

Letter to Mr. Lester Snow, Director, CALFED, dated March 17, 1998

Enclosure 1: Detailed Discussion of Options for Addressing the §404(b)(1) Guidelines ("Guidelines") for Phase II of the CALFED Program ("Program").

Two options have been identified as potentially viable strategies for conducting the necessary analysis of Program alternatives for the purpose of demonstrating compliance with the Guidelines. Each option has distinct advantages, disadvantages, and risks associated with its implementation.

Option 1: To the extent possible, make a formal determination as to compliance with the Guidelines for the selected programmatic alternative at the end of Phase II. This option assumes that adequate substantive information is present in the Programmatic Environmental Impact Statement (PEIS), thereby enabling USACE, in consultation with EPA, to evaluate and compare the nature and magnitude of adverse environmental effects associated with each of a range of alternatives reasonably available to meet the Program's purpose.

Given the programmatic level of documentation for Phase II and the complexity of the CALFED Program alternatives, realistically we would anticipate a "partial determination" of compliance with the Guidelines in Phase II. This would ideally serve as a determination of which programmatic alternative constitutes the LEDPA and an assessment of whether that alternative can comply with the other requirements of the §404(b)(1) Guidelines. This "partial" determination would assist the final determination of compliance with the Guidelines needed to support issuance of permits for projects in Phase III. Where we identify gaps in the record during our Phase II, we can specify information and analysis needed in Phase III before a determination of compliance can be completed. This can help structure and expedite Phase III work.

The advantages of this option are:

- 1) Assuming the selected alternative is determined to be the Least Environmentally Damaging Practicable Alternative (LEDPA), this identification at the programmatic level would serve to streamline the review process for permit applications in Phase III.
- 2) It would provide a crucial assurance for stakeholders that the selected alternative will not be "second-guessed," and possibly even changed, as the result of USACE's application of the Guidelines to the selected alternative subsequent to the submission of permit applications in Phase III. Further, if this option incorporates an adequate

programmatic evaluation of both non-structural and structural measures to meet CALFED goals such as water supply reliability, it could provide the necessary consideration of "soft path" approaches.

The disadvantages of this option are:

1) It establishes an administrative record at the end of Phase II regarding the status of the selected alternative. Assuming that the selected alternative is also determined to be the LEDPA, the presence of this administrative record minimizes the Regulatory program's flexibility to shift position if, subsequent to selection of the preferred alternative, the Program determines that it must substantially modify, or even change, the alternative to be implemented.

2) It compels the Regulatory program elements of the USACE, in consultation with EPA, to make an independent, formal evaluation of the adequacy of the PEIS administrative record at the time that a §404 determination is requested. Ideally, this should not be a concern. However, due to the magnitude and complexity of the Program, ensuring procedural and substantive adequacy of the PEIS by the current due date may be problematic. It could place Regulatory in the position of formally identifying deficiencies in the record, while at the same time rendering USACE unable to determine compliance with the Guidelines.

The risk of this option is that, if compelled to meet an unrealistic deadline, or to make a (partial) determination of compliance based on an inadequate NEPA document, or both, then subsequent determinations of compliance with the Guidelines for specific projects, based on the determination of compliance with the larger program, will be flawed. Remedying such flaws would entail a substantial delay to the Program's implementation.

Option 2: Critique and, to the extent possible, validate the process by which CALFED selected the programmatic alternative, indicating that we will use this information to make determinations of compliance with the Guidelines for individual permit actions during Phase III. There would be no determination of compliance with the Guidelines at the end of Phase II. However, under Option 2 we would provide guidance to CALFED, commensurate with the level of decision-making at the conclusion of Phase II, regarding the adequacy of the range of activities to be included in Phase III as well as further documentation needed.

The advantages of this option are:

1) It maintains maximum flexibility for USACE to make determinations of compliance with the Guidelines, based on

the circumstances in place when CALFED actually submits permit applications during Phase III. This could save substantial time and effort associated with developing the underlying administrative record supporting a determination on project-specific LEDPAs. This would be desirable should some significant event cause the Program to change the programmatic alternative to be implemented subsequent to the close of the current Phase II.

2) It most closely adheres to the traditional method of conducting an alternatives analysis under the Guidelines. As such, there is less likelihood of a procedural attack on how the alternatives analysis was conducted, should this method be followed.

3) It provides the Program with the option of adjusting the administrative record, to remediate any flaws identified during Phase II, prior to the point in time at which the Regulatory element of USACE will have to make a formal call on the record's adequacy as part of conducting an analysis under the Guidelines.

Disadvantages of this option are:

1) From CALFED's perspective, there is the risk that Program commitments made at the conclusion of Phase II may be inconsistent with a LEDPA. Revisiting and possibly changing during Phase III financial and other implementation commitments made in Phase II could undermine the CALFED Program and stakeholder support.

2) More fundamentally, it creates substantial uncertainty for the Program, and therefore the stakeholders, as to whether the selected alternative at the end of Phase II will be determined by USACE to be the LEDPA. Absent the assurance provided by a (partial) determination of compliance with the Guidelines, there may not be the necessary support for the Program.