

November 21, 2013

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Mr. John Swiecki, AICP
Community Development Director
City of Brisbane
50 Park Place
Brisbane, California 94005

Re: Comments on Brisbane Baylands Project
City File No: SP-1-06/GPA-2-10/State Clearinghouse No. 2006022136

Dear Mr. Swiecki:

The Modesto Irrigation District (MID) has reviewed the City of Brisbane Baylands Project Draft Environmental Impact Report (Draft EIR) and offers the following comments.

GENERAL COMMENTS:

To start with, MID prefers to have a positive and collaborative relationship with the City of Brisbane (the "City"). However, MID has not in any manner been involved in the consultation process regarding this Draft EIR and this moment offers the first serious statutorily created opportunity to express MID's issues.

As MID understands the project, it depends upon a number of public agencies entering into agreements with the City. Pursuant to the Term Sheet with Oakdale Irrigation District (OID), the City is responsible for developing and negotiating each of the required agreements. It is critical to note that MID has not been contacted by the City about this transfer; MID has not been involved in any aspect of designing or planning the water transfer and consequently MID has not considered, much less approved, the water transfer. There has been no formal request of MID, no discussion, no agreement, no commitment, no examination and no study of issues impacting MID. In fact, the first details MID has regarding the proposed project is through the Draft EIR.

The City should be aware that the likelihood of meaningful dialogue between the City and MID regarding this project lessens if the certified EIR neglects addressing environmental issues concerning MID in a positive and complete manner. In preparing these comments MID is mindful that CEQA is to be expansively interpreted in order to provide maximum evaluation and

consideration of potential direct and indirect environmental effects of a proposed project. Title 14 California Code of Regulation § 15003(f) [hereinafter CEQA Guideline]; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247,259. In keeping with this expansive statutory mandate the "EIR requirement is the heart of CEQA." CEQA Guideline § 15003(a); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795.

The statutory policies are clearly expressed in Guideline section 15003 and relevant here is the fact that the lead agency must "consider the whole of the action, not simply its constituent parts" when complying with CEQA. CEQA Guideline § 15003(h).

SPECIFIC COMMENTS:

1. Failure of Lead Agency to Consult With or Otherwise Integrate Responsible Agencies into the CEQA Process.

The Draft EIR identifies MID as a Responsible Agency. (Indeed, the project apparently fails if MID does not approve various agreements with other public agencies.) As you know, a Responsible Agency means a "public agency which proposes to carry out or approve a project." CEQA Guideline §15381. In this instance the Lead Agency essentially ignored rather than included MID, a responsible agency, in the CEQA process thereby compelling MID to submit these more lengthy and critical comments about the legal deficiencies in the Draft EIR.

For purposes of illustration, CEQA provides at least six meaningful opportunities for the City to include a responsible agency in the CEQA process. The City ignored each of these vitally important opportunities to include a directly affected responsible agency in the CEQA process.

These instances include:

1. Guideline 15060.5. Lead Agency "may include" responsible agencies in pre-application consultation.
2. Section 15064(g). Lead Agency "shall" consult with responsible agencies after determining an initial study is required.
3. Section 15072(a). Lead Agency "shall" provide responsible agencies with notice of intent to adopt a negative declaration.

4. Section 15082(a). "Immediately" after deciding to prepare an EIR the Lead Agency "shall" send a notice of preparation to responsible agencies.
5. Section 15082(c). A responsible agency may ask for a consultation with the Lead Agency. See also section 15104.
6. Section 15086(a) (1). "The lead agency shall consult with and request comments on the draft EIR from: (1) responsible agencies."

The inherent problem and obvious legal infirmity of ignoring these provisions of the CEQA Guideline is readily apparent when considering the terms "must" and "shall" are defined as identifying "a mandatory element which all public agencies are required to follow." CEQA Guideline §15005.

As the CEQA Guideline wisely observes, "**Many public agencies have found that early consultation solves many potential problems that would arise in more serious forms later in the review process.**" (Bolding added.) The present circumstance may illustrate the correctness of this Guideline statement.

2. Failure of EIR to Adequately Describe the Project Description and Adequately Address the Whole of the Action.

The Draft EIR neither fully describes the whole project nor adequately addressed the impacts of the project as a whole. These two failures are interrelated and individually and cumulatively contribute to a legally deficient Draft EIR.

First, an EIR must provide an adequate project description. Numerous cases repeatedly state a general principal that an accurate, stable, and finite project description is "the indispensable prerequisite to an informative and legally sufficient EIR." *Kostka & Zischke 1 Prac. under the California Environmental Quality Act* §12.2 at 577. A project description omitting integral components of the project may result in an EIR failing to disclose all project impacts. *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3d 818, 829.

Second, an EIR must identify and evaluate environmental impacts produced by the whole of a project. CEQA defines a project to mean "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." CEQA Guideline §15378(a). "A correct determination of the nature and scope of the project is a critical step in complying with the mandates of CEQA." *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 267. Critically, the CEQA document must consider all phases of project planning, implementation, and operation, including phases planned for future implementation. CEQA Guideline §15063(a)(1). Under this rule a lead agency

may not limit environmental disclosure by ignoring the development or other activities that will ultimately result from an initial approval. *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325.

Here the proposed project clearly depends upon and is predicate upon a multitude of intermediate water agreements, and complex water exchanges and transfers. See Draft EIR at 1-2: "*The transfer from OID to Brisbane is unique and unprecedented.*" Essentially, it appears that OID would transfer water to MID through one conveyance facility, MID would then transfer water from a separate conveyance facility to the Don Pedro Reservoir and deposit the water into a metaphysical "water bank" held by the City and County San Francisco (SFPUC), and then, independently, San Francisco would convey water to the City through a completely separate conveyance system. Under the proposed project, the transfer water would originate from the Stanislaus River, however, the actual source of the transferred water would be from the Tuolumne River that is released into a SFPUC facility at the Hetch Hetchy. Draft EIR at 3-66 to 3-68. Presumably the project requires agreements between OID and MID, MID and SFPUC, SFPUC and the City, and OID and the City. Each agreement is a discretionary action subject to CEQA and relevant aspects of California water law.

This unique multi-layered, multi-agency water transfer is described in only sketchy terms in the Draft EIR's project description. See Draft EIR 1-2. And, as explained later, this incomplete description contributes to potential environmental impacts being unaddressed in the Draft EIR analysis. The truncated project description and subsequent incomplete analysis prevents CEQA from satisfying a basic statutory goal of informing "government decision makers and the public about the potential, significant environmental effects of proposed activities." CEQA Guideline §15002(a)(1) and §15003(c) (d) and (e).

The document professes to evaluate all impacts, including direct and indirect environmental effects arising from the water supply and transfer components of the project, see Draft EIR at 1-3, but the document's narrative dismisses any effects, other than effects from MID, as a responsible agency, when certifying the EIR.

A truncated project description plus omitting a meaningful evaluation of the method of transferring and storing the water constitutes a failure to proceed in a manner required by CEQA and compels the City to revise the Draft EIR.

3. The Draft EIR did not Meaningfully Evaluate the Water Source or Transfer of Water Contemplated by the Project.

Perhaps the Draft EIR's overarching failure revolves around an abject failure to evaluate in a meaningful fashion the source of water and the circuitous method of transferring water from OID to the City. Indeed the complete absence of

analysis, to a certain extent, inhibits MID and others from participating in the process and offering comments about the Draft EIR. (Public participation, of course "is an essential part of the CEQA process." CEQA Guideline §15201. This incomplete Draft EIR thwarts meaningful public participation and does violence to one of CEQA's primary purposes.)

Furthermore, it is not MID's duty to perform the lead agency's obligations and perform studies and evaluations of potential environmental effects of the project. This is the City's non-delegable obligation. It is a lead agency's duty and not a judicial (*Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 159 n.6) or public (*Sunstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296,311) duty to specify what should be in an Draft EIR. Simply stated, "[w]hat will be the result of that study is not our concern....We require only that respondents comply with the mandates of CEQA." *Association for a Cleaner Environment v. Yosemite Community College District* (2004) 116 Cal. App.4th 629, 641. This Draft EIR does not comply with CEQA's mandates.

Substantially exacerbating this problem is the fact that obvious environmental effects could potentially occur as part of the water supply and water transfer component of the project. While MID has no responsibility to frame or identify the project's potential environmental effects, for purposes of illustration only, these environmental effects could include but are not limited to:

- 1) transevaporation of water from OID to MID to SFPUC to the City;
- 2) the amount of water that each public agency needs to release, taking into account transevaporation and other loss of water due to transportation and holding of water, to provide the City with an amount of water consistent with the OID-Brisbane agreement;
- 3) the quality and capacity of the various water transport vehicles;
- 4) Brisbane needs water year round, how can the transfer be facilitated when MID canals only operate during irrigation season;
- 5) the environmental effect to fish and wildlife from removing water from the Stanislaus and Tuolumne Rivers at certain times in order to comply with the water supply agreement;
- 6) the effect on agricultural and urban water supplies, including groundwater tables, from removing water from the Stanislaus and Tuolumne Rivers at certain times in order to comply with the water supply agreement; and
- 7) the environmental effects of introducing Stanislaus River water into the Tuolumne River drainage.

A faulty project description and sketchy evaluation of the water transfer raises numerous questions and suggests numerous environmental effects. Moreover, there is no discussion or analysis of the potential legal constraints related to the complicated legal and institutional requirements of the Raker Act and the Fourth Agreement between MID, Turlock Irrigation District and SFPUC. Indeed the Draft EIR, without disclosing evidence and analysis, dismisses the entire legal and physical water transfer scheme as inconsequential: "There are no known issues other than certification of this EIR to address the environmental impacts of the

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water transfers that will implement the agreements that require resolution." Draft EIR 3-37.

The slender evidentiary support for this statement is flimsy and incorrect. The Draft EIR incorporates by reference the OID Programmatic EIR (PEIR) for OID's Water Resources Plan and asserts this document fully evaluates direct and indirect impacts of the water transfer, water supply and water delivery. Draft EIR 4.O-6 through 4.O-7. However, this is not a true statement; this assertion is too broad and is erroneous. In fact, the Draft EIR readily concludes the OID PEIR's scope of analysis was substantially narrower than the environmental effects of the City's project. The OID PEIR did not study the City's proposal but merely "concluded that there were no significant impacts on OID's service area from transfers to customers outside its service area." Draft EIR at 4.O-7. Even this Draft EIR is forced to concede that OID's PEIR "did not analyze impacts of specific water transfers to specific recipients outside OID in the future". Draft EIR at 4.O-7. Further, the Draft EIR impliedly concedes that the scope of the OID PEIR did not take into account any environmental issues arising from MID's role in the instantly proposed project.

4. Other Environmental Issues.

MID has numerous other environmental issues that could be raised during the comment period or could be presented subsequently during the public hearings concerning the EIR and project. In the interest of time and space, and on the basis of comity with a fellow public agency, MID concludes these comments on the Draft EIR and urges the City to seriously consider the concerns presented in this comment letter and thereafter approach MID, a responsible agency that would be requested to approve contracts deemed essential for implementing the project, directly and openly.

If MID's comments are ignored or addressed in a cursory manner MID reserves the right to assert these concerns and other concerns during the public hearing process. It is, however, hopeful that the City and MID will be able to work together on the issues raised in this comment letter.

Very truly yours,



Joy Warren
General Counsel

Copy: Roger VanHoy, General Manager