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*protecting and restoring natural ecosystems and imperiled species through
science, education, policy, and environmental law*

VIA U.S. MAIL

January 11, 2005

Robert L. Reiter
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POB 5906
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(909) 387-9200

Re: Draft EIR for the Santa Ana River Water Right Applications for Supplemental Water Supply

Dear Mr. Reiter:

These comments are submitted on behalf of the Center for Biological Diversity ("Center") for the Draft Environmental Impact Report ("EIR") for the Santa Ana River Water Right Applications for Supplemental Water Supply ("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 11,000 members throughout California and the western United States, including Riverside and San Bernardino Counties. As described below, the Center objects to approval of the project based on the inadequacy of the current environmental documents.

The Draft Environmental Impact Report has been prepared pursuant to the California Environmental Quality Act ("CEQA") to evaluate the potential environmental impacts associated with water right applications filed by the San Bernardino Valley Municipal Water District ("Muni") and Western Municipal Water District of Riverside County ("Western"). Muni/Western have jointly filed two applications with the State Water Resources Control Board ("SWRCB") to appropriate 200,000 acre feet per year ("afy") of water from the Santa Ana River.

In 1989 (WR 89-25) and again in 1998 (WR 98-08), the SWRCB issued a declaration that the Santa Ana River was considered fully appropriated year-round. In 1989, the state Water Code prevented the SWRCB from accepting any new applications to appropriate water from watercourses considered fully appropriated. Muni/Western subsequently submitted a petition to revise the Declaration of Fully Appropriated Stream Status for the Santa Ana River ("SAR"), together with an application to appropriate 100,000 afy from the SAR. Muni/Western provided evidence which

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represented that flows in the SAR watershed had increased due increased runoff and releases of treated wastewater resulting from urbanization, and increased availability of water during wet years due to the subsequent operation of the Seven Oaks Dam.

The project also includes the following construction related activities: modification of the intake structure and access roads at Seven Oaks Dam; creation of the Plunge Pool Pipeline, Low Flow Connector Pipeline, and Morton Canyon Connector II Pipeline; modification of the Devil Canyon area, including State Water Project Afterbays, to accommodate the Devil Canyon By-Pass Pipeline; and creation of the Lower Lytle Creek Pipeline and Cactus Basin Pipeline.

The direct and indirect effects of the project will impact a host of rare, sensitive, threatened and endangered species, but not limited to, the following: Marsh Sandwort (*Arenaria paludicola*), Gambel's Water Cress (*Rorippa gambelii*), Stephen's Kangaroo Rat (*Dipodomys stephensi*), Arroyo Toad (*Bufo californicus*), California Red-Legged Frog (*Rana aurora draytonii*), Western Yellow-billed Cuckoo (*Coccyzus americanus occidentalis*), Southwestern Willow Flycatcher (*Empidonax trailii extimus*), Coastal California Gnatcatcher (*Polioptila californica californica*), Least Bell's Vireo (*Vireo bellii pusillus*), Santa Ana Sucker (*Catostomus santaanae*), The Santa Ana River Woolly-Star (*Eriastrum densifolium ssp. sanctorum*), Slender-Horned Spineflower (*Dodecahema leptoceras*), San Bernardino Kangaroo Rat (*Dipodomys merriami parvus*), Nevin's barberry (*Berberis nevinii*), SAR woolly star (*Eriastrum densifolium ssp. sanctorum*), Swainson's hawk (*Buteo swainsoni*), Plummer's mariposa Lily (*Calochortus plummerae*), Robinson's peppergrass (*Lepidium virginicum var. robinsonii*), Arroyo Chub (*Gilia orcutti*), Santa Ana speckled dace (*Rhinichthys osculus ssp. 3*), Western spadefoot toad (*Scaphiopus hammondii*), Southwestern pond turtle (*Clemmys marmorata pallida*), San Diego horned lizard (*Phrynosoma coronatum blainvillei*), Sharp-shinned hawk (*Accipiter striatus*), Burrowing owl (*Athene cunicularia*), Coastal cactus wren (*Campylorhynchus brunneicapillus couesi*), and California thrasher (*Toxostoma redivivum*). Draft EIR Table 3.3-2, 3.3-3, E5-1, E5-2.

Many localities, agencies and organizations, including the Center, commented on the project when the Notice of Preparation was released. The Center herein incorporates by reference comments made by those organizations listed in the Draft EIR, Appendix D at 2-3, 54-101. The comments referenced herein include, but are not limited to, those referenced in the list in Exhibit 1, App. D, NOP comment list and references.

I. THE DRAFT EIR'S ANALYSIS OF IMPACTS TO BIOLOGICAL RESOURCES IS INADEQUATE

The Biological Resources section of the Draft EIR fails to adequately disclose, analyze, minimize, and mitigate impacts to the biological resources of the project site. While the Draft EIR discloses that the endangered threatened Santa Ana sucker (*Catostomus santaanae*, "sucker"), as well as a host of other state-listed and sensitive species, will be impacted by the project, the Draft EIR fails to adequately analyze the significance of the project to these species.

The project represents three of the four main threats contributing to the decline of the sucker: 1) direct loss of suckers due to water diversions; 2) loss of connectivity; 3) destruction and degradation of habitat through urbanization, channelization and other flood control structures, water diversion and

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withdrawal, reductions in water quality; and 4) competition and predation from introduced non native competitors. 65 Fed. Reg. 19696 (April 12, 2000). As a threat contributing to the decline of the sucker population the project must be analyzed critically within the DEIR.

Contrary to CEQA guidelines and relevant case law, the Draft EIR erroneously concludes that the impacts the Santa Ana sucker will be less than significant. The project will have significant impacts on sucker habitat. The Legislature and the Secretary of Resources have determined that certain kinds of impacts are necessarily significant. "Mandatory findings of significance" are required for the following circumstances:

The project has the potential to... substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, [or] reduce the numbers or restrict the range of an endangered, rare or threatened species.

CEQA Guidelines § 15065; see also Pub. Resources Code § 21083 [emphasis added]. Additionally, the State CEQA Guidelines Appendix G defines an impact significant if it would "interfere substantially with the movement of any native resident or migratory fish or wildlife species."

Section 15065 applies "to the contents of an EIR once it is determined an EIR must be prepared." *Los Angeles Unified School Dist. V. City of Los Angeles* 58 Cal.App.4th 1019, 1024, fn.6. The mandatory findings of significance control "the identification of effects to be analyzed in depth in the EIR, the requirement to make detailed findings on the feasibility of alternatives and mitigation measures to reduce or avoid the significant effects, and when found to be feasible, the making of changes in the project to lessen the adverse environmental impacts." Discussion following CEQA Guidelines § 15065. The drafters of the guidelines realized that this section was necessary to assure agencies follow the concerns of the Legislature to determine whether effects are significant. *Id.* Courts have determined that impacts to aquatic habitat for rare flora and fauna are significant under section 15065 and require full evaluation and recirculation prior to approval. *Mira Monte Homeowners Association v. Ventura County* 165 Cal.App.3d 357, 363-364.

The project has the potential to reduce the numbers or restrict the range of an endangered species. The Project would decrease flows in the Santa Ana River on non-storm days between Seven Oaks Dam and Riverside Narrows, and no feasible mitigation measures were identified to alleviate that impact. Draft EIR at S-3. Sucker habitat is present above the Riverside narrows and would be impacted by the reduction in flows. Draft EIR 3.3-63. There is no analysis of how the impacts will affect aquatic habitat for the species. The Draft EIR simply concludes that the impact is less than significant. This analysis is contrary to federal agency opinions on the importance of flow for aquatic species. For example, the United States Fish and Wildlife Service emphasizes that the temporary reduction of flows can significantly reduce the amount of habitat for suckers and could potentially strand them in dewatered sections of the stream. Exhibit 2, *Biological Opinion for the Prado Dam Water Conservation and Supply Study, Orange, Riverside, and San Bernardino Counties, California*, at 13. The reduction and quantification of cfs is not a valid indicator, by itself, of the effects on sucker numbers and habitat. In order for the analysis to be valid the Draft EIR must assess how the reduction in flow will affect the minimum viable population and the amount of occupied habitat. Studies on sucker reintroduction have shown that the establishment of multiple independent, viable populations or subpopulations of a species is an effective buffer against species extinction and is a frequently used measure of species recovery. Exhibit 3, *Results of the Year 3 Implementation of the Santa Ana Sucker*

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Conservation Program For the Santa Ana River, Final Report, at 4. The Draft EIR must analyze the impacts of reduced flows on the minimum viable population and habitat in order to determine the level of significance.

Further, the Draft EIR concludes that the loss of critical habitat for a federally endangered species will be less than significant. Draft EIR at Table 3.3-2 (page 5 of 5). Nevertheless the Draft EIR dismisses these impacts as insignificant. *Id.* Regardless of the adequacy of these conclusions, this analysis is invalid as a matter of law. The impacts must be analyzed in depth, as a significant impact, because of their potential to reduce the numbers and restrict the range of the sucker.

The Draft EIR does not discuss the impacts on potential movement of the Santa Ana sucker upstream to reproduce in critical habitat within the project area. The Santa Ana sucker belongs to the family Castostimidae. Other species in the Castostimidae family are known to undertake spawning migrations. Tyrus and Karp 1990. Although it is not known whether the Santa Ana sucker follows similar reproductive behavior, Swift reported that Santa Ana sucker juveniles detected downstream of River Road in the Santa Ana River were likely the progeny of adults reproducing upstream. Swift 2000. These suckers may need to return upstream to spawn. The Draft EIR does not analyze the impacts to sucker reproduction or fecundity due to the decreased flows in the Santa Ana.

The Draft EIR also fails to address the impacts to other rare aquatic species. The arroyo chub (*Gila orcutti*) and Santa Ana speckled dace (*Rhinichthys osculus* ssp.) are both state and federal species of special concern that exist within the project area between Seven Oaks Dam and the Prado Flood Control Basin. Draft EIR at 3.3-5, Table E5-2 (page 2 of 7). The Draft EIR admits these species exist within the project area, yet neglects to analyze the impacts to these species. As rare species, per CEQA Guidelines § 15065, the project's impacts to these species must be addressed.

The project will negatively impact habitat and populations of the Arroyo Chub. The primary water quality threat to the arroyo chub in the Santa Ana River in western Riverside County is the long-term security of base flows within the river downstream of the Rapid Infiltration and Extraction Plant (RIX) outlet. Exhibit 4, *Final Multiple Species Habitat Conservation Plan. Volume II-B* F-13. The flow within the river is subject to frequent drops downstream of the Rialto Drain and the RIX plant, which are the origination sources of flow for the river below the Seven Oaks Dam in San Bernardino County. *Id.* Swift indicates that every few weeks the flow drops by more than 50 percent for a few hours or more during maintenance and Clean Water Act (CWA) requirements, dramatically reducing the shallow water habitats favored by native fishes downstream to Riverside Avenue and potentially limiting the number of fish that may inhabit the upstream areas of the river. Swift 2001. A portion of these flows may be subject to sale in the future, potentially reducing the flow volume available to the arroyo chub in the river. Exhibit 4. In addition, water pollution from non-point sources including heavy metals, high-levels of bacteria, and low levels of protozoa and viruses has been identified as a potential threat. Egan *et. al.* 1992. These factors are not mentioned, analyzed or addressed in the Draft EIR. The project's impacts on a State Species of Special Concern must be analyzed for the EIR to be valid.

The project's threats on the Santa Ana speckled dace were not addressed or analyzed. The Santa Ana speckled dace occupies only remnants of its native range because of water diversions, urbanization of watersheds, introduction of nonnative species, and a myriad other factors associated

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with expanding human populations in the Los Angeles region. Exhibit 5, *Fish Species of Special Concern in California, Santa Ana Speckled Dace*. It is considered to be one of the rarest native fishes in coastal southern California. *Id.* The remaining populations of Santa Ana speckled dace in the Los Angeles River were extirpated during the past ten years and dace in the Santa Ana River system are in imminent danger of extinction. *Id.* In order to maintain the remaining dace population the California Department of Fish and Game recommends that immediate steps should then be taken to protect the remaining habitats in all the San Gabriel and Santa Ana drainages, including measures to secure enough water for the fish to live in. *Id.* The appropriation of water from the Santa Ana river will reduce flows between the Seven Oaks dam and the Riverside narrows. The elimination of water from speckled dace habitat must be analyzed in the Draft EIR.

The Draft EIR states negative surveys for rare, sensitive, threatened and endangered species in viable habitat constitute a less than significant impact because the species do not exist on the project site. Draft EIR 3.3-21, 3.3-22, 3.3-24, 3.3-26. This is simply incorrect. Negative surveys do not mean that the species does not utilize the habitat on the project site; it simply means that the species was not present at the time of the survey. The project will eliminate suitable habitat for sensitive species and contribute to continued habitat fragmentation, and destruction. The elimination of marginal or immature habitat because it presently does not meet the ideal habitat for sensitive species will prevent the species from ever using that habitat in the future during dispersal and/or colonization. These impacts must be addressed and mitigated.

Impacts to sensitive species and their habitat should be fully analyzed and mitigated. Species are categorized as sensitive because of their potential to become threatened or endangered in the future. Impacts from human development, urbanization, habitat alternation and fragmentation, are some of the biggest threats to fish and wildlife. As discussed above CEQA requires a mandatory finding of significance if a project has the potential to reduce the numbers or restrict the range of an endangered, rare or threatened species. CEQA Guidelines § 15065. Direct mortality of sensitive species is a significant impact and must be analyzed in depth as a significant impact. The Draft EIR repeatedly claims that impacts to sensitive species resulting from habitat loss, disturbance and direct mortality are less than significant. Draft EIR 3.3-48, 3.3-50, 3.3-51. In order to determine the significance of the impact to sensitive species, the EIR should disclose a quantified analysis of impacts to species populations resulting from project activities. Additionally, the results of numerous individual projects eliminating small habitat fragments are cumulatively considerable. The project cannot rationalize impacts to sensitive species and their habitat as insignificant without mitigation. The Draft EIR must mitigate the impacts of habitat destruction.

In general, the Draft EIR fails to disclose or minimizes the impacts to the endangered, threatened, and sensitive species that will be impacted by the project. Having done so, the Draft EIR then fails to propose adequate avoidance or mitigation measures.

II. THE DRAFT EIR'S ANALYSIS OF GROWTH INDUCING AND GROWTH RELATED IMPACTS IS INADEQUATE

CEQA requires complete analysis of a project's growth inducing and cumulative impacts. The Draft EIR's treatment of these vitally important topics is inadequate. The Draft EIR admits that the

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project will remove an obstacle to population growth by providing additional water supplies for the area. Draft EIR at 4-2. This availability of additional water will inevitably facilitate and fuel further sprawl style development with all of its attendant environmental impacts. These impacts must be disclosed, quantified, avoided where possible, and mitigated.

The Draft EIR repeatedly refers to the County of San Bernardino General Plan Final EIR and the County of Riverside General Plan Draft EIR instead of fully analyzing the growth related impacts resulting from the project. The lead agencies rely on CEQA Guidelines Section 15091(a)(2) “to find that mitigation for growth related impacts is the responsibility of other public agencies, which either have adopted or should adopt such mitigation during the course of project-specific CEQA analysis.” Draft EIR at 4-2. Unfortunately, the lead agencies interpretation is contrary to the legislative intent of the governing guidelines. The lead agencies combined with the local municipalities share the burden of addressing growth related impacts. The guidelines clearly state the legislature intended CEQA to address “the problem of agencies deferring to each other, with the result that no agency deals with the problem.” Discussion following CEQA Guidelines § 15091. Shifting the responsibility for analysis and mitigation of environmental impacts is contrary to the purpose of CEQA that “*all* agencies... which are found to affect the quality of the environment, *shall* regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.” Pub. Resources Code § 21000 [emphasis added].

The lead agencies’ reliance on the EIRs drafted by San Bernardino and Riverside counties compounds the problem because the counties’ underlying EIRs declare significant unavoidable impacts, i.e., impacts unable to be mitigated to a less than significant level, are identified for the following resources: Air Quality; Agricultural Resources; Biological Resources; Cultural and Paleontological Resources; Geology, Soils and Mineral Resources; Hydrology and Water Quality; Noise; and Public Services, Utilities and Transportation. The EIR must identify potential mitigation measures to reduce the project’s impacts.

The problem of shifting mitigation responsibilities is exemplified by Muni’s failure to adopt adequate water conservation measures. To date Muni has not implemented conservation measures comparable to Western. Draft EIR at 5-14. Muni fails to address conservation related alternatives that would result in less adverse impacts by shifting the responsibility to localities that have demonstrated they are unwilling to presently address the issue. *Id.* Shifting the responsibility of addressing conservation related activities to the localities perpetuates “the problem of agencies deferring to each other, with the result that no agency deals with the problem.” Yet alternative 2 considers conservation related activities representing that the agency itself can and has considered conservation related concerns. Muni/Western cannot simultaneously analyze the viability of conservation related alternatives, and dismiss those alternatives as beyond their jurisdiction. Mitigation in the form of contractual requirements for conservation related activities could be included in agreements between lead agencies and the localities they service, in consideration for the services that Muni/Western provide.

In addition, the Draft EIR fails to adopt binding mitigation for the growth related impacts resulting from the project as required by CEQA section 21081. CEQA requires the adoption of binding mitigation in order to reduce a project’s environmental impacts. “Passing references to the mitigation measures are insufficient to constitute a finding,” because nothing binds the agency “to

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follow these measures.” *Citizens for Quality Growth v. Mount Shasta* 198 Cal.App.3d 433, 442. The Draft EIR continually makes a passing reference to non-binding mitigation: “impacts... *would* be reduced *should* local governments implement the following policies of the San Bernardino County and Riverside County General Plans.” Draft EIR at 4-9, 4-11, 4-13, 4-14, 4-16, 4-19, 4-20, 4-21, 4-24, 4-25 [emphasis added]. This type of non-binding boilerplate analysis violates the spirit and letter of CEQA. The agency is required to adopt mandatory mitigation for significant environmental impact through the EIR process-- not simply defer to alternative potential mitigation. The Draft EIR should analyze environmental effects with, and without, mitigation.

III. THE DRAFT EIR’S ANALYSIS OF AIR QUALITY IMPACTS IS INADEQUATE

The Draft EIR’s air quality section falls far short of CEQA’s requirements. The Draft EIR does not address the project’s impacts on existing levels of non-attainment for criteria pollutants in the South Coast Air Basin. The project will lead to significant growth inducement. Draft EIR at 4. The area served by Muni/Western is experiencing severe air quality problems. The growth inducement resulting from the project will exacerbate air quality problems in the community. The project’s indirect impacts to decreasing air quality should be fully evaluated and disclosed within the EIR. Without proper analysis of air quality the Draft EIR is invalid. A revised EIR is required to properly analyze the projects’ direct, indirect, and cumulative contribution to deteriorating air quality.

1. SIGNIFICANT AIR QUALITY PROBLEMS IN SAN BERNARDINO AND RIVERSIDE COUNTY

The project lies within the South Coast Air Basin (“SCAB”) in San Bernardino and Riverside County. The 2003 Air Quality Management Plan produced by the South Coast Air Quality Management District (“SCAQMD”) lists the South Coast Air Basin as the U.S. location with the highest number of days exceeding the federal ozone standard. Exhibit 6, *Final 2003 AQMP Appendix II- Current Air Quality*, II-S-1. In addition the Basin also continued to rank among the areas of the U.S. with high carbon monoxide (CO) and particulate matter concentrations. *Id.* The federal ozone standard was exceeded most frequently in the SCAB (36 days), and the more stringent state standard was exceeded on 121 days. *Id.* at II-2-3, II-2-4. The significance of this problem was not properly addressed within the Draft EIR. Avoidance of an issue of significance is a violation of CEQA. The increased mobile source emissions from construction and operation facilities will increase ozone pollution in the South Coast Air Basin, further violating the non- attainment status for the SCAB.

Ozone (O₃) is the chief component of the common pollutant known as "smog." Ozone is formed when emissions including reactive organic gases (ROG) and oxides of nitrogen (NO_x) undergo photochemical reactions in sunlight and are transformed to O₃. Ozone irritates lung airways and causes inflammation much like a sunburn. Ozone causes wheezing, coughing, pain when taking a deep breath, and breathing difficulties during outdoor activities. The American Lung Association focuses on ozone as one of the most hazardous of the common air pollutants. American Lung Association, 2002 at 18. Repeated exposure to ozone pollution for several months may cause permanent lung damage. Children, the elderly, and those with respiratory problems are most at risk, but anyone who spends time outdoors may be affected. Even at very low levels, ozone triggers a variety of health problems including aggravated asthma, reduced lung capacity, and increased susceptibility to

pneumonia and bronchitis. Ozone also interferes with the ability of plants to produce and store food, which makes them more susceptible to disease, insects, and weather, and damages the leaves of trees and plants, ruining the appearance of cities, national parks, and recreation areas. Ozone also reduces crop yields, and is, in fact, responsible for 98% of air quality related crop damage in California. A revised EIR must discuss the proposed project's production of ozone precursor emissions and the direct, indirect, and cumulative impact both on human health and on vegetation and wildlife habitat, especially habitat for threatened, endangered, and sensitive species.

Particulate matter (PM) is a category of pollutant which includes the respirable particles suspended in the the air. PM is classified into "coarse" particles, PM₁₀, or those under 10 microns in diameter, and "fine" particles, PM_{2.5}, or those under 2.5 microns in diameter, and comes from a variety of sources including diesel exhaust, windblown dust from agriculture and construction and motor vehicles. Because the human respiratory system's ability to filter out harmful particles decreases as particles size decreases, the smallest particles lodge deepest in the lungs and are especially dangerous. PM can contain at least 40 toxic chemicals including heavy metals, nitrates, sulfates, and aerosols, as well as soot, soil, and dust.

PM is associated with extreme health consequences. PM causes premature death, aggravates asthma, increases coughing, painful breathing, and chronic bronchitis, and decreases lung function. Lung inflammation caused by inhaling PM can also lead to changes in heart rhythm, constriction of blood vessels, blood coagulation, and increased risk of heart attacks. Unlike what is believed about some other air pollutants, there is no "safe" level of PM pollution: even very low levels of PM lead to health impacts, as described in more detail in *Particle Civics, How Cleaner Air in California Will Save Lives and Save Money* at 25.

A wealth of information on the environmental and health ramifications of the SCAB's poor air quality is readily available. These reports and others contain critical information on the health and environmental impacts of air quality. One study found that in San Bernardino County alone, 486 deaths per year are due to current PM_{2.5} levels, and 231 deaths and 34,127 asthma attacks per year are due to current PM₁₀ levels. Environmental Working Group at 19. The Draft EIR's conclusion that air quality impacts cannot be mitigated without including any basic information on the link between air quality, health impacts, and impacts to biological resources render it inadequate. This and other information must be analyzed in a revised EIR so that the project's air quality impacts can be analyzed in the full environmental context.

The Air Quality Section of Appendix G of the CEQA Guidelines (Environmental Checklist Form) specifically calls out a project's potential to conflict with or obstruct implementation of any applicable air quality plan as an impact to be discussed. The Draft EIR contains no discussion of the proposed project's contribution to this problem. Failure to meet regulatory deadlines have serious economic, environmental, and health ramifications for the SCAB, all of which should be discussed.

The Draft EIR has also omitted an adequate discussion of the project's cumulative air quality impacts. Air quality is an area where the always important cumulative impacts analysis is particularly crucial, because major air quality problems are created by a vast number of small sources which may appear individually insignificant. A revised EIR must be prepared to discuss the project's cumulative impacts to air pollution, including impacts to human health and impacts to biological resources.

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III. THE DRAFT EIR'S ANALYSIS OF CUMULATIVE IMPACTS IS INADEQUATE

The cumulative impacts analysis in the Draft EIR is inadequate and requires further analysis and recirculation. Courts have emphasized that the cumulative impacts analysis is an integral part of the EIR process.

[It] is vitally important that an EIR avoid minimizing the cumulative impacts. Rather, it must reflect a conscientious effort to provide public agencies and the general public with adequate and relevant detailed information about them. [Citation.] A cumulative impact analysis which understates information concerning the severity and significance of cumulative impacts impedes meaningful public discussion and skews the decisionmaker's perspective concerning the environmental consequences of the project, the necessity for mitigation measures, and the appropriateness of project approval. An inadequate cumulative impact analysis does not demonstrate to an apprehensive citizenry that the governmental decisionmaker has in fact fully analyzed and considered the environmental consequences of its actions.

Citizens to Preserve the Ojai v. County of Ventura, 176 Cal. App. 3d 421, 431. A proper cumulative impacts analysis must be prepared "before a project gains irreversible momentum." *City of Antioch v. City Council*, 187 Cal.App.3d 1325, 1333. The cumulative impacts analysis does not address all additional projects which will impact the Santa Ana river, and does not adequately address the cumulative impacts on flows, habitat and species.

In order for the cumulative impacts analysis to be valid the lead agencies must evaluate all reasonably foreseeable projects and their synergistic impacts on the environment in relation to the project. The Draft EIR does not even contain a valid list of cumulative projects, as required by CEQA. All reasonably foreseeable projects with similar impacts must be listed, their impacts briefly summarized, and the cumulative impacts analyzed, avoided, and mitigated. The cumulative impacts section of the Draft EIR does not even approach this standard. As a starting point, all Santa Ana river-related projects by other water agencies in the region, and all other agencies (including, but not limited to flood control districts), that undertake projects that impact the Santa Ana River and its watershed must be compiled in a list of cumulative projects and addressed. The Draft EIR does not address all reasonably foreseeable projects. For example, the Draft EIR makes no mention of the Prado Basin Water Supply Feasibility Study ("Prado Basin project") by the United States Army Corps of Engineers and Orange County Water District. The Prado Basin project will impact the Santa Ana River downstream of the project area. Notice for the availability of Prado Basin project Draft EIR was released in August of last year. 69 Fed. Reg. 51639 (Aug. 20, 2004). The Draft EIR cumulative impacts analysis must include the Prado Basin project.

The Draft EIR concludes, without justification or analysis, that the cumulative impacts on riparian habitat, aquatic habitat, and aquatic species would be less than significant. This conclusory analysis violates CEQA. A lead agency "shall briefly describe its basis for concluding that the incremental effects is not cumulatively considerable." CEQA Guidelines § 15130(a). Courts have upheld this standard to find that where an EIR concludes that cumulative impacts are not significant, it should explain the basis for that conclusion. *Citizens to Preserve the Ojai v. County of Ventura*, 176 Cal. App. 3d 421, 432. The Draft EIR does not meet this standard in determining the effects on riparian habitat, aquatic habitat, and aquatic species downstream of Seven Oaks Dam. The Draft EIR states:

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“The RIX Water Recycling Project would reduce flows by approximately 30 to 35 cfs. However, the impact analysis [RIX impact analysis] for that project did not identify significant impacts on biological resources. The Project would add an increment to the reduction caused by the RIX Water Recycling Project, but cumulative impacts in this reach would remain less than significant. Cumulative impacts on aquatic species, riparian habitat, and sensitive riparian plants and animals in the SAR downstream of Project diversions are expected to be less than significant. No mitigation is required.”

Draft EIR at 6-34.

This analysis is wholly inadequate. First, the Draft EIR cannot rely on the RIX impact analysis for a justification that the cumulative impacts from this project would not be significant. The RIX impact analysis did not consider the current project. The Draft EIR admits that the “Project would *add* an increment of reduction.” *Id.* The Draft EIR cannot justify a less than significant impact upon an analysis that did not even consider the impacts resulting from the project. Relying upon another impact analysis without addressing the current project’s impacts turns the cumulative impact analysis on its head. Secondly, the EIR must describe the basis for determining that a cumulative impact is less than significant. The EIR provides no such basis but simply concludes “cumulative impacts in this reach would remain less than significant.” *Id.* Finally, even incremental increases to existing problems can be significant and must be analyzed. Where a current project would add only a small increment to an existing problem, the current project’s effects may nonetheless be considered significant. *Los Angeles Unified School District v. City of Los Angeles* 58 Cal.App.4th 1019, 1025-1026. Consulting agencies recognize the dire situation of the Santa Ana’s reduced flows for aquatic species. The United States Fish and Wildlife Service emphasizes that the temporary reduction of flows can significantly reduce the amount of habitat for suckers and could potentially strand them in dewatered sections of the stream. Exhibit 2, *Biological Opinion for the Prado Dam Water Conservation and Supply Study, Orange, Riverside, and San Bernardino Counties, California* at 13. The lead agencies must fully consider the cumulative impacts resulting from this and other projects on riparian and aquatic species, and their attendant habitat.

The Draft EIR inadequately analyzes the cumulative impacts resulting from water diversion applications pending on the Santa Ana River. The following water right applications and projects will impact flow within the Santa Ana: San Bernardino Valley Water Conservation District Water Right Application (Conservation District Application) requests 174,545 af in any year, Draft EIR at 6-13; City of Riverside Water Right Application (Riverside Application) requests to 41,400 afy, Draft EIR at 6-14; Chino Basin Watermaster Water Right Application (Chino Application) up to 97,000 afy, Draft EIR at 6-15; Orange County Water District Water Right Application (OCWD Application) 42,000 afy baseflow plus any additional storm flows reaching Prado Dam, Draft EIR at 6-15; RIX Facility Recycled Water Use Project (RIX Water Recycling) approximately 18,000 afy of tertiary effluent would be eliminated from discharge into the Santa Ana river, Draft EIR at 6-16; Pilot Dewatering Program for the Bunker Hill Basin Area of Historic High Groundwater (Pilot Dewatering) pumping a maximum of 25,000 afy out of existing groundwater basins that could affect flow in the Santa Ana river, Draft EIR at 6-17.

These applications and projects have the potential to eliminate 597,945 afy from a fully appropriated river.¹ The combined total diversions exceed both the median and maximum flows that exist within the Santa Ana river. Draft EIR at 3.1-3. Indeed, the total diversions are 74 times greater than the annual median annual flow. The potential impacts from the cumulative impacts are not addressed in the Draft EIR. The Draft EIR only addresses the cumulative impacts to flows from the project and Conservation District Application. Draft EIR at 6-22. There is no analysis of the cumulative impacts of the 5 other projects on flows, habitat, ground water and riparian resources within the Santa Ana. The Draft EIR must account for the cumulative impacts that may potentially result from these reasonably foreseeable projects. The Santa Ana River is dying from a host of projects and impacts, many of which might be considered individually insignificant but which cumulatively are destroying the river environment. CEQA explicitly requires that a Draft EIR vigorously explore these issues. The Draft EIR fails to do so.

IV. THE DRAFT EIR'S ANALYSIS OF UNAVOIDABLE SIGNIFICANT IMPACTS IS INVALID

A draft EIR must describe those significant adverse environmental impacts that cannot be avoided because there are not feasible mitigation measures or because feasible mitigation measures cannot mitigate the impacts to a less than significant level. CEQA Guidelines §§ 15126(b); 15126.2(b). The Draft EIR lists numerous significant unavoidable impacts to air quality, public safety, hydrology and water quality, groundwater hydrology, and biological resources. Draft EIR at 3.8-12, 3.13-27, 4-8, 6-28, 6-32, 6-36. If the lead agency nevertheless decides not to require such design changes, then the EIR must describe the "implications" of impacts involved and the agency's reasons for choosing to tolerate them rather than requiring an alternative design." CEQA Guidelines §15126.2(b); Pub. Resources Code § 21100(b)(2)(A). These issues must be addressed in an EIR section that also addresses significant effects "that would be irreversible if the project is implemented." Pub. Resources Code § 21100(b)(2). The implications and reasoning for the acceptance of significant unavoidable impacts is noticeably absent. The Draft EIR's omission of the required analysis of unavoidable significant impacts makes it deficient.

V. THE DRAFT EIR SHOULD BE RECIRCULATED FOR PUBLIC REVIEW AND COMMENT

A lead agency must recirculate an EIR for further public comment under any of four circumstances:

- (1) When the new information shows a new, substantial environmental impact resulting either from the project or from a mitigation measure;
- (2) When the new information shows a substantial increase in the severity of an environmental impact, except that recirculation would not be required if mitigation that reduces the impact to insignificance is adopted;

¹ The combined application and diversions can be calculated for the five 174,545 (Conservation District Application), + 41,400 (Riverside Application), + 97,000 (Chino Application), +42,000 (OCWD Application), +18,000 (RIX Water Recycling), + 2,000 (Pilot Dewatering), + 200,000 (Project Application) = 597,945 afy

- (3) When the new information shows a feasible alternative or mitigation measure that clearly would lessen the environmental impacts of a project and the project proponent declines to adopt the mitigation measure; or
- (4) When the draft EIR was “so fundamentally and basically inadequate and conclusory in nature” that public comment on the draft EIR was essentially meaningless.

CEQA Guidelines §15088.5.

Based on the comments above, it is clear that the EIR must be re-drafted and recirculated. Conditions (1), (2), and (3) above will be met by meaningful and adequate discussion of the project’s impacts to biological resources, as well as a discussion of growth inducing and cumulative impacts. The combined effect of these omissions makes it clear that the fourth condition has also been met.

VI. THE PROJECT MUST COMPLY WITH THE ENDANGERED SPECIES ACT

The project is subject to the Endangered Species Act (“Act”), and must fully comply with the Act’s provisions. Section 9 of the Endangered Species Act of 1973, and Federal regulations issued pursuant to section 4(d) of the Act, prohibit take of endangered and threatened species without a special exemption. 16 U.S.C. 1531 *et seq.* Section 7 of the Act requires Federal agencies to consult with the United State Fish and Wildlife Service (“USFWS”) should it be determined that their actions may affect federally listed threatened or endangered species. Take is defined as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct. Harm is further defined by USFWS to include significant habitat modification or degradation that actually kills or injures a listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by USFWS as an action that creates the likelihood of injury to a listed species by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), such incidental taking is not considered to be a prohibited taking under the Act provided that such taking is in compliance with the Incidental Take Statement.

The project is subject to the Endangered Species Act, and consultation with the USFWS, regarding impacts to threatened and endangered species, must occur. The project requires approval from the U.S. Army Corps of Engineers for the following activities: approval for any alterations to Seven Oaks Dam and its operations; approval for new pipelines to connect to facilities of Seven Oaks Dam; permits/approvals per Section 404 of the Clean Water Act (for the discharge of dredged and fill material into waters of the United States); and permits/approvals per Section 10 of the Rivers and Harbors Act (for construction in waterways) The project also requires approval from the U.S. Forest Service for access agreements/permits for construction within the San Bernardino National Forest. Draft EIR at 2-9.

The project will harm and harass listed species including, but not limited to: Marsh Sandwort (*Arenaria paludicola*), Gambel’s Water Cress (*Rorippa gambelii*), Stephen’s Kangaroo Rat (*Dipodomys stephensi*), Arroyo Toad (*Bufo californicus*), California Red-Legged Frog (*Rana aurora draytonii*), Southwestern Willow Flycatcher (*Empidonax trailii extimus*), Coastal California Gnatcatcher (*Poliophtila californica californica*), Least Bell’s Vireo (*Vireo bellii pusillus*), Santa Ana

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Sucker (*Catostomus santaanae*), The Santa Ana River Woolly-Star (*Eriastrum densifolium* ssp. *sanctorum*), Slender-Horned Spineflower (*Dodecahema leptoceras*), and San Bernardino Kangaroo Rat (*Dipodomys merriami parvus*). The construction related activities and removal of additional water from the Santa Ana river will negatively impact delicate desert ecosystems, riparian habitats and streambed ecosystems. Consultation with the USFWS must occur as soon as possible to identify and mitigate any potential take of all federally threatened and endangered species impacted by the project.

VII. CONCLUSION

In summary, the current Draft EIR has not adequately disclosed, analyzed, minimized, and mitigated the environmental impacts of the proposed project. Because of the document's shortcomings, the public and decision makers cannot make informed decisions about the proposed project's costs in areas including biological diversity, cumulative impacts and growth inducement.

We appreciate the several extensions granted by your agencies of the draft EIR comment period which have enabled us to provide you with these comments in a timely fashion. The magnitude and complexity of this project is immense, and we encourage your agencies to provide adequate time for the public to review and comments on projects of this nature. Due to the importance and complexity of the issues, we request a minimum 60 day public comment period on the FEIR.

Should your agencies wish to move forward with the proposed project, the Center hopes to receive a revised Draft EIR. Please add the Center for Biological Diversity, P.O. Box 493, Idyllwild, CA 92549, Attn: Kassie Siegel, to all mailing lists for all information about this project. If you have any questions please do not hesitate to contact Peter Galvin, Conservation Director, at (415) 436-9682. Thank you very much for your consideration of these comments.

Sincerely,

/s/

Jonathan Evans
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CC without exhibits:

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LIST OF EXHIBITS AND REFERENCES

EXHIBITS

- Exhibit 1: Draft EIR Appendix D, NOP comment list and references, at 2-3, 54-101.
- Exhibit 2: United States Fish and Wildlife Service, *Biological Opinion for the Prado Dam Water Conservation and Supply Study, Orange, Riverside, and San Bernardino Counties, California*. July 1, 2002.
- Exhibit 3: Baskin, Jonathan N., Haglund, Thomas R. and Swift, Camm C. 2003. *Results of the Year 3 Implementation of the Santa Ana Sucker Conservation Program For the Santa Ana River, Final Report*. Prepared for: Santa Ana Sucker Conservation Team. San Marino Environmental Associates.
- Exhibit 4: Riverside County Integrated Project. *Final Multiple Species Habitat Conservation Plan. Volume II-B*. June 2003. F-1 – F-18.
- Exhibit 5: California Department of Fish and Game. *Fish Species of Special Concern in California, Santa Ana Speckled Dace*. 1995.
- Exhibit 6: South Coast Air Quality Management District, *Final 2003 AQMP Appendix II- Current Air Quality*.

REFERENCES:

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Egan, J.T., S.P. Canton, T.F. Moore, G.Y. Michael, M.M. Grimes, and A.P. Rochette. 1992. *Tailoring Requirements to reality: The Santa Ana River Use Attainability Analysis.* Water Environment Federation, Alexandria, VA. AC92-036-006.

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