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December 11, 1998

By Hand Delivery
Felicia Marcus
Regional Administrator
U.S. EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105

RE: CALFED REVISED PHASE II REPORT (DECEMBER 9, 1998)

Dear Felicia:

Thank you for taking the time to meet with Save The Bay and other members of the Environmental Water Caucus on Wednesday. Per your invitation, we are submitting proposals for specific language revisions in the above referenced document.

One primary concern with mentioning up front is that the agencies' understandable interest in crafting a "consensus" document has resulted in portions of it being so finely "finessed" that it is possible for parties to walk away with fundamentally different notions of what the text intends. Far from serving a useful political purpose, this tactic is highly detrimental and can lead only to increased political conflict in the (immediate and long-term) future as various parties become entrenched behind their perceptions of what has or has not been "promised" to them. Where clarity is not yet possible, we recommend that the document so state.

Our specific editorial revisions are attached. Where appropriate I have tied the revisions below to margin notes in the attached copy of the Revised Phase II Report.

Sincerely,

Cynthia Koehler
Save San Francisco Bay Association

cc: Patrick Wright (w/o enclosure)

Tom Hagler (w/enclosure)

SAVE SAN FRANCISCO BAY ASSOCIATION'S PROPOSED TEXT CHANGES FOR THE REVISED PHASE II DOCUMENT

I Water Operations/Environmental Water Account (pp 121-124)

This section is dropped into the Implementation Plan portion of the document and its purpose is not clear. Note that no other aspect of CALFED (ecosystem, water quality) is specially culled out in the Implementation Plan (distinct from other stage 1 actions). Moreover, as drafted, the section entitled "operational scenario for stage 1" is in part an implicit attack on the scientific foundation of the existing ESA and water quality standards -- this is highly inappropriate.

As indicated in our December 9, 1998 letter to Secretary Babbitt, while the environmental water account proposal under development has merit, significant institutional, operational and policy considerations have not been addressed much less resolved. **We recommend that all of section 5.32 be moved into the "Stage 1 Actions" and be rewritten as follows:**

Water Project Operations

A major Stage 1 issue is how to operate the state and federal water projects to provide greater benefits to fish and wildlife while also improving water supply reliability. There is a spectrum of views as to whether and how this could be accomplished. For the last month, a group of stakeholders and agency staff have been meeting to explore the idea of combining more environmentally protective standards in the Delta with greater operational flexibility through the mechanism of an "Environmental Water Account" (Account).

The notion behind an Account is that the projects would receive greater flexibility than is currently available under water quality standards and ESA requirements in exchange for greater environmental protections overall. The theory is that the environment could call for restrictions on export pumping when the standards may not otherwise allow for this action as needed to protect aquatic resources on a real-time basis. Similarly, the projects would be able to pump water when otherwise prevented by the standards if it was determined that such action would not be environmentally harmful. These actions would be tracked as "withdrawals" and "deposits" in the Environmental Water Account.

In theory, this greater flexibility would allow managers to respond to immediate needs that could go unmet in a strict regulatory scheme while at the same time improving water supply reliability and water quality. Some believe that an Account of this kind could be employed to increase biological protections without imposing additional water costs on

Delta exporters.

One way to construct such an Account would be to provide it with both water and financial assets that would allow whatever entity is charged with responsibility for the ecosystem restoration program ("the ecosystem manager") to reduce direct and indirect mortality and enhance the ecosystem. Thus, for example, the Account could be used to reduce exports at critical times that are not well defined in advance by drawing on groundwater storage south of the Delta to make the exporters whole or by using financial assets to purchase replacement water.

A large number of questions and issues remain to be resolved prior to a decision to establish such an Account in the phase before the ROD is issued as well as in Stage 1. The following actions will be required.

1. A full set of operational analyses are required to determine how workable the Account proposal may be in practice.

2. The amount of water necessary for the Account to function properly must be determined.

3. Because the current water quality and other environmental protections now in place were developed with the best protection of the species in mind, there are questions as to how much actual room for operational flexibility there may be that would not result in adverse biological impacts. These must be fully examined and addressed.

4. The question of whether additional physical storage (groundwater or surface water) necessary for the Account to work or would a system of credits serve effectively must be resolved.

5. If a rigorous analysis reveals that additional storage would be beneficial for purposes of an Environmental Water Account, how much and what type of storage is appropriate? CALFED must also ascertain whether the potential adverse impacts of developing more storage -- and depleting more water from the natural system -- could undermine the potential benefits of increased system flexibility.

6. If physical storage is determined to be an essential element of an Environmental Water Account, the question of whether and how the environment would share in the use of existing and new facilities -- for both storage and conveyance -- would need to be addressed.

7. The issue of carryover of ecosystem credits from year to year requires

resolution. CALFED must also examine other potential uses of ecosystem water (and financial) credits.

8. Trading regulatory certainty for increased operational flexibility shifts the assurance of environmental protection from the standards to the ecosystem manager. An institutional structure and controls must be developed to ensure that the ecosystem manager is capable of providing an equivalent level of environmental assurance.

9. An Account assumes a clear and agreed upon starting point in terms of the water available to the environment. This "baseline" question is contested among the parties to CALFED and is event he subject of federal court litigation. A process for resolving this question and bringing clarity and certainty to it is required.

10. Assuming the baseline issue is resolved, should the environment receive an initial "endowment" of water over and above that which it is entitled to based on current statutory and regulatory standards alone? If so, what should this endowment consist of and where should it come from?

11. CALFED will address how much should the environment's initial financial endowment be and who should pay for it.

12. A plan addressing the issue of secured debt and delayed payback of Account water should be developed.

13. An Account also assumes that it will be possible to track environmental water that is used by, or owed to, the environment with certainty. Such an accounting system must be developed.

14. Similarly, the specific operating rules and clear decision making authorities must be developed.

15. How will, and should, the Account's "assets" grow over time?

16. What should be the appropriate assumptions about the extent to which water user assets grow in relation to those of an Environmental Water Account? What accommodation should be made for the imbalance in the water and financial "assets" available to the environment as compared with those of the state and federal water projects at the outset?

17. How can environmental protection ensured when protective requirements exceed the water available to the ecosystem manager?

18. What would be the relationship of an Environmental Water Account to the broader issue of ensuring the availability of water to the environment as necessary to fully implement the ERP? The relationship of the Account to upstream water issues must be examined and resolved.

19. What would be the relationship between the Account and attainment of the performance standards embodied in the ERP and the Strategic Plan for the Ecosystem Restoration Program?

No decision regarding the establishment of an Environmental Water Account will be made until each of these issues, and possibly others, have been addressed.

II Storage

Page 80 add at the end of the first paragraph:

All storage requires some type of dam or diversion from a natural stream. Virtually all of California's rivers and streams have some type of dam or diversion and a large amount of water is already depleted from the ecosystem for storage for a variety of purposes.. There are concerns among some stakeholders that additional storage facilities will deplete the ecosystem even further and cause greater environmental damage, notwithstanding the potential benefits of increasing the flexibility of the system.

Page 80, add before the last sentence in the 3rd paragraph:

In order to determine the need for and the amount of new groundwater or surface storage, CALFED must develop technically sound estimates about future demand for consumptive water use taking into account the impacts of urban and water conservation, recycling and a vibrant water transfer market.

Pages 80-82, See margin notes.

Page 83, See margin notes. The bundling concept needs a lot more work -- now being seen by some as a way of ensuring absolute "parity" of spending between eco and other program elements. Linkages still provide very little in the way of assurances.

Page 84, top of page (replace the first paragraph and bullet points with the following): (As currently drafted there are no "linkages" at all -- just efforts that are to go forward at the same time. Moreover these "other actions" are so vaguely described that they provide no assurance that surface facilities will be tied to any real conditions other than the 404 process. With all due respect, this is not sufficient)

Surface Storage. New or expanded surface storage may be constructed if and when it is

demonstrated that conservation, recycling, water transfers, reoperation, expanded groundwater storage and more efficient use of existing storage facilities in combination with other CALFED actions cannot meet CALFED goals and objectives. Economic and feasibility studies for surface storage will proceed in conjunction with the following action. Each of these linkages must be met in order for further work on surface storage to proceed:

A. A [specific and measurable] level of water use efficiency ...

B. Establishment of a functioning water transfer market as demonstrated by [something specific]

C. A written commitment to finance surface water facilities, including earnest money for "studies" on the part of all potential water user beneficiaries (just urban commitment a la Category III should not suffice if there will be ag beneficiaries)

Page 113, See margin notes.

Page 114, redraft Surface storage section as follows:

New offstream and/or expansion of existing onstream reservoirs could add up to several million acre-feet of new surface storage but could result in significant adverse environmental impacts. A description of 3 to 5 possible sites will be available at the start of Stage 1. The first stage will consist of needs evaluations, feasibility studies, and economic analyses. Surface water storage facilities will only be built if and when other water supply reliability actions cannot meet CALFED goals and objectives for the water supply reliability and other program elements. The following stage 1 actions provide progress on initial studies in case surface water reservoirs are found necessary to CALFED objectives.

1. (As is)
2. Establish measurable performance standards for the water supply reliability program.
3. Correct the consumptive water demand projections in the draft EIS/EIR and develop a credible and technically defensible range of supply and demand figures to use in the water management program.
4. Perform a needs analysis comparing the development of new surface water supplies with other tools for achieving the CALFED performance standards for the water supply reliability program.
5. Perform an economic analysis comparing the cost of new (or expanded) surface supplies with all other options for achieving the CALFED performance standards for the water supply reliability program.
6. Perform feasibility studies for a specific number of sites.
7. Identify agricultural and urban beneficiaries and obtain written commitment of willingness to pay for such facilities, including a portion of the studies.
8. Perform field studies for a specific number of sites.

III Assurances and Institutional Issues

The Pre-Stage 1 and Stage 1 assurance actions are in 2 different places and are in some ways inconsistent. They should be consolidated and reconciled. It is critical that somewhere the assurances section indicate that "assurances" are not synonymous with "implementation," i.e., that the purpose of the assurances is not just to get the program out the door but to ensure that the performance standards (for each element) are actually achieved.

Page 118, see margin notes

Page 125, see margin notes. Note -- more caution is needed with the "bundling" concept. This is being seen by some as a way of grouping specific actions across the board. The problem with this is that to achieve parity in terms of performance standards, the ecosystem program may require a much larger number, or more expensive, actions particularly up-front. For example, CALFED should avoid using "bundling" as a way of holding eco-$$ hostage until an equivalent amount is made available for user benefits. The fact is that eco-actions and water supply and other actions may not "group" that well. This needs a lot more thought before it is enshrined in a document like this.

Page 126, Under Conservation Strategy.

> CALFED is preparing a Conservation Strategy to address the potential Endangered Species Act impacts of each of the program elements. The Conservation Strategy is intended to integrate the Ecosystem Restoration Program with the rest of the CALFED Program elements and ensure they fit together compatibly. The Strategy will set forth recovery goals for covered species and will establish mitigation obligations and actions for species recovery and will provide the framework for the issuance of incidental take permits. The Strategy will require further development during Stage 1 as the precise nature of specific program elements unfolds.

Page 126, see margin notes. (Note: Please do not commit to provide a "Programmatic Section 404 Assurance" as the current draft states. It is not at all clear that this would be legally supportable.)

Page 127, Add after #10:

> 11. Develop a plan for ensuring the availability of environmental water as necessary to meet the performance standards in the ecosystem restoration program strategic and the conservation strategy.
>
> 12. Develop a mechanism to ensure long-term financial stability to the ecosystem

restoration program.

13. Develop a proposal to provide for remedies to appropriate parties in the event that the assurance package fails and program elements are not fully implemented or do not meet the performance measures established.

14. Develop a proposal to reformulate the Operations Group to provide greater parity between project operators and ecosystem resource managers.

Page 127, See margin notes. Again, it is premature to be committing to this type of bundling -- as proposed the risk that meaningful restoration will not take place is very great. The short-term bundling ignores the vast differences between ecosystem projects -- which will take years to produce measurable results -- and construction projects.

Page 128, 2nd paragraph under Governance: (This section goes well beyond anything the stakeholders have discussed re overall structure. It appears to assign far more responsibility to the overall structure for implementation than necessary or appropriate -- implementation should be in the hands of specific entities (existing and new), not an overall structure. Areas of responsibility like budget preparation and project selection do not belong with the CALFED superstructure. Best way to deal with this is to flag issues rather than make decisions here.)

With regard to the overall CALFED management structure, the basic questions that need to be addressed prior to Stage 1 are: Where should basic responsibility for program implementation lie, in the overall structure or in the agencies with responsibility for specific program elements? What should be the relationship between the super-structure and the implementing agencies? Where should budget and project decisions be made? How will the superstucture deal with the issues of establishing and then tracking program linkages and other parity issues? Once the areas of responsibility as between the superstructure and the implementing entities are sorted out, the form of that entity should follow from the functions with which it will be tasked.

Options for the overall CALFED governance structure include (1) a continuation of the current CALFED Policy Group with a limited staff; (2) a higher level of formalization of that group through an MOU or other written instrument, also with some staff; (3) a continuation of the CALFED Bay-Delta Program to staff a coordinated inter=agency policy group; or (4) a full blown new entity.

Page 130 -- It is bizarre given the enormous amount of work done in CALFED on the eco-entity and the negligible work done on a CALFED superstructure that this document would contain so much text on the latter and none on the former. This should be reversed. The basic list of functions for the eco-entity should be inserted. Let me know if you need a copy of this.

IV INTRODUCTION AND BACKGROUND

Page 8 (New first paragraph under Next Steps in Phase II):

> Prior to release of the revised DEIS/EIR, CALFED will prepare economic, environmental and other technical studies and analyses necessary to evaluate and compare the alternatives under review and to formulate and select a preferred alternative. CALFED will also respond to the extensive comments submitted on the draft EIS/EIR.

Page 11, first bullet, add at the end of the last sentence:

> and allows water to remain in the system for the beneficial use of aquatic resources.

Page 13: See margin notes.

Page 19: See margin notes. Alternatively, a more substantial revision as set forth below (to replace the 3 paragraphs on page 19) would be appropriate in providing a more complete picture of the "institutional and operational framework."

> An elaborate set of systems dealing with water management and environmental protection have been developed in California. On the side of physical management of water, both federal and state governments have constructed complex water diversion, storage and delivery systems. The CVP and SWP are massive water projects that serve primarily to deliver water to agricultural purposes and to urban consumptive use as well. In addition to the state and federal projects, there are hundreds of smaller diversions throughout the Central Valley.
>
> Water use is regulated in California through a system of "water rights." Most water rights in this state are "appropriative rights" granted by the state through a permit procedure. (The state also recognizes the rights of riparian landowners to take water flowing by their lands.) Federal agencies are subject to the state water right system. Like other western states, California's appropriative rights system is based on a "first in time, first in right" concept such that the rights of senior rights holders are more reliable than those of junior rights holders. In addition, the state and federal water projects have a vast network of contractors who use the water generated by the projects. The water rights and contract systems define the parameters of who is entitled to water from which source at what time. This system of water rights (and contracts) has the effect of allocating the burden during times of water shortage as well as water savings. The State Water Board is the agency

responsible for permitting and modifying water rights. The federal Bureau of Reclamation and state Department of Water Resources are responsible for operations of the water projects and contracting for project water.

Environmental protections related to water management take several forms. The state and federal governments have enacted a series of statutes designed to protect and restore aquatic resources and their habitats including, but not limited to, clean water statutes that require the establishment of water quality standards for fish and other resources, endangered species statutes, specific restoration mandates such as the CVPIA and broadly protective principles such as the Public Trust Doctrine. In recent years, these environmental mandates have had to be integrated with a water management system that evolved under very different conditions. In some cases, these protections have modified the use of water under available under the water rights and contract system. Agencies with regulatory responsibility for these environmental programs include the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, the California Department of Fish and Game, and again the State Board.

Page 24, add at the end of the first set of bullets: The document's reliance on various narratives to define water supply reliability goals doesn't work. We know measurable standards cannot be developed in the next week and so recommend the following addition (here and throughout the document);

Prior to the release of the Revised EIS/EIR, CALFED will develop measurable performance standards for the water supply reliability program parallel to those it is developing for the ecosystem restoration and other program elements.

Page 25: Potential Water Supply Reliability Table

Add line indicating the cost of surface storage (other than Shasta) being proposed for Stage 1 studies (and more).