

CALFED BAY-DELTA PROGRAM PROGRAMMATIC EIS/EIR

RECORD OF DECISION (ROD), CERTIFICATION, FINDINGS, & STATEMENT OF OVERRIDING CONSIDERATIONS

3/1/99

Introduction. As a joint federal and State project, the CALFED Bay-Delta Program is preparing a joint programmatic environmental document to comply with both the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA). NEPA requires a Record of Decision that reflects the final decision, the rationale behind the decision, and commitments to monitoring and mitigation. CEQA requires a certification by the lead agency based on a prescribed set of findings and a statement of overriding considerations where impacts cannot be mitigated to less than significant levels.

The six federal co-lead agencies will sign the ROD. These are the U.S. Fish & Wildlife Service (USFWS), Bureau of Reclamation (BOR), National Marine Fisheries Service (NMFS), U.S. Environmental Protection Agency (EPA), Natural Resources Conservation Service (NRCS), and the U.S. Army Corps of Engineers (Corps). The Resources Agency, as the State lead agency, will sign the Certification and adopt the Findings and Statement of Overriding Considerations.

Responsible State agencies and cooperating federal agencies will adopt the EIS/EIR for use in supporting their own subsequent decisions. Other agreements adopted at the time of the decision, such as the proposed Memorandum of Agreement between the Corps, EPA and CALFED, or an enforcement agreement to carry out commitments in the Conservation Strategy, may accompany the ROD and be cross-referenced as part of the decision.

NEPA Requirements. NEPA directs that at the time of a decision, lead agencies prepare a "concise public record of decision." (40 CFR §1505.2.) The ROD must:

- (1) State what the decision was.
- (2) Identify all alternatives considered by the agency in reaching its decision.
- (3) Identify and discuss all factors which were balanced by the agency in making its decision, including economic and technical considerations and agency statutory missions, and state how those considerations entered into its decision.
- (4) Specify the alternative or alternatives which were considered to be environmentally preferable. §1505.2(b). "Ordinarily, this means the alternative that causes the least damage to the biological and physical

environment; it also means the alternative which best protects, preserves, and enhances historic, cultural, and natural resources." (*NEPA's Forty Most Asked Questions*, No. 6a.)

- (5) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.
- (6) Adopt and summarize a monitoring and enforcement program where applicable for any mitigation.

CEQA Requirements. CEQA directs State local agencies to prepare a certification, findings, and statement of overriding concerns pursuant to CEQA.

Certification. To adopt a final EIR, a lead agency must certify that it has been completed in compliance with CEQA, was reviewed and the information therein considered by the decision-maker, and that it reflect the agency's independent judgment. (Pub. Res. Code §21100; CEQA Guidelines §15090.)

Findings. In addition, where one or more significant effects on the environment would occur as a result of the project, the lead agency must make one of three findings with respect to each significant effect (Public Resources Code § 21081; Guidelines §15091):

- (1) Changes have been made to the project, or incorporated into the project, which mitigate or avoid the identified significant effects on the environment;
- (2) Those changes or alterations (i.e. mitigation measures) are within the responsibility and jurisdiction of another public agency, and have been, or can and should be, adopted by that other agency;
- (3) The agency finds that the mitigation measures or alternatives are infeasible for specific "economic, legal, social, technological, or other considerations...."¹

¹"Feasible" is defined as capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, technological, and legal factors. (Pub. Res. Code §2106.1; Guidelines § 15364.) "Infeasibility does not mean impossibility; a mitigation measure that is undesirable or impractical from a policy standpoint may be rejected as infeasible. A conflict between a proposed alternative and the agency planning goals may support a finding of infeasibility....[a] determination of infeasibility involves balancing economic, environmental, social, and technological factors...." Zischke, *Practice Under CEQA*, CEB (1997).

There are three elements necessary to make any legally required findings:

- (1) Ultimate finding or conclusion, e.g. "Alternative 1 is infeasible because...."
- (2) Substantial evidence in the record to support the conclusion in the finding;
- (3) An explanation to supply the logical link between the ultimate finding and the facts in the record. (This is sometime called "bridging the gap" between the evidence and the decision.)

Substantial evidence is data or studies that qualified experts can use to support each of the findings. This evidence could be an existing report which leads to the conclusions adopted by CALFED, or an explanation gathered from a number of different sources which can be cited. If there is contradictory information that would not support our conclusion, we need to be able to explain why reasonable minds could differ, and why CALFED decided that this particular conclusion was more reasonable, or that there exist specific economic, legal, or policy reasons for choosing this conclusion. Where findings are based on economic factors, the courts have required an analysis of comparative costs or economic benefits. This supporting data needs to be in the record prior to the decision being made.

Statement of Overriding Considerations. Further, if there are significant effects that cannot be mitigated, and which are within the lead agency's responsibility and jurisdiction, the lead agency must also find that specific overriding economic, legal, social, technological, or other benefits of the project outweigh each of the significant adverse effects. This is called the Statement of Overriding Considerations. (Pub. Res. Code §21081(b).)

Infeasibility findings for alternatives. Finally, CEQA mandates that public agencies "should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects...." (Pub. Res. Code §21002.) Consequently, agencies have an obligation to modify projects, to the extent feasible, to substantially lessen or avoid such effects. (Guidelines, §§15002 (a)(3), 15021 (a)(2).) This is normally accomplished by revising the project or by adopting mitigation measures. However, if a significant impact cannot be substantially lessened or avoided through the adoption of feasible mitigation measures or modification of the project, and one or more of the alternatives would provide mitigation for a significant impact, CEQA requires that findings on the feasibility of each of the alternatives must be made.

For each alternative selected, the findings must explain one or more of the following:

- (1) how the alternative does not satisfy the goals of the project, or would frustrate the agency's ability to meet its objectives;
(*City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 401.)

- (2) how it does not offer substantial environmental advantages over the alternative selected; or
- (3) that it cannot be accomplished or is infeasible for specific economic, legal, social, technological, or other considerations. (Public Resources Code § 21081(a)(3); Guidelines § 15091(c)(3).)

Thus, to select the Preferred Program Alternative, CALFED will need to do one or more of the following:

- (1) reject Alternatives 1, 2 and 3 and the No-Project Alternative on grounds of infeasibility;
- (2) explain how the alternatives would not achieve the objectives of the project; or
- (3) explain how the alternatives are not environmentally superior to the Preferred Program Alternative.

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