

DRAFT

CALFED BAY-DELTA PROGRAM ASSURANCES:

**STAKEHOLDER CONCERNS,
NEEDS/OBJECTIVES,
TOOLS OR METHODS OF ASSURANCE,
AND GUIDELINES**

The CALFED Bay-Delta Program is conducting a three-phase cooperative effort to develop and implement a long-term comprehensive plan that will restore ecological health, improve water quality, provide improved water supply reliability for beneficial uses, and minimize the vulnerability of the Delta's levees and channels. The first phase of the program identified three solution alternatives to be analyzed in Phase II. The second phase includes refinement of the Phase I alternatives, development of strategies for implementing the components, and a broad environmental review to identify the impacts of various alternatives. The Phase II draft Programmatic Environmental Impact Report/Statement (EIR/EIS) will be completed by the fall of 1997, with a final Programmatic EIR/EIS completed by fall 1998. The third phase of the program will include project specific environmental review of individual components of the recommended alternative.

During Phases II and III when considering the viability of the CALFED long term solution, policy makers and decision makers are likely to ask: "How do we know that we will get the benefit the program promises? How do we know that the water supply (or ecosystem restoration) enhancements will be produced? How do we know that our costs will not exceed those described by the program? How do we know that the solution will have shelf-life? How do we know that the solution will be implemented as agreed?" In anticipation of questions like these, part of developing an implementation strategy in Phase II includes developing "assurances."

"Assurances" are measures designed to develop confidence among the public, stakeholder groups, lawmakers, and state and federal agencies that the long-term Bay Delta solution will be implemented as agreed. Interested parties need assurance that the long-term solution will meet Program Objectives and adhere to the Solution Principles. Interested parties need to know that all phases of the solution will be implemented, that financing will be available, and that facilities will be constructed and operated as agreed. Assurances will also provide a process for dealing with unanticipated conflicts or complications arising during implementation of the long-term program. Assurances will be necessary regardless of the content of the long-term solution in order to give interested parties confidence that their interests will be protected.

The distinction between program components and assurances is not always clear. Certain issues clearly fall outside of the scope of assurances. For example, determining the amount of water available for export from the delta or the appropriate water use efficiency measures to be used on farms are clearly substantive program issues. Other issues are less easily categorized.

For example, an adaptive management element of the Ecosystem Restoration Component is needed in order to allow flexibility when dealing with biological uncertainty. Beyond some initial ecosystem restorative measures, the remainder of the program may be dependent upon flexible management. It will be necessary to assure that the program will attempt to achieve its goals and objectives and that financing will be provided, without dictating the precise restoration measures to be implemented in the future. Consequently, adaptive management will be addressed substantively within the Ecosystem Restoration Component, and procedurally by Assurances.

The task for the Assurance Work Group is to formulate, discuss, analyze, and recommend to the Bay Delta Advisory Council appropriate mechanisms to assure implementation of the long-term solution identified by the CALFED process. Specifically, the task is to identify the assurance needs or objectives associated with each of the Program Components (Ecosystem Restoration, Water Quality, Water Use Efficiency, Levee and Channel Integrity, Storage and Conveyance, as well as Financing) and to identify methods by which these assurances can be provided. This effort will require coordination with the other working groups and staff component refinement efforts. It is not the function of the Work Group to attempt to guarantee every desired outcome of the CALFED process. Rather, the Work Group will provide assurances that the long-term solution will be implemented as described.

To begin this process, staff compiled a summary list of Concerns described from the stakeholder or interest group perspective (Part I). In Part II staff prepared an outline of Needs and Objectives which integrates the stakeholders' concerns with the program components. Part III describes the Tools or Methods available to assure implementation. Part IV identifies Guidelines to govern the selection of assurance mechanisms. Once the work group has reviewed, commented on and is comfortable with these four parts, the task of assessing tools or methods for each need or objective begins. This effort will yield a preliminary package of assurances.

Part I. STAKEHOLDER CONCERNS

This section describes the concerns that stakeholders have voiced in workshops, public meetings and scoping meetings, written comments submitted to CALFED and the California Assembly Process, and informal discussions with CALFED staff.

1. ENVIRONMENTAL GROUPS

A. Implementation of ecosystem improvements - Recognizing that the desired outcome or result of permanent restoration of the Bay Delta ecosystem cannot be guaranteed, Environmental Groups want to have a high level of confidence, i.e., an assurance, that the promised improvements in ecosystem structure and function will be implemented. This includes all physical ecosystem changes which CALFED firmly commits to up front. This is not an assurance of a result, but an assurance the program will be implemented as described and promised, without changing the restoration goals and objectives.

B. Funding - They want an assurance of adequate funding for an agreed period of time, in order to carry out the restoration projects. Since the ultimate funding needs are not well defined, this implies that funding levels should include a margin of safety, or should be variable to mirror changes in perceived needs.

C. Adaptive management approach - For those physical/biological improvements which cannot now be defined (final land use, flow pattern, water quality patterns), the environmental groups want a decision making process (presumably an adaptive management approach) to assure that valid decisions will be made in the future to achieve restoration. Such approach or process should provide for the modification of flow and diversion patterns, and the implementation of restoration activities, whether through regulatory means or market mechanisms, based upon well defined goals and priorities. It should provide that the mission and goals of ecosystem restoration are insulated against weakening.

D. Operations - Environmental groups want assurances that new and existing water facilities will be operated as promised in the solution.

E. Water use efficiency - As a precondition to possible support of additional water development, environmental groups want assurances that urban and agricultural water users will use water as efficiently as possible.

2. FISHERY INTERESTS (Commercial and recreation)

A. Water for fish - Fishery interests want an assurance that adequate fish flows and water quality will be provided and protected into the future, as against competing demands for water from the Delta.

B. Habitat for fish - They will also want assurances that habitat restoration measures will be implemented.

C. Regulatory certainty - Fishery interests will want an assurance that adaptive management will not lead to unreasonable regulatory constraints or limits on commercial or recreation fishing.

3. EXPORT URBAN (Metropolitan Water District, Santa Clara)

A. Water supply reliability - Export agencies want assurances that the export water supply, in terms of quantity and reliability, will be improved and maintained at a level adequate and sufficient to meet current and future demand at a reasonable cost.

B. Water quality improvements - They also want an assurance that water quality of Delta exports will be maintained or improved to a level that allows for affordable treatment and enhanced ability to meet current and future drinking water standards.

C. Regulatory certainty - The exporters want an assurance of regulatory certainty in the future (i.e, that regulatory constraints in the Delta will not change or that they will change only in accordance with a predetermined agreement or plan.)

D. Costs - Export agencies want to know the limits of their financial obligations and that there is a reasonable relationship between their costs and the benefits received.

E. Facilities - Facilities which are identified in the solution must be permitted, funded, constructed, and operated according to the program plan.

4. IN DELTA URBAN (Contra Costa WD)

A. Water supply reliability - CCWD assurances needs are generally the same as those of the urban exporters.

B. Water quality - CCWD assurance needs are generally the same as those of the urban exporters.

C. Regulatory certainty - CCWD assurance needs are generally the same as urban exporters.

D. In Delta protection - Additionally, CCWD wants assurances regarding the application of the Delta Protection Act and area of origin statutes as these apply to Delta water quality and water supply for in Delta use.

5. EXPORT AGRICULTURE (San Luis, Delta-Mendota Canal, Kern-Tulare)

A. Water supply recovery - The agricultural exporters want an assurance that they will recover that portion of their contract water supplies which have been lost to existing regulatory requirements.

B. Water supply reliability - They want an assurance that in the future their water supply will be dependable, within reasonable parameters, and of sufficient quality, to meet demand at costs low enough to maintain production profitability and land values.

C. Regulatory certainty - The assurance need on this issue is the same as the urban exporters, with perhaps a greater emphasis on the need for protection from future regulatory constraints on exports. The "shelf life" of the deal is critical. Without assurance that changes in the regulatory climate will not reduce export supplies in the future, there is little incentive to provide funding for the implementation of the program.

D. Costs - Agricultural exporters also want assurance that additional water supplies produced by the CALFED program will be affordable and that their share of costs will be in proportion to the benefits received from the program.

6. DELTA AGRICULTURE (South Delta Water Agency, Central Delta Water Agency, North Delta Water Agency, Delta riparian)

A. Water supply reliability - The basic assurance need is continued reliable access to enough high quality water to meet demand, at costs low enough to maintain profitability and land values.

B. Delta protection - Delta interests also want an assurance that the existing levee system will be protected.

C. Water rights - Delta interests want an assurance that water rights will not be impaired by the CALFED program.

7. UPSTREAM AGRICULTURE (Sacramento Valley)

A. Water rights - The assurances needed by upstream agricultural agencies are that the water rights for the existing agricultural water supply will not be compromised in the future.

B. Costs - Upstream interests want an assurance that there is a rational relationship between costs and benefits received, and that their share of the payments for the program are well defined in advance and capped.

C. Regulatory certainty - Upstream interests want an assurance that existing and unavoidable regulatory constraints such as fish screens will be implemented in a way that provides some certainty of stability and durability (i.e., shelf life).

D. Water transfers - To the extent that water transfers are a critical part of the preferred alternative, the upstream interests will need assurances that the water market will be operated and regulated in a way that protects and mitigates against third party economic and environmental impacts.

E. Area of origin - They will also want an assurance that area of origin and watershed protection priorities will be maintained.

8. UPSTREAM RURAL (Mountain counties; Regional Council of Rural Counties)

A. Water supply reliability - The rural counties want an assurance that water needed for agriculture and future development is not shifted out of the upstream areas.

B. Area of origin - Protection of area of origin and watershed priorities under state law is paramount.

C. Other - These agencies are also looking for some assurance of a revenue stream to support watershed management programs. Finally, as a precondition to possible support of additional water development, the rural counties want assurances that export areas use water as efficiently as possible.

9. UPSTREAM URBAN (East Bay Municipal Utility District; Hetch Hetchy; Sacramento)

A. Water supply reliability and water rights - The basic assurance need is protection of their water rights and supply. EBMUD and Hetch Hetchy want to maintain their ability to continue high quality diversions from above the Delta. They also want assurance that their costs are quantified and capped.

10. SAN JOAQUIN TRIBUTARIES/FRIANT

A. Water rights - The basic assurance need is that the CALFED program have no significant water cost or impact on their water rights. There are concerns about the need for environmental water on San Joaquin system (where will this water be obtained; from which source, at whose cost) which may need to be addressed by assurances.

11. EAST SAN JOAQUIN (Stockton East, Central San Joaquin)

A. Water supply reliability - These agencies have generally the same concerns as ag and urban exporters.

B. Area of origin - These agencies want an assurance that area of origin and watershed protection statutes will be acknowledged and upheld.

C. Groundwater protection - These agencies want an assurance that the CALFED program will not result in further groundwater overdraft problems in East San Joaquin County.

12. DELTA RECREATION

A. General - Recreation interests want some degree of assurance that the long term solution will not materially impair the use of the Delta for recreational purposes.

13. URBAN BUSINESS INTERESTS

A. General - Urban business interests want an assurance that implementation of the long term solution will bring an end to the water wars, provide healthy environmental conditions, and ensure high quality, reasonable cost water for the future economic development of the State.

14. RURAL/AGRICULTURAL RELATED BUSINESS AND LABOR INTERESTS

A. General - Business and labor interests which are dependent on agricultural production want assurance that the implementation of the long term solution will not result in significant disruption of the agricultural economy and job opportunities.

15. SAN FRANCISCO BAY INTERESTS

A. Bay protection - Interest groups concerned with the protection of the San Francisco Bay want an assurance that implementation of the CALFED program will not adversely affect the availability of pulse and flushing flows in and through the Bay.

Part II - NEEDS/OBJECTIVES

The Stakeholders' Concerns (Part I) can be integrated with the program components to produce an outline of assurance needs or objectives. Additional detail can be added as the program components are refined or additional assurance needs are identified. Footnotes give references back to the stakeholder perspectives.

1. Ecosystem Restoration
 - A. That all habitat restoration and mitigation measures identified in the solution will be implemented.¹
 - B. That the identified instream flows and Delta outflows will be provided.²
 - C. That the operational rules for water management identified in the solution will be followed.³
 1. Storage patterns
 2. In-stream flow patterns
 3. Diversion patterns

¹This is fundamental to the environmental and fishery interests.

²Protection of promised flows responds to environmental, fishery, and delta interests.

³Nearly all stakeholder groups have an interest in assuring that operational criteria are adhered to. Environmental fisher and delta interests wish to assure adequate in-stream flows and limited diversions. Diverters want to assure access to diversions.

- D. That improvements in the Delta ecosystem will restore reliability to export water supplies and allow additional exports to meet growing demands.⁴
- E. That the adaptive management approach will be durable and effective. An assurance framework will include the following to address environmental group concerns:⁵
 - 1. Secure funding for a definite period of time.
 - 2. Stable goals and objectives.
 - 3. Implementation will be insulated against political interference.
 - 4. Authority to implement discretionary actions in pursuit of goals and objectives is clearly articulated and difficult to circumvent. Examples of discretionary actions include:
 - a. Management of water supply allocated to restoration.
 - b. Habitat acquisition and enhancement.
- F. That foreseeable changes in regulatory constraints on commercial and recreational fishing will not have unreasonable impacts upon these sectors.

2. Water Quality

- A. That actions identified in the solution to improve urban water quality will be implemented.
- B. That actions identified in the solution to improve agricultural water quality will be implemented.
- C. That actions identified in the solution to improve environmental water quality will be implemented.

⁴Support by exporters for the ecosystem component CALFED Program is predicated upon the assumption that improvements in ecosystem function will be tied to improved water supplies.

⁵Primarily a concern to environmental and fishery interests.

3. Water Use Efficiency
 - A. That water use efficiency programs identified in the solution will be implemented.⁶
 - B. That efficiency programs in the solution do not impair water rights.⁷
 - C. That appropriate mitigation for water transfers will be implemented.⁸
4. Delta Levee System⁹
 - A. That actions and programs identified in the solution to maintain Delta levees will be implemented.
 - B. That programs identified in the solution for protection of levees, channels, infrastructure and land uses from catastrophic events will be implemented.
5. Conveyance Mechanisms¹⁰
 - A. That new conveyance facilities will be permitted, funded and constructed.
 - B. That water supply reliability will be restored to exports and that additional benefits, in quantity and reliability, from conveyance improvements will be realized.
 - C. That foreseeable changes in regulatory constraints will not impair or preclude conveyance improvements, i.e., that the conveyance benefits have "shelf life".
 - D. That conveyance improvements will not impair the exercise of water rights.

⁶Of concern to environmental, fishery, upstream interests, and the general public.

⁷All water users.

⁸All upstream interests, environmental, fishery interests, and rural/agricultural related business and labor interests.

⁹Delta and environmental interests. Depending upon the solution, export interests may also have a stake in assuring protection of levees.

¹⁰Improvements in access to Delta water are fundamental to export interests. Protection of upstream water rights is fundamental to upstream interests.

6. Storage Facilities and Programs¹¹
 - A. That new storage projects will be permitted, funded and constructed.
 - B. That the water supply benefits of new storage, in quantity and reliability, will be realized.
 - C. That foreseeable changes in regulatory constraints will not impair storage improvements.
 - D. That new storage facilities or new conjunctive use and banking programs will not impair water rights.
 - E. That local groundwater supplies, economies and environmental conditions be protected by appropriate mitigation measures from adverse impacts of conjunctive use and banking programs.
7. Financing
 - A. That a revenue stream for ecosystem restoration will be quantified and stable.¹²
 - B. That funding for other program components and actions will be provided in a timely manner.¹³
 - C. That the costs of the program will be spread equitably and commensurate with the benefit received.
8. Other Implementation Issues
 - A. That the mitigation and monitoring actions included in the long term solution are implemented as agreed.
 - B. That public participation be provided for throughout the implementation process.

¹¹Whichever interest, whether upstream, delta, export, or environmental is promised benefits from new storage they will need assurances that those benefits will materialize. On the other side, existing water users, particularly upstream and in the delta, will need assurances that storage will not be used so as to impair their water rights.

¹²Environmental and fishery groups.

¹³All groups.

- C. That local economies and environmental conditions be protected from adverse impacts of implementation or that adequate mitigation measures are provided.¹⁴
- D. That the long term program as a whole is durable, and that the "shelf life" is protected from political or foreseeable regulatory interference.
- E. That area of origin and watershed protection priorities under state law be protected during the implementation of the long term solution.¹⁵

Part III - TOOLS OR METHODS OF ASSURANCE

Staff has compiled a preliminary list of tools and methods of assurances available to meet the above listed Needs/Objectives.

A. Constitutional Amendments - federal or state. Article X §2 of the California Constitution, for example, calls for the beneficial uses of all water. Constitutional amendments are difficult to obtain, and difficult to modify once obtained.

B. Statutes - federal or state - Examples of statutes that govern management of a resource include the state and federal endangered species laws, water quality laws, the federal Central Valley Project Improvement Act and federal reclamation law. Statutes may be modified by act of Congress for federal statutes and by the legislature for state statutes.

C. State voter referenda - Voter referenda can be used for a variety of purposes, but the most common are to enact particular legislation (such as Proposition 13 which enacted constitutional and statutory limits on local financing and property taxation) or to approve particular bond measures (such as the series of California Parks and Wildlife bond measures) or the bond measure funding Bay Delta ecosystem measures (Proposition 204). Modification of voter referenda is normally more difficult than modifying statutes, and at a minimum requires action by the legislature.

D. Regulations - federal or state. Adopted by administrative agencies to guide implementation of their duties and obligations. An example is the state CEQA guidelines. Regulations are proposed by federal or state agencies, and subject to public review and comment prior to adoption. Regulations may be modified by administrative agencies.

E. Judicial actions - Federal or state court judgments, orders, validations, consent decrees. Can be modified only by future judicial decrees, or statutory changes passed by Congress or the legislature.

¹⁴All upstream and rural interests.

¹⁵All upstream and rural interests.

F. Executive orders - The President and Governor both may issue executive orders. The Governor issued an executive order to form the Water Policy Council, for example. Executive orders may be modified by action of the President or Governor.

G. Administrative agency orders - Examples are water right permits or permit amendments. Administrative agency orders are applications of statutes and regulations to a particular individual or group. They can be modified by subsequent order, but generally require notice and a hearing before the agency may do so.

H. Contracts - between two or more individuals or entities. Generally, no one party may unilaterally modify the terms or conditions of the contract. Enforcement may be specified in the terms of the contract or is available through the courts.

I. Memoranda of understanding/agreement - MOU/MOAs are informal agreements that may be terminated at will by any party. The CALFED Agencies' MOU describing the roles and responsibilities of each agency with respect to preparation of the Bay-Delta Programmatic EIR/EIS is an example.

J. Joint powers agreements - State law authorizes public agencies (including federal, state and local agencies) to enter into agreements in which they "jointly exercise any power common to the contracting parties."

K. Financing mechanisms - Bond language requirements and market incentives are examples.

L. Physical constraints - Constructing a conveyance facility to carry a specified amount of water is an example.

M. Parallel implementation - Implementing elements of differing components in parallel processes in order to assure that no component is completed before another is begun.

N. Oversight/public involvement process - Implementing agencies have effective public involvement, public decision-making and dispute resolution programs and mechanisms.

O. New institutions - Generally created by federal or state statutes to implement, manage, or fund any of the program components. For example, an environmental water authority may be created by federal and state statute to ensure adequate supplies of water for environmental purposes in the future.

P. Multiple Species Protection Plans - A recent tool evolving out of the federal and state endangered species programs is the multiple species protection plan. These plans, which are usually called habitat conservation plan (HCPs) under federal law, and Natural Community Conservation Plans (NCCPs) under California law, generally preserve a portion of a particular habitat for one or more species, and at the same time provide some certainty or stability for the public and private land owners by limiting future regulatory actions in the same area.

Q. Programmatic Permitting - Regulatory assurances could also be provided in some circumstances by a programmatic permitting process for the CALFED program, which would incorporate certain agreements regarding the actions to be required in the event of future threatened and endangered listings.

Part IV - GUIDELINES

The Guidelines should be viewed as rule-of-thumb criteria to help in the development and evaluation of individual assurances and assurance packages. Note that there is overlap between some of the guidelines.

- *Satisfy the solution principles (implementable, durable, equitable, no significant redirected impacts).*
- *Provide high confidence that identified actions will be taken and that identified programs will operate as promised.* The program simply cannot guarantee performance. Ecosystem function and population targets cannot be assured within a finite budget. Water supply reliability levels cannot be guaranteed given the possibility of future climate change. Also, the assurance package should not be used to compensate for perceived problems in the solution itself.
- *Ensure that the solution contain clearly articulated performance criteria and proposed schedules for attaining program goals.*
- *Specify that the written description of the solutions constitutes the entire agreement.* Parties' unstated assumptions about the implementation of particular components should not be binding.
- *Structure the solution to be self-executing.* The CALFED solution, once implemented, should be minimally dependent upon discretionary actions by actors outside the solution framework.
- *Include recovery mechanisms.* The solution should contain internal mechanisms capable of responding to surprises and disappointments.
- *Provide for implementation of the entire program, even if that implementation occurs in stages or phases.*
- *Allow for adaptive management, wherever the current state of knowledge is inadequate to made definitive choices now.*

- *Allow for variations in the need for certainty on discrete program components.* Some parts of the program may need to be "set in stone", whereas in other areas the parties may be willing to agree to a more open-ended or flexible process. This may contradict the adaptive management guideline in some cases.
- *Work within existing statutes, regulations and institutions where feasible.*
- *Involve the public in decision making.* In order to maximize the likelihood of continued public support, the solution should contain mechanisms for soliciting, influencing, and responding to public opinion.
- *Craft an integrated package of assurances that work well together.*
- *Minimize costs.* The proposed assurance package should be structured so as to provide the necessary assurances at the lowest possible cost.