

## 5. A Crisis of Confidence: Shifting Stakeholder Perspectives on the Delta

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“The greatest challenge . . . is stating the problem in a way that will allow a solution.”

*Bertrand Russell*

By December 2004, the decade-old truce between water users and environmental groups, forged at the beginning of the CALFED process, was all but over. This truce—epitomized by the CALFED motto that “everyone would get better together”—had always been a fragile one, with continuing differences over priorities for the Delta within the CALFED investment portfolio. Disagreements had escalated over the course of 2003, as conflicts arose over a water user proposal to increase Delta export levels. Then, through the summer and fall of 2004, concerns surfaced in quick succession over the viability of two central CALFED components: the stability of the levee system and the protection of native fish. Several months after a highly publicized levee failure on Lower Jones Tract drew attention to Delta flood risks, a new analysis of the systemic long-term risks to Delta levees was reported at the October CALFED Science Conference (Leavenworth, 2004a, 2004b, 2004c). Meanwhile, routine fall fish surveys registered sharp declines in several pelagic species, including the threatened delta smelt.<sup>1</sup>

The CALFED 10-year finance plan, released in early December 2004, increased the intensity of this storm. The \$8 billion plan drew immediate fire from legislators and stakeholders, who criticized it for being either unrealistic or unfair (Taughner, 2004). The plan proposed to substantially increase financial contributions from the federal government and water users, both of which had been much lower than anticipated when the CALFED ROD was signed in 2000 (CALFED, 2004a). In a sense, the 10-

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<sup>1</sup>Figure 1.3 shows the trends in abundance of several key pelagic species.

year plan merely articulated the weaknesses in CALFED's finances that had already become apparent: The federal government was a less enthusiastic donor than CALFED architects had hoped; implementing the "beneficiary pays" principle to elicit water user contributions was proving elusive; and state bond funds, which had taken up the slack, were running out.

The storm gathered strength over the course of 2005. Much of its fury was directed at the CALFED governing and implementing bodies. The legislature slashed the program's budget, and the governor's office called for three multifaceted audits to look at finance and governance questions. An interagency POD task force was set up to investigate the reasons for the pelagic organism decline.<sup>2</sup> Meanwhile, in a vote of no confidence in the collaborative processes of the preceding decade, the environmental community filed lawsuits against the federal government on two biological opinions related to Delta exports. About this time, Hurricane Katrina struck in New Orleans, reinforcing concerns over Delta levees and highlighting that levee expenditures under CALFED had been too modest to offer much new protection. In November, DWR began a round of briefings stressing the dire consequences of a catastrophic levee failure for water supply, farmland, homes, and infrastructure (Thompson, 2005b; Snow, 2006).

The audit of CALFED's governance structure revealed weaknesses that had prevented the effective implementation and oversight of its programs (Little Hoover Commission, 2005) and put institutional reform of CALFED on the administration's and legislature's agenda. The financial review confirmed the disproportionate contributions of the state, which covered 41 percent of the \$2.5 billion in total expenditures in the first four years, compared to only 10 percent by the federal government (Department of Finance, 2005). Although contributions by water users and local water agencies amounted to a hefty 49 percent, the majority of these funds were local matches for local water supply projects (groundwater banking, conservation, and recycling investments) that would probably have gone forward anyway.

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<sup>2</sup>The POD team's early reports suggested a complex set of reasons for the collapse of the open-water species (Weiser, 2005).

As Chapters 3 and 4 have shown, future approaches to the Delta will need to revisit CALFED's assumptions about the long-term sustainability of the levee system and its approaches to ecosystem protection. Moving in this direction calls not only for new science but also for new agreements among various stakeholders. In this chapter, we examine current stakeholder perspectives on problems in the Delta, drawing on press accounts, other published documents, and conversations with over 40 stakeholders representing water users, environmental groups, and various in-Delta interests.<sup>3</sup> This review suggests that fashioning agreement on a new vision for the Delta may be even more challenging now than when the CALFED process was launched in the mid-1990s.

## Shifting Stakeholder Perspectives

The recognition of new problems in the Delta has reinforced various stakeholders' concerns about the CALFED program's ability to address their primary interests. Each group's interests correspond to one or more of the four broad goals laid out in the CALFED ROD: water quality, ecosystem support and restoration, water supply reliability, and levee stability.<sup>4</sup> Whereas environmental groups and agencies have been principally concerned with the CALFED's ecosystem goals, urban and agricultural water exporters in the Bay Area, the San Joaquin Valley, and Southern California have focused on the program's water supply reliability objectives, with water quality as a secondary concern. By contrast, for water users that draw directly from the Delta—including Delta agriculture and the Contra Costa Water District—managing water quality (particularly salinity) has been a primary objective. Delta farmers had been

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<sup>3</sup>For a list of persons consulted, see Appendix B. Because some individuals preferred not to be quoted, we use the information gathered from these conversations to inform the discussion here. The reader is referred to press accounts for public statements by various stakeholders.

<sup>4</sup>Specifically, the CALFED ROD stated the water reliability objective as follows: "Reduce the mismatch between Bay-Delta water supplies and current and projected beneficial uses dependent on the Bay-Delta system" (CALFED, 2000a, p. 9).

the only consistent advocates of the CALFED levee program before current, increased recognition of the wider consequences of levee failure.

### ***Levee Problems Draw Attention to a Broad Range of Delta Land Uses***

The new spotlight on levees has been of particular concern to interests within the Delta, and it has drawn attention to some stakeholders overlooked in earlier CALFED processes: cities and towns with current or planned development behind Delta levees and various infrastructure providers (e.g., Caltrans, Pacific Gas & Electric (PG&E), East Bay Municipal Utilities District (EBMUD), railroads, ports) whose investments depend on the stability of Delta islands. The increasing urban and recreational value of land in the Delta also has brought new and powerful land development interests into Delta policy. In contrast to many water exporters, who have begun to question the viability of a major levee investment strategy, various in-Delta interests have stressed the importance of maintaining the integrity of the levee system.<sup>5</sup> At issue are both the salinity of water supplies and the viability of current land uses; both are at risk if the levees fail.

### ***New Challenges for Water Supply Reliability***

For water exporters, both ecosystem and levee issues have raised new questions about the ability to achieve the water supply reliability goals articulated under CALFED. These goals include protection from involuntary cutbacks in exports, increases in water use efficiency to reduce demand pressures, and increases in exports through improvements in conveyance and expanded water storage. From CALFED's inception, the expansion of exports has been the most contentious goal, with disagreements over the likely environmental consequences of new surface storage projects and the appropriate distribution of costs between water users and taxpayers for investments in such projects. As the investigation of new surface storage options languished in the first few years after the signing of the ROD, water exporters from the Central Valley Project and

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<sup>5</sup>See, for instance, editorials in the *Stockton Record* (2005, 2006) and the *Contra Costa Times* (2006).

the State Water Project pushed ahead on proposals to increase exports through improvements in operations and conveyance systems.

The July 2003 “Napa Accord”—developed at a meeting of water project officials and contractors—set out a plan to enable pumping increases at the Tracy Pumping Plant under high inflow conditions. Although the process for developing the plan was highly contentious—given the absence of both fishery agencies and environmental groups from the bargaining table—it was eventually endorsed by CALFED management.<sup>6</sup> Relabeled the “South Delta Improvements Package,” the plan now includes investments to maintain water levels and reduce water salinity in the southern Delta, in response to concerns of in-Delta interests (Cooper, 2003), with 3 to 5 percent greater average export volumes (mostly in high-flow years). However, by the time the environmental documentation for this package was available for public review in November 2005, the Delta’s new ecosystem challenges had taken center stage, calling into question the feasibility of the plan’s export enhancement goal.<sup>7</sup>

Meanwhile, the new spotlight on levee instability has focused exporters’ attention on the reliability of the water conveyance system. Some of the most extensive public outreach efforts have been conducted by the Association of California Water Agencies (ACWA), whose “Blueprint for California Water,” released in October 2005, calls on officials to “evaluate long-term threats to the Delta levee and conveyance system and pursue actions to reduce risks.” As of this writing (October 2006), the Kern County Water Agency is the only exporting agency whose officials have publicly endorsed revisiting the peripheral canal (Associated Press, 2004). However, many exporters are concerned about the long-term viability of the Delta as a conduit. As Tim Quinn, vice president of the Metropolitan Water District of Southern California (MWDSC) noted, “The current policy of the state and that of our board is to move water through the

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<sup>6</sup>On the disputes, see Pollard (2003) and Machado (2003). On the CALFED position, see CALFED (2004b) and Wright (2004).

<sup>7</sup>To wit, the DWR proposed to make decisions on the project in two separate stages, focusing first on the water level and quality and environmental objectives and only later on increasing exports (Department of Water Resources, 2005b). In a recent policy statement on the Delta, the Metropolitan Water District of Southern California (2006) emphasized only the water quality objectives of the project. On environmental community objections to the proposal, see Taugher (2006a).

delta. Mother Nature, however, has not been cooperating” (Lucas, 2005). In interviews, some water agency officials emphasized their concern that a strategy to shore up Delta levees would result in “stranded assets”—costing substantial investment dollars while leaving exporters vulnerable to curtailment of supplies.

### *Heightened Concern over Ecosystem Stress*

Ecosystem stress has naturally been the primary concern for the environmental community. Given the history of battles to secure adequate environmental flows within the Delta, it is not surprising that many environmental groups looked to export levels as a likely culprit in the collapse of delta smelt and other pelagic species. In late 2005, Environmental Defense released a study reporting that environmental flows in the Delta had been considerably lower than targeted between 2002 and 2005, the period over which the fish decline set in (Rosekrans and Hayden, 2005). Even as scientific evidence has emerged suggesting that the decline is due to a more complex set of factors (Chapter 4), many within the environmental community remain convinced that export levels are at least partly to blame. In this, they have found allies among southern Delta farmers (Taughner, 2005).

In the late 1990s, a similar alliance between environmentalists and Delta farmers pulled a peripheral canal alternative off the table during the deliberations over the strategy to be pursued by CALFED. In light of new evidence on the Delta’s woes, environmentalists have been divided over rethinking their position that the Delta must remain the only conduit for water exports. Gerald Meral, a Bay Area environmentalist and DWR official at the time of the original peripheral canal referendum in 1982, was one of the first to suggest that California reconsider such an option (Meral, 2005a, 2005b). Senator Joe Simitian, a Bay Area legislator with a strong environmental record, was the first to formally float a bill on this proposal (Taughner, 2006b). As various scientists, including those from the POD team, have indicated that such alternatives are worthy of consideration, some environmental groups have indicated a willingness to put them back on the table (Thompson, 2005a; Lucas, 2005; Gardner, 2006). Wariness remains, however, with some concerned that an alternative conduit for

exports would lead to a decline in interest, resources, and commitment devoted to the Delta's ecological problems (Nelson, 2005).

## Conflicts, Old and New

Recognition of the new threats to the Delta has reinforced long-standing conflicts over export levels, water quality, and ecosystem protection and has raised new conflicts and concerns over Delta land use. Increasingly, these conflicts are finding expression in legal actions.

### ***Renewed Battles over Export Levels, Ecosystem Health, and Water Quality***

Although legal actions had never entirely ceased during the decade-long CALFED truce, in 2005 a change in strategy took place on the part of environmental groups who had collaborated under CALFED. Various legal actions have been launched against federal and state agencies responsible for fisheries and water project management, on the grounds that they have favored water exports to the detriment of ecosystem health. Two lawsuits filed in 2005 challenged the biological opinions of federal regulatory agencies regarding the effects of new CVP operating criteria and plans (OCAP) on delta smelt and salmon.<sup>8</sup> In early 2006, the proposed CALFED intertie—or connector—between the CVP and SWP aqueducts, which would have increased export potential, was successfully delayed, sending project agencies back to the drawing board to complete more detailed environmental impact documentation.<sup>9</sup> Several groups petitioned the U.S. Fish and Wildlife Service to raise the delta smelt to endangered status under federal law, and in October 2006 a coalition of fishing groups sued DWR for failing to comply with state law protecting the smelt (Weiser, 2006a, 2006b).

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<sup>8</sup>*Natural Resources Defense Council et al. v. Kempthorne et al.*, No. 1:05-CV-01207 OWW LJO (E.D. Cal. filed September 28, 2005) (delta smelt); *Pacific Coast Federation of Fishermen's Associations et al. v. Gutierrez et al.*, No. 1:06-CV-00245 OWW LJO (E.D. Cal. filed January 24, 2006) (salmon). Filing dates reflect when the cases were transferred from the Northern District to the Eastern District.

<sup>9</sup>*Planning and Conservation League v. U.S. Bureau of Reclamation* (C05-3527 CW, N.D. Cal., filed February 15, 2006).

Over this period, decisions on several legal and regulatory actions added to the mounting challenges against water exports. In October 2005, a state appeals court ruled that parts of the CALFED environmental impact review were inadequate, notably because the review had failed to consider the option of reducing exports (Boxall, 2005). The following February, the State Water Resources Control Board issued a cease-and-desist order against the CVP and the SWP, threatening to cut back pumping levels if the agencies failed to implement a plan to maintain salinity standards for agriculture in the southern Delta (Barbassa, 2006; State Water Resources Control Board, 2006). During the spring and summer of 2006, under the threat of a court-mandated reallocation of project water, water users and environmentalists negotiated a settlement to a decade-old lawsuit to restore environmental flows to the San Joaquin River.<sup>10</sup> In April, the National Marine Fisheries Service announced the listing of yet another species that migrates through the Delta, the southern green sturgeon, as threatened under the federal Endangered Species Act (ESA). In July, responding to one of the OCAP lawsuits, the U.S. Bureau of Reclamation requested a reexamination of the effects of Delta export pumping on the delta smelt (Young, 2006).

Exporters, meanwhile, have been pursuing the creation of a Habitat Conservation Plan (HCP) as an alternative approach to CALFED for ecosystem issues in the Delta. Instead of relying on biological opinions of the fisheries agencies to determine ESA regulatory actions (such as the timing and volumes of water exports), an HCP would authorize interested parties to develop and invest in a long-term, multispecies protection plan. These parties would then receive ESA coverage (i.e., permission for some “takings”—or deaths—of listed species) for a range of activities. Exporters see this approach—and its California law counterpart, the Natural Communities Conservation Plan (NCCP)—as more flexible and likely to succeed than the approach used to date.<sup>11</sup> The state and federal fisheries agencies and several environmental groups have endorsed this process,

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<sup>10</sup>*Natural Resource Defense Council et al., v. Rodgers et al.*, Stipulation of Settlement, CIV No. S-88-1658-LKK/GGH (filed at the U.S. District Court of Sacramento on September 13, 2006).

<sup>11</sup>See the University of the Pacific “Statement of Principles” (anonymous, 2005).

known as the Bay-Delta Conservation Plan (BDCP). Exporters hope to involve other actors whose behavior affects ecosystem health, including power generators at the Delta's western edge and upstream operators and diverters. To date, the BDCP's scope is more limited than those developed in various parts of Southern California (notably, Riverside and Orange Counties), in which local land use authorities (cities and counties) are active participants. As discussed further in Chapter 9, the omission of land use interests will limit the BDCP's potential to play a coordinating role, given the central role of land use decisions—and particularly urbanization—in the management of Delta environmental resources.

### ***New Conflicts over Land Development***

The 1992 Delta Protection Act had aimed to set limits on urbanization by designating the lowest and most subsidized islands as a “primary zone,” reserved principally for agricultural, environmental, and recreational use (Figure 3.5). The act did not attempt to regulate development in the “secondary zone”—consisting of upland areas as well as some low-lying lands already zoned for development. From the act's passage until the failure of Lower Jones Tract levee in the summer of 2004, land development in the Delta had maintained a relatively low profile, with urbanization plans proceeding in the secondary zone. This changed with increased recognition of flood risks in the Delta, particularly in the aftermath of Hurricane Katrina.

Urbanization in the Delta is an issue on which most other stakeholders—including some Delta farmers—are able to agree: They think it is a bad idea (Machado, 2005; Pitzer, 2006). The concerns not only include increased risks of economic damage and threat to human life from floods in Delta lowlands, they also include potential threats to water quality and a loss of wildlife habitat. As Chapter 4 points out, the “hardening” of Delta uplands is also relevant for long-term wildlife habitat options, given the likelihood of eventual flooding of many Delta islands. On the other side of this issue are developers and local land use authorities, as well as some farmers hoping to sell their land at high prices. The issue is not strictly one of profits. For local authorities, new development is often

seen as a way to increase tax revenues and finance improvements in local infrastructure, including better flood protection for existing residences.<sup>12</sup>

The first signs of a formal challenge to the 1992 partition of Delta lands emerged in the spring of 2006, when environmental groups filed legal actions against two developments within the secondary zone. One lawsuit sought to block a 4,000 home project on Hotchkiss Tract, which lies below sea level (Hoge, 2006a). The suit argued that the City of Oakley had failed to consider adequately the risks of levee failure or mitigation of the likely effects of urban development. A second action challenged the state Reclamation Board's decision to approve a developer's levee-widening proposal on Stewart Tract, now part of the City of Lathrop (Hoge, 2006b). Recalling that this island, which lies above sea level, lay under 10 feet of water during the 1997 floods, the appeal challenged that its development would "exacerbate and worsen the existing flood threat for current and future residents."

## The Context for a New Delta Vision

In several respects, the current situation is reminiscent of the turmoil in the years preceding the 1994 Bay-Delta Accord, with serious concerns over ecosystem health and a rise in legal and regulatory actions that threaten to curtail water exports. Now, as then, various interests with a stake in the Delta are embarking on an exercise to seek a new course of action. The task for the governor's Delta Vision effort—today's equivalent of the CALFED process—is even more complex. On the one hand, new stakeholders have emerged—notably developers and Delta cities promoting urbanization of Delta lowlands—with even stronger interests in maintaining parts of the Delta in their current form. On the other hand, new scientific analysis—described in Chapter 3 of this report—has shown that this goal may not be viable, given the various pressures on the levee system. Moreover, as described in Chapter 4, maintaining the current configuration of Delta water flows may not be in the best interests of the fish species that are now under threat. There is also less promise of state and federal funds to

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<sup>12</sup>See, for instance, the commentary by the city manager of Oakley (Montgomery, 2006).

lubricate and finance any agreement. For these reasons, a new agreement based on the maxim that “everyone gets better together” may be elusive, because some goals for the Delta inherently conflict.

Three questions will inevitably be central to any process to forge agreement among stakeholders on a new Delta vision. First, what capacity is there to adjust to changing conditions in the Delta? Recognition of adjustment capacity opens up the possibility to consider a wider range of options for the Delta’s future. Some stakeholders are already taking steps to reduce their exposure to risk from levee failure. Among water exporters, the Southern California agencies belonging to MWDSC’s vast network are probably furthest along this path. Investments over the past decade in water marketing contracts, groundwater and local surface storage, conservation, recycling, and other local resources have put the region in a position to ride out an outage of Delta water supplies for up to two years.<sup>13</sup> Water agencies in the Bay Area are increasing their resiliency through investments in conservation and recycling, interties, and plans for regional desalination facilities. Such adjustments are not limited to water exporters. For instance, PG&E is laying a new pressurized gas pipeline underground to reduce its vulnerability to island flooding. And although there is disagreement over their adequacy to mitigate flood risks, some Delta land developers have proposed larger levees than the legal minimum.

The second question is how will California pay for any given set of options, be it shoring up the existing levees, building a peripheral canal, or any other substantial alternative? A divergence in views has already emerged. Various interests within the Delta have hinted that water exporters should foot the lion’s share of the bill, given the importance of the Delta as a conveyance system. Exporters, meanwhile, are emphasizing their unwillingness to pay more than their “fair share,” along with all the other Delta interests.<sup>14</sup> Failure to agree on workable principles for applying a beneficiary pays criterion to Delta investments puts any new visioning exercise at risk of coming up short, as did CALFED. As discussed further

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<sup>13</sup>See, for instance, the comments by MWDSC general manager Jeffrey Kightlinger (Pitzer, 2006).

<sup>14</sup>Metropolitan Water District of Southern California (2006) and California Urban Water Agencies (2006).

in Chapter 9, the state bond funds approved for flood control in November 2006 would provide only a down payment on any long-term strategy.

The third question is how will the various legal actions now under way or planned interact with more consultative processes? Threat of legal and regulatory actions brought some water users to the table in the early 1990s, and this is certainly still a way to force compromise on issues relating to environmental protection. However, there is also a risk that court rulings will constrain the consideration of new alternatives for the Delta, because so much of the focus of the lawsuits has been on limiting exports while maintaining the Delta as a levee-dependent freshwater body.

In the remaining chapters of this report, we explore some of these issues in greater detail. Chapter 6 assesses the capacity of various water users—including exporters and those who draw indirectly from the Delta—to adjust to changes in volumes and salinity levels. Chapters 7 and 8 examine a wide set of options for the Delta’s future and evaluate the ability of these alternatives to “deliver” with respect to various Delta goals. Chapter 9 looks at questions of financing and governance, with a particular focus on how to mitigate the costs for those who would bear disproportionate adjustment burdens, and considers possible policy realignments for a new Delta vision.

Although the current crisis has similarities with the previous debates—on the peripheral canal in the 1970s and early 1980s and during the initial CALFED discussions in the early 1990s—there are now new interests and concerns. It is important to move the policy discussion beyond the choice between a levee-centric freshwater Delta and a peripheral canal.