed distance from the creek to 75 feet which, of the three distances modeled, most closely resembles the actual well's distance from the creek (given that the well is approximately 63 feet from the creek), but is still more conservative than actual conditions. This iteration found that an average of 12% of the pumping was derived from creek depletion during a 12-hour period, increasing to 25% at the 12th hour (see **Exhibit 8**).

In sum, even with the questionable characteristics used to model the hydrologic response to pumping the well (i.e., a homogenous aquifer and unjustified well distances used in the models), ultimately the model demonstrates that the closer the well is located to the creek, and the longer the well is pumped, the more likely it is that creek flow would be depleted by pumping, with 25% of well water coming out of the creek at the 12th hour. The close proximity of the well to the creek is a core issue for this application in terms of the proposed project's inconsistency with the ESHA and water supply/quality provisions of the Coastal Act. In addition, there has been no limit specified by the Applicant as to the expected duration or rate of pumping as part of the project proposal, whereas both parameters are needed to determine the extent of creek flow depletion and the subsequent effect on riparian and aquatic habitat, both in reality and as predicted by a modelling approach.

In an effort to try and resolve the questions regarding whether the pumping is damaging Liddell Creek resources and ESHA, Commission staff requested that the Applicant complete a pump test, which would help to more precisely identify how much the creek is being depleted during

24 hours of continuous pumping. However, the Applicant indicated that the cost of such a test was overly burdensome and has therefore not completed a pump test. Although it would have helped to better answer outstanding questions, the Commission acknowledges that it is unclear if the test would generate final conclusions on whether or not the well was adversely impacting the creek, sensitive creek species (including steelhead and Coho salmon), and groundwater resources. In other words, even if the pump test identified how much water is extracted in 24 hours of continuous pumping and how much the creek level dropped during this period, it would take further analysis to gauge the well's potential impacts to sensitive species, including steelhead and Coho salmon, and to determine if these adverse impacts are direct a result of well withdrawals as opposed to other issues.¹³ Because it is unclear if a pump test would have resolved all of the outstanding questions related to the well's impacts upon the creek and the associated riparian habitat, Commission staff opted to move forward with the application instead of requiring and waiting for a pump test. Finally, there is no baseline or historic data related to stream flows of Liddell Creek or the associated groundwater aquifer to use as a reference or to compare to the results of a pump test. Thus, for all of the above reasons, it is unclear the degree to which the well has had, and continues to have, a significant adverse impact upon these creek resources. At the same time, it appears relatively certain that the well is removing water that would otherwise be in the creek and available for these natural resource uses and values, including based on the hydrological modelling done by the Applicant's consultant, and it seems likely that the well has some effect on such resources, including listed species' habitats and ESHA. Regardless of the lack of a definitive determination of the well's effect on Liddell Creek, the well is not allowed in ESHA and it must be denied on this basis alone, and the Commission need not resolve the extent of the well's impacts on Liddell Creek.

In addition to the uncertainty related to the impacts of the well's pumping on stream flows, biological productivity, and groundwater supply, there is also limited information related to the amount of water that is being pumped from the well and used for irrigation – despite multiple requests of the Applicant for this information. The information known about the well and pumping is generally limited given that there is no meter on the proposed well that tracks pumping data, and there is no recorded data related to the number or duration of pumping events since the well was installed in 2012.

In terms of known information, the proposed well has actively pumped water since the County approved its construction under the County-issued ECDP in July of 2012. The Applicant has also estimated that the amount of water extracted by the subject well and the 1988 well has gradually decreased over the years due to a steadily decreasing water supply; however, the Applicant has not provided any records of historic or present-day water use, and thus there is no evidence to support this claim that well extractions have decreased over the years. That being said,

¹³ For example, CDFW has identified additional stressors to both steelhead and Coho salmon fisheries on Liddell Creek including physical impediments to fish passage and generally low base flows of the creek. While possibly related to well use, it would be difficult to differentiate these kinds of stressors on sensitive species from the degree to which they are potentially caused by well withdrawals or from the well withdrawals themselves. Conversely, because there are already impediments to fish passage, the fishery resource is already facing significant difficulties, and the proposed well withdrawals will only serve to intensify such adverse effect. Therefore, it would appear that any additional reduction of the creek's stream flows would only further hinder the productivity of these fisheries.

historically the Applicant had access to several other water sources, but over time these potential water sources have dwindled.¹⁴

In sum, there is some uncertainty related to the amount of water being pumped from the well and how the pumping has affected the creek and its associated ecosystem since 2012 in order to definitively determine the significance of project impacts on the Creek and associated ecosystem. At the same time, it appears relatively certain that the well is removing water that would otherwise be in the creek and available for these natural resource uses and values and it seems likely that the well has some non-trivial effect on such resources, including listed species' habitats and ESHA. However, ultimately, these questions need not be resolved by the Commission here on the basis of limited information provided by the Applicant because denial of a CDP here is warranted by the fact that the well constitutes a non-resource-dependent use within ESHA.

E. OTHER ISSUES

Other Potential Well Locations

The Coastal Act requires denial of the proposed well because it is a non-resource-dependent use in ESHA (as discussed above), and at this point the denial does not appear to result in a taking of the Applicant's property¹⁵ under the State and Federal constitutions. In addition to the fact that the Applicant does not own the land on which the proposed well is located, because the Applicant has only drilled for a potential well at a single alternate location, an alternate (and approvable) well location may exist on agricultural property leased by the Applicant (i.e., land not owned and managed by the BLM). Furthermore, if such a well were located over 100 feet from Liddell Creek (and on the Applicant's leased property as opposed to land owned and managed by the BLM), development of the well would not require a CDP provided it met the

¹⁴ In terms of alternate water sources, Yellow Bank Creek (which is located approximately 1.5 miles south of Liddell Creek) historically provided additional water to the Fambrini Farm until its use for irrigation purposes was terminated when the TPL purchased the land on which Yellow Bank Creek is located in 1998 (and has since been transferred to BLM as part of the National Monument). Additionally, the Applicant has the right to purchase water from the City of Santa Cruz's raw water line, which is served by two two-inch water lines located near Laguna Road. However, the Applicant has asserted that this water is undesirable due to its high cost and unpredictable availability given that this water may be rationed during drought years. Thus, during drought years, it is not clear whether the Applicant could obtain enough water from the City's raw water supply line to maintain crops, and even if the Applicant were able to obtain water, there is no guarantee that the water would continue to be available for the duration of the growing season.

¹⁵ As explained above, the Applicant has no formal, cognizable property interest in the subject well site, and thus denial of use of the well site does not result in a "taking" of any identifiable investment-backed, legally-recognized property interest that the Applicant has in the well site. The Applicant does not own or lease the land on which the well resides or have any rights to any land located north of Liddell Creek. Rather, the Applicant's leased agricultural parcels are all located south of Liddell Creek. Denial of the CDP here does not foreclose the opportunity and potential for the Applicant to find an alternate water source for its leased agricultural operations (as discussed subsequently in this section of the report), and there is no reason to assume that an adequate water supply categorically cannot be found elsewhere on the Applicant's leased holdings, so denial here also does not deprive the Applicant of economic beneficial use of that property either for purposes of takings considerations. It appears that "authority" for the Applicant to use the agricultural well at issue derives from BLM's passive acquiescence to the Applicant seeking a CDP based on a reservation of a non-exclusive easement for access to convey "any and all water rights owned" by TPL/Coast Dairies when it transferred the subject property to BLM and based on a history of prior use allowed by TPL/Coast Dairies when TPL/Coast Dairies still owned the property.

terms of the Commission-certified Agricultural Categorical Exclusion Order.¹⁶ In addition, the Applicant indicates that it is using the existing 1988 well at the current time, but has not provided any data on how much water is being pumped from that well, stating only that the 1988 well is insufficient to address agricultural irrigation needs on the leased property nearby. Finally, it is not clear to what extent City water could be purchased by the Applicant and under what terms for agricultural irrigation, even if that meant the Applicant needed to make other arrangements during drought years. In other words, the Applicant has not exhausted other water supply possibilities that are not clearly inconsistent with Coastal Act ESHA policies (as here, the proposed well site is clearly inconsistent with Coastal Act ESHA policies), including the potential for a water supply portfolio that uses a variety of potential sources.

It is also worth noting that the Applicant has not made a diligent effort to pursue alternate well locations past the one alternate location tested, despite repeated requests made by Commission staff to pursue other LCP-consistent well locations. The Applicant could have more actively pursued well exploration when the 1977 well began to deteriorate instead of waiting until the 1977 well's functioning deteriorated to the point that Santa Cruz County authorized an ECDP for a well immediately adjacent to the 1977 well and only 63 feet from Liddell Creek, citing that the 1977 well's low level of functioning would result in severe economic hardship including through lost crops. The Applicant could have also pursued alternative well locations since the appeal was originally filed in 2012, as well as when the Commission found substantial issue and took jurisdiction over the CDP in 2015. Although the Applicant has indicated (and the Commission's staff hydrologists have confirmed) that the hydrology of the north coast of Santa Cruz County is highly variable, the Applicant has only drilled for water at a single alternative location (which, like the subject well and the 1988 well, is located on federal land and given the continuity of riparian species in this area is likely in ESHA). The Applicant has not drilled for a well on its leased property, where a well would be consistent with existing deed restrictions and the CDP that created the parcel, as is discussed in more detail below.¹⁷

Furthermore, denial of the proposed well would not be overly burdensome in an economic sense for the Applicant and does not preclude the Applicant from finding a water source for agricultural use including because: 1) the Applicant leases additional agricultural land approximately five miles north adjacent to the City of Santa Cruz, and can therefore maintain an agricultural operation while exploring alternate well locations at the subject site; and 2) the Applicant continues to use the 1988 well to pump water, which may be adequate to irrigate a few of the 27 acres at the site (particularly the three lower acres that are irrigated through drip irrigation) until the Applicant has secured an alternative well site that is consistent with

¹⁶ Codified as a reference in LCP IP Section 13.20.073, where agricultural wells are exempt from CDP requirements provided that they are located over 100 feet from streams or other coastal bodies of water, not between the sea and the first public through road paralleling the sea, and located on a parcel over 10 acres in size, and otherwise consistent with all terms and conditions of the underlying Categorical Exclusion Order (see **Exhibit 5**).

¹⁷ Based on discussion and information identified in the adopted addendum for CDP 3-11-035 regarding resource extraction (albeit, in the context of mining given that CEMEX was a prior lessee of the site), the addendum (pp. 5-6) acknowledges that "resource extraction activities ... would not be consistent with the deed restrictions associated with standard conditions 3, 4, and 5. ... In short, the CDP deed restrictions do not allow, and thus prohibit, such activities." Clearly, the Permittee (TPL/Coast Dairies) was aware that the Commission explicitly stated that any resource extractions were prohibited pursuant to CDP 3-11-035.

associated permits and deed restrictions for the land and is not located in ESHA. Finally, as has been communicated to the Applicant, there are low-interest federal loans and private loans that are available to the Applicant for the purpose of well exploration (and other agricultural-related needs).

Beyond potential alternative well sites on the Applicant's leased property, it does not appear that an approvable well site exists in the vicinity of the existing wells or anywhere north of Liddell Creek due to existing CDP terms and conditions and related deed restrictions,¹⁸ and it is likely that all of the land between Liddell Creek and Bonny Doon Road is ESHA. First, CDP 3-11-035, which the Commission approved in 2012 and which authorized the land division that led to the land being acquired by BLM (and ultimately designated by the President of the United States as the Cotoni-Coast Dairies National Monument on January 12, 2017) includes Special Condition 3a, which restricts the property that the wells are located on to public recreational access, open space, and grazing uses. Specifically, Special Condition 3a requires that this site in question "be protected, used, and managed only for open space, grazing, and public recreational access uses and development in a manner consistent with the protection and preservation of coastal resources. Reclamation and restoration activities that support and facilitate such open space, grazing, and public recreational uses and development are allowed" (see **Exhibit 9**). It does not appear that an agricultural well could be found consistent with Special Condition 3a because that CDP does not allow for crop-related agricultural development in this area,¹⁹ and it is not clear how such a well could be found consistent with the protection and preservation of coastal resources (as discussed earlier in this report). The CDP-required deed restrictions similarly limit agricultural uses and operations to the agricultural parcels (which includes the land leased by the Applicant, *not* the land upon which the well is proposed), and limits the federally-owned land managed by BLM (i.e., the land on which the well resides) to be protected for the above-described open space, grazing, and public recreational purposes, and only then when consistent with coastal resource protection. The deed restriction further limits the property that contains the wells by allowing "reclamation and restoration activities that support and facilitate open space, grazing, and public recreational uses" (see **Exhibit 3**). Per CDP 3-11-035 and the associated deed restrictions, an agricultural well (or any agricultural use) is prohibited on the BLM parcel (i.e., the parcel that contains the proposed well and the 1988 well).²⁰ In addition, the land in

¹⁸ BLM has stated that it does not wish to be an obstacle to any permissible agriculture on the Applicant's leased property, which BLM indicates may be allowed by virtue of TPL/Coast Dairies' reservation of water rights when it transferred the property to BLM. That being said, any potentially retained water rights do not provide TPL, the current landowner of the agricultural land the Applicant leases, or the Applicant, the lessee, the right to use the property inconsistent with the terms and conditions of CDP 3-11-035 or the Coastal Act's resource protection policies. In addition, the City of Santa Cruz indicates (see **Exhibit 13**) that the Applicant's proposed well needs to be denied because it infringes on the City's water rights to Liddell Creek, where the City has been using such water for municipal purposes well before TPL acquired the land in 1998, and which is now the Cotoni-Coast Dairies National Monument.

¹⁹ In fact, as indicated earlier, the entire subdivision was necessary because BLM believed that managing land used for agricultural purposes conflicted with BLM's public land management duties and mission, and the subdivision carved out the agriculturally-used property from the overall land holding and the agricultural land was retained by TPL/Coast Dairies.

²⁰ In addition to CDP 3-11-035 and the associated deed restrictions, it is worth noting that it is unlikely that a well is approvable in the vicinity of the existing wells (i.e., between Liddell Creek and Bonny Doon Road) because a well at this location would inevitably be located on federal land that is likely entirely ESHA, and thus the Commission would be responsible for issuing a CDP for such a well and the Coastal Act would remain the standard of review,

question is now managed by BLM as part of Cotoni-Coast Dairies National Monument, and it is unclear whether or even how a well of this sort could be permitted under the federal rules that apply to such national monuments. Although BLM has indicated that it would work with the Applicant and the Commission to consider a proposal to drill a new well on BLM property, approval of a new well on BLM land would once again be contingent upon the new well's consistency with protection and conservation of the resources of the property, the existing deed restrictions, and the requirements of CDP 3-11-035. It appears unlikely that all of these hurdles can be overcome on BLM land given the extensive limitations that have been applied to the property by CDP 3-11-035.²¹ Thus, for all the above reasons, the likelihood that a well could be permitted in the vicinity of the subject well and the 1988 well (i.e., on federal land managed by BLM that the Applicant does not possess property rights to) or that the Applicant could pursue a well at this location is unlikely.²² Nevertheless, the Applicant could pursue a well on the land it currently leases from TPL (which is within the County's LCP jurisdiction), which is designated in CDP 3-11-035 as agricultural land. Furthermore, such a well (provided it is located over 100 feet from Liddell Creek and within the County's LCP jurisdiction) would likely be exempt from coastal permitting requirements pursuant to the Agricultural Categorical Exclusion Order discussed above.

Applicant's Revised "Screening" Proposal

The well currently draws water from the creek gravel and the underlying shale formation. The well is screened (i.e., it is porous and allows water to pass freely into the well) between 23 feet below ground surface (BGS) and 123 feet BGS. On October 12, 2017, the Applicant, supported by a letter from the Applicant's hydrology consultant, proposed to line the well where it draws water from the creek gravel (between the depths of 23 feet and 52 feet), with the intention of reducing withdrawals from the creek itself. However, with this scenario, although the well would be drawing water exclusively from the shale layer, given that groundwater is freely exchanged between the creek gravel and the shale formation, the well may indirectly draw water from the gravel, which in turn could lessen creek flows. Therefore, the Applicant's proposal to line the well in the gravel layer may not fully mitigate the well's adverse impacts (including reduced stream flows) to the creek and the associated riparian habitat/ESHA. Moreover, the well would still be located in ESHA, which is inconsistent with Coastal Act requirements.

which strictly prohibits non-resource-dependent uses in ESHA. Although a comprehensive study determining whether all of BLM land between Liddell Creek and Bonny Doon Road is considered ESHA has not been completed to date, it shares many of the same riparian characteristics as the current well site, and it is likely that this entire area is ESHA. If the aforementioned area is in fact located entirely in ESHA, then a well would not be approvable at the BLM site because it would need to be found consistent with Coastal Act Section 30240, which, as described above, only allows for resource-dependent uses within ESHA.

²¹ Although it does not appear that a well is approvable on the federal land where the wells are currently located, BLM has indicated that a well on its property would likely require a BLM discretionary approval (assuming the permissibility of siting a well in this location).

²² Based on discussion and information identified in the Commission's addendum for CDP 3-11-035 regarding a federal consistency determination for BLM's use of any water rights onsite (pp.7-9), it is also possible that BLM may need to come in for a federal consistency determination given the fact that the well resides on BLM land.

City of Santa Cruz Water Rights

The City of Santa Cruz has indicated that they have certain water rights to Liddell Spring and, due to the hydrologic connection between Liddell Spring and Liddell Creek, attendant legal obligations to maintain instream flow standards for Liddell Creek to protect listed Coho salmon and steelhead (see City’s letter in **Exhibit 13**). The City further argues that “the applicant has no right to divert water through the well under the City’s agreement with the applicant’s predecessor,” and has asked the Commission to deny the well application (see also discussion in “Response to Comments” section below).

California Department of Fish and Wildlife (CDFW) Notice of Violation

On October 26, 2017, CDFW issued a Notice of Violation (NOV) to the Applicant (see **Exhibit 10**). This NOV concluded that the Applicant’s well(s) result in the diversion of the natural flow of Liddell Creek, and that there was no notification pursuant to Fish and Game Code section 1602 for such diversions. In other words, in order for the Applicant to resolve the violation, the Applicant would need to send written notice to CDFW identifying the diversion of the natural flow of Liddell Creek.²³ The NOV advised the Applicant to submit the appropriate notice of diversion notification (i.e., an application for a Lake and/or a Streambed Alteration Permit) no later than November 24, 2017, or CDFW may pursue enforcement actions. As of January 8, 2017, CDFW had not received a notification from the Applicant for the diversion discussed above.

State Water Resources Control Board (SWRCB) Notice of Violation

On November 13, 2017, Commission staff received notice that the SWRCB also issued a Notice of Violation (see **Exhibit 11**) to the Applicant related to unauthorized diversions. SWRCB concluded that the wells are diverting water primarily from the alluvial aquifer comprising the Liddell Creek Subterranean stream. The NOV also noted that some of the parcels leased are likely riparian to Liddell Creek,²⁴ and that water applied to the riparian portion can likely be diverted under a valid basis of right; however, any water applied to non-riparian areas is diverted without a basis of right. In other words, the land immediately adjacent to Liddell Creek likely qualifies for a riparian water right because it is presumed that the water will eventually drain back into the creek, but it is likely that the upland acres where the bulk of the well water is being used would not be considered riparian to Liddell Creek. SWRCB estimates that the Applicant is diverting approximately 64 acre-feet per annum of water without a valid basis of right, and that this diversion likely injures the ability of the City of Santa Cruz to divert water under its pre-1914 water rights.

The NOV further identifies that diversions from a surface or subterranean stream without a valid basis of right are considered to be a trespass against the State of California, and that the property owner/diverter is subject to enforcement action, including administrative penalties totaling \$500 per day or a cease-and-desist order with penalties of \$1,000 for every day of violation. In order

²³ Nothing in CDFW’s Notice of Violation suggests that diverting Liddell Creek’s natural streamflow is inconsistent with Fish and Game Code; the Notice of Violation simply alerts the Applicant to the fact that the Applicant must notice CDFW in order to divert any of Liddell Creek’s natural stream flow.

²⁴ Water can only be diverted under a riparian right when water is used on land that drains back into the lake, river stream, or creek from which the water was taken.

to prevent any enforcement action, the SWRCB recommended that the Applicant cease any diversions from a surface or subterranean stream without a valid basis of right immediately. The NOV further advised the Applicant to apply for and receive a water right permit from the SWRCB if the Applicant would like to divert water subject to the SWRCB's permitting authority (i.e., water to be applied outside of the riparian area). On December 7, 2017 the Applicant responded to the SWRCB's NOV, stating the following: 1) the Applicant has ceased all use of the 2012 well that is the subject of this application; 2) that the Applicant will file an application for the 1988 well, which the Applicant indicates supplies water to approximately 3.14 acres, and which the Applicant identifies as riparian to Liddell Creek; and 3) that the Applicant disagrees with the SWRCB's position that the 1988 well draws any of the creek's surface flows; however, the Applicant will not challenge the SWRCB's statements in order to avoid costly litigation.

F. RESPONSE TO COMMENTS

Applicant's Lack of Property Right to the Well Site

On September 7, 2017 Robert E. Bosso, attorney for the Applicant, submitted a comment letter (see **Exhibit 12**) in response to the publication of the staff report for this proposed project. In the comment letter, the Applicant's attorney argues, among other things, that contrary to the discussion in the staff report, the Applicant does in fact "have a formal property right to the land where the well is located." First, he notes that the Applicant (along with its predecessors) "were always granted the access to the wells which only served their leasehold." However, paragraph 22 of the Applicant's agricultural lease, which governs use of the Applicant's leased agricultural parcels, *not* the federally-owned land upon which the well is situated, states:

*Lessee may use water from legally permitted sources for irrigation purposes from reservoirs, water impoundments, wells, pumps, and pipelines **presently existing on the Premises** for the irrigation of the crops at no cost to Lessee; provided, however ... **nor shall Lessee irrigate any of the Premises from stream water or stream diversion water.***
(emphasis added)

As explained previously in this report, the well does not constitute a water source "on the premises" of the Applicant's leased agricultural lands, much less a "legally permitted source" (see also discussion regarding CDFW and SWRCB Notices of Violation above). Moreover, even if the Applicant did have a formal property right to the land where the well is located, the Applicant has not established a right to draw water from the proposed well. Paragraph 22 of the Applicant's lease for the agricultural land specifically states that the Lessee (the Applicant) shall not "irrigate any of the Premises from stream water or stream diversion water" (see below regarding City of Santa Cruz's comment letter for further discussion about stream diversion water vis a vis the proposed well).

Next, the Applicant's attorney notes that: "At the time that Coast Dairies and Land Company deeded properties to BLM in 2014, Coast Dairies & Land Company specifically reserved an easement, showing on Exhibit B, which runs to Agricultural Parcel 3 (the Fambrini Parcel) showing the well sites as the location of the beginning of the easement."

However, even assuming that TPL's Coast Dairies & Land Company subsidiary validly reserved "any and all water rights owned" and "non-exclusive easements and access to convey water by use of existing channels" as stated on page 2 of the original Grant Deed (as well as the Correction Grant Deed),²⁵ these reservations by their terms are for the benefit of Coast Dairies & Land Company, not the Applicant. A "non-exclusive easement" simply means that "despite the granting of an easement, the owner of the servient tenement may make any use of the land that does not interfere unreasonably with the easement" (*Gray v. McCormick* (2008) 167 Cal.App.4th 1019, 1025). Here, that simply means BLM (the grantee and owner of the servient tenement) may make any use of the land that does not interfere unreasonably with Coast Dairies & Land Company's reserved easement. Furthermore, Coast Dairies & Land Company's reservation of "any and all water rights owned" does not necessarily mean that Coast Dairies & Land Company even actually had any water rights to reserve (see below regarding City of Santa Cruz's comment letter for further discussion about water rights), much less that any water rights reserved by Coast Dairies & Land Company legally run to the Applicant.

The Applicant's attorney also asserts that the Applicant has a property interest in the well and associated infrastructure based on a reserved easement, specifically "Easement B" as identified on Page 29 of 44 of the Grant Deed's (and the Correction Grant Deed's) property description; "an easement for ingress, egress, and utility purposes, being a strip of land 20 feet in width, designated EASEMENT B, as described in EXHIBIT "EASE-B."" However, this easement is not located on or adjacent to the well site (which is made evident by both the metes and bound description and the corresponding survey's map), and thus this easement does not establish that the Applicant has a property interest in the well site.

Finally, the Applicant's attorney asserts that "Mr. Fambrini (i.e., the Applicant) does have a property interest in the well and associated infrastructure, which is recognized by BLM "because the proclamation which made Coast Dairies & Land Company, the Cotoni-Coast Dairies portion of the California national monument, specifically provides that the national monument dedication shall not be construed to interfere with the operation or maintenance or replacement of utilities, pipelines located on the property" (emphasis in original). However, the fact that the National Monument designation is not to interfere with replacement of utilities does not mean that the Applicant has a right to the well or the land in the first place (even assuming the

²⁵ On October 21, 2016, after the Commission found substantial issue and took jurisdiction over this CDP application, Rick Cooper on behalf of the BLM and Tily Shue acting as representative for TPL recorded a Correction Grant Deed (without notifying or checking in with Commission staff to see if such a correction would be allowable pursuant to the TPL/Coast Dairies CDP 3-11-035). The Correction Grant Deed did not change any of the language in the original Grant Deed; rather it served to include previously referenced but excluded exhibits (including a purported Exhibit B, the "Liddell Creek Ag Water Map," and Exhibit C, the "San Vicente Water Map"). However, the Correction Grant Deed was not part of the record when the Commission took its 2012 CDP action, and was not provided when the CDP-required deed restrictions were recorded. In any case, these CDP-required deed restrictions were recorded free of prior liens and any other encumbrances that might affect the restrictions imposed by the Commission. In other words, the Commission's restrictions are imposed on and applied to the property *first* when considering any other property encumbrances, including the Correction Grant Deed recorded some five years after the Commission's CDP action. Any other subsequent encumbrances recorded against the deed, like the Correction Grant Deed (that appears to be directly in response to the appeal and seems to be trying to allow something not allowed when the Commission took action in 2012), does not and cannot take precedence over the Commission's deed restrictions, and thus is immaterial in that respect. In any case, it does not appear that the Correction Grant Deed is consistent with the terms and conditions of CDP 3-11-035.

proposed well constitutes “replacement of utilities” for purposes of the National Monument proclamation).

In short, the Applicant has not established a property interest either in the proposed well itself or the land upon which the well is to be situated. In any case, whether the Applicant has a formal, cognizable property interest in the property upon which the well site is situated or not is only relevant to inform a takings analysis; it is not a basis upon which the Commission is denying the requested permit here, which is being denied for inconsistency with the Chapter 3 policies of the Coastal Act.

Applicant’s Lack of Information Regarding Impacts to Liddell Creek

The Applicant’s attorney notes that “The Hydrometrics report, when corrected for distance from the well to the creek indicated that 12% of the water in the well might be coming from water flowing into the creek (that is intercepted ground water).” The Applicant’s attorney makes this assertion apparently to suggest that drawdown impacts of the well on Liddell Creek will be less than significant (since only 12% of the well water will come from creek flow water). However, even assuming that only 12% of the well water will come from creek flow water, this statistic says nothing about how much of the creek flow water that 12% comprises. Furthermore, at this time there is no way of knowing how much of the creek flow that 12% comprises considering that the Applicant has not provided sufficient information regarding how much of the well water the Applicant proposes to withdraw, and, as indicated above, it could be significantly more than 12%.

Finally, the Applicant’s attorney suggests that “This well replaces one approved by the Coastal Commission in 1977, that replaced an earlier well at that location, so there is no greater impact than the well approved in 1977 or the 1988 well which was also approved.” This assertion is unwarranted. Cumulative impacts of wells that have been drawing down water for 50 years do not appear to be well understood and have not been adequately addressed by the Applicant. Simply because wells have been permitted in the past does not mean that permitting a well now will have less-than-significant adverse impacts on coastal resources, cumulative or otherwise. Furthermore, both the 1977 well and the 1988 wells were over 100 feet from Liddell Creek at the time of permitting (whereas the subject well is approximately 63 feet from the creek), and in general, a greater distance between the creek and the well correlates to a smaller percentage of the creek’s stream flow being captured and pumped by the well. In other words, although it is not possible to definitively state that the 1977 and 1988 wells drew less of the creek’s stream flow and relied more heavily on subsurface groundwater (including because there is limited data on these wells), there is evidence to suggest that the 1977 and 1988 wells drew less of the creek’s stream flow compared to the 2012 well.²⁶

²⁶ The Applicant’s hydrology report (**Exhibit 8**) demonstrated that a shorter distance between the well and the creek correlated to more stream flow being captured by the well, and a greater distance between the well and the creek correlated to less stream flow being captured by the well. The correlation between the well’s distance from the creek and the amount of stream flow being captured by the well was demonstrated in the Applicant’s various iterations of the hydrology report where the modeled distance from the creek to the well changed from 170.8 feet to 140 feet, and later to 75 feet.

City of Santa Cruz Water Rights

On October 6, 2017 the City of Santa Cruz submitted a comment letter (see **Exhibit 13**) in response to the Applicant's September 7, 2017 comment letter (see **Exhibit 12**). In its letter, the City of Santa Cruz argues that it possesses certain water rights to Liddell Spring and, due to the hydrologic connection between Liddell Spring and Liddell Creek, attendant legal obligations to maintain instream flow standards for Liddell Creek to protect listed Coho salmon and steelhead. The City further argues that "flow and associated water rights in Liddell Creek are inseparable from those at Liddell Spring" and that "the applicant has no right to divert water through the well under the City's agreement with the applicant's predecessor."

Although the City's letter and supporting documentation could reasonably be construed to constitute substantial evidence supporting the City's claim of superior water rights to the water of Liddell Creek as compared to the Applicant,²⁷ the Commission concludes that it need not go so far as to make this conclusion. This is because the City's letter and supporting documentation are sufficient to show that the Applicant has not adequately demonstrated that the proposed well will have less-than-significant adverse impacts on Liddell Creek, taking into consideration the City of Santa Cruz's presumed water rights to Liddell Spring, the hydrologic connection of Liddell Spring and Liddell Creek, and the City's instream flow requirements for Liddell Creek. The information provided in the City's letter and the corresponding lack of information provided by the Applicant in order to find full consistency of the proposed project with Coastal Act Chapter 3 policies supports the Commission's decision at this time to deny the proposed project.

G. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Public Resources Code (CEQA) Section 21080(b)(5) and Sections 15270(a) and 15042 (CEQA Guidelines) of Title 14 of the California Code of Regulations (14 CCR) state in applicable part:

CEQA Guidelines (14 CCR) Section 15042. Authority to Disapprove Projects. [Relevant Portion.] A public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed.

Public Resources Code (CEQA) Section 21080(b)(5). Division Application and Nonapplication. ... (b) This division does not apply to any of the following activities: ... (5) Projects which a public agency rejects or disapproves.

CEQA Guidelines (14 CCR) Section 15270(a). Projects Which are Disapproved. (a)

²⁷ As emphasized by the City in its comment letter, page 3 of the agreement between Coast Dairies & Land Co. and the City of Santa Cruz states: "Said party of the first part [Coast Dairies & Land Co.] hereby agrees that all riparian rights attached and incident to any and all parts of the land secondly described in that certain deed from Jeremiah Respini to said Coast Dairies & Land Co. (a corporation) dated March 16, 1901, and recorded in the office of the County Recorder of said County of Santa Cruz, in Vol. 136 of Deeds, at page 453 and also described in the patent issued by the United States of America to James Williams, dated the 21st day of February, 1881, by reason of the waters of said 'Liddell Spring' or any part thereof or of the waters of Liddell Creek flowing through the same shall be subject to, diminished by and, if essential to the use of said party of the second part [City of Santa Cruz], destroyed by the sale of water and water rights hereinabove agreed to be conveyed and this provision shall apply to and bind the successors and assigns of said party of the first part [Coast Dairies & Land Co.]."

CEQA does not apply to projects which a public agency rejects or disapproves.

14 CCR Section 13096(a) requires that a specific finding be made in conjunction with CDP applications about the consistency of the application with any applicable requirements of CEQA. This report has discussed the relevant coastal resource issues with the proposed project. All above findings are incorporated herein in their entirety by reference. As detailed in the findings above, the proposed project would have significant adverse effects on the environment as that term is understood in a CEQA context.

Pursuant to CEQA Guidelines (14 CCR) Section 15042 “a public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed.” Section 21080(b)(5) of the CEQA, as implemented by Section 15270 of the CEQA Guidelines, provides that CEQA does not apply to projects which a public agency rejects or disapproves. The Commission finds that denial, for the reasons stated in these findings, is necessary to avoid the significant effects on coastal resources that would occur if the project was approved as proposed. Accordingly, the Commission’s denial of the project represents an action to which CEQA, and all requirements contained therein that might otherwise apply to regulatory actions by the Commission, do not apply.

APPENDIX A – SUBSTANTIVE FILE DOCUMENTS

- Lyons, Kathleen. “*Fambrini Well Site Evaluation.*” Biotics Resources Group. August 11, 2015. (1-3).
- Culkin, Sean & Williams, Derek. “Technical Memorandum.” HydroMetrics. November 24, 2015. (1-16).
- CDP 3-11-035 (Cotoni-Coast Dairies National Monument Land Division)
- County Well Permits 19553, 88-069, 12-083, 12-084, and 12-344

APPENDIX B – STAFF CONTACTS WITH AGENCIES AND GROUPS

- Bureau of Land Management
- California Department of Fish and Wildlife
- United States Fish and Wildlife Service
- National Oceanic and Atmospheric Administration
- City of Santa Cruz Water Department
- Trust for Public Land