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To	R. BREITENBACH	From	K. BOGDAN		
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DATE: April 8, 1996

TO: Rick Breitenbach

FROM: Kenneth Bogdan 

SUBJECT: U.S. Army Corps of Engineers Alternatives Analysis Requirements under Section 404(b)(1) of the Clean Water Act

This memorandum presents the basic discussions at our meeting with representatives from the Sacramento District of the U.S. Army Corps of Engineers (Corps) on March 29, 1996. The discussion focused on the fact that the Corps will have permit authority over only the project implementation phase of the CALFED Bay-Delta Program (Program); the Corps will not have any permit authority for the adoption of the Program that will be analyzed in the Program Environmental Impact Statement/Environmental Impact Report (EIS/EIR). Also, the Corps indicated that if CALFED wishes the Corps to focus its Section 404(b)(1) alternatives analysis, for the project implementation phase, on onsite alternatives and not revisit the broader alternatives selected for the Program EIS/EIR, the Program EIS/EIR should incorporate the requirements of the U.S. Environmental Protection Agency (EPA) Section 404(b)(1) Guidelines.

U.S. Army Corps of Engineers Permit Authority

As discussed in our meeting with the Corps on March 29, 1996, the Corps does not expect to have permitting authority under Section 404 of the Clean Water Act for CALFED's program phase of developing the long-term solutions for the Bay-Delta. Under Section 404 of the Clean Water Act, the Corps regulates the discharge of dredge or fill material into waters of the United States. The development of the Program may include selecting an alternative that involves the discharge of dredge or fill material into waters of the United States; however, the decision to select a particular alternative would not involve any ground-disturbing activities and, therefore, would not require a permit from the Corps. A number of the actions during the implementation phase of the selected Program alternative would require a permit from the Corps.

Although no Corps permit action would be required at the Program development level, the Corps identified a concern regarding utilization of the alternatives analysis from the Program EIS/EIR for the future Corps permit process for the actions during the implementation phase of the selected Program alternative. Section 404(b) of the Clean Water Act directs that Corps permits issued under Section 404 comply with EPA Section 404(b)(1) Guidelines. These guidelines require that the Corps issue a permit only in the absence of 'practicable' alternatives to the proposed discharge that would have a less adverse impact on the aquatic ecosystem. This requirement warrants an alternatives

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analysis for projects to discern the those that are least environmentally damaging and practicable. Nonconformance with EPA Section 404(b)(1) Guidelines is grounds for permit denial.

Compliance with EPA Section 404(b)(1) Guidelines

Compliance with Section 404(b)(1) Guidelines is qualitative and involves exercise of the Corps' judgement in applying the guidelines to a permit application. The guidelines direct that when the proposed activity is not water-dependent, there is a presumption that less damaging practicable upland alternatives exist. According to EPA Guidelines, the practicability of an alternative is a function of cost, technical, and logistical factors, including availability to the project proponent at the time of market entry, as related to the project proponent in light of overall project purposes and private and public need supporting the project purpose. An area not presently owned by the applicant that could be reasonably obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed action should also be considered in an alternative. The applicant bears the burden of demonstrating that no practicable alternatives exist that will meet the project purpose.

The selection of alternative actions that should be analyzed to select the least environmentally damaging practicable alternative is based on the effectiveness of an action in meeting the project purpose. The project purpose should allow the Corps to consider a broad range of alternatives that may be considered practicable. The project purpose should be defined so potential alternatives that may otherwise be considered practicable are not unduly eliminated. The Corps does not allow the applicant to define the purpose so narrowly as to eliminate any other alternative location or design. When the Corps analyzes projects with multiple project objectives it will analyze separate alternative actions to meet each objective. The applicant must sometimes extensively justify the purpose and need for the project as well as the selection of the proposed project location compared with offsite and onsite alternatives. If cost (i.e., affordability) is a factor in defining practicable alternatives, the applicant is often required to provide justification of financial constraints.

Application to CALFED Bay-Delta Program EIS/EIR Alternatives Analysis

During the implementation phase of the Program, a permit from the Corps will be required for actions that will involve the discharge of dredge or fill material into waters of the United States. As part of its permit review for implementation of the Program actions, the Corps will be required to document compliance with EPA Section 404(b)(1) Guidelines. The Corps indicated at the March 29, 1996 meeting that the program EIS/EIR could be used in documenting compliance with EPA Section 404(b)(1) Guidelines for the alternative analysis requirement for "offsite" alternatives (i.e., at the Program action implementation level, the Corps would not revisit the issue of developing alternatives to meet the overall program objectives and would focus only on the onsite alternatives to permit the least environmentally damaging practicable alternative) provided that the range of alternatives satisfied the requirement of EPA Guidelines. Therefore, while no Corps permit action would be required at

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the Program development level, the alternative analysis for the Program EIS/EIR should also meet the requirements of EPA Section 404(b)(1) Guidelines.

The CALFED team is currently selecting alternatives to be analyzed in the Program EIS/EIR. During Phase One of developing the Program, the CALFED team identified the purpose of the Program in its mission statement and the four primary objectives of water quality, ecosystem quality, water supply, and Delta system vulnerability to achieve the mission of the Program. The CALFED team listed all possible actions to meet the four primary objectives. These actions were divided into 20 alternatives and, after further review, combined and grouped into 10 alternatives. From these 10 alternatives, a range of alternatives will be selected to be analyzed in the Program EIS/EIR.

The CALFED team is currently developing selection criteria to evaluate and refine the proposed alternatives for the Program EIS/EIR, to satisfy the requirement of the California Environmental Quality Act (CEQA)/National Environmental Policy Act (NEPA) to analyze a reasonable range of alternatives. The selection criteria will be based on CALFED's four primary objectives in achieving its mission. The Program EIS/EIR alternatives selection process can be used to comply with EPA 404(b)(1) Guidelines for the Corps' subsequent permit process for implementation of actions pursuant to the selected alternative of the Program. Alternatives should not be screened out from the Program EIS/EIR if they could be considered practicable according to EPA Guidelines; therefore, in developing the selection criteria for the Program EIS/EIR alternatives, the CALFED team should incorporate EPA Section 404(b)(1) Guidelines' requirement to screen alternatives based on "practicability" (including cost, technical, and logistical factors). In addition, it should be noted that when the Corps analyzes projects with multiple project objectives, it will analyze alternatives to meet *each* objective; therefore, the Program EIS/EIR alternatives selection process should not artificially combine actions that meet each objective into an alternative that may, as a result, unnecessarily eliminate other potentially practicable action items.

The Corps identified a scenario for the Program EIS/EIR alternatives selection process that potentially could conflict with EPA Guidelines. One of the solution principles defined to guide the efforts of the CALFED team in the alternatives selection process requires that an alternative "must pose no significant redirected impacts." The Corps interpreted this to mean that CALFED agencies would not consider alternatives that would require the use of eminent domain proceedings to acquire properties. Although this screening criteria may be appropriate for the selection of alternatives in the CEQA/NEPA process, according to the Corps, this screening approach may unduly limit the analysis of potential practicable alternatives for purposes of meeting the requirements of EPA Guidelines. Therefore, if CALFED wishes to achieve both the objectives of CEQA/NEPA and EPA Guidelines, it may not be appropriate to use this particular principle to screen out otherwise practicable alternatives.

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