

# APPENDIX B

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**Legal Comments Letter  
Prepared by Matthew Emrick**



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July 14, 2014

BDCP Comments

Ryan Wulff, NMFS

650 Capitol Mall, Suite 5-100

Sacramento, CA 95814

Via email: [BDCP.Comments@noaa.gov](mailto:BDCP.Comments@noaa.gov)

Re

Subject: **Appendix B** to the City of Antioch's BDCP comment letter

Dear Mr. Wulff:

I am submitting the following comments on the Bay-Delta Conservation Plan (BDCP), the Implementing Agreement, and Associated Environmental Impact Report/Environmental Impact Statement (EIR/EIS) on behalf of the City of Antioch (the City) to highlight further certain legal issues with the BDCP and its EIR/EIS as well as with the Implementing Agreement (referred to cumulatively as the "BDCP").<sup>1</sup> In reviewing the following comments, it must be considered that Antioch has adjudicated pre-1914 appropriative water rights with a priority from at least 1867. Antioch was able to use its water rights prior to the 1920's year-round and 208 to 225 days or more a year on average since the 1930's.

**The BDCP Fails to Adequately Address and Analyze Impacts to Downstream Water Rights Holders Such As Antioch:** As discussed in more detail in Antioch's Appendix A of its BDCP Comments, the BDCP will adversely impact the City's water rights and water supply by reducing Delta outflow and increasing salinity to the point that the City's ability to divert water at all will be critically limited. Antioch's water rights are senior in priority to those to be

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<sup>1</sup> The comments in this letter are based in part on the technical comment on BDCP modeling and water quality impacts set forth in Appendix A to Antioch's BDCP comments.

diverted pursuant to the BDCP. And yet, the EIR/EIS fails to adequately analyze the BDCPs impacts to the City's water rights or to propose any mitigation.

In fact, as noted in Antioch's Appendix A of its BDCP Comments, the EIR/EIS states that Antioch only infrequently uses its water rights, which is an absolutely false statement. As noted above, the City pumps potable water from the Delta every day when it is not too saline to do so, which has been approximately 208 to 225 days a year since the 1930s.<sup>2</sup> The EIR/EIS also fails to properly recognize that the source of Antioch's water supply includes the tributary flow of the Sacramento River via Georgiana and Three Mile Sloughs. Without acknowledging the correct facts and without understanding the nature and scope of the City's water rights, it is simply not possible for the EIR/EIS to have adequately analyzed the impacts of BDCP operations on the City's water rights and water supply.

CEQA (e.g. *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 655) and Water Code Section 1702 (as well as the law of water right priority) require that the BDCP properly analyze project impacts (flow, water quality) on water and water rights downstream of the proposed new diversions. Further, the law of water rights priority (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224) and section 1702 specifically require that any adverse impacts on senior water rights be mitigated.<sup>3</sup> The EIR/EIS fails to meet these requirements. As noted, although EIR affects analysis indicates increased salinity and lower outflow downstream of the project, the EIR fails to adequately recognize Antioch's water rights, fails to adequately analyze the impacts to such rights, and as noted above, incorrectly concludes that the City only infrequently uses its rights. Despite potential significant adverse impacts to water quality, the EIR/EIS fails to provide any mitigation measures to protect Antioch's water rights which supply water to over a 100,000 people.

Additionally, neither the BDCP or the BDCP Implementing Agreement ("IA") provide any provisions to ensure that the BDCP and its operations will not adversely impact senior downstream water rights such as Antioch's. The Decision Tree process only requires outflow criteria to satisfy certain biological objectives. While the City acknowledges that a goal of the BDCP and the IA is to protect covered species, this goal does not excuse or immunize the BDCP and its participants and beneficiaries from complying with other provisions of law. As noted, the EIR/EIS needs to properly analyze impacts to in-Delta water rights and propose full mitigation of

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<sup>2</sup> Prior to the early 1930s and the advent of significant upstream diversions on both the Sacramento and San Joaquin Rivers, the City could pump potable water year around every year except in the most severe drought years.

<sup>3</sup> Diverting water out of the Delta for junior water rights used primarily for agricultural purposes in a manner that will adversely impact senior domestic water rights and public trust purposes is unreasonable.

such impacts. The IA should describe the funding and operational requirements to implement such mitigation.

In sum, the EIR/EIS contains incorrect information and fails to properly analyze and mitigate the adverse project impacts to Antioch's senior water rights as required by law.

**The BDCP Fails to Meet the Requirements of Delta Protection Act of 1959 and Water Code Section 85320:** The EIR/EIS fails to explain how the project meets the requirements of the Delta Protection Act of 1959. In fact, the EIR/EIS indicates that the BDCP will not meet the objectives and requirements of the Act as discussed under the City's Technical Comments. As shown in Appendices A and C to the City's BDCP comment letter, the Proposed BDCP Project will increase salinity levels at Antioch's intake so significantly that the City's water rights and ability to divert its water supply will be substantially impacted – all without any proposed mitigation in the EIR/EIS, BDCP or in the Implementing Agreement.

Water Code sections 12200 et seq. (the Delta Protection Act) were intended in part to ensure that water exports from the Delta do not deprive in-Delta users of water necessary for their beneficial uses and for salinity control. A similar water availability requirement for the BDCP is provided under Water Code section 85320(b)(2)(A). The EIR/EIS as presently proposed, however, fails to adequately analyze the amount water available for export that would not result in adverse impacts to in-Delta uses – especially to in-Delta water rights with higher priority than the State Water Project (SWP) and Central Valley Project (CVP) export projects.

Although Antioch and Department of Water Resources (DWR) have an agreement for impacts to its water quantity and quality from the existing State Water Project, that Agreement has a remaining term of less than 15 years and is not based on the projected additional adverse impacts from the BDCP. Further, the projected impacts from the BDCP will continue for a minimum of 50 years. In addition, the Agreement between Antioch and DWR does not mitigate whatsoever for impacts from CVP operations.

Again, both the BDCP and the IA fail to provide any specific provisions as to how operation of the BDCP will be conducted to comply with the requirements of the Delta Protection Act (or Water Code section 85320(b)(2)(A)). In fact, the IA appears to authorize BDCP operations to violate the provisions of the Delta Protection Act and to immunize BDCP participants from any future regulatory liability by limiting the amount of water required for future mitigation or compliance with the Act. The EIR/EIS should identify all impacted downstream beneficial uses of water and analyze the impacts on such uses and provide specific

mitigations. The IA should describe how the mitigation measures will be properly funded and implemented.<sup>4</sup>

**The EIR/EIS Fails to Adequately Address Impacts to Recreation and Public Trust Resources at Antioch:** As presently proposed, the BDCP will result in years of construction impacts that will adversely affect in-Delta recreation including preventing and limiting recreational access to certain areas within the Delta. Further, the BDCP will permanently increase salinity (and other water quality related constituents) and reduce outflow in the western Delta and specifically at Antioch.

Antioch's unique historic and cultural legacy within the Delta has been as a freshwater location for well over 150 years. Antioch is known as the gateway to the western Delta for its freshwater location and recreational opportunities. A portion of Antioch's economy is dependent on freshwater boating, recreation, and fishing. The City's operates a municipal marina that is related to certain commercial uses and activities in the City. Many people have chosen to buy or rent homes in Antioch specifically because of the proximity to these freshwater boating, recreation and fishing activities or to simply to enjoy a lifestyle near a freshwater river environment.

While the EIR/EIS recognizes certain potential short-term impacts of construction on recreation and attempts to mitigate such impacts, the EIR/EIS fails to adequately address the *long-term* impacts of the BDCP on recreation, boating, and fishing at Antioch and provides no mitigation for such long-term impacts. In fact, the EIR/EIS indicates that impacts to recreational boating could be non-existent in the long-term. Given that the effects analysis indicates higher salinity and lower outflow in the western Delta, however, such a conclusion would appear contrary to the BDCP's own effects analysis. Increased salinity will impact fish species and fishing opportunities; boating preferences; and recreation (e.g. waterskiing, wakeboarding).

Further, the EIR/EIS fails to address any impacts to public trust resources at Antioch from higher salinity such as impacts to aesthetics (from freshwater river to tidal marsh), aquatic plants and wildlife (Tule islands), and navigation (decreased outflow, increased salinity). Without acknowledging such potential impacts, it is not possible to adequately analyze and potentially mitigate any impacts

Finally, the IA fails to provide any operating procedures or obligations to specifically

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<sup>4</sup> It is significant to note that earlier versions of the BDCP had mitigation built into the project in the form of relocating impacted downstream diversions at sole cost to the BDCP.

protect or mitigate in-delta recreational and cultural resources or non-covered public trust uses (e.g. navigation, fishing, boating) from projected operational impacts – either short term or long term. Since the IA is the primary operational document, it appears that the BDCP does not intend to mitigate either the long-term adverse impacts to in-Delta recreation and non BDCP-covered public trust resources.

In sum, the EIR/EIS and its associated effects analysis indicate increased salinity levels at Antioch, and yet any analysis of the physical impacts of this condition on recreation and public trust resources within the EIR/EIS are inadequate.

**The EIR/EIS Fails to Adequately Analyze and Mitigate Potential Urban Decay Impacts:** As discussed above, the BDCP will cause significant changes to the physical environment at Antioch – a City of over 100,000 people and the major City downstream of the proposed project in the western Delta. The EIR/EIS acknowledges certain potential impacts to in-Delta communities including but not limited to declining property values, declining economic stability in communities relying on recreation, and potential abandonment of structures and buildings (especially those near proposed construction). As noted above, the EIR/EIS also acknowledges potential short-term impacts to in-Delta recreation. And yet, there is almost no analysis within the EIR/EIS of any potential urban decay impacts within specified in-Delta communities and none with respect to Antioch.

When there is evidence that adverse effects caused by a project could result in a reasonably foreseeable indirect environmental impacts such as urban decay or deterioration (as here), then the CEQA lead agency is obligated to analyze these indirect environmental impacts. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1182). In the present case, the EIR/EIS indicates potential significant changes in the environment within the western Delta, significant changes to the City’s water supply, and acknowledges further potential physical impacts to local communities as noted above. The EIR/EIS, however, fails to analyze the potential for urban decay impacts within Delta communities including Antioch. And since protection and preservation of in-delta cultural resources is a requirement of the Delta Reform Act, the BDCP is legally required to mitigate potential adverse impacts.

**The BDCP Fails to Comply with the Co-Equal Goals of the Delta Reform Act of 2009:** Public Resource Code section 29702 sets forth the dual/co-equal goals of providing a more reliable water supply and “protecting, restoring, and enhancing the Delta ecosystem.” Section 29702 provides further that achieving the co-equal goals shall include protecting and enhancing the “unique cultural, recreational, natural resource” values of the Delta. The BDCP

fails to meet the co-equal goals as the requirements of section 29702 are applied to Antioch and the western Delta. As Antioch's comments indicate throughout this letter, the physical environment, the reliability of Antioch's water supply, and the unique cultural heritage of Antioch will all be adversely impacted by the BDCP. The Delta Reform Act's co-equal goals are legal requirements on the BDCP that, put simply, require the BDCP to improve water quality and supply reliability within the Delta – or at a minimum to not further degrade water quality and the physical environment at Antioch.

The EIR/EIS fails to provide any adequate mitigation measures to ensure the co-equal goals will be met at Antioch or the western Delta other than vague allusions and references to future undefined mitigation at some future underdetermined time. Without full mitigation, the BDCP does not meet the specific requirements of the Delta Reform Act and is therefore invalid.

Further, the IA fails to provide any operational provisions or obligations to ensure that the co-equal goals are met during the course of the 50 year BDCP project term. In fact, the IA appears to assume that the co-equal goals will be met via the operation and implementation of the BDCP alone providing no assurances for in-delta water supply reliability. However, the Delta Reform Act does not limit water supply reliability to the BDCP alone and protection of in-delta water supply reliability is a critical component of complying with the co-equal goals. As noted throughout the City's comments, the BDCP effects analysis shows adverse impacts on downstream water supply reliability including Antioch's.

**The EIR/EIS Fails to Adequately Address Mitigation of Impacts to Water Quality:**

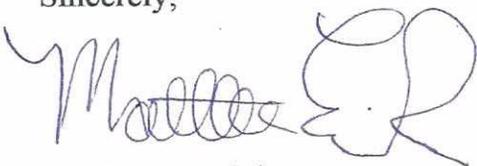
As discussed above and throughout the accompanying documents, the BDCP is subject to certain legal requirements regarding the adverse impacts of water quality in the Delta. An EIR is inadequate if '[t]he success or failure of mitigation efforts . . . may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.' (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670.) 'A study conducted after approval of a project will inevitably have a diminished influence on decision making. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA.' (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70.)

In the present case, the BDCP is compelled to meet specific requirements of law, including but not limited to the Delta Reform Act, the Delta Protection Act, and Water Code section 1702. Because these are legal requirements, the BDCP must meet their requirements and this requires mitigation in cases where the project cannot comply with such legal requirements. The BDCP and the EIR/EIS fail to mitigate certain adverse impacts that result in the BDCP violating applicable law. As noted, the EIR/EIS instead attempts to propose future mitigation via consultation with impacted parties without setting forth any specifics, any standards, any time frame, any commitment of funds, or any performance criteria. This violates CEQA, and because the BDCP cannot override legal requirements, the failure to fully mitigate the adverse impacts to Antioch renders the entire project and the EIR/EIS invalid.

The EIR/EIS should analyze how water quality for downstream beneficial uses (including superior water rights such as Antioch's) will be protected and how the BDCP operating criteria will be able to meet both the water quality requirements for covered species and the legal requirements of downstream beneficial uses. The IA should describe how water quality requirements will be met by project operations and provide specific funding and operational criteria to adequately mitigate impacts to downstream beneficial uses. As presently written, the IA fails to do this and provides operational constrictions that could in fact potentially prevent or hinder any future mitigation after project approval (e.g. regulatory assurances; limitations on operational modifications; restrictions on dedication of future water for outflow; lack of input to governance structure from adversely impact non-BDCP parties, etc.).

The City appreciates the opportunity to submit these comments, and we look forward to seeing these comments addressed in the final EIR/EIS for the BDCP.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Matthew Emrick', with a large, stylized flourish at the end.

Matthew Emrick  
Special Counsel for the City of Antioch

