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Little Hoover Commission – 5 Questions

1. Please describe inadequacies in CALFED's governance structure and how these inadequacies limit progress of the CALFED program. Please provide specific examples of how flaws in governance structure create problems.

**There are three principal problems with the California Bay Delta Authority's (CBDA or Authority) governance structure:**

- 1) **The 24-member CBDA is an unworkable amalgam of state, federal, and public governance bodies into a single entity that does not function well as a decision-making body for charting the future of CALFED.** This experiment in cementing three types of governance into a single, 24-member entity has failed to effectively resolve conflicts and has been unable to make realistic long-term planning decisions. The attempt to meld three different kinds of representatives into a single entity is a failed experiment in governance, for several major reasons:
  - **Federal representatives are severely constrained in their capacity to participate in the CBDA.** The 2002 state statute establishing the CBDA (SB 1653) anticipated that Congress would authorize full federal participation in the CBDA. "Full" federal participation would have meant that federal agency officials would comply with all of the state laws governing this state body, including voting on CBDA decisions, and compliance with the orders and determinations of the CBDA. Congress failed to authorize full federal participation. In fact, the federal agencies have no right to vote on CBDA decisions, and thus cannot function as equal partners with the state. Federal agency participation in the CBDA has been very limited. This stands in clear contrast to the example of the South Florida Everglades restoration program, where the federal government is authorized to participate fully as a result of stronger federal enabling legislation.
  - **The six state agency chief executives who serve on the CBDA give undue deference to the CBDA Chair and Executive Director.** The

CBDA Chair and Executive Director are both appointed by the Governor and the perception has grown that these two individuals serve as the “de facto” chief executives for the CBDA. These two individuals frequently meet and confer with the Governor or his senior staff on important CBDA matters in order to seek the policy direction from the Governor, in advance of the public meeting. This is entirely appropriate, but an unanticipated consequence has been that the other six state agency chief executives who serve on the CBDA have tended to defer to the Chair and Executive Director on policy matters. Over time, the state agency officials who serve on the CBDA have been generally reluctant to challenge the perspectives and recommendations of the Chair and the Executive Director. This has resulted in minimal debate and hard questions being asked by the state agency officials at CBDA meetings. It was never intended that these six senior officials would serve as advisory to the policy decisions announced by the CBDA Chair.

- **The public appointees are the CBDA voices that actively and independently scrutinize and question the direction of the CALFED program, the efficacy of its expenditures, and whether or not it is accomplishing the original ecosystem, water supply reliability, and water quality program goals.** Since the public members of the CBDA are not officials of either the state or federal Administrations, they approach CALFED with a more independent perspective than the agency officials. Consistently, it has been the public members of the CBDA who ask the hard questions during CBDA meetings.
- 2) **The CBDA’s statutory mission includes two important functions that are in tension with one another:** 1) promoting greater interagency coordination and integration; and 2) independent program oversight and assessment. Improving interagency coordination is best accomplished by building upon existing program activities by those who carry out these programs. By contrast, independent program oversight is best accomplished by those who do not have a stake in the status quo and who are not responsible for the day-to-day activities of the program. These two functions should not be vested in the same governing body. The Authority’s current statutory mission is muddled, as it is charged both with trying to promote interagency coordination as well as provide for outside program oversight. The goals and responsibilities of the CBDA contain the embedded conflict between interagency coordination on implementation issues on the one hand, and independent oversight of program performance, on the other hand. It is neither reasonable nor fair to ask implementing agency executives to implement their programs and at the same time, stand in judgment of their accomplishments.
  - 3) **The 24-member CBDA has too large a membership to serve effectively as an executive, decision-making body.** The size of the CBDA prevents a meaningful exchange of views across the membership. Much of the information presented at

meetings of the CBDA is scientific and technical in nature. The large membership of the CBDA makes it difficult to allow for questioning of experts regarding these technical presentations. A 24-member body would be better suited to serve as an advisory body, rather than a decision-making body. Equal and opposite problems are present: too many voices can derail a focused debate, while at the same time representatives can easily sit back and decline to express a position. Most decisions are the result of a unanimous vote in support of the motion made by the Chair. Meetings are typically structured to avoid debate by relying on informational presentations not intended to raise questions about effective coordination or performance.

**Examples of failures in CBDA governance:**

- 1) **The problem of plummeting Delta fish populations was brought before CBDA only after it had become a full-blown crisis.** Agency biologists had been aware of the declining trends for many months, but the communication system broke down with this failure to alert the CBDA in a timely fashion. CBDA members ended up being better informed of this problem by press accounts. The CBDA should have been the appropriate venue for such discussion during the early stages of this crisis, leading to a coordinated and more timely response from the implementing agencies. Both the Authority's three-part membership problem and its size have rendered it incapable of prompting agency action.
- 2) **The 2003 "Napa accord" process to better coordinate operations of the CVP and SWP, was conducted outside of the purview of the CBDA, even though the CBDA had a direct interest in the subject of federal-state project operations, affecting the Delta.** The decision on the part of DWR and USBR to conduct these discussions elsewhere suggests that the CBDA is not perceived as a viable forum for high conflict issues. The inability of the CBDA to constructively address the difficult issues demonstrates it is not effectively carrying out its core purpose.
- 3) **The CBDA proved incapable of developing a viable finance plan for the CALFED Program.** Despite two years of study and some stakeholder involvement, CBDA could not secure the Governor's endorsement for its December 9, 2004 \$8 billion 10 Year Finance Plan. The CBDA public review process of this \$8 billion Plan was compressed into an unrealistic time frame, and any dissent or requests for additional information from CBDA members was repeatedly ignored. Repeatedly, the public members of the CBDA called for this Plan to be amended to address the CALFED "beneficiary pays" principle and such requests were repeatedly ignored by the full body. The few independent voices in the CBDA were thus rendered moot, and the oversight function failed.

4) **The CBDA has been ineffective in its overall program evaluation and oversight function, necessitating the current “revitalization” process imposed by the Governor.** As a governing body, the CBDA has not recognized and responded to the challenges that have been in immediate evidence: vanishing public funds, the Delta ecosystem crisis, integrity of Delta levees, lack of progress in improving water supply reliability and drinking water quality, and the loss of public confidence in the CBDA’s leadership. The fact that the public members of the CBDA comprise only one-third of the total membership has hampered the CBDA’s willingness to acknowledge those programs areas where there has been very little indicators of success. This paralysis is directly tied to the structural flaw of “self-regulation,” or a lack of independent, non-vested oversight.

5) **The CBDA has not attempted to address the significant questions regarding the long-term sustainability of the Delta.**

During 2004, the Independent Science Board (ISB) evaluated the impacts of levee stability on CALFED programs and objectives. A summary of the ISB’s findings was presented to the CBDA in October of 2004. Among its findings was the determination that there is a 2 in 3 chance that catastrophic flooding will significantly change the Delta within the next 50 years. Such flooding would have calamitous and permanent impacts on the Delta’s export capacity and its ecosystem, with significant collateral impacts on the state’s economy. Despite the urgency of these findings, the CBDA has not treated this long-term threat as a high priority matter. While the CBDA is the obvious candidate to address the issue of the Delta’s long-term sustainability, the disparate nature of its membership and its size allowed important information to only be presented in an informational manner, without any decision by the CBDA regarding a coordinated response.

2. What functions do you believe are most important for the governance structure to provide?

Two entirely distinct, but related functions must be performed by the future governance structure for this program:

a) **Interagency coordination, program integration, conflict resolution, action on implementation.** With two dozen state and federal agencies involved, the need for frequent and regular communication and coordination cannot be overstated. Interagency coordination among co-equal implementing agencies can only be successful if it is undertaken with mutual agreement and buy-in on decision-making.

b) **Program evaluation, independent oversight, findings of program balance.** From the outset of the CALFED program, it has been vital to provide a fair and independent perspective on whether the program is achieving adequate progress

in a balanced manner. Independent program evaluation can be performed by those who do not have a vested interest in the implementation the various program elements.

3. Please describe your recommendations for improving the CALFED governance structure.
- a) **CALFED needs a venue for interagency coordination, program integration, conflict resolution, and action on implementation.** The Policy Group should be reinstated as the primary venue for coordinated decision making and conflict resolution on the part of the state and federal agency officials. The Policy Group, established in the early years of the CALFED program, was an active force during the planning phase of the CALFED program, and its membership was comprised of high-level policy representatives from all the implementing state and federal agencies. It met weekly for several hours – the kind of time investment necessary to guide the development of the program through to the completion of the Record of Decision. While a reconstituted Policy Group may not require a similarly intensive commitment in the future, it has proven itself as an effective vehicle for coordinated actions and policy direction. As before, these meetings should be open to the public, with the opportunity for public comment. The Policy Group had a federal co-chair appointed by the President and a state co-chair appointed by the Governor.
  - b) **CALFED also needs a separate entity for independent program evaluation, independent oversight, and for making findings of program balance.** The CBDA should be reconstituted as a smaller (7 to 9 members, in total) commission comprised only of appointed public members. This commission would be responsible for those specific duties and responsibilities that relate to keeping the program “on track”. . As part of this independent review responsibility, the commission should also be responsible for annual findings pertaining to program balance, budgets, and timelines.

4. Do you believe that the California Bay-Delta Authority should have more legal authority than it currently has over implementing agencies? If so, how would you fashion that authority?

**No.** As noted in the responses to Questions 2 and 3, the primary structural flaw in the CBDA is its dual function both for agency coordination and for oversight. The challenge is to separate the two activities. The powers exercised by the implementing agencies were established by a variety of state and federal statutes, which were the result of lengthy deliberation and debate. The agency staff who administers these programs have in-depth experience in administering these responsibilities. It would not be good public policy to empower one state agency with the authority to suspend the provisions of a state law that are administered under the jurisdiction of a different

state agency. The institutional expertise of the implementing agencies must not be undervalued or assumed to be easily set aside; providing “override” powers to the CBDA would create far greater governance problems than it would solve.

5. What is your assessment of the state and federal partnership that is the basis of the CALFED program? Do you have recommendations for improving the relationship between the state and federal entities that are needed for CALFED to succeed?

The state-federal partnership is critical for success, due to the enormous investments both have made in water resources in California and their joint responsibilities for environmental protection. Ideally, Congress should authorize federal agencies to fully participate in the CALFED program, so that federal agencies will be subject to the determinations of this CALFED commission that exercises independent oversight. Additionally, the federal agencies should be authorized to participate in the Policy Group for achieving greater interagency coordination. CALFED cannot succeed without full federal participation in both of these successor entities for governance of this program.