



# CENTER FOR BIOLOGICAL DIVERSITY

May 30, 2006

*via facsimile and first class mail*

Craig Miller  
Orange County Water District  
10500 Ellis Avenue  
Fountain Valley, CA 92708  
Phone: 714-378-3200  
Fax: 714-378-3373

**RE: Orange County Water District Application to Appropriate Santa Ana River Water -  
Recirculated Draft Program Environmental Impact Report SCH #2002081024**

Dear Mr. Miller:

The Center for Biological Diversity ("the Center") is a non-profit, public interest environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has over 22,000 members throughout California and the United States. The Center submits the following comments on the Recirculated Draft Program Environmental Impact Report ("DPEIR") for the Orange County Water District Application to Appropriate Santa Ana River Water State Clearinghouse #2002081024 ("the project") on behalf of our members, staff, and members of the public with an interest in protecting the native species and habitats along the Santa Ana River.

The Center contends that the DPEIR still fails to identify and adequately analyze potential environmental impacts for all of the proposed projects and fails to provide adequate alternatives that would avoid those impacts or include enforceable mitigation measures to minimize those impacts, as required by law. The application for 505,000 af/y of native Santa Ana River (SAR) water is not fully analyzed and in compliance with the California Environmental Quality Act (CEQA). The Center strongly urges the Orange County Water District ("OCWD") to seek a water rights application only for the proposed projects that currently have project-level CEQA analysis in this DPEIS. If the OCWD submits an application for additional water, then we contend these projects need to be fully analyzed in an updated and recirculated DPEIR.

/

/

/

Tucson • Phoenix • San Francisco • San Diego • Los Angeles • Joshua Tree • Pinos Altos • Portland • Washington, DC

---

Adam F. Keats, Staff Attorney • 1095 Market St., Suite 511 • San Francisco, CA 94103  
Phone: 415-436-9682 x304 • Fax: 415-436-9683 • akeats@biologicaldiversity.org

**A. The DPEIR Improperly Defers CEQA Mandated Environmental Review and Mitigation.**

**1. Adequacy of Water Availability for the Application.**

We question the need for a water rights application for 505,000 ac/y. Figure ES-1 (DPEIS at Page ES-5) does not support the availability of 505,000 ac/y of “native” SAR water. That amount is more than double the acre-feet/year of water that is currently available. We question the adequacy of the analysis that 505,000 af/y of “native” SAR water will be available in the future for the Orange County Water District (“OCWD”) to acquire. Thirty years of water flow data do not fully represent the cyclical nature of hydrological processes in southern California. We contend a much more comprehensive data set is necessary to adequately establish native SAR flows. From those data, a more realistic amount of water can be determined that may be available for water rights applications.

To date the greatest amount of water in a single year that has been available for the OCWD to divert was 237,000 af (DPEIS at Page ES-2). This amount is below the current recharge capacity of 250,000 af/y of OCWD’s existing facilities (DPEIS at Page ES-3). On average currently there is only enough “native” SAR water to provide 184,000 af/y for recharge (DPEIS at Page ES-4), an amount that the current facilities can easily infiltrate. In light of the unproven availability of additional “native” SAR water, the proposed projects appear to be unnecessary, and the water rights application is requesting more “native” SAR water (af/y) than is actually available. We are very concerned that this Application and DPEIS will only add to the steadily-growing list of “paper-water” entitlements throughout southern California and on the Santa Ana in particular. Although future planning is important and necessary, the DPEIS makes almost no concessions to the very real possibility that the OCWD’s projections will not be met. Granting numerous overlapping appropriations and thus allowing for the removal of more water than exists is completely detrimental to the health of the SAR and the surrounding environment. CEQA demands that this significant impact be identified, analyzed, and mitigated, if possible. The DPEIS fails to do this.

**B. The DPEIR Fails To Properly Identify the Full Range of Direct, Indirect, and Cumulative Impacts to Biological Resources and Mitigate Those Impacts.**

**1. Analysis of Impacts.**

Many of the inadequacies of the DPEIR identified in these comments stem from the fact that the document improperly defers identification and analysis of the project’s impacts for the “programmatic” projects, as well as formulation of mitigation measures, to later stages of project development. This deferral frustrates informed decision-making and violates CEQA. The DPEIS is based on a number of projects that are analyzed as posing a potentially significant impact to numerous environmental resources (DPEIS at Page 5-13 through 5-24). However, the evaluation of the resources and analyses of impacts are deferred to future CEQA documents. Just mentioning the potential broad impacts does not in any way satisfy CEQA’s requirement to thoroughly analyze the environmental effects of the impacts in order to avoid or mitigate those

effects. This is an unfortunate consequence of the lack of information about specific populations of wildlife and plants.

## 2. Mitigation Measures

Most of the mitigation measures proposed in the DPEIR are already required by existing law and do not represent additional efforts to avoid or mitigate the environmental harm that will result from build-out of the project. These mitigation measures include requiring biological surveys to be conducted, obtaining the proper permits, determining jurisdictional surface waters, zones for open space, and protect active raptor nests. Further, a number of important mitigation measures are either deferred to a later time or are inadequate to offset the extreme damage that will occur from additional infrastructure development in both a State Park and within the boundaries of a Natural Communities Conservation Plan area.

Unfortunately, the DPEIR is full of examples of impacts that are identified in only the most cursory fashion, and left both unanalyzed and unmitigated. For example, Section 5.5 identifies impacts to 933 acres of critical habitats for the Least Bell's Vireo and southern Willow Flycatcher; however, analyses of the impacts to these federally listed species in the plan area are left to future EIRs, and thorough discussion of mitigation for lost habitat is limited to "See **RB-BIO-1** and **RB-BIO-2**." RB-BIO-1 states that "The District will consult with resource agencies including the USFWS, CDFG, the USACE, and the RWQCB to obtain necessary permits prior to implementation of projects that could result in disturbance to biological resources". RB-BIO-2 states:

The District shall implement a pre-construction mitigation strategy first to identify sensitive habitats, plants, and wildlife species, and then to avoid impacts if possible. If avoidance is not possible, the District shall minimize the impact and compensate in accordance with permitting requirements. This general mitigation strategy is summarized below.

- **Determine if sensitive habitats or species are present:** The District will retain qualified biologists to survey the project site for sensitive habitats, plants, and wildlife species.
- **Avoid loss of sensitive habitats and species:** The District will avoid disturbing sensitive biological resources, if possible. During project planning and siting, alternative locations or project configurations will be evaluated.
- **Minimize loss of sensitive habitats and species:** If avoidance is not possible, the District will limit construction activities in and around sensitive habitats and species to the minimum area necessary.
- **Compensate for unavoidable loss of sensitive habitats and species:** If avoidance is not possible, the District will compensate for the unavoidable losses in coordination with the USFWS and CDFG. Compensation for sensitive habitats and special-status plant communities could involve either purchasing property with similar habitat or plant communities and providing for their protection and management for wildlife value in perpetuity, or enhancing sensitive habitat and plant communities within existing conservation areas.

All of these mitigation measures are generalized, and do not analyze what the actual impacts will be and how, when and where the mitigations for specific impacts will be implemented.

Furthermore, Section 5.5 indicates that many of these resources have “potentially significant” impacts (DPEIR at 5-20 through 5-23), with no additional proposed mitigation measures. Given the high number of federally listed species on the project sites, the DPEIR is seriously and fundamentally flawed because it fails to adequately analyze the applicability of the Endangered Species Act (“ESA”) to the proposed projects. Section 9 of the Endangered Species Act forbids the “take” of threatened and endangered species. 16 U.S.C. §1538, ESA §9; 50 C.F.R. § 17.31. Take is defined by the ESA as “harass, harm, pursue, hunt, wound, kill, trap, capture, collect, or attempt to engage in such conduct,” 16 U.S.C. § 1532(19), and harm “means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 CFR §17.3. The DPEIR will result in harm to a number of protected species, through modification and degradation of its habitat, and may result in harm to several other listed species. Unfortunately, the DPEIR fails to adequately identify or analyze these issues.

Further, because this document is programmatic, these projects may be built-out over the course of 15 to 20 years. CEQA requires that all the proposed projects be evaluated as a whole and be reviewed at the *earliest possible time* in order to avoid the kind of piecemeal implementation that fails to take into account the direct, indirect, and cumulative environmental impacts of each stage, phase, or part of a project. One of the fundamental objectives of CEQA is to facilitate the identification of “feasible alternatives or feasible mitigation measures which will avoid or substantially lessen” significant environmental effects. Pub. Res. Code § 21002. Under CEQA, “public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects. . . .” Public Resources Code § 21002. Consequently, an EIR must accurately identify impacts and feasible measures to mitigate significant environmental impacts identified in the EIR. 14 CCR §15126. The OCWD’s duty to provide a detailed analysis of environmental impacts of the proposed projects and to impose enforceable mitigation measures cannot be deferred to a later stage of environmental analysis.

### **C. Conclusion**

The above-described defects must be corrected before the OCWD can lawfully proceed through the water rights application process. The DPEIR for the Application to Appropriate Santa Ana River Water fails to adequately disclose, analyze, avoid, minimize, and mitigate the environmental impacts of the proposed projects. As detailed above, the DPEIR fails to comply with CEQA and fails to provide necessary information about the impacts of the project in many areas including biological resources, water availability, and other environmental resources.

Neither decision-makers nor the public can make informed decisions about the costs to the environment of the proposed projects based on this fundamentally flawed and cursory

environmental review. The Center looks forward to reviewing a revised EIR that takes into account the issues raised in this comment letter and in letters provided by others.

Sincerely,

/s/

Adam Keats  
Staff Attorney  
Center for Biological Diversity

CC:

Field Supervisor  
USFWS- Ecological Services  
Carlsbad Field Office  
6010 Hidden Valley Road  
Carlsbad, CA 92011

California Department of Fish and Game  
Los Alamitos Administrative Office  
4665 Lampson Avenue, Suite J  
Los Alamitos, CA 90720