

MEMORANDUM



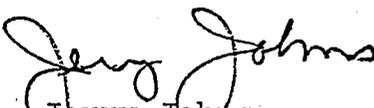
Pete Wilson
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FROM: 
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DIVISION OF WATER RIGHTS

DATE: SEPTEMBER 18 1996

SUBJECT: PURPOSE AND NEED STATEMENT

Per Lester's recent request, I have reviewed the Purpose and Need statement of the CALFED Bay-Delta Program. Generally it looks good. However, one issue needs to be addressed. I am concerned that the CALFED program set forth in this document differs from the Framework Agreement. The Framework Agreement in Exhibit "C" provides details on the points of agreement on the development of joint state-federal process to develop long-term solutions for the problems affecting public values in the Bay-Delta Estuary. This exhibit uses terms like "cooperation" and a joint "long-term solution finding process". It references the CEQA/NEPA process as the foundation for this process. The Purpose and Need statement as currently written states the CALFED program is charged with "development of the solution." As drafted, the process appears secondary to finding the solution.

This is a subtle but very important shift from what the SWRCB agreed to as being part of CALFED. The SWRCB can easily commit to assisting in the CEQA/NEPA process, as was set forth in the Framework Agreement. However, as an adjudicatory agency, we cannot commit to parts of a solution that may later be permitted by us until we have conducted any necessary water right hearing and adopted a decision or order. Identification of alternatives and helping ensure the environmental analysis is adequate for our use in considering possible water right changes are among the tasks we should be doing as a responsible agency under CEQA. However, if it appears that we have "developed" the solution as part of CALFED and then later are put in the position of permitting pieces of that solution (like individual water right permits or changes to the Bay/Delta standards), it could be argued that the SWRCB compromised its independent adjudicatory role. If a court were to agree with such an



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argument, the SWRCB decision and any projects it approves could be overturned and remanded for further hearings. This could cause delay in implementation of proposed solutions. This is not a theoretical concern. We have recently been involved in two Bay-Delta lawsuits that made similar claims.

I have discussed this issue with Barbara Leidigh and we have drafted some suggested revisions to the Purpose and Need statement to make it consistent with the Framework Agreement. These suggested changes begin on page 2, last paragraph as follows:

CALFED provides policy direction to the Program. It was formed as part of the Framework Agreement signed in June 1994. As part of this Framework Agreement, the state and federal governments pledged to ~~work together to formulate~~ coordinate their implementation of water quality standards to protect the Bay-Delta estuary, coordinate State Water Project (SWP) and Central Valley Project (CVP) operations and develop a process to establish a long-term Bay-Delta solution.

Impetus to forge this joint process to develop a long-term solution came at the state level in December 1992 with formation of the Water Policy Council and the Bay Delta Oversight Council, an advisory group to the Water Policy Council. The following year, in September 1993, the Federal Ecosystem Directorate was created at the federal level to coordinate federal resource protection and management decisions for the Bay-Delta.

In December 1994, an agreement - the Bay-Delta Accord - was signed by state and federal regulatory agencies, with cooperation of diverse interest groups. This accord ~~set out integrated,~~ recommended water quality standards, and provided further definition to the created a state/federal coordination group established by the framework agreement to better integrate the SWP and CVP. The Program is charged with responsibility for the third issue; ~~development of a~~ conducting a long-term solution-finding process. The CALFED agencies will assist in the solution-finding process to the extent that it does not compromise their independent regulatory responsibilities.

These changes reflect the concerns I have been expressing over the type of letter we can sign for phase two of the CALFED process. The Purpose and Need statement needs to be



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consistent with the Framework Agreement. I believe the proposed changes help to accomplish that. The next issue that needs to be addressed is the role the SWRCB should and can play in the CALFED process as this process matures. Our role as an adjudicatory agency in CALFED has to be different than the role of DWR and USBR and even consultation roles of DF&G, USF&WS and NMFS. We can easily participate in the CEQA/NEPA process. However, SWRCB cannot be perceived as making adjudicatory decisions outside the adjudicatory processes set forth by statute. Any future joint letter signed by CALFED agencies must differentiate between the adequacy of the solution-finding process and concurrence on the proposed solution. While we can join with the other CALFED agencies in supporting the process, agreeing on the proposed solution outside our adjudicatory process may not be possible for the SWRCB. We are willing to assist in drafting such a letter when it becomes appropriate.

I hope these comments are perceived in the constructive manner in which they are intended. If you have any questions or would like to discuss this further, please contact me at 657-1981.

cc: Lester Snow
Steve Yeager