MEMORANDUM OF UNDERSTANDING

Among the Federal Highway Administration,
California Department of Transportation,
United States Environmental Protection Agency,
United States Army Corps of Engineers,
United States Fish and Wildlife Service,
and the National Marine Fisheries Service

National Environmental Policy Act and Clean Water Act Section 404 Integration Process for Federal Aid Surface Transportation Projects in California

April, 2006

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Appendix A. Dispute Resolution System
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Acronyms and Definitions

Caltrans	California Department of Transportation
CIG	Continuous Improvement Group
COE	U.S. Army Corps of Engineers
CWA	Clean Water Act
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
FHWA	Federal Highway Administration
FWS	U.S. Fish and Wildlife Service
LEDPA	Least Environmentally Damaging Practicable Alternative
MOU	Memorandum of Understanding
NMFS	National Marine Fisheries Service
NEPA	National Environmental Policy Act
SAFETEA-LU	Safe, Accountable, Flexible, Efficient, Transportation Equity Act – A Legacy for Users

"Integration Project" – a project to which this MOU applies.

"Responding Agencies" – resource or regulatory agencies.

"Signatory Agencies" – FHWA, Caltrans, EPA, COE, FWS, and the NMFS.

"Tiering" – Tiering of an EIS refers to the process of addressing a broad, general program, policy or proposal in a programmatic EIS (Tier 1 EIS), and analyzing a narrower site-specific proposal, related to the initial program, plan or policy in a project-level Environmental Impact Statement (Tier 2 EIS).

"Transportation Agencies" – FHWA, Caltrans, and other agencies with transportation responsibility, such as local government if the latter are invited to participate as a Signatory Agency.

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Section I. Introduction

This Memorandum of Understanding (MOU) merges the National Environmental Policy Act (NEPA) and Clean Water Act (CWA) Section 404 processes. It applies to federal aid surface transportation projects that have five or more acres of permanent impacts to waters of the United States and that require a NEPA Environmental Impact Statement (EIS). The consolidation of these processes will provide for more timely decision making while improving the overall quality of those decisions. The goal of this MOU is to foster agreement among the Signatory Agencies and to make it possible for the U.S. Army Corps of Engineers (COE) to more efficiently adopt the Federal Highway Administration's (FHWA) EIS.

In March 1994, Caltrans along with other state departments of transportation and federal agencies, executed the *Memorandum of Understanding – National Environmental Policy Act and Clean Water Act Section 404 Integration Process for Surface Transportation Projects in Arizona, California, and Nevada* (NEPA/404 MOU). In August 2000, the Signatory Agencies began working on a revised MOU that would apply only to federal aid surface transportation projects in California. Prompted by the 1999 FHWA reorganization, (which eliminated their regional level) and by changes in the COE's Nationwide Permit program that increased the number of Individual Permit applications being processed, the Mare Island Accord group (FHWA, Caltrans, and EPA) agreed to convene the Signatory Agencies to review and improve the NEPA/404 MOU. This document addresses these changes.

Section II. Overview

This NEPA/404 Integration MOU has the following components.

1. **Procedures (Section III).** This section outlines: a) the procedures Transportation Agencies follow in presenting information to Responding Agencies, b) procedures the Responding Agencies follow in replying to the information, and c) the Transportation Agencies' options once they receive the response. Basically, this section equates to the 'who, what, when and how' of the MOU. For a conceptual overview of this section, see Figure 1, *Overview of the MOU Process* and Figure 2, *Coordination of Checkpoint Process.*

2. **Dispute Resolution (Section IV).** This section describes the dispute resolution tools that can be used when the Transportation Agencies receive a negative comment, disagreement, or non-concurrence (defined below). The primary resolution tool in this agreement is the "mid-level elevation." The mid-level elevation is a management meeting that relies on a collaborative staff document, called the briefing paper, to frame the issues for resolution. Procedures for the mid-level elevation and other dispute resolution tools are also presented.

3. **Continuous Improvement (Section V).** The signatories to this MOU are committed to continuous improvement of the integration process and have established the Continuous Improvement Group (CIG). The CIG will propose amendments to this MOU as necessary and may also identify policy issues. The changes will be based on project-tracking information and surveys as described in

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Section V.3. Trends from the mid-level elevations will be compiled by Caltrans representatives to provide information that may help identify needed changes.

4. **Tiering (Section VI).** The NEPA/404 integration process may be used for a Tier 1 EIS. Guidance on how to apply the NEPA/404 integration process to tiered projects is presented in this section.

5. **Planning (Section VII).** In Section VII, the Signatory Agencies agree on the importance of early identification and consideration of environmental concerns in conjunction with land use and transportation planning.

6. **Legal Force and Effect/Modification (Section VIII).** This final section provides detail on the legal import of this document. The MOU is meant to be flexible and should be improved, as necessary, by the CIG. At the project level, this MOU can be superseded by agreement of all the Signatory Agencies. Furthermore, the MOU merely sets a framework for collaboration; a signatory can opt out of the MOU or out of the integration process for a specific project. The signatories to this MOU encourage ongoing formal and informal collaboration not specifically described in this MOU.

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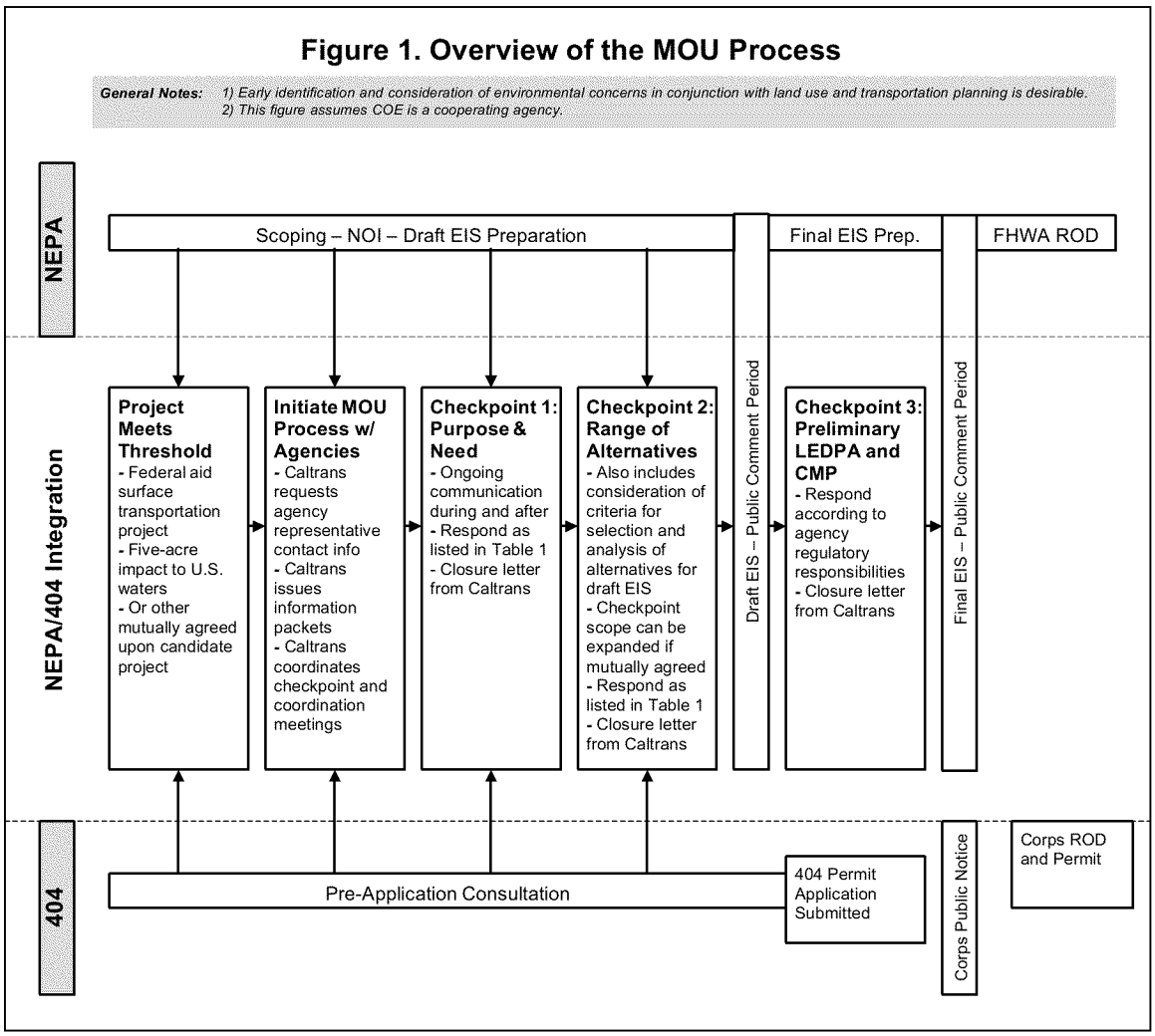

Section III. The NEPA/404 Integration Process

This section lays out the Signatory Agencies' roles at each checkpoint, outlines the Transportation Agencies' options for resolving a negative comment, disagreement, or non-concurrence, and describes each of the three checkpoints. Figure 1, *Overview of the MOU Process* and Figure 2, *Coordination of Checkpoint Process* provide an overview of this section.

1. **Project Inclusion**. This NEPA/404 integration process applies to federal aid surface transportation projects that have five or more acres of permanent impacts to waters of the United States and that require preparation of an EIS. For purposes of evaluating whether this threshold will be met, possible growth-related impacts will not be included. If all the Signatory Agencies agree, the integration process may be applied to other projects. For instance, a project with fewer than five acres of impacts to waters of the United States may be included. In this document, a project to which this MOU applies is referred to as an "Integration Project."

2. **Process for Deciding on Inclusion.** The decision to apply the NEPA/404 integration process will be made as early in project development as possible, and

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preferably prior to scoping for environmental studies. In consultation with one another, the Transportation Agencies will identify projects that meet the threshold, or that are otherwise recommended for the process, and notify the Signatory Agencies. Any Signatory Agency may raise concerns about the decision. Once a concern is raised, the Transportation Agencies will consult with all Signatory Agencies about the appropriate course of action. FHWA will make the final decision whether or not a project is an Integration Project.

3. **Appointment of Elevation Representatives.** At the time the decision is made to integrate a project, each Signatory Agency will identify the appropriate representatives for elevation. This process is described in more detail in Section IV of the MOU.

4. **Focus of the MOU**. The key difference between Integration Projects and other projects is the formal commitment of Signatory Agencies for early and continuous involvement in project development. The required steps fall within the programming-to-permit phase of project development, as shown in Figure 1. Though the signatories to this MOU strongly encourage early involvement with local government during transportation planning, the MOU does not prescribe pre-programming steps.

5. **Transportation Agencies' Responsibilities**. FHWA is the lead federal agency and is ultimately responsible for implementation of this MOU. Generally, the specific activities outlined in this section are performed by Caltrans; including preparing information packets, convening meetings, addressing agency responses, and initiating the mid-level elevation briefing paper. At times, local agencies may perform many of the functions attributed to Caltrans in this document. When they do, Caltrans, and FHWA as needed, will be involved in the advance review of the products and in the meetings.

6. **Checkpoints**. The integration process comprises three checkpoints, which punctuate ongoing coordination efforts. These checkpoints are:

   (a) Purpose and Need;
   (b) Identification of the Range of Alternatives to be Studied in the draft EIS; and
   (c) Preliminary Least Environmentally Damaging Practicable Alternative (LEDPA) Determination and Conceptual Mitigation Plan.

   The range of alternatives checkpoint also includes consideration of the criteria used to select and analyze the range of alternatives to be studied in the draft EIS. If all the Signatory Agencies agree, they may expand these checkpoints. A diagram outlining the coordination and checkpoints process is below.

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Figure 2. Coordination and Checkpoint Process

1. Start with informal Coordination process for information exchange and agency input:

Coordination (informal)

Caltrans organizes a Coordination meeting with Responding Agencies.
Caltrans sends Responding Agencies an information packet.

(allow 14 days after sending packet)

All Signatory Agencies participate in Coordination meeting(s) to discuss the project, checkpoint, and timelines; exchange information; and address questions. Agencies continue to share information and provide input.

2. When ready for formal Checkpoint process, proceed as follows:

Checkpoint (formal)

Caltrans organizes a Checkpoint meeting/call for final discussion.
Caltrans sends checkpoint information packet.

(allow 14 days after sending packet)

All Signatory Agencies participate in Checkpoint meeting.

Caltrans sends formal written request for Responding Agencies' responses on Checkpoint.

(30-day "clock" begins with formal written request.

Responding Agencies send written response to Caltrans' Checkpoint request.

Caltrans sends letter to Responding Agencies describing the Transportation Agencies' final decision for checkpoint.

If the response is:

- Concurrence
- Agreement
- Comment, with no request for elevation

→ **Transportation Agencies** proceed to next checkpoint

If the response is:

- Non-Concurrence
- Disagreement
- Comment, with request to elevate

→ **Caltrans** initiates mid-level elevation[1]

3. See Figure A-1, Dispute Resolution Process, for detailed dispute resolution information.

[1] Caltrans may deny requests for mid-level elevation that are sent as part of a comment.

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7. **Participants**. All Signatory Agencies may participate in the checkpoints. The level of participation by the agencies differs by agency and by checkpoint as described below and in Table 1, *Types of Response by Agency and Checkpoint.* The flow of information and decision points within each checkpoint are described below and in Figure 2, *Coordination of Checkpoint Process*.

   With the agreement of the Signatory Agencies, other agencies may be included. The invitation letter will specify the agency's role in the integration process, including the type of response the agency will give at each checkpoint.

8. **Coordination Meetings**. The integration process may involve a series of coordination meetings to exchange information about the proposed project and potential impacts. While in-person meetings are preferred, they may occur by conference call. Among other objectives, coordination meetings provide an opportunity for the Responding Agencies to identify what additional information will be necessary to make a decision about an upcoming checkpoint. Timeframes for information exchange and response will be mutually determined by the Signatory Agencies on a project-by-project basis.

9. **Checkpoint Meetings.** A checkpoint is initiated when Caltrans sends a checkpoint information packet to the Signatory Agencies. The Transportation Agencies will convene a "checkpoint meeting" when they determine it is time to make a checkpoint decision. If a negative comment, disagreement, or non-concurrence is pending, this should be identified at or before the checkpoint meeting. Throughout this MOU process, all Signatory Agencies share responsibility for providing informal 'heads up' of pending problems/potential issues so that the other agencies can begin to prepare for a mid-level elevation or other intervention before the formal responses are made. If a mid-level elevation appears likely, Caltrans should begin framing the elevation briefing paper, coordinating the development of the briefing paper with the Signatory Agencies, and scheduling the mid-level elevation during or immediately after the checkpoint meeting.

10. **Information Packet.** Caltrans is responsible for sending information packets to the Signatory Agencies at least 14 calendar days in advance of each checkpoint or coordination meeting. Information packets should identify critical issues of concern to the other Signatory Agencies. As Caltrans is preparing the information packet, issues should be identified and communicated informally to the Signatory Agencies.

11. **Caltrans Request for Response and Responding Agency Responses.** Following a checkpoint meeting, Caltrans will send the agencies a request for response. Upon receipt of a request for response, each agency that chooses to respond will send the response in writing or e-mail to Caltrans within 30 calendar days. The response will be a comment, agreement or disagreement. Additionally, the COE may submit a concurrence or non-concurrence at the LEDPA checkpoint

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as specified in Table 1, *Types of Response by Agency and Checkpoint*. The response terms (comment, agree, disagree and for the COE, concur/non-concur) reflect the regulatory responsibilities of the Responding Agencies at different points in the NEPA and CWA Section 404 processes. Table 1 summarizes the only types of response an agency may give at a checkpoint.

Table 1. Types of Response By Agency And Checkpoint.

Agency	Purpose and Need	Alternatives	Preliminary LEDPA/CMP
COE	Agree/Disagree	Agree/Disagree	Concur/Nonconcur
EPA	Agree/Disagree	Agree/Disagree	Agree/Disagree
FWS	Comment	Agree/Disagree	Agree/Disagree
NMFS	Comment	Comment	Agree/Disagree

12. **Types of Response**. As summarized in Figure 2, *Coordination of Checkpoint Process*, the Responding Agency sends a formal **comment**, **agreement or disagreement**, (and the COE may also send a **concurrence** or **non-concurrence at the LEDPA checkpoint)** to the Transportation Agencies, as follows:

    (a) **Comments.** The Responding Agency provides written comments. If the agency does not respond within 30 calendar days, the Transportation Agencies cannot assume the Responding Agency has no comments, but may proceed. The Transportation Agencies are not required to address or resolve negative comments except as specified in paragraph 13. The Responding Agencies may request a mid-level elevation in writing at the time they respond. The Transportation Agencies also may choose to resolve the issue or may choose to use the elevation process.

    (b) **Agreement/Disagreement**. The Responding Agency provides a written response agreeing or disagreeing with the Transportation Agencies' checkpoint proposal. The Responding Agency's letter must identify the basis for the disagreement. If the Responding Agency does not respond within 30 calendar days, the Transportation Agencies cannot assume the Responding Agency agrees but may proceed. In the case of a disagreement, the Transportation Agencies must convene a mid-level elevation. If the mid-level elevation does not resolve the issues, the Transportation Agencies at their discretion may: (i) continue to attempt to resolve the problem through other forms of dispute resolution (such as continued elevation or use of a facilitator), (ii) may proceed without resolution, or (iii) may proceed while concurrently attempting to resolve the problem. If the Transportation Agencies choose to move on, any Responding Agency may concurrently request a senior-level elevation within seven calendar days of notification by Caltrans of the decision to proceed. The senior-elevation group will decide whether or not they wish to review the issue.

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(c) **Concurrence/Non-concurrence by the COE**. The COE provides a written response concurring or non-concurring with the LEDPA checkpoint proposal. The COE letter must identify the basis for non-concurrence. If the COE does not respond within 30 calendar days, the Transportation Agencies may initiate the mid-level elevation. If Caltrans receives a non-concurrence from the COE, the Transportation Agencies may not proceed until the issues are resolved. The COE's response at the preliminary LEDPA/conceptual mitigation checkpoint is the only use of concurrence/non-concurrence except as described in paragraph 15 of this Section. FHWA may not issue the final EIS until the COE concurs.

13. **Closure at Each Checkpoint**. At each checkpoint, Caltrans will send the Signatory Agencies a letter identifying the status of each issue that received a negative comment, disagreement, or non-concurrence. This letter will be sent before the next checkpoint, before the draft EIS is issued, before the final EIS is issued, or within 90 days, whichever is sooner. If a mid-level elevation has been triggered, and resolution is reached prior to the mid-level elevation, Caltrans will send notification to the Signatory Agencies.

14. **Mid-level elevation**. The procedure for the mid-level elevation is described in Section IV.

15. **Cooperating Agencies**. FHWA recognizes that the COE is the lead federal agency for the CWA Section 404 permitting process. As such, the COE is encouraged to become a cooperating agency on Integration Projects. As a cooperating agency, the COE could more efficiently adopt the NEPA document for their CWA Section 404 permitting decision and, therefore, it becomes a concurring agency for all checkpoints in developing joint NEPA documents. Because 23 USC 139(f) reaffirmed FHWA's authority as the Federal lead agency to determine the purpose and need and range of alternatives for FHWA's NEPA documents, concurrence by the COE only signifies that FHWA's NEPA document is satisfactory for CWA Section 404 purposes.

Section IV. Elevation Procedures and Other Project-Specific Dispute Resolution Tools

Elevation, as necessary, is encouraged. Stale disputes are as hard on the overall process as they are on the development of an individual project. The elevation process is intended to resolve issues quickly and to maintain constructive working relationships. This section provides an overview of the project-specific dispute resolution tools available under this MOU. Detailed guidance and recommendations are available in Appendix A. 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 project-specific dispute resolution tools are intended to be expeditious, practical, 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

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Appendix A. 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**. When the Transportation Agencies initiate the NEPA/404 integration process, they will request that each Responding Agency identify the appropriate mid-level and senior-level representatives who may speak for their agency in an elevation should the need arise. The senior-level representative should include the top regional/state decision-maker for each agency, or their designee. This request will come with the first information packet distributed regarding purpose and need.

3. **The Mid-level Elevation**. The mid-level elevation is a tool to resolve disagreement or non-concurrence at a checkpoint. Though the Responding Agencies should have given Transportation Agencies informal notice prior to and at the checkpoint meeting, the formal trigger for a mid-level elevation is the receipt by Caltrans of a letter of disagreement or non-concurrence as described in Section III.12(b) and (c). Upon receiving the letter, the Transportation Agencies have 30 calendar days to convene a mid-level elevation. Convening a mid-level elevation requires Caltrans 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 a neutral facilitator, as necessary.

4. **Briefing Paper**. A collaboratively 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 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 standard format as discussed in Appendix A.

5. **Senior-level elevation**. If the mid-level elevation does not result in resolution, the Signatory Agencies may raise the issue to the senior management as discussed in Section III.12(a)-(b). Eventually, an issue may need to enter the more formal dispute resolution system developed by the Department of Transportation.[1]

Section V. Continuous Improvement

The signatories to this MOU are committed to continuous improvement of the integration process. The foundation for continuous improvement is information from project tracking; the monitoring plan, described below; and the elevations.

[1] The Department of Transportation Order 5611.1A (October 10, 2003) establishes procedures for elevating disputes involving environmental review of highway and mass transit projects to the Secretary of Transportation. The procedures are designed to address significant interagency disputes among Federal agencies or State agencies with federally delegated authority.
http://environment.fhwa.dot.gov/strmlng/DOT5611_order.htm

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1. **Continuous Improvement Group (CIG).** Each Signatory Agency will appoint one representative and an alternate representative to the CIG. The initial composition of the group is listed in Appendix B. This group is responsible for reviewing the monitoring information and recommending improvements to the integration process.

2. **Convener**. Caltrans will convene meetings of the CIG unless other arrangements are made by mutual agreement. Caltrans will draft and distribute an agenda as well as chair the meetings.

3. **Monitoring**. The effectiveness of the integration process will be measured by tracking project characteristics and timelines, surveys of most or all agency participants who have participated in the checkpoint processes, and information from the mid-level elevations. Surveying occurs at each checkpoint and at the final EIS. Caltrans will implement the monitoring process and the CIG will oversee it.

4. **Frequency of Reviews**. Once sufficient data is collected, presumably within a year of signing this MOU, Caltrans will distribute metric and survey results, along with a draft agenda for a continuous improvement meeting. For the following two years, the CIG may meet frequently, if needed, to adapt the integration process based on the monitoring results and elevations. Eventually, the CIG will meet a minimum of once a year, unless all the Signatory Agencies agree that the meeting is not necessary. Any of the Signatory Agencies may request a meeting.

5. **Policy Issues**. As well as adapting the integration process, the CIG may identify policy issues that emerge as the root cause of recurring disputes, and may raise these issues with the appropriate agency or agencies.

Section VI. Tiering

Applying this integration process to a Tier 1 EIS may be appropriate for some projects. If so, the approach outlined in this section is recommended.

Modification of the NEPA/404 Integration Process for Tiered Projects. A NEPA Tier 1 evaluation will not result in the submittal of a CWA Section 404 permit application. However, in general, it is anticipated that a Tier 1 evaluation will result in a Tier 2 project subject to this MOU that will require a permit from the COE. Therefore, the NEPA/404 integration process will be modified for Tier 1 to reflect programmatic decisions made at Tier 1, and to anticipate the permit application requirements at Tier 2. The NEPA/404 integration process for Tier 2 will follow the standard procedure outlined in Section III of the MOU.

The Tier 1 (modified) and Tier 2 (standard) NEPA/404 integration processes are similar in many respects. Both processes include the same checkpoints. The main difference between the Tier 1 and Tier 2 NEPA/404 integration processes occurs at the last checkpoint. In Tier 2, the Transportation Agencies seek Responding Agency comment, agreement or COE concurrence on the LEDPA and the conceptual mitigation plan for the

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LEDPA. In Tier 1, however, the Transportation Agencies seek Responding Agency comment, agreement or COE concurrence on the alternative (corridor) ***most likely to contain the LEDPA***, and on the ***general framework for mitigation***.

All other elements of the standard NEPA/404 integration process apply, unless otherwise indicated.

Section VII. Local Planning

Although transportation planning and programming occur prior to the NEPA process, the Signatory Agencies recognize the importance of early identification and consideration of environmental concerns in conjunction with land use and transportation planning. Such early consideration will facilitate the NEPA/404 integration process, and will lead to better transportation project decisions. FHWA has provided guidance on this subject in their document, "Linking the Transportation and NEPA Processes" (February 2005). See this document on the web at http://nepa.fhwa.dot.gov/ReNepa/ReNepa.nsf/0/9fd918150ac2449685256fb10050726c?OpenDocument

In addition, SAFETEA-LU supports early consideration of environmental concerns in local and regional transportation planning. SAFETEA-LU requires that Regional Transportation Plans include a discussion of potential environmental mitigation activities and sites to carry out the activities. This discussion is to be developed by the Metropolitan Planning Organization in consultation with environmental resource and regulatory agencies. See this document on the web at http://www.fhwa.dot.gov/safetealu/index.htm

Section VIII. Legal Force and Effect/Modification

1. The NEPA/404 integration process does not include all environmental review and permitting requirements. Recently enacted 23 USC 139(f) reaffirmed FHWA's authority as the lead federal transportation agency, to determine purpose and need and range of alternatives for FHWA's NEPA documents. The EPA has authority under the Clean Air Act Section 309 to review and comment on the NEPA documents of other Federal agencies. This is independent of EPA's role in the NEPA/404 integration process. Specific approvals not addressed by this MOU include, but are not limited to, the following: Endangered Species Act 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. However, the signatories are committed to ensuring that these other permit and approval requirements be integrated into the overall NEPA Process.

2. The new SAFETEA-LU section 6005 permits future delegation of a number of FHWA's NEPA responsibilities to Caltrans. Under section 6005 (23 USC 327), Caltrans may assume the full responsibilities of FHWA with respect to one or more highway projects within California (23 USC 327(a)(2)(A)), including those requiring EAs and EISs, except Caltrans may not assume FHWA's responsibilities for Clean Air Act conformity determinations or those imposed on

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FHWA by 23 USC 134 and 135 (Metropolitan and Statewide Planning). Under either statute, a delegation of FHWA responsibilities to Caltrans would be set out in a separate MOU between the two parties. Accordingly, the Signatory Agencies agree that Caltrans would assume the responsibilities of FHWA under this MOU for any Integration Project delegated to Caltrans pursuant to either 23 USC 326 or 327.

3. Regulatory and resource agency participation in this process does not imply endorsement of all aspects of a transportation plan or project. Nothing in this MOU is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of the Signatory Agencies.

4. A Signatory Agency's participation in the integration process is not equivalent to serving as a cooperating agency, which is a separate process established through a formal written agreement from a Signatory Agency to the lead federal agency.

5. This MOU is not a fiscal or funds obligation instrument. Nothing in this MOU will be construed as affecting the authorities of the participants to act as provided by statute or regulation or as binding beyond their respective authorities or to require the participants to obligate or expend funds in excess of available appropriations.

6. 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.

7. Any Signatory Agency may terminate participation in this MOU upon written notice to all other Signatory Agencies. If all Signatory Agencies decide not to participate in this agreement any further, the FHWA will provide written documentation to all Signatory Agencies that the MOU is terminated.

8. On a project-specific basis, any Signatory Agency may opt out of applying this agreement upon written notice to all other Signatory Agencies.

9. This MOU will become effective on the date of the last signature.

10. Modifications.

    (a) **Specific Integration Project**. Each of the timelines and methods specified in this MOU may be modified for a specific project upon agreement of all the Signatory Agencies. Agreement must be in writing and can be communicated by letter or by e-mail.

    (b) **MOU**. Any Signatory Agency or the CIG may propose modifications to this MOU. Note that it is preferable to have the CIG discuss and propose changes.

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(c) **Modification Procedure**. Proposals for modification of a specific Integration Project or to the MOU will be circulated to all Signatory Agencies for review and comment. The agencies will have 30 calendar days from receipt of the proposed modification(s) to submit comments. The CIG and the Signatory Agency proposing the change will coordinate and decide who will be responsible for circulating the proposal and collecting and compiling the comments. The proposing agency will also be responsible for circulating the comments and resolving any issues if possible. Upon written acceptance of a proposal by all Signatory Agencies, Caltrans will circulate a revised MOU for execution.

(d) The amended MOU will become effective 15 calendar days after execution by the last Signatory Agency and will supercede any previous version of the MOU.

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Section IX. Signatures

Joseph Schroedel
Brigadier General, U.S. Army
Commander, South Pacific Division
U.S. Army Corps of Engineers

8 May 2006
Date

Wayne Nastri
Regional Administrator
U.S. Environmental Protection Agency, Region IX

MAY 15, 2006
Date

Gene Fong
Division Administrator
Federal Highway Administration, California Division

4/4/06
Date

Acting **Steve Thompson**
Manager, California/Nevada Operations Office
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MAY 0 4 2006
Date

Rodney R. McInnis
Regional Administrator
National Marine Fisheries Service, Southwest Region
(Control # SWR-072)

4-13-06
Date

Will Kempton
Director
California Department of Transportation

4/13/06
Date

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Appendix A. Dispute Resolution System

The Briefing Paper

At every mid-level elevation, staff of each of the Signatory Agencies involved in the dispute will prepare a collaborative briefing paper. This paper may also be used for senior-level elevations. The briefing paper should offer salient information precisely framing the issues requiring resolution. The briefing paper:

- Encourages neutral presentation of issues, rather than polarizing;
- Maximizes the likelihood of resolution of at least some of the issues as staff prepare for the elevation;
- Ensures that the problem statement is robust, clear, and focused; and
- Fosters improved communication.

The briefing paper should be short and will need to be developed quickly – in 21 calendar days in most cases. A format for the briefing paper is presented below.

Ideally, the issues to be addressed in the briefing paper should be framed at the checkpoint meeting. Caltrans should begin the first draft shortly after the checkpoint meeting. Once the Responding Agencies reply formally to Caltrans' request for responses, Caltrans will complete the first draft of the briefing paper and send it to all the Signatory Agencies. A person from each agency responsible for the development of the briefing paper (a point of contact) should be identified informally at the checkpoint meeting, if possible, and formally in the response letter.

Upon receipt of the first draft, any of the signatory agencies may contribute to the briefing paper; use of the "Track Changes" tool in Word is preferred. A single set of changes will be sent by each agency's point of contact. Caltrans may either accept the changes or move them to one of the 'alternate' columns and this document becomes the second draft. Caltrans then distributes the second draft to the contributors and makes requested changes prior to sending a final document to the elevation decision-makers. There may be other iterations as needed and as the schedule allows.

Informal telephone conversations and e-mails should occur in support of all stages of the development of the briefing paper.

When a mid-elevation is triggered, the sequence for development of the briefing paper is as described in Figure A-1, *Dispute Resolution Process*. The specific timing for reviews, changes, and incorporation of changes may be modified by mutual agreement at or shortly after the checkpoint meeting, or whenever a mid-level elevation is first anticipated.

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Figure A-1. Dispute Resolution Process

Note: This process includes informal communication among all participants in the briefing paper process.

30-day timeline

If mid-level elevation is anticipated, **Caltrans** initiates development of the mid-level briefing paper.

↓

Responding Agencies: 1) Send formal disagreement, non-concurrence, or comment with a request for elevation[1]; and 2) Appoint representative staff responsible for collaborating on the briefing paper. **Caltrans** will convene a mid-level elevation meeting within 30 days.

↓

Caltrans: 1) Notifies and schedules the managers who will resolve the dispute and the staff who will brief them; 2) Completes and issues a first draft of the briefing paper; 3) Schedules the finalization of the briefing paper with the specified representatives; 4) Arranges for a neutral facilitator as necessary.

↓

Responding Agencies amend the first draft.

↓

Caltrans incorporates the amendments and circulates the draft to the Responding Agencies for their final comment.

↓

Caltrans distributes briefing paper.

↓ (allow at least 10 days after sending briefing paper)

Caltrans will convene mid-level elevation meeting.

↓

If the <u>mid-level</u> elevation resolves a:

- Non-Concurrence →
- Disagreement →

Transportation Agencies proceed to next checkpoint

If the <u>mid-level</u> elevation <u>does not</u> resolve a:

- Disagreement →

Transportation Agencies may proceed without agreement. Alternatively, **Transportation Agencies** may opt to: 1) proceed while attempting to resolve the disagreement; or 2) not proceed until agreement is reached.

Any Signatory Agency may concurrently request senior-level elevation within 7 days.

If the <u>mid-level</u> elevation <u>does not</u> resolve a:

- Non-Concurrence →

Transportation Agencies will continue dispute resolution until concurrence is reached.

Any Signatory Agency may initiate **<u>senior-level</u>** elevation.

Eventually, **<u>more formal dispute resolution</u>** may be needed.

[1] Caltrans may deny requests for mid-level elevation that are sent as part of a comment.

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Figure A-2. Sample Briefing Paper

Project Name: **Checkpoint:**		
As the briefing paper is developed, alternate views that are not easily incorporated into the main body of the document can be dropped into columns on the right, and sized to fit in whatever way makes graphic sense. If the alternate view columns prove to be unnecessary, they can be taken out.	**Alternate comments**	**Alternate comments**
Background:		
Issue 1: A Word or Phrase Naming the Issue. A succinct summary. Ideally, the list of issues will have been sketched out at the checkpoint meeting. **QA:** At the end of the summary of the issue, end with a question. This helps keep the decision-makers in the elevation focused. **QB:** Sometimes within an issue there is more than one question. For instance, there might be a question about whether an alternative is practicable or not, and there might be a separate question about which agency ought to make the determination on a specific technical issue.		
Issue 2: A Word or Phrase Naming the Second Issue. A succinct summary. **Q:**		
Resolution:		
Issues Still Requiring Resolution:		
Dates: Checkpoint meeting ___/___/___; Request for Response ___/___/___; Negative assessment or non-concurrence ___/___/___; Mid-level elevation; ___/___/___; Resolution ___/___/___.		

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Use of Facilitators

The use of a facilitator may be an effective way to conduct a coordination meeting, checkpoint meeting, or elevation. Here are some approaches to involving facilitators that have been useful in the past:

The process for hiring the facilitator should be as collaborative as practicable. Involving agencies in the selection of a facilitator sets a neutral tone from the outset.

Involve the facilitator in the development of the agenda.

Strike the right balance in terms of substantive knowledge. A facilitator who has to stop and ask 'What is Section 404 of the CWA?' is likely to bog things down. Yet it is not necessary to find someone who knows the details of the transportation process and each of the statutes and all of the regulations. It is probably more important that the facilitator be truly skilled at facilitation and have a general natural resources background.

Be creative about finding and retaining a facilitator. Identifying and hiring a facilitator on short notice can be a challenge, but not an insurmountable one. Many of the agencies participating in this MOU have trained facilitators who could assist with the meeting or elevation. To access an external facilitator, the participating agencies (including the local transportation agency, if applicable) should explore the available funding and contracting options to expedite the contracting process. The U.S. Institute for Environmental Conflict Resolution maintains a roster of qualified facilitators who can be easily accessed by many federal agencies.

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Appendix B. Composition of the Original Continuous Improvement Group

Agency	Delegate	Alternate
Caltrans	Sheila Mone	Muggs Stoll
COE	Susan Meyer	David Castanon
EPA	Nova Blazej	Tim Vendlinski
FHWA	Maiser Khaled	David Tedrick
NMFS	Dick Butler	Dan Logan
FWS	Michael Hoover	Mark Littlefield