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Via Facsimile

April 11, 1997

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RE: Final Report on Assumptions for Existing Conditions and the No Action Alternative

Dear Lester:

Thank you for your memorandum of January 28, 1997 regarding the Existing Conditions and No Action Alternative Assumptions Report ("Report"). This letter constitutes the comments of the Natural Resources Defense Council on the Report. We request that our comments be incorporated into the no action alternative and the existing conditions discussion prior to the release of the Draft Environmental Impact Statement/Environmental Impact Report ("EIS/EIR") for the CALFED Program. Our comments focus on three broad areas: (1) the legal requirements for the affected environment and no action discussion in the EIS/EIR; (2) the physical and environmental baseline for the EIS/EIR; and (3) the operational and regulatory baseline for the EIS/EIR.

1. Legal Background: No Action Alternative/Existing Conditions

Both the National Environmental Policy Act, 42 U.S.C. 4371 *et seq.*, (NEPA) and the California Environmental Quality Act, Pub. Res. Code 21000 *et seq.*, (CEQA) require that agencies include a "no action" or "no project" alternative in Environmental Impact Statements and Reports. The purpose of this requirement is to ensure that the public and decision makers are able to compare the environmental impacts of the proposed project (and other action alternatives) to the option of not proceeding with the proposal. A separate and distinct requirement is that the EIS or EIR include a description of the "affected environment" or "the environmental setting," the physical area that will be affected by the alternatives under consideration.

We concur with the CALFED Bay-Delta Program's effort to distinguish between assumptions appropriate to the "no action alternative" and those underlying the discussion of "existing conditions." However, the Report does not provide a discussion about the differences between these labels, or explain to the public how they will be used or relate to each other in the EIS/EIR. In addition, the Report does not clearly specify how these assumptions will be

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employed as part of a "baseline" for determining environmental impacts --or the water costs -- of the action alternatives under consideration. We recommend a brief analysis in this regard to provide the public and decision makers with greater insight into the Program's environmental and economic impact analyses.

The Report defines the "No Action Alternative" as "the scenario of what would happen to the environment if the proposed action were not implemented and existing trends and conditions continued into the future." (Report at 77.) This is not entirely accurate. A no action alternative is the scenario of what would happen if the proposed action simply were not implemented; this may or may not constitute the continuation of "existing trends and conditions." In the present case, considerable changes in the status quo are mandated by various statutes and regulatory mandates regardless of whether or not a CALFED long-term program is adopted.

The Report does not appear to explain the purpose or function of the "existing conditions" category, or how the assumptions regarding this category will be employed in the EIS/EIR.¹ We recommend further clarification on this point. Specifically the Report should set forth the role of the "affected environment" or "environmental setting" requirements of NEPA and CEQA and the role of this discussion as the baseline against which to measure impacts to the physical environment of all of the alternatives under review.

The Report should further clarify that the no action alternative itself will be analyzed against the baseline provided by the affected environment section. While in most cases the no action alternative will result in no change to the affected environment, CALFED's EIR presents a far more complicated task. Under no scenario will the status quo remain static; thus even the no action alternative will result in substantial changes from the baseline environmental setting. Moreover, CALFED is faced with the additional problem of defining an "affected environment" that represents a fair historic picture of baseline conditions and is not merely a snapshot of any one moment in time. In other words, the challenge for CALFED is to identify the baseline physical environment, and to then analyze the impacts of each of the action alternatives, as well as the alternative of not proceeding with a CALFED solution, all in the context of an inherently fluid set of physical and regulatory circumstances. Because the comparison of alternatives is the "heart of the EIR," it will be crucial to the success of the CALFED Program that all parties understand the physical and economic baseline for comparison (the affected environment) and

¹ Since the requirements of both CEQA and NEPA in this regard focus on the physical environment that will be affected by the alternatives under consideration (see EPIC v County of EL Dorado, 131 Cal. App. 3d 350 (1982)), it would aid the public's understanding to refer to this section of the EIR as "affected environment" instead of "existing conditions."

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the role of the no action alternative.

2. Physical and Environmental Baseline

Turning to the construction of the physical baseline, we have two comments; (1) the resource categories need to be substantially more inclusive with regard to the physical and biological environment; and (2) the time period for describing the environmental baseline should include the historic fisheries and ecological functions of the system and not be limited to the period during which such resources were the most degraded historically.

A. Resource Categories

The Report contains a brief summary of the "resource categories" for the Bay-Delta Program's EIR. (Report A-1.) This appears to be a list of the physical, biological and economic attributes of the affected environment. It is our understanding that these categories will be employed in the EIR to evaluate the environmental impacts of the alternatives.

We note with concern that the physical and biological environment lists are substantially truncated from prior drafts of the resource category list. Thus, "biological environment" includes only Fisheries, Vegetation and Wildlife. Earlier drafts have included more broadly Aquatic Resources and Special Status Species. Similarly, the "physical environment" includes Surface Water Hydrology, Surface Water Quality, Groundwater, Water Supply, Geology and Soils, and Air Quality. Omitted from this list are:

- Riverine Hydraulics;²
- Water Management Facilities and Operations;
- Bay-Delta Hydrodynamics;
- Noise;
- Traffic and Navigation.

We recommend that all of these be added to the list of resource categories that will provide the environmental baseline for the CALFED EIR.

In addition, we recommend that the next iteration of the resource category list include the "important changes to be evaluated" sub-categories and descriptions of "related information to be measured" as provided in the October 9, 1996 draft. This additional information would provide a very useful picture of what the Program staff intends to address under these categories. For

² Note that this category is substantially different from surface and groundwater hydrology in terms of the information to be analyzed. See October 9, 1996 draft.

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example, the prior draft indicated that under "Geomorphology, Soils and Seismicity," the EIR would examine surface soil erosion, soil salinity, risk of levee failure and subsidence caused by various factors. It is difficult to ascertain from the Report what "Geology and Soils" will encompass.

B. Affected Environment Description Period

As indicated above, we agree with the Program that the affected environment baseline must be portrayed over time in order to present the public and decision makers with an accurate sense of the resources at stake and the ability of the various alternatives to achieve the CALFED objectives. In this regard, we do not concur with the Report's recommendation that the affected environment for all of the biological resources be limited roughly to the last ten years. (Report at A-1.) The biological assets of the Bay-Delta Estuary and the entire Central Valley were more degraded during that period than at any other time in history.

Limiting the affected environment analysis to this period would improperly skew the analysis of the alternatives in terms of ecological impacts. The alternatives for a long-term water supply solution for the Bay-Delta should not be measured against the highly degraded state of biological resources resulting from over fifty years of state and federal water project impacts to the system. Rather, the impacts of these alternatives must be analyzed against as complete an historic picture of the biological resources as possible. We recommend that the entire historic record available for all of the physical and biological resources be employed to constitute the affected environment for purposes of the required NEPA/CEQA comparison of the environmental impacts of the alternatives under review.

3. Operational and Regulatory Baseline

A. Delta Water Quality Standards

We concur with the Program that the standards contained in the 1995 Water Quality Control Plan (WQCP) should be assumed as part of the regulatory baseline for the affected environment, and that the no action alternative should carry this assumption forward. We concur as well with the December 17, 1996 CALFED Proposal to assume full implementation of the Vernalis flow standard in the no action alternative without assigning responsibility for meeting this standard to particular parties. (Report at 14.) This is a programmatic document and as such broader conclusions regarding the potential "water costs" of the alternatives is appropriate. However, it appears that the Report's final recommendation is to assume, even in the no action alternative, that no party other than the CVP will be assigned responsibility to meet the Vernalis standard, and therefore that this standard will remain unmet in certain years. (Report at 3, 4.)

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This assumption is inappropriate. The Vernalis standard is a legally binding water quality standard. The WQCP is clear that assignment of responsibility for meeting the standards to the federal and state projects is intended as an interim step until the State Board holds its water right proceeding. The fact that the state has been delinquent in doing so does not render the standard invalid or otherwise amend the legal requirement that it be met. The no action alternative should assume full compliance with all of the water quality standards in the 1995 WQCP. *Does just not who?*

We are not entirely comfortable with CALFED's proposal to assume non-compliance with the Vernalis standard as part of the affected environment assumptions. The 1995 WQCP clearly anticipated that assigning responsibility for meeting the standards to the federal and state water projects would be a brief interim step to allow the State Board to conduct the requisite water rights proceeding. The fact that the Board has failed to do so does not in any way lessen the legal force of the water quality standards.

Finally, we would object to inclusion of the water supply impacts resulting from the 1995 WQCP in comparison to Decision 1485 as part of either the discussion of existing conditions or the no action alternative. (The Report is somewhat vague about how or where the Program actually intends to include this information.) The WQCP was adopted almost two years ago. By the time the CALFED EIS/EIR is finalized, the 1995 WQCP -- and not D-1485 -- will have been part of the regulatory baseline for several years. The water costs of this regulatory change cannot reasonably be assigned, or implied to be so, to the CALFED Program. It would be highly inappropriate for CALFED to build in the "water cost" of these new standards into the economic impact section of this programmatic EIS/EIR. These "costs" have been assessed in many prior documents and the appropriate method of noting them, to the extent that they are relevant to the CALFED long-term solution, is to reference those prior analyses.

B. Central Valley Project Improvement Act Implementation: 800,000 Acre Feet Requirement and the AFRP

As previously indicated by many members of the Environmental Water Caucus as well as NRDC, it is our position that full implementation of the CVPIA must be assumed as part of the CALFED Bay-Delta Program regulatory and operational baseline. We are particularly concerned about the Report's treatment of the statutory dedication of 800,000 acre feet of water annually to fish and wildlife restoration as well as the mandate to double anadromous fish populations.

The final report states only that "considerable uncertainty exists" regarding how the

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800,000 will be used, and indicates that the "CVPIA Flow Criteria" developed by DWR will be employed as modeling assumptions for both the affected environment and the no action alternative. (Report at 4-5, 54.) This "Criteria" assumes that a limited amount of the 800,000 AF dedication will be employed on the Sacramento River system. The Report apparently makes no assumption, for purposes of modeling environmental impacts or water costs, that any of the 800,000 AF will be employed elsewhere in the system.

The assumptions should be revised to clarify for the public and decision makers that the Central Valley Project Improvement Act is a federal statute that provides in relevant part: "The [Department of the Interior] is further authorized and directed to: ...(2) upon enactment of this title dedicate and manage annually 800,000 acre of Central Valley Project yield for the primary purpose of implementing the fish, wildlife and habitat restoration purposes and measures authorized by this title." P.L. 102-575, Sec. 3406(b)(2). While the precise manner of implementing this directive has not been finally resolved, its existence cannot be assumed away. To the extent that uncertainty exists, the assumptions should find a means of accommodating such uncertainty rather than assuming that a legal mandate will simply remain unheeded. To the extent that the Program is going to limit any assumptions about the federal government's implementation of Section 3406(b)(2) to the "criteria" developed by the state's Water Resources Department, the basis for this criteria and limitations on the assumptions should be provided.

We note also that the Report is apparently silent as to any assumptions regarding the related CVPIA mandate to double anadromous fish populations.³ The next iteration of the assumptions document should identify this significant directive and assume its full implementation as part of the no action alternative. We acknowledge that there are uncertainties regarding precisely how this program will be implemented and that these uncertainties present difficulties for the CALFED Program in crafting its no action assumptions. Nevertheless, the implied assumption of the current draft is that the AFRP mandate is not part of the regulatory baseline. We are confident that sufficient work has been developed to date such that programmatic level analysis regarding the measures likely to be implemented as part of the AFRP can be taken into account for purposes of the no action alternative. In a similar vein, we recommend that the no action alternative assume that all of the fish and wildlife restoration actions mandated under Section 3406 of the CVPIA will be fully implemented.

³ DOI is "directed to: (1) develop ... a program which makes all reasonable efforts to ensure that, by the year 2002, natural production of anadromous fish in Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period 1967-1991." P.L. 102-575, Sec. 3406(b)(1).

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C. Water Rights

We are not entirely comfortable with the blanket assumption that all "senior" water rights holders will obtain full deliveries of water in every year. We agree that the affected environment section and the no action alternative should identify the nature and amount of such water rights. However, they should also identify actual water consumption and limitations on the exercise of such water rights. The assumption should also acknowledge the limits on the ability of water rights holders to assert such rights under state law; water rights are not absolute and are inherently limited by both the doctrine of reasonable use and the public trust doctrine. See U.S. v SWRCB, 227 Cal. Rptr. 161 (1986). Full delivery to even "senior" rights holders is probably not a reasonable assumption in all years. Finally, the Report is unclear as to the reach of "senior" water rights. Which water rights does the Program mean to exclude from this assumption?

It is our recommendation that the EIS/EIR should identify water rights in the study area and the expectation of deliveries that accompany such rights. The EIS/EIR should also identify actual deliveries based on the legal limitations of such rights, as well as actual water demand. Finally, for purposes of determining the baseline agricultural and M&I water use (see Resource Categories), we recommend reference to actual historic use as opposed to water rights.

D. Water Conservation

The Report proposes to use the water conservation assumptions in DWR's Bulletin 160-93 for purposes of setting the water conservation baseline and the no action alternative. Bulletin 160-93 underestimates the level of conservation that will occur under the no action alternative. For example, Bulletin 160-93 fails to take into account conservation that will take place as a result of appliance standards in existing state and federal laws, including the National Energy Policy Act of 1992, which set efficiency standards for all toilets, showerheads, and faucets. Furthermore, Bulletin 160-93 overestimates agricultural water demands by using unrealistic assumptions regarding future irrigated acreage and failing to include reduced demand in response to water price increases resulting from the CVPIA. We urge you instead to provide a demand forecast that takes into account the impact of existing policies, and we refer you to the 1995 Pacific Institute report entitled, California Water 2020: A Sustainable Vision. In addition, we recommend that the EIS/EIR assume full implementation of the urban water conservation Memorandum of Understanding.

E. Endangered Species

We concur with the Report's proposal to assume currently listed species for purposes of the environmental baseline. We note that "currently" listed species should include species listed

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at the time the final EIS/EIR is released. Therefore, the current, or working, list of listed species should be expanded to include Sacramento River Spring Run Chinook salmon as a candidate species under the state Endangered Species Act in light of the recent court ruling directing the Fish and Game Commission to take this action.

We concur as well that it may be appropriate to assume for purposes of the no action alternative that no additional species will be listed. It may be reasonable, however, to build a caveat into this assumption to the extent that federal action on several long-pending ESA petitions appears to be imminent at the time the EIS/EIR is finalized. For example, the National Marine Fisheries Service has been considering a petition to list a number of salmon populations, including a large number within the CALFED study area, for well over two years.

F. Flood Control

While we generally concur that it would be appropriate to assume existing flood control policies in both the affected environment and no action alternative categories, the recent Central Valley flooding and the substantial activity around such policies call this assumption into question. We recommend that the CALFED Program consider factoring into the no action alternative federal or state policies that are finally adopted prior to the release of the final CALFED EIS/EIR, at least insofar as such new policies would go forward in the absence of the CALFED program and are likely to have a substantial affect on the no action alternative.

G. Monterey Agreement

While we do not object to the assumption that the Monterey Agreement is "in place," as part of the no action alternative, the Report should provide a bit more information about what this assumption entails. For example, it is our understanding that although the Monterey Agreement contains language suggesting that the State Water Project should be fully "built out," the CALFED Program has not adopted this particular concept as an assumption underlying the no action alternative.

Thank you for providing us with the opportunity to comment on the Report. We look forward to working with you and the CALFED Program staff on this and related issues as the

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EIS/EIR moves forward.

Sincerely,



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cc: Rick Breitenbach