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April 20, 2020

SENT VIA EMAIL

John Swiecki
Community development Director
City of Brisbane
50 Park Place
Brisbane, CA 94005

RE: Comments on NOP for Baylands Project Draft EIR

Dear Mr. Swiecki:

These comments on the Notice of Preparation (“NOP”) for the Brisbane Baylands Project (“Baylands” or “Project”) are submitted on behalf of the Stanislaus Groundwater Alliance, which seeks to protect groundwater resources in the Eastern San Joaquin and Modesto subbasins and to and ensure compliance with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq. [“CEQA”]) and other laws of the State designed to protect the public and the environment.

The overriding and primary goal of CEQA is the protection of the environment. (See Pub. Resources Code, §§ 21000–21002.) It is the policy of the state to “[t]ake all action necessary” to provide citizens with “clean air and water,” “freedom from excessive noise,” “[p]revent the elimination of fish or wildlife species due to [anthropogenic] activities” and “[e]nsure that the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criterion in public decisions.” (Pub. Resources Code, § 21001, subd. (b)-(d).) The purpose of an environmental impact report (“EIR”) is to provide the public with detailed information about a proposed project’s likely effects on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project. (Pub. Resources Code, §§ 21061, 21002.1, subd. (a).) The City of Brisbane’s (“City”) Draft EIR for the Project must

disclose and fully analyze all the Project's potentially significant impacts, including those impacts that would occur outside the immediate project area.

As the City conducts its environmental review of Baylands it must be cognizant of both the changing physical environment and legal landscape. While it is encouraging that the City has decided to prepare a new EIR rather than attempt to rely on the previously prepared environmental review for the Project, the City must address substantial changes that have developed in the interim. The following comments raise potential issues that the City must carefully consider when evaluating the environmental impacts of Baylands, including the impacts of supplying the Project with an adequate water supply.

The Draft EIR Must Evaluate the Impacts of Providing Water Supplies to the Project from Oakdale Irrigation District

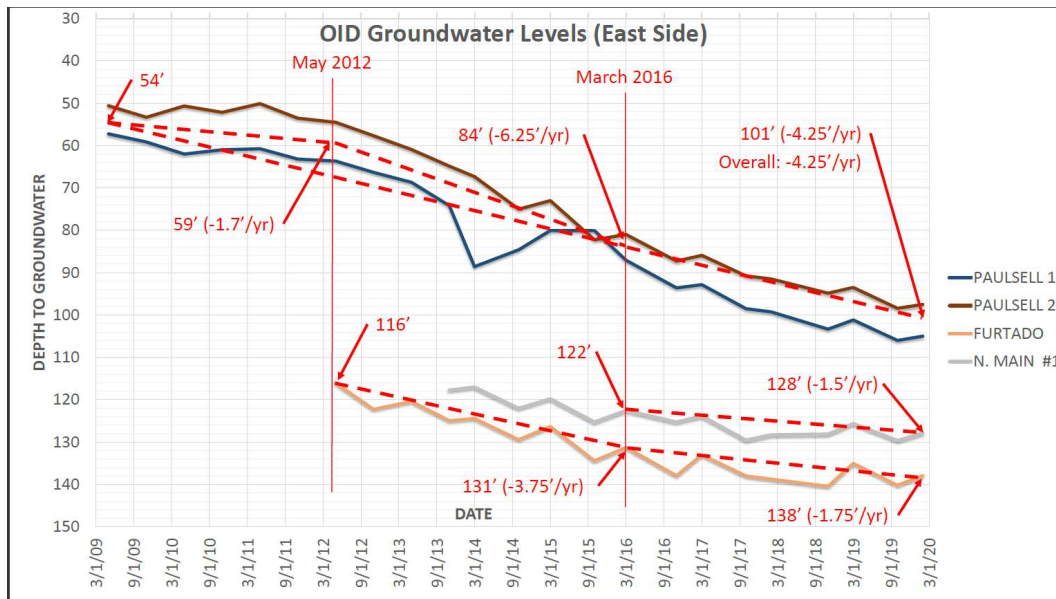
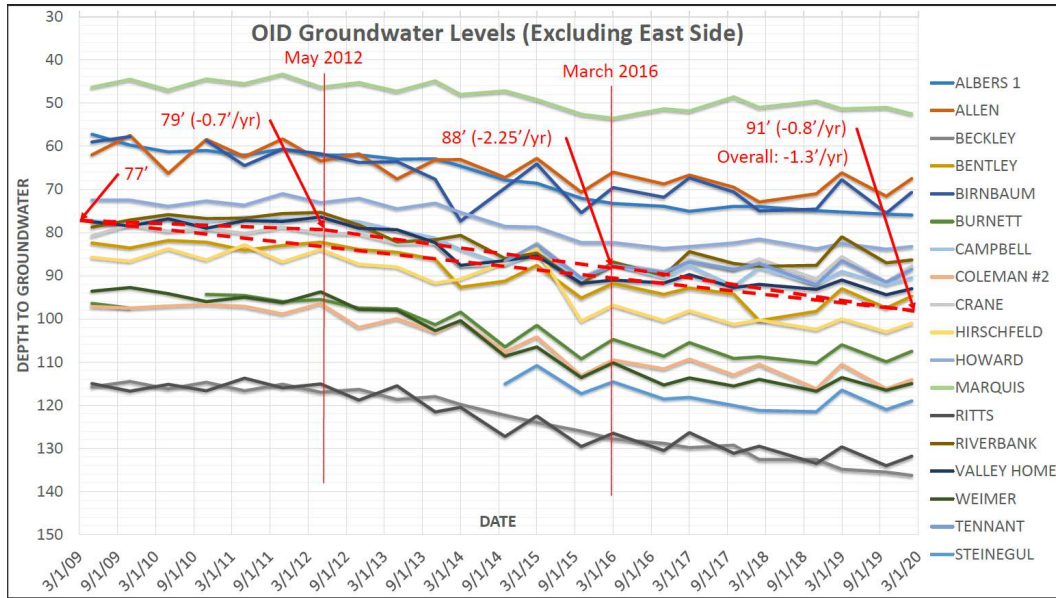
An EIR must "identify the significant effects on the environment of a project," including "cumulative impacts" that result from the combination of multiple effects (Pub. Res. Code § 21068; Cal. Code Regs., tit. 14, §§ 15130, 15355 ("Guidelines").) In the context of water supply analysis, "[a]n EIR evaluating a planned land use project ... must analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed project." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431 (*Vineyard*)). Thus, the EIR must analyze the impacts of obtaining its water source, both by considering the ways in which water would be made available by the seller and the impacts and taking water from its source.

Water transfers by Oakdale Irrigation District ("OID") for use by the Project would create a hardened demand for water that would otherwise be available for agricultural and uses within and near the OID service area. Project transfers could, for instance, lead to conversion or fallowing of agricultural land. The Draft EIR must analyze the Project's impacts on agriculture in areas served by the transferor.

The Project also has the potential to cause significant impacts on groundwater in the subbasins that overlie the area from which water would be transferred to meet Project demands. According to information presented to the OID Board of Directors by its Water Operations Manager, groundwater levels in nearly all of the district's wells are declining. Depending on which wells are considered, rates of decline range from .7 foot per year to 6.25 feet per year.¹

¹ See agenda item 25, available at: <https://www.oakdaleirrigation.com/files/7e1786a5e/Agenda+03-03-20.pdf>.

Permanently transferring water for use by the Project could reduce the availability of surface water supplies and cause OID and surrounding areas to further rely on groundwater.



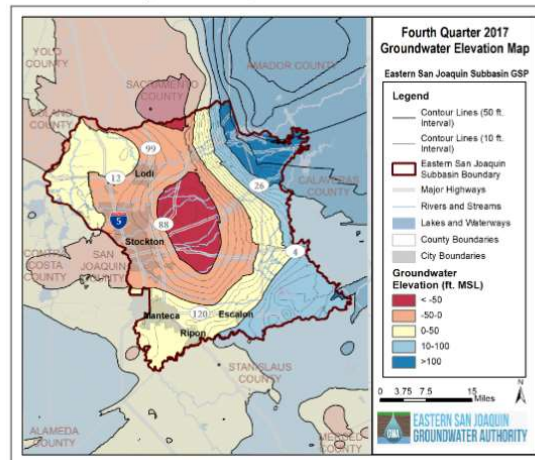
The Draft EIR for the Project must analyze the potential of the Project to interfere with implementation of the Sustainable Groundwater Management Act

(“SGMA”), adopted by the Legislature in 2014,² in transferor areas. The transferor, OID, overlies two subbasins: the Modesto subbasin, which is designed as “high priority” due to deteriorating groundwater conditions, in the and the Eastern San Joaquin sub-basin, which is designated as critically overdrafted. Overdraft is defined as “the condition of the groundwater basin or aquifer where the average annual amount of water extracted exceeds the average annual supply of water to a basin or aquifer.” (Wat. Code, § 37900, subd. (a)(17).)³

The Groundwater Sustainability Agencies in the Eastern San Joaquin Subbasin adopted a Groundwater Sustainability Plan (“GSP”), which was submitted to the Department of Water Resources (“DWR”) in January 2020.⁴ The Eastern San Joaquin Subbasin GSP documents a large cone of depression in the center of the Subbasin.⁵



Figure 2-38: Fourth Quarter 2017 Groundwater Levels



² See

https://www.waterboards.ca.gov/water_issues/programs/gmp/docs/sgma/sgma_20190101.pdf.

³ A critically overdrafted groundwater basin is “[a] basin is subject to critical overdraft when continuation of present water management practices would probably result in significant adverse overdraft-related environmental, social, or economic impacts.” (See <https://water.ca.gov/Programs/Groundwater-Management/Bulletin-118/Critically-Overdrafted-Basins>.)

⁴ Available at: <http://www.esjgroundwater.org/>.

⁵ See Eastern San Joaquin Subbasin GSP (November 2019), p. 2-69, available at: <http://www.esjgroundwater.org/>.

One of the projects identified in the GSP to address overdraft in the Eastern San Joaquin Subbasin is to transfer water from OID to provide surface water supplies within overdraft areas and reduce groundwater reliance, especially in drought years. (ESJ Subbasin GSP, pp. 6-4, 6-18 to 6-19.) A long-term contractual obligation to supply water to the Baylands Project could interfere with this planned use of OID surface water supplies within the Eastern San Joaquin Subbasin.

The Modesto Subbasin GSP is under development by the Stanislaus and Tuolumne River Groundwater Basin Association (“STRGBA”) and its member agencies, and must be submitted to DWR by January 2022.⁶ Water transferred for urban uses by the Project in Brisbane would also affect the ability of the STRGBA to develop a GSP and comply with SGMA.

The Project would have potentially significant impacts on groundwater resources by reducing the potential for use of water for local needs as well as recharge from that use of surface water in two subbasins. In addition to agricultural and groundwater impacts, adverse environmental impacts such as land subsidence and water quality degradation may occur as a result of the Project.⁷ These potentially significant impacts must be disclosed in the Draft EIR.

The Draft EIR Must Evaluate the Biological Impacts of the Project

As already recognized by the trustee agency, California Department of Fish and Wildlife (“CDFW”), several special-status species have the potential to occur at the Project site. (CDFW March 16, 2020 Letter, pp. 1-2.) Potential impacts to these special-status species within the Project area must be disclosed and analyzed.

The Project also has the potential to cause other significant impacts to biological resources outside the Project area. The Project’s water supply would originate from the Tuolumne River. As discussed below, the State Water Resources Control Board (“SWRCB”) adopted Water Quality Control Plan (“WQCP”) Amendments in 2018 to protect native fish species. (See SWRCB

⁶ See <http://www.strgba.org/Pages/News.html>.

⁷ See, e.g., Department of Water Resources, Bulletin 118 Interim Update (2016), p. 10, available at https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Groundwater-Management/Bulletin-118/Files/B118-Interim-Update-2016_ay_19.pdf.

Resolution 2018-0059, pp. 1, 5; see WQCP Amendments, pp. 5, 8, 10.⁸) Protecting flows in the Tuolumne River is necessary to obtain the water quality objectives for fish and wildlife beneficial uses of the San Joaquin River and the Sacramento-San Joaquin Delta. The EIR must therefore consider the impacts of diverting water from the Tuolumne River on biological resources.

The EIR Must Adequately Analyze the Reasonable Availability of Water Necessary to Supply the Project

In addition to analyzing the impacts of providing water, the Draft EIR must also evaluate the reasonable foreseeability of obtaining the water supply necessary for a given project. (*Vineyard, supra*, 40 Cal.4th at 432-435.) Further, “water supplies must be identified with more specificity at each step as land use planning and water supply planning move forward from general phases to more specific phases.” (*Id.* at 433-434.) “If the uncertainties inherent in long-term land use and water planning make it impossible to confidently identify the future water sources, an EIR may satisfy CEQA if it acknowledges the degree of uncertainty involved, [and] discusses the reasonably foreseeable alternatives” (*Id.* at 434.)

The NOP identifies the Project’s water supply as a 2,400 acre-feet annual transfer from OID. (NOP, p. 1.) The NOP also discloses that the transfer would not only be subject to an agreement with OID, but agreements between the intermediary Modesto Irrigation District (“MID”) and San Francisco Public Utilities Commission (“SFPUC”). (NOP, p. 23.) The water supply assessment prepared in June 2013 for the Draft Programmatic EIR for the Baylands Project accounted for the possibility that the City would not be able to obtain the water transfer with OID. This same assumption must be made for the new water supply assessment, especially considering new developments in the interim time period.

The WQCP Amendments adopted in 2018 by the SWRCB require 40 percent unimpaired flows on the Tuolumne River. (See WQCP Amendments, p. 15.) This new unimpaired flow requirement may affect the availability of water to transfer for the Project. SFPUC’s comments on the WQCP Amendments state that the unimpaired flow requirements would jeopardize water supply availability within SFPUC’s service area.

⁸ Available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/2018_sed/.

If the State Water Board implemented a 30, 40, or 50-percent unimpaired flow objective on the Tuolumne River, and San Francisco was responsible for bypassing 51.7-percent of the requisite flow, San Francisco would experience severe water shortages during sequential-year droughts that would require the SFPUC to significantly reduce deliveries to the [Regional Water Service] service territory.

(WQCP Amendments Substitute Environmental Documents, Responses to Comments, Letter 1166, Comment 27.)⁹ The WQCP Amendments now include a 40 percent unimpaired flow requirement on the Tuolumne River. This significant development since the City's 2013 water supply analysis would have a considerable impact on the availability of the Project's planned water supply according to SFPUD. The Draft EIR must therefore address the availability of water for the Project, now that the WQCP Amendments have been adopted.

Water Conservation Measures Necessary to Establish an Adequate Water Supply must be Analyzed

In the City's 2013 water supply assessment for the prior version of the Project, the water demand evaluation assumed water conservation measures for indoor and outdoor use were implemented. (Baylands Water Use Projections and Water Balance Technical Memorandum, p. 3.) To the extent these water conservation measures are necessary for the Project to obtain its water supply, they must be analyzed as part of the Project, as CEQA prohibits improper piecemeal review of a project. (*Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1231; *San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus* (1994) 27 Cal.App.4th 713; *Del Mar Terrance Conservancy, Inc. v. City Council of the City of San Diego* (1992) 10 Cal.App.4th 712; *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438; *Laurel Heights Improvement Ass'n v. Regents of Univ. of California* (1988) 47 Cal.3d 376; *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829.) Conservation measures, such as wastewater treatment operations or hotel retrofits, could have their own potentially significant environmental impacts. As a part of the Project, these measures must be described and analyzed in the Draft EIR to avoid piecemealing review of all actions necessary to carry out the Project.

⁹ Available at:
https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/2018_sed/docs/CmtTbl_1166.pdf

The EIR Must Evaluate Health Risks and Impacts to Future Residents

“[W]hen a proposed project risks exacerbating those environmental hazards or conditions that already exist, an agency must analyze the potential impact of such hazards on future residents or users.” (*California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369, 377 (CBA).) The Project location poses two significant risks to future residents: hazardous wastes and liquefaction.¹⁰ Development of the Project and the introduction of residential units to the area has the potential to exacerbate these impacts. If developing the Project ultimately exacerbates these existing hazards, it must also analyze how that exacerbation would negatively impact Baylands’ residents. Such a scenario was addressed in a hypothetical by the California Supreme Court in *CBA*.

Suppose that an agency wants to locate a project next to the site of a long-abandoned gas station. For years, that station pumped gasoline containing methyl tertiary-butyl ether (MTBE), an additive—now banned by California—that can seep into soil and groundwater. ... Without any additional development in the area, the MTBE might well remain locked in place, an existing condition whose risks—most notably the contamination of the drinking water supply—are limited to the gas station site and its immediate environs. But by virtue of its proposed location, the project threatens to disperse the settled MTBE and thus exacerbate the existing contamination. The agency would have to evaluate the existing condition—here, the presence of MTBE in the soil—as part of its environmental review.

(*Id.* at 389.) Thus, it is critical that the City analyze whether the Project has the potential to exacerbate the risks posed by hazardous waste and liquefaction to future residents.

The Project’s Impacts to Historical Resources Must be Disclosed

CEQA provides a detailed process for evaluating the significance of impacts to historical resources. CEQA Guidelines section 15064.5 subdivision (a) describes what constitutes a historic resource and what constitutes a substantial

¹⁰ See Kendall, *Meet the 27-year-old mayor about to double her Bay Area city’s population*, The Mercury News (March 19, 2019), available at: www.mercurynews.com/2019/03/19/meet-the-27-year-old-mayor-about-to-double-her-bay-area-citys-population/ [describing liquefaction risk]; Bartholomew, *Dispute over Brisbane Baylands development will bleed into next year*, San Francisco Examiner (October 1, 2016), available at: <https://www.sfexaminer.com/news/dispute-over-brisbane-baylands-development-will-bleed-into-next-year/> [describing health risk from landfill waste].

adverse change to a historical resource. A substantial adverse change to a historical resource means “demolition, destruction, relocation, or alteration such that the significance” of the resource would be impaired. (CEQA Guidelines, § 15064.5, subd. (b)(1); *League for Protection of Oakland’s Architectural and Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 909.) More specifically, the significance of an historical resource is impaired when a project “demolishes or materially alters . . . those physical characteristics . . . that convey its historical significance to justify its eligibility for inclusion in the California Register of Historical Resources[.]” (CEQA Guidelines, § 15064.5, subd. (b)(2)(C).) Last, subdivision (b)(3) provides that if a project would cause significant impacts to a historical resource, implementing the Department of Interior guidelines would generally result in mitigation to a less than significant level.

According to the NOP, a historic resource, the railyard Roundhouse, is present on the Project site. (NOP, p. 2.) The NOP states that the Project would include restoring the Roundhouse. (NOP, p. 13.) Even if the developer intends to rehabilitate this historic resource, the EIR must evaluate whether the planned changes are consistent with the Department of Interior’s standards.¹¹ Directly or indirectly changing the character of a historic resource can constitute a significant impact under CEQA, thus even changes that are framed as beneficial for the historic resource must be analyzed as potentially significant impacts.

The Draft EIR Must Reflect Adequate Consultation with Responsible Agencies and Integration of Competing Regulatory Authorities

An EIR must include “[a] list of related environmental review and consultation requirements [found in] federal, state, or local laws, regulations, or policies. To the fullest extent possible, the lead agency should integrate CEQA review with these related environmental review and consultation requirements.” (Guidelines, § 15124, subd. (d)(1)(C); see also Guidelines, § 15006, subd. (i).) An EIR must also consider related regulatory regimes when considering project alternatives. (See Guidelines, § 151126.6, subd. (f)(1).) Identifying competing regulatory authorities of other agencies and disclosing how those authorities may impact a project is essential information for an EIR. (See *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 935 (*Banning Ranch*); see Pub. Resources Code, § 21003, subd. (a).)

The City may not simply assume that the Project, as planned, would obtain all necessary approvals. One subsequent approval that must be fully discussed

¹¹ See <https://www.nps.gov/tps/standards.htm>.

in the EIR are the interim agreements between OID, MID, and SFPUC that would be necessary to facilitate the water transfer from OID to the City. The execution of these agreements would be necessary to provide the Project's water supply; whether or not the City obtains them will inform the development of the Project and alternatives in the EIR. Inclusion of this information is not only necessary under CEQA, but more practically, "coordination between a lead agency and a permitting agency serves the laudable purpose of minimizing the change the City will approve the Project only to have later permits for the Project denied" (*Banning Ranch, supra*, 6 Cal.5th at 941-942, quoting *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 642 [internal quotations omitted].)

This same concern applies to each necessary approval identified in the NOP. The City must "make a good faith attempt to analyze project alternatives and mitigation measures in light of applicable [regulatory] requirements" and may not "leav[e] it to other responsible agencies to address related concerns seriatim." (*Banning Ranch, supra*, 6 Cal.5th at 941.) Since the Project would ultimately receive water from the Tuolumne River, a tributary to the San Joaquin River and the Sacramento-San Joaquin Delta, the Project may be a covered action under the Delta Reform Act. (See Wat. Code, § 85225.)¹² If so, a Consistency Certification for consistency with the Delta Plan, with the potential for appeals to the Delta Stewardship Council may be implicated. The Project appears to be inconsistent with "[t]he policy of the State of California [] to reduce reliance on the Delta." (Wat. Code, § 85021.) The transfer would increase Brisbane's reliance on the Delta watershed. In addition to the Delta Stewardship Council, the potential review and oversight by the SWRCB over the actions necessary to carry out the Project should be considered, especially in light of the SWRCB's recent WQCP Amendments.

Another parallel approval process that is not disclosed is Section 106 consultation, yet the NOP fails to identify the consulting agency for Section 106. The Section 106 consultation will determine the significance of the Project's impacts to the Roundhouse. Agencies must begin Section 106 review by defining the area of potential effects ("APE"). (*Monumental Task Comm., Inc. v. Foxx* (E.D.La. 2016) 157 F.Supp.3d 573, 591.) An APE is "the geographic area . . . within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties" (36 C.F.R. § 800.16, subd. (d) (emphasis added).) After designating an APE, agencies must then identify historical sites within that area, consider whether the project would affect the historical sites found, and then determine whether those impacts are adverse.

¹² See <https://coveredactions.deltacouncil.ca.gov/?page=1>.

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(36 C.F.R. §§ 800.4-5; *Coalition of Concerned Citizens v. Fed. Transit Admin. of United States DOT* (10th Cir. 2016) 843 F.3d 886, 906; *Diné Citizens Against Ruining Our Env't v. Jewell* (D.N.M. 2018) 312 F.Supp.3d 1031, 1100.) In addition to the substantive analysis required for the Section 106 consultation, the EIR must adequately disclose and explain the process, the authority of the consulting agency over the Project, and integrate the consultation process to the extent feasible.

CONCLUSION

Thank you for considering these comments.

Very truly yours,

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