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## Fixing the Delta: The CALFED Bay-Delta Program and Water Policy Under the Davis Administration

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## ARTICLE

# FIXING THE DELTA: THE CALFED BAY-DELTA PROGRAM AND WATER POLICY UNDER THE DAVIS ADMINISTRATION

BY PATRICK WRIGHT\*

### I. INTRODUCTION

On June 9, 2000, California Governor Gray Davis and U.S. Department of Interior Secretary Bruce Babbitt led a large consortium of state and federal agencies in adopting the most comprehensive water management program in the nation – the CALFED Bay-Delta Program.<sup>1</sup> The plan (Framework for Action and subsequent Record of Decision<sup>2</sup>) was the product of over five years of discussions and negotiations among the state and federal agencies and urban, agricultural, and environmental interests over how to allocate California's water supplies among many competing uses.<sup>3</sup>

The Framework for Action was greeted with cautious optimism and some skepticism among the major interest groups, and newspaper editorials generally praised the effort.<sup>4</sup> Few

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<sup>1</sup> See California's Water Future, A Framework for Action, CALFED Bay-Delta Program (2000).

<sup>2</sup> See PROGRAMMATIC RECORD OF DECISION, CALFED BAY-DELTA PROGRAM (2000).

<sup>3</sup> See *id.* at 1.

<sup>4</sup> See Matthew Barrows, *Historic Water Plan Unveiled: Precarious Balance Be-*

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observers were convinced that the plan would end the state's water wars, but many were relieved that a comprehensive plan was finally in place.<sup>5</sup>

For the previous two decades, water planning and politics have been characterized by conflict rather than cooperation. Each of the major interest groups have been powerful enough to block each other, in court or at the ballot box, but none have been powerful enough to enact their own agenda. Environmental groups, for example, have been successful in blocking new reservoirs, but unable to stop increased diversions from the Delta that have contributed to listings of several fish species under the federal Endangered Species Act. With the exception of passage of the federal Central Valley Project Improvement Act (CVPIA) in the waning hours of the Bush Administration, the resulting stalemate has prevented progress in either restoring the San Francisco Bay-Delta estuary or improving the state's water supply reliability.<sup>6</sup>

The CALFED Bay-Delta Program, and the 1994 Bay-Delta Accord that preceded it, began with the hope of breaking this gridlock.<sup>7</sup> They also reflect a new, more collaborative way of setting water policy that holds the promise of producing more lasting solutions. The state and federal agencies and stakeholders are now working together to implement a \$8.6 billion program to address the state's most pressing ecosystem restoration, water quality, and water supply reliability needs.

The Framework for Action and Record of Decision were developed over a five year period through two different state administrations and several changes in leadership in the Clinton Administration. Many of the key milestones and priorities for implementation, however, were negotiated in a final series of negotiations between the state and federal agen-

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*tween Aiding Delta and Meeting Demands*, SACRAMENTO BEE, June 10, 2000 at PAGE; Nancy Vogel, *Pact Averts New Hostilities in Water Wars*, LOS ANGELES TIMES, June 12, 2000 at PAGE; Glen Martin, *State Water Plan Taps into Art of Compromise*, San Francisco Chronicle, June 10, 2000, Editorial, *Water: Pushing into the Future*, LOS ANGELES TIMES, June 12, 2000; Editorial, *A Good Water Plan*, SAN DIEGO TRIBUNE, June 12, 2000; Editorial, *CALFED Takes Big Step*, CONTRA COSTA TIMES, June 18, 2000.

<sup>5</sup> See *id.*

<sup>6</sup> See Central Valley Project Improvement Act, Pub. L. 102-575, 106 Stat. 4600 (1992).

<sup>7</sup> See *supra* note 1.

cies in the spring of 2000. Through these negotiations, the administration of California Governor Gray Davis put its own stamp on the Record of Decision, and set the course for state water policy for the next decade.

This article will examine the origins and key elements of the CALFED Record of Decision, the role of the Davis Administration in developing the final plan, and the major challenges ahead in implementing the plan.<sup>8</sup>

## II. THE SAN FRANCISCO BAY-DELTA: AN OVERVIEW

San Francisco Bay and the Sacramento-San Joaquin River Delta combine to form the largest estuary on the West Coast.<sup>9</sup> The estuary's watershed drains 40% of the state, including the watersheds of the Sacramento and San Joaquin Rivers, which flow from the Sierra Nevada and Coast Range through the Central Valley and Delta to San Francisco Bay.<sup>10</sup>

Historically, the Delta and much of the Central Valley was a vast region of wetlands, before pioneer settlers diked the islands and reclaimed the soil for farmland.<sup>11</sup> Today the Delta's 700-square mile maze of islands and channels serves as the hub of the state's two largest water distribution systems, the federal Central Valley Project and the State Water Project. The state and federal projects export water through canals and aqueducts to the San Francisco Bay Area, San Joaquin Valley and southern California, providing water to over 4.5 million acres of irrigated farmland, and to over 20 million residents. Two-thirds of the state's residents receive some or all of their drinking water supplies from the Delta.<sup>12</sup>

The Bay-Delta estuary also supports the state's largest habitat for fish and wildlife, providing a migration corridor for two-thirds of state's salmon, and nearly half of the waterfowl and shorebirds along the Pacific Flyway. The estuary supports over 120 fish species, and contains Suisun Marsh, the largest contiguous brackish water marsh in the United States.<sup>13</sup>

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<sup>8</sup> Much of the discussion in this article is based on the author's experience as a participant in his capacity as a senior state or federal official.

<sup>9</sup> See SAN FRANCISCO ESTUARY PROJECT, SACRAMENTO – SAN JOAQUIN DELTA (1992).

<sup>10</sup> See *id.*

<sup>11</sup> See WATER EDUCATION FOUNDATION, LAYPERSON'S GUIDE TO THE DELTA (2000).

<sup>12</sup> See *id.*

<sup>13</sup> See Water Quality Standards for Surface Waters of the Sacramento River, San

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The fish and wildlife resources of the Bay and Delta have undergone significant declines over the past several decades. Prolonged drought, diversions of freshwater, and dramatic increases in introduced species have reduced fish species, including salmon, steelhead, striped bass, and Delta smelt, to extremely low levels.<sup>14</sup>

Despite these declines, large demands for water by the agricultural community and the state's growing urban areas have made it difficult to allocate additional freshwater flows for environmental purposes. Given the competing interests for available supplies, managing the state's water resources is a delicate balancing act.

### III. THE 1994 BAY-DELTA ACCORD AND THE ORIGINS OF CALFED

The predecessor to the CALFED Bay Delta Program was the 1994 Bay-Delta Accord, which grew out of several years of conflict surrounding the adequacy of freshwater flows to protect the ecological health of the estuary.<sup>15</sup>

The State Water Resources Control Board ("State Board") grappled with Delta outflows in its 1978 Water Quality Control Plan.<sup>16</sup> No sooner had the Board made its decision than the lawsuits began, lawsuits that ultimately yielded a court order asking the Board to revisit its decision.<sup>17</sup> The Board made one attempted revision in 1988, but this proposal was withdrawn after public outcry.<sup>18</sup> A second, more limited revision to the water quality control plan followed in 1991, but this revision failed to deal with the crucial issue of Delta

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Joaquin River, and San Francisco Bay and Delta of the State of California, 60 Fed. Reg. 4664 (1995).

<sup>14</sup> See SAN FRANCISCO ESTUARY PROJECT, SAN FRANCISCO BAY-DELTA ESTUARY (February 1991).

<sup>15</sup> See PRINCIPLES FOR AGREEMENT ON BAY-DELTA STANDARDS BETWEEN THE STATE OF CALIFORNIA AND THE FEDERAL GOVERNMENT (1994).

<sup>16</sup> See California State Water Resources Control Board, Water Right Decision 1485, Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh, adopted August 1978.

<sup>17</sup> See *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82 (1986).

<sup>18</sup> See Water Quality Standards for Surface Waters of the Sacramento River, San Joaquin River, and San Francisco Bay and Delta of the State of California, 59 Fed. Reg. 811 (1994)

outflow.<sup>19</sup>

While the State Board continued its painful process of Plan amendments, Federal statutes began to come into play. The National Marine Fisheries Service ("NMFS") listed the winter-run chinook salmon as threatened under the Federal Endangered Species Act in November 1990, and imposed several restrictions on water project operations.<sup>20</sup> Environmental groups began petitioning the U.S. Fish and Wildlife Service ("FWS") for additional listings.<sup>21</sup> The Federal Clean Water Act also came into play when the U.S. Environmental Protection Agency ("EPA") formally disapproved the State's water quality standards in the Delta in 1991.<sup>22</sup> Finally, Congress leapt into the fray with the passage of the CVPIA in October 1992.<sup>23</sup>

All of this activity threatened to explode in 1993, when the State administration withdrew yet another draft water quality plan,<sup>24</sup> the FWS proposed listing the Delta Smelt under the ESA,<sup>25</sup> and U.S. EPA proposed Federal water quality standards for the Bay and Delta.<sup>26</sup> Fortunately, leaders

<sup>19</sup> See CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, WATER RIGHT ORDER 91-15: WATER QUALITY CONTROL PLAN FOR SALINITY FOR THE SAN FRANCISCO/SACRAMENTO-SAN JOAQUIN DELTA ESTUARY (1991).

<sup>20</sup> See Endangered and Threatened Species; Sacramento River Winter-run Chinook Salmon, 50 C.F.R. § 27; NATIONAL MARINE FISHERIES SERVICE, BIOLOGICAL OPINION FOR THE OPERATION OF THE FEDERAL CENTRAL VALLEY PROJECT AND THE CALIFORNIA STATE WATER PROJECT (1993).

<sup>21</sup> See U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Notice of 90-day Findings on Petition to List the Delta Smelt and Delhi Sands Flower-Loving Fly as Endangered, 55 Fed. Reg. 52852 (1990); U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; 90-Day Finding On and Commencement of Status Review for a Petition to List the Sacramento Splittail and Longfin Smelt, 58 Fed. Reg. 36184 (1993).

<sup>22</sup> See Water Quality Standards for Surface Waters of the Sacramento River, San Joaquin River, and San Francisco Bay and Delta of the State of California, 59 Fed. Reg. 810 (1994).

<sup>23</sup> See Pub. L. No. 102-575, § 3401 et seq., 106 Stat.4600, 4706 (1992).

<sup>24</sup> See CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, DRAFT WATER RIGHT DECISION 1630: SAN FRANCISCO/SACRAMENTO-SAN JOAQUIN DELTA ESTUARY (1992). See also Letter from Pete Wilson, *Governor of the State of California*, to John Caffrey, *Acting Chair of the California State Water Resources Control Board*, reprinted in 3 Cal. Water L. & Pol'y Rptr. 153 (1993).

<sup>25</sup> See United States and Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Delta Smelt, 58 Fed. Reg. 23854 (1993).

<sup>26</sup> See Water Quality Standards for Surface Waters of the Sacramento River San

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emerged from the government and stakeholder communities, and these leaders took advantage of the conflicts to forge a new collaboration.

First, under the leadership of DOI Assistant Secretary Betsy Rieke, the Federal government agencies (EPA, FWS, NMFS, and the U.S. Bureau of Reclamation ("USBR")) formed "Club FED" to coordinate Federal efforts in the Bay and Delta.<sup>27</sup> Until then, each federal agency acted independently in exercising their respective authorities under the Clean Water Act and Endangered Species Act. While EPA was continuing to push the State to adopt water quality standards that would be approvable under the Clean Water Act, FWS and NMFS were separately and independently issuing regulations under the Endangered Species Act. The first major accomplishment of this group was to issue an integrated set of regulatory proposals published together in a single federal register notice in January 1994.<sup>28</sup>

This coordinated effort, together with the state's earlier establishment of the Governor's Water Policy Council, ultimately led to the development of a joint approach. Under the Framework Agreement signed in June 1994,<sup>29</sup> the State and Federal agencies agreed to 1) work together in developing new state standards that would satisfy federal Clean Water Act and Endangered Species Act requirements; 2) coordinate the operations of the state and federal water projects; and 3) develop a long-term planning process that later became the

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Joaquin River, and San Francisco Bay and Delta of the State of California 59 Fed. Reg. 810 (1994).

<sup>27</sup> See UNITED STATES FISH AND WILDLIFE SERVICE, UNITED STATE BUREAU OF RECLAMATION, NATIONAL MARINE FISHERIES SERVICE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AGREEMENT FOR COORDINATION ON CALIFORNIA BAY/DELTA ISSUES (1993).

<sup>28</sup> See Water Quality Standards for Surface Waters of the Sacramento River San Joaquin River, and San Francisco Bay and Delta of the State of California, 59 Fed. Reg. 810 (1994).

<sup>29</sup> See FRAMEWORK AGREEMENT BETWEEN THE GOVERNOR'S WATER POLICY COUNCIL OF THE STATE OF CALIFORNIA AND THE FEDERAL ECOSYSTEM DIRECTORATE (1994). The early Club Fed efforts, the Framework Agreement, and the Bay-Delta Accord were all focused primarily on integrating CWA and ESA requirements. As discussed later, their failure to also address and integrate CVPIA water allocation requirements threatened to unravel support for the Accord and became a major focus of the final CALFED Bay-Delta Program negotiations.

CALFED Bay-Delta Program.<sup>30</sup>

To meet the first goal, the State and Federal agencies joined ongoing stakeholder efforts to define at least a temporary solution to the Delta issues. On December 15, 1994, Governor Wilson and Secretary Babbitt signed the Bay-Delta Accord, together with a large group of stakeholders who participated in negotiating the final agreement.<sup>31</sup> The Accord was developed through two years of discussions among the agencies and urban, agricultural, and environmental interests, and a final round of intense negotiations that concluded just hours before a court-ordered deadline for EPA to set federal standards.<sup>32</sup> The Accord's key provisions called for significant increases in freshwater flows to the Bay, in return for greater water supply reliability and the promise of a long-term planning process.<sup>33</sup>

The Accord paved the way for the CALFED Program in two important respects: It solidified the high level of agency coordination in decision making and it highlighted the need for stakeholder participation in resolving these complex disputes.<sup>34</sup>

The Accord was billed as a temporary truce in the state's water allocation wars until a more comprehensive solution could be developed as part of the CALFED Program. The truce was short lived, however, as the agencies and stakeholders who signed the Accord began to have different interpretations of its key provisions.<sup>35</sup> These disagreements erupted into

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<sup>30</sup> See *id.* at 4-5.

<sup>31</sup> See Bay-Delta Accord *supra* note 12

<sup>32</sup> See Bruce Babbitt, *Restoring our Natural Heritage*, NATURAL RESOURCES & ENVIRONMENT 147-148 (Winter 2000).

<sup>33</sup> See *id.*

<sup>34</sup> See Elizabeth Ann Rieke, *The Bay-Delta Accord: A Stride Toward Sustainability*, 67 U. Colo. L. Rev 341 (1996); Patrick Wright, *The Federal Perspective on the Bay-Delta Standards*, CAL. WATER L. & POL'Y RPTR (1995). These articles provide a more thorough discussion of the events and lessons learned in the Bay-Delta Accord negotiations.

<sup>35</sup> The disagreements were focused primarily on the level of water supply "assurances" provided in the agreement. For example, many in the agricultural community have argued that the Accord established a cap on further reductions in water supplies, and provided protections from additional restrictions to protect endangered fish entrained at the pumping plants, and from allocations of water for fish under the CVPIA. Others, including the federal agencies, have argued that the Accord protections were limited to habitat needs, and did not extend to pumping restrictions neces-



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frequent, highly visible conflicts over water project operations every year, and generated a great deal of mistrust among the agencies and stakeholders - at the same time that their participation was needed in developing a long term plan as part of the CALFED program.

IV. THE EARLY YEARS OF THE CALFED BAY DELTA PROGRAM UNDER THE WILSON ADMINISTRATION

The CALFED Bay Delta Program began in 1995 as a cooperative effort to fix the Delta - the heart of the state's water distribution system.<sup>36</sup> In the early years, the workshops and public meetings Program focused primarily on potential changes to the state's storage and conveyance systems - changes that would allow more reliable water supplies to be shipped through the Delta from northern to southern California while improving the biological health of the estuary. But as the planning process stretched out over several years and more interests became involved, the program evolved into a comprehensive plan with eight major program elements: storage, conveyance, ecosystem restoration, water quality, levee restoration, watersheds, water use efficiency, and water transfers.<sup>37</sup>

The CALFED Bay Delta Program released a draft programmatic EIS/EIR in March 1998.<sup>38</sup> This draft did not include a preferred alternative, and was in effect a mechanism for securing more formal comment from the interested stakeholders. Comments were generated at more than a dozen pub-

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sary to reduce "take" at the state and federal pumping plants, or to restrictions necessary to implement the CVPIA.

<sup>36</sup> See Notice of Intent to Prepare Environmental Impact Statement/Environmental Impact Report, 61 Fed.Reg. 10379 (1996).

<sup>37</sup> The storage and conveyance elements received more attention at this stage, in part, because they were described as "variable" elements in the alternatives, while the other elements were described as "common" elements that did not vary among the alternatives evaluated.

<sup>38</sup> See Notice of Availability of Draft Environmental Impact Statement/Environmental Impact Report, 63 Fed.Reg. 12823 (1998); See also CAL. PUB. RES. CODE §21000 *et seq.*(West 1996). A joint EIS/EIR allows the federal and state agencies to fulfill their respective obligations under the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA).

lic hearings throughout the state, as well as in more than 1800 written comments submitted to the Program.

As the Wilson Administration drew towards an end, Secretary Babbitt and George Dunn, Chief of Staff to Governor Wilson, initiated a monumental effort to reach a consensus among the various stakeholder representatives on an appropriate preferred alternative for the CALFED Bay Delta Program. During the summer and fall of 1998, these leaders sponsored weekly meetings of stakeholders, considered the entire range of issues in the Program, and sought agreement. The time commitment made at this high level of state and federal governments was unprecedented, and underscores the importance of California water issues on both the state and national levels.

Although the Babbitt/Dunn discussions helped define most of the contours of a CALFED solution, ultimate success - defined at the time as formal stakeholder consensus - eluded them. Several divisive issues, including the role of new reservoirs and water conveyance structures, prevented a final agreement. Instead, the CALFED agencies issued a "Phase II Report" summarizing the progress made by the end the Wilson Administration.<sup>39</sup>

In retrospect, the Babbitt/Dunn discussions may have pushed too hard to develop a stakeholder consensus, rather than to issue a final plan based on stakeholder comments and recommendations. By including the stakeholders in the drafting sessions, the agencies were forced to weaken or qualify many of the key recommendations as they sought to gain unanimous support. Given the complexity of the program and the competing interests, it was probably unrealistic to expect formal agreement among all of the stakeholder groups.

## V. CALFED UNDER THE DAVIS ADMINISTRATION

At the outset of the Davis Administration, it was not at all clear where the Governor would stand on water issues. Historically, water issues are politically treacherous, and the new Administration was wary. While the Governor generally supported the CALFED Program as a candidate, water issues were not prominent in the campaign. Immediately upon tak-

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<sup>39</sup> See CALFED BAY-DELTA PROGRAM, REVISED PHASE II REPORT (1998).

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ing office, the Governor generally maintained his support for the program, and urged the agencies and stakeholder groups to find common ground. He also insisted upon a balanced plan that would address the key short and long-term needs of each of the major stakeholder groups.

This approach was a major disappointment for many environmental groups, who had hoped that a new Democratic administration, together with the Clinton Administration and Democratic majorities in the state assembly and senate, would significantly change the direction of the Program. Instead, the Davis administration's moderate, incremental approach, which has become the hallmark of his first two years, helped cement the framework of the Program negotiated with the previous administration.

As the Davis Administration took office in January of 1999, the basic elements of the CALFED plan were in place. The Program released a second, revised draft EIS/EIR in June of 1999 with a framework for each of the major program elements.<sup>40</sup> For the first time, the Program also selected a preferred alternative, which was centered around making significant improvements in the existing plumbing system to meet the Program's ecosystem restoration, water supply reliability, and water quality goals.

Despite these signs of progress, however, the level of stakeholder support for the program was eroding, for several reasons.

First, stakeholders whose vision for the program was rejected became disillusioned. These included proponents of the peripheral canal<sup>41</sup> and/or major new onstream surface storage projects on the one side, and opponents of any increased diversions and storage projects on the other. Farm groups began to step up their concerns about the impacts of the ecosystem

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<sup>40</sup> The peripheral canal is a proposed 42 mile water conveyance structure that would circumvent the maze of Delta channels and directly carry Sacramento River water south to the state and federal pumping plants. The canal was defeated in a state referendum in 1982 because of cost and environmental concerns, but later re-surfaced as an alternative in the CALFED Program.

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program on agricultural lands, and Delta agricultural interests grew worried that their water supply and quality would be put at risk as pumping from the Delta increased.

Second, the ongoing disagreements over water project operations and interpretations of the Accord and CVPIA rules became a lightning rod for opponents of the Program. In the late summer of 1999, the Fish and Wildlife Service shut down Delta pumping for an extended period as large numbers of Delta smelt, a listed species, were being killed at the state and federal pumping plants. Environmental groups charged that the agencies weren't doing enough to protect the species, and water users claimed that the promise of certainty in the Bay-Delta Accord was being abandoned. Another conflict erupted in November of 1999, when a series of decisions to re-operate the state and federal water projects to protect fisheries and water supply began to severely degrade water quality levels in the Delta.

To the agencies, these episodes only underscored the importance of developing a new set of water management tools through the CALFED Program to better manage the ongoing conflicts. But to many of the stakeholders, the episodes contributed to a lack of confidence in the agencies developing the program. As the disagreements intensified, they eroded much of any remaining trust that might have existed among the stakeholders who negotiated the Accord, and just as important, diverted their time and attention from working collaboratively in developing the CALFED Plan.

Finally, many stakeholders simply became tired and frustrated with the process and its seemingly endless meetings. In the face of what some began calling "CALFED fatigue", the early promise of a stakeholder-driven process gave way to a demand for the agencies to provide more leadership and make decisions.

## VI. THE FINAL NEGOTIATIONS LEADING TO THE FRAMEWORK AND RECORD OF DECISION

To regain momentum behind the program, the state and federal agencies began meeting early in 2000 to discuss their options in finalizing the plan. They quickly agreed to hold a series of meetings over the following months to develop and issue the final plan. With the presidential elections approach-

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ing in November, it was clear that a final plan had to be issued by summer or risk starting over with a new federal administration.

As the final negotiations began, the active involvement of the Governor's office and state cabinet officials was essential. The state team was led by cabinet secretary Susan Kennedy, and included Resources Secretary Mary Nichols, Department of Fish and Game Director Robert Hight, California Environmental Protection Agency Secretary Winston Hickox, Department of Water Resources Director Tom Hannigan and his Chief Deputy Steve Macaulay, Congressman Gary Condit, Keith Brackpool, an advisor to the Governor, and various other staff.<sup>42</sup>

The new state team was an extremely diverse group, and well reflected the interests and divisions within the stakeholder groups. Despite these differences, the new state team worked hard to reconcile their competing viewpoints and forge a state consensus.

The Federal side of the discussions was led once again by Secretary Babbitt and by his long time aide and new Deputy Secretary David Hayes. Other federal leaders, including Felicia Marcus, the Regional Administrator of U.S. EPA, were brought into the discussions as issues moved beyond the CVPIA and Endangered Species Act.

Given the substantial progress of the Program in developing the broad framework for a CALFED plan, the final discussions focused on the most difficult unresolved issues. The state team focused its attention on a few key issues.

#### A. ESTABLISHING THE ENVIRONMENTAL WATER ACCOUNT

A key element of the final plan was the establishment of an Environmental Water Account (EWA).<sup>43</sup> The basic idea was that a large block of water would be purchased to supplement existing regulatory protections for the fisheries, and to protect Delta exporters from further pumping restrictions to minimize

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<sup>42</sup> The author participated in these discussions in my capacity as Deputy Secretary for Resources. As noted earlier, my conclusions are largely based on my participation in these and other meetings.

<sup>43</sup> See Programmatic Record of Decision, *supra* note 2, § 2.2.7; See also *id.* at Attachment 2, Environmental Water Account Operating Principles Agreement.

entrainment of threatened and endangered fish species at the state and federal pumping plants. The EWA was essential to provide regulatory assurances under the federal Endangered Species Act that no additional water would be needed to protect listed species. Through this innovative approach, the agencies hoped to provide both the additional freshwater flows necessary to protect the Delta fisheries and the regulatory stability necessary to gain support from the agricultural and urban water users.

But for EWA to succeed, the agencies had to agree on the regulatory protections, or “baseline,” upon which it was built. The Department of Interior had been struggling since the passage of the Central Valley Project Improvement Act in 1992 to develop guidelines for allocating 800,000 acre feet of water provided for environmental purposes under the Act. After a legal challenge to its initial allocation policy, DOI issued a new, more aggressive policy that drew strong opposition from the water users and many within the state administration.<sup>44</sup>

At first, Secretary Babbitt and his staff balked at making any changes in its CVPIA implementation strategy as part of the CALFED plan, particularly after it survived a legal challenge in the summer of 1999. But when the Davis administration made it clear that some changes would be necessary to clear the way for progress on the long-term issues as part of CALFED, the federal agencies agreed to put them back on the table for discussion. Ultimately, DOI agreed to some modest reductions in water allocated to fish under its CVPIA implementation plan that were offset by increased purchases of water for fish as part of the new Environmental Water Account (EWA).

More than any element of the CALFED plan, the State’s insistence on these changes had a profound and lasting impact on stakeholder perceptions of the administration. Many in the water user community, who were initially skeptical of the Davis Administration, became convinced that the state team was willing to stand up to the federal government to defend their interests. Some environmental groups, frustrated with their lack of direct access to the Governor, became fur-

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<sup>44</sup> See *San Luis & Delta-Mendota Water Authority v. United States*, Nos. CV-F-97-6140, CV-F-98-5261 (E.D. Cal., filed Mar. 13, 2000).

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ther disillusioned. Other, more pragmatic environmental groups were more willing to accept compromises to achieve their long term goals of securing more water and money for ecosystem restoration.

B. SETTING MILESTONES

The Davis administration also put its stamp on the final plan by firmly insisting on specific milestones and deadlines for every major element of the program. Acutely aware of the disagreements and lack of clarity that arose over the Accord, they were determined to make the plan as clear and unambiguous as possible, and insisted upon setting specific dates and milestones for each key element of the plan.<sup>45</sup> The plan also requires an annual report to ensure that all program elements move forward together.<sup>46</sup>

Again, this approach divided the interest groups. The water users were generally supportive, but were concerned that process commitments to build new projects were not strong enough. The environmental community, on the other hand, was concerned that the commitments were premature and inappropriate without much more site-specific analyses. The CALFED Plan generally struck a middle ground, through a strong commitment to immediately move forward with environmental and technical review of the most promising projects.<sup>47</sup>

C. STORAGE

The Governor's moderate, incremental approach was also reflected in the CALFED Program's decisions on surface storage reservoirs, one of the most contentious elements of the plan. The urban and agricultural communities urged the Program to make strong commitments to build new off-stream reservoirs to meet the state's growing demand for water. The environmental community, however, strongly opposed moving

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<sup>45</sup> See Record of Decision, *supra* note 2, at pp. 42-47. For example, where the previous draft plan suggested that the Program "may" include new storage projects if certain conditions were met, the final plan included a series of specific dates and commitments for each step in the process, from planning to approval for construction.

<sup>46</sup> See *id.* at 4-5.

<sup>47</sup> See *id.* at 42-47.

forward on these projects until other, less environmentally damaging alternatives were exhausted, including aggressive water conservation and recycling programs. In the final plan, the CALFED agencies agreed to move forward on the studies needed to build the most promising projects, and to make a final decision on whether and how to proceed after a thorough review and opportunity for public comment. They also agreed to invest heavily in local groundwater management and water use efficiency programs throughout the state. Through this approach, the Program was able to demonstrate its commitment to providing more reliable supplies through a broad set of programs, while stressing that specific projects must undergo detailed site-specific environmental analyses to gain approval.

#### D. FUNDING COMMITMENTS

Finally, to further solidify support for the plan, the Davis Administration made commitments to unprecedented investments in the plan. The final plan includes a budget calling for investments of \$8.6 billion over a seven year period.<sup>48</sup> Fortunately, the passage of Propositions 204<sup>49</sup> and 13<sup>50</sup>, together with a large surplus in the general fund, made available substantial resources to draw upon in the early years of implementation.

#### VII. REACTIONS TO THE PLAN

On balance, the stakeholder and press reaction to the Record of Decision has been favorable, although measured. Many groups welcomed the specific commitments in the plan, and a fresh start after years of gridlock, but expressed skepticism as to whether the agencies could deliver on the ambitious timetable. Given the history of conflict over water issues, the measured reaction was not entirely unexpected.

Many stakeholders expressed concern that, unlike the earlier Babbitt/Dunn discussions, the agencies did not include them in the final series of negotiations on setting the priori-

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<sup>48</sup> See Framework for Action, *supra* note 1, at App. A.

<sup>49</sup> See CAL. WATER CODE §§ 78500 et seq. (West Supp. 2001).

<sup>50</sup> See CAL. WATER CODE §§ 79000 et. seq. (West Supp. 2001).



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ties for implementation. This approach cost the agencies some support, particularly from members of Congress and the state legislature, but produced a much stronger document, free of the many qualifiers and contingencies that plagued the earlier draft programmatic documents. Ironically, many of the same stakeholders who had previously demanded leadership from the agencies in making the tough decisions after seemingly endless stakeholder discussions now criticized the agencies for taking this approach.

The agencies recognized that most stakeholders would express support for many key elements of the plan, but also have concerns with others. The hope was that the plan as a whole would attract broad-based support and form the basis of continued cooperation among the agencies and stakeholders.<sup>51</sup>

The lawsuits filed in response to the Record of Decision were also not unexpected. Three different lawsuits, on behalf of the California Farm Bureau, the Municipal Water District of Orange County, and an interesting coalition of Delta diverters and rural counties have been filed in various state and federal courts.<sup>52</sup> Substantively, these lawsuits raise particular concerns about how the Record of Decision will be implemented or concerns that the Record of Decision inadequately addressed their specific issues.<sup>53</sup> In addition, these lawsuits are symptomatic of the historic distrust between water-rich areas of the State and other areas reliant on distant water sources. They also reflect the historic mistrust of the state and federal agencies among local governments.

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<sup>51</sup> In general, stakeholder groups who have the staff and resources to fully participate have been more comfortable working with the agencies - and have more realistic expectations - while local interests who have a more difficult time being heard have been less supportive of the program. Hopefully, this perception will change as program moves to a more regionally and locally-based focus in the implementation stage.

<sup>52</sup> See *Don Laub v. Babbitt*, CV F-00-6601 OWW SMS (E.D. Cal. FULL DATE); *Municipal Water District of Orange Co. v. California Resources Agency*, No. BC237574 (Los Angeles County Superior Court); *Regional Council of Rural Counties*, No. 00CS01331 (Sacramento County Superior Court)

<sup>53</sup> For example, the Farm Bureau claimed that the Final EIS/EIR did not adequately address the impacts of the Program on agricultural resources, and the Regional Council of Rural Counties argued that the EIS/EIR should have evaluated alternatives that reduced exports from the Delta.

A major challenge for the Program will be to address the underlying fears and concerns of these groups while moving forward in the implementation stage. A key to this approach will be to develop regional strategies, in which local interests, rather than the state and federal agencies, develop and implement projects within the context of the overall plan. The agencies will then be in a position to offer technical, scientific, and financial assistance to locally-based, collaborative projects.

### VIII. LOOKING AHEAD

The Davis Administration has significant political and financial resources invested in the CALFED Program, and the final plan is likely to chart the course for water policy in the state for the next decade. The Program's success will largely be determined by the following factors:

#### *1. The Weather*

The state has been blessed with six years of normal or better rainfall, which has tended to minimize the impact of the conflicts among competing uses.<sup>54</sup> But if the weather turns dry for an extended period before significant additional flexibility is built into the system, conflicts will escalate, and stakeholder support for a collaborative process may evaporate in the face of water shortages.

#### *2. Meeting the Deadlines and Commitments*

Given the historic mistrust among the agencies and stakeholders, much of the credibility of the program depends upon the CALFED Program's ability to meet the aggressive milestones and commitments in the Record of Decision. The agencies managed to meet all of the end-of-year commitments for the year 2000,<sup>55</sup> but the uncertainty of federal funding for implementation threatens progress in the years ahead.

To the agricultural and urban interests, the key issue will be whether the Program can deliver on its commitment to

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<sup>54</sup> Water Conditions in California, California Cooperative Snow Surveys, Bulletin, 120-1-01, CA Dept. of Water Resources, February 1, 2001, p. 16.

<sup>55</sup> See CALFED BAY-DELTA PROGRAM, ANNUAL REPORT 2000, (2000).

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provide significant improvements in water supply reliability. To gain environmental community support, the challenge will be to develop a world class ecosystem restoration program, and to fully apportion the costs and benefits of water storage projects to their intended beneficiaries.

### 3. *The Environmental Water Account*

The EWA is the centerpiece of the Program in the short-term, and a major test of whether a non-regulatory approach can protect the estuary's fisheries while providing water supply reliability for exporters. If this approach is successful in the first year, the program is likely to gain significant momentum and may begin to restore stakeholder confidence in the CALFED agencies.

### 4. *Governance*

The institutional impediments to develop and implement a large-scale interagency program with multiple objectives are formidable. For example, agency budgets are nearly always based on narrow objectives or specific projects. While other large-scale programs are emerging in the Pacific Northwest, Everglades, Chesapeake Bay, etc., most are focused on a single objective (i.e., ecosystem restoration) and are managed largely by one or a few agencies.<sup>56</sup> The Bay-Delta Program, by contrast, involves coordinating the activities of over a dozen agencies to implement its water supply, water quality, ecosystem restoration, and levee stability projects and programs.<sup>57</sup>

It remains to be seen whether a consortium of agencies can effectively implement a large scale, multi-purpose program. Without a high level of direct funding and accountability from the legislature and congress, the task may be impossible. The program and its staff are all borrowed from the participating agencies, and decision-making depends upon a consensus of these agencies. A new governance structure is

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<sup>56</sup> For an overview of these issues, see the REPORT OF THE INTERAGENCY ECOSYSTEM MANAGEMENT TASK FORCE, THE ECOSYSTEM APPROACH, HEALTHY ECOSYSTEMS AND SUSTAINABLE ECONOMIES (1995).

<sup>57</sup> See Record of Decision, *supra* note 2 at p. 1.

essential to provide leadership, accountability and meaningful stakeholder involvement in implementing the program.

#### *5. Changing political leadership*

To date, the program has survived two governors and several changes in leadership within the Clinton Administration. This pattern is likely to continue under the Bush Administration. The new administration is unlikely to abandon a balanced plan and face the conflicts that would arise if it does not succeed.

Maintaining continued support from the legislature and congress, however, will be more difficult. Individual members, who often have the power to block appropriations bills, may have no stake in a successful program. In addition, elected officials are more likely to be more supportive of specific programs or projects in their areas than the program as a whole. Securing balanced and adequate funding without compromising the plan is likely to be the Program's greatest challenge.

#### *6. Broad-based support and involvement in program implementation*

From the beginning, the program has been dedicated to a high level of stakeholder involvement in decision-making. This approach will be even more important as the program enters the implementation phase. To attract continued support from state and federal elected officials, the program must be led by and be responsive to local and regional needs and concerns.