11/14/97 DRAFT

BDAC ASSURANCES WORK GROUP

ASSURANCES PROPOSAL - DISCUSSION PAPER

I. EXECUTIVE SUMMARY

A. Background

The CALFED Bay-Delta Program is developing a long-term comprehensive plan to restore the ecological health, and improve water management for beneficial uses, of the Bay-Delta system. Once the CALFED agencies select a long-term plan, they will need an implementation strategy which assures that the components, elements and actions described in the plan will be implemented and operated as agreed. In addition, the CALFED agencies will need a process to address a situation where a key component of the plan cannot be implemented.

Assurances are necessary for two reasons. First, all interested parties need to know that the long term plan and its various components will be implemented. Second, stakeholders need assurances that the plan will be implemented in a way that provides the benefits promised and that is not adverse to their interests.

The implementation strategy will consist of the assurances proposal and the financing plan. It will not be part of the preferred alternative, but it will be incorporated in or appended to the Programmatic EIR/EIS.

Early in the assurance proposal development process, the BDAC Assurances Work Group identified a number of assurance issues and stakeholder concerns. These are identified in a paper which was circulated to and discussed by the Work Group and which will be incorporated into the draft Assurances Plan.

The Work Group also identified a set of tools which could be used to provide assurances. The tools which were determined to be the most applicable are contracts and agreements of several types, including bonding instruments; regulations imposed by a state agency; state and federal legislation; and physical limits on new facilities.

B. Program Assurance Issues

There are a few assurance issues which relate to program implementation generally.

1. The role of stakeholders in program implementation - Should stakeholders have decision making roles in program implementation, or should their roles continue to be advisory?

2. The scope of adaptive management in areas other than ERPP - This is probably a program content question more than an assurance issue, but to the extent that adaptive management approaches are applied to parts of the program other than ERPP, how does this affect the ability to assure that a program component will be implemented as agreed?

3. The nature of performance measures and the use of benchmarks or milestones in gauging success of ERPP elements and actions - Should the assurance package be based on achieving specific program objectives as determined by qualitative performance measures or indicators, or do assurances apply to implementing actions and ensuring process (not results)?

Some assurances issues are specific to the relationship between the adaptive management approach of the Ecosystem Restoration Program Plan (ERPP) and the needs of the water suppliers for regulatory certainty and water supply reliability. While there is a limit to the number of ways in which the available tools can be combined to develop assurance proposal alternatives, there are some distinct options for addressing at least some of these ERPP/water supply issues.

1. Management and governance of the ERPP - What are the roles of the stakeholders and the existing agencies? Stakeholder involvement can be advisory as is the current practice with ERPP management by existing agencies, or a new entity could be formed by existing agencies. Alternatively, a new entity with stakeholder representation in the decision making process could be created to manage the ERPP.

2. The effect of adaptive management on regulatory certainty and water supply reliability - How can water supply reliability and regulatory certainty be assured in the absence of a better understanding of how the ecosystem will respond to the various actions proposed in the ERPP? The risk to water supply reliability can be borne by water suppliers or it can be shifted to the ecosystem manager, or the risk can be shared according to an agreed upon formula.

3. The utility of an HCP and the "no surprises" policy and other types of indemnity or insurance agreements - Is an HCP the right instrument for providing the assurance of regulatory certainty? How can this assurance be provided to federal contractors and permittees?

4. The appropriate level and use of user fees for ERPP implementation - Is the ERPP adequately funded with public money or are user fees necessary? Public money (e.g., G.O. bonds and appropriations) can be used to fund the ERPP, or water users and others (power users, recreation users, fishing interests) can be taxed to support ERPP implementation, or some combination.

5. Phasing and linkage - Can phasing or linking ERPP and facilities development in the assurances package assure that benefits to the ecosystem program will not come at the expense of water supply; that improvements in water supply reliability will be accomplished in ways that complement and enhance ecosystem restoration efforts; and that both components will proceed together?

In the three remaining common components (Water Quality, Water Use Efficiency and Levee Integrity), the assurances are somewhat more straightforward and there is less variability in the assurance proposal. Basically, there must be assurances that each component will be implemented in a reasonable manner, that funding will be secured for the long term, and that component objectives will be achieved.

The conceptual model for the assurance proposal for the three common components can be seen as a series of layers, with the implementation by existing agencies as the foundation, and agreements, legislation, and physical limits added as necessary. The general approach of the CALFED long term program is that implementation will be voluntary and encouraged by market forces and incentive programs. Success of the implementation of each component will be measured by a set of performance measures or criteria which will indicate the level of progress or achievement of program objectives. For each of these components, benchmarks or milestones will be established, so that after agreed upon periods of time, the performance indicators or measures can be read, and decisions can be made about whether a different implementation approach is needed.

In some cases, if a component is not moving towards its objectives, it may be necessary to shift to a more regulatory approach to implementation. The events or circumstances which trigger a shift to a regulatory approach will be agreed upon in advance. The regulatory approach will use sanctions or penalties

to support the voluntary, incentive based approach. Finally, in some circumstances, it may be appropriate to provide a legal remedy to enforce implementation or compliance with an implementation objective.

C. Content and organization of the discussion paper

This paper describes a draft proposal for providing assurances. This is not a recommendation; it merely illustrates a combination of tools that can be used to assure the implementation of the preferred alternative, and identifies where there are options for providing assurances on specific aspects of the program. This proposal has been prepared in response to discussions among members of the Bay-Delta Advisory Council (BDAC) Assurances Work Group and in response to requests for a detailed example of an assurance package.

The assurance proposal is based on the case study which is in turn based on Program Alternative 3(b). This alternative was selected because it includes new storage and conveyance facilities, which present complex assurance issues. Again, the use of this alternative as a case study does not represent any decision or recommendation by the CALFED agencies concerning selection of a preferred alternative or the outcome of the environmental review process.

This paper is organized as follows: Following this Executive Summary, Part II describes the draft assurances proposal for the case study and the options for specific aspects of the program. Part III is an analysis of the advantages and disadvantages of the proposal in the context of well it satisfies the Guidelines and solution principles. Part IV describes a proposal for phasing of the program.

II. ASSURANCES PROPOSAL

A. Program Implementation Options

1. Principles Agreement

This option is a principles agreement which would be signed by all CALFED agencies and participating stakeholder groups, on or about the time of the adoption of the final Programmatic Environmental Impact Report/Statement (EIR/EIS). After its formation, a new ecosystem management entity (discussed in more detail below) would also sign this agreement.

The principles agreement will provide the blueprint for the phased implementation of the Program. The key elements of the principles agreement are:

a. Support for the preferred alternative for the long-term Bay Delta Program, including agreement on the facilities to be included in the Program, the allocation of water from new storage facilities, and the scope and objectives of the ERPP;

b. The formation, structure, governance, purposes and powers of the new Delta Ecosystem Restoration Authority (DERA). In general, DERA will be responsible for implementation of the ERPP, assuring regulatory stability for water users, and management of environmental water;

c. The formation, structure, governance, purposes and powers of the Oversight Committee. In general, the Oversight Committee will be responsible for overseeing the implementation process and coordinating CALFED agencies' activities;

d. The process for revisions to the Water Quality Control Plan (WQCP), Environmental Protection Agency (EPA) approval of the revised WQCP, amendments to the Biological Opinions (BO's) for Winter Run Salmon and Delta Smelt, changes to the Central Valley Project (CVP) and State Water Project (SWP) water rights, and other necessary permits, including a process for expedited permitting where appropriate;

e. Operating rules and criteria for the new CALFED Bay Delta Program storage and conveyance facilities and any necessary changes to the operating rules and criteria for existing CVP and SWP facilities;

f. Fundamental principles of adaptive management for the ERPP, including goals and objectives, performance measures, scientific peer review, and a monitoring and reporting program;

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g. Support for the measures to deal with federal and state Endangered Species Act (ESA) concerns, e.g., the Bay Delta Programmatic Habitat Conservation Plan (HCP) and Natural Communities Conservation Plan (NCCP);

h. The scope of regulatory certainty to be provided to participating water users and to the environment;

i. Funding, including revenue sources and cost allocations;

j. The process to be used by the Oversight Committee for dispute resolution, and for responding to circumstances where a Program component cannot be implemented or operated as agreed;

k. Linkage and phasing of components;

l. Proposed state and federal legislation.

2. The Implementation Plan with a CALFED Joint Authority

This option is a comprehensive implementation plan that identifies the assurance tools, the sequence of implementation and the responsible entities; and the formation of a CALFED joint powers authority as the management entity for implementation of the ERPP, with a mechanism for stakeholder input through an advisory body, similar to BDAC.

The Implementation Plan will be included in the Final Programmatic EIR/EIS. The Implementation Plan functions in much the same way as the Principles Agreement described above. It will describe the actions necessary to implement each program component and will provide assurances that the program will be implemented and operated as agreed. In addition, the plan will include a process to address unforeseen circumstances that might make implementation of a specific element or action impossible.

The Implementation Plan will include:

a. The financing plan, including sources of revenue and cost allocations.

b. The Programmatic Bay-Delta HCP and the agreement for federal agency consultation. The HCP and related agreement will address the actions and entities covered, the avoidance and minimization strategy, the recovery plan, the "no surprises" policy, the definition of "extraordinary circumstances", monitoring and reporting obligations, and an enforceable implementation agreement clearly articulating the rights and responsibilities of each participant in the HCP. Consultation for federal agencies will be coordinated by separate agreement if they cannot be covered by the HCP.

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c. A description of the state and federal legislation needed for the creation of the Joint Authority, program funding, operational limitations on new facilities and linkages to ERPP, and any additional authorizations necessary to carry out the program.

d. The structure, governance and authority of the joint powers authority, the CALFED Ecosystem Restoration Authority (CERA).

e. The purpose, structure, scope of authority and representation of a stakeholders' advisory committee on program implementation.

f. A description of the assurance tools required for each program component. For example, if the adaptive management process for the ERPP requires specific monitoring and reporting activities, the implementation plan will include those requirements and identify the entities and funds to implement them. All contracts, agreements, regulatory modifications, and any other tools necessary to assure each component will be described in as great a detail as is available at the conclusion of the Programmatic EIR/EIS.

g. A process and schedule for finalizing pieces of the implementation plan that may not be complete by the time of the Final Programmatic EIR/EIS.

h. A contingency plan which describes a process to be followed in the event of unforeseen circumstances which prevent key components from being implemented or operated as agreed.

i. A sequence of events for implementation and a description of what will be done in each phase.

3. The Implementation Plan without a new entity

This Option is identical to Option 2, except that it would not include a new Joint Authority. Program implementation would be coordinated through the existing CALFED structure.

B. The CALFED Oversight Committee

1. The Oversight Committee will be a joint federal-state policy committee, with the California Resources Secretary and Secretary of the Interior as co-chairs, and the Regional Director of the USBR, the Region IX EPA Director and the Regional Director of USFWS as federal members, and the Director of Water Resources, the CAL-EPA Secretary, and the Director of Fish and Game as state members. The committee will also include the Executive Director of DERA. The Oversight Committee will be formed by state and federal legislation, with protocols and operating rules set out in an interagency memorandum of agreement.

2. Stakeholder Participation - A federally chartered advisory committee of representative stakeholder policy managers will provide advice to the Oversight Committee on program implementation, priorities of actions or funding, phasing and responses to unforeseen circumstances.

3. The function of the Oversight Committee will be to oversee implementation of the long term CALFED plan. Direct management and operations functions will be performed by the existing CALFED agencies and a new ERPP management entity, if created. Oversight includes the following roles:

- o To determine when implementation milestones have been reached so that the Program can move on to the new phase.
- o To develop responses to unforeseen circumstances.
- o To modify ERPP implementation objectives, if needed.[1]

4. Dispute resolution - When a dispute arises among the agencies charged with implementing the program (e.g., the scope of adaptive management, the limits of the "no surprises" protection provided by the HCP, the authority of the ERPP manager to carry out an action or implement any aspect of the ERPP, conflicts with project operations which cannot be resolved by the Operations Group), such disputes will be referred to the Oversight Committee. The Oversight Committee will have delegated authority to resolve interagency disputes arising out of implementation of the Program.

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1 Staff assumes that the ecosystem manager (the Executive Director of DERA in this alternative) would have the authority to modify ERPP targets based on the experience and information developed through adaptive management. If it became apparent over time that the implementation objectives should be modified, that level of change would be subject to review by the stakeholder advisory committee and approval by the Oversight Committee. Presumably, the ERPP goals and visions remain constant over the life of the program.

5. The Oversight Committee and the stakeholders advisory committee will be charged with submitting periodic reports to Congress, the State Legislature and the public, documenting the progress of the Program. These reports may be used in determining milestones, making findings, or in triggering the release of funds designated for specific elements of the Program.

C. ERPP Management Options

1. Option 1 - The Delta Ecosystem Restoration Authority

This option is a new management entity, the Delta Ecosystem Restoration Authority (DERA). DERA will be a new public agency created by state and federal legislation.

DERA will have three critical functions:

o Implement ERPP through Adaptive Management. The Adaptive Management process will include phased implementation, monitoring and research, independent scientific review, stakeholder involvement, and prioritization of funding.

o Manage environmental water. DERA will control some conveyance and storage capacity and manage its water supply.

o Indemnify water users. DERA will use its resources, if necessary, to insulate water users from new regulatory constraints up to some agreed limit.

DERA will be governed by a 15 person Board of Directors, jointly appointed by the Secretary of the Interior and the Secretary for Resources. Four Board members will represent the CALFED agencies (two federal, two state); two members will represent the agricultural water agencies of the state (one from San Joaquin, one from Sacramento Valley); two members will represent urban water agencies (one from Southern California, one from Bay Area); there will be four members from environmental organizations (one from Southern California, one from the Bay Area, one from Sacramento Valley, one at large), two Board members from the legal Delta (one agricultural representative, one other), and one Board member from the counties of origin.[2]

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2 This particular composition of the Board of Directors is one possibility. If the final assurances package includes a new entity for ERPP implementation, the precise composition of the Board will be one of many issues which will have to resolved. The composition of the Board will be influenced by the need of the agencies and stakeholders to assess and balance their risks associated with the ERPP. Distribution of seats among participants will also be an issue. Appointments can be allocated by interest group or by geography, for example. The appointment powers can be distributed among elected or appointed political officials in different ways as well.

The Board will appoint an Executive Director, who will be authorized to hire staff adequate to carry out the program. The staff will include biologists, engineers and other specialists with technical skills and practical experience.

DERA will administer ERPP projects, conduct monitoring and research programs and manage its water resources.

DERA will establish an independent scientific review process to assess its data collection and analysis. A stakeholder advisory committee will consult with DERA regarding its water resource operations and other aspects of DERA's responsibilities. DERA will consult with local agencies and interest groups on projects of specific interest to local areas. Finally, as noted above, the DERA Board will include stakeholder representation.

DERA will have the powers necessary to accomplish its mission, but it will rely heavily on market transactions to achieve the program objectives. It will be authorized to acquire land, water, water rights and other property, by lease or purchase. It will have the authority to provide financial incentives to local water agencies for changes in water management practices or for local restoration projects.

DERA will not have any regulatory authority, but will have a limited power of eminent domain for the acquisition of land. It will only be allowed to exercise the power of eminent domain with the consent of the relevant local land use planning agency.[3]

DERA will be authorized to participate in the regulatory processes of other agencies, such as the Regional Water Quality Control Boards, the State Water Resources Control Board (SWRCB) or the Federal Energy Regulatory Commission (FERC), in the same manner as any other resource management agency. However, it will not have the authority to require the imposition of conditions or

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[3] The power of condemnation ensures that DERA will be able to function effectively in the market. Without the ability to condemn property interests of private or public landowners, an intransigent owner could prevent the implementation of a critical part of the program, by demanding higher than fair market value for the property interest in question. The power of condemnation provides DERA the ability to use existing and standard legal procedures to determine the fair market value of property and to compel an owner to accept fair market value as compensation. On the other hand, the inclusion of eminent domain authority will be controversial. The argument against eminent domain is that the agency would thereby be able to ignore the views of local communities and landowners in pursuit of habitat restoration. The current proposal represents a middle ground which would force DERA to work with local interests, while still precluding the possibility that individual landowners could block widely supported projects.

requirements on permits or licenses issued by state or federal regulatory bodies.

Other powers of DERA will include the power to contract with private parties and other public agencies, to receive funding from public and private sources, to spend money on authorized projects, to sue and be sued, to lobby at the state and federal level on issues related to Delta ecosystem management, and to communicate with the public. The scope of these powers will be defined in the enabling legislation.

All state and federal Delta ecosystem restoration funds, including at least a portion of the Central Valley Project Improvement Act (CVPIA) Restoration Fund, will be appropriated to DERA. DERA will prepare an annual budget and establish funding priorities for ecosystem restoration actions and projects.

Responsibility for implementing the fish and wildlife portions of the CVPIA will be assigned to DERA through new federal legislation. The 800,000 acre feet of CVPIA b(2) water will be converted into a contractual entitlement or a water right assigned to DERA. Some <u>non-CVP</u> flow requirements will be converted into contractual entitlements or water rights assigned to DERA. (For example, flows currently required under the Endangered Species Act (ESA) will be managed by DERA.)

Additionally, DERA will have a contractual entitlement to a specified amount of storage, pumping, and conveyance capacity through CVP and SWP facilities. DERA will be entitled to one third of any new storage capacity constructed under the CALFED program and will have specified rights to use the isolated conveyance facility and the export aqueducts. DERA will manage these rights to promote AFRP goals and to implement the ERPP.

DERA will be authorized to purchase and schedule enhanced flows in addition to all regulatory requirements, by acquisition of supplemental water through transfers, or by reducing export pumping rates below permitted levels by purchase of replacement water already available in the export service area, or by purchasing a reduction in demand in the export service areas (i.e, making funds available for the purchase of replacement water).

After its formation DERA will assume the obligations of, and become the permit holder under, the Bay-Delta Programmatic HCP/NCCP. Through the HCP/NCCP and a set of agreements with DWR and USBR and the project contractors, and with other water users or water rights holders on the Sacramento-San Joaquin system, DERA will assume responsibility for providing any water needed for environmental or water quality purposes in the Delta, above the regulatory baseline. In consideration of this indemnity,

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non-project water users will provide additional financial support to DERA in the form of water user fees (See Section ___).

DERA will act as lead agency for CEQA/NEPA compliance and will hold the 404 permit and other permits necessary to implement the ERPP.

DERA will conduct or coordinate necessary monitoring, data collection and analysis to measure performance of the program, or will direct such efforts through the Interagency Ecological Program (IEP), and will issue periodic Program status reports to Congress, the Legislature, the CALFED Oversight Committee, and the public.

2. Option 2 - The CALFED Ecosystem Restoration Authority

This option is a new Joint Authority formed by the CALFED agencies to implement the ERPP. The joint powers agreement will describe the structure, authority and governance of CERA. The CALFED agencies will not transfer any regulatory authority, but will provide CERA with funding and any other powers possessed by the agencies necessary to implement the ERPP. State and federal legislation may be necessary to provide authorities not commonly held by the CALFED agencies. The federal agencies may not be able to operate under the state joint powers authorization and specific federal authorization may be required.

CERA will appoint an Executive Director to manage the day to day implementation of the ERPP. Specific implementation actions may be assigned to individual federal or state agencies, or contracted out to local or private entities.

A federally chartered citizens' advisory committee will be set up to provide comments, stakeholder coordination and oversight of CERA's implementation of the ERPP and to provide input to the CALFED agencies.

D. Other ERPP Assurances

1. Revisions to the May 1995 Bay Delta Water Quality Control Plan (WQCP) - A revised WQCP will be proposed to the State Water Resources Control Board (SWRCB) which includes environmental water quality and outflow requirements. The WQCP will include or incorporate by reference revised operational rules for the existing facilities which will control until new facilities are on line, at which time a new set of operational rules will apply to both new and existing CVP and SWP facilities.

The Principles Agreement or Implementation Plan (PA or IP) will include recommendations by the CALFED agencies and

participating stakeholders on revisions to the WQCP, and the process by which these recommendations will be submitted to the SWRCB. These recommendations will reflect the changes in water quality and outflow requirements in the Delta as a result of implementation of ERPP and the increased operational flexibility provided by an isolated conveyance facility.

2. Revisions to CVP and SWP water rights - Implementation of the ERPP and construction and operation of new facilities will require changes in the permits and licenses of the CVP and SWP. The PA or IP will include or incorporate by reference an agreement that will describe the process for making such changes and for any necessary changes to the Coordinated Operating Agreement (COA).

3. Revisions to other water rights - Implementation of the ERPP and construction and operation of new facilities will result in changes to the WQCP. This in turn may require that other permits and licenses for water diversions be amended. The PA or IP will include a description of how those changes will be determined.

4. Revisions to waste discharge regulations - The Ecosystem Manager (DERA, CERA or CALFED agencies) will have the authority to provide financial incentives for reduction of waste water discharges in waters tributary to the Delta and to broker market transactions in transferable discharge credits. This will require changes in the state water quality regulations on Waste Discharge Requirements (WDR's). The PA or IP will include or refer to an agreement which will describe the process by which recommendations for changes to those regulations will be submitted to the regional and State Boards. (See Section ___ for discussion of other water quality assurance tools.)

5. Bonds to provide funding - The PA or IP will include agreements on the amount of funding for the ERPP to be provided by bonds, the type of bonds to be used, how the bonds will be approved, how the bonds will be repaid, what projects will be funded, and the timing and phasing of issuance.

6. Water user fees - The PA or IP will include an agreement on how funding for ERPP implementation and water user indemnity will be provided by water user fees, how the fees will be collected and by whom, the timing of collection, and the duration of such fees. This will include an agreement on how current payments by water users for environmental mitigation or enhancement programs will be credited.

7. Two types of water user fees (adjusted for credits) will be imposed on all water users meeting agreed upon criteria. These fees will be levied and collected by the State Board

pursuant to their water rights authority. The first set of water user fees will be used for bond repayment and annual operating expenses of the ERPP. The collection of these fees would be conditioned on reaching agreed upon milestones for completion of new facilities.

The second set of fees will be levied on those water users who benefit from (a) the CALFED program, including use of or access to new facilities; and (b) the "no surprises" indemnity provided by the HCP/NCCP. These fees will be phased in and will increase when new facilities come on line. The money provided by this second set of water user fees will be used to create a reserve or insurance fund for the purchase of supplemental water or for other actions necessary to provide the "no surprises" protection of the HCP/NCCP.

8. State and federal appropriations to provide funding - The PA or IP will include an agreement and proposed legislation on the amount of nonreimbursable federal and state general funds to be sought for the ERPP and what such funds will be used for. Generally, such appropriated funds will be used as an endowment of the ERPP, i.e., for initial capital funding for projects such as land and water rights acquisition or purchase of water transfer options. This agreement will also describe what happens if such funding cannot be obtained through the appropriations process.

9. Funding linkage - Long term operational funding for the ERPP will be linked to the completion of the storage and conveyance facilities and future regulatory stability. Funding instruments and related agreements will provide that if facilities cannot be built or operated as agreed, water user fees and bond funding for restoration funding will be reduced or ended. In other words, continued funding for ecosystem restoration, whether by bonds, water user fees, or other sources, will be dependent on construction and operation of new facilities. However, fees sufficient to repay outstanding bonds will be guaranteed.

State or federal legislation will also be used to link implementation of the ecosystem restoration component with construction of water supply facilities. For example, in Proposition 204, a substantial portion of the ecosystem restoration money is held in abeyance until there is a final EIR/EIS describing a preferred alternative. In the longer term, legislation might provide that ecosystem restoration funds are phased in, corresponding to the level of progress made in permitting and constructing facilities. As facilities progress and eventually come on line, more money is released for ecosystem restoration.

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Similarly, the PA or IP will propose legislation and include an agreement that construction of facilities will be tied to the progress of the ecosystem restoration program, as measured by expenditure of funds, acquisition of habitat or some other objective criteria. In other words, the permitting, construction and operation of facilities will be dependant on findings or agreement that the ERPP is making adequate progress towards its implementation objectives.

10. Phasing and linkage - The PA or IP will describe the timing of Program Phase III ERPP projects in relation to the construction and operation of new facilities. It will describe the linkage between the funding and implementation of Phase III ERPP projects and the construction and operation of new facilities. (See Section ___ for additional discussion of phasing.)

11. Physical limits on new facilities - The physical size of the isolated conveyance facility will provide additional assurances for water quality and outflow conditions in the Delta. An isolated facility of 5000 cfs will be insufficient to meet export demands most of the time and will ensure that export water will continue to move through, rather than around, the Delta, thereby maintaining the Delta as a "common pool".

12. Assurances on operations - Assurances that SWRCB and other operational requirements will be adhered to will be secured in a number of ways:

o Language in the bonds used to fund facilities will specify the operating rules for the facilities. Variances from these operational rules will require the consent of the Oversight Committee and SWRCB.

o The ecosystem manager will be given a priority for any use of capacity in the isolated system above 5,000 cfs (if the facility is constructed to a capacity greater than 5000 cfs).

o Water users covered by the "no surprises" assurances from the ecosystem manager will indemnify against any relaxation in flow or diversion standards. That is, if the SWRCB relaxes standards in the future, water users will compensate the ecosystem manager with water and/or money. This "reciprocal indemnity" will be incorporated into the HCP/NCCP.

13. State legislation - State legislation may authorize the formation of DERA, describe its governance and management structure, authorize appointment of Board members by the Governor (jointly with the Secretary of Interior), and define its powers and purposes.

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State legislation will also link permitting, construction and operation of new facilities to funding and implementation of the ERPP, by providing for a series of checkpoints at which findings will be made by the Secretary of the Interior and the Secretary for Resources that both programs (ecosystem restoration and water supply) are moving ahead in equitable increments.

14. Federal legislation - Federal legislation may authorize the formation of DERA or CERA, describe its governance and management structure, authorize the appointment of Board members (jointly with the Governor), and define its powers and purposes.

Federal legislation will also amend the Central Valley Project Improvement Act to assign the management of the 800,000 acre feet of fish and wildlife water, the Restoration Fund and the AFRP to DERA or CERA. Federal appropriations will be sought for some of the initial capital funding of the ERPP.

E. Water Supply Facilities Management Options

1. Option 1 - The Principles Agreement will provide that new water supply storage and conveyance facilities will be jointly constructed, owned and operated by USBR and DWR. The Principles Agreement will include a number of specific agreements on permitting, funding, and operation of the new facilities, and provide for linkage of facilities construction and operation to ERPP implementation.

2. Option 2 - The CALFED resource management agencies will enter into an agreement with DWR and USBR to formalize the manner in which they will coordinate operations of the CVP and SWP and to describe how CALFED Program actions will be integrated with CVP and SWP operations. The agreement will specify the time and manner for public participation before final decisions on water management are made. The COA will be amended to reflect changes required by the long term CALFED Bay-Delta Program.

F. Other water supply assurances

1. Funding for new facilities - The Principles Agreement will provide that the construction of new facilities will be funded with state and federal appropriations. The portion of the new facilities which is dedicated to the ERPP will be paid for by the general public. That portion of the new facilities which is dedicated to consumptive water supply will be repaid by long term contracts with local water supply agencies, through the existing CVP or SWP contracting process. Contract repayment will include capital, interest, and operations and maintenance costs.

2. Permit processing - The Principles Agreement will include an agreement on the permitting process for the construction and operation of new facilities. This will include agreement on what permits will be required. Permits for new facilities will be linked to milestones or completion of high priority levee rehabilitation projects. Facilities permits may also be linked to milestones in other components (ERPP, water quality, water use efficiency.

3. Construction scheduling and phasing - The Principles Agreement will include a schedule for construction of new facilities and describe the linkage between construction of new facilities and implementation of ERPP. Continued funding of ERPP through water user fees will be tied to construction and operation of new facilities.

4. Operating rules for existing facilities - The Principles Agreement will include interim CVP and SWP operations criteria, and an agreement on how the operations criteria will be modified as ERPP and new facilities come on line.

5. Operating rules for new facilities - The Principles Agreement will include operating rules for the new facilities (or an agreement on how these will be developed), including the allocation of capacity between environmental and consumptive uses.

6. ESA Concerns - There are three areas of concern: Federal ESA Section 10 issues; Federal ESA Section 7 issues; and State ESA issues.

a. Section 10 issues - The Principles Agreement will incorporate the Bay Delta Programmatic HCP. After its formation, DERA will assume the obligations of and become the permit holder for the HCP. Some of the key terms and provisions of the HCP are:

(1) The Bay Delta HCP would cover all species identified as affected by the implementation of the long term Bay-Delta Program and for which there is adequate biological information to make the necessary determinations.

(2) The HCP would include a description of the Program activities covered by the HCP, including any required mitigation actions.

(3) It would include Program phasing and monitoring requirements.

(4) The term of the HCP would be related to the time frame

for the ecosystem restoration program; perhaps in the range of 20 to 30 years.

(5) An incidental take permit would be issued for all covered species.

(6) The Bay Delta HCP would include a description of what constitutes extraordinary circumstances or the process for making that determination.

(7) The Bay Delta HCP would include provisions which would provide that if the HCP were being adequately implemented, the permit holder would receive some degree of regulatory certainty, through the Department of Interior's "no surprises" policy.

(8) Project operator and water user costs would be quantified, fixed and certain. The HCP might also include a formula for cost increases, if necessary.

b. Federal agency actions will be subject to Section 7 consultation requirements.

c. The NCCP will address California ESA issues.

7. Indemnity/insurance for water users - The Principles Agreement will link assurances for ecosystem restoration and water supply reliability. These will be provided by a set of agreements or contracts, including the Bay Delta HCP, to provide limited indemnity for water users and for the environmental water supplies.

If additional water (above the agreed upon baseline amount) is required by regulatory agencies for ecosystem restoration, DERA will provide replacement water up to some agreed level, using either existing water supplies under its control (e.g., the b(2) water) or purchased water.

Under extraordinary circumstances, which will be defined and agreed upon (e.g., DERA has expended over x% of its resources on replacement water), the responsibility for compliance with regulations would fall back upon the water users, without additional compensation.

Water users covered by the limited indemnity would similarly indemnify DERA against any relaxation in standards by the SWRCB.

8. Monitoring and reporting - DWR and USBR will coordinate with DERA on monitoring the impact of facilities

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operations on various conditions in the Delta and will periodically report the results to the Oversight Committee and the public.

9. Dispute resolution - The Principles Agreement will provide that disputes which may arise among agencies and/or stakeholders regarding facilities operations will be resolved by the current Operations Group and that unresolved issues will be elevated to the Oversight Committee.

10. Revisions to WQCP - The new facilities will be controlled by the revised Water Quality Control Plan (WQCP), which will incorporate a complete set of operations criteria.

11. CVP and SWP water rights - CVP and SWP will apply for water rights permits for the new facilities and existing permits will be revised to reflect the new facilities and the revised WQCP.

12. Revisions to other water rights - The Principles Agreement will describe or incorporate the specific agreement by which water rights holders other than the CVP and SWP will contribute water to meet the requirements of the WQCP.

13. Rules for water transfers - The Principles Agreement will describe the proposed rules and regulations for water transfers to be recommended for adoption by the State Board (and the state legislature, if necessary), including access to and costs of wheeling through CVP and SWP facilities.

14. Rules for conjunctive use programs - The Principles Agreement will include provisions on the conjunctive use and management of Central Valley groundwater and proposed rules for groundwater based transfers.

15. Bonds to provide funding - The Principles Agreement will describe the revenue bond funding for the construction of new facilities, including the amount of bonds, time of issuance, who issues them, and who will repay them.

16. State and federal appropriations - The Principles Agreement will describe the proposal for federal and state appropriations to fund the construction of that portion of the new CALFED facilities which are dedicated to ecosystem restoration and environmental purposes.

17. Water user fees for O&M of new facilities - The Principles Agreement will describe the process by which water users will contract for any new water supply provided by CALFED facilities and for use of and access to CALFED facilities, including payment of operations and maintenance costs.

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18. Federal legislation will also provide water supply reliability assurances, with a provision that all necessary permits for construction and operation of new facilities will be granted so long as the proposed facilities and their operation are consistent with the CALFED Program.

19. Assurances for protection of water rights will be provided by legislation which affirms that transfers do not impair the underlying water rights.

20. Water rights and groundwater protection assurances will also be provided by water transfer rules and policies that protect local economies, environmental conditions and groundwater resources without unduly restricting the water market.

21. Water rights assurances will also be provided by provisions in the facilities construction bonds that preclude use of the isolated system to convey transferred water if the transfer would have unreasonable economic or environmental impacts on the source county.

G. Levee Integrity Component

1. The general approach to implementation of the levee component is that local reclamation districts will continue to maintain the levees within their jurisdictions, with financial and technical support from DWR and the US Army Corps of Engineers (USACE), and emergency assistance from the Federal Emergency Management Agency (FEMA).

2. The Principles Agreement will include a proposal for funding by state and federal appropriations or bonds, state general obligation bonds, or user fees for three categories of levee related projects: (1) long term ongoing maintenance, (2) initial levee improvements to bring them up to USACE/FEMA or the agreed upon applicable standards, and (3) ERPP habitat projects on levees.

3. DWR will administer the funds provided by federal or state appropriations, state bonds, or user fees, for long term, ongoing maintenance, pursuant to cost sharing work agreements with local districts.

4. Funds for the initial phase of levee improvements required to bring designated levees up to the applicable standards (USACE, FEMA or other) may also be administered by DWR, or these funds may be controlled to some extent by the ecosystem manager in consultation with DWR and the Delta Protection Commission. Cost sharing may or not be required, depending on the conditions of the work agreement.

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5. Funds provided for ERPP habitat projects which entail levee improvements will be administered by the ecosystem manager, in consultation with the reclamation districts and possible the Delta Protection Commission. Cost sharing would not be a requirements for these agreements.

6. In agreements under Paragraphs 4 and 5 above, reclamation districts and landowners may be required to agree to certain conditions before money will be provided for levee improvements. These conditions would be the subject of negotiation, but could include the following:

- o Habitat easements
- o Limits on development on or adjacent to levees
- o Limits on levee maintenance techniques
- o Subsidence management measures
- o Drainage discharge management programs

7. The ecosystem restoration manager and the ESA regulatory agencies will provide "safe harbor" agreements for landowners and Reclamation Districts who agree to operate and maintain levees in accordance with ERPP program conditions.

8. Program phasing will ensure that specified critical levee improvements (e.g., on the key western islands) will be completed before the construction of the isolated facility.

9. An interagency emergency response program will be created and administered by DWR. The program will assure that resources are available to respond to major flooding or seismic events in the Delta on a timely basis. Funding for the program will be provided by state and federal appropriations, or water user fees.

H. Water Quality Component

1. The Principles Agreement will include agreements on the use of new facilities to meet water quality objectives, timelines for compliance, proposed revisions to the WQCP, funding for water quality programs, etc. The general approach to achieving the water quality objectives of the Program is a tiered or layered approach. The first layer is financial incentive or assistance programs administered by the SWRCB. If, after an agreed upon period of time, water quality objectives are not being met, the approach will shift to reliance on regulations, with penalties and sanctions for non-compliance. The third layer is reliance on legal actions to compel compliance.

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2. Protection of Delta salinity levels for environmental, agricultural, and urban uses will be provided in the same way that environmental flows are provided, as described in earlier sections. The SWRCB will set new salinity standards which will be incorporated into permit requirements for the state and federal projects, and upstream water users. These standards will be incorporated into the Bay Delta HCP/NCCP. Violations of these salinity requirements would lead to a loss of the "no surprises" protection. Language in the bonds used to fund new facilities would prohibit use of the facilities whenever salinity requirements are being violated. DERA would indemnify water users against the increased water costs of more stringent future salinity standards. Water users would indemnify DERA against future relaxations in salinity standards.

3. In the first phase of implementation, the SWRCB and the Regional Boards would be required by state and federal legislation to meet various water quality standards, according to a specific timeline, through non regulatory means. Implementation will be based on incentive and assistance programs designed to encourage voluntary compliance with water quality standards. The standards would be written to reduce discharges of various pollutants that degrade water quality. Such discharges include heavy metals, pesticides, selenium, salts, and organics. State and federal funding would be provided up front to the SWRCB and the Regional Boards for this purpose.

4. The ERPP manager may supplement SWRCB and Regional Board funding for these incentive based programs.

5. If, after an agreed upon period of time, the water quality standards have not been met through the voluntary programs, the SWRCB and Regional Boards will implement the standards through regulatory programs and sanctions, such as:

a) Tradeable discharge permits;

b) Best management practices;

c) Waste discharge permits;

d) "No surprises" assurance for a discharger would be conditional on compliance with SWRCB requirements; discharger in violation of SWRCB/Regional Board requirements would not be allowed access to CALFED facilities or state water bank;

e) Levee rehabilitation and maintenance funding for an in Delta discharger would be conditional on compliance with SWRCB drainage discharge requirements.

6. Legislation will be proposed to authorize citizen suits for direct legal action against polluters or to compel SWRCB and Regional Board compliance with these water quality objectives, if the standards are not met within an agreed upon period of time.

7. DWR, USBR and the export contractors would enter into agreements to assure that Delta export facilities are operated to preferentially provide water from the isolated conveyance facility to urban contractors.

I. Water Use Efficiency Component

1. The Principles Agreement will include a statement of commitment to water management and conservation efforts.

2. The general approach of the CALFED Program is that water use efficiency programs and measures will be implemented by water agencies and by individual water users on a voluntary basis. The CALFED Program will provide incentives and assistance programs managed by DWR and USBR. These programs will be designed to increase the value of conserved water to agriculture and expand the scope of measures which will satisfy the test of cost-effectiveness. If, after an agreed upon time, the objectives or performance measures for the Water Use Efficiency component have not been met, the approach will shift to regulatory requirements, with penalties and sanctions for noncompliance.

3. Urban water agencies will implement Best Management Practices for conservation and for water reclamation. Agricultural water agencies will implement Efficient Water Management Practices. Refuge managers will also implement efficiency practices. In each case, the level of implementation can be no less than what is cost effective for the implementing agency.

4. Urban and agricultural efficiency will be measured through a certification program. The California Urban Water Conservation Council (CUWCC) will certify only those urban water agencies which meet specified requirements. The Agricultural Water Management Council (AWMC) will certify only those agricultural water agencies which meet specified requirements. Another, as yet undefined, council will certify districts using water reclamation criteria. A method to measure refuge efficiency has yet to be developed.

5. If, after an agreed upon period of time, perhaps two years, an agreed upon number or percentage of agencies have not been certified, legislation would be proposed to enact regulatory approaches and sanctions will be triggered. For example:

a) Local agencies which do not have certified plans lose eligibility for financial incentive or technical assistance programs.

b) Facilities construction bond language will prohibit the use of new facilities to convey either project or purchased water for any urban or agricultural agency purchaser which is not certified as efficient.

c) The SWRCB would promulgate rules and regulations on water management and water use efficiency as a condition of water rights. These rules would include sanctions or penalties for those water users who are not certified or failed to satisfy implementation criteria.

d) Agencies which are not certified will lose any "no surprises" assurances in the HCP until they are certified.

6. No agency would be granted "no surprises" protection under the HCP unless it assented to necessary contract amendments to allow the above sanctions to be applied at the individual agency level.

7. These sanctions would apply to top tier urban wholesalers (e.g., MWD, Santa Clara) when more than 10% of the water delivered by the wholesalers is delivered in areas not certified. First tier wholesalers would be allowed to escape from a numeric certification requirement if they were willing to make a long-term programmatic commitment to efficiency at certain specified levels. They would then be subject to sanctions if they did not uphold their programmatic commitments.

8. These sanctions would apply to top tier agricultural wholesalers (e.g., Kern) when more than 10% of the water delivered by the wholesalers is delivered in areas not certified. First tier wholesalers would be allowed to escape from a numeric certification requirement if they were willing to make a long-term programmatic commitment to efficiency at certain specified levels. They would then be subject to sanctions if they did not uphold their programmatic commitments.

J. Funding

1. The Principles Agreement will include the basic agreement on allocation of costs and sources of revenues.

2. Funding for implementation of the CALFED solution will require general obligation bonds, revenue bonds, state and federal appropriations, and water user fees.

III. Analysis

(to be added)

IV. Phasing

Because the long term Bay-Delta solution will require a number of legislative, regulatory, contractual and institutional changes, as well as funding and permitting, implementation will be an extremely complex problem. It will be impossible to implement all program components simultaneously. Some actions -- ecosystem restoration projects, levee improvements, water quality measures -- could be implemented with minimal lead time while others will require many years, e.g., Delta facilities and storage, even after they have been approved. Therefore, it seems logical to implement the Bay-Delta solution in phases.

If the program is implemented in phases, the order in which actions are taken becomes very important. The challenge is to allow actions that can be taken immediately to occur, while assuring that each interest group has a continued stake in the successful implementation of the entire program.

Phasing should have the following characteristics:

- Each phase should be completed before the next phase can begin. A designated entity or individual will certify that the necessary milestone has been reached and the necessary findings made.
- Each major stakeholder interest should have strong inducements to support the completion of each phase.
- Program elements which are outside the control of the CALFED agencies should be implemented in the early stages of the program to reduce the risk that outside actors could affect the process at a later date.

Phase 1 Present to Completion of Final Programmatic EIR/EIS

- Final EIR/EIS adopted by CALFED.
- Final negotiations and signature of the Principles Agreement by all CALFED agencies and a "critical mass" of urban, agricultural, and environmental interests (for Alt. 1); or approval of the Implementation Plan (for Alternatives 2 and 3).
- Initial set of ecosystem actions begins, using existing authorities and existing funding. Interim arrangements to continue until new ecosystem manager is functional.
- Agreement on interim CVP and SWP operations.

- o Agreement on funding and water user fees.
- o Agreement on dispute resolution and contingency process.
- o Outlines of State and Federal legislation to be introduced.
- o Prepare outline of each CALFED agencies' decision-making documents.

Phase 2 Transition from Decision to Implementation

- o Sign and execute the Programmatic HCP/NCCP implementation agreement.
- o Complete a programmatic 404 permit.
- o Introduce State and Federal legislation.
- o Authorizations to create or modify management entities (DERA or CERA).
- o Modifications to CVPIA if necessary.
- o Modification to state water quality, water transfer, and water conservation statutes if necessary.
- o Authorization for state GO bonds to fund ERPP.
- o Seek Federal authorization and appropriations for a portion of ERPP, water use efficiency, water quality, levee programs and water supply facilities..
- o Establish forum for discussions with stakeholder during transition.
- o Draft contracts and agreements to govern implementation. This includes:
  - o Joint powers authorities MOUs or other agreements among CALFED agencies.
  - o Contracts between agencies and stakeholders.

Phase 3 Near Term Implementation

- o Election to authorize state GO bonds for ERPP, water use efficiency, water quality and levee programs.
- o Establish a process for issuing revenue bonds for state share of new facilities:
- o Complete site specific analysis and permitting for new facilities.
- o Enhance water transfer legislation (i.e., measures to rationalize markets while improving protection for local areas).
- o Establish stakeholder participation process (for example Federally chartered advisory committee).
- o Finalize process to address circumstances which prevent key components from being implemented or operated as agreed.
- o Begin initial levee upgrade program using state, federal, and local funds.

- o SWRCB develops and implements new interim WQCP and water rights decision. Standards remain largely unchanged, except that (1) Vernalis flow measures are modified to match adaptive management proposal; (2) Unlimited joint point of diversion is granted to state and federal projects.
- o Begin implementation of water quality and water use efficiency components.
- o Begin ERPP monitoring and reporting programs.
- o Begin implementing the HCP/NCCP.

Phase 4 Long-term Implementation

- o Transfer ecosystem restoration responsibilities and funding to new entity.
- o Complete South Delta improvements.
- o Reach levee upgrade milestones.
- o Begin water user fees for ERPP operations, with sunset in x years if facilities not completed.
- o Apply regulatory programs for water quality and water use efficiency if targets are not being met.
- o Construct facilities if ecosystem restoration plan and HCP/NCCP are being implemented as scheduled.
- o SWRCB develops long-term WQCP and water rights decision, including:
  - o New flow and export requirements;
  - o Assignment to ecosystem manager of some flows currently required by SWRCB.
- o Once ecosystem goals achieved or after specified number of years, water diversion fees are reduced to level required for (1) routine maintenance of ecosystem program and HCP/NCCP.
- o If all program components are being implemented substantially as agreed, all funding is released for program components; otherwise contingency/failure of conditions process is triggered.