ECOSYSTYEM ENTITY WHITE PAPER

(Cliff Schulz)

On two occasions, the Assurances Technical Team has presented to the policy group recommendations concerning methods for implementing the CALFED Bay-Delta ecosystem restoration plan ("ERPP"). Based on those recommendations, the policy group instructed the Assurances Technical Team to proceed on the assumption that a new entity would be created to manage the ERPP, and to develop, in cooperation with CALFED staff, an administrative structure and decision-making processes for that entity.

At the same time CALFED's ecosystem workgroup was also considering this issue. At a meeting earlier this year, the workgroup endorsed the concept of a new entity. CALFED also retained the Natural Resources Law Center (then under the direction of Betsy Reicke) to prepare a paper discussing preliminary considerations related to designing a new environmental restoration entity. This paper, issued February 2, 1998, has been distributed to the Ag/Urban policy group. Apparently, the paper generated substantial controversy among the CALFED agencies, as it did assume (although without deciding) that a new entity would be created. On March 16, 1998, the NRLC issued a second paper stating that it was not promoting a new entity, but merely describing how one might be organized if one were to be created. This white paper does not reconsider the issue of whether a new entity should be formed. Instead, using the February 3, 1998, NRLC paper as a guide, this paper addresses the new entity's structure, governance, and operation.

Several aspects of the first NRLC paper impressed the Assurances Technical Team. The issue areas and lessons from history described in that paper appear to present logical outlines for identifying and solving problems related to the form and operation of a new ecosystem entity. The seven issues identified are:

- Scope
- Functions and Responsibilities
- Operational Attributes
- Types of Authorities
- Legal Structure
- Financial Resources
- Membership and Participation

Each of these will be discussed below and policy questions will be raised which require Ag/Urban consideration. However, before we could begin to examine these seven issue areas, we had to reach a common consensus on how we viewed the proposed ecosystem program, how it would depart from past approaches, and how the program should interrelate with existing regulatory and water supply agencies. Therefore, this white paper starts with a vision statement that guides the remainder of the paper.

Vision Statement

For several decades, conflicts between ecosystem and water supply needs have been fought in the regulatory arena – originally before California's State Water Resources Control

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Board and more recently pursuant to federal authorities such as the Endangered Species Act. The resulting regulatory risk has substantially increased the uncertainty of vital water supplies, while not significantly improving the health of the Bay-Delta ecosystem. At the same time, over a half-dozen agencies have begun monitoring and studying the Bay-Delta, often without adequate coordination. This has resulted in sometimes duplicative and ineffective ecosystem programs.

The overreaching purpose of the AgUrban's recommended approach to ecosystem restoration is not to supplant the existing regulatory authority of agencies such as the EPA, the Federal Fish and Wildlife Service, and the California Department of Fish and Game. Therefore, at the outset, it should be emphasized that the new ecosystem entity will not possess regulatory authority. Instead, the goal is to implement a nonregulatory, highly coordinated, well-funded, market based adaptive management plan that will protect and improve the environment, thereby avoiding the need for agencies to exercise their existing regulatory authority. Equally important, if, despite best efforts, new species become endangered or other unforeseen circumstances require environmental action, the new entity will use its assets and expertise to respond to such circumstances, thereby providing certainty that water users will not be adversely impacted as they have in the past. Some of the critical factors that lead to the recommendation that a new entity should be created and to the recommendations concerning its makeup and functions can be summarized as follows:

a. Market mechanisms will be employed to achieve and surpass regulatory requirements and to reduce conflict with water project operations. The entity will have a budget and must constantly appraise and reappraise what actions will provide the greatest benefit at the most reasonable costs within available financial resources.

b. Assurances to stakeholders would be facilitated through mechanisms for risk assessment, risk management and risk indemnification. In this regard, the entity will act similar to an insurer rather than a regulator.

c. Responsibility and accountability for performance and attainment of objectives would reside with a single entity, endowed with adequate financial and technical means, thereby reducing overhead costs and the potential for inconsistent actions. It is critical to the success of the ecosystem program that there be a single responsible organization.

d. Ecosystem management, to be successful, must be adapted regularly and immediately to improvements in the underlying scientific understanding.

e. A single entity should be responsible for all funds available for Bay-Delta ecosystem programs and for prioritizing projects.

f. Monitoring to fill specified, policy-relevant data gaps must be driven by and integrated into decision making on an ongoing basis. The same entity holding the adaptive management authority must coordinate and prioritize the monitoring and study programs.

g. The type of functions proposed would be best carried out if there were broad-based stakeholder participation in governance of the entity.

The creation and use of a new ecosystem entity is a positive reinvention of government necessary to meet the challenge of Bay-Delta restoration. No existing agency acting alone, and no group of agencies acting in concert, currently perform these functions in the way or to the extent envisioned. Certainly, none now involve the direct participation of non-federal or State agency stakeholders. The entity here envisioned is without precedent and will have to be invented by the governmental, water user, and environmental stakeholders in concert.

The AgUrban stakeholders believe that moving beyond the compulsions of the regulatory status quo and developing a strong scientifically based adaptive management program will result in a better future for all stakeholders. However, to avoid regulatory actions, all stakeholders must understand and acknowledge that we must responding effectively to environmental needs as they arise, when the necessary adjustments are relatively painless, rather than deferring action until crises overwhelm the opportunity for preventative measures. That is the vision that the new entity would carry out.

Scope

[To Follow]

Functions and Responsibilities

As detailed below, the functions of the ecosystem entity are likely to be very broad. The breadth of these functions will likely influence other factors such as legal structure and financial resources. **It should be emphasized again that the entity will not possess regulatory authority**. However, it may often make recommendations to existing regulatory authorities or provide funding to assist regulatory programs through financial incentives.

In general, the entity's major functions can be summarized as follows:

1. Using the process of adaptive management, the entity will coordinate and implement features of the ERPP specified in the CALFED Bay-Delta Plan

2. The entity will manage water purchased by, dedicated to, or assigned to the Ecosystem Program.

3. Pursuant to an HCP or similar federal and California ESA vehicles, the entity will take all necessary action, including water purchases, to provide certainty to water users that new water regulations will not impact them.

4. The entity will coordinate ERPP actions with other CALFED programs such as levees, water quality, and water supply.

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The major specific functions are described below

Coordinate CalFed Bay-Delta ecosystem activities with other components of the CALFED program. This activity will be very important from the standpoint of insuring that there is maximum coordination between the ERPP and other elements of the CALFED plan. For example, levee protection programs must be coordinated with ERPP efforts to create shallow water habitats. To do otherwise could waste financial resources and risk inconsistent implementation of these the two programs. Another example involves water quality improvement programs to protect aquatic species. While the ecosystem entity will not be a regulatory body, it must provide monitoring data to regulatory bodies and work with them to ascertain whether funding from monies available to the ecosystem entity would assist in meeting water quality goals.

Manage implementation of ERPP actions. The ecosystem entity will be a proactive manager of the ERPP, assuming direct responsibility for deciding which programs and projects should receive priority. However, the entity will primarily act as a planning, funding, and coordinating agency. It is not contemplated that it will design and construct facilities with a large staff of engineers. Instead it will enter into contracts with others to carry out such activities. To the extent necessary, the entity may own and operate facilities after construction, but that should be the exception rather than the rule. For example, a shallow water habitat area could be designed, owned, and operated by CDF&G; however the ecosystem entity would decide how that project should be prioritized and funded as part of the overall ERPP. In general, the entity will contract or execute agreements with existing public agencies or other entities including private organizations to carry out ecosystem projects and programs or to ensure coordination of ecosystem activities.

Hold water rights and ownership interests in water supply and delivery facilities. The general rule that the entity will not own and operated facilities once they are constructed would not apply to water rights and water facilities. If, for example, Sites Reservoir were constructed and a portion of its yield were dedicated to environmental purposes, the entity could be a part owner in this facility. In the alternative, it could hold the water supply through contracts with others. The entity could also hold option contracts or other agreements for water transfers from willing sellers necessary for the Ecosystem Program or to comply with future environmental requirements that would otherwise reduce water supplies of agricultural and urban users.

Be a party to an HCP or other contracts designed to implement the CALFED Bay-Delta Plan. As stated in the vision statement, central to success of the CALFED program is a shift in way the Bay-Delta system will be protected in the future. The plan for the future is to provide protection through a combination of more market-related activities, combined with funds allocated to the ERPP through the CALFED process.

In summary, a substantial sum of money (in excess of $1 billion) will be allocated to the ERPP. This money will be used to conduct the adaptive management program, and will be used in part to construct ecosystem facilities and in part to purchase water. In addition to this initial infusion of money, an "insurance fund" will be established to provide funds to meet unanticipated changes. These funds will provide the bases for the federal government to provide

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water users with a "no surprises" type of assurance that no additional water will be lost through regulatory actions. This program will be detailed in an HCP type agreement and the new entity will have major responsibility for ensuring that it is performed in a manner that provides the water supply assurances.

Receive and disburse all funds needed to carry out the ERPP. The ecosystem entity should be structured so that it may receive and expend federal and state appropriations and act under Proposition 204 to manage and distribute funds earmarked for the CALFED ecosystem program. If user charges are established to help fund the ERPP, these funds should also flow to the entity.

Implement the fish and wildlife portions of the Central Valley Project Improvement Act. To insure that there are no conflicts between the CVPIA fishery programs and the ERPP, the new entity should have responsibility for managing the AFRP and the CVPIA restoration funds. The CVPIA restoration fund monies should be handled in the same way as other federal appropriations.

Assume responsibility (by contract or agreement) for other programs carrying out ecosystem improvement activities, such as Four Pumps.

Issue and repay bonds and other forms of indebtedness. It is possible that certain projects or programs may require funding that does not fit the annual appropriation process. In such cases the entity would have the authority to issue debt.

As necessary, obtain and hold all necessary permits and approvals to carry out ecosystem projects and programs and take necessary steps to ensure compliance with those permits and approvals. Flexibility should be provided in this area. It is anticipated that a programmatic Section 404 permit may be obtained for the entire CALFED program, including the ERPP. The entity likely should be a party to this permit. For site specific permits, the identity of the permit holder may depend on how a specific action is to be carried out and who will own and operate the facility upon completion. The ecosystem entity should have broad discretion to work out details on a case by case basis.

Monitor compliance with flow, water quality, and export regulations established through the CALFED process. This activity could include working with the project operators to implement flexible modifications of operations that could benefit both the environment and water supply or water quality.

As necessary, act as lead agency for and prepare environmental documents to implement the Ecosystem Program. This authority should not be used to divest local agencies of the right to control programs that have been historically been under their jurisdiction. For example, the environmental documents for screening projects funded as part of the ERPP would likely be prepared by the local district that will own and operate the screen. On the other hand, more programmatic environmental reviews or for pilot programs conducted by the ecosystem entity would be prepared by the entity.

Acquire land necessary to carry out ecosystem projects and programs. [Issues: (a) eminent domain; (b) authority of local land use planning agency; (c) duties to avoid impacts on farming operations or other local economic interests.]

Employ or contract with experts in any area of ecosystem management to provide oversight and ensure that programs and projects are consistent with the highest standards of science. Consultation concerning and peer review of adaptive management decisions is central to the premise that the ERPP will be carried out based on the best independent science available. In general, independent scientists will be provided on a contract basis. However, some employees that meet this criterion may be critical to the success of the entity.

As a water project operator, participate in the Ops Group just as other water project operators do. This power assumes that the entity does hold an interest in a water supply project such as Sites Reservoir, in which case the entity would schedule and otherwise operate water resources assigned to or purchased by it the same as DWR and the USBR.

Sue and be sued.

Hire an Executive Director. The Director would be authorized to hire a staff adequate to carry out the program or to contract or execute agreements with public agencies or private entities to provide that staff. The staff will include biologists, engineers and other specialists with technical skills and practical experience.

Work through an Adaptive Management Team. The team would consist of staff or other individuals with both technical expertise about the Bay-Delta ecosystem and experience in the policy and management aspects of technical issues.

Communicate with the public and provide information to state and federal agencies and others on issues related to Delta ecosystem management.

Carry out a comprehensive monitoring and data analysis program. Delta monitoring, studies, and data analysis would be consolidated within the ecosystem entity. These data will be vital to the success of the adaptive management program and, therefore, need to be coordinated within a single entity. The focus of the monitoring activities will be to collect and analyze data relevant to decisions to be made by the entity, including data on physical habitat improvements, screening, the effect of flows and other water project operations on the ecosystem, hatchery and harvest management, toxics and other contaminants, introduced species, and any other data on factors affecting the ecosystem or measures to improve the ecosystem.

Receive proposals and otherwise develop programs and projects to carry out ecosystem goals and objectives.

Interact with existing regulatory agencies. The ecosystem entity, as stated above, would not have independent regulatory authority. It would, however, provide advice to existing regulatory agencies on the actions of those agencies that could affect the ecosystem, including recommendations on regulatory programs to be carried out and on the terms and conditions

attached to regulatory actions. The ecosystem entity could provide funds to the regulatory agencies to enable their programs to be more successful.

Provide comprehensive reports. The entity would prepare and publish regular reports setting forth all relevant data and analyses collected by the program and by others and prepare regular, periodic reports on conditions of the Bay-Delta ecosystem.

Establish or participate in mitigation banking projects.