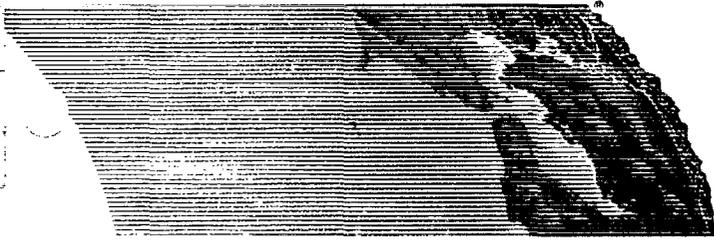


# Save San Francisco Bay Association



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**JUL 0 1 1998**

July 1, 1998

By Hand Delivery  
CALFED Bay-Delta Program  
1416 Ninth Street, Suite 1155  
Sacramento, CA 95814  
Attn: Rick Breitenbach

RE: CALFED Programmatic Environmental Impact Statement/Report

Dear Mr. Breitenbach:

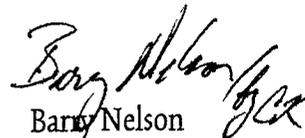
Save San Francisco Bay Association ("Save The Bay") respectfully submits the attached comments on the Draft CALFED Programmatic Environmental Impact Statement/Environmental Impact Report ("EIS/R") on behalf of its Board of Directors and membership. "EIS/R" is used throughout these comments to refer to not only the draft programmatic document, but also to all of the technical appendices, errata, Phase II Report and Executive Summary.

Save The Bay is the oldest conservation organization in California dedicated to the protection and preservation of San Francisco Bay and the Delta Estuary and represents thousands of members. These comments are timely under the extension of time announced by CALFED.

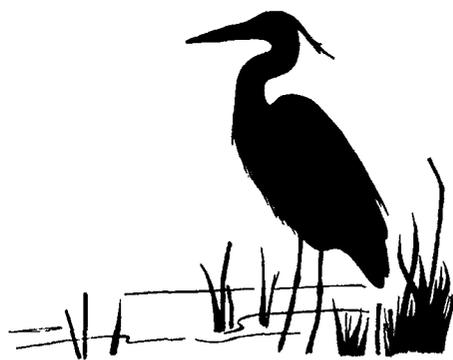
We appreciate your consideration of our views and look forward to working with the CALFED Program and the CALFED agencies to achieve a successful solution to the important problems facing our Bay and Estuary.

Sincerely yours,

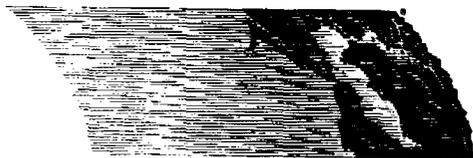
  
Cynthia Koehler  
Legal Director

  
Barry Nelson  
Senior Fellow

**Comments of Save San Francisco Bay Association  
on the CALFED-BAY Delta Programmatic  
Environmental Impact Statement/Environmental  
Impact Report**



Save San Francisco Bay Association



July 1, 1998

# INTRODUCTION

Save the Bay believes that the CALFED Bay-Delta program offers tremendous potential to address ecosystem and water supply reliability issues. Strategies are available which could play a major role in ecosystem restoration and improving water supply reliability for water users. We believe that CALFED has the potential to resolve long-standing Bay-Delta disputes. CALFED can demonstrate the water supply benefits of ecosystem restoration (e.g. reduced uncertainty and exposure to mitigation costs) and the potential ecosystem benefits of some water supply programs (including reduced pumping at critical times, land retirement and water transfer programs which could benefit water users and the environment).

A sound environmental document is a key to bringing stakeholders together and supporting sound decision-making by responsible agencies in the CALFED process. Unfortunately the draft EIS/R is technically and legally inadequate to form the basis for any Bay-Delta ecosystem or water management decisions, near- or long-term. Program objectives are nebulous and equivocal, particularly with regard to the water supply reliability element. The draft identifies a highly constricted range of alternatives that closely resemble one another. Analysis of environmental impacts of the alternatives that are under review is limited, technically insufficient and inadequately documented. The draft fails to discuss project impacts in relation to historic ecological conditions. Key assumptions are not clearly articulated or even identified in many cases. There is virtually no analysis of the environmental impact of various economic factors — the draft does not contain even a preliminary least cost analysis with regard to water management. There is no discussion of mechanisms to provide assurance (and enforcement opportunities) that program elements will be adequately implemented, notwithstanding near universal agreement that such assurances are central to determining the feasibility of the alternatives under review. Moreover, despite the bulk of the document and the various technical appendices, little actual information is provided since the same limited analysis is repeated — often verbatim — in several different places.

CALFED has requested comment on 6 issues. We respond to these briefly below.

1. Are the assumptions and technical evaluations in the EIS/R valid?

It is often almost impossible to ascertain CALFED's assumptions based on the draft EIS/R. We are concerned that several key assumptions, particularly regarding Bulletin 160-98's demand projections, are not valid. The technical evaluations performed by CALFED are not invalid so much as absent. As described below, the EIS/R contains remarkably little information about the affected environment, the project alternatives and most importantly, the potential environmental impacts of the proposals.

2. Are the common programs adequate to ensure program success?

CALFED has failed to examine an alternative that does not posit the construction of new water development facilities . . .

The common program elements are not described in sufficient detail — even for a programmatic EIS/R — to answer this question. In general, Save The Bay maintains that the Ecosystem Restoration Program is quite modest given the ambitious goals for the program. The water use efficiency program is even more limited.

3. How well do the alternatives meet the CALFED solution principles?

It is not clear that any of the alternatives under review satisfy the solution principles. As discussed below, CALFED has failed to examine an alternative that does not posit the construction of new water development facilities but achieves the water supply reliability objective through “soft path” avenues. Moreover, the extremely limited information and analysis in the draft EIS/R — even for a programmatic document — precludes reaching any conclusions at this point regarding the superiority of any alternative.

Save the Bay recommends that CALFED revise the document to include an alternative which would meet CALFED’s water supply reliability goals without additional depletions by utilizing improved water management and water efficiency programs. In fact, by increasing the amount of water dedicated to environmental restoration through a more ambitious ERPP, such an alternative could reduce net depletions from the system.

4. Is construction of new water facilities acceptable to the public?

This is really an issue of political feasibility and appears to be quite premature since the analysis provided so far fails to establish either (1) a compelling technical need for such facilities or (2) assurances that such new facilities would not cause further environmental degradation. At this point, Save The Bay remains opposed to the construction of new surface water storage reservoirs, new dams and or a peripheral canal.

5. Are beneficiaries willing to pay for a comprehensive Bay-Delta solution?

Save The Bay supports this as one of the financing principles for CALFED. However, its validity is being undermined as the definition of “beneficiary” expands such that the public winds up being the beneficiary of all program elements. To the extent that CALFED moves down the path of providing new public subsidies for developed water, Save The Bay will not support the financing program.

6. Can an adequate assurance package be devised?

There is little doubt that such a package can be crafted. However as discussed below, the draft EIS/R makes little or no movement in that direction. It provides no clear overview of what such a package should entail or the options available for putting such assurances in place.

In sum, while Save The Bay remains committed to the CALFED program, the draft EIS/R is wholly deficient. Even the revised schedule which anticipates a supplemental draft EIS/R by

the end of the year is obviously inadequate. We strongly recommend that the CALFED Program and the CALFED Policy Team reconsider the expense and effort necessary to produce yet another rendition of a document that is very likely to fail once again to pass legal or technical muster and put those resources instead to obtaining a high quality document in a reasonable time frame.

Our specific comments and recommendations are below. These comments have two major parts. The first section deals with the environmental impact analysis in the EIS/R and several of the "technical appendices." The second part addresses CALFED's approach to assurances and implementation issues.

**CEQA/NEPA Analysis**

# Part I: Draft Environmental Impact Statement/Report

## A. Standards for Programmatic EIS/R

The draft EIS/R fails entirely to meet the legal requirements for a sufficient programmatic review under 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). Programmatic EISs and EIRs have the same fundamental purpose as site specific EISs and EIRs: to inform the public and decision-makers of a program's environmental consequences before decisions are made. A programmatic EIS/R must provide the basis for decision-makers to determine whether subsequent actions may have significant environmental effects. It should address the environmental effects of the proposed program specifically and comprehensively.

To the extent that the EIS/R omits relevant information, it effectively precludes the informed decision-making that is the central objective of CEQA and NEPA. Thus, for example, the EIS/R must consider alternatives that would substantially avoid or reduce the adverse impacts of the program, even if such alternatives would impede to some degree the attainment of the project objectives. Similarly, the document must contain enough information about each alternative to allow meaningful evaluation and comparison of impacts.

Thus, it is not sufficient for a programmatic EIS/R to merely provide general policy guidelines as to relevant environmental factors; it must ensure that decision-makers consider all of the specific and particular consequences of its actions and the alternatives available to them. This standard is particularly crucial at the programmatic stage since subsequent site specific EIS/Rs often rely heavily on the environmental analysis conducted in the programmatic review. CALFED may not defer analysis of key environmental impacts to the projectspecific stage. As the courts have found, "tiering is not a device for deferring identification of significant environmental impacts that adoption of a specific [alternative] can be expected to cause." Stanislaus natural Heritage Project v County of Stanislaus, 48 Cal. App. 4<sup>th</sup> 182 (1996). The adequacy of the environmental impact analysis in the CALFED EIS/R is all the more important since the agencies intend to use this document as the project specific environmental review for at least part of the program.

As discussed below, the draft EIS/R must be substantially revised and expanded to provide the public and decision-makers with the information necessary to make sound decisions about the CALFED Bay-Delta program.

## B. Geographic Scope of the Bay-Delta Program

The CALFED problem area should be redefined to include all of San Francisco Bay, including the South Bay. San Francisco Bay is inextricably linked to the Delta Estuary biologically and hydrologically. The draft EIS/R fails to provide a scientific rationale for arbitrarily excluding the Bay from the problem area of a "Bay-Delta" solution. While we appreciate that the Bay is included in the "solution" area, there is little question that the problems facing the Bay that bear directly

The CALFED  
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San Francisco Bay

on the program objectives – and ecosystem quality in particular – are not addressed in the draft EIS/R.

*We recommend that the EIS/R be revised to include all of San Francisco Bay in the CALFED "problem scope" area.*

### **C. Project Purpose**

The general program purposes set forth in the draft EIS/R (pp 1-5 to 1-8) are useful. However, they are extremely broad and vague, even for a programmatic NEPA/CEQA document. For example, the purpose of the ecosystem element is "to improve and increase" habitats and ecological functions. Thus as currently described, almost any level of improvement in the current highly degraded system would suffice to satisfy this project purpose. However, CALFED's objectives for ecosystem restoration are far more ambitious than mere "improvement" of any kind. A clear and accurate project purpose is essential under state and federal law because it serves as a benchmark in determining the adequacy and sufficiency of the alternatives under review.

*We recommend that the project purpose for the ecosystem restoration element be revised to state CALFED's objective of achieving broad fish and wildlife and ecosystem recovery and restoration in the Bay-Delta Estuary.*

Similarly, the purpose of the water supply reliability element is to "reduce" conflict between supplies and "current and projected beneficial uses." This is ambiguous suggesting that the program will attempt to provide water supply to meet all future projected demand for Delta water. This is contrary to suggestions in other CALFED documents that the program's purpose is limited to stabilizing the reliability of for existing water supply and will not attempt to develop new sources of water to meet future demand projections.

*We recommend that the project purpose for the water supply reliability element be revised to state CALFED's objective of addressing reliability of current needs and not to satisfy currently projected future demands for consumptive (urban and agricultural) uses.*

### **D. Ecosystem Goals and Objectives**

#### **1. Species Restoration Objectives are Too Limited.**

Given the broad ecosystem restoration objective of the CALFED program, the goals of the ERPP are very modest. When all is said and done, CALFED is proposing to achieve "recovery" for only a handful of species already listed under endangered species laws. The ecosystem restoration program will only "contribute to" recovery for many others. While we are mindful of the need to set realistic and attainable goals, this limited approach to ecosystem recovery seriously undermines CALFED's stated objective of large scale ecosystem restoration and raises several important questions.

Foremost, what agency will take responsibility for species recovery if not CALFED? The implication of this approach is that the fish and wildlife agencies will be pursuing more extensive recovery efforts for listed and jeopardized species outside of the CALFED process. However, this would run counter to the entire premise of the CALFED effort which is to put a comprehensive ecosystem recovery plan in place that, among other things, minimizes water supply reliability disturbances. Moreover, CALFED is intended to enhance coordination among state and federal natural resource and water development agencies. Such coordination is undermined if species recovery is planned and implemented in an effort outside of but parallel to CALFED. Finally, given the nature of the water supply reliability assurances under discussion, it is essential that CALFED set a high bar for its ecosystem recovery objectives.

*We recommend that the EIS/R should be revised to establish recovery of all listed species likely to be affected by CALFED actions in the Delta and the Bay as the program objective.*

*We recommend that, as a preliminary matter, CALFED adopt the recovery criteria developed by the Delta Native Fishes Recovery Team for the fish species identified in that important inter-agency effort. Recovery criteria should be developed along the model employed by the Delta Native Fishes Recovery Team for each species identified on the "covered species list" that is being prepared for use in the conservation strategy.*

## **E. Water Supply Reliability Program Goals and Objectives**

Closely related to the problem discussed above, the draft EIS/R suffers throughout from a failure to identify the objectives of the water supply reliability element of the CALFED Program. This is in marked contrast to the intense effort to quantify, measure and specify the goals of the ecosystem restoration program and to develop measurable targets. The draft EIS/R and the myriad technical appendices fail to notify the public of the Program's intentions for the water supply reliability element beyond vague references to "increases" and "improvements."

This defect mars the analysis throughout. For example, the draft EIS/R states that additional study will be required to determine "optimal storage sizes." But optimal for what purpose? The amount of storage "necessary" (if any) has everything to do with CALFED's assumptions about how much new yield (if any) is required to meet the Program's water management objective. Even the detailed "Problems and Objective Statements" (an appendix to the Program Goals and Objectives Technical Appendix) is framed entirely in vague intentions to "improve uncertainty" and "help meet" long term needs.<sup>1</sup>

<sup>1</sup> In addition, the status of the Problem and Objective Statement contained in the Technical Appendix is unclear. As currently drafted it is little more than a comprehensive wish list of stakeholder parties. CALFED has not identified how "objectives" that conflict with one another will be prioritized in evaluating the efficacy of the alternatives or indeed whether this document will be employed at all in the analysis.

This lack of specificity makes it impossible for the public and decision makers to evaluate the effectiveness of the alternatives. Are new dams and surface water reservoirs “necessary” to meet the CALFED water supply reliability goals for urban and agricultural water users? (We address the argument that such facilities are necessary for environmental purposes below). This question cannot be answered based on the draft EIS/R because CALFED has failed to identify clear goals for the water management element of its program. Thus, there can be no objective evaluation of the “adequacy” of the alternatives under review.

This reluctance to clarify the CALFED objective for the water management element is in sharp contrast to the drumbeat of insistence that the ERPP goals and objectives be “measurable” and “quantifiable.” A basic CALFED principle is parity among the program elements. The parity of the entire program is undermined from the start if there is no demarcation of the benefits the CALFED Program is intended to provide to the consumers of developed water supply.

*We recommend that the EIS/R be revised to identify specific and measurable water supply reliability goals and objectives for the consumptive sectors (urban and agricultural water users) to serve as a benchmark for evaluating the efficacy of the program alternatives.*

CALFED’s shifting positions on this issue have compounded the problem. Last September’s Phase I Final Report states that the water supply reliability program is intended to “improve the ability to transport water through the Bay-Delta system” (p. 6). However, the Phase II Report released with the draft EIS/R states that the objective is to “increase the flexibility to store and transport water” (P. 20). By defining success as increasing storage, this change in CALFED’s water supply reliability objectives stacks the cards against a soft path solution.

*We recommend that the EIS/R be revised to identify a water supply reliability program objective which focuses not on achieving a particular level of supply, storage or transfer, but rather on improving water supply reliability to contribute to the maintenance of healthy agricultural and urban communities and economies. The focus of this objective should be on the economic and other benefits of water supply reliability, not on an artificial and arbitrary supply number (as in the case of Bulletin 160).*

## **F. No Action Alternative**

The purpose of the requirement for a “no action alternative” in both CEQA and NEPA is to ensure that the public and decision makers are able to compare the environmental impacts of the proposed project (and the 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. In a simple project, the No Action Alternative may be nothing more than the maintenance of the existing conditions.

That is not the case for the CALFED program; with or without any CALFED action, existing conditions will change over the next decades as a result of (1) foreseeable physical changes in the system and (2) existing and foreseeable regulatory requirements. Thus, it is important to craft a No Action Alternative that provides the public and decision makers with a sense of what the

system will look like in light of these foreseeable changes even without any action by the CALFED program, and to distinguish this future scenario from a description of the resources in the affected environment. (See below.) However, the draft EIS/Rs analysis of the No Action Alternative – and comparison of project impacts to this option – is flawed for several reasons.

First, some of the assumptions underlying the No Action Alternative are troubling or unclear. Table 2-1 indicates an assumption that the 1995 WQCP is in place, but it fails to specify whether CALFED further assumes that such standards will be fully implemented, and if so, what further assumptions CALFED is employing about the water supply consequences of such compliance. For example, under existing conditions, the 1995 WQCP is implemented through Water Right Decision 95-6. Is CALFED assuming a continuation of this Decision? Or is it assuming that a new water right regimen will be adopted to replace 95-6? We note that at least with regard to the Vernalis standard, CALFED is apparently assuming that the Board will adopt the VAMP agreement.

Second, CALFED is assuming that certain CVPIA requirements are in place but is silent on implementation of the fish doubling plan required by CVPIA Sec. 3406(b)(1). Some of the water necessary to meet this baseline legal requirement will be provided by the 800,000 acre-foot dedication, but it is expected that additional water may be needed to implement the final fish doubling plan.

Third, CALFED is assuming that there would be no new listings of endangered species in the study area in the absence of the CALFED program. This assumption is not warranted. Spring run salmon are likely to be listed under both state and federal statutes and several other aquatic species are either the subject of petitions or proposed for listing by the responsible agencies. The water supply impact analysis should take these issues into account in a revised document.

*The draft should be revised to clarify what is meant by compliance with the Vernalis standard "subject to VAMP" for purposes of water supply assumptions in the modeling and what assumptions if any CALFED is making regarding the Board's adoption of any of the other "negotiated agreements" now pending before the Board, as well as other assumptions regarding implementation of the 1995 WQCP.*

*The draft should be revised to clearly identify CALFED's assumptions regarding the water supply impacts of full implementation of the fish doubling plan mandated by the CVPIA.*

*The draft should be revised to include at least ESA listing for spring run salmon, steel head trout and possibly other aquatic species that are now under consideration for listing such as Sacramento splittail, in assumptions for the No Action Alternative.*

## **G. Water Supply Reliability Alternatives**

### **1. Description of Programmatic Water Management Alternatives Inadequate**

The discussion of alternatives in the draft EIS/R is wholly inadequate. (Chapter 2, Project Alternatives Appendix). The "overview" of the alternatives in the draft is so nebulous that it is impossible to ascertain what is under consideration. For example, Alternative 1 is described as including unspecified "modifications" and "improvements" intended to remove "regulatory constraints" to increased pumping.

The more detailed descriptions of the alternatives are not much better. We learn that the proposed modifications include "a new Clifton Court intake structure" and "channel enlargement along a 4.9 stretch in Old River." The reader has no idea what this new structure would consist of, how it would function, or what purpose it is intended to serve; there is no disclosure of what the channel enlargement would consist of, how it relates (if at all) to the new intake structure, or what its purpose would be. There is no disclosure of the "regulatory constraints" at issue and whether they serve an environmental or other legitimate purpose.

This problem is not remedied by recourse to the "Technical Appendix" on the project alternatives which for the most part merely repeats the information in the main EIS/R. No additional information is provided regarding the nature or purpose of the new intake structure or the mysterious "regulatory constraints." This problem persists for each of the alternative water management configurations in the EIS.

Even at a programmatic level, NEPA and CEQA require more than a single sentence describing the facilities under consideration. It is also difficult to ascertain the proposed changes – what they are, what purpose they would serve – in the environmental restoration program that accompany each alternative due to the extremely abbreviated description of such actions. For example, Alternative 3 would modify the ERP to include unspecified "modifications" of the Mokelumne River Floodway and conversion of certain islands to "aquatic habitat." What is the purpose of these modifications and what do they have to do with Alternative 3? There is no way to discern the agency's proposal from the very limited description provided. The same problem holds true for descriptions of modifications to the other common programs.

We do not suggest that the ERP, or other common programs, be reproduced in full in the EIS/R. However, CALFED is obligated to provide the public and decision makers with a clear picture of the alternative programmatic approaches to solving the Bay-Delta problems that are under review. This requires at a minimum that the EIS/R set forth a clear picture of the alternatives explaining how the various elements fit together in a coherent whole. The current draft contains little more than a list of program elements. This problem is exacerbated when the public and decision makers reach the analysis of the environmental impacts associated with each alternative. (See below.)

*We recommend that Chapter 2 of the EIS/R be revised to describe each of the programmatic alternatives under consideration in sufficient detail to provide the public with a clear picture of (1) each of the program elements and (2) the different purposes or functions the program elements are intended to serve; and (3) how the program elements form a coherent alternative; and (4) the nature of the "regulatory constraints" at issue and analysis of the need for such constraints.*

*We recommend that the Project Alternatives Technical Appendix be rewritten to disclose all of the technical information supporting the development of the alternatives under review and to eliminate all material that merely repeats the text of the draft EIS/R.*

## **2. Range of Water Management Alternatives Inadequate**

The draft EIS/R fails to meet one of the most crucial NEPA and CEQA obligations; to provide the public and decision makers with an adequate range of alternatives. This requirement is particularly key at the programmatic stage since all later decisions will flow from the options addressed in the broader review.

However, the draft EIS/R considers a very narrow range of alternatives to address the water supply reliability element. All three alternatives anticipate substantial new water facilities intended to create even more developed water for consumptive use. Consideration of a reasonable range of alternatives clearly requires full evaluation of a non-structural solution for the water management element of the CALFED program. This is particularly the case since the very ecological destruction that CALFED is trying to remedy was largely caused by construction and operation of water development facilities that take water out of the natural system and divert it for consumptive use.

The draft EIS/R contains no explanation for this glaring defect. Nothing in the document suggests that water transfers, water conservation, recycling and other non-structural approaches would not be successful in addressing the water management objectives of the program. Nor can it be argued that this approach would be too expensive – federal studies establish that these “soft path” tools are far more cost-effective than building new water development facilities. CALFED is not compelled to select this “Alternative 4” simply by including it in the revised draft (as it is not compelled to select any of the three current alternatives), although we believe that a thorough analysis will reveal it to be the environmentally superior alternative.

We note that CALFED has in the past refused to include a “soft path” alternative in its analysis claiming that “it won’t work” and “the numbers aren’t there.” However, there appears to be no documentation in the draft EIS/R supporting these assertions. In part, this problem relates back to the program’s failure to articulate clearly its objectives for the water supply reliability element. Analyses conducted by our colleagues in the Environmental Water Caucus clearly indicate that existing water use can be made substantially more reliable and predictable without the aid of new dams, canals or surface water reservoirs. To the extent that a soft path alternative is infeasible, and we do not believe that it is, CALFED is obligated to provide that information to the public and decision makers.

*We recommend that the EIS/R be revised to include full and complete evaluation of a water management alternative that relies on a combination of soft path approaches to achieving the water supply reliability objective of the CALFED program. (Note that Alternative 1A does not meet this criterion since it is merely implementation of the common programs without an alternative management strategy in place to address water supply reliability.)*

### 3. Analysis of the Benefits, Impacts and Assurances Aspects of "Dual Conveyance".

One of the reasons CALFED is considering a "dual conveyance" Alternative 3 is to preserve the concept of the Delta common pool, which is intended, in part, to provide assurances regarding Delta environmental, water supply and water quality issues. However, the proposed operators plan for alternative 3 includes low minimum Delta diversions through much of the year and no minimum Delta diversions in the Spring (Project Alternatives, p. 65). It is likely that such low levels of Delta diversions would provide little or no real world assurances regarding Delta environmental, water supply and water quality issues.

*We recommend that the EIS/R be revised to explore a full range of possible operations for an isolated facility, to explain the rationale for the proposed Delta diversion levels and to fully evaluate the benefits and impacts of the proposed operations plan, as well as the assurances implications of the proposed plan.*

## H. Ecosystem Restoration Alternatives/Adequacy of ERPP

### 1. The EIS/R Does Not Acknowledge Key Related Programs for San Francisco Bay.

The discussion of the Suisun Marsh/North San Francisco Bay Ecological Zone (ERPP, Vol. II, p. 99) does not acknowledge important related restoration programs: the Partnership for the San Pablo Baylands and the San Francisco Bay Joint Venture. Save San Francisco Bay Association, which coordinates the Partnership for the San Pablo Baylands, is currently preparing a plan for the stewardship of this area. This plan, which will be released in July, 1998, was developed in cooperation with agencies and local landowners and will provide a model for improved cooperation within CALFED and for strengthening of the ERPP. We believe that this plan will provide recommendations which should be included in the CALFED ERPP and preferred alternative. We have attached (Attach Marc's summary document).

### 2. The ERPP's Restoration Goals for San Pablo Bay Are Too Modest.

We have previously discussed our opposition to the exclusion of portions of San Francisco Bay from the CALFED program. However, even where the Bay is included, the program's goals are too modest. For example, the tidal restoration goal for San Pablo Bay is 2,500 to 5,000 acres. Given the ecological importance of this region, and the potential for restoration, we believe that these goals are unjustifiably small.

Also, although the EIS/R recommends seasonal wetlands restoration in the Suisun Marsh area, the EIS/R does not contain any goals regarding the restoration of seasonal wetlands in the San Pablo Bay area. Save the Bay is developing restoration opportunities here, which could include improved management for wildlife on farmed Baylands.

*We recommend that the EIS/R be revised to include a San Pablo Bay tidal habitat restoration goal of and a seasonal wetlands enhancement goal of 10,000 acres and a seasonal wetlands enhancement goal of at least another 10,000 acres.*

### **3. The EIS/R's Delta Restoration Goals are Inadequate.**

Despite the discussion of the importance of tidal habitat in the Western Delta, the EIS/R recommends the restoration of only 2,500 acres of tidal habitat in the Central and West Delta units. We believe that a more extensive restoration of habitat in this area is necessary for the success of the program. As we have stated elsewhere, we also believe that there are potential strategies available to restore subsided Central and West Delta islands to tidal habitat elevations. We believe that more extensive restoration throughout Delta, and upstream, will be required to achieve the goals of CALFED.

*We recommend that CALFED dramatically increase its restoration goals for the Delta and upstream and further recommend that the EIS/R analyze the adequacy of the proposed habitat restoration program to achieve CALFED's ecosystem goals.*

### **4. The EIS/R Does Not Evaluate the Cost-Effectiveness of Alternative Strategies to Provide Essential Additional Environmental Water.**

The Implementation Strategy appendix states that CALFED assumes that new storage north of the Delta would be used jointly for ecosystem and water supply purposes (and possibly funded as an ecosystem restoration activity) (p. 31). However, just as the EIS/R fails to analyze the cost effectiveness of alternative strategies to provide increased water supply reliability (see below), the EIS/R also fails to analyze the cost effectiveness of alternative strategies to provide increased water for the environment required to meet CALFED's environmental objectives.

Any new storage should have a portion of its yield dedicated to environmental mitigation. We oppose the use of any public funds for surface storage, even to provide environmental benefits, because we believe that constructing new surface storage would not be cost-effective.

*We recommend that the ERPP and economic analysis regarding water supply also discuss the cost-effectiveness of alternative environmental water supply strategies.*

### **5. The ERPP is Not Adequate to Achieve the Goals of the CALFED Process.**

The ERPP has been the subject of extensive discussions over the past several months. As included in the draft EIS/R, we believe that the ERPP is inadequate to achieve CALFED's ecosystem goals, or possibly, even to mitigate for the ongoing impacts of the operation of existing water projects. However, we strongly endorse the components of the strategic plan (Developing a Strategic Plan appendix, p. 5) to develop a more adequate, scientifically sound, effective and adaptive ERPP.

*We encourage CALFED to aggressively pursue the components of the strategic plan and to revise the EIS/R accordingly.*

## **I. Water Use Efficiency Program**

### **1. The EIS/R Fails to Adequately Analyze the Potential Benefits of Increased Water Efficiency.**

We have elsewhere recommended the development of a soft path alternative which analyzes the potential of an aggressive program to increase the efficiency of the use of currently developed water supplies. The water use efficiency analysis relies heavily on DWR's draft Bulletin 160-98. We believe that that document, and therefore, the DEIS/R, is fatally flawed with regard to:

- the role of economics in promoting efficient use.
- current and protected water use.
- conservation and reclamation potential in the urban community.
- conservation, crop changes, land retirement and other water management
- opportunities for the agricultural community.
- the potential of water transfers.

With regard to transfers in particular, the EIS/R fails to analyze current and potential benefits for the agricultural community. For example, the Westlands Water District has used the market extensively to provide increased water supply reliability. In addition, from 1993 to 1997, the Bureau of Reclamation has approved 1.4 million acre feet of transfers within the CVP service area, pursuant to section 3405(a) of the CVPIA. Finally, South of Delta agricultural users are currently establishing an electronic market to facilitate water marketing among water districts. Such transfers increase water supply reliability with no change in Delta exports, and at a cost far lower than new surface storage.

*We recommend that the EIS/R be revised to provide a complete analysis of the potential for transfers to benefit agricultural and urban users, without increasing depletions from the environment.*

### **2. The EIS/R Fails to Analyze the Potential Benefits of a Well-Constructed Land Retirement Program.**

A previous CALFED analysis has revealed potentially significant and cost-effective water supply benefits from an ambitious land retirement program. The EIS/R, however, fails to analyze a full range of land retirement opportunities. This strategy should be included and analyzed as a part of a water supply reliability option. Such willing seller programs are currently being used to the benefit of water users and the environment in other areas within this region of the Bureau of Reclamation (e.g. the Newlands Project).

CALFED has stated that land retirement has been excluded because it violates CALFED's solution principles with regard to redirected impacts. If CALFED believes that such redirected impacts are unacceptable, then surely the additional water diversions contemplated by each of the alternatives in the EIS/R would represent a similar redirected impact, which should likewise be excluded.

*We recommend that the EIS/R be revised to include a complete analysis of all of the potential benefits (e.g. water quality, habitat and water supply) of an ambitious, well-designed, willing seller land retirement program.*

## **J. Water Quality Program**

### **1. The Water Quality Analysis Fails to Identify Adequate Strategies to Protect Environmental Values.**

The EIS/R acknowledges that water quality problems currently impair beneficial uses, including environmental values. However, the EIS/R fails to identify specific actions to improve water quality for the benefit of drinking water and environmental values. In contrast with the ERPP (which we do not believe is currently adequate), the water quality program contains far less detail with regarding to current impairment, the primary causes of impairment and effective strategies for remediation.

*We recommend that the EIS/R be revised to provide an adequate analysis of and comprehensive strategies to address water quality problems.*

### **2. The Water Quality Analysis Fails to Evaluate Adequately the Technical Feasibility of a Full Range of Strategies to Provide Adequate Drinking Water Quality.**

The water quality appendix identifies the relocation of water supply intakes in the Delta (e.g. construction of a Peripheral Canal) as one of only two methods to reduce impairment of drinking water quality (Water Quality appendix, p. 25). However, the EIS/R does not contain an adequate discussion of the potential for other strategies to contribute to protective drinking water quality. Other such strategies include:

- Trading Delta water for other South of Delta water sources (e.g. for water from the Friant Unit of the CVP).
- Blending Delta water with other water sources, a strategy which is available to nearly all areas which use Delta water for drinking water.
- The potential effectiveness of advanced water treatment technologies.
- Likely improvements in water treatment programs in the no action alternative.
- The drinking water quality benefits from a more ambitious water quality program and ecosystem restoration program (e.g. wetlands, floodplain and meander belt restoration)
- The water quality benefits from decreased Delta diversions and increased outflow at sensitive times of the year.

Regarding the latter, the EIS/R should explore possible linkages between increased flows to provide for ecosystem restoration and flows which could provide for decreased seawater intrusion to provide water quality benefits. Such increased Delta outflows could be made possible through environmental water purchase programs and the aggressive water conservation and water management alternative we have discussed elsewhere.

*We recommend that the EIS/R be revised to contain an adequate analysis of a full range of strategies to provide high quality drinking water.*

**3. The EIS/R does not adequately analyze the water quality relationship between increased storage and increased Delta diversions.**

The EIS/R states that an increase in storage could have a beneficial impact on export water quality (p. 6.1-57). However, the EIS/R does not discuss whether changes in operational plans or applicable standards (e.g. E:I ratios, x2 standards, export pumping limits) would reduce or eliminate these potential benefits.

Further, although the EIS/R states that increased storage, coupled with increased diversions, could result in increased water quality, it does not explore whether decreased diversions or increased releases from existing storage could achieve the same result.

*We recommend that the EIS/R be revised to analyze adequately the water quality relationship between storage and Delta exports.*

**4. The EIS/R does not evaluate the relative economic and environmental advantages of alternative strategies to provide high quality drinking water.**

Once CALFED prepares the above recommended analysis of the technical feasibility of alternative strategies regarding drinking water quality, the document should be revised to include an analysis of the cost effectiveness and environmental impacts and benefits of different strategies.

**5. The EIS/R does not contain an adequate discussion of possible future drinking water standards.**

Some urban water districts have argued that a Peripheral Canal is needed to meet future water quality standards. The EIS/R does not provide an adequate analysis regarding possible future standards or a clear statement from responsible state and federal agencies (e.g. EPA and the SWRCB) regarding these standards.

## **K. Affected Environment**

The "Affected Environment" analysis in the draft EIS/R is wholly deficient and fails entirely to meet the standard for a programmatic document. For example, notwithstanding the centrality of the aquatic resources of the Bay-Delta Estuary to the entire program, the draft EIS/R commits a single paragraph to a description of the historic fisheries in the Delta region – even this small effort fails to convey any information relevant to the historic fisheries in this region. The entire other aquatic species in the Affected Environment sections, or to provide a programmatic level review of their historic distribution and abundance levels. The draft similarly fails to identify the amount and distribution of historic tidal or seasonal wetlands in the Bay and Delta regions or to describe their ecological functions. The same deficiency is repeated over and over again throughout the Affected Environment sections of the draft EIS/R.

In short, CALFED appears to have made an extraordinarily limited effort to provide the public and decision makers with meaningful information about the biological or physical resources at the heart of its program. (To the extent that this information is buried in "technical reports" that are available at a limited number of repositories around the state, CALFED cannot claim to have fulfilled its obligation to disclose this information to the public.) The deficiencies in this analysis fall into three categories: (1) the time frame for describing the affected environment is too circumscribed; (2) the level of analysis and information provided is grossly circumscribed; and (3) the species and habitat types reviewed in the EIS/R cannot be ascertained.

### **1. Time frame for Describing the Affected Environment Too Circumscribed**

CALFED has included two time frames in the draft EIS/R to establish baseline conditions for the resources at issue; a "historic perspective" and "existing conditions." Given the degradation of biological and physical resources over time, we agree that a historic time frame is appropriate in addition to an attempt to capture current conditions. Because one of the central purposes of the CALFED program is to restore and rehabilitate the Bay-Delta ecosystem, it is essential that the baseline "affected environment" analysis provide decision makers and the public with a clear view of the historic abundance of aquatic and other species, the types, functions and distributions of important types of habitats that supported such species, and an overall perspective on ecosystem functions and processes. The EIS/R fails to do so, however. The "historic perspective" sections are far too cursory even for a programmatic document and do not clearly identify the time frame at issue. Moreover, it is not clear that CALFED is employing the historic perspective as providing a baseline against which environmental impacts will be measured.

To the contrary (as discussed below), the environmental impact analysis appears to be based exclusively on a comparison with the current – highly degraded – state of the natural environment. This is unacceptable in a program of this nature and is likely to result in a skewed analysis of program impacts. For example, in addition to asking whether the ERP will benefit the existing depleted resources of the Bay, the Estuary and most of their inhabitants, the

CALFED program must also consider the level of benefits provided in comparison to the historic conditions that prevailed in these regions. Is the measure of success small increases from today's depleted conditions? Or is it getting close to a return to historic functions and processes?

Obviously it is not our contention that historic conditions must be fully recreated – it is our contention that CALFED is obliged to restore the natural functions and processes of the Bay-Delta ecosystem to the maximum extent possible. This cannot be accomplished without a clear picture of what those conditions were.

We recommend that the EIS/R be revised to provide clear and complete information regarding the historic condition of Bay-Delta fishes, wetlands and other biological and physical resources in the Affected Environment sections of the EIS/R. In making this recommendation we are mindful that this is a programmatic level review and we are confident that CALFED can provide the public and decision makers with a programmatic level review of historic conditions. The current draft does not meet this test.

## **2. Level of Description of Affected Environment Fatally Flawed**

As discussed above, even setting aside the issue of the time frame for the appropriate environmental baseline, the Affected Environment sections fail to provide a sufficient level of information about the natural resources most at issue. There is no way to conduct a reasoned analysis of the environmental impacts of the alternatives given the baseline information provided in the draft EIS/R.

*We recommend that the draft EIS/R be revised to provide the public and decision-makers with sufficient information regarding the environmental baseline that CALFED is using in its analysis of the environmental impacts of the alternatives under review.*

### **3. Species and Habitat Types At Issue in EIS/R Not Ascertainable**

The EIS/R is vague in its description of the Bay-Delta's natural resources. In a typical example, the Affected Environment section of vegetation and wildlife fails to identify vegetation at all but refers only to "plants," even when discussing special status species. Similarly, the discussion of historic and current conditions fails in general to identify fish or aquatic species in the Bay-Delta.

*We recommend that the draft EIS/R be revised to provide clear descriptions of historic and current conditions of a reasonable range of specific plant, animal amphibian and other species.*

In making this recommendation we are mindful that this is a programmatic level review. It is clear that CALFED has access to programmatic level information about specific species given its conclusions about the impacts the alternatives are likely to have on individual species. The public and decision-makers cannot assess the adequacy of the analysis - or the merits of CALFED's conclusions - without clear baseline information about the species at issue.

## **L. Impact Analysis of Alternatives Under Review**

### **1. Failure to Disclose Technical Review**

A major deficiency in the EIS/R and its supporting technical appendices is the near-total absence of technical information supporting CALFED's conclusions about the potential impacts of the programmatic alternatives under review. The draft EIS/R states that CALFED staff and consultants did prepare reports "Analyzing and describing programmatic changes that could result from implementing CALFED program alternatives.;" however, this basic analysis was not made available to the public or decision-makers. This is entirely unacceptable. As discussed above, NEPA and CEQA establish basic standards for the adequacy of even programmatic documents. These standards at the very least require CALFED to disclose its review of "programmatic changes" expected to result from the alternatives. This is the heart and essence of CEQA and NEPA.

It is in no way sufficient to point the public and decision-makers to the CALFED offices or "public repositories" to dig up such information - obviously no full review of such reports can take place unless they are part of the EIS package provided to the public. Even a brief review of the impact analysis sections reveals the extreme disadvantage the public and decision-makers suffer in reviewing the draft EIS/R; these sections consist largely of cursory conclusions regarding program impacts with virtually no analysis or discussion of the support or basis for such conclusions.

*We recommend that the EIS/R be substantially revised to include CALFED's analysis and descriptions of program impacts that could result from implementing CALFED Program alternatives, as well as the assumptions, data and other documentation supporting the impact conclusions in the EIS/R. In making this recommendation we are mindful that this is a programmatic level review. Nevertheless, the NEPA and CEQA requirements for adequate technical information and full public disclosure are not suspended for programmatic EISs and EIRs.*

## **2. Impact Analysis Re: Fisheries and Aquatic Ecosystems Inadequate**

The CALFED Program is a massive undertaking, proposing to fundamentally alter the water management system for most of the state and to rehabilitate dozens of jeopardized species over an ecosystem covering thousands of miles. Yet the analysis of impacts to fisheries and aquatic resources is extremely limited and fails to meet the information and disclosure standard for a programmatic document. As drafted, it cannot serve as the basis for decision regarding a programmatic approach to a water supply alternative or an ecosystem restoration program.

The fish impacts section (p. 7.1-32 to -45) consists primarily of unsupported conclusions about program impacts. The information that is furnished is for the most part extremely sketchy and limited. For example, we are told that under alternative 2, flow from the new channel would adversely affect flow patterns in the east and central Delta; we are not told what impact this would have on any fish or other aquatic species. For example, in the table on page 7.2-1, the DEIS/R states that the no action alternative and alternative 1 would have minimal impacts. However, the no action alternative and all alternatives assume increases in diversions. These increased diversions would be likely to have significant impacts on fish and wildlife, particularly fish species listed and proposed for listing under the state and federal ESAs.

Alternatives 2 and 3 would result in increased diversions from the mainstem Sacramento River. The EIS/R does not adequately analyze potential impacts from these alternatives on up and down-stream migrating salmonids and other fish on the Sacramento River, particularly those listed or proposed for listing under the State and Federal ESAs. The EIS/R should examine the efficacy of implementing an alternative designed to cause further impacts to the Sacramento River, in order to reduce pressure on the San Joaquin River, particularly without a strategy to put water back into the mainstem of the San Joaquin River below Friant Dam.

*We recommend that the EIS/R be revised to evaluate potential impacts to salmonids on the Sacramento River. We further recommend that the EIS/R compare these impacts with the relative benefits, if any, for fish in the Delta and on the San Joaquin River.*

### 3. Impact Criteria Re Water Supply and Management Improper

CALFED defines as a "significant adverse impact" on water supply any impact that would "reduce the quantity or reliability of water that can be delivered to meet all beneficial uses." (EIS/R at 6.1-68.) There are several problems with this paradigm. First, economic impacts on consumptive water users do not constitute "environmental impacts" for purposes of NEPA or CEQA. While such economic impacts should be identified and analyzed in the CALFED program, it is improper to conflate them with the environmental impacts of the program.

Second, the draft defines any impact on water supply as a "significant adverse impact" for NEPA/CEQA purposes. This semantic device may restrict any environmental restoration program to measures that can be implemented with no effect on water supply. This may or may not be an appropriate policy choice at the end of the process. It is clearly impermissible to stack the deck with this type of bias in the context of the environmental review.

Finally, the significance criterion for the water supply analysis runs counter to CALFED's parity principle. While the significance of impacts to water supply is defined in terms of an alternative's ability to achieve the CALFED program objectives, the significance of impacts to the environment is defined more cautiously. In contrast with the broad standard for finding that an alternative would have a significant adverse effect on water supply, project impacts on fish are not "significant" unless it could be shown that the project would contribute to the further reduction in species abundance and distribution.

*We recommend that the draft EIS/R be revised to ensure parity among the significance criteria for the program elements by making one of two changes: Either (1) the criterion for water supply should be changed to match that in place for fisheries; or (2) the criterion for fisheries should be changed to match that in place for water supply reliability.*

#### **M. Economic Analysis**

##### **1. The EIS/R Fails to Include Adequate Economic Analysis of Alternative Water Supply Reliability Strategies**

The EIS/R (and the CALFED program) is segmented into a number of sections that address reliability issues. These sections include storage and conveyance, water use efficiency, and water transfers. These represent alternative strategies to increase water supply reliability for water users. The EIS/R dismisses other reliability strategies such as groundwater metering and regulation and land retirement.

As a result of this segmentation and exclusion, the EIS/R fails to perform an analysis comparing a full range of water supply reliability strategies to determine the relative operational, economic and environmental costs and benefits of each. For example, the discussion of the storage and conveyance refinement process indicates that CALFED developed preliminary cost estimates, but does not reveal any strategy to compare these costs with the costs of other potential approaches to water supply reliability. By failing to perform such an analysis, the EIS/R is likely to lead CALFED to a smorgasbord approach which includes some of each strategy -- transfers, storage and water user efficiency.

However, an adequate economic analysis could produce a better balance of strategies. It might also reveal, for example, whether new surface storage, which is featured prominently in all three alternatives, is cost effective or not and whether it should be included in the preferred alternative. Without such an economic analysis, CALFED cannot develop a program with water supply benefits which optimally balances operational, environmental and economic benefits. Attached is a more detailed discussion of the shortcomings of the EIS/R with regard to economic analysis.

*We recommend that the EIS/R be revised to include a thorough analysis of the economic costs and benefits of a full range of alternative strategies to provide increased water supply reliability.*

## **2. The Analysis of Impacts on Agricultural Economics is Inadequate.**

The EIS/R states, in the discussion of agricultural economics ( p.8.1-5), that the alternatives “would potentially increase the amount of water available for agricultural production in some regions.” However, the impacts on agricultural economics are determined by far more than the availability of water. In particular, the EIS/R fails to discuss the impacts which the alternatives would have on the price of water – a factor of great importance to agricultural water users in the Central Valley.

At a Congressional hearing on April 15, 1998, agricultural representatives testified that they were unable (or at least unwilling) to pay water rates in the range of \$30 per acre foot. According to the Least-Cost Yield Study, prepared by the Department of Interior pursuant to the Central Valley Project Improvement Act, the cost of new water developed through new surface storage projects (one of the strategies featured most prominently in the DIES/R alternatives) ranges from \$300 to \$3,000 per acre foot.

Therefore, CALFED could increase water supplies for agriculture, but that agricultural water users would be unable to purchase that water, resulting in no benefits to the agricultural economy. Alternatively, if, through CALFED assurances and financing packages, agricultural interests were compelled to pay for this water, these CALFED alternatives could result in significant negative impacts on the agricultural economy.

By failing to analyze the cost of water developed through alternative water supply strategies and by failing to develop a financing package, the document fails to present adequate information to perform an analysis of impacts to the agricultural economy.

*We recommend that the DEIS/R be revised to include an economic and financing analysis adequate to determine potential benefits and impacts to the agricultural economy.*

## **3. EIS/R Fails to Analyze the Potential Environmental Justice Benefits of a Soft Path Alternative.**

The EIS/R indicates that the actions considered in the EIS/R could have a “disproportionate impact on minority and low income populations” (P.8.10-1). However, a soft path could

offer benefits to some minority and poor communities. In particular, the irrigation and crop changes which could result from improved water management could result in increased employment in agriculture. In addition, programs working with inner city communities (e.g. toilet retrofit programs), particularly in Southern California, have revealed significant economic benefits for poor communities from conservation programs.

The CALFED alternatives which rely on increased storage and conveyance could increase water rates in inner city communities for the construction of facilities far away. On the other hand, the soft path alternative which we have advocated, could offer the dual benefits of lower water rates and increased employment in inner city communities.

*We recommend that the EIS/R be revised to include an analysis of the possible environmental justice benefits of a soft path alternative.*

## **N. Impact Analysis Re Hydrodynamics and Riverine Hydraulics Inadequate**

The impact of all of the CALFED alternatives would be to increase the effects of water development on the hydrology of the system, particularly: increasing depletions from the system; and carving peaks off of the hydrograph through expanded storage. These actions have, in the past, caused serious impacts on Central Valley rivers, the Delta and the Bay. The impacts on South San Francisco Bay, regarding stratification, primary productivity and water quality, are well known. However, the EIS/R incorrectly finds that the impacts of most of these modifications are not substantial (p. 6.1-41-54)

*We recommend that the EIS/R address the impacts of increased hydrodynamic modifications of the entire system (particularly San Francisco Bay) and examine operating criteria that could avoid or reduce these impacts (e.g. "protecting" some peaks in the hydrograph).*

## **O. Impact Analysis Re Groundwater Resources Inadequate**

The discussion of current conditions finds serious problems with regard to groundwater resources, including land subsidence, depressed groundwater levels and declining water quality. The EIS/R then finds that the CALFED program could result in "possible reduction or reversal of the adverse effects of past overdrafting of groundwater, such as land subsidence and water quality degradation."

The State Water Project and Central Valley Project were both constructed, in part, to address groundwater problems in the Central Valley. Groundwater problems in the Central Valley (although inadequately documented) are due not to a lack of surface water development, but to the lack of adequate metering, management and regulation.

*We recommend that the EIS/R be revised to evaluate the extent to which the CVP and SWP succeeded in solving groundwater problems in the Central Valley. The EIS/R should then evaluate the potential of the CALFED program to address groundwater problems, given the current lack of regulatory controls. Finally, we recommend that the EIS/R be revised to evaluate the adequacy of existing information regarding groundwater (e.g. metering) and the extent to which the adequacy of this information affects the ability to evaluate the actual extent of current groundwater problems.*

## **P. Financing Issues**

### **1. The EIS/R Fails to Include a Financing Strategy**

Financing is a key not simply to the implementation of a preferred alternative, but to the contents of that alternative. The degree to which water users must pay for program elements will dramatically influence their recommendations to CALFED regarding acceptable strategies. For example, despite CALFED's general support for a benefits-based cost allocation formula, some water users continue to advocate expanded surface storage, to be financed by the public, and to be managed to provide water supply benefits for water users. If CALFED develops a clear, specific financing strategy, it will influence the position of these stakeholders regarding storage and other water supply reliability strategies. Although the EIS/R discusses alternative financing strategies in the Implementation Strategy appendix, it does not provide the specific financing proposal needed to shape the

*We recommend that the EIS/R be revised to include a detailed, specific financing strategy and that financing be incorporated early into the development of the preferred alternative. We further recommend that this strategy include significant water user contributions to ecosystem restoration, in recognition of currently unmet environmental mitigation obligations.*

### **2. The EIS/R Fails to Analyze the Risk of Creating Stranded Assets**

As discussed above, the EIS/R fails to prepare an adequate analysis of the cost effectiveness of alternative water supply strategies and fails to present a financing package. However, the EIS/R does assume some user contribution to the CALFED programs which could provide water supply benefits. As a result of these two failures, CALFED's document does not analyze the possibility that the CALFED program could create a significant stranded assets problem.

The energy field has been struggling with stranded assets for a decade. In that field, investments which the environmental community has long argued to be not cost effective, have proven to be unwise. The responsibility for shouldering these bad investments can fall to ratepayers, stockholders or the general public, with significant impacts.

**Assurances/  
Implementation**

# **PART II: ASSURANCES, IMPLEMENTATION STRATEGY AND ESA COMPLIANCE ISSUES**

One of Save The Bay's major concerns about the CALFED process is how to ensure a meaningful level of restoration and recovery for the Bay-Delta ecosystem over the long-term. The draft EIS/R is enormously disappointing in this respect — very little in the volume of paper provided analyzes the many opportunities and avenues available to make this objective a reality. Part of the problem may be a surfeit of planning. The Implementation Strategy and the Conservation Strategy are all crafted to address different parts of this challenge. The effect, however, is a fragmentation of effort that is unlikely to achieve success.

## **A. Assurances/Implementation Strategy Technical Appendix**

An assurances package is a basic element of the CALFED Program, like drinking water quality. The acceptability of other program elements, such as storage and conveyance and the restoration plan, will turn in part on the strength of the associated assurance mechanisms in the package. For example, a facility with no legal remedies or binding contracts associated with its operation is far less likely to pass muster than an adequately constrained facility. An ecosystem restoration program without long-term funding attached to it will fail to gain public confidence as well. For this reason, the assurance proposal cannot be prepared sequentially, after the substantive proposals have been completed.

The draft EIS/R defines assurances as "mechanisms necessary to assure that the solution will be implemented and operated as agreed." However, what it provides to the public and decision makers is instead an "implementation strategy" — an entirely different thing. Putting a program in place or on a schedule is not the equivalent of building into that program guarantees of performance. It is not difficult to imagine the ERPP being "implemented" with little ecosystem recovery actually occurring. Moreover, without a serious examination of assurance issues, the chances of successful implementation are minimal.

The draft EIS/R fails entirely to provide the public or decision makers with a sense of the options available to assure the program elements. The draft never asks the basic question: What do we need to do to ensure that the Ecosystem Restoration Program (or any other program) is fully implemented so as to achieve its substantive goals? The draft lists "tools," and "management structures," and "guidelines" for an assurance package, but it never sets forth the basic elements necessary to guarantee that the ecosystem restoration program will achieve its objectives.

For example, ecosystem restoration will not be achieved without a secure source of both water and funding. There is no discussion in the EIS/R of the alternatives available to achieve these assurances. The draft EIS/R fails as well to evaluate the potential environmental impacts associated with different assurances approaches. For example, using water transfers to

assure the water necessary for the restoration program could result in very different environmental impacts than the dedication of water through an environmental water right.

It is revealing that neither the EIS/R nor the technical appendices deal directly with assurances but instead approach this issue through the more limited question of how to "implement" the program. However, the Implementation Strategy fails to identify much less examine assurance issues but focuses instead on the "process" for obtaining public consensus. While consensus is laudable and important, the CALFED agencies are still obligated to provide full and clear information to the public about assurance issues regardless of the work group's progress. (Surprisingly, the draft EIS/R fails to mention the one assurance issue that enjoyed unanimous consensus among stakeholders: the notion that the Ecosystem Restoration Program should be implemented by a new entity.)

While we recognize that absolute guarantees may not be attainable under all circumstances, an assurance package should provide a high degree of confidence that the program's substantive goals will be met. The purpose of an assurance package should be to ensure program outcomes. As discussed below, in the case of the Ecosystem Restoration Program and the Conservation Strategy, this means that the assurances package should have as its objective achievement of the performance standards established for the restoration efforts.

*Save The Bay recommends that the revised EIS/R examine the package of assurance mechanisms listed below for the ecosystem restoration component:*

1. *Strong ERPP with measurable performance standards*
2. *Legal mandates to achieve performance standards*
3. *Institution dedicated to implementation with sufficient authority*
4. *Water*
5. *Funding*
6. *Enforcement of baseline environmental statutes*
7. *Physical constraints on new water developments*
8. *Controls on water project operations*
9. *Phasing/linkages of program elements*
10. *Remedies*

Some of the mechanisms listed above are touched upon in the draft, but not as part of a total approach to ensuring that the ecosystem restoration program is successful over time. There are alternative ways of addressing each of the categories above. For example, the revised draft should consider whether the most effective approach to guaranteeing the necessary water for ecosystem restoration would be (1) to allocate some specified amount of water to the environment in the nature of a water right; or (2) to provide the ecosystem restoration entity with sufficient funds to buy water as needed for the environment. Our specific recommendations on this list of assurance mechanisms is below.

## 1. Strong ERPP and Conservation Strategy with performance standards

We have provided extensive comments elsewhere on the merits of the ERP. For purposes of crafting an assurances package for the ecologic recovery programs, the first step must be an express understanding that the purpose and function of the assurances package is the achievement of the performance standards guiding the ERP and the Conservation Strategy (see below). This issue is not addressed in the Implementation Strategy or elsewhere in the draft. The draft should be revised accordingly.

*We recommend that the EIS/R be revised to include an assurance proposal establishing attainment of the ERP performance standards as the express purpose of the assurance package.*

## 2. Legal mandates to achieve performance standards

Assuming that adequate performance standards are adopted by the CALFED program, such standards will not be self-executing. Achieving these standards should be elevated to a legal mandate for whatever institution is tasked to implement the ecosystem restoration programs. This issue is not addressed in the Implementation Strategy or elsewhere in the draft. The draft should be revised accordingly.

*We recommend that the EIS/R be revised to include an assurance package that makes attainment of the performance standards a legal responsibility of the implementing entity.*

## 3. Institution dedicated to program implementation with sufficient authority

The draft acknowledges that "institutional arrangements" are a significant assurance issue but fails to examine the alternative institutional models available to ensure not only the ecosystem restoration program but the other program elements.

*We recommend that the draft EIS/R be revised to provide the public and decision-makers with clear information regarding the alternative institutional options available to assure the implementation of the ecosystem restoration and other program elements.*

## 4. Environmental Water

Water for the environment is essential to ensuring that the ecosystem restoration program is implemented. Nevertheless, the draft EIS/R fails to examine the very difficult issue of how such water can be assured. Indeed, notwithstanding the strong concerns of various members of the environmental community, it is not even listed as among the "issues and concerns" identified in the draft. Moreover, environmental water rights, regulatory changes and other

mechanisms for securing environmental water are not listed as assurance "tools."

*The draft EIS/R should be revised to include a thorough discussions of the alternative means available to ensure adequate supplies of environmental water necessary to achieve implementation of the ecosystem restoration program, including the establishment of an environmental water right.*

## 5. Funding

Questions about how to finance the CALFED solution are addressed at various times in the draft EIS/R. These issues differ fundamentally from the question of money as an assurance mechanism, particularly with regard to the ecosystem restoration program. However CALFED decides to finance the long-term solution, an entirely different question is: How will such funds be obtained in the long-term?

This is especially critical for the ecosystem restoration program which hinges almost entirely on the availability of large sums of money – both to conduct restoration and to buy water – over long periods of time. Yet the EIS/R fails to address the alternatives available for securing such resources. To the extent that the entire plan is contingent on the annual federal and/or state appropriation processes, there is nothing even remotely "assured" about the restoration program.

*We recommend that the draft EIS/R should be revised to analyze funding scenarios for each of the program elements from an assurances perspective.*

## 6. Enforcement of Baseline Environmental Statutes

The draft EIS/R ignores the question of baseline enforcement of existing environmental statutes and regulations. Maintenance of the regulatory baseline is a key assurance issue for the CALFED program; it has long been assumed that the minimal level of water, habitat and funding provided by the Clean Water Act standards, ESA protections and CVPIA implementation are the foundation of the CALFED program. Without this baseline, the Program has that much further to go in achieving its restoration objectives. Moreover, as this baseline and the assurances it was intended to provide has been corroded by litigation and delayed implementation, confidence in the ability of CALFED or any agency to provide assurances that environmental recovery will be achieved is diminishing.

*We recommend that the draft EIS/R be revised to establish a clear regulatory baseline from which the CALFED program will move forward.*

*We recommend that all species which are now eligible for listing be listed under applicable federal and state endangered species laws as part of the CALFED assurances package. At the very least, the EIS/R should be revised to take this action into account.*

## 7. Physical Limits on New Water Developments

The draft EIS/R fails to examine the relationship between assurances and physical limitations. Nor does it explore how to assure that operational criteria for reservoirs and conveyance facilities will survive as intended, and we are skeptical that such criteria can be fully “assured” over the long term. For example, storage constructed for the limited purpose of capturing “surplus water” could be employed to divert more water out of rivers and streams necessary for environmental health. There is no legal arrangement or agreement that will not break down given sufficient political pressure over time.

*The EIS/R should be revised to examine: (1) the extent to which the operation of new facilities proposed in the alternatives can be “assured,” particularly using a system of automatic defaults (see “phasing and linkages” below); and (2) given the difficulty of legal assurances, the efficacy of physical limits on new water management add other facilities from an assurances perspective.*

## 8. Controls on Water Project Operations

While it is widely acknowledged that operational controls will be a key assurance issue, the draft fails to identify any such controls or evaluate their reliability. Operational controls are key to a successful ERPP and conservation strategy and can take several forms. For example, CALFED could craft an “ecosystem-friendly” operations plan establishing protection of natural processes, functions, habitats and species as a key factor in project operations. In addition, the current “Ops Group” could be replaced by a new committee to oversee operations and address conflicts between the ERPP/conservation strategy implementation and project operations as they occur. Moreover, to the extent that a new environmental authority is to be governed in part by water user interests, the governance structure for the federal and state water projects should be revamped to include substantial control by environmental interests. It is essential that the assurance package provide a basic level of parity in the governance of the water management and ecosystem restoration authorities.

*We recommend that the EIS/R be revised to explore these proposals.*

## 9. Staging/Phasing/Linkages of Program Elements

Staging is the one assurance mechanism that the EIS/R addresses but in very limited detail. Phasing can be a key assurance element by keeping all parties invested in the success of all program elements. However, the draft EIS/R is very incomplete in its discussion of this issue. First, the draft does not clarify how the adaptive management of the ecosystem restoration plan fits into the staging scheme. Nor does it discuss how the staging schedule would address adaptive management for the water supply reliability program.

Second, the stages as configured in the EIS/R appears to be out of balance. CALFED is proposing that agreements providing (apparently) for some level of No Surprises assurances — or at least for the issuance of incidental take permits — as soon as the draft EIS/R is complete, well in

advance of the establishment of an ecosystem restoration entity or other implementing authority. Indeed, this entity is not scheduled to come on line until many years later. As discussed in greater detail below, the question of what type of assurances are provided to federal, state and other water development interests with regard to future limits on ESA or other environmental regulation is a key issue. In our view, any promises that would suspend the limited safety net of the Endangered Species Act would be inappropriate at the programmatic review stage, particularly in light of the limited information and analysis regarding species impacts — and endangered species impacts in particular — in the draft EIS/R.

Finally, the draft does little more than establish a schedule for implementation. It does not function as an assurance mechanism weaving together the various commitments of the CALFED program in a mutually dependent manner.

*We recommend that the EIS/R be revised to include a phasing plan in accordance with the following principles:*

\* Irreversible commitments benefitting one group should be linked to irreversible commitments that benefit others. For example, funding and permitting for a storage facility should be linked to deed restrictions protecting a certain amount of previously unprotected habitat from alternative uses. To explore appropriate linkages and craft a phasing plan that is more than a schedule, it would be useful to lay out each piece of the performance package (including performance standards for each of the common programs) and determine at least the following:

- (1) What is the time frame for completion of this implementation task?
- (2) Are there any interim milestones that will be completed in less time?
- (3) How reversible is this piece of the solution?

\* The phasing program should tie implementation of components that can be disrupted to the benefits of all parties. For example, if the ecosystem restoration program depends upon a functioning water market and the ability to transport purchased water, then some significant component of water user supply also should be dependant upon the a functioning water market and the ability to transport purchased water. In this way the temptations of parties to undermine the advances of different program elements may be lessened.

\* Ensure that blocking implementation of any portion of the CALFED package is not in the interest of any party. A system of "mutually assured defaults" should be built into the implementation strategy so that failure to achieve the results specified in the performance package would have known consequences that are less desirable to all parties than achieving such results. As currently proposed, there appears to be no barrier to one part of the program proceeding even if others are stymied. For example, what would occur if federal and state governments refuse to implement or fund portions of the ERPP? The draft does not appear to limit the water manage program from moving forward nevertheless. Mechanisms must be put into place that make all program elements interdependent, particularly with regard to program funding.

\* Provide "certainty" to parties in a manner inversely proportional to the elapsed time. For example, a "no surprises" policy that is limited in scope and application might be appropriate during a five year period for certain actions, but the commitments included would become less certain at the ten, fifteen and twenty year points.

\* To the extent that the ecosystem restoration program in particular depends upon institutional fixes, these should be put into place before other program commitments are initiated.

## 10. Remedies

In the event that program commitments are not fulfilled as intended, remedies must be available to the public. This is particularly true for the ecosystem program which is inherently dependent upon thousands of discretionary actions, and contains a high degree of uncertainty. Remedies can include existing tools such as citizen enforcement under the ESA if the plans fail to protect listed species (this is why it is key that all eligible species are listed). However, new remedies should be made available as well and the EIS/R should consider a range of options for enforcing CALFED commitments. For example, the EIS/R should examine the merits of enabling legal action in the event that the ERPP/Conservation Strategy performance standards are not met or if projects violate the terms of the operating rules. intended to benefit the environment. We realize that such proposals are likely to be controversial. Nevertheless, the system must contain backstops to discourage defaults in program expectations as well as to provide relief. Such measures can be crafted in a limited way that makes them available only when the circumstances warrant.

CALFED seems to be addressing the issue of remedies only through its proposal to develop a "contingency plan" for dealing with a breakdown in the implementation schedule. This should be part and parcel of the assurances package, not another separate planning exercise. As we have indicated previously, the assurances package should be tiered with a series of default mechanisms available all the way down to legal remedies.

*We recommend that the EIS/R be revised in accordance with the proposal above.*

## B. ESA Compliance Technical Appendix

In sharp contrast to the very limited approach to environmental assurances contained in the EIS/R, CALFED has provided a detailed "ESA and CESA Compliance" paper intended to guide the process for incidental take permits. This paper outlines a future Conservation Strategy geared primarily toward ensuring that human actions that affect listed species are able to be permitted under the applicable statutes.

Importantly, CALFED did not make the draft Conservation Strategy available for public review with the draft EIS/R. The paper provided – in the Errata to the EIS/R – states that such a document will be forthcoming. Thus, the public and decision makers are given virtually no information about the direction and substance of the proposal for ESA compliance.

In essence, CALFED is proposing to use the Conservation Strategy in conjunction with the EIS/R as the Section 7 consultation required by the federal ESA. These two documents are intended to serve together as a kind of programmatic biological opinion for the entire CALFED program. In addition, they will be used as the site-specific biological opinions for specific Federal actions proposed. They are also intended to serve as the basis for "HCPs that might be necessary." Save The Bay has several responses to this proposal.

### **1. When Take Permits Would Be Required, and for Which CALFED Actions, Unclear.**

There is an internal tension in the draft between the fact that the CALFED program is now limited to a programmatic level of review, with site specific analyses a long way off in many cases, and the press for issuance of incidental take permits following the Record of Decision on the EIS/R. As discussed above, the programmatic alternatives and their impacts are only very superficially described and there is virtually no information on site specific projects (other than those listed in the ERPP). The CALFED Program has been explicit that further environmental review – including ESA and Section 404 permitting – will be required prior to any site specific project permitting.

Nevertheless, the compliance paper states that in fact the programmatic EIS/R will serve as the site specific NEPA/CEQA documentation for at least some projects from the common programs and some conveyance actions within the Delta and "interim changes to operating procedures for water storage and conveyance." It is impossible to assess the sufficiency of the Conservation Strategy as a mechanism for authorizing incidental take without clear and specific information about the actions under review.

*We recommend that the EIS/R be revised to (1) identify the specific actions that CALFED intends to implement in Stage 1 (0-7 years from the Record of Decision on the programmatic EIS/R); and (2) provide a schedule for implementation indicating when incidental take permits would be required for such projects.*

### **2. "Programmatic" Incidental Take Permit Improper**

We concur that the EIS/R and the conservation strategy should serve together as the assessment of impacts to listed species for the CALFED program. As discussed above, these planning approaches should be merged or at least fully coordinated. We agree with the approach outlined in the compliance paper indicating that the agencies will examine the entire program from the perspective of each covered species and habitat and determine which specific program actions are likely to (or could) affect such covered species and habitats. This assessment should be conducted with an eye toward identifying potential harm to such species and habitats and identifying appropriate mechanisms to avoid entirely harm to, or take of., such species and habitats. Similarly, it would be useful for the agencies to identify the types of restrictions on harm to identified species, mitigation measures or research gaps that will be needed in the implementation phase.

However, the draft proposes that the Conservation Strategy will go beyond this assessment

stage and will serve as a "programmatic" biological opinion, presumably including a "programmatic" incidental take statement. This is unacceptable to Save The Bay. In light of the massive scope and breadth of the CALFED program it is neither practicable or appropriate to permit take of listed, or other covered, species based solely on a programmatic level environmental review. An incidental take statement relies on the ability of the agency to assure that affected species or designated habitat will not be jeopardized. Such assurances are not feasible on the massive scale of the CALFED programmatic EIS/R. (Save The Bay does support near-term implementation of those actions that are the subject of a complete site-specific EIS/R and a biological assessment).

Moreover, the draft EIS/R and Conservation Strategy do not provide a high degree of confidence that the level of analysis and information disclosure in the programmatic document will be in any way sufficient to support the issuance of a biological opinion, much less some type of programmatic incidental take permit. (See comments above.) For the same reason we are very troubled by the suggestion in the draft that the agencies are considering a "programmatic take permit."

*We recommend that the EIS/R be revised to eliminate the suggestion that the agencies will issue a programmatic biological opinion or incidental take statement, or to limit this proposal to actions that will have a net environmental benefit.*

### 3. Clarification of Intent Regarding No Surprises Policy Required

The draft suggests that the agencies have abandoned the notion of a programmatic HCP covering the entire CALFED program. It further suggests that the agencies anticipate that individual HCPs will be required for CALFED actions that would be implemented by non-federal parties. This continues some of the difficulties discussed in the conservation community letter to CALFED of October 20, 1997 incorporated herein by reference in its entirety.

First, assuming that the State will have a significant implementing role certain to involve take of covered species, what is the agencies' intent with regard to an HCP? For example, is it expected that the State will prepare a habitat conservation plan to mitigate the environmental impacts associated with a new surface water reservoir? If so, how would such a plan relate to the CALFED ERPP? The draft provides no insight into how these apparently distinct planning efforts would inter-relate or whether adherence to this model works to the benefit of ecosystem restoration and endangered species recovery.

Second, of greater significance, the draft fails to discuss the nature of the No Surprises assurances that would be provided to the state or other non-federal parties implementing portions of the CALFED program pursuant to the federal HCP program. Our concerns in this regard are set forth in more detail in the EWC letter to the CALFED Bay-Delta Program referenced above.

*We recommend that the EIS/R be revised to disclose the agencies' intentions for incorporating the federal HCP process into the CALFED Program and the relationship of this process to (1) the larger assurances package and (2) ERPP implementation.*

#### **4. Unified Set of Restoration and Recovery Goals Required.**

The draft suggests that the Conservation Strategy will contain its own recovery goals. We strongly agree that endangered species concerns should inform recovery goals for specific species or habitats. However, these recovery goals should be the driving force in the ERPP – they should serve as part of the performance objectives for the ecosystem restoration program. As discussed above, the ERPP should serve as the action plan for the species recovery aspect of the Conservation Strategy. CALFED should not prepare separate ecosystem recovery plans with distinct recovery objectives.

In other words, to the extent that the Conservation Strategy would posit a higher standard for environmental recovery than the ERPP, the ERPP should embrace and incorporate the goals established by the ESA compliance analysis. Conversely, if the recovery objectives in the ERPP are more ambitious than the ESA recovery goals, than the Conservation Strategy should incorporate those higher standards.

*We recommend that the EIS/R be revised to compare the restoration and recovery objectives of the Conservation Strategy and the ERPP and to adopt as performance measures for both the most ecologically protective standards.*

#### **5. Assurances Proposal Impermissibly Vague**

The draft lists various ‘assurances’ that the Section 7 process would allow for in the CALFED process and states that a variety of these will be used without further elaboration. The draft goes on to state that ESA consultation would “only occur after all adaptive management measures have been exhausted or a significant change is made to the project description.”

If the door on ESA consultation is to be shut this firmly, it is essential that the EIS/R shed some daylight on what the agencies are proposing in the way of “assurances” for the federal agencies subject to the consultation requirements – primarily the massive federal water development projects. Moreover, as discussed above, we cannot concur that any firm assurances should be provided given the substantial uncertainty surrounding how to achieve the species and ecosystem recovery at issue in the CALFED program.

*We recommend that the EIS/R be revised to contain a complete discussion of (1) the “assurances” that are being contemplated in connection with the Section 7 consultations and (2) how such assurances would be limited to account for the current lack of certainty regarding species and habitat recovery.*

## 6. Unified Adaptive Management Program Required

The EIS/R states that the Conservation Strategy will contain an adaptive management and monitoring program and that this effort will supplement the adaptive management and monitoring programs being developed as part of the ERPP. We strongly concur that Endangered Species Act compliance requires monitoring and an adaptive management program. However, the ecosystem restoration program should function as a comprehensive recovery plan for covered species and the monitoring program and adaptive management approach should be sufficiently broad to address endangered species recovery requirements.

*We recommend that the draft EIS/R be revised to provide the public and decision makers with an integrated monitoring program and adaptive management program that addresses endangered species concerns together with the additional objectives of the ERPP.*

## 7. Conservative Approach to Contingencies Required

The agencies intend to devise a process for dealing with “unforeseen circumstances” surrounding endangered species recovery issues. However, given the scope and breadth of the program, the reality is that many if not most of the “circumstances” regarding species recovery will be unforeseeable. While much is known today, there is considerable uncertainty (and at least as much dispute) about how to restore, rehabilitate and recover the vast number of depleted species and particularly how to do so while simultaneously meeting the water supply reliability and other program goals. Restoration plans developed today may be right on target, or may be largely irrelevant in ten years.

*We recommend that the EIS/R be revised to adopt as a base assumption that the ecosystem and endangered species recovery plans being developed in the CALFED program contain substantial amounts of uncertainty as to their ability to actually achieve recovery of jeopardized species and habitats. Therefore, it should be assumed that many actions will be required to be taken that are unforeseeable today.*

*Given uncertainty as a base assumption, and CALFED's commitment to an adaptive management approach, the EIS/R should clarify what is meant by a “contingency” and the need for a contingency plan.*

*Any contingency plan developed with regard to endangered species recovery should be merged with the contingency plan for assurance issues generally and should not be a separate effort.*

## 8. Single Funding Approach for Endangered Species and Ecosystem Restoration

*We recommend that the funding strategy for implementing the Conservation Strategy be fully merged and integrated with funding for the broader ecosystem restoration program.*