

Agenda Item: 8-3
Meeting Dates: December 8 and 9, 2004

ANNUAL JOINT MEETING WITH BAY-DELTA PUBLIC ADVISORY COMMITTEE

DIRECTOR'S REPORT

CALFED Litigation Update (November 2004)

A. Programmatic Litigation

1. Federal case

Laub v. Babbitt, et al., U.S. District Court, Fresno

Plaintiffs: The California Farm Bureau Federation and several individual farmers.

Defendants: All Federal and State agencies participating in the CALFED Program. The State agencies recently named in the Farm Bureau's latest complaint are sued via their executive officers: Governor Schwarzenegger; Michael Chrisman, The Resources Agency (Resources); Terry Tamminen, Environmental Protection Agency (CalEPA); Celeste Cantu, State Water Resources Control Board (SWRCB); Lester Snow, Department of Water Resources (DWR); Ryan Broddrick, Department of Fish and Game (DFG); Peter Rabbon, The Reclamation Board; Margit Aramburu, Delta Protection Commission; Darryl Young, Department of Conservation; Will Travis, Bay Conservation and Development Commission; Sandra Shewry, Department of Health Services (DHS); and A.G. Kawamura, Department of Food and Agriculture (CDFA).

Summary of Case: The Farm Bureau filed this case in September 2000. It alleges that the CALFED Programmatic Environmental Impact Statement/Environmental Impact Report (EIS/EIR) violates the National Environmental Policy Act (NEPA) and the Administrative Procedures Act. It seeks an injunction against all State and Federal actions to implement the Record of Decision (ROD) until an adequate Programmatic EIS/EIR is prepared. The State defendants are apparently being sued under the theory that the Program is a joint Federal-State partnership that requires NEPA compliance under Federal law; and, therefore, the Federal government must comply with NEPA for all State projects, as well as Federal projects.

Current Status: The case is pending in the Federal district court. The district court dismissed an earlier version of the complaint as premature in August 2001. The

Court of Appeals reversed that decision in September 2003. The agencies have filed their administrative record. A status conference was held on November 1, 2004. Plaintiffs are to designate experts by December 15, 2004; and Defendants are to designate experts by February 17, 2005. The opening brief as to Plaintiffs' NEPA claims is due to be filed on or before April 4, 2005; opposition briefs on or before May 24, 2005; and the reply briefs on or before July 25, 2005. The hearing is scheduled for September 6, 2005. Discovery on the State's jurisdictional issues is postponed pending dispositive motions.

2. State court cases

Laub v. Davis, et al., Court of Appeal, Third Appellate District (Sacramento)

Petitioners: California Farm Bureau Federation and several individual farmers

Respondents: State of California; The Resources Agency, Secretary of Resources; CalEPA, CalEPA Secretary

Summary of Case: The Farm Bureau filed this case in State court after the Federal district court dismissed a California Environmental Quality Act (CEQA) claim that had been part of their original NEPA lawsuit (described above). Defendants won all issues in the trial court and the Farm Bureau appealed. The Farm Bureau alleges that the CALFED Programmatic EIS/EIR violates CEQA and seeks an injunction of all Program activities until the alleged CEQA violations are cured. This case has been coordinated in Sacramento Superior Court with Regional Council of Rural Counties (below).

Current Status: The State defendants won on all issues at trial. The case is now on appeal and the parties' briefing was completed on May 11, 2004. In June, The Nature Conservancy was permitted to file an amicus curiae brief supporting the Programmatic EIS/EIR. The Farm Bureau's response was filed on July 16, 2004.

Regional Council of Rural Counties v. State, et al., Court of Appeal, Third Appellate District (Sacramento)

Petitioners: Regional Council of Rural Counties, Central Delta Water Agency, South Delta Water Agency, and individual farmers

Respondents: State of California; The Resources Agency, Secretary of Resources; CalEPA, CalEPA Secretary (plus real parties in interest: DWR Director; DFG Director; Patrick Wright [as Director of the CALFED Bay-Delta Program]; and numerous Federal agencies and officers)

Summary of Case: The complaint alleges that the CALFED Programmatic EIS/EIR violates CEQA and that the Project would harm the Delta. They also contend that the ROD is illegal under several water law theories. This case was coordinated in

Sacramento Superior Court with *Laub v. Davis* (above), and the two cases have been consolidated on appeal.

Current Status: The State defendants won on all issues at trial. The case is now on appeal and briefing was completed on May 11, 2004.

B. Environmental Water Account Litigation

California Farm Bureau Federation v. Mike Chrisman, et al. Sacramento Superior Court

Petitioners: California Farm Bureau Federation

Respondents: The following State agencies were sued in addition to those directors and secretaries in their official capacities: Resources (Michael Chrisman); CalEPA (Terry Tamminen); CDFA (A.G. Kawamura); DWR (Lester Snow), DFG (Ryan Brodrick); DHS (Sandra Shewry); and California Bay-Delta Authority (Patrick Wright)

Summary of Case: On April 16, 2004, the Farm Bureau filed this CEQA action challenging the adoption of a Final EIS/EIR covering operation of the Environmental Water Account (EWA) through 2007, the end of the first stage of implementation of the CALFED Program. The Farm Bureau alleges the EIS/EIR does not adequately address "agricultural resources" when analyzing impacts, alternatives, mitigation, and other issues regarding operations of the EWA.

Current Status: The administrative record was fully lodged as of October 7, 2004, and an answer was filed on behalf of DWR and Lester Snow on November 5, 2004. The Farm Bureau's CEQA statement of issues was filed and one on behalf of the State Respondents is in the process of being filed. The status conference and the demurrer to remove all agencies from the lawsuit except the lead agency, DWR, is set for hearing on December 10, 2004. The briefing schedule is that the Farm Bureau's opening brief will be due on or before March 25, 2005; the State's opposition brief will be due on or before May 10, 2005; and the Farm Bureau's reply brief will be due on or before June 3, 2005. The CEQA merits hearing will be on July 1, 2005.