

SAN FRANCISCO PUBLIC UTILITIES COMMISSION COMMENTS ON DRAFT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT/ENVIRONMENTAL IMPACT REPORT FOR THE CALFED BAY-DELTA PROGRAM

The San Francisco Public Utilities Commission ("SFPUC") provides the following comments on the Draft Programmatic Environmental Impact Statement/Environmental Impact Report ("DPEIS/EIR") for the CALFED Bay-Delta Program ("Program").

The SFPUC's Hetch Hetchy Water System on the Tuolumne River supplies over 2.3 million residential, commercial and industrial water users in San Francisco, San Mateo, Santa Clara and Alameda counties. The SFPUC believes its customers will benefit from a healthier Bay-Delta ecosystem. A diverse group of stakeholders are participating in this program. There should be an effort to ensure that any future benefits anticipated to result from a program as broadly funded as this effort should accrue to all water users dependent upon diversions from the Sacramento and San Joaquin River watersheds.

As CALFED moves forward with the Program, it is important for CALFED to recognize the interests of all water rights holders in affected areas. Prior to deciding on any aspects of the Program, all water rights holders that may be potentially impacted by an action must be contacted and permitted to provide input. Senior appropriative water rights must be recognized and respected. If the Program creates additional physical capacity through new storage or increased conveyance, and such additional capacity is broadly funded by all California residents, then access to such additional capacity must be fairly and equitably apportioned to a broad spectrum of water users.

NEPA/CEQA Compliance

The DPEIS/EIR provides information to affected parties and allows CALFED to gather recommendations and commentary on the different aspects of this complex program. The document is thus an important and helpful step in the overall effort to ensure that the NEPA/CEQA requirements are satisfied for the CALFED program. We recognize that considerable improvements will be made to the document before it is issued in revised draft form for additional public comment, and we assume that prior to that time, any apparent issues with regard to impacts analysis or other aspects of the document will be resolved. These comments are intended to assist CALFED in identifying potential issues in order to facilitate the release of the revised DPEIS/EIR.

Cumulative impacts

NEPA requires an analysis of the "cumulative impacts" of a project, which are defined as the impacts on the environment resulting from "the incremental impact of the action when added to the other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. CEQA, similarly, requires an EIR to describe indirect and cumulative impacts of a project under review. CEQA Guidelines §§ 15130, 15355.

We are concerned that the DPEIS/EIR does not adequately address the cumulative impacts of the CALFED program. In the section discussing cumulative impacts, the DPEIS/EIR lists a number of proposed actions that may affect the Bay-Delta resources. The analysis then briefly discusses the individual and combined impacts of these identified actions. Notably, the analysis does not discuss how these actions, in combination with the CALFED alternatives, will cumulatively or synergistically affect the Bay-Delta environment. In other words, there has been no effort to examine the incremental impact of the action under review (i.e., the CALFED program) as it relates to the other identified past, present, and foreseeable projects in the area. It is not enough to simply identify some other foreseeable projects in the area. There must be some effort to examine the synergistic effect that these other projects will have in combination with the CALFED program.

Alternatives

NEPA requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. §§ 4332(2)(E). CEQA similarly mandates the consideration of alternatives in an EIR. Pub.Res.Code §§ 21001, 21002.1, 21061, 21100. The alternatives should derive from the DPEIS/EIR's statement of the project purpose and need and should set forth alternative methods of achieving the project goals.

In the DPEIS/EIR, CALFED has set forth the project purpose and goals for the Program. CALFED has also identified six "common approaches" to achieving these goals, along with varying approaches for storage and conveyance alternatives. CALFED documents describe these common approaches as elements which will help the program to meet its objectives. The concept is that fairly fixed programs for these six program elements would go forward under any of the three water conveyance and storage alternatives. To the extent that the common approaches are actually elements of the project, the revised DPEIS/EIR should discuss alternatives for implementing these approaches. CALFED, however, seems to have predetermined that these common program elements will "remain constant." CALFED should consider expanding its alternatives analysis to show how these individual common program elements might be implemented, and further evaluate how impacts from implementation of the common approaches may vary depending on how the storage and conveyance elements are achieved.

Endangered Species Acts Issues

CALFED has begun developing a Conservation Strategy which will allow for the recovery of listed species and the conservation of currently unlisted species. The DPEIS/EIR indicates that this Strategy will function as a "blueprint" or framework for assessing the effects of Program actions and identifying conservation, minimization, and mitigation measures. The document states that the Strategy will provide the "general process" for evaluating actions within the context of the Strategy.

We support CALFED efforts to prepare a programmatic strategy addressing impacts of CALFED program action on affected species in the Bay-Delta. This strategy should serve as the basis for determining the impacts of activities on listed species, and subsequent activities or actions should then be evaluated to determine whether they are consistent with this Conservation Strategy and with the goals of the ERPP.

The document should specifically acknowledge the State and Federal standards that apply to federal and non-federal parties participating in the distinct regulatory programs for protecting species that are listed in the Conservation Strategy discussion. For example, as noted in the document, section 10(a)(2)(A) of the Federal Endangered Species Act requires that an applicant for an incidental take permit minimize and mitigate the impacts of a taking of a listed species to the maximum extent practicable. The taking also must not appreciably reduce the likelihood of survival and recovery of the species in the wild. Parties submitting an application for a section 10(a)(1)(B) permit should be held to this requirement.

The document should also emphasize a natural-community based approach to ensuring species protection. This will aid in providing the greatest protection to covered species in the region and minimize conflicts in measures recommended and actions taken within the area. We urge CALFED to pursue the concept of a programmatic approach to authorizing actions in the area, using, if possible, a programmatic permitting program authorizing groups of actions occurring within the same geographic area.

The Strategy should also address the full time period estimated for completing program actions and should include specific provisions for extending this time period to assure implementation of the Program measures and take coverage.

Water Transfer Element

Water Use Efficiency Component Technical Appendix

The Water Use Efficiency Component Technical Appendix is incorporated by reference into the DPEIS/EIR. The Technical Appendix's Water Transfer Element notes that there are two primary transfer issues: physical capacity to move water through the Delta, and the policy framework to allow water transfers to successfully occur. However, the Water Transfer Element focuses solely on the policy framework. (Tech. App., p. 7-1. All page references are to the Technical Appendix unless otherwise noted.)

The primary difficulty with the DPEIS/EIR's Water Transfer Element is that it is impossible to discern what project is proposed to be carried out or approved by CALFED. The public is thereby denied an adequate opportunity to meaningfully comment. This is not consistent with the CEQA requirements for an EIR. (See, e.g., *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193; "an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.")

The bulk of the Water Transfer Element is dedicated to descriptions of existing law and comments thereon, statements of objectives and goals, and identification of issues needing resolution. For most of the issues, the terminology used throughout the text is conditional (see e.g., "can probably be resolved," "intends to continue to work with," "will continue to work on solution options," "will be the most critical issue for CALFED to resolve" (p. 7-6).)

"Initial recommendations" begin on page 7-15, but even these contain a high degree of uncertainty. The recommendation for which the most detail is provided remains at the "concept" stage of development. The potential clearinghouse functions vary widely, from development of data and information collection to operation as a market broker or bank. Even who performs the (undetermined) functions is not clear. There are substantive inconsistencies and shifts in the description of what CALFED either will or might do laced throughout the Water Transfer Element text. Clearly, CALFED is not ready to proceed with the Water Transfer Element, and hence is unable to adequately describe it.

The Water Transfer Element also does not provide alternatives, or assessments of those alternatives in light of the "no project" alternative. Hence, there is simply no true environmental impact analysis of the Water Transfer Element upon which the public may comment.

CALFED member agencies have important regulatory and proprietary roles with regard to water transfers. Indeed, some believe that CALFED member agencies are the source of significant institutional constraints on water transfers. Whether or not this is true, the individual and cumulative power of the CALFED member agencies makes it imperative that there is adequate public understanding and opportunity for comment on any water transfer element and/or policy adopted by CALFED.

In the interest of providing input that will be useful in reformulating this section, we offer the following specific comments.

Objectives of the Water Transfer Element. The first and probably primary objective of this element is to promote, encourage and facilitate water transfers. Some of the recommendations presented later in the element (see, e.g., page 7-16) could create significant additional burdens on transfers. In many instances the window of opportunity for a water transfer is brief, and entities must be willing and able to act quickly to move water when capacity is available and adverse impacts, if any, to fish and wildlife resources can be avoided, or even benefits provided. The process applicable to transfers needs to recognize and be responsive to this need.

Paragraphs 8 and 9 of the objectives endorse uniform rules for transfers with regard to use of facilities and conjunctive use transfers. We believe that uniform rules for all transfers should also be endorsed by CALFED. We are concerned with the proliferation of different standards for transfers in the many forums discussing that topic. Uniformity is necessary to ensure fairness and to avoid differential treatment based upon political considerations.

Issues to resolve. The list of issues are primarily formulated in the form of questions. While interesting, it does not appear that this text is ready for public comment.

Solutions options. This section is somewhat more definite, but remains in a question/background/discussion format. It also is not ready for public comment. However, we offer the following comments. It is our understanding that a relatively large number of Sacramento Valley counties have passed ordinances restricting or limiting the export of groundwater. The text on page 7-8 should be corrected. The description of the "real water" test on page 7-9 appears to assume that that test is a separate and independent criterion from the "no injury" to downstream users criterion. This is not correct; the purpose of the real water test is to protect downstream users with valid prior rights from injury.

Development of Solution Options Through the BDAC Work Group. Page 7-14 includes a bulleted list of "solution options" being discussed by the BDAC work group. While many of these appear to be good ideas, cumulatively they could have a significant adverse effect on transfers to the extent that transfers are regulated out of proportion to their volume or impacts. Care should be taken to tailor the amount of regulation to the relevant substantive factors.

The BDAC work group is apparently calling for separate environmental review and analysis of each water transfer proposal. This is not required by current law. In an effort to facilitate short-term water transfers, legislation has been enacted to exempt water transfers from CEQA (Water Code § 1729). Are the BDAC and CALFED now opposing this legislative effort to facilitate transfers?

Does the water transfer element apply to all water transfers? To those within CALFED's problem area? To those within CALFED's solution area? To those which depend upon crossing the Delta? To CALFED transfers only?

CALFED Program Initial Recommendations. The initial recommendations reflect a desire to change existing law. In some instances these appear to be very beneficial recommendations; in other respects they may additionally burden transfers beyond the burdens created by existing law. Is this truly the intent of CALFED?

The ability of individual CALFED agencies to affect water transfers is recognized on page 7-15. In addition to developing uniform and integrated rules and criteria, the goal of facilitating and expediting transfers should be adopted by each agency. The proposed requirement that water transfers must create "net improvements in ecosystem health and water quality" is a laudable goal, and may be accomplished in some contexts. However, it should not be a new mandatory requirement for all transfers. Transfers can produce significant benefits in various categories, and should be allowed to do so provided that they do not have unreasonable impacts in other respects.

The Clearinghouse Concept. The initial description of the clearinghouse concept states that it would not require any change in existing regulatory authority or water rights law. However, some of the listed potential functions of a clearinghouse for the Sacramento Valley

indicate otherwise. For example, the provision of public notice on all proposed water transfers and provision of a forum for public discussion and comment on proposed transfers is not required by current law for some transfers (e.g., short term transfers of pre-1914 surface water, or transfer of groundwater not subject to CEQA). In order to address "all" proposed water transfers, the transferor and/or transferee would have to be required to submit to this process. That would require a change in the law.

The range of functions of a water transfers clearinghouse is wide. It should be clearly recognized that acting as a market broker or bank involves significantly increased functions with critical potential impacts on allocation of the water resource. If these functions are to be seriously pursued, the rules of operation and respective responsibilities should be carefully set forth and addressed.

The possibility of the clearinghouse developing a set of priorities or guidelines on transfers which could favor certain types of transfers, transferors or transferees over others raises similar issues. We do not intend to indicate that addressing these is not possible, but is much more challenging than providing an information exchange function.

The comments regarding who performs the clearinghouse functions are valid. CALFED's conclusion that expansion of SWRCB jurisdiction "may logically follow" is a source of great concern for many water rights holders, and we believe unnecessary to implement a clearinghouse should that become a preferred alternative in the future. Objectivity will be a critical element in choice of an entity. This is recognized in the bullet on page 7-18 regarding a "neutral party". Neutrality is essential.

Supplement A: Water Transfers In The Context Of The CALFED Bay-Delta Program. This supplement discusses estimates of available transfer capacity in the existing system (physical and regulatory), potential effects of CALFED alternatives on that capacity, potential demand for water transfers, and economic modeling used for transfer policy analysis. The general description is interesting and useful. The major shortfall is the lack of hard information regarding effects of the various Delta alternatives on future transfer capacity. The entire discussion of that topic is on pages A-6 and A-7. It states that system operations modeling is being used to evaluate the potential water supply impacts and benefits of proposed physical facilities and operational changes associated with Bay-Delta program alternatives. It predicts that available physical capacity "may be evaluated." What is needed is an evaluation, both for physical and for regulatory capacity.

CALFED defines "unused" capacity as physically available capacity, and "available" capacity as capacity which is actually available for wheeling after application of both physical and regulatory constraints. On page A-6, the text states the determination of potential water transfer capacity for each CALFED alternative will be included as part of the DPEIS/EIR. CALFED should analyze "available" transfer capacity for each alternative as well as "unused" capacity.

"no project alternative" (i.e., DWR's Drought Water Bank) simply required that an entity be signatory to the urban memorandum of understanding.

DPEIS/EIR

The DPEIS/EIR states that "the potential for the water transfer program to result in greater availability of water transfers could beneficially impact Bay region water supply economics." (Page 8.2-47). There is no evidence that the Water Transfer Element as described in the Water Use Efficiency Technical Appendix will result in greater availability of water transfers. The policy may additionally burden transfers as a result of addressing third-party impacts and groundwater impacts. Uniform CALFED agency rules should be a benefit, but as they are not described it is impossible to tell. Presumably, the statement is based upon the enhanced physical capacity to move water through the Delta. As noted above, however, the studies necessary to support the statement have not yet been performed.

Water Use Efficiency

The SFPUC is committed to continued promotion of water use efficiency as a means to reduce future demand. However, CALFED must recognize that much of the "softness" in urban agencies' customer demand has disappeared through industry market-based decisions on water efficiency and existing public agency water use efficiency programs. In addition, CALFED's aggressive water conservation and recycling goals will require substantial local flexibility, state and federal financial support and incentives in order to be reasonably achievable.

Ecosystem Restoration Program Plan

The analyses conducted in the revised DPEIS/EIR must be based on sound, independently reviewed science. In the absence of such information, or where there is considerable uncertainty, actions should be implemented as interim measures based on an adaptive management approach. The basic assumptions which underlie conclusions regarding potential benefits to fisheries resources must be reevaluated prior to finalizing the document. The revised DPEIS/EIR must provide a more complete and critical evaluation of the actions proposed by CALFED for the ERPP, particularly the target flows, and provide an independent evaluation of the underlying assumptions.

In those cases where there is significant uncertainty associated with the potential impacts, the DPEIS/EIR should state this. The DPEIS/EIR should acknowledge that the science is not definitive and that it is not capable of supporting specific long-term decisions at this time. NEPA requires that in cases where there is incomplete or unavailable information, an agency must acknowledge that relevant scientific information is lacking and provide a summary of existing credible scientific evidence. (*Robertson v. Methow Valley Citizen's Council* (1989) 490 U.S. 332; 40 CFR 1502.22 and 1502.24.) Given the high level of uncertainty regarding potential benefits, the final document should temper its conclusions regarding the likely effects of the ERPP on fisheries. The draft USFWS Anadromous Fish Recovery Plan Working Paper should not be used as a reference document for the DPEIS/EIR.

Project Alternatives Technical Appendix: Water Transfers Component Of The Water Use Efficiency Program

With respect to the water transfers component of the Water Use Efficiency Program, the Projects Alternative Technical Appendix comments that this approach is already in process and will be developed in coordination with appropriate CALFED agencies. This indicates that the Water Transfer Component is not ready for public review from a CEQA standpoint.

The water transfer element is described as an important part of the CALFED program but not one which the program will actively manage or undertake. Rather, the proposal is that CALFED agencies work cooperatively to facilitate a statewide water transfer market consistent with the Governor's water policy on transfers and the CALFED solution principles. The development of an "effective, standardized water transfer market" will be encouraged, and development of a "uniform set of rules and criteria to be consistently applied to transfers by affected states and federal agencies" will also be encouraged.

The SFPUC supports consistent public and uniform rules and markets. Rules should not make additional burdens or constraints on water transfers, and should provide for equal access to transfers and to wheeling for transfers for all entities statewide. For purposes of wheeling use, the "owners" of CALFED-funded facilities should not be the SWP or CVP, but all needing wheeling services. The SFPUC raises this issue in response to statements in the Phase II Interim Report at page 106 (see discussion below).

The alternative descriptions contained in this document do not quantify the amount of additional transfer capacity that each alternative would make available. The Phase II Interim Report indicates that there is not a wide variation between Alternatives 1, 2 and 3 in terms of increased transfer capacity, except that alternatives with new storage have less transfer capacity than those without new storage. (page 106.) The report goes on to state:

... new storage would provide additional water to SWP and CVP water users, and ... this water would receive higher priority of use of available conveyance capacity. Institutional arrangements could be implemented to change the priority of use of export facilities to increase conveyance capacity available for transfer water. (Page 106.)

The SFPUC endorses the principle that all increases in capacity due to CALFED be equally available to all water users for transfers.

The Projects Alternatives Technical Appendix also discusses conditions for use of Program facilities for water transfers, including regulatory water use efficiency measures. The DPEIS/EIR fails to identify the mechanism for approving water conservation programs. Overall, this program is poorly defined. Further, the environmental analyses is deficient in not presenting a full range of alternatives for implementing the program, including the no project alternative. For example, the proposed "project" precludes an agency with an unapproved water use efficiency program from either receiving benefits of new water made available or participating in any water transfer due to its need for wheeling through SWP or CVP facilities. However, the

For actions or programs where benefits and costs are uncertain, the revised DPEIS/EIR should lay out a reasonable process for moving forward with implementation of the ERPP, using adaptive management and intensive monitoring.

The SFPUC resubmits comments on the Ecosystem Restoration Program Plan ("ERPP") that were sent on October 14, 1997; it appears that the DPEIS/EIR ERPP technical appendices were not modified in light of these previously submitted comments.