

BDAC ASSURANCES WORK GROUP

Meeting Summary
December 3, 1997

The BDAC Assurances Work Group held its 12th meeting on Wednesday, December 3, 1997, from 9:00 a.m. until noon in Room 1412 of the Resources Building.

BDAC Members present:

Hap Dunning, Chair
Alex Hildebrand
Rosemary Kamei
Stu Pyle

CALFED Staff/Consultants

Mary Scoonover
Eugenia Laychak
Dave Fullerton
Mike Heaton
Sue Lurie
Marti Kie
Michael Ramsbotham

Others present:

John S. Mills	Dennis O'Connor	P. Candy
Dan Craig	Amy Fowler	Bob Raab
Gregg Ellis	Greg Zlotnick	Randall Neudeck
Jim Chatigny	Anthony Farrington	Kathy Mannon
Dan Keppen	Alf Brandt	Jerry Lo
Jeff Jaraczski	Tammy White	Tiki Baron
Bill DuBois	Bill Dunn	Debbie Drake
Dave Harlow	Ros Tobe	Liz Howard
Terry Young		

1. Work Group Chair Hap Dunning convened the meeting at 9:00 a.m. Meeting participants introduced themselves. Hap introduced Betsy Rieke, Director, Natural Resources Law Center, University of Colorado, School of Law. Betsy reported that she will be doing some

consulting work for the CALFED program on institutional issues, particularly ERPP management and governance.

2. The meeting summary of the October 24 meeting was reviewed. There were no additions or corrections.
3. Cliff Shulz reported that the Ag-Urban Policy Group has continued to focus on CVPIA and b(2) water issues for the past several weeks, and progress on CALFED issues has been slow. However, the Ag-Urban technical teams have been working on facilities and operations issues. Also, the Ag-Urban Policy Group has adopted a policy position favoring creation of a new entity with agency and stakeholder representation in its governance structure for ERPP implementation. The new entity could be something like DERA as described in previous discussion papers or it could be a trust or conservancy.
4. There was no report from the Environmental Water Caucus.
5. Mary Scoonover reported that it was necessary to cancel the Assurances Work Group meeting in January 1998 due to schedule conflicts. The next Assurances Work Group meeting was set for February 25, 1998 and a schedule for 1998 meetings will be developed at that time.
6. Mary described the process for the next several weeks. BDAC will consider the three hybrid alternatives at its meeting on December 12 and convey any advice or comments to the CALFED Policy Group for consideration at its meeting on December 18/19. At that time, the CALFED Policy Group is expected to make a decision regarding the preferred alternative to be described in the draft EIR/EIS. The draft EIR/EIS will be publicly released in late January or February 1998.
7. Mary asked the Work Group for reactions and comments on the draft Assurances Proposal dated 11/25/97, particularly whether there are areas of agreement or areas of disagreement which can be identified. In response to a question, Mary explained that the draft proposal identifies some options where there are areas of known disagreement. For assurance or implementation issues without options, there has been no identified disagreement or no significant discussion.
8. Hap asked about the difference between an Implementation Agreement and an Implementation Plan. Mary said the primary difference is that the Agreement would be signed by agency and stakeholder representatives. The Plan is an agency only document which lays out how the program will be implemented. Cliff noted that these may not be real options, since it would be difficult to implement the program without an agreement. Randall Neudeck described his view of a two step process where a plan is developed, then an agreement is negotiated on the basis of the plan for implementation.

9. Other comments about the plan/agreement approach to implementation:

- It may not be realistic to rely on an agreement among all parties; CALFED will not be able to get all the agreements in place prior to program implementation;
- Accord-type agreements may not provide reliable assurances of implementation; we will need a stronger mechanism to assure legal and environmental baseline;
- There may be ways to get concurrence on implementation without specific agreements;
- We will need to have a mechanism to deal with changes in baseline conditions;
- Nothing in the proposal provides assurances for the threat to Delta interests created by an isolated facility;
- Concern was expressed about reference in the proposal to changes in water rights; there will be no agreement to allow unspecified changes in water rights;
- We need to develop assurances for the preferred alternative or develop assurances for each remaining alternative and assess feasibility of assuring each alternative;
- A process may provide the mechanism for agreement, rather than written instruments;
- We need to talk about what specific agreements are needed; we should establish clearly the floor for assurances; Current assurances don't work, so how do we know future assurances will be reliable;
- The 11/25/97 proposal as an assurances package is not adequate but it has some useful concepts;
- We need to consider assurability of different alternatives;
- There is no agreement on the need for new facilities;
- We need a mechanism for phased implementation;
- MWD will want some agreement from other stakeholders that they will support the program;
- Nothing in the proposal provides assurances of facilities operations;
- There are laws other than CVPIA which are part of the environmental baseline and which need to be incorporated into assurances package;

- Mitigation measures need to be incorporated into assurances package.
- The federal agencies will not agree to the release of final Program EIR/EIS without significant stakeholder support, whether in the form of a written agreement (the Accordo Grande) or otherwise.
- The concepts in the proposal need more detail and there is a need for some kind of agreement.

Mary summarized the discussion by saying that there appeared to be consensus that an implementation plan was an essential part of the assurance package, but that there is disagreement whether there needs to be written or political agreement indicating support for the program.

10. In response to comments about assessing assurability of alternatives, Mary reminded the group that assurability is one of the distinguishing characteristics factored into the alternatives analysis.

11. Other comments on program wide assurances:

- There may be options for oversight which are not reflected in the proposal. The stakeholder role in oversight could be advisory, as with BDAC, or it could be something different. Mary noted that BDAC sunsets after the Record of Decision on the final EIR/EIS, so part of the assurances package is an agreement on continued stakeholder involvement in program implementation.
- We need provisions for contingency response and dispute resolution. Who will decide when the program is not working or that a dispute needs to be elevated to some higher level of decision making?
- Concern was expressed that the proposal does not include performance measures, for either the ERPP or for other program components. In response, Mary reported that review by CALFED program managers resulted in changing the assurances approach on the Water Quality Component. Assurances will be based on incentive and assistance programs; regulatory tools will not be used. We will use voluntary and regulatory tools for assuring the Efficient Water Use Component.
- There is concern about redirected impacts from water quality actions. How will decisions be made about actions designed to deal with one constituent of water quality when that affects another constituent in a different way? For example, if the Water Quality Component tries to reduce hydro-carbons for benefit of urban water quality, how do we assure that there will be no adverse affect on fish food chain or agriculture?

- Concern was again expressed about the absence of performance measures. We need to at least say there is a need for performance measures for each component and add this to the list of items for the implementation plan or agreement.
- There was a discussion about whether performance measures are part of program content or part of assurances. Some believe that assurances is not the right place to develop performance measures. Assurances should assure the component is implemented in a way that meets performance standards and should explain what happens if performance standards are not met.
- There appeared to be agreement that part of assurances is to assure achievement of performance measures.

12. Discussion of ERPP Management Options

The comments are summarized below:

- These are adequate descriptions of options, but there probably is no consensus. Are Options 1 (Existing entities) and 2 (JPA of existing entities) really different? Most participants believe we will need common management of the program and that we could eliminate Option 1 (existing entities).
- There is no agreement on who would serve on the Board of the new entity or how they would be appointed.
- After further discussion, it appeared there was no objection to the elimination of Option 1. Discussion continued on Options 2 and 3.
- An argument for a new entity is that management would have more flexibility and would not be limited by existing agency authorities.
- There was some expression by environmental representatives that they did not necessarily agree that a broad representation of stakeholders should be on the governing board of a new entity. There is a concern that this would tilt the governance toward favoring southern California interests.
- There is no agreement on how appointments would be made; it was suggested that appointments would not necessarily be made by the Governor and/or Secretary of Interior.

There appeared to be some rough consensus in favor of Option 3 (new entity), with reservations about composition of the Board and how Board members would be appointed.

Also, there was a brief discussion about whether the new entity should have the power of eminent domain, or a limited power of eminent domain. There is no agreement on this issue.

13. Other ERPP Assurances

- Adaptive Management - Mary said the idea is that visions and goals are fixed. Implementation objectives and targets can be changed under certain circumstances, which will have to be defined.
- There is no consensus that water users will pay fees for ERPP.
- Financing is not just an adaptive management issue; it is a program wide issue. Where is the assurance for a steady stream of revenue for ERPP?
- Where is the assurance for resolving conflicts between ERPP and other program components?
- Where is the assurance that there will be sufficient environmental water? Reliance on market transaction is not enough. ERPP will need an environmental water right.

In response to the question what will be done with this proposal, Mary said that CALFED staff will prepare another draft and further clarify areas of consensus and areas of disagreement and will identify additional options.

14. ESA Issues

Hap asked if the concerns of the Work Group expressed at the last meeting were conveyed to the CALFED management and policy groups? Mary said that the concerns were noted, but the policy decision was made that a Section 10 HCP will be part of ESA compliance strategy. There is no agreement on the structure or content of the HCP.

15. Water User Efficiency

- Many agriculture interests do not agree that there should be a two year "hammer" on ag water use. There is no consensus on any of the enforcement measures.
- There appears to be general agreement that implementation of EWU can begin with voluntary incentive based measures, but there is no agreement on what happens if those are not successful, or how success will be defined.

16. Water Supply

- There is no agreement on the utility of an HCP as assurance for water supply reliability.
- It is not clear how Section 7 will be applied to federal actions or federal contractors/permittees/licensees. There is no clarity on how or whether federal parties will get "no surprises" assurance as provided under a Section 10 HCP.
- There was some discussion of using an insurance fund with water user fees or federal funds as a way of providing some protection to federal contractors.
- The distinction was made between funding of facilities and funding of water user indemnity.

17. Other comments

- Some environmental group representatives believe that public money should not be used for environmental restoration, but only for enhancement. Water users should pay for restoration. This means we have to know what the baseline is so that we can determine the difference between restoration and enhancement.
- Some portion of the facilities costs may be charged to flood control. Fees on other users should be considered - power, recreation, fishermen.
- There is concern about the lack of assurances for water transfers; that there is nothing to support the development of a water market.
- In response to a question about the reference to modification of water rights, Mary said this refers to water rights for new facilities.
- Hap observed that appears to be no agreement on funding issues and no agreement on the use of an HCP for water supply reliability.
- It was again suggested that we should add the concept of an indemnity or insurance fund as an assurance for water supply reliability and regulatory certainty.
- In response to the question whether there will be a programmatic 404 permit, Tom Hagler said there is no decision yet, but that this is an option.

18. Process

Mary said that by early January, we will send out a revised version of the draft proposal for review and comment and will take it to BDAC in late January. The next Work Group meeting is set for February 25, 1998.