

White Paper
on the
The Implications of the Conservation Strategy for
Ecosystem Program Institutional Arrangements
David Fullerton
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This paper reflects a number of discussions I have had lately with various stakeholders and agency representatives on the relationship between the Conservation Strategy and the institutional arrangements for implementing the CALFED Ecosystem Restoration Program. In particular, the paper looks at what implications the Conservation Strategy might have for the creation and structure of a new institution, tasked with implementing the ERPP.

No individual or organization has endorsed these remarks. They are solely for the purpose of promoting discussion and dialog.

Coordination vs. consolidation of authority, resources, and accountability

There seems to be broad agreement on the need to consolidate the ecosystem management and restoration functions in some way. However, stakeholders and agencies appear to have a different level of enthusiasm for the creation of a new, non-regulatory ecosystem entity. Stakeholders generally believe that only a new entity will be able to (1) reduce duplication during implementation, (2) contract for services quickly and efficiently, (3) reduce overhead costs, and (4) develop a managerial (as opposed to a regulatory) personality.

Agencies do not reject the idea and, in fact, often make arrangements for other organizations to implement programs, while retaining their regulatory authority. However, the need for such a major institutional shift is less apparent to the agencies. It may be possible to divide up responsibilities for implementation of the ecosystem program between various agencies a few years at a time, with an evaluation of progress and needed adjustments every few years. That is, efficiency and accountability may be possible through a coordination effort as opposed to a consolidation effort.

Design Considerations

Most people agree that the institutional arrangements should be determined by implementation needs. That is, form should follow function. A number of design considerations need to be considered:

- The structure of the Conservation Plan will have major implications for institutional design. The basic concept behind the Conservation Plan is straightforward. The export projects (and perhaps others) will make a series of commitments toward implementation of the CALFED program. Of particular importance for institutional design will be agreements to (1) provide partial funding for implementation of the ERP (possibly including credits for existing payments), (2) operate existing and future facilities

according to agreed rules (e.g., SWRCB standards), and (3) implement various ecosystem restoration projects. In return, state and federal regulatory agencies will provide some degree of assurance that future regulatory changes will not adversely impact export water supplies.

The Conservation Plan is essentially an insurance arrangement in which one side (the water users) pays premiums to an insurer and agrees to certain obligations. Then the insurer assumes some or all of the future regulatory liabilities of the water users. The water users get increased water supply predictability in return for their money. The insurer gets user money with which to carry out restoration.

Note that the Conservation Strategy is intended to go far beyond mere avoidance of jeopardy for endangered species, but will require aggressive restoration efforts. Therefore, financial liabilities may be triggered, not just if new species are listed, but if affirmative restoration targets are not met. This higher bar increases the likelihood of failure and makes the issue of liability and shared risk all the more important.

1. One implication is that, those who bear the residual risk that the ecosystem program will fail (e.g., that new species will be listed and that new water or money will be needed to protect the species) should control, or at least have major influence over implementation of the ecosystem program. This control will assure that the program gives high priority to protecting those who have assumed the liabilities for the program.
 2. Another implication is that the amount of money that the water users should be willing to invest in the ecosystem program will be a function of their remaining liability. If the liability for failure remains largely on their shoulders, they would be expected to pay less up front into the ecosystem program and to demand considerable control over how the ecosystem money gets spent. Conversely, if the water users could be absolutely relieved of all future regulatory liability (no one believes this is possible in the real world), then they should be willing to pay more money up front and to demand less control over the conduct of the ecosystem program.
 3. Similarly, if the public (through commitments by the state and federal governments) assumes financial liability for future regulatory shifts, then the public should have control of the ecosystem program via the state and federal governments.
 4. The greater the chances that the holder of the liability will be required to expend large amounts of money in the future to pay for future regulatory shifts, the less likely that a Conservation Strategy can be negotiated which satisfies all sides (just as with insurance, the premium rises as the risk of a payout rises). This means
- Based upon these considerations, the institutional structure should have the following characteristics:

1. Responsive to those who bear the risks of failure (accountable). This implies that, while the program can be based upon protection of the ecosystem, the implementation program must also give a high priority to heading off new regulatory interventions. That is, the program will be biased toward servicing the needs to species that are or could become endangered.

2. Designed for efficient and effective implementation. If the implementation program is not lean and mean, then the amount of money required for a given amount of restoration will rise as well as the risk of failure. As costs and risks rise, it becomes more difficult to negotiate the Conservation Strategy.

3. Endowed with sufficient tools. The ecosystem program cannot provide high confidence of success (cannot lower the risk of failure) unless it is authorized to fix ecosystem problems wherever they arise. CALFED has indicated that the ecosystem program will be non regulatory. This means that the main tools available to the program will be property based. The eco program will start with some combination of money, water rights, diversion rights, capacity rights, and land rights. It will manipulate those rights to achieve its goals, including:
 - Managing its property (restoring land, using its diversion and capacity rights to improve flow and diversion patterns).
 - Buying property rights (buying land, buying water)
 - Selling property rights (selling land, selling capacity, selling water).
 - Providing incentives to others to manage on behalf of the environment (e.g., agricultural efficiency incentives).

4. Able to direct the monitoring and research efforts as needed to support the management goals.

The eco program is based upon the timely development of ever more highly leveraged approaches to ecosystem restoration and protection. The monitoring and research program should be the responsibility of the eco program and should be viewed as an exercise in applied research, not pure research.

5. No incentives for failure. Having a board made up of the various parties at risk should the ecosystem effort fail is one way to assure that management will remain focussed on success. Another possibility would be to force the eco manager to use discretionary funds to resolve the impacts caused by future regulatory changes, up to some cap. This would give the ecosystem manager a strong incentive to use discretionary funds to head off problems before they reached the point of requiring new regulations.

- The group expressed a preference for shared risk and shared control. That is, the risk of failure should not be placed entirely on the shoulders of the water users or the state and federal governments. If both sides are on the hook, then both sides will have incentives to make the program a success. This implies the need for broad-based governance, with public and water user representation.
- Most of the stakeholders believe that only a new ecosystem entity will be able to satisfy these criteria for institutional design. However, the amount of money that will be committed to the program, the assignment of liability, the governance structure, and the form of the institution (public, quasi public, JPA, non profit) all remain to be worked out.
- Many agency representatives remain unconvinced that these criteria for institutional design imply a need for a new institution. Arguments against a new ecosystem entity include the following: (1) Real institutions are never as good as the theory and the ecosystem entity will be no exception; (2) It will be very difficult to untangle the responsibilities of a new eco entity from those of existing agencies working on ecosystem problems in the watershed; and (3) Existing agencies have enormous expertise, but have simply lacked good coordination up until now.