



# State Water Resources Control Board

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**Winston H. Hickox**  
*Secretary for  
Environmental  
Protection*

## Division of Water Rights

901 P Street . Sacramento, California 95814 . (916) 657-1951  
Mailing Address: P.O. Box 2000 . Sacramento, California . 95812-2000  
Fax (916) 657-1485 Web Site Addresses: <http://www.swrcb.ca.gov>, <http://www.waterrights.ca.gov>

### **NOTICE OF PUBLIC HEARING**

PETITIONS TO REVISE  
DECLARATION OF FULLY APPROPRIATED STREAMS  
TO ALLOW PROCESSING OF TWO SPECIFIED APPLICATIONS TO  
APPROPRIATE WATER FROM THE SANTA ANA RIVER

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9:00 a.m., December 7 & 8\*, 1999

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\* If necessary

State Water Resources Control Board  
Paul R. Bonderson Building  
901 P Street, First Floor Hearing Room  
Sacramento, CA 95814

### **SUBJECT OF HEARING**

This hearing is scheduled to receive evidence which will assist the State Water Resources Control Board (SWRCB) in determining whether to revise the [Declaration of Fully Appropriated Streams](#) (Declaration) to allow for processing two applications to appropriate water from the Santa Ana River.

### **BACKGROUND**

Pursuant to Water Code sections 1205 through 1207, the SWRCB has adopted and periodically revised a Declaration of Fully Appropriated Streams (Declaration). The Declaration includes a list of stream systems that have been found to be fully appropriated for all or part of the year based upon court decisions or decisions of the SWRCB. The Santa Ana River stream system has been found to be fully appropriated throughout the year from its mouth at the Pacific Ocean upstream in Riverside, San Bernardino and Orange Counties. The Santa Ana River system was included in the original Declaration adopted by SWRCB Order WR 89-25 and it remains listed on the most recent revised Declaration adopted by SWRCB Order WR 98-08. Order WR 89-25 cited State Water Rights Board Decision 1194 for the finding that no unappropriated water is available from the Santa Ana River watershed. The finding regarding no unappropriated water in

Decision 1194 referred to the Court of Appeal decision in *Orange County Water District v. Riverside et al*, 188 Cal. App. 2d (1961).

The subject of water rights on the Santa Ana River was also addressed in an April 17, 1969, stipulated judgment of the Superior Court for Orange County. (Orange County Water District v. City of Chino, Superior Court No. 117628.) The 1969 Orange County judgment provided a basis for division of the water resources of the upper and lower portions of the Santa Ana River based upon specified flows at Prado Dam and Riverside Narrows. The judgment also provides that the guaranteed flows are to be calculated over stated periods of time and are subject to adjustment for water quality. The judgment further provides that, if parties downstream of Prado Dam receive the water to which they are entitled and other provisions of the judgment are complied with, then water users and other entities upstream of Prado Dam are free to engage in “unlimited water conservation activities, including spreading, impounding, and other methods.”

A stipulated judgment was also entered on April 17, 1969, by the Superior Court for Riverside County. (Western Municipal Water District of Riverside County v. East San Bernardino County Water District, Superior Court No. 78426.) The Riverside County judgment declared that water users within the boundaries of San Bernardino Valley Municipal Water District (SBVMD) are entitled to 72.05% of the safe yield of the San Bernardino Basin Area. The judgment also declared that six of the plaintiffs whose service areas are wholly or mostly within Riverside County are entitled to the remaining 27.95% of the safe yield of the San Bernardino Basin Area. Western Municipal Water District (WMWD) is one of the six parties referred to in the judgment. This judgment also refers to “new conservation” in the San Bernardino Basin Area.

Section 871, et seq. of title 23, California Code of Regulations (regulations) sets forth the procedure and requirements applicable to revision of the Declaration to allow for processing of water right applications on streams previously declared to be fully appropriated. 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. Each petitioner has also submitted an application to appropriate the water identified in the petitions.

The first petition was submitted by SBVMWD and WMWD on May 31, 1995. The petition and accompanying hydrologic data were filed for the purpose of demonstrating that water that was previously lost as flood flows can now be stored in the Seven Oaks Dam flood control project. The petitioners assert that the opportunity for “conservation of flood water by Seven Oaks Dam constitutes a ‘change in circumstances’ within the meaning of section 871, subdivision (b)” of the applicable regulations. The petition filed by SBVMWD and WMWD was accompanied by a water right application which requests direct diversion and storage for municipal use in the years when such water is available without infringing on existing rights. The application requests: (1) the right to divert up to 800 cubic feet per second (cfs) by direct diversion; (2) the right to store up to 50,000 acre-feet per annum (afa) in the reservoir formed by Seven Oaks Dam; and (3) the right to place up 100,000 afa in underground storage. The total combined amount of water to be directly diverted or stored during any one year would not exceed 100,000 afa.

On September 3, 1999, the Orange County Water District (OCWD) filed a petition and accompanying hydrologic information to demonstrate that flows in the lower reach of the Santa Ana River watershed have changed due to upstream urbanization and increased return flows of treated wastewater now discharged into the stream system. The petition also states that OCWD has made a significant effort and investment to capture the increased return flows that would otherwise flow to the ocean. Thus, the petitioner asserts that there is a “change in circumstances” within the meaning of section 871(b) of the regulations. The OCWD

petition states that the sole purpose of the petition is to enable the SWRCB to accept and ultimately approve a water right application submitted by OCWD on November 15, 1992, and supplemented on August 21, 1998. The OCWD petition states that its application is not intended to disrupt previously established existing rights for diversion upstream of OCWD facilities. The OCWD application seeks a permit to appropriate up to 800 cfs by direct diversion and up to 146,800 afa by storage in Prado Dam, Gypsum Canyon Reservoir, Aliso Canyon Reservoir and underground storage in various groundwater basins as part of OCWD's ongoing groundwater recharge operations. The total combined amount taken by direct diversion and storage during any one year would not exceed 507,800 afa.

The Chief of the Division of Water Rights has reviewed the hydrologic information provided by each of the petitioners and concluded that there is basis for a hearing on the question of whether the Declaration should be revised in order to allow for processing of the water right application of SBVMD and WMWD, and the water right application of OCWD. Approval of either petition would allow the SWRCB to accept, for filing, the water right application submitted by that petitioner and proceed with processing the application(s) in accordance with applicable provisions of the Water Code. The hearing on the petitions to revise the Declaration is not a hearing on the merits of the water right applications, nor would approval of either or both petitions require a finding that water is available in the quantities or during the entire seasons of diversion specified in the applications. Rather, the hearing is limited to the purpose of determining if the Declaration should be revised to allow the SWRCB to proceed with processing the petitioners' water right applications. If either petition is granted, the petitioner's water right application would be accepted for filing, and any issues regarding that application would be addressed pursuant to the provisions of Water Code section 1200 et seq.

## **KEY ISSUES**

Should SWRCB revise the Declaration for the limited purpose of processing the water right applications submitted by the petitioners?

- Has adequate information been provided to demonstrate that there is a change in circumstances since the Santa Ana River system was included in the Declaration?
- Is there adequate information to determine the appropriate diversion season for purposes of revising the Declaration to allow for processing the applications filed by the petitioners? If the information is not presently available, should the petitioners be required to submit information to document the appropriate diversion season during application processing? Are any other requirements appropriate?
- Have the petitioners documented that there is adequate unappropriated water to justify revision of the Declaration for purposes of processing the applications, in whole or in part?
- Are any senior pending applications to appropriate water affected by the SWRCB action on the petitions? If so, what actions are appropriate to address this issue?

**A SPECIAL NOTE IF YOU WANT TO TAKE PART IN THIS HEARING:** All those persons who plan to participate in this hearing should carefully read the enclosure entitled "Information Concerning Appearance at Water Right Hearing." As stated in that enclosure, parties intending to present evidence at the hearing must submit a "[Notice of Intent to Appear](#)" which must be **RECEIVED** by the Board on or before **4:00 p.m. November 5, 1999.**

Questions concerning this notice may be directed to *Katherine Mrowka of the Division of Water Rights at (916) 657-1951* FAX # (916) 657-1485, or to *Dan Frink of the Office of Chief Counsel at (916) 657-2104*.

## PARKING AND ACCESSIBILITY

The enclosed map shows the location of the Paul R. Bonderson Building in Sacramento. Public parking is available in the State Garage on 10th Street between O and P Streets, in metered spaces on area streets, and in the public parking garages on L Street between 10th and 11th Streets and on P Street between 11th and 12th Streets.

The Paul R. Bonderson Building first-floor hearing room is accessible to persons with disabilities.

/s/ Dale Claypoole for

Maureen Marché  
Administrative Assistant to the Board

Enclosures

Date:

## INFORMATION CONCERNING APPEARANCE AT WATER RIGHT HEARING

The following procedural requirements will apply to this hearing and will be strictly enforced by the SWRCB. Failure to submit witness information and exhibits in a timely manner may be interpreted by the SWRCB as intent not to appear.

**1. PARTIES:** A person who wishes to participate in the hearing as a party and present evidence must submit a Notice of Intent to Appear, written testimony, and exhibits, in accordance with the requirements set forth below, with a request to be designated a party to the hearing.

A person who wishes only to present only a policy statement, either orally or in writing, will be considered an interested person and not a party to the hearing. A person who wishes to present a policy statement must file a Notice of Intent to Appear and follow the requirements governing policy statements (see item 6a below).

**2. NOTICE OF INTENT TO APPEAR:** Parties and interested persons must submit to the SWRCB a written Notice of Intent to Appear (notice) on the enclosed form. If there is any change

in the hearing schedule, only those persons who have filed a notice will be informed of the change.

The notice must include the name and address of the party or interested person, or the name of the party's or interested person's representative. An interested person should clearly indicate on the notice his or her intent to make a policy statement only. A person who wishes to participate as a party must also include the name of each witness who will testify on the party's behalf, together with a description of the proposed testimony and the estimated amount of time required by the witness to present an oral summary of his or her testimony, which must be submitted in writing as described in item 3, below. For each expert witness, a statement of qualifications should be attached.

The SWRCB must receive six copies of the notice by **4:00 p.m. on November 5, 1999**. Following receipt of the notices, the SWRCB will compile and mail out a list of parties to exchange information that is composed of the persons who submitted a notice and intend to present evidence. Only a party who has submitted a notice will be included on the list of parties to exchange information. No later than **November 19, 1999** each party shall serve a copy of the party's notice, along with exhibits, on each of the parties identified on the list.

**3. WRITTEN TESTIMONY:** Each party proposing to present testimony on factual or other evidentiary matters at the hearing must submit the testimony in writing by **4:00 p.m. on November 19, 1999**. Written testimony is, and will be treated as, an exhibit (see item 4 below). Oral testimony that goes beyond the scope of written testimony may be excluded.

**4. EXHIBITS:** Each person wishing to present exhibits shall submit six copies of the party's exhibits to the SWRCB and serve one copy on each of the other parties included on the list of parties to exchange information. All written testimony of each witness, and the statements of qualifications for expert witnesses, are considered to be exhibits. All written testimony, statements of qualifications for expert witnesses, other exhibits, and a complete list of exhibits must be received by the SWRCB **no later than 4:00 p.m. on November 19, 1999**, and served on the other parties by mail on or before that date. A statement of service, which indicates the manner of service on the parties, shall be filed with each party's exhibits.

Each party also shall complete and submit the attached exhibit identification index with the party's exhibits. The Status of Evidence column will be completed by the SWRCB during the course of the hearing.

Proposed exhibits are subject to the following requirements:

- a. Information based on technical studies or models shall be accompanied by sufficient information to clearly identify and explain the logic, assumptions, development, and operation of the studies or models.
- b. In accordance with California Code of Regulations, title 23, section 648.3, public records of the SWRCB and documents or other evidence that have been prepared and published by a public agency, if otherwise admissible, may be submitted as exhibits by reference provided that the original or a copy is in the possession of the SWRCB.
- c. If documents are submitted as exhibits by reference, the parties offering such documents shall advise the other parties with whom exhibits must be exchanged of the titles of the

documents, the particular portions on which they rely, the nature of the contents, the purpose for which the exhibit will be used when offered into evidence, and the specific file folder or other exact location in SWRCB's files where the document(s) may be found.

- d. Exhibits that rely on unpublished technical documents will be excluded unless the unpublished technical documents are admitted as exhibits.

**5. RULES OF EVIDENCE:** Evidence will be admitted in accordance with the provisions of Government Code section 11513.

**6. ORDER OF PROCEEDING:** The hearing will be conducted in accordance with California Code of Regulations, title 23, section 648.5 and the following specific rules.

**5.ORDER OF PROCEEDING:** The hearing will be conducted in accordance with California Code of Regulations, title 23, section 648.5 and the following specific rules.

**a. POLICY STATEMENTS:** Pursuant to California Code of Regulations, title 23, section 648.1, subdivision (d), the SWRCB will provide an opportunity for presentation of policy statements or comments by interested persons who are not participating as parties in the proceeding. A policy statement is a non-evidentiary statement that may include the speaker's policy views or non-expert analysis of evidence that already has been submitted. Policy statements will be heard first. Policy statements are not subject to the pre-hearing requirements for exhibits set forth above. All persons wishing to make policy statements, however, are requested to file a Notice of Intent to Appear on the enclosed form indicating clearly an intent to make only a policy statement.

Persons making policy statements will not be sworn or asked to affirm the truth of their statements, and they must not attempt to use their statements to present evidence of facts, either orally or by introduction of written exhibits. At the discretion of the hearing officer, questions may be addressed to persons making policy statements for the purpose of clarifying their statements. Persons making policy statements, however, are not subject to cross-examination.

Time limitations of five minutes or less will be imposed on policy statements. Persons making policy statements are encouraged to have written copies of their statement available at the time they speak for distribution to the SWRCB.

**b. OPENING STATEMENTS:** All parties who present evidence in the hearing may make an opening statement. Oral presentation of an opening statement will be limited to 20 minutes for each party. An opening statement may also be submitted in writing. Parties should use their opening statements to explain the objectives of their case, the major points that will be made, and the relationship between the major points and the key issues. An opening statement may include any policy-oriented statements that the party wishes to make.

**c. PRESENTATION OF EACH PARTY'S CASE-IN-CHIEF:** Each party shall present one case-in-chief addressing the key issues identified in the hearing notice. The presentation shall include all written testimony and other exhibits. Oral presentation of the direct testimony of each witness shall be limited to a maximum of 20 minutes per witness, not to exceed a total of two hours for all witnesses presented by a party. The time allowed for the presentation of a party's case-in-chief may be extended upon a showing of good cause. The hearing officer will limit presentation of

redundant testimony.

All witnesses presenting testimony must appear at the hearing. Each witness shall identify his or her written testimony, affirm that the testimony is true and correct, and briefly summarize the major points in the testimony. Written testimony may not be read into the record. The written testimony shall be treated as direct testimony in its entirety.

**d. CROSS-EXAMINATION:** Immediately following the presentation of each party's case-in-chief, the party's witnesses will be subject to cross-examination by the other parties, SWRCB members, and SWRCB staff. Witnesses may be cross-examined on subjects that were not covered in their direct testimony.

If a party presents multiple witnesses on a given subject area or closely related subject areas, those witnesses may be subject to cross-examination as a panel, at the discretion of the hearing officer. Cross-examination will be limited to 20 minutes per witness or panel of witnesses, for each party conducting cross-examination. The time allowed for cross-examination will be extended upon a showing of good cause demonstrated in an offer of proof. Redirect examination and recross examination may be permitted for good cause at the discretion of the hearing officer.

**e. REBUTTAL EVIDENCE:** Parties will have the opportunity to present rebuttal evidence. Parties must not use the opportunity to present rebuttal evidence to attempt to present new evidence that should have been included in the case-in-chief, or to present repetitive evidence. All rebuttal evidence will be subject to cross-examination.

**f. CLOSING ARGUMENTS:** Oral closing statements shall not be made. An opportunity will be provided for submission of written closing statements or legal briefs following the close of the hearing. Six copies of any closing statements or legal briefs shall be submitted to the SWRCB and one copy shall be mailed to each of the parties required to exchange information for this hearing. The schedule for submission of closing statements and legal briefs will be decided by the hearing officer at the close of the hearing.

**7. EX PARTE COMMUNICATION:** During the pendency of the proceeding, commencing no later than the issuance of the Notice of Hearing, there will be no *ex parte* communications between SWRCB members or staff and any of the parties or interested persons regarding substantive issues within the scope of the proceeding. Communications regarding noncontroversial procedural matters will be permitted, but ordinarily should be directed to SWRCB staff and not to SWRCB members.

**8. CONDUCT OF PROCEEDING GENERALLY:** The proceeding will be conducted as provided herein and in accordance with the procedures for adjudicative proceedings set forth in California Code of Regulations, title 23, sections 648-648.8, 649.6, and 760. Please note that section 648.5, subdivision (a), provides that:

“Adjudicative proceedings shall be conducted in a manner as the Board deems most suitable to the particular case with a view toward securing relevant information expeditiously without unnecessary delay and expense to the parties and to the Board.”

Materials submitted to the SWRCB should be addressed as follows:

Division of Water Rights  
State Water Resources Control Board  
P.O. Box 2000  
Sacramento, CA 95812-2000  
Attn: Katherine Mrowka  
Phone: (916) 657-1951  
Fax: (916) 657-1485