

STATE OF CALIFORNIA

GRAY DAVIS, Governor

DEPARTMENT OF FOOD AND AGRICULTURE

WILLIAM (BILL) J. LYONS, JR., Secretary

1220 N Street, Room 409
Sacramento, CA 95814
Phone: (916) 654-0433
Fax: (916) 654-0403



August 23, 1999

Ms. Mary Nichols
Secretary
Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, California 95814

Dear Ms. Nichols:

RE: CEQA Compliance and Agricultural Mitigation under CALFED

I appreciate your letter clarifying the Resource Agency's position regarding application of CEQA's categorical exemptions to projects that may adversely affect farmland. We at CDFA believe that the position reflected in your letter is inconsistent with prior understandings between our agencies as to state policy and interpretation of CEQA. This inconsistency also suggests a lack of commitment to assurances made in CALFED's draft PEIS/EIR regarding consideration and mitigation of agricultural impacts. May I respectfully suggest that before the Resources Agency takes any further actions based upon that position, this divergence from policy should be discussed and clarified, rejected or revised by the Administration.

At the outset it should be acknowledged that it is clear that projects which may result in adverse impacts to agricultural resources trigger CEQA. This is reflected in the Draft Programmatic Environmental Impact Statement/ Environmental Impact Report prepared in support of CALFED. Consequently, CEQA's categorical exemptions simply do not apply to these types of projects.

From your letter, it appears that you may misunderstand CDFA's position on application of categorical exemptions to acquisition of agricultural lands and their associated water rights. CDFA does not contend that the mere purchase or sale of agricultural land triggers CEQA. To the contrary, it is the acquisition of agricultural land, or rights to the land and associated water rights, by a public agency where the purpose or potential result of the acquisition is the conversion of the land to a non-agricultural use which triggers CEQA review and necessitates the preparation of an EIR and adoption of mitigation measures. In these circumstances categorical exemptions are not applicable to avoid CEQA analysis and adoption of necessary mitigation. I believe the CEQA Guidelines are quite clear on this.

CDFA's concerns are not merely academic or unripe. CALFED agencies have and continue to acquire farmland for the purpose of converting it from agricultural use. Some of these acquisitions may have been made in order to further goals and purposes that are part of the CALFED program, although the CALFED PEIR/EIS is still being circulated and CEQA compliance has not yet been completed. These acquisitions were done in clear violation of CEQA, because the CEQA Guidelines specifically proscribe acquisition of land prior to CEQA compliance. Even if the acquired farmland

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is to be retained in agricultural use at the time of acquisition, where the overall goal of the acquisition is to allow ultimate conversion, CEQA still must be completed prior to the acquisition. If the CEQA review is delayed until actual conversion, the EIR process will be little more than a post hoc rationalization for the project, and for the actions and acquisitions made prior to completion of the EIR. Such post hoc rationalization violates and undermines CEQA.

Acquisition of land for the purpose of habitat development does not exempt these projects from CEQA or allow application of a categorical exemption. Categorical exemptions do not apply if there is a reasonable possibility that the activity will have a significant effect on the environment. The courts have recognized that a project's beneficial effects do not exempt it from CEQA review if there may be other adverse effects. In fact, it has been recognized that it is particularly appropriate to apply CEQA in those instances when the impact may be either adverse or beneficial.

Your letter references two specific categorical exemptions; but, according to their own terms, neither of those exemptions would apply to exempt these types of land acquisitions. Your letter references the Class 17 exemption and argues that CDFA's position is contrary to it; but, in so doing CDFA's position is mischaracterized. CDFA believes that acceptance of an agricultural easement would qualify for a Class 17 exemption, but only so long as the purpose of the easement was to continue agricultural use. On the other hand, if the purpose or result of the easement is to facilitate conversion to a non-agricultural use, then the categorical exemption does not apply. Neither would the Class 13 exemptions apply to these acquisitions. According to its explicit terms, the Class 13 exemption only applies to projects where the purpose is to preserve the land in its natural state. Therefore, this exemption does not apply where land to be acquired has been in agricultural use, because the land is no longer in its "natural condition" and the conversion would not, and could not, be to preserve the land in its "natural condition."

The limitations within the Class 13 and 17 categorical exemptions are necessary in order for them to be consistent with CEQA's statutes. In order for an activity to be listed as exempt, the Resources Secretary must "make a finding that the listed classes do not have an effect on the environment," and, activities that may have a significant effect on the environment may not be exempted from CEQA. The Guidelines recognize the limitations upon categorical exemptions by including provisions which exclude application of the exemptions for activities which would otherwise be categorically exempt from CEQA, if there is even a "reasonable possibility" that the project will result in a significant effect on the environment. Because the conversion of prime, unique and important farmland to non-agricultural uses constitutes a significant environmental effect, the acquisition of agricultural land for that purpose triggers CEQA, and categorical exemptions do not apply.

You refer to SB 1057, in support of Resource Agency's position. However, the Senate Committee analysis for SB 1057 indicates that regardless of that bill, the Section 15300.2 exemption to the categorical exemptions would apply when there is a reasonable possibility that significant environmental effects will occur as the result of an acquisition of land. Therefore, rather than supporting Resource Agency's position that SB 1057 would have accomplished the purpose asserted by CDFA, the Committee Report indicates that SB 1057 was unnecessary because, under existing law, the categorical exemptions could not be asserted to exempt these land acquisitions from CEQA.

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CDFA is aware of your role, as Secretary of the Resources Agency, to certify and adopt the Guidelines. Pursuant to this process, CDFA has participated in discussions with both the Resources Agency, and the Governor's Office of Planning and Research, which is responsible for preparing and developing the Guidelines (Guidelines Section 21083) and recommending proposed changes or amendments to the Guidelines (Guidelines Section 21087(a)), including additions and deletions to the list of categorical exemptions (Guidelines Section 21086), to the Resources Secretary. CDFA also recognizes that the statutory mandate to review and adopt the Guidelines and adopt criteria for implementation of CEQA is done in pursuit of policies established by the Administration, of which CDFA is an equal part.

The CDFA agrees with the Resources Agency that CALFED's draft PEIS/R should "assess the broad programmatic and long-term actions of the Program, and will be followed by second tier, more specific environmental documentation prior to approval of individual actions with potentially significant site-specific impacts." We also agree with the Resources Agency and with the PEIS/EIR acknowledgement that the cumulative impacts to farmland embodied in the CALFED Program will be significant. Unfortunately, this recognition of impacts and the need for ongoing CEQA compliance does not appear to be reflected in several CALFED actions and statements by CALFED representatives. First, agricultural land acquisitions continue prior to completion of the PEIS/R and without project specific environmental review. As discussed above, this is contrary to CEQA and is contrary to policy. Second, my staff informed me that at the last Policy Group meeting (August 12, 1999) Mike Spear's (USFWS) comments concerning the proposed North Delta Wildlife Refuge indicated that once the EIS for the proposed refuge was completed, there would be no need for environmental review for each parcel acquisition. If this is in fact true, then there would be no opportunity for site-specific identification of impacts and mitigation or actual summation of cumulative impacts. The Policy Group must ensure that CALFED consistently complies with CEQA in its environmental review and documentation. These discrepancies re-emphasize the need for an explicit policy towards NEPA/CEQA compliance and agricultural mitigation.

Throughout the CALFED process, CDFA and the CALFED agencies have encountered a number of, and resolved many, disagreements regarding the mitigation of effects on agricultural resources. As a result, the PEIS/EIR includes a list of strategies to minimize or avoid impacts to agriculture; the list includes commitments to site and align projects to avoid agricultural impacts, restore degraded habitat prior to converting agricultural land to new habitat, and focus habitat restoration and development efforts on public land before converting agricultural lands. CDFA believes that the strategies that are listed in the document reflect CALFED policy and apply to all CALFED agency projects. Therefore, the acquisition of agricultural land for the purpose of converting or allowing the eventual conversion of the agricultural land or its associated water to non-agricultural purposes, prior to completion of the NEPA/CEQA process, or assertion of categorical exemptions to avoid CEQA's requirements in furtherance of such acquisitions not only violates CEQA but is also contrary to existing policy.

With specific respect to CALFED's PEIS/EIR, although CDFA recognizes that the CALFED PEIS/EIR has included the above-referenced mitigation strategies, which were offered and are supported by CDFA, we are of the opinion that the document remains inadequate for its failure to

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provide effective mitigation at the programmatic level. In addition, inclusion of a programmatic mitigation policy could avoid the types of misunderstandings that must continue to be addressed by our agencies. As suggested by CDFA, inclusion of an express programmatic policy declaring that categorical exemptions will not be asserted to support acquisition of agricultural land where the purpose of the acquisition is to convert the land to other purposes, would ensure that a mechanism exists for consideration of both the site specific and cumulative effects of such conversions. Such an acknowledgement of the existing CEQA Guidelines in the PEIS/R would help build CALFED's credibility among agricultural interests and help bring the PEIS/R into CEQA compliance. On the other hand, failure to include such a policy may leave the PEIS/R and agricultural land and water acquisitions by CALFED agencies susceptible to a successful CEQA challenge.

In closing, I would like to reiterate that your letter of July 20th indicates an important change in policy which you seem to assert is within the discretion that you claim over categorical exemptions. These policy choices cannot be made unilaterally, but must be fully analyzed and discussed for resolution by all appropriate members of the executive branch. In view of the policy implication potential for agriculture and the Administration, I respectfully suggest that we meet at that level in the near future. My calendar is open for the purposes of holding that meeting.

Mary, again thank you for your time and effort concerning these most important issues. I look forward to resolving the few remaining issues between our agencies.

Sincerely, -

William (Bill) J. Lyons, Jr.
Secretary

copy: Lester Snow, CALFED