



CALIFORNIA AND PACIFIC OFFICE
*protecting and restoring natural ecosystems and imperiled species through
science, education, policy, and environmental law*

May 25, 2005

VIA CERTIFIED MAIL; RETURN RECEIPT REQUESTED

Robert L. Reiter
General Manager and Chief Engineer
San Bernardino Valley Municipal Water District
1350 South "E" Street
POB 5906
San Bernardino, CA 92412-5906

Re: Water Right Applications A031165 and A031370 and Draft EIR for the Santa Ana River Water Right Applications for Supplemental Water Supply for San Bernardino Valley Municipal Water District and Western Municipal Water District of Riverside County SCH #2002071062

Dear Mr. Reiter,

This letter is submitted on behalf of the Center for Biological Diversity ("Center") regarding the draft Environmental Impact Report ("DEIR") for the Santa Ana River Water Right Applications for Supplemental Water Supply for San Bernardino Valley Municipal Water District and Western Municipal Water District of Riverside County ("the project"). The Center is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has over 13,000 members throughout California and the western United States, including in San Bernardino and Riverside counties where the project is located.

I. INTRODUCTION.

The Center's comments herein are based on a review of the DEIR, the State Water Resources Control Board ("SWRCB") comment letter on the DEIR dated January 14, 2005 ("SWRCB Comment Letter 1"), the SWRCB letter to Mr. Aladjem dated March 14, 2005 ("SWRCB Comment Letter 2"), the protest to Application A031165 and A031170 filed by the United States Department of Agriculture, Forest Service ("USFS") dated March 7, 2003 ("FS

Tucson • Phoenix • Silver City • San Diego • San Francisco • Joshua Tree • Portland

Lisa Belenky, Staff Attorney
1095 MARKET STREET, SUITE 511 • SAN FRANCISCO, CA 94103
TEL.: (415) 436-9682 x. 307 • FAX: (415) 436-9683
Email: lbelenky@biologicaldiversity.org • www.biologicaldiversity.org

Protest), and the protest filed by the California Department of Fish and Game dated November 5, 2002 ("DFG Protest). Attached hereto as Exhibits A, B, C & D. The Center's earlier comments on the DEIR submitted on January 11, 2005, ("Center Comment Letter 1") are incorporated herein by reference.

As the project proponents are aware, comments submitted before an EIR is certified are timely and must be considered by the lead agency. Pub. Res. Code § 21177(a),(b); *Galante Vineyards v. Monterey Peninsula Water Management District*, 60 Cal. App. 4th 1109, 1117-1121 (1997). Therefore, the Center hopes and expects that the San Bernardino Valley Municipal Water District ("Muni") and Western Municipal Water District of Riverside County ("Western") will give full consideration to all comments submitted regarding this project.

II. THE DEIR FAILS TO MEET THE REQUIREMENTS OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.

As detailed below, in the Center's previous comments, and in comments and protests submitted by others, the DEIR was inadequate in many ways. In response, the project proponents must add significant additional information to the EIR. When significant new information is added to an EIR, CEQA requires that the EIR be re-circulated. See Pub. Res. Code §21092.1; CEQA Guidelines §15088.5, 14 CCR §15088.5. In this instance, once the DEIR is revised in response to the significant issues raised in comments on the DEIR and protests, the DEIR must be re-circulated to the public for review and comment.

A. The DEIR Improperly Fails to Coordinate State and Federal Environmental Review and Project Approvals.

CEQA requires that:

Local agencies integrate the requirements of [CEQA] with planning and environmental review procedures otherwise required by law or by local practice so that all those procedures, to the maximum feasible extent, run concurrently, rather than consecutively.

Pub. Res. Code §21003. The CEQA Guidelines §15124(d)(1)(C), similarly provide that: "To the fullest extent possible, the lead agency should integrate CEQA review with these related environmental review and consultation requirements." 14 CCR §15124(d)(1)(C). The DEIR provides no explanation for failing to coordinate the federal environmental review pursuant to NEPA with the CEQA process.

The CEQA Guidelines require that an EIR contain a list of permits and approvals required to implement the project and a "list of related environmental review and consultation requirements required by federal, state, or local laws, regulations, or policies." CEQA Guidelines §15124(d), 14 CCR §15124(d). The DEIR notes that additional permits, approvals and consultations will be needed in order for the project to be carried out. DEIR at 2-8 to 2-10. These include: several required approvals from the Army Corps of Engineers; permits, approvals and consultations from the Fish and Wildlife Service; and access agreements and permits from

the Forest Service. DEIR at 2-8 to 2-10. The DEIR acknowledges that the approvals from federal agencies will require environmental review pursuant to NEPA. DEIR at 2-10. Nonetheless, the DEIR provides no explanation why the federal environmental review is not running concurrently with the CEQA review as provided by CEQA §21003, Public Resources Code §21003. Indeed, without the federal approvals the project cannot go forward and the SWRCB cannot properly consider the pending applications to appropriate water.

For example, the Forest Service points out that seasonal storage of water behind Seven Oaks Dam will require the project proponents to obtain a special use permit from the Forest Service. FS Protest at 2. Without this permit, the project proponents will not have the right to store water within the San Bernardino National Forest and thus, it will be impossible to actually store the water that the proponents claim can be "conserved" behind the dam. To date, the project proponents have not filed an application for a special use permit. *But for* the issuance of a special use permit from the Forest Service, there is quite simply no water to appropriate. Without first obtaining approvals from the Forest Service, and completing the required NEPA review and FWS consultation, it is premature for the SWRCB to consider the applications to appropriate water. Thus, by failing to coordinate the required State and Federal approvals and the required CEQA and NEPA review, the project proponents have made it impossible for the SWRCB to properly review and consider the pending applications.

B. The DEIR Fails to Adequately Identify, Analyze, Avoid or Mitigate the Environmental Impacts Related to Seasonal Water Storage at the Seven Oaks Dam.

1. The DEIR improperly relies on an eight year old Feasibility Study EIR/EIS produced by the Corps that was not certified.

As the SWRCB points out, the DEIR fails to properly identify or analyze the environmental impacts related to seasonal water storage at the Seven Oaks Dam ("SOD"). SWRCB Comment Letter 2 at 2. On that basis, the SWRCB requested that the project proponents submit CEQA documentation addressing the biological impacts of the project related to seasonal water conservation at Seven Oaks Dam by June 1, 2005. SWRCB Comment Letter 2 at 2. The information requested by the SWRCB is significant new information that was not contained in the DEIR.

The DEIR contains the bare assertion that "[u]pstream from Seven Oaks Dam, impacts related to seasonal water conservation storage were evaluated USACE's 1997 report, Seven Oaks Dam Water Conservation Feasibility Study Final EIS/EIR." DEIR at 3.3-1. The only further discussion related to upstream impacts is a bare reference to the environmental impacts of the reservoir in the immediate vicinity of the dam that was analyzed for flood control purposes only as part of the Seven Oaks Dam approval process. See DEIR at 3.3-55. However, as the SWRCB points out, the DEIR's reliance on the U.S. Army Corps of Engineers' 1997, Seven Oaks Dam Water Conservation Feasibility Study Final EIS/EIR ("Feasibility Study EIS/EIR") is improper. See SWRCB Comment Letter 2 at 2. The Feasibility Study EIS/EIR was not properly

incorporated by reference nor can the project proponents rely on it as a first "tier" environmental document.

10 The DEIR did not properly incorporate the Feasibility Study EIS/EIR by reference. First, the DEIR failed to provide a summary or a description of the information relied on from the Feasibility Study EIR/EIS and failed to analyze whether any information in the document needs to be updated eight years after it was produced. CEQA Guidelines §15150(b), 14 CCR §15150(b). Second, the Feasibility Study EIS/EIR is not generally available to the public. See CEQA Guidelines §15150(a), 14 CCR §15150(a). Third, it is inappropriate to rely on incorporation by reference for *analysis* of impacts to biological resources and other impacts. CEQA Guidelines §15150(f), 14 CCR §15150(f).

13 Moreover, the Feasibility Study EIS/EIR cannot be relied on by the project proponents because it was not a first-tier CEQA document and was not certified as such by either of the project proponents. CEQA Guidelines §15152, 14 CCR § 15152. Indeed, according to the Seven Oaks Dam Water Control Manual no record of decision was signed by the Corps for this document. See U.S. Army Corps of Engineers, September 2003, Water Control Manual Seven Oaks Dam and Reservoir ("Water Control Manual") at 8-8. There was also no FWS section 7 consultation for the Feasibility Study EIR/EIS and no biological opinion was issued by FWS taking into account the impacts to rare, threatened, and endangered species resulting from seasonal storage of water behind the Seven Oaks Dam. Most importantly, the DEIR fails to demonstrate that the Feasibility Study EIR/EIS adequately identified or analyzed all of the potential environmental impacts of storing water behind the dam (including the biological impacts and the cumulative impacts), analyzed alternatives that would avoid those impacts, or identified and adopted specific enforceable mitigation measures to minimize impacts as required by CEQA. CEQA Guidelines §15152(f)(3), 14 CCR §15152(f)(3).

16 2. The DEIR improperly ignores project impacts within the San Bernardino National Forest

17 As the Forest Service points out, the project would inundate lands within the San Bernardino National Forest and result in "a larger pool for a longer period of time" than use of the SOD for flood control alone. FS Protest at 4. The DEIR fails to adequately address direct and indirect impacts within the forest related to water storage or to evaluate consistency with the San Bernardino National Forest LMRP. FS Protest at 4, 4-6 (list of potential impacts). The potential upstream impacts identified by the Forest Service include, but are not limited to, impacts due to: increased size and duration of the lake resulting in exotic fish, frogs, and other species being established and moving upstream; increased fishing and other uses by humans and the resulting wildlife disturbance; impacts to upstream habitat including spawning gravels; establishment of riparian vegetation along the storage pool; acceleration of sediment, erosion, and bank sloughing from the shoreline due to saturation of the soil with longer periods of standing water; and establishment of exotic weeds due to fluctuating water levels. FS Protest at 4-5.

Oddly, the only mention of these impacts in the DEIR is in the cumulative impacts section regarding the Santa Ana River upstream of the Seven Oaks Dam. See DEIR at 6-20 to 6-21. The DEIR's perfunctory discussion fails to meet the requirements of CEQA, that the direct, indirect and cumulative impacts be identified, analyzed, avoided or mitigated in the DEIR. Moreover, as discussed above, to date, the project proponents have not filed an application for a special use permit from the Forest Service or prepared federal environmental review documents for the project as required by NEPA.

19

20

3. The DEIR improperly fails to describe or analyze the direct, indirect and cumulative impacts to biological resources.

21

The DEIR's cumulative impacts analysis states that "nearly all of the loss or modification of biological resources [within the Seven Oaks Dam and reservoir area] have been previously mitigated as part of the Seven Oaks Dam project." DEIR at 6-32. However, the DEIR improperly ignores the fact that many of the mitigation measures required for construction of the Seven Oaks Dam remain unfulfilled. It is critical that the DEIR accurately identify the current status of the biological resources taking into account only the actual mitigation that has occurred, because the proposed project will have additional impacts on many of the same biological resources as those impacted by the construction and operation of the Seven Oaks Dam for flood control purposes. As noted above, at the time that the Seven Oaks Dam was constructed, there was no ESA section 7 consultation with FWS regarding the impacts to rare, threatened, and endangered species from seasonal storage of water behind Seven Oaks Dam. The biological opinion issued by the FWS for the Seven Oaks Dam in December 2002 ("SOD BO 2002") only evaluates flood control operation of the Dam. See SOD BO 2002. The only non-flood control related water storage authorized at the Seven Oaks Dam is for mitigation measures to benefit the Santa Ana Woolly Star Preserve Area ("WSPA"). The Corps operations manual provides that water within the pool behind the dam may be "held longer so that additional head will be available for releases greater than what is schedule[d] in the water control plan." Water Control Manual at 7-05(h).

22

23

To date, the Corps has not yet implemented the proposed flood-related mitigation measures outlined in the SOD BO 2002 for the Woolly Star Preserve Area, although the Woolly Star population continues to decline within the Preserve. See "Santa Ana River Woolly Star Report of Biological Studies For the Preserve Management Program, Years 4 through 9," April 2004 at 17-18 (indicating overall decline in number of plants at all sites from 1996 to 2003). Indeed, the recent winter, 2004- 2005, is the first time since the construction of the Seven Oaks Dam that there has been sufficient rainfall to test the flood control functions of the dam and the Corps has determined that no water will be stored behind the dam this year (not even the amounts that might be used for mitigation for the WSPA) because the dam requires repairs. The DEIR's assumption that the mitigation measures have been fulfilled is erroneous and thus, the cumulative impacts analysis is flawed. Moreover, the failure to analyze the additional direct, indirect, and cumulative impacts of *this* project on biological resources is improper.

24

25

Although construction of the dam was completed more than five years ago, and the SOD BO 2002 anticipated completion of a comprehensive Multi-Species Habitat Management Plan

26

26 ("MSHMP") within 2 years of the issuance of the BO, no comprehensive species management
plan has yet been developed or implemented that includes the required mitigation for the Seven
27 Oaks Dam's impacts to the endangered San Bernardino Kangaroo Rat ("SBKR"). For rare,
threatened, and endangered species, delayed and deferred mitigation measures often increase a
project's impacts and, thus, fail to minimize impacts as they were intended. While the DEIR
acknowledges that the MSHMP is "still in the early planning stages," DEIR at 3.5-9, the DEIR
completely fails to identify and analyze the direct, indirect, and cumulative impacts to the species
28 that have resulted from this delay and which may be further exacerbated by the proposed project.
The DEIR also identifies but fails to properly analyze the impacts from activities that will likely
be facilitated by the development of the MSHMP including ground disturbance from
29 development of additional recharge basins, sand and gravel mining, and road expansions and
alterations that in turn may cause additional impacts to biological and other resources in the area.
DEIR at 6-3. Because the cumulative impacts analysis begins from an erroneous baseline, its
analysis is fundamentally flawed.

30 As noted above, the DEIR erroneously assumes that the required mitigation for the SOD
construction has already been completed, this mistaken assumption also renders the DEIR's
discussion of additional mitigation measures for impacts to the Santa Ana River inadequate. See
31 DEIR at 6-35, MM BIO-9 and BIO-10. Indeed, the proposed mitigation measures closely
parallel those that were required in the SOD BO 2002 but have not yet been carried out to
improve and restore habitat for the SBKR and the Santa Ana River Woolly Star. Thus, there is
no basis for the DEIR's assumption that such measures will be effective or sufficient.

32 The DEIR must analyze the condition of the rare, threatened, and endangered *as they*
currently exist it cannot simply assume that these resources have benefited from as yet
unfulfilled mitigation measures. As the Department of Fish and Game ("DFG") noted, the
project proponents must "quantify the loss of resources that have occurred, and that will occur,
33 as a result of the diversion amounts and timing set forth in the application." DFG Protest at 4.
By improperly identifying the baseline condition of the biological resources, the DEIR fails to
meet the requirements of CEQA and the new mitigation measures it identifies cannot fairly be
presumed to mitigate the impacts of the project on these resources.

34 Moreover, the DEIR fails to provide a comprehensive assessment of in-stream needs and
proposals for by pass flows. See DFG Protest at 4. DFG specifically requested that the project
proponents provide "[a] habitat-based stream needs assessment that incorporates habitat, species,
and life history criteria specific to the Santa Ana River, the tributaries and downstream reaches,"
35 and "[a] specific proposal to provide minimum bypass flows for maintenance of aquatic habitat,
fish, and wildlife resources including, but not limited to, Santa Ana sucker, Santa Ana speckled
dace, arroyo chub, arroyo toad, western spadefoot toad, least Bell's vireo, southwestern willow
flycatcher and southwestern pond turtle. The starting point for determining the minimum bypass
flow should be the estimated unimpaired February median flow at the points of diversion." DFG
Protest at 4. Because the DEIR fails to provide the required information, it fails to comply with
CEQA.

4. The DEIR must be revised to include new information regarding the poor water quality of flood water stored and released from Seven Oaks Dam.

The DEIR must be supplemented or revised and reissued to account for the new information regarding the quality of the water that is held behind the dam for flood control. As the project proponents are well aware, the water that was released from Seven Oaks Dam this spring was of very poor quality – containing large amounts of silt and sand. Indeed, several local agencies have called for the Corps to conduct a multi-million dollar study into the causes of the poor water quality and ways to improve the water quality. Until that study is completed, it will remain unclear whether or not the proposed project is even feasible and the project proponents' applications are, thus, premature.

C. The Water Availability Analysis and Project Description in the DEIR are Inadequate.

The DEIR's analysis of the surface hydrology and water availability is inadequate. These inadequacies include, but are not limited to the following: using an incorrect baseline; underestimating the amount of water that may be needed for species conservation, restoration and recovery; ignoring other in-stream beneficial uses; underestimating the need to release water for flood control purposes; underestimating the uncertainty of water storage in any given year; and on these bases, overestimating the amount of water available for appropriation.

Flood control is, and will remain, the primary purpose of the Seven Oaks Dam. Whether or not the SOD can be used to store water in any given year will be entirely dependent on the timing of winter storms and predictions regarding future storms. Thus, the availability of the SOD for water storage storage will vary widely in different years, and the amount of water that may be stored in any given year is completely speculative. The DEIR recognizes that the water available in even an *average* year is far less than the 200,000 afy of water the applicants seek and estimates a range of availability of additional water from 11,000 afy to 28,000 afy. Appx. A at 4.2-5. However, the DEIR completely fails to take into account dry years, consecutive dry years, or to account for seasonal variability and the uncertainty that storage will be available in any year due to flood control needs. Ignoring these factors, the project proponents have applied to appropriate the maximum amount of water that could possibly be made available on a cumulative basis. As SWRCB requested, an adequate water availability analysis must consider the amount of water available for appropriation based on median water year flows or long-term averages that take into account the frequency of dry years. SWRCB Comment 1 at 7-8; SWRCB Comment 2 at 1-2. The DEIR must be revised using a correct median or long-term average baseline and taking into account the uncertainties of storage that are created by the use of the SOD for flood control.

Although the DEIR acknowledges that stored water must first be made available for mitigation measures that were imposed to mitigate impacts of the construction SOD, it assumes that only 1,000 cfs of water will be used over two days for these purposes in any given six month

44 period. DEIR Appx. A at A-4-9. Because FWS has not yet determined the amount of water that
45 will be required for mitigation from construction of the SOD — mitigation that is intended to
46 simulate flood conditions for several rare, threatened, and endangered species in the Santa Ana
47 Wash Area — any estimate of how much water will be needed for the environmental habitat
release is entirely speculative. The project itself may also require additional mitigation measures
for impacts to many of the same species that have already suffered as a result of construction of
the SOD and from other projects in the area. Further, as SWRCB pointed out, additional water
may be required to support other in-stream beneficial uses for recreation and wildlife including
fisheries and other riparian needs. SWRCB Comment 1 at 8; *see also* DFG Protest at 4. None of
these other water uses were properly taken into account in the DEIR and, thus, the water
availability assessment is essentially flawed. It is entirely inappropriate for the SWRCB to
approve appropriations for the *maximum* speculative amount of water that may be available in
very wet years and after an as yet unknown amount of water has been dedicated to mitigation
measures for rare, threatened, and endangered species and for beneficial in-stream uses.

48 The DEIR also fails to properly identify and analyze the project's proposed use of stored
SAR water for export/exchange. Under this proposal, high quality SAR water will be exported
from the area via the State Water Project ("SWP"). At a later time, other water, of unknown
quality, may be imported and used for distribution or recharged. The DEIR fails to identify
impacts that may occur from the end-use of the exported water (which will likely be growth
inducing and may impact water and air quality and biological resources), as well as the impacts
to water quality in the SAR region from recharge and/or distribution of imported water. As the
49 Court of Appeal recently stated, the SWRCB cannot properly determine the amount of water
required for a specific beneficial use without knowing the actual, intended use or uses of the
water to be appropriated. *Central Delta Water Agency v. SWRCB*, 124 Cal. App. 4th 245, 264
(2004). The Court expressly rejected specifying the service area generally as the area served by
the SWP noting that "the Board has done little more than say the water should be used in
California." *Id.* at 263. The Court also found that CEQA review based on inadequate project
information regarding the end user of the appropriated water was inadequate. *Id.* at 271-272.

50 Because the project proponents have failed to properly identify and analyze the amount
of water available for appropriation and failed to properly identify the end user of the water that
they seek to appropriate, the project description is inadequate and the DEIR based upon it is
fundamentally flawed.

D. The Alternatives Analysis in the DEIR Is Inadequate.

51 The DEIR provides an inadequate description and analysis of the Enhanced Conservation
Alternative (Alternative 2), and over emphasizes the difficulties of implementing conservation
measures in the Muni service area and the potential impacts to water quality and biological
resources due to reduced wastewater flows. *See* DEIR at 5-13 to 16.

52 The DEIR attempts to justify the project's increased impacts on biological resources in
the upper Santa Ana Wash Area and the lack of water conservation measures in the Muni service
area by reference to the threatened Santa Ana sucker. DEIR at 5-14 to 15. Due to the over-

appropriation of the Santa Ana River which leaves essential Santa Ana sucker habitat in the Santa Ana River mainstem through the Santa Ana Wash Area dry much of the year, the Santa Ana sucker's range has been reduced to areas of the Santa Ana River with year-round wastewater flows from treatment plants. The DEIR's attempt to justify the lack of comprehensive water conservation measures in the Muni service area and the project's proposed additional appropriations from the Santa Ana River by claiming that conservation measures may adversely impact the sucker is both cynical and absurd. The sucker has been reduced to surviving on wastewater flows because of over-appropriation of the Santa Ana River, it makes no sense to justify appropriation of additional water, and failure to conserve, by reference to the sucker. Because the DEIR's description and analysis of the Enhanced Conservation Alternative is inadequate the DEIR fails to meet the requirements of CEQA.

52

Further, the DEIR improperly fails to provide a reasonable range of alternatives. The DEIR provides three alternatives and the no project alternative. There is no effort to include any water conservation measures in the project itself or in Alternative 1 or 3 even though water conservation measures in the Muni service area could easily be included in the project as well as in any of the project alternatives. Because including water conservation measures in the Muni service area would minimize or avoid the environmental impacts of the project, water conservation measures should be evaluated as mitigation measures for the project, and in each of the alternatives, and where feasible, must be adopted as mitigation measures for the project.

53

54

The project proponents' failure to identify the Enhanced Conservation Alternative as the preferred Alternative is unsupportable. The additional water appropriations sought would significantly impact environmental resources in an already heavily impacted area. Moreover, the failure to implement comprehensive water conservation efforts within the Muni service area to date or to include *any* water conservation measures in the project description, as mitigation measures, or in either of the other alternatives, calls into question whether Muni's existing water appropriations are being put to beneficial use.

55

56

57

The waters of the state of California are a public trust resource subject to Constitution Article X, §2, in which it is

....declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that *the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.* The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and *such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.*"

58

Cal. Const. Art. X, §2 (emphasis added). The SWRCB is charged with ensuring that all water appropriations are put to beneficial use and not wasted. While the domestic use of water is a

59

59

60

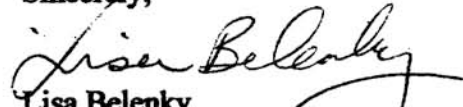
beneficial use, the waste of water is not. Muni's bald assertion that it cannot impact the implementation of water conservation measures because it is a water wholesaler, does not provide adequate justification for failing to identify and analyze conservation measures as mitigation for the projects impacts and as the preferred alternative. Even a water wholesaler must assure that the water it appropriates is put to beneficial use and not wasted by the end users. The lack of comprehensive conservation efforts within the Muni service area is untenable and the SWRCB is unlikely to grant Muni additional water appropriations in such circumstances.

III. CONCLUSION.

61

In light of the issues raised by the Center in these comments and our previous comments, as well as the issues raised in other comments on the DEIR and protests, it is clear that the DEIR is inadequate and must be revised and re-circulated before the pending water appropriations applications can be heard by the SWRCB. We look forward to reviewing the revised DEIR. If you have any questions regarding these comments please feel free to contact me at (415) 436-9683 ext. 307.

Sincerely,


Lisa Belenky
Center for Biological Diversity

List of Exhibits:

Exhibit A:

State Water Resources Control Board, Division of Water Rights ("SWRCB") comment letter on the DEIR dated January 14, 2005 ("SWRCB Comment Letter 1"),

Exhibit B:

SWRCB letter to Mr. Aladjem dated March 14, 2005 ("SWRCB Comment Letter 2")

Exhibit C:

Protest to Application A031165 and A031170 filed by the United States Department of Agriculture, Forest Service ("USFS") dated March 7, 2003.

Exhibit D:

Protest filed by the California Department of Fish and Game dated November 5, 2002 ("DFG Protest")

CC:

John V. Rossi
General Manager
Western Municipal Water District of Riverside County
450 Alessandro Blvd.

Riverside, CA 92508

Jane Farwell
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

Field Supervisor
USFWS- Ecological Services
Carlsbad Field Office
6010 Hidden Valley Road
Carlsbad, CA 92009
Attn: Karin Cleary-Rose

California Department of Fish and Game
330 Golden Shore, Suite 210
Long Beach, CA 90802
Attn: Curt Taucher, Regional Manager, Region 6

California Department of Fish and Game
4949 Viewridge Avenue
San Diego, CA 92123
C.F. Raysbrook, Regional Manager, Region 5

Joshua Rider
Office of the General Counsel
USDA
Pacific Region – San Francisco Office
33 New Montgomery St, 17th Floor
San Francisco, CA 94105-4511

EXHIBIT A



State Water Resources Control Board

FAXED 1/14/05 by
SURNAME

Alan C. Lloyd, Ph.D.
Agency Secretary

Division of Water Rights
1001 I Street, 14th Floor, Sacramento, California 95814
P.O. Box 2000, Sacramento, California 95812-2000
(916) 341-5300 ♦ FAX (916) 341-5400 ♦ www.waterboards.ca.gov

A031165

Arnold Schwarzenegger
Governor

In Reply Refer to: JF:A031165

JAN 14 2005

Western Municipal Water District of Riverside County
Mr. John V. Rossi, General Manager
450 Alessandro Blvd.
Riverside, CA 92508

Dear Mr. Rossi:

SWRCB COMMENTS ON THE DRAFT ENVIRONMENTAL IMPACT REPORT ON THE SANTA ANA RIVER WATER RIGHT APPLICATION FOR SUPPLEMENTAL WATER SUPPLY FOR SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT AND WESTERN MUNICIPAL WATER DISTRICT OF RIVERSIDE COUNTY

On October 15, 2004, the San Bernardino Valley Municipal Water District and Western Municipal Water District (Muni/Western) issued the Draft Environmental Impact Report on the Santa Ana River Water Right Applications for Supplemental Water Supply (DEIR). On December 17, 2004, Muni/Western extended the deadline to file comments to January 14, 2005. The California Environmental Quality Act (CEQA) requires the State Water Resources Control Board (SWRCB), Division of Water Rights (Division), as responsible agency, to consider the environmental effects as shown in the DEIR. In issuing any water right permits, however, the SWRCB will make independent findings, and may require additional or different mitigation measures for impacts identified in resource areas within the SWRCB's jurisdiction, specifically for the water right application component of the Project. (Cal. Code Regs., tit. 14, § 15096.) Staff has concerns about the environmental analysis, particularly for the stretch of the Santa Ana River (SAR) below Seven Oaks Dam. Staff provides comments on resource areas in detail below.

Environmental Settling, Project Impacts, and Mitigation Measures

Muni/Western states that 16 different simulations combining four basic parameters were used to bracket potential impacts to the environment based on upper and lower limits of diversion quantities. (DEIR at p. 3.0-3.) Ideally, this would help facilitate the SWRCB's decision-making under various water allocation schemes advocated for at any hearing on this matter. Unfortunately, the document proves less useful in this respect because the four Project scenarios are not segregated and analyzed independently under each impact assessment, and they are compared to a No Project Scenario which occurs somewhere in the bracketed range of alternatives. The No Project Scenario includes water diversions by San Bernardino Valley Water Conservation District (SBVWCD) and senior water right claimants, (DEIR at p. 3.0-2; 3), which are also presented as a major parameter in the variation in amount of appropriated water under project implementation. (DEIR at p.0-3.) Assuming that the No Project Scenario accounts for the historical diversions of senior water right claimants and SBVWCD, whether authorized or

SURNAME

Janell
1/14/05

California Environmental Protection Agency
1/14/05

♻️ Recycled Paper

JAN 14 2005

not, a comparison with the Project reveals no or very little change. The No Project alternative should introduce a scenario with parameters similar to Scenario 13 but where Muni/Western does not capture water for a better impact assessment.

Surface Water Hydrology and Associated Biological Impacts

The DEIR identifies the decrease in river flow on non-storm days in all river segments below Seven Oaks dam as significant and unavoidable. (DEIR at pp. 3.1-37; 41; 43; 45; 47). As a result of the Proposed Project, Segment C will be completely dewatered. (DEIR at p. 3.1-41.) In Segments D and E, there will be some small flow but the volume would be less and occur less frequently. (DEIR at pp. 3.1-43; 45.) Segment F would experience decreased flows, however, the impact is reduced by reliance on the continued discharges from the Rapid Infiltration and Extraction facility (RIX) and Rialto Effluent Outfall. (DEIR at p. 3.1-47.) Segments C through E have been historically dry, due in part by water diversions of SBVWCD and others. The Project appears to exacerbate an already degraded condition. This suggests that even otherwise minor impacts of individual water development projects may be cumulatively significant when considered along with past projects.

Change in flow on non-storm days is critical to the environmental analysis because impacts in other resource areas stem from changes in hydrology. In the biological resources area, changes in non-storm day flows could affect aquatic, riparian and wetland habitats and species, including the Santa Ana Sucker (SAS), downstream of the point of diversion.

For example, the document states that reduced flow on non-storm days could reduce aquatic habitat and species downstream, but concludes that reductions are "negligible throughout the year due to lack of flows under No Project conditions." (DEIR at p. 3.3-62.) This conclusion appears to rely in part on the historic dewatering of this stream section, which may not be appropriate because some of the historic diversions in this reach may not be authorized. Moreover, this conclusion is inconsistent with the finding of significant and unavoidable impact in surface hydrology section 3.1. There lacks evidence to support the conclusion that there is no significant impact from a significant reduction of non-storm day flow on aquatic habitat and species.

Another example is the document's conclusion that changes in non-storm day flows could affect SAS but does not because of the unlikely presence of the species in this reach. (DEIR at p. 3.3-63.) As discussed in detail below, year-round aquatic habitat is present between Seven Oaks Dam and Cuttle Weir, but SAS is not expected because of nine miles of intervening non-suitable habitat. The species is not currently supported in this reach because of lack of water; however, some evidence indicates that increased flow could create a benefit to the habitat in this area, potentially supporting the existence of the species. A more refined analysis is needed. Similarly, the document states that changes in non-storm day flow could effect riparian and wetland habitat. (DEIR at p. 3.3-64.) The DEIR concludes that this impact is less than significant without any supporting evidence or analysis, except to say that only a small amount of riparian and wetland

habitat exists in this reach. The fact that only a small amount still exists suggests that its protection is even more critical.

The DEIR lacks evidence to support biological resource conclusions of less than significant impacts in light of the significant change in surface hydrology. Approximately 70 percent of all days are classified as non-storm flow days. (DEIR at p. 3.1-29.) Non-storm flow days result in low flows, and thus diversions are more likely to have a measurable impact. (Id.) Muni/Western must conduct a more refined analysis of the impacts on biological resources considering that the DEIR identifies significant impacts already identified with surface hydrology. The DEIR states that the effect of Project diversions on SAR non-storm flows is identical regardless of whether Muni/Western diverts at a rate of 500 or 1500 cubic feet per second (cfs). (DEIR at p. 3.1-29.) The DEIR concludes that Scenario A and B will have the same impacts, as does Scenario C and D. (Id.) It seems unlikely that a difference in the diversion rate of 1000 cfs would not have an impact, unless there is no chance that diversions over 500 cfs will occur on non-storm flow days. If that is the case, it should be clarified in the document as a mitigation measure or as part of the project description.

In light of additional impacts in other resource areas that stem from reduced flow on non-storm days, Muni/Western must conduct a detailed analysis to determine whether some amount of flow retained in these reaches on non-storm days could reduce impacts, and if so, the amount and timing of such flow that is needed. The DEIR states that an assessment was made involving changes in timing, pattern, and volume of diversions, however, no feasible mitigation measures were identified that would still allow "a consistent and reliable diversion for beneficial use by the Project." (DEIR at pp. 3.1-37; 41; 43; 45; 47.) No evidence exists to support this conclusion. Altering the quantity of water that Muni/Western may divert in order to avoid changes in flow on non-storm days and the resulting impacts from that change in flow may be the most feasible and practicable mitigation available.

SWRCB staff has heard suggestions that instream flows would not provide habitat benefits because any water would seep into the ground too rapidly. The DEIR contains no evidence to support this conclusion. The DEIR states that "[i]t is likely that, due to evaporation and percolation, very little surface water in River Segment B has hydrologic connectivity to points downstream." (DEIR at p. 3.1-39.) This conclusion regarding hydrologic connectivity appears to be based on the historical dewatering of the stream by diversions, not on natural hydrology. More evidence is needed before Muni/Western can conclude that flow mitigation is not feasible.

Mitigation Measures that Lack Assurances

Several mitigation measures proposed in the DEIR and relied upon to reduce impacts to less than significant levels lack assurances to make these conclusions proper. Conservation storage at Seven Oaks Dam will increase the amount of water subject to anaerobic conditions. (DEIR at p. 3.1-35.) Simply implementing a program as suggested in MM SW-1, without requiring the cessation of storage if the measures do not solve the program, is not sufficient to reduce this impact to less than significant levels. Reduction in frequency and extent of overbank flooding

JAN 14 2015

could adversely affect San Bernardino Kangaroo Rat (SBKR) and SAR woolly-star habitat. (DEIR at p. 3.3-60.) Simply funding and implementing an adaptive management program and an invasive species control plan does not ensure that this impact will be mitigated. Plans and programs must contain measures that monitor and report on program success and that cease diversions if the suggested mitigation is not working.

MMBIO-2 states that monitoring for revegetation and erosion control for all habitat areas directly affected by construction activities will continue for 3 to 5 years or until performance criteria are met. (DEIR at p. 3.3-40.) Clarify the performance criteria that will be used to determine if revegetation goals have been met. Also, cite the reference to demonstrate that 3 to 5 years will be adequate to meet the goals.

Mitigation measures MMBIO-3, 4, 5 and 6, (DEIR at p. 3.3-40), discuss the following actions for non-listed and listed plant and animal species; preconstruction surveys, relocation of animals species to suitable habitat, development, implementation, and monitoring for listed plant species involving permits or memorandums of understanding with U.S. Fish and Wildlife Service (USFWS) and California Department of Fish and Game (CDFG). Describe how Muni/Western will ensure these mitigation measures are met and the actions Muni/Western will undertake if they are not.

In mitigation measure, MMBIO-8, (DEIR at p. 3.3-44), the DEIR states that to compensate for permanent or long term loss to Riversidian alluvial fan sage scrub (RAFSS) habitat, Muni/Western will acquire, for every one acre impacted, a minimum of one acre of good quality habitat of similar or greater habitat value. Please cite the reference to demonstrate this amount of mitigation is adequate. In addition, MMBIO-8 lacks the standard habitat mitigation and reporting plans to assure the long-term viability of the RAFSS restoration. SWRCB staff requests that the requirement of long-term mitigation and reporting plans being approved by the Chief of the Division of Water Rights prior to the diversion of water, be added to MMBIO-8.

Impact Conclusions that Rely on Wastewater

In Segment F and G, the DEIR impact conclusions rely on the continued inflow of various wastewater treatment facilities. For example, water quality impacts that are of greater concern upstream diminish further downstream. (DEIR at pp. 3.1-39; 41; 43; 45 [no impacts on water quality].) Evidence suggests that the base flow in the SAR provided by numerous wastewater treatment facilities may not stay constant. The RIX facility discharges over 40,000 acre-feet of treated wastewater to the SAR in a reach where the SAS is known to exist. (See DEIR at p. 3.1-5; See Economic Analysis of Critical Habitat Designation of the Santa Ana Sucker, Northwest Economic Associates, 2004, at p. 50 [hereinafter referred to as "Economic Analysis"]) RIX is proposing to sell up to 18,000 acre-feet per year (afy) of water that has historically been discharged into the river. (Id.) To what extent do Muni/Western's impact conclusions rely on this base flow? Is Muni/Western willing to backstop the historic flow maintained in the channel? The biological impact conclusions for reduced non-storm flow for Segment F and G are all

JAN 14 2005

called less than significant because flow is present from continued wastewater discharge. Do any of these impact conclusions change depending on increased wastewater marketing in the future?

The analysis presented in the Cumulative Impacts section falls short because it assumes that no base flow exists below Cuttle Weir. The method for evaluating water quality impacts supposedly assumed a "worst-case" scenario where all the water diverted by the proposed project and SBVWCD would otherwise flow downstream. (DEIR at p. 6-22.) Yet the analysis does not in fact compare the two scenarios for an accurate assessment of impacts in Segments C-E, and Segment F if water was removed from the system by the RIX facility. (DEIR at Table 6.2-1.) SWRCB comments above also apply to cumulative impacts that identify significant and unavoidable impacts from decreased non-storm day flow in the river. (DEIR at p. 6-26.) Biological impacts that stem from significant impacts on surface hydrology must be analyzed and mitigation explored in detail. Reductions in the rate or quantity of diversions is a feasible mitigation.

Sediment Transport

The DEIR states that flows over 4,000 cfs transport gravel and cobbles, whereas flows from 500 to 4,000 cfs transport sand. (DEIR at 3.1-9.) The DEIR should explain this assumption in more detail, particularly because the impact conclusion on change in storm flows affecting the SAS relies on this assumption. In addition, the DEIR concludes that impacts on sediment transport from decreased flows is less than significant above Mill Creek because Mill Creek dominates sediment contribution and transport in this stretch. (DEIR at p. 6-25.) The cumulative impact assessment should analyze effects together with the SBVWCD application to appropriate 19,800 acre-feet from Mill Creek as well.

Seven Oaks Dam

The DEIR omits any discussion of biological impacts related to seasonal water conservation. (DEIR at p. 3.3-1; 3.3-55.) The DEIR states that these impacts were evaluated in the United States Army Corp of Engineers (Corps) Seven Oaks Dam Water Conservation Feasibility Study Final EIS/EIR in 1997. (Id.) The DEIR should summarize this analysis and incorporate any mitigation measures identified in that document into this EIR.

Reduced Flood Flows

The DEIR identifies a significant impact to SBKR and SAR woolly-star habitat from reduced overbank flooding. (DEIR at p. 3.3-60.) These species are associated with pioneer to intermediate phase RAFSS. Lack of flood disturbance causes this habitat to mature into less-suitable habitat that does not support SBKR. (Id.) The DEIR concludes that this impact is mitigated to less than significant levels through implementation of MM BIO-9 and MM BIO-10.

MM BIO-9 proposes using a combination of physical removal and herbicidal treatment to remove invasive non-native species. (DEIR at p. 3.3-61.) The use of herbicidal treatments could cause water quality impacts that should be identified and mitigated in the EIR.

MM BIO-10 proposes the development of an adaptive management program to "selectively restore" SBKR and SAR woolly-star habitat by simulating the "habitat-renewing aftermath of natural flooding." (Id.) A high-pressure nozzle will be directed at suitable habitat areas in a randomized block design to allow experimental testing of variables. (DEIR at p. 3.3-62.) The DEIR cites no evidence that this method has been peer reviewed or effective in other cases. Muni/Western must provide more evidence and analysis to determine whether this proposal could be effective mitigation. For example, the germination cycle of RAFSS vegetation may require conditions not provided by mechanical manipulation. Do seeds need to soak in water for a time? Do the seeds require scarification in order to germinate? These inquiries may help determine the probability of success of this type of program. Without more supporting data, the conclusion that the impact is mitigated is improper. If Muni/Western proposes to answer these questions in the future through adaptive management, the impact must be called significant and unavoidable for now. In addition, it is unclear why this impact is considered mitigated in Section 3.3 but significant and unavoidable in the Cumulative Impacts section. (DEIR at p. 6-35.) The conclusion in Cumulative Impact BIO-6 seems more appropriate. (Id. [{"D}ue to the uncertainty of the effectiveness of the proposed mitigation, cumulative impacts remain significant"].)

Santa Ana Sucker

The Santa Ana Sucker (SAS) is listed as threatened under the federal Endangered Species Act and as a state species of special concern. The SAS is a small brown fish that occupies small to medium sized permanent streams in habitat subject to periodic flooding. (DEIR at p.3.3-10.) Historically, the SAS was native to the Los Angeles, San Gabriel, and Santa Ana River drainage systems in Los Angeles, Orange, Riverside, and San Bernardino Counties. (See 65 Fed. Reg. 19686 (April 12, 2000).) The SAS has lost approximately 75 percent of its historic range and has declined in significant portions of its current range. (Economic Analysis at 12.) Decline of the species is attributed to urbanization, water diversions, dams, introduced species, and other human caused disturbances. (Id.) Sixty percent of the remaining range of the SAS occurs in the SAR. (See 50 C.F.R. Part 17.) Distribution within the SAR corridor extends from just upstream of the Rialto Drain downstream to below Prado Dam. (DEIR at p. 3.3-11.) Suitable year-round habitat exists from Seven Oaks Dam downstream to just below the confluence with Lytle Creek, however, the species does not occur in this area due to 9 miles of intervening, non-suitable habitat where there is little or no water. (DEIR at p. 3.3-21.)¹

¹ On January 4, 2004, the federal government removed the Santa Ana River from the critical and essential habitat designation for the SAS. (See 50 C.F.R. Part 17.) The USFWS justified its decision to remove the critical habitat designation on the SAR based on an economic analysis of the benefits of listing critical habitat or not. The Service excluded "essential habitat" designations in areas covered by the Western Riverside Multispecies Habitat Conservation Plan and SAS Conservation Program. Neither Plan nor Program is applicable to the stretch of the SAR below Seven Oaks Dam (Unit1B), nor do they identify increased flows to improve habitat, a primary conservation measure for the species. It is unclear whether the removal of the critical habitat designation on the SAR will alter any previous federal consultation and mitigation for the Seven Oaks Dam and other projects as they relate to the SAS. Thus, it would be improper to

JAN 14 2005

The DEIR suggests that the reduction of peak storm flows benefits the SAS because flood flows may otherwise wash some individuals downstream. (DEIR at p. 3.3-63.) This conclusion seems inconsistent with background data that find the SAS adapted to habitats prone to flooding. Although high flows in the early 1990's caused a decline in population, a large number of SAS juveniles were found in tributaries. (Economic Analysis at p.12.) Some evidence suggests that increased flow below Seven Oaks Dam would benefit habitat and water quality, (San Bernardino Water Conservation District DEIR at pp.5.3-26; 5.3-28; 29), and that additional water removal would detrimentally affect the SAS. (See Economic Analysis pp. 63-64 [citing U.S. Fish and Wildlife Service comments on NOP].) The SAS is present in the stretch of the SAR where there is water. There is no evidence to show that SAS would not exist in the reach below Seven Oaks Dam if sufficient water were present. More analysis is needed to determine what flows could benefit the SAS in this reach.

The DEIR lists a significant measurable change in non-storm day flows in SAR segments C, D, and E attributable to the Project; however, no feasible mitigation measures were identified to avoid that impact (DEIR at pp. 3.1-41-45), even though the SAS may utilize this stretch of the River. As discussed previously, there lacks evidence to support the conclusion that no mitigation is feasible for this impact. For the protection of the SAR, Muni/Western must analyze alternative flow regimes to maintain the fish in good condition in this area of the river. If the analysis does not reveal a feasible flow regime, Muni/Western should investigate potential mitigation upstream of Seven Oaks dam.

Water Availability

Every water right application submitted to the SWRCB must include "sufficient information to demonstrate a reasonable likelihood that unappropriated water is available for the proposed appropriation." (Water Code section 1260(k).) In addition, in accordance with Section 1375(d) of the Water Code, there must be unappropriated water available to supply the applicant in order for the SWRCB to issue a permit to appropriate water. Furthermore, as stated above, CEQA requires the SWRCB to consider the environmental effects of a project before issuing a permit. Muni/Western's water availability analysis (WAA), therefore, must quantify the amount of water available for diversion and then evaluate the impacts of that diversion under CEQA in order for the SWRCB to issue a permit. The WAA must consider all existing and pending senior water rights, under all bases of right, both upstream and downstream, as well as any necessary bypass flows to protect public trust resources. Additional information regarding WAAs, as well as an example of a WAA format, is available at:

<http://www.waterrights.ca.gov/WaterAvailability/default.html>.

Muni/Western requests 200,000 acre-feet per year (afy) in its water right applications. According to Tables 3.0-3 and 3.0-4, this amount of water is available for capture by Muni/Western with a

rely on any previous or future mitigation measures required by federal agencies to ensure the adequate protection of this species.

JAN 14 2005

"Maximum Annual" flow, at a project diversion capacity of 1,500 cfs, with senior claimant diversions at historical levels (i.e. 65 cfs), with no environmental habitat release, and with SBVWCD diversions at its current licensed diversion amount of up to 10,400 afy. These parameters raise several questions. Generally, long-term average or median water year flows are used for the WAA. It is not readily apparent how the "Maximum Annual" flows in Tables 3.0-3 and 3.0-4 were calculated. The definition of the Maximum Annual flow should be listed in the tables in a footnote or there should be a reference to the applicable section in the document. How does Muni/Western justify its request to appropriate 200,000 afy? What is the probability that 200,000 afy of flow will be available to Muni/Western? It appears Muni/Western has assumed in its model that any available water will be applied to the two pending applications and not to any of the other competing applications pending before the Board. Did Muni/Western include any other pending applications in their model? If not, Tables 3.0-3 and 3.0-4 could be expanded to show pending applications.

In compliance with Water Code section 1243, "in determining the amount of water available for appropriation, the SWRCB shall take into account, whenever it is in the public interest, the amounts of water needed to remain in the source for protection of beneficial uses...." Instream beneficial uses include, but are not limited to, recreation and the preservation of fish and wildlife habitat. One objective of a Water Availability Analysis (WAA) is to determine the impact of the project on streamflow in order to evaluate the impacts to fishery resources as required by the CEQA, the California Endangered Species Act (CESA), and the federal Endangered Species Act (ESA). The CDFG filed a protest against Muni/Western's water right applications, among others, which requested a specific proposal to provide minimum bypass flows for maintenance of aquatic habitat, fish, and wildlife resources as a protest dismissal term. Muni/Western needs to consider possible bypass flows in its analysis, and establish how it intends to comply Fish and Game Code section 5937 as well.

Water Quality and Groundwater Contamination

The proposed Project has the potential to affect the groundwater quality in the Bunker Hill and Lytle Creek groundwater basins collectively referred to as the San Bernardino Basin Area (SBBA). Constituents such as nitrates, perchlorate, polychlorinated biphenyls (PBCs), tetrachloroethylene (PCE), total dissolved solids (TDS) and trichloroethylene (TCE) were investigated in the DEIR.

In DEIR section, 3.2 Groundwater Hydrology and Water Quality, for the TDS constituent, impact GW-4 (DEIR at p. 3.2-27), Muni/Western states the Project would increase TDS concentrations such that post-Project TDS would exceed water quality objectives. This is a significant impact. Even with mitigation measure MM-GW-1 which states; to the extent feasible given existing infrastructure and consistent with meeting other basin management objectives, Muni/Western will direct Project water spreading to reduce significant TDS impacts, (DEIR at p. 3.2-29), the impacts to TDS concentration levels in the SBBA remain significant. Muni/Western draws an identical conclusion for the Project's impact on nitrate concentrations in the SBBA and mitigates with MM-GW-1. (DEIR at 3.2-31.) The levels of impact of TDS and nitrate concentrations

(ranging from beneficial to significant) to wells in the Lytle Creek and Bunker Hill sub-basins is demonstrated in DEIR pp. figures pp. 3.2-21 to 28 (the annual impacts for TDS under current and proposed water quality objectives) and figures pp. 3.2-33 – 40 (the annual impacts for nitrates under current and proposed water quality objectives). Since well locations are known, Muni/Western should state what action(s) it will pursue if spreading Project water is unsuccessful at reducing significant nitrate and TDS impacts to those wells. For example, Muni/Western could pay for water treatment or supplemental state project water for downstream users or necessary instream flows.

In DEIR section 3.12, Hazardous Materials and Groundwater Contamination, regional groundwater contamination plumes such as Muscoy/Newmark Plume, the Norton Plume and the Redlands-Crafton Plume containing PCBs, perchlorate, and TCE have been documented to exist within the SBBA and adjoining basins where Project related facilities are located. (DEIR at p. 3.12-4-5.) Project-related groundwater recharge in spreading basins located around the perimeter of the San Bernardino Valley could affect existing groundwater contamination plumes. The movement of the plumes in relation to Project activities such as groundwater spreading was modeled as part of this DEIR. The modeling results are shown in Appendix B, section 6.

The impacts of the movement of groundwater contaminants such as perchlorate, TCE and PCE under Project scenarios A-D are cited in HAZ-2, (DEIR at p.3.12-14), HAZ-3, and HAZ-4. Impact HAZ-2 through 4 each state that a significant impact will result from the implementation of some or all of the Project scenarios. Following implementation of mitigation measure MM HAZ-4, (DEIR at p. 3.12-14), the DEIR concludes that impacts of PCE, perchlorate, and TCE on the groundwater supply will remain significant and unavoidable. As mitigation, to the extent feasible, Muni/Western will direct Project water spreading to limit adverse plume movement, (DEIR at p. 3.12-14), in the Lytle Creek and Bunker Hill sub-basins

The DEIR does not, however, show levels of impact (ranging from beneficial to significant) to wells in the Lytle Creek and Bunker Hill sub-basins for perchlorate, TCE and PCE as it did for nitrate and TCE in figures pp. 3.2-21 to 28 and figures pp. 3.2-33 to 40. Muni/Western's document should include similar tables for the effects of perchlorate, TCE and PCE contaminant plumes on the wells in the SBBA. As with wells potentially contaminated with TDS or nitrates, the document should state what action(s) Muni/Western will take if direction of Project water spreading to reduce significant perchlorate, TCE and PCE impacts to those wells is unsuccessful.

Mr. John V. Rossi

10

JAN 14 2005

For example: will the well owners be notified of the possible impact to the wells at the onset of the Project? If an individual well owner's water supply becomes contaminated due to project activities, will Muni/Western supply an alternative source of water to the well owners? If you have questions regarding these comments, please contact me at (916) 341-5349.

Sincerely,

ORIGINAL SIGNED BY.

Jane Farwell

Environmental Scientist

bcc: Jean McCue, Samantha Olson

JF:llv 01/14/05 U:\Herdrv\JFarwell\File A031165DEIRfinal.doc

EXHIBIT B



State Water Resources Control Board



Division of Water Rights

1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
Mailing Address: P.O. Box 2000 ♦ Sacramento, California 95812-2000
FAX: 916.341.5400 ♦ www.waterrights.ca.gov

Alan C. Lloyd, Ph.D.
Agency Secretary

Arnold Schwarzenegger
Governor

MAR 14 2005

In Reply Refer to: JF:A031165

Mr. David R. E. Aladjem
Downey Brand LLP
555 Capitol Mall, 10th Floor
Sacramento, CA 95814

Dear Mr. Aladjem:

INFORMATION REQUEST FOR WATER RIGHT APPLICATIONS 31165 AND 31370 OF THE SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT AND WESTERN MUNICIPAL WATER DISTRICT OF RIVERSIDE COUNTY

Under Water Code section 1275, the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) may request additional information reasonably necessary to clarify, amplify, correct or otherwise supplement information required to be submitted under Article 2 (commencing with section 1260) of the Water Code. On August 8, 2003, Division staff sent an information request letter requesting a Water Availability Analysis (WAA); clarification of California Environmental Quality Act (CEQA) compliance for the Project component involving conservation storage at Seven Oaks Dam; and a revised CEQA schedule. In response, San Bernardino Valley Municipal Water District and Western Municipal Water District of Riverside County (Muni/Western) indicated that the WAA and CEQA analysis of Seven Oaks Dam storage would be included in the draft Environmental Impact Report (DEIR). Muni/Western also submitted a revised CEQA timetable. On October 15, 2004, Muni/Western released its DEIR of the Santa Ana River Water Right Applications for Supplemental Water Supply (DEIR). Division staff submitted comments on the document and incorporate those comments by reference in this letter. This letter follows up on the adequacy of data submitted under the Division's August 8, 2003 request, and requests additional information within the time period provided.

Water Availability Analysis

The Division requested a WAA that accounts for seasonal availability and other relevant factors. In its September 15, 2003 response, Muni/Western submitted an excerpt from the administrative draft of the EIR that describes the quantity of water Muni/Western believes is available for diversion from the Santa Ana River (SAR). The average quantity of unappropriated water varies from 11,000 acre-feet per year (afy) to 28,000 afy. Muni/Western requests 200,000 afy in its water right applications. According to the DEIR this amount of water is available for capture by Muni/Western with a "maximum annual" flow. As stated in the Division's CEQA comments, long-term average or median water year flows need to be used when determining water availability. Muni/Western has not satisfied the WAA information request at this time.

TURNNAME

Alkapin
3/16/05

Alkapin
California Environmental Protection Agency
3/16/05

Recycled Paper

MAR 14 2005

The WAA must consider any necessary bypass flows to protect public trust resources. Water Code section 1243 states that, "in determining the amount of water available for appropriation, the State Water Board shall take into account, whenever it is in the public interest, the amounts of water needed to remain in the source for protection of beneficial uses...." In stream beneficial uses include, but are not limited to, recreation and the preservation of fish and wildlife habitat. The DEIR finds a significant change in non-storm flow days as a result of the Project. Change in flow on non-storm days could impact other resource areas stemming from changes in hydrology. In the biological resources area, changes in non-storm day flows could affect aquatic, riparian and wetland habitats and species, including the Santa Ana Sucker (SAS), downstream of the point of diversion. Muni/Western must conduct a more refined analysis of the Project's effects on these biological resources. The analysis needs to include information to determine whether some amount of flow retained in these reaches on non-storm days could reduce impacts, and if so, the amount and timing of such flow that is needed. This study is due no later than June 1, 2005.

CEQA and Seven Oaks Dam

The Division requested Muni/Western to specify how it intends to meet CEQA requirements for the Seven Oaks Dam conservation storage component of its Project. In Muni/Western's response, it stated that conservation storage at Seven Oaks Dam was to be part of the "Project" analyzed in the EIR, and potential impacts were to be discussed. The DEIR does not include any discussion of biological impacts related to seasonal water conservation at Seven Oaks Dam. The DEIR states that these impacts were evaluated in the United States Army Corp of Engineers Seven Oaks Dam Water Conservation Feasibility Study Final EIS/EIR in 1997. Muni/Western needs to address the impacts and mitigation of those impacts in its own document. The request for CEQA documentation for conservation storage at Seven Oaks Dam is not satisfied. Please submit this information by June 1, 2005.

Failure to provide the information requested within the time period provided could result in the cancellation of applications.

If you have any questions, I can be reached at 916/341-5349.

Sincerely,

ORIGINAL SIGNED BY.

Jane Farwell
Environmental Scientist

bcc: Jean McCue, Samantha Olson

JF:llv 02/25/05
U:\Herdrv\JFarwell\File A031165IRFUSO2.doc

EXHIBIT C

RSS/m sm
A 31165 et al



United States Department of Agriculture
Office of the General Counsel

Pacific Region—San Francisco Office
33 New Montgomery, 17th Floor
San Francisco, CA 94105-4511

Telephone: 415-744-3166
Facsimile: 415-744-3170
Internet: jack.gipsman@usda.gov

March 7, 2003

Mitchell Moody
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

STATE WATER RESOURCES
CONTROL BOARD
2003 MAR 10 PM 1:28
DIV. OF WATER RIGHTS
SACRAMENTO

- Subject: Forest Service Protests to:
- Application No. 31165 of San Bernardino Municipal Water District/Western Municipal
 - Application No. 31174 of Orange County Water District
 - Application No. 31169 of Chino Basin Watermaster
 - Application No. 31170 of San Bernardino Municipal Water District/Western Municipal
 - Application No. 31171 of San Bernardino Valley Water Conservation District
 - Application No. 31172 of City of Riverside

Dear Mr. Moody:

Enclosed are protests of the Forest Service, USDA to the above-mentioned applications.

Sincerely,

Jack Gipsman
Attorney for the Forest Service

Enclosure

cc: Applicants

JG/ams

PROTEST - APPLICATION

Based on Environmental Considerations, Public Interest, Public Trust, and Other Issues.
(Protests based on INJURY TO PRIOR RIGHTS should be completed on other side of form)

APPLICATION 31165

1. I, (We) Forest Service, USDA

of 1824 S. Commercenter Cir., San Bernardino, (909) 383-5588 have read carefully a copy
of, or a notice relative to, Application 31165 of see attached
to appropriate from Santa Ana River
at a point see attached

2. I, (We) protest the above application on:

ENVIRONMENTAL ISSUES, ETC.:

The appropriation will not best conserve the public interest, will have an adverse environmental impact and/or will adversely affect a public trust use of a navigable waterway. *

a. Public interest protests should clearly indicate how the appropriation will affect the public.

b. Environmental protest should identify specific impacts and provide supporting recitals on issues such as: plants, animals or fish affected, erosion, pollution, aesthetics, etc.

c. Public trust protests must identify the navigable waters to be affected and how the project will impact public trust values.

Protests of a general nature (not project specific) or opposed to constitutional or legislated state policy will not be accepted. A request for information or for studies to be conducted is not a protest.

OTHER ISSUES, ETC.:

The appropriation will be contrary to law, will require access rights, will not be in the State Water Resources Control Board's jurisdiction, or concerns other issues.

Facts and, if applicable, points of law which support the foregoing allegations are as follows: see attached

3. Under what conditions may this protest be disregarded and dismissed? see attached

(Conditions should be a nature that the applicant can address and either accept or submit mitigating measures.)

4. A true copy of this protest has been served upon the applicant by mail

* For the purpose of filing a protest, navigable waters include streams and lakes that may be seasonally navigable in small recreational watercraft.

Date: 2-7-03

Notes: Attach supplemental sheets as necessary. Protests must be filed within the time specified in the notice of application

Personally or by mail
Protestant(s) or authorized representative sign here
Jack Giosman
Type or print name and title of representative, if applicable
33 New Montgomery St., 17th Floor
Street address
San Francisco, CA 94105
City and State
(415) 744-3166
Telephone number

1 JACK GIPSMAN
Attorney
2 Office of the General Counsel
U. S. Department of Agriculture
3 33 New Montgomery Street, 17th Floor
San Francisco, California 94105-4511
4 Telephone: (415) 744-3166

5
6 STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS
7

8 PETITIONS TO REVISE DECLARATION)
OF FULLY APPROPRIATED STREAMS)
9 TO ALLOW PROCESSING OF)
SPECIFIED APPLICATIONS)
10 TO APPROPRIATE WATER FROM)
THE SANTA ANA RIVER)
11

Application No. 31174
Application No. 31165

PROTEST BY FOREST SERVICE, USDA
TO NOTICE OF APPLICATION TO
APPROPRIATE WATER BY PERMIT

12 Pursuant to Section 760 of the California Code of Regulations and the Notice of
13 Application to Appropriate Water by Permit issued by the State Water Resources Control Board
14 (SWRCB) on January 11, 2002, and the Notice extending the protest period on January 23, 2003,
15 the Forest Service, USDA (Forest Service) submits this Protest to the joint applications filed by
16 San Bernardino Valley Municipal Water district (SBVMWD) and Western Municipal Water
17 district (WMWD) on May 31, 1995, and a separate application filed by Orange County Water
18 District (OCWD) on November 15, 1991, to appropriate water from the Santa Ana River
19 (hereinafter the "SBVMWD/WMWD Application" and the "OCWD Application", respectively).

20 A. Access

21 The Forest Service, under various authorities, is responsible for protecting and managing
22 National Forest System (NFS) lands and resources pursuant to a multiple-use mandate, see, e.g.
23 the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C.A. §§ 528-531, the Forest and
24 Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest
25 Management Act of 1976, 16 U.S.C.A. § 1600 *et seq.*, section 501 of the Federal Land Policy
26 and Management Act of 1976, 43 U.S.C.A. § 1761, and section 4(e) of the Federal Power Act, 16
27 U.S.C.A. § 797(e).

28 The Forest Service is greatly concerned about proposed development underlying the

1 applications before you. The proposed reservoir or "Conservation Pool" would inundate
2 National Forest System (NFS) lands up to the Santa Ana River No. 1 powerhouse. Because NFS
3 lands will be occupied by the proposal, a special use permit from the Forest Service will be
4 required before the proposal could be implemented.

5 Gene Zimmerman, the Forest Supervisor of the San Bernardino National Forest,
6 submitted a letter to you dated October 28, 1999 noting that Forest Service approval would be
7 required for this proposed project and that, prior to granting approval, there must be compliance
8 with the National Environmental Policy Act (NEPA) and Endangered Species Act (ESA).
9 (Exhibit A) While NEPA and ESA are important laws that must be dealt with, the procedural
10 requirements of NEPA and ESA come into play only after the Forest Service accepts the
11 application for a special use permit. In addition, the Forest Service must comply with the
12 National Forest Management Act (NFMA) which requires all projects to be consistent with the
13 applicable forest plan. 16 U.S.C. §1604(i); 36 CFR 219.10(e). Before the Forest Service can
14 accept the application, the proposed project must survive a new rigorous screening process which
15 is based, in large part, on the forest plan consistency requirement.

16 On November 30, 1998 the Forest Service amended its special use permit regulations to
17 require all proposed uses for NFS lands to go through a two-stage screening process. 36 CFR
18 254(e). 63 F.R. 65965 (Nov. 30, 1998). Proposals that do not survive either of the screening
19 stages will not be further considered and therefore, do not require environmental analysis and
20 documentation. 36 CFR 254(e)(2) and (6).

21 In order to pass the first screening stage, the authorized Forest officer must "ensure" that
22 the proposed reservoir meets the following minimum requirements, including but not limited to:

- 23 1. The proposed use is consistent or can be made consistent with standards and
24 guidelines in the applicable forest land and resource management plan. 36 CFR
25 §254(e)(ii), citing the National Forest Management Act, 16 U.S.C. §1604(i) and
26 the implementing regulations, 36 CFR 219.
- 27 2. The proposed use will not create an exclusive or perpetual right of use or
28

1 occupancy. 36 CFR §254(e)(iv).

2 If the proposal can pass the first screening stage it would then proceed to the second
3 stage. There the Forest officer is required to reject any proposal, if the officer determines:

- 4 1. The proposed use would be inconsistent or incompatible with the purposes for
5 which the lands are managed, or with other uses. 36 CFR 251.54(5)(i)
- 6 2. The proposed use would not be in the public interest. 36 CFR 251.54(5)(ii).

7 If the project proponents can demonstrate the inundation of NFS land will not create an
8 exclusive use or occupancy of that land, the San Bernardino Land and Resources Management
9 Plan (San Bernardino LRMP) contains several other requirements that will make it difficult for
10 this proposal to pass the screens. (Excerpts from the San Bernardino LRMP are attached as
11 Exhibit B.) The goals, expected future condition of the forest, and standards and guidelines of
12 the San Bernardino LRMP are all consistent in emphasizing protection and enhancement of
13 riparian areas, managing riparian areas for maintenance and enhancement of riparian dependent
14 resources, and managing water to meet or exceed beneficial use requirements. There are also
15 requirements to manage habitat for threatened, endangered and Forest Service sensitive species
16 to enhance populations, for genetic and geographic diversity and long-term viability, to improve
17 the distribution and productivity of habitat, and to attempt to re-establish species in unoccupied
18 habitat. Habitat protection and improvement is required to be emphasized in all forest
19 management activities. Management direction specific to the area of this project reiterates the
20 above in requiring maintenance and improvement of habitat conditions for species as well as
21 managing to maintain and enhance watershed integrity.

22 The NFMA does allow for amendment of forest plans. In addition, the San Bernardino
23 LRMP is currently in the midst of a process to revise its forest plan. The clear trend in recent
24 years, however, is that amended or revised plans contain far more stringent environmental
25 protection measures for fish and wildlife, riparian areas and watersheds than those found in the
26 plans adopted in the late 1980s.

1 **B. Environmental Considerations, Public Interest, Public Trust and Other Issues**

2 The California Environmental Quality Act requires the preparation of an Environmental
3 Impact Report prior to the SWRCB's consideration of the SBVMWD/WMWD Application. Cal.
4 Public Resources Code (PRC) § 21000 et seq., and the Guidelines adopted thereunder, Cal. Code
5 of Regulations(CCR) §15000 et seq.; SWRCB Order WR 2000-12. Approval of the
6 SBVMWD/WMWD Application, which is dependent on creation of a conservation pool behind
7 Seven Oaks Dam, has potential for adverse impacts to land and sensitive species located in the
8 area. The EIR prepared for the SWRCB's use must thoroughly consider the environmental
9 consequences and cumulative effects of approving the subject application. To help facilitate
10 inter-agency coordination, Section 21080.3(a) of the CCR requires the lead agency to consult
11 with all responsible agencies and trustee agencies before preparation of an EIR.

12 A Notice of Preparation for a Draft EIR for diversion of water from the Santa Ana River
13 was previously issued for applications 31174 and 31165. The Forest Service submitted written
14 comments in a letter dated August 8, 2002. The letter identified the following resource concerns
15 and issues as topics that warranted analysis in the Draft EIR that still must be prepared for these
16 consolidated applications:

- 17 • The storage of water behind the dam will result in a larger pool for a longer period of
18 time. This will likely result in increased human use (fishing) and thus disturbance to
19 wildlife.
- 20 • The increased size and duration of a lake will result in a greater likelihood that warm
21 water fish and exotic frogs and other species will become established and move upstream.
22 This could adversely affect trout and the success of planned native fish and amphibian
23 restoration.
- 24 • Backing water further and storing it longer will have a greater effect on the stream habitat
25 (spawning gravels etc.) upstream of the dam. This should be thoroughly evaluated and
26 mitigation measures developed.
- 27 • Riparian vegetation that would become established above the flood control pool would be

1 flooded for a considerably longer period of time under the proposal. It would result in a
2 significantly smaller amount of riparian habitat maintained in the long run due to
3 prolonged inundation. A riparian ecologist should evaluate this potential impact. The
4 San Bernardino LRMP would require mitigation for adverse impacts.

5 • Sediment, erosion, and bank sloughing from the shoreline would be accelerated due to the
6 saturation of the soil with longer standing water.

7 • Changes in flood regimes and instream flows downstream from the dam from current
8 flood control operation need to be considered and worked out in consultation with the
9 U.S. Fish and Wildlife Service and the Department of Fish and Game. There are at least
10 two threatened and endangered species (San Bernardino kangaroo rat and Santa Ana
11 sucker) downstream of the dam. Consistency in conclusions regarding analysis of effects
12 and appropriate mitigation is important as the Forest Service will need to formally consult
13 with the U.S. Fish and Wildlife Service under the Endangered Species Act when it
14 considers a special use permit application for the proposed conservation pool.

15 • The change in timing of flows could potentially affect the Santa Ana River woolly star
16 and the slender-horned spineflower, both endangered plant species known to occur
17 downstream of the dam. These species are dependent upon periodic flooding. The Forest
18 Service will need to formally consult with U.S. Fish and Wildlife Service for these plant
19 species as well.

20 • Exotic weeds may become established with fluctuating levels of water. The water
21 conservation alternative will result in a greater loss of vegetation and could cause a flux
22 of non-native exotic plants. This needs to be evaluated.

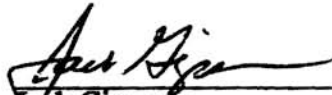
23 • Other potential effects from this project include but are not limited to: dewatering of
24 downstream habitats, desiccation of downstream riparian areas, alteration of downstream
25 and upstream channel morphology, loss or decrease of flushing flows, degradation of
26 streambed, decreased bank stability, changes in nutrient patterns, and alteration of
27 surface/subsurface flows.

1 • Potential mitigation measures for the wildlife, vegetation, and recreational impacts need
2 to be developed and considered as part of the environmental documentation for the
3 proposal. Hopefully, these items can be agreed to in collaboration with the affected
4 agencies and made a part of the proposed action.

5 The Forest Service reserves the right to raise additional issues and objections throughout the
6 course of the environmental review process under CEQA and consideration of these applications.

7 Dated: March 7, 2003.

8 Respectfully submitted,

9
10 

11 Jack Gipsman
12 Attorney for Forest Service, USDA
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT D

Memorandum

201...
31174
31165
Copy

DIV. OF WATER RIGHTS
SACRAMENTO

2002 NOV 19 PM 2:16

STATE WATER RESOURCES
CONTROL BOARD

To : Mr. Edward C. Anton, Chief
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812

Date: 11/5/02

Attn: Mr. Mitchell Moody

From : Department of Fish and Game -- South Coast Region and
Eastern Sierra-Inland Deserts Region

Subject: Protest of Water Applications (WA) 31174 of Orange County Water District (OCWD) and WA 31165 of San Bernardino Valley Municipal Water District (SBVMD) and Western Municipal Water District of Riverside County (WMWDRC); Tributaries to the Santa Ana River, and the Santa Ana River, Tributary to the Pacific Ocean in Orange, Riverside, and San Bernardino Counties

The Department of Fish and Game (Department) respectfully requests that the enclosed protests be accepted by the State Water Resources Control Board (SWRCB). The Department regrets that the enclosed protests are being submitted after the time originally allotted for the receipt of protests. Unfortunately, Nancee Murray, the person at the Department who received your March 4, 2002 letter regarding the extension of time for submittal of protests, was on maternity leave in March. The attorney assigned to this matter in her absence was in the process of leaving the Department in the summer of 2002 and did not realize that the protest deadline had passed some time in July. The Department participated in the earlier hearing regarding the revision to the Declaration of Fully Appropriated Streams for the Santa Ana River and participated in the July, 2002 telephone hearing regarding the limited revision to the Declaration. Other parties are aware of the Department's interest in the various applications to appropriate water from the Santa Ana River and should not be surprised or prejudiced by this later submittal of the Department's protests.

Basis of Protest

The Department's protest and interest in these applications is based on its status as trustee agency for fish and wildlife resources in California (Fish and Game Code Sections 711, 1802).

It is the goal and responsibility of the Department to protect and maintain viable populations of fish and wildlife resources throughout the State. Watershed and habitat protection are vital to our mission to manage California's diverse fish, wildlife and plant resources.

The Santa Ana River and its tributaries support the following State- and/or Federally-threatened or endangered species, and species of special concern (SSC):

Mr. Edward C. Anton, Chief
November 5, 2002
Page Two

San Diego fairy shrimp (*Branchinecta sandiegonensis*), Santa Ana sucker (*Catostomus santaanae*), Santa Ana speckled dace (*Rhinichthys osculus*), arroyo chub (*Gila orcutti*), arroyo toad (*Bufo californicus*), western spadefoot toad (*Scaphiopus hammondi*), southwestern pond turtle (*Clemmys marmorata pallida*), coastal western whiptail (*Cnemidophorus tigris multiscutatus*), orange-throated whiptail (*Cnemidophorus hyperythrus beldingi*), San Diego horned lizard (*Phrynosoma coronatum blainvillei*), western yellow-billed cuckoo (*Coccyzus americanus occidentalis*), least Bell's vireo (*Vireo bellii pusillus*), southwestern willow flycatcher (*Empidonax traillii extimus*), California gnatcatcher (*Polioptila californica*), Belding's savannah sparrow (*Passerculus sandwichensis beldingi*), California least tern (*Sterna antillarum browni*), snowy plover (*Charadrius alexandrinus nivosus*), tri-colored blackbird (*Agelaius tricolor*), yellow-breasted chat (*Icteria virens*), white-faced ibis (*Plegadis chihi*), white-tailed kite (*Elanus leucurus*), Swainson's hawk (*Buteo swainsoni*), ferruginous hawk (*Buteo regalis*), San Bernardino kangaroo rat (*Dipodomys merriami parvus*), Santa Ana River woollystar (*Eriastrum densifolium* ssp. *sanctorum*), and slender-horned spineflower (*Dodecahema leptoceras*).

The SSC designation is given to species that appear to be vulnerable to extinction because of declining populations, limited ranges, and/or continuing threats. Some SSC may be just starting to decline, while others may have already reached the point where they meet criteria for listing as a threatened or endangered species. For instance, the Santa Ana sucker is a SSC and federally-threatened species found in a limited stretch of the River below Prado Dam and a 6-km stretch between Norco and Riverside. Because these subpopulations are dependent upon adequate in-stream flow and releases from sewage plants, any reduction will likely have a devastating effect upon the population.

Native plants, including riparian habitat, and many resident wildlife species, are also present in this watershed and altering the flow regime may cause adverse changes in habitat and could ultimately alter species composition.

The Department is concerned that the proposed projects may result in direct and cumulative adverse impacts to the resources of the Santa Ana River basin by reducing in-stream flows needed to maintain riparian habitat and species within the drainage. We are also concerned that the cumulative diversion rate within the Santa Ana River basin may reduce riparian and wetland habitat values within the watershed

Furthermore, the Santa Ana River Basin Plan specifies that all six of the Santa Ana River reaches have two or more of the following beneficial use designations: WARM; COLD; WILD; RARE; and SPWN. According to the plan: WARM is defined as waters which support warmwater ecosystems that may include, but are not limited to, preservation and enhancement of aquatic habitats, vegetation, fish and wildlife,

Mr. Edward C. Anton, Chief
November 5, 2002
Page Three

including invertebrates; COLD is defined as waters which support coldwater ecosystems that may include, but are not limited to, preservation and enhancement of aquatic habitats, vegetation, fish and wildlife, including invertebrates; WILD is defined as waters which support wildlife habitats that may include, but are not limited to,

the preservation and enhancement of vegetation and prey species used by waterfowl and other wildlife; RARE is defined as waters which support habitats necessary for the survival and successful maintenance of plant or animal species designated under state or federal law as rare, threatened or endangered; and SPWN is defined as waters which support high quality aquatic habitats necessary for reproduction and early development of fish and wildlife. The basin plan requires the protection of beneficial uses and any impacts to these uses needs to be addressed.

Project Descriptions

Under WA 31174, the applicant proposes to appropriate 506,800 acre-feet for underground storage and subsequent diversion, and direct diversion, year-round. Under WA 31165, the applicants propose to directly divert 100,000 acre-feet, and 100,000 acre-feet for diversion to storage for a total of up to 200,000 acre-feet per year. The construction of additional infrastructure to distribute the proposed diversions to appropriate holding facilities and feeders are also proposed.

Protest Dismissal Terms

Protest Dismissal Terms, if adopted as enforceable conditions of the water rights permits, are intended to mitigate adverse impacts to fisheries and wildlife resources. However, information on the projects is currently limited, and the draft Programmatic Environmental Impact Report for OCWD and the draft Environmental Impact Report for SBVMD and WMWDRC on the diversion projects are currently being prepared, in accordance with the California Environmental Quality Act (CEQA). Until the draft documents are prepared, the information needed by the Department to develop specific protest dismissal terms is "not in the possession or under the control of the protestant" within the meaning of Water Code section 1335 (b). The Department reserves the right to develop more specific dismissal terms after the CEQA documents are released.

A. Based on the general information provided by the applicants, a site-specific study for the purpose of determining appropriate flow-related terms and conditions is needed. The study plan should include, at a minimum the following:

1. A hydrologic study to determine if the production of the watershed is sufficient to provide the water requested without having significant adverse impacts to aquatic and riparian resources of the subject streams or downstream reaches. The study shall identify all other basis of water rights in watersheds potentially affected by the

Mr. Edward C. Anton, Chief
November 5, 2002
Page Four

proposed appropriation, and the pending applications for appropriations for the Santa Ana River and its tributaries and downstream reaches. Furthermore, the study shall clearly identify where the points of diversion are located, the amount of water that will be discharged at each point, and shall identify current and future flow amounts, both for the projects and cumulatively.

2. A habitat-based stream needs assessment that incorporates habitat, species, and life history criteria specific to the Santa Ana River, the tributaries and downstream reaches.

3. A complete updated (within the last 2 years) assessment of the flora and fauna within and adjacent to the project areas, with particular emphasis upon identifying endangered, threatened, and sensitive species and sensitive habitats. This includes protocol surveys (USFWS and/or Department protocol) for the presence of listed plant and animal species and SSC conducted on the entire project site, places of diversion (including downstream reaches affected by the diversions), places of storage, and places of use. The Department's California Natural Diversity Data Base in Sacramento should be contacted at (916) 327-5960 to obtain current information on any previously reported sensitive species and habitat, including Significant Natural Areas identified under Chapter 12 of the Fish and Game Code.

4. Quantify the loss of resources that have occurred, and that will occur, as a result of the diversion amounts and timing set forth in the application. Evaluate the impacts to resources based on the amount of water that the existing permit specifies, the amount of water actually currently being diverted, and proposed future diversion amounts. The CEQA documents should contain a thorough discussion of direct, indirect, and cumulative impacts expected to adversely affect biological resources, with specific measures to offset such impacts. Project impacts should be analyzed relative to their effects on off-site habitats. Specifically, this should include nearby rivers, streams, or lakes located downstream of the project, public lands, open space, adjacent natural habitats, and riparian ecosystems. Impacts to and maintenance of wildlife corridor/movement areas, including access to undisturbed habitat in adjacent areas, should be fully evaluated and provided.

5. A specific proposal to provide minimum bypass flows for maintenance of aquatic habitat, fish, and wildlife resources including, but not limited to, Santa Ana sucker, Santa Ana speckled dace, arroyo chub, arroyo toad, western spadefoot toad, least Bell's vireo, southwestern willow flycatcher and southwestern pond turtle. The starting point for determining the minimum bypass flow should be the estimated unimpaired February median flow at the points of diversion.

6. An assessment of the impacts of the proposed diversions on channel forming flows with a specific proposal to provide periodic channel maintenance and flushing flows that are representative of the natural hydrograph.

7. A plan to monitor compliance, the effectiveness of the stipulated flows, and procedures for making subsequent modifications, if necessary.

8. A mitigation plan aimed at replacing lost plant, fish, and/or wildlife resources including, but not limited to, species or habitats described above, and in the California Natural Diversity Database. This plan shall include a survey which quantifies loss of resources that have or will occur as a result of these projects. Plans will specify measures taken to offset impacts to resources and outline specific mitigation and monitoring programs.

9. If warranted, an erosion control plan shall be developed. This plan shall outline measures aimed at alleviating sediment delivery into the tributaries and the Santa Ana River basin. This plan shall include:

a. Time restriction for grading operations or other project-related activities to reduce the potential for erosion and sediment delivery to affected streams.

b. Buffer zones shall be established along any riparian corridor of the affected project site. Discing or removal of existing riparian vegetation or other disruptive work shall not occur within said buffer zone.

c. Erosion control for all exposed areas susceptible to erosion including seeding, mulching, tree planting, slope contouring, and other erosion protection measures shall be included in this plan.

B. When the results of the above-indicated studies and plans are provided to the Department, appropriate mitigation measures and protest dismissal terms will be determined. Depending on the outcome of these studies, dismissal terms may include, but are not limited to:

1. The unimpeded passage of fish and wildlife resources both upstream and downstream shall be obtained. Any device or contrivance which prevents, impedes, or tends to prevent or impede the passage of fish and wildlife up or downstream shall not be accepted as a means to divert or store water.

2. During diversion, a flow around or through the point of diversion shall be bypassed which will be of sufficient quantity and quality to maintain in good condition any fish and wildlife resources that are likely to exist in downstream reaches under unimpaired flows. Determination of the bypass flow can be based on site-specific biological investigations conducted in consultation with the Department.

State of California
 State Water Resources Control Board
DIVISION OF WATER RIGHTS
 P.O. Box 2000, Sacramento, CA 95812-2000
 Info: (916) 341-5300, FAX: (916) 341-5400, Web: http://www.waterrights.ca.gov

PROTEST - APPLICATION

Based on Environmental Considerations, Public Interest, Public Trust, and Other Issues
 (Protests based on INJURY TO PRIOR RIGHTS should be completed on other side of form)

APPLICATION 31174

STATE WATER RESOURCES CONTROL BOARD
 2002 NOV 19 PM 2:18
 DIV. OF WATER RIGHTS SACRAMENTO

1. I, (We) California Department of Fish and Game
 of 1416 Ninth Street, Sacramento, CA 95814 (_____) have read carefully a copy
Name of Protestant(s)
Mailing address and zip code of protestant(S) Telephone Number
 of, or a notice relative to, Application 31174 of the Oranoe County Water District
Name of applicant
 to appropriate from the Santa Ana River
Name of source
 at a point various

2. I, (We) protest the above application on:
 ENVIRONMENTAL ISSUES, ETC.:
 The appropriation will not best conserve the public interest, will have an adverse environmental impact and/or will adversely affect a public trust use of a navigable waterway.
 a. Public interest protests should clearly indicate how the appropriation will affect the public.
 b. Environmental protest should identify specific impacts and provide supporting recitals on issues such as: plants, animals or fish affected, erosion, pollution, aesthetics, etc.
 c. Public trust protests must identify the navigable waters to be affected and how the project will impact public trust values.
 Protests of a general nature (not project specific) or opposed to constitutional or legislated state policy will not be accepted. A request for information or for studies to be conducted is not a protest.

OTHER ISSUES, ETC.:
 The appropriation will be contrary to law, will require access rights, will not be in the State Water Resources Control Board's jurisdiction, or concerns other issues.

Facts and, if applicable, points of law which support the foregoing allegations are as follows: see attached

3. Under what conditions may this protest be disregarded and dismissed? see attached
 (Conditions should be a nature that the applicant can address and either accept or submit mitigating measures.)

4. A true copy of this protest has been served upon the applicant by mail

* For the purpose of filing a protest, navigable waters include streams and lakes that may be seasonally navigable in small recreational watercraft.

Date: 11/15/02

Notes: Attach supplemental sheets as necessary. Protests must be filed within the time specified in the notice of application

(Signature)
 Protestant(s) or authorized representative sign here
C.F. KRYSER REGIONAL MANAGER RS
 Type or print name and title of representative, if applicable
4949 VIEWRIDGE AVENUE
 Street address
SAN DIEGO, CA 92123
 City and State
(619) 467-4210
 Telephone number

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
P.O. Box 2000, Sacramento, CA 95812-2000
Info: (916) 341-5300, FAX: (916) 341-5400, Web: http://www.waterrights.ca.gov

PROTEST - APPLICATION

Based on Environmental Considerations, Public Interest, Public Trust, and Other Issues
(Protests based on INJURY TO PRIOR RIGHTS should be completed on other side of form)

APPLICATION 31165

STATE WATER RESOURCES
CONTROL BOARD
2002 NOV 19 PM 2:18
DIV. OF WATER RIGHTS
SACRAMENTO

1. I, (We) California Department of Fish and Game
of 1416 Ninth Street, Sacramento, CA 95814, (_____) _____ have read carefully a copy
Mailing address and zip code of protestant(S) Telephone Number
of, or a notice relative to, Application 31165 of the San Bernardino and Western Water Districts
Name of applicant
_____ to appropriate from the Santa Ana River
Name of source
at a point various

2. I, (We) protest the above application on:

ENVIRONMENTAL ISSUES, ETC.:

The appropriation will not best conserve the public interest, will have an adverse environmental impact and/or will adversely affect a public trust use of a navigable waterway. *

a. Public interest protests should clearly indicate how the appropriation will affect the public.

b. Environmental protest should identify specific impacts and provide supporting recitals on issues such as: plants, animals or fish affected, erosion, pollution, aesthetics, etc.

c. Public trust protests must identify the navigable waters to be affected and how the project will impact public trust values.

Protests of a general nature (not project specific) or opposed to constitutional or legislated state policy will not be accepted. A request for information or for studies to be conducted is not a protest.

OTHER ISSUES, ETC.:

The appropriation will be contrary to law, will require access rights, will not be in the State Water Resources Control Board's jurisdiction, or concerns other issues.

Facts and, if applicable, points of law which support the foregoing allegations are as follows: see attached

3. Under what conditions may this protest be disregarded and dismissed? see attached

(Conditions should be a nature that the applicant can address and either accept or submit mitigating measures.)

4. A true copy of this protest has been served upon the applicant by mail

* For the purpose of filing a protest, navigable waters include streams and lakes that may be seasonally navigable in small recreational watercraft.

Date: 11/15/02

Notes: Attach supplemental sheets as necessary. Protests must be filed within the time specified in the notice of application

Personally or by mail
Curt Taucher for CURT TAUCHER
Protestant(s) or authorized representative sign here
CURT TAUCHER, REGIONAL MANAGER, RG
Type or print name and title of representative, if applicable
330 GOLDEN SHORE, SUITE 210
Street address
LONG BEACH, CA 90802
City and State
(562) 590-5113
Telephone number