MEMORANDUM OF UNDERSTANDING

Integration Process for the Bay Delta Conservation Plan

National Environmental Policy Act (42 U.S.C. 4321 et seq)

and

Clean Water Act Section 404 (33 U.S.C. 1344)

and

Rivers and Harbors Act of 1899 Section 10 (33 U.S.C. 403)

and

Rivers and Harbors Act of 1899 Section 14 (33 U.S.C. 408)

Among:

California Department of Water Resources
United States Army Corps of Engineers

[Insert Current Date]

TABLE OF CONTENTS

RECITALS....3
Section I. Checkpoints, Products, and Milestones.... 5
Section II. Schedule.... 9
Section III. Dispute Resolution and Elevation Process.... 9
Section IV Modification and Termination.... 10
Section V. General Provisions.... 11
Section VI. Effective Date and Duration....12

ED_000733_DD_NSF_00009219-00002

RECITALS

1. **CWA Section 404.** The U.S. Army Corps of Engineers, through the Regulatory Program, administers and enforces Section 404 of the Clean Water Act (CWA). Under CWA Section 404, a permit is required for the discharge of dredged or fill material into waters of the United States.

2. **RHA Section 10.** The U.S. Army Corps of Engineers, through the Regulatory Program, administers and enforces Section 10 of the Rivers and Harbors Act of 1899 (RHA). Under RHA Section 10, a permit is required for work or structures in, over or under navigable waters of the United States.

3. **Section 408.** Section 408 provides that the Secretary of the Army may, on recommendation of the Chief of Engineers, grant permission for the alteration or permanent occupation of a public work so long as that alteration or occupation is not injurious to the public interest and will not impair the usefulness of the work. Permission for major alterations which include changes the authorized purpose, scope, or functioning of a project, must be approved at Headquarters (HQ) USACE. Permission for minor, low impact modifications has been further delegated to the District Engineer. This MOU focuses on major alterations that require approval at HQUSACE. The primary focus of the USACE's Section 408 review will be to ensure that there are no adverse impacts to the flood risk reduction system.

4. **The Bay Delta Conservation Plan (BDCP).** The BDCP is a habitat conservation plan (HCP) being prepared to meet requirements of the Endangered Species Act (ESA), the California Endangered Species Act (CESA), and the State of California's Natural Community Conservation Planning Act (NCCPA). DWR intends to apply for ESA and CESA take permits for water operations, conveyance, and restoration activities in the Delta as described in the BDCP. These take authorizations would allow take of threatened and endangered species resulting from covered activities and conservation measures described in the BDCP. Conservation measures and take provisions under ESA and CESA will be identified through planning, and NEPA and CEQA compliance processes; to include those associated with water operations of the State Water Project (SWP) as operated by DWR, and certain Mirant Delta LLC (Mirant Delta) power plants. Additionally, if feasible, the BDCP will be used as the basis for Section 7 ESA compliance for permitting decisions by USACE.

5. **The BDCP EIR/EIS.** An EIR/EIS is being prepared for the BDCP for the purpose of compliance with NEPA and the California Environmental Quality Act (CEQA) by the NEPA and CEQA Lead Agencies (Reclamation, U.S. Fish and Wildlife Service, National Marine Fisheries Service, and

DWR). The status of planning efforts and the level of detail for separate actions of the BDCP varies; such that the BDCP EIR/EIS analyzes actions for the conveyance and operations elements of the BDCP at a site-specific or project level, and analyzes habitat-restoration actions at a programmatic level. As appropriate, actions analyzed in the BDCP EIR/EIS will require subsequent compliance, including compliance with NEPA, CEQA, RHA Section 10, Section 408, CWA Section 404, and all other applicable regulations, when planning efforts provide site-specific detail or indicate there are substantive changes.

The BDCP EIR/EIS is intended to serve as the primary method of NEPA/CEQA compliance for a significant number of regulatory and operational decisions, including, but not limited to: (1) decisions to issue ESA Section 10(a)(1)(b) and State Fish & Game take permits for the BDCP; (2) decisions by DWR and Reclamation to implement the BDCP, including new conveyance and operations of the SWP and CVP, (3) decisions by the State Water Quality Control Board to issue a change in the point of diversion permit to the CVP and SWP, and issue Clean Water Act Section 401 certification for the BDCP activities; and (4) to the extent possible, to support permitting decisions by the USACE.

Signatory Agencies: California Department of Water Resources and theU.S. Army Corps of Engineers.

CEQA Lead Agency: California Department of Water Resources.

NEPA Lead Federal Agencies: U.S. Fish and Wildlife Service, National Marine Fisheries Service, and Bureau of Reclamation.

AGREEMENT

The parties to this Memorandum of Understanding (MOU) are the California Department of Water Resources (DWR) and the U.S. Army Corps of Engineers (USACE). The goal of this MOU is to establish an understanding of processing requirements, and facilitate issuance of BDCP permits under the Clean Water Act section 404 (33 U.S.C. section 1344) (hereinafter "CWA Section 404"), Rivers and Harbors Act of 1899 section 10 (33 U.S.C. section 403) (hereinafter referred to as "RHA Section 10"), and Rivers and Harbors Act of 1899 section 14 (33 U.S.C. section 408) (hereinafter referred to as "Section 408").

This MOU is also the formal commitment of Signatory Agencies for early and continuous involvement in BDCP EIR/EIS development. Throughout this MOU process, all Signatory

Agencies share responsibility for providing informal "heads up" of pending problems/potential issues as early as possible.

This MOU has the following components:

1. **Section I. Checkpoints, Milestones, and Decision Points.** This section describes the major checkpoints, milestones, and decision points for permitting by the USACE.
2. **Section II. Schedule.** This section describes the schedule for major checkpoints and milestones necessary to meet the implementation schedule.
3. **Section III. Dispute Resolution and Elevation Process**. This section provides details on the elevation process to resolve issues quickly and to maintain constructive working relationships.
4. **Section IV. Modification and Termination.** This section provides details on modification and termination of the MOU.
5. **Section V. General Provisions.** This section provides details on the legal import of this document.
6. **Section VI. Effective Date and Duration.** This final section provides details on when the MOU becomes effective and the duration of the legal force and effect of the MOU.

Section I. Checkpoints, Products, and Milestones

This section describes the major checkpoints, products, and/or milestones of the processes supporting permit actions of the USACE.

1. **CWA Section 404 and RHA Section 10 Milestones.** Coordination meetings, discussed below, are generally appropriate for each of the major checkpoints, milestones, and decision points. Additionally, USACE will provide a written response for each of the major checkpoints, milestones, and decision points below.
   a. Purpose and Need – NEPA and CEQA Lead Federal Agencies' definition of the purpose and need for the BDCP under NEPA[1];
   b. Preliminary determination by USACE that the scope of the NEPA analysis includes the Least Environmentally Damaging Practicable Alternative;

[1] Concurrence was received on May 3, 2012.

ED_000733_DD_NSF_00009219-00005

c. Preliminary Determination that the BDCP EIR/EIS document provides the necessary information to support USACE's permit decisions for the proposed project;

d. CWA Section 404 and RHA Section 10 application submitted. USACE determination of complete application;

e. USACE definition of the basic and overall project purpose under CWA Section 404 for the new intake and new SWP/CVP operations;

f. USACE verification of jurisdictional determination;

g. Preliminary determination by USACE that the Preliminary LEDPA and Draft Mitigation Plans for the project is consistent with applicable USACE regulations;

h. USACE Public Notice, Corps release of additional NEPA documentation if needed, USACE Public Hearing if requested;

i. USACE approval of final mitigation plan;

j. USACE permit decision and ROD.

2. **Section 408 Milestones**. In order for the USACE to process a major alteration under Section 408, several products must be developed. Completion of these products marks milestones in the Section 408 process. There are two documents which currently outline the process and milestones for major alterations: (1) 17 November 2008 – Memorandum from Director of Civil Works – Clarification Guidance on the Policy and Procedural Guidance for the Approval of Modification and Alteration of Corps of Engineers Projects; and (2) 23 October 2006 – Memorandum from Director of Civil Works – Policy and Procedural Guidance for the Approval of Modification and Alteration of Corps of Engineers Projects. New policy documents for Section 408 are anticipated to be issued in late 2012 or 2013. The list below summarizes the most significant products and milestones for major alterations as described in current policy documents:

a. Request for Permission to Alter a Federal Project – The non-Federal sponsor, the Central Valley Flood Protection Board, must, if they concur with the alteration, submit a letter to the USACE requesting permission to alter a Federal a Federal project.

b. NEPA – The NEPA Lead Agencies must prepare, in coordination with USACE, a NEPA document that includes sufficient detail to support USACE's decision that the alteration is not injurious to the public interest and does not impair the usefulness of

the project.

c. Sixty-five Percent Engineering and Design – DWR must prepare 65 percent designs. These designs and basis of these designs must be reviewed by USACE as well as an independent external peer review panel. Hydraulic analyses, including risk and uncertainty, as appropriate, will be required.

d. Safety Assurance Review – A Safety Assurance Review (SAR), also known as a Type II Independent External Peer Review, is required during design and construction. A SAR Plan must be prepared by DWR and must include a proposed panel of independent and external reviewers. The SAR Plan must be approved by USACE.

e. Project Summary Report – DWR must prepare a Project Summary Report documenting the scope of the alteration and summarizing the required analyses. The Project Summary Reports shall be supported with full engineering analyses and documentation.

f. Decision by HQUSACE– Decision by HQUSACE is based upon 65 percent designs or greater. An approval by HQUSACE does not provide the Lead Agencies with permission to begin construction.

g. Decision by USACE Sacramento District and Letter of Permission – The USACE Sacramento District will issue a Letter of Permission to the Central Valley Flood Protection Board, the non-Federal sponsor.

3. **Coordination Meetings**. Coordination meetings provide an opportunity for exchange of information about the BDCP and its progress. Coordination meetings between DWR and USACE staff will be held every two weeks or more frequently or as needed. Management update meetings will be held quarterly.

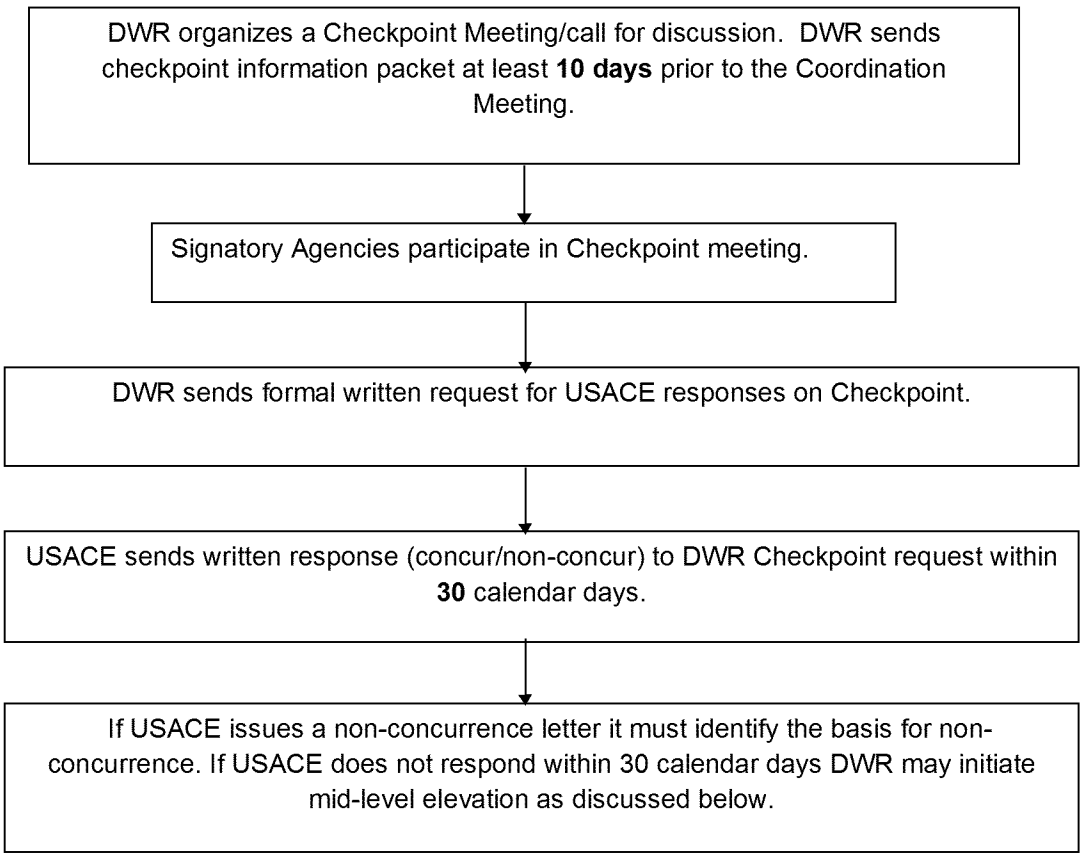
4. **Document Review**

a. DWR will provide draft documents to USACE for review throughout the permitting process.

b. USACE will review documents and provide comments within 30 days or less, or as agreed upon by both agencies.

c. If DWR does not receive comments within the agreed upon review period they may initiate mid-level elevation as discussed below.

5. **Checkpoint Concurrence Process and Timeline.** The following process and timeline applies to the Section 404/10 and Section 408 permitting.



Checkpoint Meetings. DWR will convene a "checkpoint meeting" when they determine it is appropriate and necessary to confirm a checkpoint position. A Checkpoint is initiated when the Lead Agencies send a checkpoint informational packet to USACE.

Information Packet. DWR is responsible for sending an information packet USACE at least 10 calendar days (or as otherwise agreed upon) in advance of each checkpoint meeting. Information packets should identify critical issues of concern to DWR and USACE. During development of the information packet issues should be identified and communicated informally to USACE.

DWR Request for Response and USACE Responses. Following a checkpoint meeting, DWR will send USACE a request for response. Upon receipt of a request for response, USACE will send a concur/non-concur response in writing or by e-mail to DWR within 30 calendar days. If the USACE issues a non-concurrence letter, then it must identify the basis for non-

concurrence. If the USACE does not respond within 30 calendar days, DWR may initiate the mid-level elevation, and may continue elevation as needed. If DWR receive a non-concurrence from the USACE, DWR must convene a mid-level elevation.

Closure at Each Checkpoint. At each checkpoint, DWR will send USACE a letter identifying the status of each issue that received a disagreement, not recommended or non-concurrence. If a mid-level elevation has been triggered, and resolution is reached prior to the mid-level elevation, the Lead Agencies will send notification to the Signatory Agencies.

Section II. Schedule

This section describes the schedules that have been agreed upon by the agencies for the Section 404/10 and Section 408 permitting processes. These schedules were developed to ensure the permitting process would not delay implementation of Conservation Measure 1 as described in the BDCP. USACE is not required to meet the schedule; if USACE determines the schedule cannot be met and DWR disagrees, DWR may initiate mid-level elevation as discussed below. Revisions to the schedule will follow the checkpoint process defined above and formal concurrence from the Signatory Agencies must be received for the schedule revisions to be effective. Schedule revisions will not require amendment of the MOU.

1. Conservation Measure 1 Section 404/10 Permitting Schedule

The schedule for the Section 404/10 permitting is detailed in Attachment A.

2. Conservation Measure 1 Section 408 Permitting Schedule

The schedule for the Section 408 permitting is detailed in Attachment B.

Section III. Dispute Resolution and Elevation Process

Elevation, as necessary, is encouraged. The elevation process is intended to resolve issues quickly and to maintain constructive working relationships. In keeping with the spirit of the integration process, nothing in this section precludes any other traditional or nontraditional approaches to dispute resolution.

1. **Flexibility**. The specific dispute resolution tools are intended to be expeditious, practical, respectful and accessible. All the tools are available at any point on a voluntary basis. However, the mid-level elevation is required for disagreements or non-concurrences. For these, the briefing paper should be used as described in Appendix C. The mid-level elevation may be used any time (including outside the checkpoints) all the Signatory

Agencies agree it would be effective.

2. **Representatives for Elevation**. Upon notification from DWR that elevation is requested under this MOU, USACE will identify staff to assist in the preparation of the joint briefing paper and will confirm the appropriate mid-level and senior-level representatives who have been identified to speak for their agency (Appendix C). The senior-level representative should include the top regional/state decision-maker for each agency, or his/her designee.

3. **The Mid-level Elevation**. The mid-level elevation is a tool to resolve disagreement at a checkpoint. The formal triggers for a mid-level elevation are: the receipt by DWR of a letter of disagreement or non-concurrence or non-recommendation, or non-response, as described in Section I.5 above; changes to the schedule where both parties do not agree; or a letter requesting formal elevation to resolve an issue(s). Upon receiving the letter, the Lead Agencies have 30 calendar days to convene a mid-level elevation. Convening a mid-level elevation requires DWR to:

   a. Notify and schedule the managers who will resolve the dispute and the staff who will brief them;

   b. Coordinate, develop, and distribute an elevation briefing paper; and

   c. Arrange for and fund a neutral facilitator, as necessary.

4. **Briefing Paper**. A cooperatively prepared briefing paper is a key component of the mid-level elevation and is recommended for subsequent elevation to senior managers if the latter elevation is determined to be necessary. The briefing paper should be sent by the Lead Agencies to the mid-level managers along with a draft agenda at least 10 calendar days prior to the mid-level elevation. The briefing paper should follow the format as discussed in Appendix C.

5. **Senior-level elevation**. If the mid-level elevation does not result in resolution, the involved Signatory Agencies may raise the issue to the senior management. Eventually, an issue may need to enter a more formal dispute resolution process organized by DWR.

Section IV Modification and Termination

1. **Modification**.

   a. Any Signatory Agency may propose modifications to this MOU.

   b. The Signatory Agencies will have 30 calendar days from receipt of the proposed modification(s) to submit comments. Upon written acceptance of a proposal by all Signatory Agencies, DWR will circulate an MOU amendment for execution.

c. The amended MOU will become effective 15 calendar days after execution by the last Signatory Agency and will supersede any previous version of the MOU.

2. **Termination.** This MOU may be terminated by any Signatory Agency upon 30 days written notice to all other Signatory Agencies.

Section V. General Provisions

1. The MOU does not address all environmental review and permitting requirements. The USACE may also need additional information and analysis beyond what is in the EIR/EIS to complete its permitting processes. The USACE has sole authority to determine if the BDCP EIR/EIS prepared by the NEPA and CEQA Lead Agencies is sufficient for its permitting decisions. This MOU does not require the USACE to adopt the BDCP EIR/EIS. If the BDCP EIR/EIS does not fully meet the needs of USACE for its permit decisions, USACE will supplement the BDCP EIR/EIS or require a new EIR/EIS to be prepared as USACE determines appropriate. This MOU also does not require the USACE to complete its permit processes concurrent with or otherwise synchronized with the signing of Records of Decisions by the NEPA Lead Federal Agencies.

2. Specific approvals not addressed by this MOU include, but are not limited to, the following: any real estate permissions, CVFPB encroachment permit, Endangered Species Act Section 7 compliance, CWA Section 401 water quality certification, Coastal Zone Management Act consistency determination, National Historic Preservation Act Section 106 compliance, and Department of Transportation Act Section 4(f) compliance.

3. Signatory Agency participation in this process does not imply endorsement of all aspects of a BDCP project or the BDCP itself. Nothing in this MOU is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of the Signatory Agencies.

4. Documents, data, maps, and other information provided pursuant to this MOU may be pre-decisional (intra-agency or inter-agency memoranda or letters) or privileged Signatory Agency information, or information that is prohibited from disclosure pursuant to applicable law. For public requests of such information, under the Freedom of Information Act or otherwise, the releasing party will notify the other Signatory Agencies within 10 days of the public request and provide an opportunity to comment on whether the information is pre-decisional, privileged, or prohibited from disclosure by applicable law. Prior to release, the releasing Signatory Agency will consider comments and respond to the commenting Signatory Agency.

ED_000733_DD_NSF_00009219-00011

5. A Signatory Agency's participation in the integration process is not equivalent to serving as a cooperating agency as defined by regulations promulgated by the Council on Environmental Quality, 40 C.F.R. Part 1501, which is a separate process established through a formal written agreement from a Signatory Agency to the NEPA Lead Federal Agency.
6. As required by the Anti-deficiency Act, 31 U.S.C. Sections 1341 and 1342, all commitments made by Federal agencies in this MOU are subject to the availability of appropriated funds. Nothing in this MOU, in and of itself, obligates Federal agencies to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations that would be inconsistent with agency budget priorities. The non-Federal signatory to this MOU agrees not to submit a claim for compensation for services rendered to any Federal agency in connection with any activities it carries out in furtherance of this MOU. This MOU does not exempt the non-Federal party from Federal policies governing competition for assistance agreements. Any transaction involving reimbursement or contribution of funds between the parties to this MOU will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements.
7. This MOU does not confer any right or benefit, substantive or procedural, enforceable at law or equity, by a party against the United States, its agencies, its officers, or any person.

10 The parties recognize that EPA and the USACE have existing agreements on the processes that those agencies will use to collaboratively and expeditiously resolve specific issues in Section 404 permit program implementation. Nothing in this MOU is intended to supersede, expand, or void any part of those existing agreements. If either the EPA or the USACE initiates any dispute resolution mechanism under these existing agreements as to an issue arising in the context of the BDCP, the initiating agency will communicate that fact to the other parties of this agreement in writing. The USACE will keep the other Signatory Agencies of this MOU apprised of any developments in the dispute resolution process.

Section VI. Effective Date and Duration

This MOU will become effective on the date of signature by the last party. This MOU shall remain in force, subject to Section II.2, until whichever of these events occurs first: a) the MOU is terminated pursuant to Section V.2, or b) expiration or revocation of the Section 10 ESA permit for the BDCP.

IN WITNESS WHEREOF, this MOU is executed by the California Department of Water Resources and the U.S. Army Corps of Engineers, acting by and through their respective authorized officers.

_____ _____

William J. Leady, P.E.
Colonel, U.S. Army
District Commander, Sacramento District

Date

_____ _____

Mark W. Cowin
Acting Director
California Department of Water Resource

Date

ED_000733_DD_NSF_00009219-00013