

AUGUST 10, 2000

STATE WATER RESOURCES CONTROL BOARD

CLOSED SESSION WORKSHOP

SACRAMENTO, CALIFORNIA

AUGUST 17, 2000

ITEM:

SUBJECT:

PROPOSED WATER RIGHT ORDER REGARDING PETITION FOR EXTENSION OF TIME ON PERMIT 5882 (APPLICATION 10216) OF CITY OF SAN LUIS OBISPO – SALINAS RESERVOIR PROJECT ON SALINAS RIVER

DISCUSSION:

The City of San Luis Obispo (San Luis Obispo) has filed a petition for extension of time (petition) to complete beneficial use of water and construction work under Permit 5882 for the Salinas Reservoir project. The SWRCB is a responsible agency under the California Environmental Quality Act for purposes of considering whether to approve the petition.

The Salinas Reservoir project began on October 9, 1941, when the State Water Resources Control Board's (SWRCB) predecessor issued permits to the United States Army Corps of Engineers (Corps) (Permit 5881) and San Luis Obispo (Permit 5882). The permits authorize storage of 45,000 acre-feet (af) per annum in the Salinas Reservoir and direct diversion of 12.4 cubic feet per second. These permits were duplicative, not additive. Because the Corps needed only limited quantities of water for Camp San Luis Obispo, it has contracted with San Luis Obispo for the full yield of the reservoir since the completion of the reservoir in 1942. The Corps, however, retains ownership of the facility. The dual permit issue was resolved in 1995 when Permit 5881 of the Corps was revoked and the Corps was listed as co-permittee on Permit 5882.

The Corps designed and built the Salinas Reservoir to hold 45,000 af of water. Due to seismic concerns, storage was effectively limited to 23,843 af. A spillway drum gate or other similar structure must be installed before the full 45,000 af capacity storage can occur.

In addition to seeking additional time to complete beneficial use of water, San Luis Obispo seeks an extension of time to complete the actions needed to store 45,000 af in the reservoir, including obtaining ownership of the facility from the Corps, seismic retrofit work and installation of a spillway drum gate.

On October 12, 13 and 18, 1999, the SWRCB held a hearing to take evidence to address the California Sportfishing Protection Alliance's unresolved protest to the petition. Based on the

evidence, the proposed order concludes that there is good cause to conditionally approve San Luis Obispo's petition and to grant a 10-year extension of time to complete beneficial use of water and construction of the Salinas Reservoir. The proposed order includes measures to mitigate the project's potentially significant adverse impacts, a condition requiring San Luis Obispo to develop a reservoir operations plan that will not contribute to the overdraft of the Paso Robles Groundwater Basin, and certain environmental studies.

POLICY ISSUES:

Should the SWRCB adopt the proposed order conditionally approving a 10-year extension of time for San Luis Obispo to complete beneficial use of water and construction of the Salinas Reservoir?

FISCAL IMPACT:

This activity is budgeted within existing resources and no additional fiscal demands will occur as a result of approving this item.

REGIONAL BOARD IMPACT:

None

STAFF RECOMMENDATION:

Staff recommends that the SWRCB adopt the proposed order.

PLEASE NOTE: PROPOSED ORDER IS AS FOLLOWS:

STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2000-____

In the Matter of the Petitions to
**Revise Declaration of Fully Appropriated Streams
to Allow Processing Specified Applications to
Appropriate Water From the Santa Ana River**

SOURCE: Santa Ana River

COUNTIES: Riverside, San Bernardino, Orange

**ORDER AMENDING DECLARATION AND
DIRECTING DIVISION OF WATER RIGHTS TO
PROCEED WITH PROCESSING SPECIFIED APPLICATIONS**

1.0 INTRODUCTION

Acting pursuant to Water Code sections 1205 through 1207, the State Water Resources Control Board (SWRCB) adopted a Declaration of Fully Appropriated Streams (Declaration) which was most recently updated on November 19, 1998. (SWRCB Order WR 98-05). The Declaration includes a list of stream systems found to be fully appropriated for all or part of the year. Water Code section 1206 provides that the SWRCB shall not accept any new applications to appropriate water from watercourses listed on the Declaration, except in accordance with the provisions of the Declaration and applicable regulations. The Declaration lists the Santa Ana River stream system as fully appropriated on a year-round basis.

The SWRCB has received two petitions requesting that the Declaration be revised to allow for processing two applications to appropriate water from the Santa Ana River. The first petition was submitted by the San Bernardino Valley Municipal Water District (Muni) and Western Municipal Water District of Riverside County (Western) on May 31, 1995. The petition and accompanying hydrologic data were filed to demonstrate that water previously lost as flood flows can now be stored or regulated by the new Seven Oaks Dam flood control project. The petition filed by Muni and Western was accompanied by a water right application to appropriate water from the Santa Ana River for municipal use by direct diversion and diversion to storage.

The second petition was filed by Orange County Water District (OCWD) on September 3, 1999. The petition and accompanying hydrologic information were submitted to demonstrate that flows in the lower reach of the Santa Ana River watershed have changed due to upstream urbanization and increased release of treated wastewater into the stream system. OCWD asks that the SWRCB modify the Declaration to allow the SWRCB to accept and ultimately approve a water right application that was previously submitted by OCWD on November 15, 1992.

Based on the evidence in the record discussed below, the SWRCB finds that the Declaration of Fully Appropriated Streams, as adopted in Order WR 98-05, should be revised to allow for processing the water right application submitted by Muni and Western and the water right application submitted by OCWD. All questions regarding the specific amount of water available for appropriation under the applications, the season of water availability, approval or denial of the applications, and the conditions to be included in any permit(s) that may be issued on the applications will be resolved in further proceedings on each application pursuant to applicable provisions of the Water Code.

2.0 BACKGROUND

Sections 2.1 through 2.3 below discuss the statutory provisions governing the appropriation of water in California, the classification of Santa Ana River as fully appropriated, and the SWRCB hearing on the petitions to revise the Declaration of Fully Appropriated Streams to allow for processing the pending applications on the Santa Ana River.

2.1 Water Code Provisions

Following enactment of the Water Commission Act of 1913, new appropriations of water in California have been subject to the application and permitting system now set forth in the California Water Code. Water Code section 1201 provides that all water flowing in any natural channel that is not needed for use under riparian rights and has not been previously appropriated is subject to appropriation pursuant to the provisions of the Water Code. Water Code section 1225 provides:

“Except as provided in Article 2.5 (commencing with Section 1226) of this chapter, no right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with the provisions of this division.”¹

Thus, compliance with applicable Water Code provisions is now the exclusive way to establish a right to appropriate water subject to appropriation. The statutory requirements and procedure for establishing an appropriative water right are set forth in Water Code section 1250 et seq.

Normally, the first step is to file an application to appropriate water which sets forth specified information including the proposed source, proposed quantity and rate of diversion, the proposed point of diversion, and the proposed place and purpose of use. (Water Code §§ 1250 and 1260.)

However, subdivision (a) of Water Code section 1206 prohibits the SWRCB from accepting for filing any application for a permit to appropriate water from a stream system that is listed on the Declaration of Fully Appropriated Streams established pursuant to Water Code section 1205.

Notwithstanding the general prohibition on acceptance of applications to appropriate water from a fully appropriated stream, subdivision (b) of section 1206 provides that the SWRCB may allow for filing of applications to appropriate water from fully appropriated streams under specified conditions set forth in the Declaration. In addition, subdivision (c) of Water Code section 1205 provides:

“Upon its own motion or upon petition of any interested persons, and following notice and hearing, the board may revoke or revise a declaration that a stream system is fully appropriated.”

The petitions under consideration in the present proceeding request that the SWRCB revise the provisions of the Declaration adopted in Order WR 98-05 to allow for processing the petitioners’ applications to appropriate water. Approval of the petitions does not constitute approval of the

¹ Article 2.5 establishes an alternative procedure for acquiring rights for stockponds for which a claim was filed with the SWRCB before January 1, 1998. That alternative procedure does not apply to the projects described in the applications submitted by petitioners in the present proceeding.

applications, nor does it imply that the SWRCB believes the applications should be approved. Rather, approval of the petitions simply allows the SWRCB to accept the petitioners' applications for processing in accordance with the normally applicable procedures and requirements under the Water Code and applicable regulations.

Following acceptance of an application for filing and assignment of a priority date, the SWRCB provides public notice of the application, an opportunity for interested parties to file protests, an opportunity for the applicant and any protestants to negotiate a resolution of issues raised in the protests, and an opportunity for hearing if needed to resolve protest issues or to obtain information otherwise needed for action on the application. (Water Code §§1350-1375.) A permit to appropriate water is issued only if all statutory requirements are met, including the requirement that water is available for appropriation under the permit and that the intended use is beneficial. (Water Code §1375.) Permits to appropriate water are issued subject to such terms and conditions as the SWRCB concludes will "best develop, conserve, and utilize in the public interest the water" covered by the permit. (Water Code §1253.)

2.2 Findings Regarding Santa Ana River in Fully Appropriated Streams Declaration

The Santa Ana River stream system was included in the original Declaration adopted by the SWRCB in Order WR 89-25, and it remains listed on the most recent revised Declaration adopted by the SWRCB in Order WR 98-08. Order WR 89-25 refers to State Water Rights Board Decision 1194 as a basis for the finding that no unappropriated water is available from the Santa Ana River watershed. Based on review of the record from the hearing on Applications 11036 and 11037² in 1962 and 1963, and the Court of Appeal decision in *Orange County Water District v. City of Riverside et al.*, (1961) 188 Cal. App. 2d 566 [10 Cal. Rptr. 899],³ the State

² Application 11036 was filed by Santa Ana Valley Irrigation Company for a permit to appropriate 10 cubic feet per second (cfs) by direct diversion between March 1 and December 1 of each year and 2,000 acre-feet per annum (AFA) by underground storage between December 1 of each year and March 1 of the succeeding year from the Santa Ana River in Orange County. Application 11037 was filed by OCWD for a permit to appropriate 75 cfs by direct diversion between March 1 and November 30 of each year and 4,000 acre-feet (AF) by underground storage between December 1 and February 28 of each season from the underflow of the Santa Ana River and Chino Creek within Riverside and San Bernardino Counties.

³ The Court of Appeal decision referred to in Decision 1194 was entered in a declaratory judgment action brought by the OCWD against several cities in the Santa Ana River Basin. The decision discusses the imbalance between [footnote continues on next page]

Water Rights Board concluded that “[c]onsidering the Santa Ana River watershed as a whole, the record indicates that no unappropriated water is now available” for the applicants. (Decision 1194, p. 4.) Nevertheless, the State Water Rights Board approved Applications 11036 and 11037 based on a finding that the applicants could salvage or conserve water by eliminating consumptive uses attributed to phreatophytes along a 15-mile reach of the Santa Ana River. Decision 1194 limited the quantity of water that could be diverted under both applications to a combined total of 6,000 acre-feet per annum (AFA), subject to the requirement of no injury to prior rights. Decision 1194 does not contain a hydrologic analysis of the run-off of the Santa Ana River watershed and the amount of water that may be available in normal or wet years after meeting prior rights.

2.3 SWRCB Hearing on Petitions

Section 871 of Title 23 of the California Code of Regulations provides that the SWRCB may revoke or revise the Declaration of Fully Appropriated Streams upon its own motion or upon petition of any interested person. In this instance, the SWRCB held a public hearing on the petitions on December 7 and 8, 1999. The hearing provided an opportunity for the petitioners and all interested parties to present evidence and argument in support of their positions.

In addition to the petitioners, representatives of the following parties participated in the SWRCB hearing: United States Forest Service, San Bernardino Valley Water Conservation District, City of Ontario, Cucamonga Water District, City of Riverside, City of San Bernardino, East Valley Water District, California Department of Fish and Game, Inland Empire Utilities Agency, Santa Ana River Local Sponsors, Big Bear Municipal Watermaster, Big Bear Municipal Water District, City of Corona, City of Chino, and the State of California agencies holding water rights in the Chino Basin.⁴

water demands and supplies in the Santa Ana River Basin, but was not entered in the context of an overall adjudication of basin water rights.

⁴ The state agencies that hold water rights in the Chino Basin area of the Santa Ana River watershed are the Department of Corrections, the Department of Fish and Game, the Department of Transportation and the Department of Toxic Substances Control.

Following the evidentiary hearing, the SWRCB received legal briefs in support of their respective petitions from OCWD and from Muni and Western. The East Valley Water District submitted a brief in opposition to revising the fully appropriated stream status of the Santa Ana River. The San Bernardino Valley Water Conservation District submitted a brief that opposes changing the fully appropriated stream status of reaches 5 and 6 of the river. The City of Chino, City of Ontario, City of Pomona, Cucamonga County Water District and the Monte Vista Water District joined in the brief submitted by the Inland Empire Utilities Agency in opposition to revising the fully appropriated stream status of the river.⁵

3.0 DESCRIPTION OF THE SANTA ANA RIVER WATERSHED

The Santa Ana River watershed includes approximately 2,450 square miles covering major portions of San Bernardino, Riverside, and Orange Counties. (Muni/Western 4-6.) During high flow periods, the Santa Ana River flows over 75 miles from Mount San Gorgonio in the San Bernardino Mountains to the Pacific Ocean at Newport Beach. During most years, the Santa Ana River has little or no surface flow from its confluence with Bear Creek in the San Bernardino Mountains to just upstream of the San Bernardino/Riverside County Line. From that point, there is continuous surface flow to the OCWD diversion points in Orange County. (Muni/Western 3-1, pp. 1 and 2.)⁶

The Santa Ana River watershed below the San Bernardino Mountains and San Gabriel Mountains consists of the Upper Area above Prado Dam and the Lower Area located downstream of Prado Dam. Most of the diversions within the Upper Area are made within the boundaries of the petitioners Muni and Western or within the boundaries of the Inland Empire Utilities Association (formerly the Chino Basin Municipal Water District). Petitioners Muni and Western seek to appropriate water which they believe will be made available due to the regulatory effects, and possible storage capacity, provided by the recently completed Seven Oaks Dam located downstream of the confluence of the Santa Ana River and Bear Creek. Most of the

⁵ In addition to the legal briefs submitted following the hearing, some of the parties also presented legal arguments in written submittals and policy statements presented at the time of the hearing.

⁶ Exhibits are identified by the name of or abbreviation for the party submitting the exhibit, the exhibit number, and the page number or other location of the reference material within the exhibit.

diversions within the Lower Area are made by OCWD for use within Orange County. There was extensive evidence presented by various parties establishing that water districts and other entities in both the Upper Area and Lower Area of the watershed have developed extensive wastewater treatment and reuse programs. (See e.g. RT pp. 89-90.)

4.0 COURT JUDGMENTS ADDRESSING WATER RIGHTS ON THE SANTA ANA RIVER

Water rights on the Santa Ana River have been addressed in a number of court judgments, two of which establish the overall framework for the division of rights and responsibilities among the major water users in the basin. The April 17, 1969, stipulated judgment of the Superior Court for Orange County in *Orange County Water District v. City of Chino* (Superior Court No. 117628, hereinafter *Orange County Water District*) provides a basis for the division of water between the upper and lower portions of the Santa Ana River based upon specified flows at Prado Dam and the Riverside Narrows. (Muni/Western 3-3).⁷ In recognition of the complexity of the case and the difficulty in attempting to adjudicate the individual water rights of over 4,000 parties, the judgment states:

“d. Need for Physical Solution. It is apparent to the parties and to the court that development of a physical solution based upon a formula for inter-basin allocation of obligations and rights is in the best interests of all the parties and is in furtherance of the water policy of the State. For purposes of such physical solution, it is neither necessary nor helpful to define individual rights of all claimants within the watershed.... Sufficient information and data of a general nature are known to formulate a reasonable and just allocation as between the major hydrologic sub-areas within the watershed, and such a physical solution will allow the public agencies and water users within each such major hydrologic sub-area to proceed with orderly water resources planning and development.”

The judgment also states that OCWD, Chino Basin Municipal Water District (CBMWD), Western, and Muni were public districts overlying the major areas of water use within the

watershed and had the authority and resources to implement a physical solution. All remaining parties to the suit were dismissed.

The judgment provides that the water users located above Prado Dam (“Upper Area users,” i.e. CBMWD, Western, and Muni) must deliver an average of approximately 42,000 AFA of “base flows”⁸ to Prado Reservoir. Of this amount, Muni is responsible for an average annual amount of 15,250 AFA at the Riverside Narrows upstream of Prado Dam. The judgment provides that the guaranteed flows are to be calculated over stated periods of time and are subject to adjustment for water quality. If water users downstream of Prado Dam receive the water to which they are entitled and all other provisions of the judgment are complied with, then paragraph 5(a) of the judgment provides that “[i]nsofar as Lower Area claimants are concerned, Upper Area water users and other entities may engage in unlimited water conservation activities, including spreading, impounding, and other methods, in the area above Prado Reservoir.”

A second stipulated judgment affecting water rights on the Santa Ana River was entered on April 17, 1969, by the Superior Court for Riverside County in *Western Municipal Water District of Riverside County v. East San Bernardino County Water District*, (Superior Court No. 78426, Muni/Western 3-3.) The stated purpose of the judgment is to further implement the physical solution entered in the *Orange County Water District* action and to determine the rights of several specified plaintiffs (including Western) and the sole remaining defendant, Muni. The judgment defines the respective rights of the named parties as against each other to the natural supply of the San Bernardino Basin Area, the Colton Basin Area and the portion of the Riverside Basin Area in San Bernardino County. The judgment also refers to new water conservation projects that may be undertaken by the parties.

Both of the 1969 stipulated judgments express the courts’ recognition that there would be future water development projects within the basin. The judgments do not constitute a comprehensive adjudication of water rights in the Santa Ana River Basin. Rather, the net effect of the two 1969

⁷ Muni/Western Exhibit 3-3 provides a compilation of judgments, court orders, stipulations and related settlement agreements concerning water rights in the Santa Ana River Basin.

⁸ “Base flow” was defined to exclude high flows associated with storms.

stipulated judgments is to establish a framework governing the allocation of water in the Santa Ana River Basin among the parties to those proceedings.

All of the petitioners in the current proceeding have submitted a settlement agreement with the Inland Empire Utilities Association in which they acknowledge that they are bound by the provisions of the 1969 *Orange County Water District* judgment and that any additional water rights which they obtain from the SWRCB must be consistent with the restrictions imposed that judgment. (OCWD 8.)

5.0 DESCRIPTION OF PROJECTS PROPOSED BY PETITIONERS

The petition submitted by Muni and Western requests modification of the Declaration to allow for processing their application to appropriate: (1) up to 800 cfs by direct diversion; (2) 50,000 AFA by diversion to storage at Seven Oaks Dam; and (3) 100,000 AFA to underground storage with total diversions in any one year not to exceed 100,000 AF.⁹ (Muni/Western 1-3, p.1.) The U. S. Army Corps of Engineers (Corps) constructed Seven Oaks Dam as a flood control project but has not yet authorized use of the dam for water storage. Even if water storage at the dam is not authorized, however, petitioners Muni and Western argue that the regulatory effect of the dam on high flows caused by storm events would make it feasible to divert water that previously would have flowed rapidly downstream.

The OCWD petition requests modification of the Declaration to allow for processing the district's application to appropriate: (1) up to 800 cfs by direct diversion; and (2) up to 146,900 AFA by diversion to storage in Prado Dam, Gypsum Canyon Reservoir, and Aliso Canyon Reservoir; and (3) storage in various groundwater basins. A November 1992 supplement to the OCWD application states that total combined diversions in one year would not exceed 507,800 AF. Of this amount, approximately 306,400 AFA are diverted by OCWD's existing projects. (OCWD 7, Supplement, p. 2; RT pp.166-167.) OCWD contends that its present diversions are

⁹ A witness for Muni and Western testified that recent calculations showed that in some years, considerably more water may be available for their direct diversion without injury to prior rights, and that Muni and Western may seek to amend their application to include a increased annual limit on diversions in those years when the additional water is available. (RT pp. 64 and 117-121.)

authorized by a combination of water rights from various sources, but it submitted the petition and proposed application in the event that SWRCB or other interested parties do not agree that OCWD has sufficient rights to cover its present and proposed diversions. (OCWD 6, Attachment 10-1.)

6.0 CHANGES IN THE SANTA ANA RIVER WATERSHED AFFECTING THE AMOUNT OF WATER AVAILABLE FOR APPROPRIATION

The evidence regarding changes in conditions that affect availability of water for appropriation in the Santa Ana River watershed and the potential ability of the petitioners to divert that water is discussed in Sections 6.1 through 6.5 below.

6.1 Seven Oaks Dam

Muni and Western contend that the major change in conditions that results in water being available for appropriation under the districts' application is the construction and completion of the 146,500 AF capacity Seven Oaks Dam built by the U.S. Army Corps of Engineers (Corps) as a flood control facility. (Muni/Western 1-2, pp. 5 and 6.) Based on USGS data, the Corps calculated that the average annual inflow to Seven Oaks Reservoir would be approximately 24,000 AF. Although the Corps has not approved operation of the reservoir for seasonal storage of water, a Corps feasibility study includes an estimate that operation of the dam using a water conservation pool of 50,000 AF could make an average of approximately 12,950 AFA of water available for use by downstream users. The Corps study also shows an estimate that operation of the reservoir using a water conservation pool of 16,000 AF would result in a net average annual yield of approximately 4,120 AF. (Muni/Western 3-1, p. 11; RT pp. 108-111.) Thus, the record establishes that operation of the Seven Oaks Reservoir for water storage would make more water potentially available for appropriation under the Muni/Western application for a water right permit. However, use of the reservoir for water storage would require federal approval, as well as a water right permit issued by the SWRCB.

In addition to the possibility of seasonal storage at Seven Oaks Dam, Muni and Western emphasize that the regulatory effect of the Seven Oaks Dam on high flows due to storm events represents a significant change in circumstances. By regulating the release of water downstream of the dam, the petitioners contend that the dam makes water available for appropriation that

could not have feasibly been diverted previously. The districts presented expert testimony that 140,991 AF of water would be available for appropriation in one of 20 years, based on calculations using hydrologic data from the 20-year hydrologic period of 1971-72 through 1990-91. In all but two of the 20 years, however, the maximum amount of water available for direct diversion was less than 20,000 AFA, with no water at all being available in seven years. The total amount of water available for direct diversion over the 20-year period was estimated to be 302,338 AF.¹⁰ If the Corps of Engineers maintains the present 500 cfs limit on releases from Seven Oaks Dam, the maximum amount available for direct diversion in any one year would decrease to 116,966 AF and the total amount available for direct diversion over the 20-year period was estimated to be 278,343 AF. Limiting maximum annual diversions to 100,000 AF as stated in the Muni/Western water right application would reduce the total estimated amount of water available for diversion over the 20-year period to 261,347 AF, or an average of 13,067 AFA. (RT pp.117-121; Muni/Western 4-16, columns 11-13.)

6.2 Discharge of Treated Wastewater

The Santa Ana River Watermaster Report for 1997-98 shows that treated wastewater discharges into the Santa Ana River upstream of Prado Dam have increased by 125,904 AFA from 1970-71 to 1997-98, with 38,954 AFA of this increase occurring since 1990. (Muni/Western 3-4, Table 5.) The large contribution of treated wastewater to the base flows available below Prado Dam has led to an increase in base flows during the dry season of May through September. (OCWD 31, p. 6; OCWD 14.) Base flows in the Santa Ana River at Prado Dam have increased from approximately 30,000 AFA in water year 1963-64 to approximately 155,000 AFA in 1997-98. (OCWD 31, p. 5; OCWD 9.) By 2020, treated wastewater discharges above Prado Dam are projected to increase to 255,000 AFA. (OCWD 31, p. 5.) Based on the assumption that upstream water agencies will develop additional projects to reuse treated wastewater, the Santa Ana Water Project Authority (SAWPA) estimates that base flows reaching Prado will be 231,000 AFA by 2020. If the additional reuse projects are not developed to the extent anticipated by SAWPA, then the quantity of water provided by base flows at Prado Dam would be expected to be higher. (OCWD 31, p. 6.)

¹⁰ The estimates on water availability set forth in column 11 of Muni/Western Exhibit 4-16 reflect the assumption [footnote continues on next page]

6.3 Effects of Urbanization

OCWD and Muni presented testimony that the amount of runoff entering the Santa Ana River has increased due to urbanization. The percent of impervious cover in the watershed upstream of Prado Dam has increased from 16 percent in 1970 to 28 percent in 1990. (OCWD 31, pp. 4, 7 and 8.) In addition, increased concrete lining of flood channel facilities has increased the rate of runoff. The result of changes due to urbanization is that a greater percentage of precipitation runs off the land and enters the stream system.

6.4 Increased Availability of Water During Wet Years

The average precipitation during the 26-year base period (1934-35 through 1959-60) used in developing the physical solution adopted in the 1969 *Orange County Water District* judgment was 17.98 inches per year. (Muni/Western 3-4, p. 4.) In some years, however, substantially higher precipitation results in more water being available in the river than was allocated under the judgment. For example, in water year 1997-98, precipitation totaled 33.41 inches or 186 percent of the average used in developing the physical solution reflected in the 1969 judgment. (Muni/Western 3-4, p. 4.)

Although above normal run-off during years of high precipitation cannot be relied upon in all years, the higher flows do make water available for diversion by projects which are designed to divert high flows when present but which do not depend upon large quantities of water being available for diversion in all years. In this instance, the record shows that the project proposed by the Muni and Western, in particular, is designed to capture high flows when available, but does not depend upon availability of water for diversion in every year.

6.5 Summary of Record Regarding Availability of Water for Appropriation

The purpose of the water availability analysis in this proceeding is not to determine the specific amount of water available for appropriation by the petitioners after satisfying prior rights and providing appropriate protection for instream uses and the environment. Rather, the purpose is

that diversions would be limited by the 1969 *Orange County Water District* judgment.

to determine whether the record establishes that there is sufficient water available for appropriation to justify revision of the fully appropriated stream status of the Santa Ana River to allow for acceptance of the petitioners' water right applications for processing.

The evidence discussed above establishes that increased releases of treated wastewater and increased runoff due to urbanization have substantially increased flows present in the Santa Ana River since entry of the 1969 *Orange County Water District* judgment, and that it is reasonable to expect a further increase in flows in the future. Most of the increased flows are due to increases in treated wastewater and increased urban run-off occur below the points of diversion identified in the Muni/Western application. However, the availability of that water to satisfy downstream rights effectively increases the amount of water that is potentially available for diversion by Muni and Western, as well as the amount of water potentially available for diversion downstream by OCWD.

In addition, the construction of the Seven Oaks Dam is a significant change in conditions that will affect the pattern of flows below the dam following storm events and make it feasible to divert more water. The possibility of using Seven Oaks Reservoir for water storage if federal approval is obtained would further increase the quantity of water potentially available for appropriation by Muni and Western in some years.

The evidence that Upper Area water users have established large credits of water to which they are entitled under the *Orange County Water District* judgment supports the conclusion that Muni and Western could divert more water without interfering with prior rights or violating the provisions the judgment. Similarly, the evidence that, for many years, OCWD has been diverting a large portion of the water for which it seeks a water right permit is persuasive evidence that much of the water covered by OCWD's application is physically present and potentially available for appropriation.¹¹

¹¹ As discussed in Section 5.0 above, OCWD presently diverts approximately 300,000 AFA of the water for which the district seeks an appropriative water right permit from the SWRCB.

7.0 ENVIRONMENTAL ISSUES

In this instance, the California Department of Fish and Game and the United States Forest Service both expressed an interest in protection of environmental resources dependant upon flows in the Santa Ana River. (RT pp.18-19 and 81-87.) The environmental issues associated with the project proposed by the petitioners will be addressed by the SWRCB in the context of processing the water right applications. Prior to any potential approval or decision to proceed with a proposed project, the applicant water districts and the SWRCB must fulfill their obligations under the California Environmental Quality Act (“CEQA,” Public Resources Code section 21000 et seq.) In addition to meeting statutory responsibilities under CEQA, the SWRCB will comply with its obligations to consider environmental and public interest issues under the Water Code and the public trust doctrine in the context of processing the water right applications submitted by the petitioners.¹² In addition, the SWRCB recognizes that the proposal of Muni and Western to use the Seven Oaks Dam as a water storage facility is also subject to obtaining all necessary federal approvals and compliance with the federal environmental review process.

8.0 CONCLUSION

The parties to the hearing introduced a large amount of evidence regarding the hydrology of the Santa Ana River watershed, the history of water use and litigation over water rights in the watershed, the potential for future wastewater reclamation projects, the availability of water for appropriation by the petitioners, and numerous other issues. The SWRCB recognizes that processing petitioners’ water right applications will require consideration of numerous issues not

¹² Neither Order WR 89-25 nor subsequent revisions of the Declaration provide an extensive explanation of the basis for classifying the Santa Ana River as fully appropriated. However, there is no indication that the classification of the Santa Ana River as fully appropriated was based upon a need to reserve or retain water in the river or its tributaries for instream uses. Neither Order WR 89-25, nor Decision 1194 addresses the subject of retaining water in the river to meet instream needs. In an instance in which instream or environmental considerations were not relied upon as a basis for classifying a watercourse as fully appropriated, a decision to revise the fully appropriated designation to allow for processing new water right applications need not involve consideration and analysis of instream or other environmental uses of the water sought to be appropriated. Those issues can properly be addressed in the context of processing the applications once they are accepted for filing.
[footnote continues on next page]

addressed in this order. However, as indicated in the hearing notice, the focus of our inquiry in this proceeding is on the relatively narrow task of determining if the evidentiary record supports revising the fully appropriated stream status of the Santa Ana River for the limited purpose of processing the water right applications submitted by the petitioners.¹³ Based on our review of the record and the findings above, we conclude that the Declaration of Fully Appropriated Streams, as adopted by Order WR 98-08, should be revised to allow for processing the water right applications submitted by Muni/Western and OCWD in accordance with the provisions of the Water Code and other applicable law.¹⁴

ORDER

IT IS HEREBY ORDERED, based upon the foregoing findings, that:

1. The Declaration of Fully Appropriated Streams, as adopted by State Water Resources Control Board Order WR 98-08, is amended to allow for processing the following applications to appropriate water:
 - (a) the application to appropriate water from the Santa Ana River filed by San Bernardino Valley Municipal Water District and Western Municipal Water District of Riverside County; and
 - (b) the application to appropriate water from the Santa Ana River filed by Orange County Water District.

¹³ The petition filed by Muni and Western refers to revising the fully appropriated stream status of the Santa Ana River “to permit the granting of the application accompanying this petition.” (Muni/Western 1-2, p. 7.) In addition, the notice preceding the SWRCB hearing specified the key issue as whether the SWRCB should revise the Declaration for the limited purpose of processing “the water right applications submitted by the petitioners.” Our finding that the evidence supports revising the Declaration to allow for processing petitioners’ applications is limited to the rates of diversion and maximum quantities of water identified by the petitioners in their applications and supplemental material submitted prior to the date of the hearing notice.

¹⁴ SWRCB files contain several other minor applications to appropriate water in the Santa Ana River watershed on which no action has been taken due to the fully appropriated status of the watershed. The parties who submitted those applications did not present evidence at the hearing and the status of the applications is not affected by this order. The provisions of Order WR 98-08, however, allow for processing applications in fully appropriated
[footnote continues on next page]

2. The State Water Resources Control Board Division of Water Rights shall process the specified water right applications in accordance with applicable law.

CERTIFICATION

The undersigned, Administrative Assistant to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 21, 2000.

AYE:

NO:

ABSENT:

ABSTAIN:

Maureen Marché
Administrative Assistant to the

watersheds under specified limited conditions (e.g. diversions from sources lacking hydraulic continuity with the fully appropriated watercourse downstream). (Order WR 98-08, p. 26.)