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## **Testimony of Jody Freeman Professor of Law, Harvard Law School**

### **Little Hoover Commission Public Hearing on CalFed/Bay-Delta Authority October 27, 2005**

Chairman Alpert and members of the Commission, thank you for the opportunity to speak here today.

I am a Professor of Law at Harvard Law School and the Director of the law school's Environmental Law Program. I also maintain an affiliation with the UCLA School of Law as an Environmental Fellow. I specialize in administrative law (the law of government agencies) and environmental law. My areas of expertise include the design of governance institutions, regulatory tools and decision-making procedures. I currently teach a course on regional ecosystem management to students in the law school and the Kennedy School of Government at Harvard, in which the explicit purpose is to compare efforts to manage ecosystems in order to distill which approaches are more successful than others.

In response to your letter of invitation, I will focus my remarks on CalFed's governance structure.

#### Reiterating Support for CalFed's Essential Features

The events of the last several months have made clear the need to restructure the CalFed program. My own strong view is that, although it is advisable to rethink the Bay-Delta Authority (BDA), it would be a mistake to eliminate the CalFed program entirely, or to assign responsibility for it to an existing executive agency that has historically served only one set of stakeholder interests. Whatever else the Commission may recommend, it is crucial that it express support for the fundamental commitments at the heart of CalFed: *inter-agency coordination, science-based decisionmaking, and balanced implementation of multiple goals.*

Experience thus far with the Bay Delta and evidence from other ecosystem management initiatives around the country have shown that there is simply no viable alternative to this approach. The problems that afflict the Bay Delta will only get worse over time.

Demographic predictions tell us that the demand for water in the state will only increase in the foreseeable future as Southern California's population swells; the best science on climate change suggests that weather related disasters, including flooding, are likely to increase as well, putting pressure on the Delta's vulnerable levee system; and the fragile Delta ecosystem, already weakened by water diversions and other habitat impacts, will deteriorate further without continued restoration efforts, destroying commercial fisheries. To dismantle CalFed or to give control to a single mission agency, will only defer the hard questions and the tough fights. It will return us to the approach that predated the CalFed program, an approach characterized by agencies acting alone, following their own narrow statutory mandates and serving their own clients, with costly, time-consuming litigation serving as the dispute resolution mechanism of first resort. From a political, economic and ecological perspective, that would be disastrous.

Thus far, CalFed has proceeded in a relatively informal way. It has depended as much on relationships and unenforceable agreements as legal mandates. While this approach had much to recommend it originally, when CalFed was first developing, its disadvantages have now become clear. As a result of this relatively informal structure, the CalFed program is especially vulnerable to the ebb and flow of political and economic developments. A short-term lack of leadership can send the program into crisis. Stakeholders increasingly seem to circumvent the established CalFed channels and resort to litigation. The Commission should therefore recommend that a reformed CalFed program be formally institutionalized in legislation, with a revised governance structure. The goal should be to make CalFed a permanent program, with a strong legal mandate, so that it can better withstand the shifting political winds.

#### Calling on the Legislature To Pass a CalFed Statute

The first step in designing a governance structure for the CalFed program is deciding in which body to vest decision-making power. The question for the Commission is: who should make the fundamental policy choices and the key tradeoffs concerning the Bay Delta? The answer is the legislature.

Lodging this power in the legislature will address one of the most important problems with CalFed: the policy commitments made in the 2000 Record of Decision (ROD) are not formally binding on the implementing agencies. The CalFed program has proceeded thus far with the essential policy determinations about the program's scope coming from the ground up—from the federal and state agencies, informed by stakeholders and guided, in recent years, by the BDA. This informal negotiated process of course produced the ROD which reflects a consensus on both the substance and process of the CalFed program. On substance, the ROD reflects a commitment to water supply and reliability improvements, levee integrity reinforcement, water quality enhancement, and ecosystem restoration. On process, the ROD reflects a commitment to balanced implementation, inter-agency coordination and science-based decision-making. As this Commission has discovered, the ROD is sometimes treated by the agencies and stakeholders like a statute (in that it establishes basic commitments but requires elaboration over time), and sometimes like a “framework” document that might need to be entirely re-negotiated. This has led to a “soft” approach to policymaking, in which the agencies agree in

principle to take certain actions but can only be encouraged, rather than required, to do so.

The Commission should solve this problem by recommending that the legislature pass a statute that formally establishes the CalFed program, makes the fundamental policy choices about the program's goals and priorities, and sets deadlines for achieving specified outcomes. The legislature should delegate the implementation of these goals—the filling in of the details—to an implementing agency (the BDA or its successor) that will be given authority over the regulatory and management decisions of state agencies that affect the Bay Delta.

The advantage of transferring the policymaking role to the legislature is threefold. First, it would clarify lines of accountability by putting responsibility for establishing program goals where we normally expect it to be—with elected officials. Second, it would provide an implementing agency (again, the BDA or its successor) with a clear legal mandate and, potentially, coercive power over state agencies whose decisions impact the Bay Delta. This is something that the BDA, despite being officially established via legislation, still lacks. Third, it would enable that implementing agency to be held accountable not only to the legislature (which can hold oversight hearings, amend the statute, or cut funding), but also to the executive branch (which may have a role in appointing and removing the members of the implementing agency) and to courts (which can be enlisted to review agency decisions for their compliance with the statute). Thus, by establishing clear principal-agent relationships, the legislature could provide clarity about who is responsible for what in the CalFed program.

Although there are obstacles to calling on the legislature to pass a statute and delegate its implementation to an agency, they can be overcome or mitigated. First, it is true that legislation could introduce rigidity into a system that has evolved somewhat organically and iteratively through negotiation and consensus. An argument can be made that many of CalFed's innovations, both substantive and procedural (e.g., the Environmental Water Account), would not have emerged or would have been slower to emerge in a more top-down process. In the current approach, the implementing agencies are the drivers of the decision-making system. Yet it is possible, even with a more top-down approach, to find ways to encourage policy innovation and buy-in by the implementing agencies and stakeholders. I say more on this below.

Second, and this may be somewhat surprising coming from a law professor, increased formality and legality is not always beneficial. Even if it produces more formal accountability (i.e., one can see who is legally responsible for what), it may not produce sufficient *progress* toward the policy goals. That is, policymaking through statutes and regulations can be relatively inflexible. Statutes and regulations can be vague, hard to amend and difficult to repeal. They are not well suited to “adaptive management,” which requires real-time decision-making in response to updated information. For this, agencies need discretion. By comparison, policymaking through instruments like the ROD, annual work plans, “packages” like the Delta Improvements Package, and other inter-agency agreements which are informally negotiated and not vulnerable to judicial review can be

an effective and efficient way to make policy. They require ongoing buy-in from the implementing agencies, which serves to remind them of their commitments. Some of these benefits could be lost in a more formal structure.

Yet this problem too, can be largely mitigated. Assuming the legislature has the political will to pass a statute, it is not entirely clear that such a statute will be any more specific than the ROD. Many environmental statutes establish the equivalent of the general goal of “balanced implementation” among two or three competing and seemingly incompatible commitments, but leave the hard decisions about where to make tradeoffs (e.g., how much investment in water supply reliability *versus* how much investment in ecosystem health restoration; how much water to give the fish versus the farmers) to the implementing agency. Though passing a statute restricts the exercise of the implementing agency’s discretion, it will never eliminate it. Inevitably then, the statute will provide some range for agency discretion. And this will be important if the new agency is to be expected to practice adaptive management. The agency must be enabled by the statute to experiment responsibly with decision-making, providing that experimentation is based on credible and legitimate science, informed judgment and sound reasoning.

Third, and in a related vein, because it will have policy discretion, the implementing agency will become a forum for intense interest group activity. This is not an entirely bad thing, and it too can be managed with careful design. The new agency’s decision-making process will need to be structured, however, to allow for balanced stakeholder input and significant public participation, and in more than a *pro forma* way. There are a number of ways to accomplish this, which I discuss below.

Finally, formalizing the CalFed program through a statute that delegates power to an implementing agency, and adding procedural requirements that the agency must follow, could add both expense and conflict to the policy making process. This formalization can also multiply and diversify the grounds on which stakeholders can challenge agency action in the courts. Again, this risk can be managed through careful attention to design. The legislature can dictate when agency decisions can be judicially reviewed, and how much deference the agency should receive from reviewing courts.

Clearly, there are risks and obstacles involved in restructuring CalFed. Yet the clarity and accountability to be gained by calling on the legislature to pass a CalFed statute that delegates implementation power to a new agency, which itself will have an explicit policymaking role in CalFed, is worth the price. Nevertheless, the Commission should recommend that the new governance structure be designed in a way that mitigates the problems identified above.

#### Restructuring the BDA or its Successor

The BDA or its successor could be structured in a number of ways. There are a variety of agencies in California that could serve as useful models. Each alternative arrangement has its advantages and disadvantages. A traditional executive agency with a single political appointee serving at the pleasure of the Governor would maximize gubernatorial accountability but would not insulate the CalFed program from political swings as

administrations change over time. An “independent” multi-member board, with appointments divided between the Governor, the Assembly and the Senate, would insulate the agency somewhat from too much influence by any one branch. Another option is a multi-member board that serves at the pleasure of the Governor but for which the legislature establishes expertise requirements—much like the California Air Resources Board. This would not be a conventional executive agency, but it would still allow for significant gubernatorial control through appointments and removal. The new agency could be called a “Commission” or a “Committee” rather than a board or an agency. Whatever the particular configuration, the overriding goal would be to create a new agency equipped not only with a mandate to coordinate and supervise state agencies in their decisions affecting the Bay Delta (which the BDA currently enjoys), but also to equip it with policymaking authority that the current BDA lacks.

Conceivably, the new agency could look very much like the BDA looks now, with multiple members representing the key federal and state agencies, stakeholders and the public. The advantage of this structure is that it would consist of a balance of different kinds of members representing different interests. It could afford a prominent role to stakeholders with expertise, and to public members who would introduce a more general perspective into the decision-making process. However, the weaknesses of the current BDA structure counsel against simply reproducing it in a new agency. Two main problems undermine the effectiveness of the BDA. First, the public members are not sufficiently integrated into decision-making and do not all appear to have the necessary expertise to play a meaningful role. And second, the agency representatives on the BDA cannot be expected to criticize their own proposals. Instead, they must be directed and held to account by a set of officials who are statutorily charged with taking a *program-wide* view.

Nevertheless, as mentioned above, the new agency must be structured to provide a meaningful and ongoing opportunity for stakeholder and public input. Stakeholders have been crucial to many of the innovations in CalFed thus far. On numerous occasions, they have generated solutions rather than simply criticized agency proposals. This kind of stakeholder input should be encouraged. It is not the norm in most agency settings, where stakeholders are kept at arms-length. In traditional agency processes, the most stakeholders can hope for is a chance to informally lobby the agency before it proposes to act, and to provide comment on proposed actions before they are final. Comments are usually written, and there is typically only one opportunity to provide it. The only recourse most stakeholders have if they want to get the agency’s attention is to initiate litigation.

By contrast, a restructured BDA or its successor should be required to consult with advisory committees of stakeholders on a regular basis and to take their views into account. These committees should be involved not just episodically, but continually, as the agency oversees program implementation. In addition, the agency should be required to consult with advisory committees of scientists, and to base agency decisions on the science they produce. The agency should also be required to consult regularly with high level representatives of the state and federal implementing agencies that will be

responsible for implementing their decisions. This back and forth between the new agency and the implementing agencies will be critical for CalFed's success, since only the implementing agencies can make the management and regulatory decisions necessary for implementing the program. Their cooperation is necessary, and their expert input vital. In addition, the new agency may be required to consult regularly with federal officials, which I explain further below.

### Promoting Inter-Agency Coordination

The history of CalFed reveals that its greatest innovation has been inter-agency coordination. Whatever the ultimate policy balance struck by the legislature in a statute (or, in the absence of a statute, whatever the ultimate policy balance negotiated by the agencies and stakeholders in a revised ROD), implementing that balance will require unprecedented inter-agency coordination. Prior to the water crisis of the early nineties (brought on, as testimony before this Commission has recounted, by a combination of drought, pump shutdowns due to Endangered Species Act listings, and federal pressure to improve water quality standards), such coordination was simply non-existent. Federal and state agencies with different jurisdictions, statutory mandates, histories, cultures, budgets and constituencies had operated independently, often at cross-purposes, and usually competitively, to the detriment of the Bay Delta. The CalFed process began as a conversation across these jurisdictional and bureaucratic lines. And it evolved into concrete efforts to coordinate management and regulatory actions that would affect the Bay Delta. As other witnesses have noted, the operating and regulatory agencies in the Bay Delta now routinely and regularly consult over decisions regarding Delta operations. Because of CalFed, more information is shared than ever before. Yet there is no formal mechanism institutionalizing this coordination, which makes it vulnerable and unstable over the long-term. A statute could require it, however, and thereby give it staying power.

Any new governance structure must, at its core, be focused on promoting and strengthening inter-agency coordination where multiple agencies have the potential to adversely impact the Bay Delta but where none of them can ameliorate these conditions acting alone. The simplest way to achieve this for state agencies would be for the state legislature to require it. Nothing changes agency behavior like legal requirements backed up by sanctions. For example, the state legislature could conceivably demand that the state Department of Water Resources consult with both federal and state fisheries agencies prior to making operational decisions that would adversely affect the health of the ecosystem (and not necessarily only when Endangered Species Act listings are an issue). Each state agency with policy responsibility over the Bay Delta could be required to engage in a consultative process with the other agencies prior to taking regulatory or management steps. There are many such consultation requirements in environmental law. Some are stronger than others. Some give the lead agency the ultimate authority to move forward even when the consulting agencies disagree; others require that the lead agency explain any disagreement with the consulting agencies if it wishes to proceed against their recommendations, and make the decision to proceed reviewable in court. Requirements such as these tend to reduce the ability of one agency to "go it alone."

They increase the need for negotiation among agencies before any of them make final decisions.

In addition, the legislature could establish a formal inter-agency dispute resolution process to be followed by the state CalFed agencies, with unresolved matters to be elevated to a point-person in the Governor's office. This would clarify the role of the Governor in the CalFed program, and give him the ultimate decision-making authority in cases of inter-agency disagreement. It would also provide the state CalFed agencies with a place to go to resolve intractable policy conflicts.

### Strengthening the State-Federal Relationship: Providing a Forum for Coordination

The state legislature cannot, however, legally require federal agencies to do anything. This is especially important now, since the federal-state cooperation that originally launched CalFed appears to have substantially weakened. The CalFed program began in earnest only once the federal agencies ("ClubFed") agreed to coordinate their actions, and the state then agreed to do the same. This culminated in the two sets of agencies talking across the federal-state divide, which produced the 1994 Bay Delta Accord. The program's early success can be credited in part to the fact that one point-person spoke for the federal agencies, and another for the state agencies, and it was their responsibility to see that their agreements were implemented. Since all evidence suggests that this relationship has broken down, the question for the Commission is, how might a new governance structure improve the federal-state relationship?

First, the state agencies need to commit to a coherent and coordinated game plan. As a political matter, it will be difficult for the federal agencies to decline to participate in a revised CalFed program if the state agencies speak with a single voice, and if the Governor supports the program. Still, even if the state agencies were perfectly coordinated, their management efforts could be easily undermined by federal agency action. For example, if the federal Bureau of Reclamation renews long-term water contracts without considering the state's long-term plans for water allocation in the Bay-Delta, or if the federal Fish and Wildlife Service lists endangered species and authorizes a recovery plan without the same consideration, the state's efforts to manage the ecosystem in a coordinated way will be compromised.

A restructured CalFed program must create a forum for federal-state coordination. This could be something built into the design of the new agency charged by the legislature with implementing a CalFed statute. As noted above, that agency might consist of more than one appointee. Under these circumstances, one or more of the appointees to the new agency might be a federal official. To avoid any legal conflicts, however, such officials need not have decisional authority but instead could participate as non-voting members of the body (much as federal officials participated in the BDA until recently). Alternatively, the new state agency could simply be required by state legislation to consult on a regular basis with a federal "advisory committee," to be comprised of the key federal officials with authority over CalFed—the agencies that currently participate in the BDA.

Ultimately, it would be ideal to have federal legislation “bless” this arrangement, much as Congress authorized the CalFed program.

Whatever its ultimate design, however, this forum must provide a venue in which the state is encouraged to speak with one voice, and the federal government is encouraged to speak with one voice, and where meaningful policy decisions are expected to be made by people of sufficient stature to ensure that they are implemented. Although the state cannot demand federal participation of this kind, it can encourage it by creating such a forum, and leverage it by developing a coherent and consistent state approach to the Bay Delta.

#### Reinforcing the Role of Science

Many other witnesses have testified about the crucial role that independent science has played, and must continue to play, in the CalFed program. I have little to add except to echo that sentiment, and to impress upon the Commission what I have learned by studying other ecosystem management efforts: those that do better have built-in mechanisms for incorporating independent and credible science into decision-making in ways that inform agency choices before they solidify. This is harder than it might sound, because the science must be produced by individuals who are known for their integrity and independence, and through a process that will make that science not only scientifically credible but also practically relevant and politically legitimate to a wide variety of stakeholders. Any new CalFed statute, and any new governance arrangement established pursuant to it, should make science-based decision-making an integral element of the policy process. Although science alone cannot resolve high level policy disputes—especially those that involve distributional tradeoffs—science can usefully inform the policy process.

#### Calling for Leadership: Raising CalFed’s Profile and Securing Funding

In the interests of time, and in response to your request, I have focused my remarks specifically on the governance structure of the CalFed program. But I also wish to underscore my agreement with the testimony of other witnesses who have suggested that CalFed’s ultimate success depends as much on leadership as on sound design. Most pressing in the short term is the need for leadership from the Governor on developing a finance plan. This plan will likely involve a variety of revenue measures, and pressure will need to be placed on Congress to contribute. A viable finance plan will necessarily require the imposition of user fees. All of the stakeholders know that this is inevitable and have already agreed to user fees in principle in the ROD. But only the Governor can bring the relevant parties to the table, secure an agreement on user fees, and strike a balance between public and private funding. The Commission should encourage him to do so.

The Commission should also recommend that the Governor take steps to raise the profile of CalFed. Very few people outside the region know anything about CalFed, even though it is one of the most ambitious and important efforts at ecosystem management in the United States. (Indeed, until the recent coverage of the Delta woes, few people in the state beyond the agencies and stakeholders knew much about CalFed.) One witness has suggested to the Commission that CalFed be renamed the San Francisco Bay Estuary, and

placed on a footing with other national treasures like the Everglades or Chesapeake Bay. Such a step seems relatively easy compared to the governance challenges that lie ahead. But it could go a long way to increasing public awareness and building broad-based political support for the program.

This concludes my remarks. I would be happy to answer any questions that you might have.