

DRAFT ASSURANCES PLAN

Introduction

This document supersedes the assurances discussion in the Draft Implementation Strategy dated February 15, 1998, which was included as a Technical Appendix in the March 1998 Draft Programmatic EIR/EIS.

The purpose of this document is to provide the reader with an understanding of what is meant by "assurances" and the status of the preliminary assurances plan. The document includes discussion on the definition of assurances; the process by which CALFED has developed assurances; issues and concerns about assurances raised by stakeholders; the tools and mechanisms which can be used to provide assurances; and the guidelines by which assurances have been developed. It also describes the draft assurances proposal, which includes staging, linkage and bundling of actions in Stage 1; and other element specific assurances designed for and incorporated into Stage 1, including program oversight, as well as management and governance of the Ecosystem Restoration Program (ERP).

Purpose and Definition

The assurances plan is a set of tools and mechanisms to assure that the Program will be implemented and operated as agreed. The assurances plan will include mechanisms to be adopted immediately as well as components for the long term, such as the conservation strategy and the contingency response process. While the principles of the long term assurances plan will be substantially complete before beginning Stage 1, the details of some components will remain to be finalized during Stage 1.

Assurances are the tools or mechanisms CALFED will employ to ensure that both its member agencies and stakeholders will have confidence that the CALFED Bay Delta solution, in the form of the preferred alternative, will be implemented and operated as planned and agreed. For some stakeholders, assurances also means a level of protection from the potential adverse impacts of program actions.

Assurances can be internal to the program or external. Internal assurances are those mechanisms which are integral to program actions, such as staging, linkage and bundling of actions. External assurances are those tools which may be applied to the program, such as legislation,

regulations, or contractual arrangements.

Process for Developing Assurances

During Phase 2 of the CALFED process, the BDAC Assurances Work Group met several times, over a period of two years, to discuss assurance issues, concerns and options related to the development of the assurances package. These discussions occurred at public meetings, held approximately every six weeks, and included BDAC members, invited participants, CALFED agency representatives and members of the public.

Early in the discussions, the Assurances Work Group determined it was necessary to develop a case study in order to focus their discussions. The work group selected a hypothetical alternative that presented multiple assurance issues. This effort resulted in the identification of a number of assurance issues and concerns arising out of program implementation. It also provided that basis for the development of a list of tools and guidelines to use in developing the assurances package. Finally, the case study process allowed the work group to identify some areas of consensus among work group members about assurances, and to clarify where consensus did not exist. More recently, the work group turned its attention to the development of assurances for Stage 1 implementation.

Periodically, CALFED staff or BDAC members presented updates to the full BDAC on the work group's efforts. The work group process and resulting discussions at BDAC have identified the basic structure of the assurances package. However, neither the work group nor BDAC have been able to develop a comprehensive assurances package that addresses every concern or the satisfies all stakeholder and interest groups. Thus, it will be necessary to continue work on long term assurance issues during Stage 1 implementation.

Assurance Issues and Concerns

Some assurance issues and concerns relate to program implementation generally. Other issues are directly related to the implementation of a specific component, element or action within the program. Some of the major assurance issues identified by the Work Group are:

- 1. Program implementation oversight and coordination** - How will the program generally be managed; will CALFED continue to function as the oversight agency; how will the individual agencies participate?
- 2. Management and implementation of the Ecosystem Restoration Plan (ERP)** - Is a new entity necessary or desirable to manage the ERP? Or can the ERP be managed by existing agencies?

3. Protection of water rights and area of origin priorities - How will the long term solution affect water rights and area of origin priorities? What protection to these rights can be provided?

4. Regulatory stability - How can the program assure water users of a stable regulatory environment? To support the CALFED program and the ERP in particular, water users need an assurance that new regulatory constraints will not adversely affect water supply reliability.

5. Protection of existing environmental conditions - What assurance can be provided that existing environmental conditions in the solution area will not be impaired? To support the program, environmental groups and resource agencies need an assurance that water supply demands and/or new facilities will not impair achievement of ERP objectives.

6. The role of stakeholders in implementation - How can stakeholders continue to be involved in program implementation? Will the role be advisory or can stakeholders directly participate in decision making?

7. Water project operations - Program implementation will probably result in changes to Central Valley Project (CVP) and State Water Project (SWP) operating criteria and Delta water quality requirements. How can assurances be provided that such changes will not adversely impact water supplies or environmental conditions in the Delta?

8. Adaptive management - Adaptive management by definition requires flexibility in operations and decision making. How can the assurance package reflect this essential requirement without unduly restricting implementation of the program?

9. Costs and cost allocations - How can assurances be provided that funds for program implementation will be available when needed and that cost allocations will be equitable?

10. Local economies and environment - Some stakeholders are concerned that program implementation may adversely affect local economic or environmental conditions.

11. Linkage and "getting better together" - For some stakeholders the fundamental assurance issue is whether the program can be implemented in such a way that all major sectors (agricultural, urban and environmental water users) receive some benefits from the program and are not overly burdened by costs.

Tools

CALFED Staff and Work Group participants developed a list of tools and mechanisms available to meet the assurance needs and stakeholders' concerns. The most obvious assurance tools are legislation, regulation, and contracts. Some believe that the only reliable assurance tool for

certain issues is a physical solution. Some tools would provide greater certainty of program implementation but may be legally or politically more difficult or more expensive to use than others. Selection of specific tools for the "assurances package" is, therefore, a function of balancing risk and certainty against costs and difficulty of use.

1. Constitutional Amendments. Federal or state. Article X §2 of the California Constitution, for example, requires the reasonable and beneficial use of all water. Constitutional amendments are difficult to obtain, and difficult to modify.

2. Statutes. Federal or state. Examples of statutes that govern management of a resource include the state and federal endangered species laws, state and federal water quality statutes (the Porter-Cologne Act and the federal Clean Water Act), state and local land use statutes and the federal Central Valley Project Improvement Act. Statutes may be modified by act of Congress for federal statutes and by the Legislature for state statutes

3. 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 imposed constitutional and statutory limits on local financing and property taxes), 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.

4. Regulations. Federal or state. Adopted by administrative agencies to guide implementation of their duties and obligations. An example is the California Environmental Quality Act (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.

5. 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. Examples: the Racanelli decision on the 1978 Water Quality Control Plan; and the California Supreme Court opinion in the National Audubon case, particularly the application of the "public trust" doctrine.

6. Executive orders. The President and Governor both may issue executive orders, such as the Governor's executive order to form the Water Policy Council. Executive orders may be modified by action of the President or Governor.

7. 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.

8. Contracts. Legal agreements between two or more individuals or entities. Generally, no one party may unilaterally modify the terms or conditions of a contract. Enforcement may be specified in the terms of the contract and remedy for breach is available through the courts.

9. Memoranda of understanding/agreement. MOU/MOAs are interagency agreements with varying levels of specificity. Many are general agreements to cooperate that may be terminated at will by any party. Others are more specific and bind the agencies to a particular financial or programmatic commitment. 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.

10. 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." Federal legislation would be needed to authorize a federal agency to participate in a joint powers agreement with a state agency.

11. New entity/agency. Created 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.

12. Financing mechanisms. Various processes are available for generating capital and operating revenues. Water user fees are one example.

13. Bond measures. Bonds may be enacted by legislation or by voter referenda. Provisions in the authorizing legislation or in the bond instruments could be used to establish Program requirements, schedules or related commitments.

14. Market incentives. Market forces can be used to encourage or discourage specific behaviors. For example, a water transfer market can create an incentive to use water more efficiently so that the unused portion can be sold.

15. Physical solutions. Constructing a conveyance facility to carry a specified amount of water is one example of a physical solution to an assurance problem.

16. Parallel or linked implementation. Implementing elements of differing components in parallel or linked processes can provide an assurance that one component is not completed before another is begun.

17. Public oversight/public involvement process. This includes public involvement, public advisory processes and dispute resolution mechanisms.

18. Multiple Species Protection Plans. These plans, which are usually called Habitat Conservation Plans (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.

19. Programmatic permitting. Regulatory assurances could be provided in some circumstances by a programmatic permitting process for the CALFED Program, which would incorporate agreements regarding the actions to be required in the event of future regulatory constraints.

Guidelines for Evaluating Assurances

CALFED staff and the Work Group identified Guidelines to use in evaluating assurances.

- 1. Satisfy the Program solution principles** (implementable, durable, affordable, equitable, reduce conflicts, no significant redirected impacts).
- 2. Provide high confidence that identified actions will be taken and identified programs will operate as agreed.** CALFED cannot guarantee outcomes. Assurances should not be used to compensate for perceived problems in the solution itself.
- 3. Ensure that the solution contains clearly articulated performance criteria and proposed schedules for attaining program goals.**
- 4. Specify that the written description of the solution constitutes the entire agreement.** Unstated assumptions about program implementation should not be binding.
- 5. Structure the solution to be self-executing.** The solution, once implemented, should be minimally dependent upon factors outside the solution framework.
- 6. Include recovery mechanisms for natural processes.** The solution should contain internal mechanisms capable of responding to surprises and disappointments.
- 7. Provide for implementation of the entire program, even though implementation will occur in stages.** Staging, funding, and institutional arrangements should be structured so that stakeholder groups have an incentive to support full implementation of the CALFED solution.
- 8. Allow for adaptive management, wherever the current state of knowledge is inadequate to made definitive choices now.**
- 9. Allow for variations in the need for certainty on program components.** Some parts of the program may need to be "set in stone"; other areas may require a more flexible approach. This

suggests that assurances may vary in nature and scope among components.

10. Work within existing statutes, regulations and institutions where feasible.

11. Provide for public involvement in decision making. To maximize the level of public support, the plan will should contain mechanisms for soliciting and responding to public opinion.

12. Provide that assurances are complementary and integrated.

13. Minimize costs of assurances. The assurances package should be structured to provide the necessary assurances at the lowest possible cost.

Preliminary Assurances Plan

Overview

The preliminary assurances plan is an integral part of the implementation plan and includes assurance mechanisms which are program-wide and element-specific, internal and external, long term and short term. Eventually, the assurances plan will consist of several related components:

- A programmatic implementation plan or agreement
- Program wide assurances, including Program oversight and management
- Specific assurances for Program elements and actions
- Contingency Response Process

Over the long term, assurances will also be provided through the Conservation Strategy and the Comprehensive Monitoring Plan, both discussed elsewhere in the Phase 2 Report.

Not all of these assurance components will be fully developed prior to Stage 1 of the implementation process. Therefore, CALFED and stakeholders will need to continue work in Stage 1 to complete the long term Assurances Plan. During Stage 1, assurances will be provided by the linkage and bundling of actions; by Program oversight and management functions; and by element or action specific assurances.

Additionally in Stage 1, these following steps will be taken to develop the assurances package:

1. Complete programmatic implementation plan (yr 1)
2. Finalize coordination among agencies or agreement on new entity (yr 1-3)
3. Refine conservation strategy (yr 1-3)
4. Develop mechanisms to allow incidental take, where necessary, for those actions

- identified in the Record of Decision to be completed during Stage 1 (yr 1)
5. Recommend legislation, if necessary, to implement new institutional arrangements or facilitate program implementation (yr 2-3)
 6. Incorporate the final State Board's water rights decision for allocation of responsibility to meet flow requirements for Water Quality Control Plan 95-IWR (May 1995) in water transfer and operational rules (yrs 1-2)
 7. Implement an environmental documentation and permit coordination process (yr 1-7)
 8. Implement and revise contingency response as needed (yr 1-7)

Stage 1 Assurances

Assurances in Stage 1 are in many cases provided in the way that actions have been selected and proposed for implementation, and by linkage and integration with other Stage 1 actions. The concept of linkage provides that actions of one element will not be implemented unless linked actions in a different element are also implemented. Bundling refers to the idea of putting actions from different program elements into one project for purposes of CEQA/NEPA compliance or other permit requirements. Thus, a set of actions from a particular element cannot be implemented without counterpart actions from other elements also being implemented. Assurances will also be provided by conditional decision making. A decision is conditional if it can only be made after a specific set of events have occurred or specified criteria have been met.

Additionally, since in Stage 1 the program is dealing with short term implementation efforts, perhaps on the order of 2 or 3 sets of bundled actions over a seven year time frame, there will be frequent and periodic checkpoints at which parties can determine if the program is meeting their needs and expectations. Effectively, the commitment of all interested parties will not have to last any longer than the current set of bundled actions requires for permitting and implementation. This reduces the need to develop long term assurances prior to the beginning of Stage 1.

Program Governance

There are two distinct assurance questions related to program management and governance. First, how will the program as a whole be implemented, managed and governed? Is CALFED the appropriate entity for program management. Second, how will the ERP specifically be governed and managed. Is the current CALFED structure adequate or is a new arrangement needed?

Program Oversight and Management - The tentative premise is that CALFED will continue to function as the general program manager and provide oversight and policy guidance for program implementation. There has been some discussion, without resolution, on whether CALFED should be formalized by a joint powers agreement or some similar mechanism. Some stakeholders believe that the current structure is not adequate to deal with the issues which will arise in managing a multi-billion dollar program which cuts across several agencies'

jurisdictional lines. It has been argued that a centralized apparatus, with a well defined decision making structure, which is not wholly dependant on informal consensus, will be necessary to provide program oversight for long term implementation. One possibility, for example, is a joint federal-state authority, with delegated powers and purposes and designated agency representatives acting as a board of directors.

A major oversight function will be to determine when program implementation milestones or performance measures have (or have not) been achieved and making the necessary reports or findings so that the program can move on to the next stage of implementation. Other oversight functions will include development of program budgets, project prioritization, and inter agency coordination. Also, the oversight entity will be called upon to make the necessary decisions and program adjustments due to unforeseen or uncontrollable events, as described in the contingency response process (See Section 7.5).

Stakeholder participation at the program level can be provided by a new or reconstituted advisory committee such as BDAC. This role could be expanded from its current limited advisory capacity to more active involvement in making findings necessary to advance the program to the next stage or in preparing and adopting reports to the Legislature and/or Congress.

ERP Management and Governance - Many stakeholders believe that the best way to assure achievement of environmental improvements in the Bay-Delta system is to endow an environmental trustee with the financial means, legal rights, authorities, and discretion needed to carry out the Ecosystem Restoration Program (ERP). Stakeholders support such an approach for a variety of reasons, many of which are listed below. This approach is consistent with CALFED's determination that the ecosystem restoration program will not, in general, use regulatory mechanisms to secure new environmental improvements. (See Chapter 6 of the ERP Strategic Plan.) At the same time, no regulatory authorities of existing agencies to protect the ecosystem will be weakened or altered. The creation of such an environmental trustee would:

- Increase accountability. The trustee would be a single purpose organization whose success or failure would be judged by the success or failure of the ecosystem program.
- Simplify decision making. The trustee would be in a position to create and implement an integrated restoration program to meet the CALFED ecosystem goals.
- Encourage environmental efficiency. Accountability will drive the trustee to invest its limited resources in highly leveraged restoration actions and studies.
- Assure Flexibility. Many assets of the trustee would be fungible and could be reallocated as needed in light of improved science and changed biological conditions.
- Expand participation. A trustee institution could be structured to allow significant participation from affected stakeholders and the public in the decision making process. It could also be responsible for coordination with other restoration programs.

The trustee institution would play four roles within the CALFED Program:

- Manager. Responsible for planning, executing, and funding ERP actions; for directing ecosystem monitoring and research; and for revising ERP action plans adaptively.
- Rights Holder. Hold rights to land, water, conveyance, and storage.
- Operations. Have some degree of influence over water project operations on a "no net loss" basis to minimize diversion impacts.
- Overall Governance Structure. Report back to CALFED and to NMFS, FWS, CDFG, EPA and other regulatory agencies on the status of implementation.

The possibility that the trustee might provide some (as yet undetermined) degree of regulatory stability to water users has been discussed.

The trustee institution would be endowed with the following resources, tools and authorities:

- An initial endowment of money, water, storage, conveyance, pumping, and property rights. The water endowment would be based upon and built from a well defined baseline.
- An assured income stream.
- The right to manipulate funds and property to implement the ERP. That is, the trustee would be able to sell or trade its rights, purchase or lease new rights, spend its funds, entail future income through bonds, etc., in order to implement the ERP and to optimize environmental conditions.

The Trustee would be governed by a Board of Directors. The Board would hire an executive director. A public advisory committee would provide advice to the Board and a scientific review panel would provide peer review. The legal form of the trustee institution, the makeup of the Board, and the selection process for the Board have yet to be determined. However, the Board should include broad participation from both state and federal agencies, and stakeholder interests. A number of structural alternatives are under discussion, including:

- A state agency with federal participation on the Board.
- A joint state/federal agency.
- A public corporation, trust or conservancy.

Summary of Other Stage 1 Assurances

In addition to the usage of linked and bundled actions and institutional structure as assurance mechanisms, each of the major program component or elements requires more specific assurances. These are summarized in this section.

Financing Issues - The finance plan incorporates significant assurances that the program will be implemented as agreed. Assurances that the financing plan will operate as agreed will be addressed by cost-sharing agreements, state and federal appropriations and related legislation, and provisions in state bond measures.

Monitoring Issues - The monitoring program can provide assurances that the ERP in particular achieves its performance measures and/or that the data necessary for adaptive management decision making is available.

Water Transfer Policy - There are two aspects to assurance issues for water transfers. Upstream and area of origin interests want an assurance that water transfers will not result in adverse impacts, such as loss of water rights or environmental and socio-economic damage. The clearinghouse is one assurance CALFED can offer to these interests, if it is set up so that it can provide public disclosure of transfer analysis and impacts. Legislation will be required to create the clearinghouse and define its scope of function and authority.

Exporters and environmental interests want some assurance that water transfers will be reliable sources of supplemental supply. Such assurance can be provided by resolving, prior to or during Stage 1, the issues related to the definition of transferable water and other operational questions, by developing rules and/or a process for protection of transferred water to the point of delivery, and by providing reliable access to wheeling and storage facilities. Most of these issues can be resolved by policy decisions at the CALFED level, in cooperation with stakeholder interests.

Water Use Efficiency - Assurances for the water user efficiency element will be provided by incentive and assistance programs to encourage water conservation. The funds necessary to implement these programs will be provided by appropriations, bonds or user fees. Such programs would be administered by DWR, USBR or the ERP manager.

Any water user receiving benefits from the CALFED Bay-Delta Program will be required to meet the applicable urban, agricultural or refuge water conservation measures and must be so certified by the appropriate authority or agency.

If, after two years from certification of the Programmatic EIR/EIS, local agencies do not have certified conservation plans, they will lose eligibility for financial incentives or technical assistance programs. Failure to meet the applicable conservation requirements could also result in denial of access to facilities for transfers. In some cases, there may be existing legal authority for imposition of a penalty added to the cost of water, or for a reduction in the amount of water delivered. As an additional assurance, if after two years a sufficient percentage of water agencies

have not voluntarily met the conservation standards and targets, state legislation would make those standards mandatory.

Construction and operation of new storage facilities would be linked to an agreed upon level of compliance with water management standards. This condition would be incorporated into any bond or appropriations language providing funding for studies of new facilities.

Levees - The critical assurance for the levee element is to provide a reliable revenue stream for levee repair, maintenance and operations. DWR will administer funds for ongoing levee maintenance enabling all local districts to attain PL 84-99 standards. To provide security to the revenue stream, the levee program will be supported by bonds or user fees, in addition to appropriations provided by legislation.

Any needed improvements on critical western delta islands will be completed prior to construction of an isolated Delta conveyance facility if that contingent strategy were to be implemented sometime after Stage 1.

An interagency emergency response program would be created and administered by DWR to assure timely response in the event of emergency conditions. The program would define protocols to follow in the event of levee(s) failures and assure that initial funding and necessary equipment would be available in a timely manner. This may require legislation.

Levee improvements will be closely linked and coordinated with ERP. An ESA Section 7 consultation or HCP/NCCP would provide protection of endangered species during levee maintenance, and would in turn provide assurances to the levee owner regarding the conditions under which maintenance could occur.

For Delta interests, it is critical that the concept of the "common pool" be retained in the implementation of the program, on the basis that the best assurance of continued long term support and funding for Delta levees is the continued reliance of the export projects on pumping from the south Delta for a majority of export supplies.

Ecosystem Restoration - Whatever the form of the management entity, the manager of the ERP should be able to perform the following functions:

- buy and sell water and property through purchase, lease, etc;
- develop and participate in incentive programs and market transactions;
- contract with private parties and public agencies for project implementation;
- obtain funding from public and private sources for projects and programs.

Many stakeholder groups and participants of the Assurances Work Group believe that it would be advantageous to have a new entity (probably a new public agency or conservancy/trust) whose sole purpose is ERP implementation. See Section 7.3.2. for additional discussion.

A major issue for ERP implementation is financing. Through a combination of federal and state appropriations, Proposition 204, local agency contributions to Category III projects, CVPIA Restoration Fund, and other funds such as Four Pumps, there may be in excess of \$1 Billion available for ERP actions over the next 10 to 15 years. However, many participants in the CALFED process believe that additional dedicated funding may be necessary, in order to avoid reliance on annual appropriations. Three options for ERP funding have been identified, and the financing plan will probably include a combination of these.

- User fees - Most CALFED participants believe that long term funding outside of the scope of the annual state and federal budget process is necessary. One option is the levy of fees on water users and others (power recreational fisheries) within the Delta watershed, to partially fund ecosystem restoration. Such fees could be linked to the timely completion of water supply facilities in order to link the ecosystem restoration program and water supply reliability. The linkage would work in both directions, i.e., progress on permitting and construction of facilities would be conditioned on funding of ERP, and implementation of ERP would be conditioned on permitting and constructing facilities.
- Federal and state appropriations - Another option for funding ERP implementation is to seek legislation authorizing and appropriating dedicated state or federal funds, over a period of years. A related option is to authorize the appropriation of CVPIA Restoration Funds to be used for ERP.
- Bonds - Another option is general obligations bonds, similar to Proposition 204.

Another major issue for ERP implementation is to ensure that a secure supply of water for environmental and instream purposes is available. This is water over and above the agreed upon regulatory baseline. While distinct options can be identified to do this, the most success will likely be achieved by a combination of these.

- Federal legislation to amend CVPIA - One method to secure water for the ERP is to seek legislation assigning at least some of the 800,000 acre feet of fish and wildlife water provided by Section 3406(b)(2) of the CVPIA to the ERP manager. This water would become a contractual entitlement of the ERP manager.
- Water rights under state law - Another option would be to modify state water rights law to allow the ERP manager to acquire instream water rights. (Water Code section 1707 allows instream transfers, but does not provide for an actual instream water right.)
- Transfer market access - The ERP manager will also need to be able to access water markets in order to augment baseline instream flows. Thus, the ERP manager will need sufficient funds to participate in the market

The ERP Implementation Plan will provide for an independent scientific review process to assess the progress of restoration and monitoring actions, as well as the status of planning efforts

for future actions. Scientific peer review will help ensure durable and effective adaptive management of the ERP. The review panel will prepare a report annually recording their findings and recommendations. This peer review group will advise and consult with the ecosystem manager on issues within its purview.

Depending on the level of stakeholder involvement provided at the CALFED program oversight level and in the ERP management entity itself, a citizens advisory committee may be desired to advise and consult on implementation of the ERP. The committee would provide advice to the ecosystem restoration manager on implementation, monitoring and planning.

The ERP adaptive management plan will include a set of objective performance measures (narrative or numerical) which will be used as benchmarks for gauging the success or failure of a specific action. Performance measures can be defined by whether a particular ecological indicator is achieved within a reasonable period of time, or by whether a specific action or set of actions is implemented within a certain period of time. If the ERP is not achieving the desired performance measures, other program actions can be delayed or deferred until remedial action is taken.

ERP implementation will be linked to levee restoration projects and to construction of water supply facilities. For example, permit work, construction and/or operation of an isolated facility (in the event that contingent strategy were to be implemented) might be conditioned on achieving agreed upon performance objectives of the ERP. Similarly, continued funding of the ERP may be linked to adequate progress on achieving improvements in water supply reliability.

Water Quality - The Stage 1 water quality programs and actions, such as source control/land retirement, can be funded by annual appropriations, bond proceeds, user fees or some combination thereof. The precise combination will be an issue for negotiation among the stakeholders and the CALFED agencies during Stage 1.

Watershed Management - The basic assurance is secured funding for locally managed watershed programs and projects. Funding will be included in CALFED bonds and/or appropriations.

Water Supply Reliability - There are two aspects to assurances for water supply reliability in Stage 1. First, water users want some assurance that new regulatory constraints will not be imposed which would negate or offset the water supply improvements generated by Stage 1 actions such as Joint Point of Diversion, Interim South Delta Program or the Tracy-Banks Intertie. For the short term, this assurance can be provided by an extension of the Accord.

Second, since it is unlikely that there will be any construction of surface storage or conveyance facilities during Stage 1, water users want assurances that the process of planning and permitting new facilities will go forward. This can also be addressed in an extension of the Accord.

Water supply reliability assurances with respect to facilities in Stage 1 are provided primarily by implementation timing, linkages and the "conditional" decision making process. Authorization for new storage facilities will be linked to achieving agreed upon levels of success or progress in other program areas such as water conservation, water transfers, and ecosystem restoration. Once permitted and constructed, additional assurances will be provided by conditions on the operations of new storage facilities, such as yield sharing or time limits on diversions to storage.

With respect to conveyance, the contingent strategy provides that a new conveyance facility will not be incorporated into the program without findings on the water quality/public health benefits issue and the fishery protection issue. Additionally, In-Delta, upstream and environmental interests want assurances that a new facility, if constructed, will not be operated to their detriment. These assurances can be provided by such measures as agreements on export limits, preservation of the "common pool", flood and seepage protection, etc.

Water rights and area of origin priorities must not be impaired by development of new storage and conveyance facilities. Such assurances can be provided by conditions on water rights for new facilities; rules for wheeling water through the state and federal facilities to minimize third party and environmental impacts; rules for conjunctive use programs including provisions minimizing third party and environmental impacts; and dedication of a portion of new storage capacity to upstream uses (areas of origin).

If new facilities are constructed, costs must be allocated among the parties. The actual cost sharing agreements will be worked out during Stage 1. Generally, the guiding principle will be that those who benefit from new facilities will pay for them.

For the long term, Project operators, water users, and exporters seek assurances that CVP and SWP operations will not be unreasonably constrained in the future by new ESA regulatory requirements. If the ERP and the Conservation Strategy provide a sufficient level of environmental protection, restoration and operational flexibility, and if water users can provide the financial resources, CALFED may be able to provide some level of regulatory certainty to water users that new ESA listings or other regulatory constraints will be managed through the ERP and not impair water supply reliability. The degree of long term assurances of regulatory stability will to a great extent be a function of the degree of assurances that the ERP will be implemented and achieve its objectives. These must be in balance. In other words, assurances for water supply reliability cannot be stronger or weaker than the ERP assurances, and vice versa. This issue will have to be resolved during Stage 1.

The Contingency Response Process

The Contingency Response Process is to be used when elements of the solution cannot be implemented or operated as agreed.

The Goals of the Contingency Response Process

1. To provide an accountable process that promotes appropriate actions by Program managers when contingencies or unpreventable circumstances affect Program functions.
2. To avoid disrupting Program implementation any more than necessary. The Program should not have to come to a halt while minor problems are resolved. By the same token, minor problems should not be allowed to become serious because they are not dealt with.
3. To increase the potential for effective, efficient solutions to contingencies. The process should be designed so that resolution of problems caused by unpreventable circumstances is speedy and minimizes staff time and financial resources.
4. To promote Program durability by avoiding or minimizing imbalances among interests when unpreventable circumstances occur. Having a contingency response process that acknowledges and deals with the need to rebalance benefits and costs when necessary should provide incentives to various interests to promote stability in the Program.

Issues and Concerns

Problems with Program implementation or operation will directly affect CALFED member agencies and stakeholders. This underscores the need for an agreed-to process to restore Program functions for those who would be adversely affected by the inability of the Program to carry out the agreed upon solution.

The Assurances Work Group participants expressed concerns about how contingency levels would be determined and by whom, and how the process could be structured to prevent arbitrary use to modify Program implementation or operations. There was a concern that what might be a minor contingency to one geographic area or to one interest might be perceived as significant by another. To address this concern, contingency levels should be determined based on the effects of unpreventable circumstances on Program implementation, not on effects to various interests.

Concern was expressed that the process could be used to manipulate Program actions or objectives without the existence of triggers or thresholds to be met before it would be utilized. Some of the common program elements will have some form of internalized, or built-in, contingency response mechanisms. When those mechanisms fail to resolve problems, the Program Contingency Response Process will be triggered. This assumes that some likely

contingencies are anticipated by the Program and methods to deal with them are made an intrinsic part of implementation or operation guidelines.

An example of internalized mechanisms to deal with a contingency would be explicit sanctions built into the Program for the refusal of any water user to pay agreed-to water diversion fees into the ERP. Such an action could impede the ecosystem restoration program from reaching its objectives. By crafting an implementation plan that included contractual agreements and tied benefits to payments, the contingency could be dealt with two ways: A water user who suddenly refused to carry through with a prior commitment would lose its "no surprises" protection, and it could be subject to legal recourse. Only if these internalized mechanisms failed to produce a viable resolution would the Program Contingency Response Process be utilized.

Other Program elements will have internalized mechanisms to resolve problems. Where mechanisms internal to a common program element exist to deal with contingencies, those will take precedence. In certain cases, such internalized contingency responses may fail to resolve problems. In other instances, no internalized responses may exist to deal with contingencies. A situation where no built-in mechanisms exist would be one in which, at the end of Stage I, one or more common programs did not achieve stated objectives or did not complete agreed-to actions. Since the solution requires that each stage be completed before the next one is begun, the Program would likely be stopped, unless it had an agreed-to process to negotiate how to bring lagging elements up to needed performance levels and/or how much other elements of the program might be allowed to proceed while problem areas were being dealt with. Where internalized mechanisms fail to produce needed results or where no such mechanisms exist, the Contingency Response Process will be the Program method of resolving problems.

Minor Contingencies

For minor contingencies, Program policy should be to delegate decision making to the lowest possible level. For instance, if a contractor responsible for a restoration project did not perform as agreed to, it would be the responsibility and authority of the Program project manager to remedy the situation. All contracts would likely contain remedies for non-performance, and it would be unnecessary to refer such a problem to any oversight committee unless the project was so significant in scope that it alone could prevent the ecosystem restoration program from achieving its objectives.

Under circumstances where the outcomes of non-performance have negligible effects on the overall Program or on the affected common program element, it should be the policy that other common program element managers and overall Program administrators be informed of the problem and the resolution. Maintaining good communication ensures that if, for whatever reason, a series of minor contingencies in one program could become a problem for different programs, other managers could evaluate the situation and make recommendations to reduce potential problems. If for any reason a minor contingency became significant and could not be resolved through internalized mechanisms, the common element program manager should be

required to refer the problem to an oversight committee, discussed below, for application of the Program Contingency Response Process.

Significant Contingency Responses

Significant contingencies, which prevent common program elements from achieving objectives, may affect multiple common elements because of linkages in the programs, or may affect Program implementation or operation. Thus, the response process should be more inclusive and more formal than for minor contingencies. If the contingency is significant to only one common program element, the manager of the program should be responsible for notifying other program managers of the problem and working with them as appropriate to resolve the problem. Written notice of the problem should also be provided to affected parties so that there is adequate communication about contingency effects on the Program and efforts to resolve them.

It should be the policy of the Program to automatically employ the Contingency Response Process and to convene the oversight entity to develop alternatives and make decisions when a significant contingency affects more than one common element. This will reduce the potential for conflicts or unintended consequences which can result from one common program element manager taking unilateral action to resolve a contingency that affects more than his or her program element. It may be desirable to have the oversight entity be responsible for the Contingency Response Process. Another option is to set up a special contingency oversight committee. Since significant contingencies may have considerable effects on stakeholders, there should be thought given to how stakeholders can participate in the process or whether representatives of such interests should be members of the decision making body.

Catastrophic Contingency Response

The same oversight entity or contingency committee should be convened when contingencies have catastrophic effects on the Program: implementation or operations are immediately halted and/or changes in implementation and operations policies will be required in order for the Program to continue. An example would be adoption of new water quality standards several years into the program that make it impossible to operate water supply facilities as agreed. Under such circumstances, it is recommended that the oversight entity or committee take on the role of guiding a larger process. Instead of being the body which develops alternatives, it would preside over a formal process that includes immediate public notice, a series of public hearings, direct stakeholder involvement in alternatives development and negotiation of the new terms of implementation and operations, and written findings of the public process before any modification of the Program is agreed to.

Emergency Contingency Response

Emergency contingencies will be dealt with differently than other contingencies. Sudden, unexpected occurrences such as floods or earthquakes that pose imminent loss or damage to life,

health, safety, property or essential public services will trigger responses by emergency management organizations outside the Program. Emergencies may require suspension of Program operations. Under such circumstances, a specific position or a team comprising several designated positions from the Program would be responsible for coordinating communications and any necessary Program actions between the emergency management organizations and Program managers. The Contingency Response Process will likely have to be utilized once emergency conditions abate or are stabilized. Outcomes from emergency contingencies might require temporary or permanent changes in the Program, depending on the severity and magnitude of the event. Depending on the post-emergency conditions, the process for significant or catastrophic contingencies may be required.

Proposed Contingency Categories and Program Responses

Category	Effects/Outcomes	Response Process
Minor	<p>Has negligible effect on Program implementation or operation and/or</p> <p>Confined to single program element with low risk of affecting others and/or</p> <p>Requires only minor and/or temporary changes in implementation or operation of affected element</p>	<p>Delegated to lowest appropriate decision maker.</p> <p>Immediate response and resolution as deemed appropriate by decision maker.</p> <p>Notification to other Program managers as appropriate.</p>
Significant	<p>Will prevent achieving element objectives and/or</p> <p>May immediately affect more than one element or has potential to affect more than one element if not resolved and/or</p> <p>May immediately or eventually affect Program implementation or operation and/or</p> <p>Requires significant changes in implementation or operations on either temporary or permanent basis</p>	<p>If one element affected, delegated to highest appropriate decision maker in charge of implementing that element.</p> <p>If more than one element is affected, oversight entity will resolve.</p> <p>Notice to all Program managers and other affected parties.</p> <p>Written notice of resolution of outcome to all managers, Program administration and affected parties.</p>
Catastrophic	<p>Immediately halts Program implementation or operations and/or</p> <p>Requires changes in Program policies in order for Program to go forward</p>	<p>Formal process</p> <p>Early public notice</p> <p>Public hearings</p> <p>Stakeholder involvement</p> <p>Written findings</p>
Emergency	<p>Sudden, unexpected occurrences that pose imminent loss or damage to life, health, safety, property or essential public services and/or</p> <p>Requires immediate suspension of Program operations</p>	<p>Immediate notification of appropriate emergency management organizations.</p> <p>Delegated responsibility within Program to coordinate with emergency management organizations</p>