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Marcus/R9/USEPA/US  
cc: Tom Hagler/R9/USEPA/US  
Subject: issues of concern in Framework Document  
t:  
Fax to:

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preliminary comments on Framework Document in text and attachment

\*\*\* MEMORANDUM \*\*\*

June 27, 2000

TO: CALFED Framework Document Drafting Group  
FR: Gary Bobker, The Bay Institute  
RE: Preliminary Discussion of Major Concerns with Framework  
Document, and Proposed Revisions

This memorandum discusses six issues of concern for TBI in the Framework Document, and makes some preliminary suggestions for modifying the text. Remedying the concerns discussed under Issues 1 and 2 will require major modifications to the Document; however, failure to do so will likely result in serious legal and political challenges to the ROD and/or related documents. It should be noted that this memorandum does not reflect all of TBI's concerns with the Framework Document or the final EIS/R, particularly with regard to specific storage and conveyance projects proposed by CALFED, or reflect TBI endorsement of the Document in whole or in part.

Issue 1: Is the EWA worth it?

Discussion: TBI has prepared an analysis of the EWA gaming results, which will be presented to CALFED next week. This analysis makes clear that:

- most of the dry year fishery benefits identified in the gaming result from WQCP/CVPIA implementation.
- the wet year fishery benefits provided by EWA appear significant only

when compared to the estimated take levels associated with the increased pumping regime proposed by CALFED, not when compared with historical levels.

- in some cases the reduction in take is not significant when compared to historical levels and in other cases take is significantly increased when compared to historical levels.
- Tier 3 assets may need to be invoked as often as one in every four years.
- the increased export pumping for both consumptive and EWA purposes proposed by CALFED, including export of upstream environmental water acquisitions, may prevent ERP and CVPIA objectives for Delta outflow from being achieved.

TBI helped develop and continues to support the concept of an EWA which can be used to reduce or eliminate export pumping in response to real-time endangered species impacts. Such an EWA should be moderately sized and used to react rapidly to events while longer-term operational decisions are made, including rescheduling operations to allow for make-up pumping as appropriate and permissible. Building a large-sized EWA in conjunction with a default assumption of practically unlimited use of new export capacity is simply not environmentally defensible. Unfortunately, CALFED has taken a good idea and pushed it further than it can go.

In short, the document's assertions (p. 22) that "the EWA will provide water for the protection and recovery of fish" and that "it is unlikely that assets beyond those in Tier 1 and Tier 2 will be needed" are not justified. I predict that these assertions can and will be successfully challenged in court.

Proposed revision: downsize the EWA (and the associated export pumping for consumptive uses) and eliminate the associated ESA assurances (see issue 2). Commit to an ERP water management program of up to 400,000 acre-feet in Stage 1 that includes water for instream flow, Delta outflow and export reduction, whose assets are to be managed and allocated among these different uses in the long term by the ERP implementing entity under Commission oversight and with independent scientific review.

Issue 2: Why should CALFED commit to no water supply impacts to exporters, and how will it honor this commitment?

Discussion: The commitment to no reductions beyond existing regulatory levels in Delta exports as a result of ESA fish protection measures should be eliminated for three reasons:

- as discussed above, the EWA (Tier 2) is not adequate to provide protection and recovery of endangered species, and may result in degraded conditions in some years, and is therefore an insufficient basis for any permitting assurances.
- to be blunt, Tier 3 is a fairy tale. CALFED agencies have identified no significant, assured resources of water or funding to make credible their claim that Tier 3 assets will be provided if necessary.

□ providing a "no surprises" policy on this scale, in a system this complex, in exchange for an untested, experimental approach, and applied to federal and state entities, is unprecedented and goes far beyond the very limited assurances provided under the Accord.

Proposed revision: Eliminate the CALFED commitment to no export impacts and Tier 3. Modify the drought contingency plan to be a water shortage contingency plan that identifies appropriate measures to provide additional water during critical water shortages for all beneficial uses using appropriate funding sources, and affirm CALFED's commitment to minimize or eliminate water supply impacts using the contingency plan approach. In short, make the contingency plan approach real, and outline how the commitment to develop and implement a plan will proceed.

Issue 3: How will alternatives analysis at the site-specific level for CALFED water supply projects be handled?

Discussion: On page 16, the framework document refers to a programmatic alternatives analysis process to be developed as part of a Clean Water Act Section 404 MOU, and states that "CALFED's storage project screening process has identified and addressed most potential ESA issues on a programmatic level". However, the current level of uncertainty is high as to a) what the real water demands for various beneficial uses throughout the state will be over time; b) how much water savings and/or other benefits can be generated from conservation, recycling and emerging technologies; c) whether specific CALFED measures will achieve the Program's ecosystem restoration and water use efficiency objectives; and d) what consequences will occur if the Program's specific objectives in these areas are not achieved. Therefore, any analysis of alternatives to major CALFED water supply projects that occurs at the site-specific level will need to evaluate the most recent information generated through CALFED's science-based adaptive management process on the potential for future water use efficiency improvements; the efficacy of ERP implementation in mitigating systemwide impacts; modified estimates of demand; and other new information that becomes available.

Proposed revision:

Pg. 16, especially 1st and 3rd bullets: insert language to the effect that CALFED agencies commit to performing rigorous and up-to-date alternatives analyses that address programmatic/systemic/cumulative impact issues, as well as site-specific alternatives issues, at the site-specific level for any major new water supply projects, and that project-level biological opinions will also incorporate new information on programmatic/systemic/cumulative impact issues.

Issue 4: How can groundwater management be made more credible to regulators, local interests, and the broader public?

Discussion: The Framework Document states on the one hand that groundwater should be managed at the basin level, but on the other hand provides no meaningful guidance or structure for regional, basinwide management. According to Appendix H, groundwater mgmt plans are to be adopted by local water agencies and the authority of local agencies clarified; not only is

this inconsistent with a basin approach, but the implication that local government must defer to water agency actions may unnecessarily fuel local paranoia.

Proposed revisions:

Appendix H should be revised to ensure that legislation addresses the following needs:

- the formation of regional groundwater management councils which include water agencies, local government representation, and other participants as appropriate and which would oversee the development and implementation of basin plans.
- strengthening the oversight role of the state to include certifying basin plans, and providing technical assistance not only for data collection but for preparing the actual basin plans.
- state sponsorship of a facilitated process for developing groundwater BMPs and other guidance for basin plans, using both agency-stakeholder advisory groups (see the models of the Urban Water Conservation Council negotiations and CALFED Ag. Water Use Efficiency Steering Committee) and independent technical review panels.

pg. 34 -- (2) Lower transaction costs: this section should explicitly state that the degree to which transfers conform with groundwater basin plans will be one of the most significant components of the streamlining process. (Another is conformity with ERP targets; see Issue 6).

Issue 5: Why should CALFED provide "insurance" for Tier 1 impacts?

Discussion: In Appendix B, CALFED proposes to use available agency resources to eliminate impacts when the CVP obligation under the WQCP exceeds the 450 TAF annual cap for use of (b)2 water. This insurance policy should be deleted for two reasons. First, as a matter of policy and law, it is one thing to propose that public funds be used to create an EWA in order to achieve more timely and efficient reaction to take of endangered species -- in other words, improve the level of protection -- even if in doing so water users are cushioned from take-related impacts (provided the level of protection is actually improved); it is entirely another thing to subsidize compliance with direct CWA, ESA and CVPIA requirements which are now being met and where improvements above current levels of implementation are not involved. Second, on a pragmatic implementation level, obligating available agency resources for this insurance policy will make it even harder for CALFED to allocate necessary water and/or funding to meet its environmental needs during critical water shortages, such as contributing to a contingency plan approach, or fulfilling its proposed Tier 3 commitment, or using resources on focused measures to achieve ERP targets for species abundance.

Proposed revision:

App. B, WQCP, first bullet, should be revised to read in its entirety: "The drought {OR water shortage} contingency plan discussed in the Water Supply

Reliability section will help minimize potential impacts which may arise in rare circumstances when the CVP obligation under the WQCP exceeds the 450 TAF annual cap for use of (b)2 water."

Issue 6: What is CALFED's commitment to achieving ERP objectives, including environmental water objectives? What are the consequences if ERP objectives are not being achieved?

Discussion: On the one hand, CALFED makes firm commitments to specific outcome-based targets for water supply reliability (15 percent increase for the Westside), the Environmental Water Account (no water supply impacts from federal endangered species actions), and Tier 1 impacts (insurance policy for CVP WQCP impacts >450TAF). On the other hand, CALFED commits to develop funding and implement measures -- but not to achieve the targets -- of the ERP, which includes both flow and nonflow related objectives in addition to the EWA's export management, or to eliminating impacts of critical water shortages on endangered species and ecosystem function by ensuring environmental water supply reliability, or to strengthen legal protections of environmental water assets.

Proposed revisions:

i. pg. 3, 3rd paragraph: "Progress will be measured by...-achievement of targets for ecosystem restoration, water supply reliability, water use efficiency, and the EWA."

ii. pp. 5-7:

a. commit to developing a large-scale environmental water management program for instream flows, Delta outflows and export reduction, under which CALFED agencies acquire up to 400 TAF in Stage 1 (which represents the lower boundary of the amount of water estimated by CALFED to achieve ERPP objectives) and secures up to \$75 million annually for environmental water acquisition of which no more than one-third may be used for the EWA.

b. commit to improve existing protections for environmental water, including implementation of an instream flows registry and establishment of instream water rights and other mechanisms for securing environmental water that is supplemental to regulatory requirements.

pg. 34 -- (2) Lower transaction costs: this section should explicitly state that the degree to which transfers contribute to or detract from the attainment of ERP flow and other targets will be one of the most

significant components of the streamlining process.  - frmwrk\_doc\_-\_TBI\_issues\_6.27.00