May 14, 2009

Ms. Delores Brown,
Chief, Office of Environmental Compliance
Department of Water Resources,
P. O. Box 942836
Sacramento, CA 94236

Re: BDCP – Comments on NOF for EIR/EIS

Dear Ms. Brown

Thank you for allowing the City of Antioch the opportunity to comment on the Notice of Preparation (“NOP”) for the joint Environmental Impact Report/Environmental Impact Statement (“EIR”) for the Sacramento-San Joaquin Bay Delta Conservation Plan (“BCDP”). In addition to the comments set forth in this letter, the City incorporates its previous comments on the BDCP’s prior NOP set forth in the City’s letter dated May 30, 2008. The City’s prior letter is part of the record and is posted on the BDCP website.

I. ANTIOCH’S BENEFICIAL USE OF WATER IN THE DELTA

The City is concerned about potential impacts to its water supply (e.g. in-Delta water flows and water quality) that could result from the implementation of the BDCP.

As previously stated, Antioch holds pre-1914 water rights to the San Joaquin River. The City’s rights are among the highest priority rights in the Delta and have been validated as a matter of law by the California Supreme Court (Town of Antioch v. Williams Irrigation District (1922) 188 Cal. 451). Significantly, the City’s Delta water rights include as a matter of law the right to Sacramento River flow into the Delta. Id.¹

The City’s water supply is protected pursuant to the City’s water rights priority, the Delta Protection Act (Water Code sections 12200 et seq.), Watershed of Origin protections (Water Code

¹ In the Town of Antioch v. Williams Irrigation District (1922) 188 Cal. 451, the California Supreme Court found:

"It is important here to state some additional facts to explain how this pollution comes about and why diversions from the Sacramento River may or do affect the volume and quality of the water flowing down the San Joaquin River by the city of Antioch into Suisun Bay . . . For many miles above the entrance of the two rivers into said bay the land between them is flat and threaded with sloughs in which water either stands or flows. From the Sacramento River at two points, one about eight and the other about twenty-three miles above its mouth, sloughs diverge, into which parts of its water escape and flow through said sloughs and into the San Joaquin River at points several miles above the diversion by the City of Antioch."
sections 11460 et seq.), by the doctrines of reasonable use and the public trust as well as by the enabling legislation for the Central Valley Project and Shasta Dam (See Water Code section 11207)

II. NOP COMMENTS

A. Project Description

The proposed BDCP project ("project") is still not adequately described in the NOP. Under the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 et seq., (and 40 CFR section 1508.22 for the EIS component of the EIR), the NOP must adequately describe the proposed project in order to enable meaningful comments and to adequately inform the public of the potential impacts to the environment.

The BDCP NOP is vague as to the project description. It is generally understood that the BDCP is likely to include a project component involving some form of an out-of-Delta conveyance facility. However, the NOP omits any details about such a facility including the preferred location and size of such a facility. Additionally, the NOP fails to state whether the proposed conveyance element of the BDCP will be a through-Delta only conveyance, or an out-of-Delta only conveyance, or a dual conveyance alternative including both through-Delta and out-of-Delta facilities.

During the scoping meetings, several alternatives regarding the location of the out-of-delta conveyance facility were shown on certain maps. However, no alternative was indicated as a preferred alternative and the locations of the intakes and alternatives (e.g. western, eastern, and in-Delta alignments) were indicated to be tentative and for discussion purposes only. There was some discussion at the scoping meetings that the eastern alignment for the out-of-Delta conveyance facility was being considered as a potentially preferred location for the purposes of the habitat conservation plan but not for the CEQA process. Further, other in-Delta projects have been discussed as part of the BDCP such as the Frank’s Tract Project; however, the exact configuration of these projects and how they would operate within the framework of the BDCP is not set forth in the NOP.

Without an adequate project description, it is not possible to know the potential impacts of the BDCP.

B. Document Type

It remains unclear whether the EIR will be a "project" level document or whether further environmental review will be conducted in future phases. An adequate project description must include a clear description of the environmental document to be prepared. It is also unclear how the

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2 Recently, however, the BDCP has publically recommended a dual facility and has selected the eastern alignment as the preferred alignment for the out-of-Delta conveyance facility. As these decisions were made during the NOP comment period, and were not part of the project description in the NOP, the public has been deprived of an opportunity to comment on these decisions.
Environmental Impact Report and the Environmental Impact Statement will be jointly addressed and developed.

C. Discretionary Decisions

The EIR continues to fail to list clearly all the discretionary decisions expected to rely on this document. Many local, state and federal approvals will be necessary to implement the proposed project.

D. Impacts on In-Delta Resources, Water Quality and Beneficial Uses

The BDCP has the potential to impact in-Delta resources and beneficial uses by diverting water north of the Delta and reducing Sacramento River flow to the southern, central and western Delta. To date, there has been little discussion or analysis regarding these impacts other than some preliminary modeling. There was almost no discussion of such potential impacts during the scoping meetings conducted this spring.

Potential impacts from the BDCP include changes in the operation of upstream projects including Shasta, Oroville, and Folsom dams. Changes in inflow to, and outflow from, the Delta are also being proposed. These potential operational changes to existing facilities as part of the BDCP are not adequately described in the NOP (See for example page 8 of the NOP). As a result it is not possible to comment meaningfully on potential impacts to in-Delta water supplies and resources (including potential impacts from increased salinity in the western Delta) or on potential conflicts between the BDCP and in-Delta protections such as the Delta Protection Act. There may also be a conflict between operational changes (and the construction of new facilities) and stated potential covered activities such as the Cache Slough Restoration area resulting in improvement of “Delta salinity conditions.”

In addition, the BDCP has the potential to impact in-Delta resources and water quality due to potential changes in the location of diversion points resulting in less water diverted from the southern Delta and more water diverted from the Sacramento River near Hood. Diverting large amounts of Sacramento River flows upstream of the Delta is likely to have critical impacts on the in-Delta resources and other beneficial uses. Without a specific project description of the location and configuration of the proposed new intakes, it is not possible to adequately comment on the potential impacts from the change in these points of diversion. It is unclear whether in-Delta water supplies could be impacted by these new diversion points and corresponding facilities.

Although preliminary model results have been provided to us at our request, we are unable to assess the impacts of the proposed project upon water quality at the City of Antioch’s intake location. First, we understand that certain project components (e.g., size of habitat in the Cache Slough area) may change in subsequent project evaluations. Second, it is unclear that the tool being used to assess impacts (DSM2) is adequate. We understand that a “recalibration” process is currently underway that may alter the way in which flows into and out of the habitat restoration area
are simulated, with subsequent impacts to tidal flow dynamics and downstream water quality. We are also concerned about the ability of the DSM2 model to adequately describe future conditions, including both project-induced conditions and those that will result whether the project proceeds or not. In the former category, the DSM2 model being used to simulate salinity is frequently unable to reproduce salinity under conditions of low Net Delta Outflow (NDO), and it appears that the frequency of low NDO may increase under the proposed project. In the latter category, the salinity return component of the model at the Bay boundary has not, to our knowledge, been adjusted to accurately simulate the expected effects of sea level rise. We understand that a recalibration process may be underway to address this concern as well. Finally, and as noted above, changes in the operations criteria of upstream projects (e.g., Shasta, Oroville, and Folsom Dams) have not been included in the current model evaluations and may significantly affect the quality and timing of fresh water flows to the Delta.

The EIR must examine these potential impacts from the BDCP. The EIR must review how the BDCP will be implemented within the framework of the California water rights system (e.g. protecting water rights holders with superior priorities) and how the BDCP will meet the requirements of the Delta Protection Act (e.g. protecting against salinity intrusion and maintaining in-delta water quality). The EIR must also review how new export facilities and operational changes to existing facilities will impact in-Delta species. While one of the stated goals of the BDCP is to protect and restore aquatic and natural communities, the facilities constructed as part of the BDCP could in fact cause new significant impacts on aquatic and natural communities.

E. Mitigation/Alternatives

Potential mitigation measures and alternatives such as increased water conservation or reduced Delta exports are not described in the NOP and should be incorporated into the EIR. Water conservation has been a primary objective of other in-Delta processes such as the Delta Vision. Water conservation measures are likely to have less impact on in-Delta resources and water supply than out-of-Delta conveyances and are also likely to be far less costly than such facilities.

In addition, a reduced export/increased storage alternative should be considered and incorporated into the EIR. With increased storage facilities (both upstream and downstream of the Delta), it is possible that present pumping operations - even as currently constricted by the Biological Opinion for Delta Smelt - could meet the needs of the exporters. A recent study by Contra Costa Water District showed that the proposed conveyance scenarios for the BDCP may not result in significant increased supply of water for exports particularly during dry climatic periods.

F. Baseline Data

Historical conditions prior to the construction and operation of the State Water Project (and in the context of the requirements of the Delta Protection Act) should be used to establish the baseline for the BDCP. Historically, water in the Delta, especially the western Delta, was much
fresher than it is today (See for example Town of Antioch v. Williams Irrigation District (1922) 188 Cal. 451).

The NOP correctly notes that for the purposes of CEQA, the baseline for determining impacts from a proposed project is generally the same as existing conditions. However, existing conditions are leading to the decline of many species. Therefore, at the very least, the EIR must examine historical conditions and data to describe the conditions that native species are adapted to and how they might respond to project-induced changes that may differ significantly from those historic conditions. It is difficult to imagine that the BDCP could achieve its goals of protecting and restoring aquatic and natural communities by examining only present conditions.

G. Reasonably Foreseeable Impacts

It is reasonably foreseeable that the out-of-Delta component of a dual conveyance system as part of the BDCP could be used to convey water exclusively at times - either due to operational considerations or as the result of physical conditions such as levee failure due to earthquakes or floods. The EIR must comprehensively analyze the impacts (especially in-Delta impacts) of operating an out-of-Delta conveyance facility exclusively as part of the BDCP. For the purposes of the NOP’s project description, the NOP does not provide a potential range of future operating criteria for the out-of-Delta conveyance facility component of the BDCP, making it impossible for the public to fully understand the potential impacts of the BDCP or to provide for meaningful input and comment.

Sincerely,

Phillip L. Harrington
Director of Capital Improvements/Water Rights

c: James Jakel, City Manager
Lynn Tracy Nerland, City Attorney
Matthew Emrick