# ***PRELIMINARY DRAFT***

# 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)**

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Among:
Bureau of Reclamation
California Department of Water Resources
National Marine Fisheries Service
United States Fish and Wildlife Service
United States Environmental Protection Agency
United States Army Corps of Engineers

[Insert Current Date]



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Appendix A. Dispute Resolution System

**Signatory Agencies:** California Department of Water Resources, U.S. Fish and Wildlife Service, National Marine Fisheries Service, Bureau of Reclamation, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency.

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**Lead Agencies:** California Department of Water Resources, U.S. Fish and Wildlife Service, National Marine Fisheries Service, and Bureau of Reclamation.

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

**Federal Cooperating Agencies:** U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency.

## Section I. Introduction



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The parties to this Memorandum of Understanding (MOU) are the California Department of Water Resources (DWR), U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), Bureau of Reclamation (Reclamation), U.S. Army Corps of Engineers (USACE), and the U.S. Environmental Protection Agency (EPA). The goal of this MOU is to facilitate compliance with the National Environmental Policy Act (NEPA) (42 U.S.C. section 4321 *et seq*), 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") for certain projects contained in the Bay Delta Conservation Plan (BDCP) seeking USACE permitting.

The integration of these processes is intended to expedite decision-making while improving the overall quality of those decisions. The purpose of this MOU is to foster agreement among the Signatory Agencies respective to their roles under NEPA , to facilitate Federal Cooperating Agency and permit applicant compliance under CWA Section 404, and to make it possible for the USACE to more efficiently adopt the BDCP Environmental Impact Report /Environmental Impact Statement (BDCP EIR/EIS) for CWA Section 404 permits, RHA Section 10 permits, and Section 408 authorizations.

**1. The BDCP**

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The BDCP is a habitat conservation plan (HCP) being prepared to meet the requirements of the Endangered Species Act (ESA), and the State of California's Natural Community Conservation Planning Act (NCCPA). DWR intends to apply for ESA and state take permits for water operations, conveyance and restoration activities in the Delta as described in the BDCP. These take authorizations would allow the take of threatened and endangered species resulting from covered activities and conservation measures as described in the BDCP that will be identified through the planning process, including 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 ESA compliance by Reclamation, including compliance with Section 7 of ESA in coordination with FWS and NMFS for operation of the Central Valley Project (CVP).

**2. 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 State and Federal Lead Agencies with regard to their permitting decisions under the ESA and NCCPA. The planning process status and level of detail currently available varies for the different actions that will be implemented under the



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BDCP, so the BDCP EIR/EIS analyzes actions for the conveyance and operations elements of the BDCP at a site-specific, project level, and analyzes habitat-restoration actions at a programmatic level. As appropriate, actions described at a programmatic level in the BDCP EIR/EIS will require subsequent environmental compliance, including compliance with NEPA, CEQA, RHA Section 10, Section 408, CWA Section 404, and all other applicable environmental regulations, when planning efforts for these actions can provide site-specific detail for environmental analysis.

DWR is the lead agency under CEQA for the BDCP EIR/EIS. The FWS, NMFS and Reclamation are lead agencies under NEPA for the BDCP EIR/EIS. The USACE and EPA have agreed to participate as cooperating agencies under NEPA for the BDCP EIR/EIS.

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 by Regional Water Quality Control Board to issue Clean Water Act Section 401 certification for the BDCP activities; and (4) decisions by the USACE to permit, under RHA Section 10 and Section 408 and Clean Water Act Section 404, certain site specific BDCP activities.

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### 3. This MOU

This MOU is intended to coordinate Federal Cooperating Agency review of two different sets of activities, consistent with the content of the BDCP EIR/EIS described above. First, the entire set of activities described in the BDCP EIR/EIS will be considered at the programmatic level of detail, to the extent that programmatic decisions may affect subsequent USACE permitting. Second, the new conveyance facilities and associated changes in operational parameters for the SWP and CVP (collectively, the "New Conveyance Projects") will be considered at the site-specific project level, with a goal of providing USACE with sufficient information to make permit decisions for these activities. Specifically, this MOU is intended to cover USACE permit decisions for any necessary (1) CWA Section 404 permit decisions to discharge dredged or fill material into waters of the U.S., (2) RHA Section 10 permit decisions to authorize work in, over, or under navigable waters of the U.S., including the diversion of water from navigable waters of the U.S., and (3) Section 408 permit decisions for alterations/modifications to existing USACE projects.

The USACE has exclusive jurisdiction for implementing RHA Section 10 and Section 408. Administration of CWA Section 404 is divided, by statute, between USACE and EPA. As relevant



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to this MOU, the USACE administers the permitting program by processing individual and general permits, determining Clean Water Act jurisdiction, and conducting compliance assistance. EPA is responsible for oversight, including writing regulations that must be followed in issuing 404 permits, developing policy and guidance, determining the scope of geographic jurisdiction, reviewing and commenting on individual permit applications, and, where appropriate, objecting to or vetoing individual 404 permits.

The Signatory Agencies intend to act expeditiously to implement this MOU. To that end, the Signatory Agencies have already initiated discussions as to how best to move forward with "Checkpoint A" (described below). Where feasible and with the explicit agreement of the involved Signatory Agencies, timelines described in this MOU may be shortened on a case-by-case basis.

The USACE, NMFS and Reclamation agree that a separate NEPA process for the potential changes in facilities and operations at the Fremont Weir will be discussed within three months of the signing of this MOU. The Federal Lead Agencies will coordinate with DWR on planning any changes in facilities and operations of the Weir.

The Signatory Agencies recognize that additional projects emanating out of the BDCP in the future may require USACE permits. Although not covered by this MOU, the Signatory Agencies anticipate that they will rely on the framework contained in this MOU for processing those future USACE permit decisions. The Signatory Agencies will memorialize in writing the application of this framework to any future projects, pursuant to either the MOU amendment provisions below or a new MOU.

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Section II. Overview

This MOU has the following components:

1. **Integration Process (Section III)**. This section outlines: a) the procedures the Lead Agencies will follow in presenting information to Federal Cooperating Agencies; b) procedures the Federal Cooperating Agencies will follow in replying to the information; and, c) the Lead Agencies options once a response is received. This section equates to the "who, what, when, and how" of the MOU. For a conceptual overview of this section, see Table 1, *Overview of the California Bay Delta Conservation Plan MOU Process* and Figure 1, *Coordination and Checkpoint Process*.

2. **Dispute Resolution (Section IV)**. This section describes the dispute resolution tools that may be used when the Lead 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

cooperatively developed 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. **Modification and Termination (Section V).** This section provides details on modification and termination of the MOU. This MOU may be modified and superseded by written agreement of all the Signatory Agencies through the execution of an amendment of the MOU.

4. **General Provisions (Section VI).** This section provides details on the legal import of this document. The MOU provides a framework for cooperation. The signatories to this MOU encourage ongoing formal and informal cooperation not specifically described in this MOU.

5. **Effective Date and Duration (Section VII).** This final section provides details on when the MOU becomes effective and the duration of the legal force and effect of the MOU.

Section III. The NEPA/404/10/408 Integration Process

This section lays out the Signatory Agencies' roles at each checkpoint, outlines the Lead Agencies options for resolving a negative comment, disagreement, or non-concurrence, and describes each of the three checkpoints.

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1. **Project Inclusion.** This MOU applies to the New Conveyance Projects. In addition, the procedures outlined in this MOU will be used by the Signatory Agencies in evaluating programmatic analyses or decisions in the BDCP EIR/EIS, to the extent that such programmatic decisions may affect subsequent USACE permitting.

2. **Appointment of Elevation Representatives**. Each Signatory Agency will identify the appropriate representatives for elevation. This process is described in more detail in Section IV of the MOU.

3. **Focus of the MOU**. This MOU is the formal commitment of Signatory Agencies for early and continuous involvement in BDCP EIR/EIS development. The required steps are shown in Table 1, *Overview of the BDCP MOU Process* Throughout this MOU process, all Signatory Agencies share responsibility for providing informal "heads up" of pending problems/potential issues as early as possible 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, the Lead Agencies should begin framing the elevation briefing paper, cooperating in the development of the briefing paper with the Signatory Agencies, and scheduling the mid-level elevation during or immediately



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after the checkpoint meeting.

4. **Lead Agency Responsibilities**.

   a. The Lead Agencies are ultimately responsible for implementation of this MOU and the content of the EIR/EIS.

   b. The Lead Agencies are also responsible for issuing closure letters for the checkpoints.

   c. The Lead Agencies will decide between themselves which agencies or individuals will perform each of the tasks assigned to the Lead Agencies by this MOU.

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

   a. Definition of the purpose and need for the BDCP under NEPA, and the basic and overall project purpose under CWA Section 404 **for the New Conveyance Projects**;[1]

   b. Identification of the Range of Alternatives to be evaluated in the EIR/EIS at the programmatic and project specific level of detail; and

   c. Preliminary USACE LEDPA Determination; USACE Section 408 Draft Response; and USACE agreement that the Draft Mitigation Plans (DMP) are consistent with applicable regulations.

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

6. **Coordination Meetings**. The integration process will involve a series of coordination meetings to exchange information about the BDCP and the New Conveyance Projects and potential impacts. In-person meetings are preferred. Among other objectives, coordination meetings provide an opportunity for the Federal Cooperating Agencies to identify what additional information will be necessary to make a decision about an upcoming checkpoint. Participants will assure that scheduled meetings are well-

[1] The requirements under NEPA for a "purpose and need" statement are discussed at 40 CFR Section 1502.13. The "basic and overall project purpose" is discussed generally at 40 CFR Section 230.10 and in more detail in the Corps of Engineers Standard Operating Procedures, 1999, at page 6.



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organized and focused on making progress towards a specific project issue or issues. Timeframes for information exchange and response will be mutually determined by the Signatory Agencies.

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**Table 1 Overview of the BDCP MOU Process**

| NEPA Steps | Integration Process | USACE Permit Process |
|---|---|---|
| Draft EIR/EISS Preparation | Initiate MOU process with Signatory Agencies<br>-Lead Agencies request representative contact information<br>-Lead Agencies issues information packets<br>-Lead Agencies coordinate checkpoint and coordination meetings | Pre-Application Consultation |
| Draft EIR/EIS Preparation | Checkpoint A: NEPA Purpose and Need Statement and USACE permit process Basic and Overall Purpose Statements<br>-Lead Agencies identify the project(s) seeking USACE permits<br>-Ongoing communication during and after<br>-Federal Cooperating Agencies respond as listed on Table 2<br>-Closure letter **from Lead Agencies** | **Pre-Application Consulta**tion |
| Draft EIR/EISS Preparation | Checkpoint B: Range of **[EIR/EIS]**Alternatives to the Project(s) seeking USACE permits<br>-Lead Agencies identify screening criteria for alternatives<br>-Lead Agencies identify proposed level and methods of analysis<br>-Lead Agencies identify alternatives for analysis in the EIR/EIS<br>-Lead Agencies identify preliminary analysis of impacts of the project(s) seeking USACE permits<br>-Federal Cooperating Agencies respond as listed on Table 2<br>-Closure letter from Lead Agencies | Verify wetland Delineation<br>Preliminary or Approved Jurisdictional Determination |
| Public Draft EIR/EIS sent out for public review | | Application submitted for Section 10, 404 and 408 permits<br>USACE issues Public Notice<br>Independent review of Section 408 |
| Final EIR/EIS Preparation | Checkpoint C: Preliminary LEDPA, Preliminary District 408 Recommendation, and Draft Mitigation Plan<br>-Federal Cooperating Agencies respond as listed on Table 23<br>-Closure letter from Lead Agencies | Permit Application Evaluation |
| Final EIR/EIS 30 day waiting | | Permit Application Evaluation<br>USACE issues Informational Public Notice |
| MOU ENDED at end of Final EIR/EIS 30 day waiting period | MOU ENDED at end of Final EIR/EIS 30 day waiting period | MOU ENDED at end of Final EIR/EIS 30 day waiting period |
| Lead Agency RODs | | Permit Application Evaluation |
| | | District submits section 408 package through SPD to HQUSACE for review on 65% level of design<br>Final mitigation plan approval<br>Section 10/404 permit evaluation completed<br>Section 408 permit evaluation completed on 100% |

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| | | |
|---|---|---|
| | | level design<br>USACE RODs signed<br>USACE permits issued or denied |

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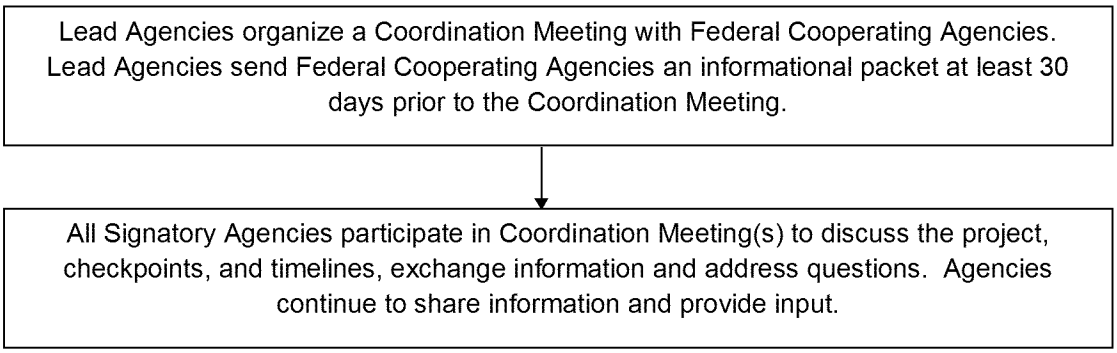
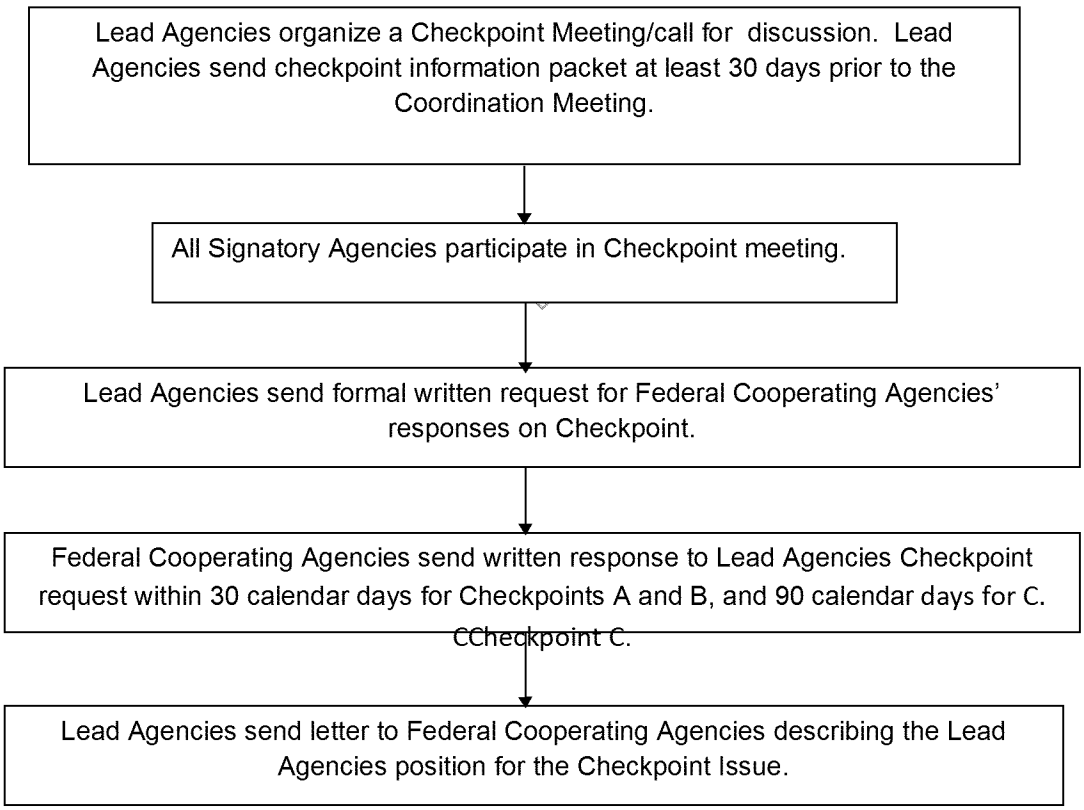
**Figure 1 Coordination and Checkpoint Process[2,3]**

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




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




[2] If the response is Concurrence, Recommendation, Agreement, or Comment with no request for elevation – Lead Agencies proceed to next Checkpoint.

[3] If response is Non-Concurrence, Not Recommend, Disagreement, or Comment with request to elevate – Lead Agencies initiate mid-level elevation.

8. **Checkpoint Meetings**. A Checkpoint is initiated when the Lead Agencies send a checkpoint informational packet to the Signatory Agencies. The Lead Agencies will convene a "checkpoint meeting" when they determine it is appropriate and necessary to confirm a checkpoint position. If a negative comment, disagreement, or non-concurrence is pending, this should be identified by the Signatory Agency raising the comment, disagreement, or non-concurrence at or preferably before the checkpoint meeting

9. **Information Packet.** The Lead Agencies are responsible for sending information packets to the Signatory Agencies at least 30 calendar days (or as otherwise agreed upon) in advance of each checkpoint meeting. Information packets should identify critical issues of concern to the other Signatory Agencies. As the Lead Agencies are preparing the information packet, issues should be identified and communicated informally to the Signatory Agencies.

10. **Lead Agencies Request for Response and Federal Cooperating Agency Responses.** Following a checkpoint meeting, the Lead Agencies will send the Federal Cooperating 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 by e-mail to the Lead Agencies within 30 calendar days for Checkpoints A and B and within 90 calendar days for Checkpoint C. The response will be a comment, agreement, or disagreement. Additionally, the USACE may submit a concurrence or non-concurrence concerning the Preliminary LEDPA/ Draft Mitigation Plan (DMP). Also, the USACE Sacramento District would either preliminarily recommend or not recommend Section 408 approval at checkpoint C as specified in Table 2, Types of Response by Agency. The response terms (comment, agree, disagree and for the USACE, concur/non-concur/recommend/not recommend) will reflect the regulatory responsibilities of the Federal Cooperating Agencies at different points in the NEPA, Section 404, RHA Section 10, and Section 408 processes. Table 2 summarizes the only types of response an agency may give at a checkpoint.

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**Table 2. Types of Response by Agency**

| Agency | Purpose & Need and Basic and Overall Purpose Statements | Range of Alternatives | Preliminary LEDPA/DMP | Section 408 Preliminary Recommendation |
|---|---|---|---|---|
| USACE | Agree/Disagree | Agree/Disagree | Concur/Non-concur | Recommend/Not Recommend |
| EPA | Agree/Disagree | Agree/Disagree | Agree/Disagree | N/A |

11. **Types of Response**. As summarized in Figure 1, *Coordination and Checkpoint Process*, the Federal Cooperating Agency sends a formal agreement or disagreement, (and the USACE may also send a concurrence or non-concurrence at the Preliminary LEDPA/DMP and recommend/not recommend at the Section 408 Preliminary Recommendation checkpoint) to the Lead Agencies, as follows:

    a. **Agreement/Disagreement**. The Federal Cooperating Agency provides a written response agreeing or disagreeing with the Lead Agencies checkpoint proposal. If there is a disagreement, then the Federal Cooperating Agency's letter must identify the basis for the disagreement. If the Federal Cooperating Agency does not respond within 30 calendar days for Checkpoint A and B and within 90 calendar days for Checkpoint C, the Lead Agencies may not assume the Federal Cooperating Agency agrees and the Lead Agencies may initiate the mid-level elevation and may continue elevation as needed. In the case of a disagreement, the Lead Agencies must convene a mid-level elevation.

    If the mid-level elevation does not resolve the issues, the Lead 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 Lead Agencies choose to move on, any Federal Cooperating Agency may concurrently request a senior-level elevation within seven calendar days of notification by the Lead Agencies of the decision to proceed. The senior-elevation group will decide whether or not they wish to review the issue.

    If the Lead Agencies choose to produce an EIR/EIS which does not fully meet the



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needs of USACE for its permit decisions, the USACE will supplement the EIR/EIS or require a new EIS to be prepared as USACE determines appropriate.

b. **Concurrence/Non-concurrence by the USACE**. The USACE provides a written response concurring or non-concurring with the Preliminary LEDPA and DMP at Checkpoint C. If the USACE issues a non-concurrence letter, then it must identify the basis for non-concurrence. If the USACE does not respond within 90 calendar days, the Lead Agencies may initiate the mid-level elevation, and may continue elevation as needed. If the Lead Agencies receive a non-concurrence from the USACE, the Lead Federal Agencies must convene a mid-level elevation. If the Lead Agencies choose to proceed with the development of the EIR/EIS after receipt of a non-concurrence letter for the Preliminary LEDPA from the USACE, then the Lead Agencies must first inform the USACE in writing that they have no expectation that the USACE would be able to adopt the EIR/EIS for its permit decisions. If the Lead Agencies choose to produce an EIR/EIS which does not fully meet the needs of USACE for its permit decisions, the USACE will supplement the EIR/EIS or require a new EIS to be prepared as USACE determines appropriate.

c. **Preliminarily Recommend/Not recommend by a USACE District Office**. Checkpoint C also requires a written response from USACE District Office(s) preliminarily recommending or not recommending Section 408 approval. If the USACE District Office's response letter does not preliminarily recommend Section 408 approval, then it must identify the basis for the decision. If the USACE District Office does not respond within 90 calendar days, the Lead Agencies may initiate the mid-level elevation, and may continue elevation as needed. If the Lead Agencies receive a "not recommending" letter from the USACE District Office(s), the Lead Federal Agencies may not proceed with EIS preparation until the USACE District Office(s) preliminarily recommends Section 408 approval, unless the Lead Agencies first inform the USACE in writing that they have no expectation that the USACE would be able to adopt the EIR/EIS for its permit decisions. If the Lead Agencies choose to produce an EIR/EIS which does not fully meet the needs of USACE for its permit decisions, the USACE will supplement the EIR/EIS or require a new EIS to be prepared as USACE determines appropriate.

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12. **Closure at Each Checkpoint.** At each checkpoint, the Lead Agencies will send the Signatory Agencies a letter identifying the status of each issue that received a disagreement, not recommended or non-concurrence. This letter will be sent before

the next checkpoint, before the draft EIR/EIS is issued, before the final EIS/EIS is issued, or within 90 days after the checkpoint, whichever is sooner. 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.

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

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

Elevation, as necessary, is encouraged. The elevation process is intended to resolve issues quickly and to maintain constructive working relationships. 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 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 A. The mid-level elevation may be used any time (including outside the checkpoints) all the Signatory Agencies agree it would be effective.

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2. **Representatives for Elevation**. Upon notification from the Lead Agency or Agencies that elevation is requested under this MOU, each Federal Cooperating Agency 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 A). 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. Though the Federal Cooperating Agencies should have given the Lead Agencies informal notice prior to and at the checkpoint meeting, the formal trigger for a mid-level elevation is the receipt by the Lead Agencies of a letter of disagreement or non-concurrence or non-recommendation as described in Section III.12(a), 12(b), and 12(c) above 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 the Lead Agencies 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 A.

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 the Lead Agencies.

Section V. 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, the Lead Agencies 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.** Any Signatory Agency may terminate participation in this MOU upon 30 days written notice to all other Signatory Agencies.

Section VI. General Provisions

1. The integration process does not include 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 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



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to complete its permit processes concurrent with or otherwise synchronized with the signing of Records of Decisions by the Lead Federal Agencies.

2. 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 MOU.

3. Specific approvals not addressed by this MOU include, but are not limited to, the following: any real estate permissions, 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.

4. 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.

5. 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.

6. 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 1500, which is a separate process established through a formal written agreement from a Signatory Agency to the Federal lead agency.

7. 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



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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.

8. 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.

9. 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. EPA and the USACE will keep the other Signatory Agencies of this MOU apprised of any developments in the dispute resolution process.

10. This MOU is being entered into by the Federal Signatory Agencies under the authority of Title IV of the Intergovernmental Cooperation Act of 1968 (42 U.S.C. 4201-4233); Alternative Dispute Resolution Act of 1990 (5 U.S.C. 581 et seq.); NEPA of 1969 (42 U.S.C. 4321 et seq.); the CEQ Regulations for Implementing the Procedural Provisions of NEPA at 40 CFR 1500-1508; and other applicable federal laws and regulations.

11. Nothing in this MOU alters or supersedes the authorities and responsibilities of any of the Signatory Agencies on any matter under their respective jurisdictions.

Section VII. 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 end of the Final EIS 30 day waiting period, or b) the MOU is terminated pursuant to Section V.2.

IN WITNESS WHEREOF, this MOU is executed by the U.S. Fish and Wildlife Service, National Marine Fisheries Service, Bureau of Reclamation, California Department of Water Resources, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency, acting by and through their respective authorized officers.



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_____ _____

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

Date

_____ _____

Jared Blumenfeld
Regional Administrator
U.S. Environmental Protection Agency, Region IX

Date

_____ _____

Donald R. Glaser
Regional Director
Bureau of Reclamation
Mid-Pacific Region

Date

DRAFT

_____ _____

Ren Lohoefener
Regional Director
U.S. Fish and Wildlife Service
Pacific Southwest Region

Date

_____ _____

Rodney McInnis
Regional Administrator
National Marine Fisheries Service
Southwest Region

Date

_____ _____

Mark W. Cowin

Date

Acting Director
California Department of Water Resources

DRAFT



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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 cooperative 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, rather than polarizing, presentation of issues;
- 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.

The issues to be addressed in the briefing paper should be framed at the checkpoint meeting. The Lead Agencies should begin the first draft shortly after the checkpoint meeting. Once the Federal Cooperating Agencies reply formally to the Lead Agencies request for responses, the Lead Agencies 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. The Lead Agencies may either accept the changes or move them to one of the "alternate" columns, and this document becomes the second draft. The Lead Agencies then distribute the second draft to the contributors and make 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.

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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When the Lead Agencies initiate the MOU process, they will request that each Federal Cooperating Agency initiate its internal actions for preparing to engage in the elevation process, including the review of the briefing paper and confirmation of the appropriate mid-level and senior-level representatives who have been identified to speak for their agency. The following are the identified mid-level and senior level representatives for each agency.

| **Signatory Agency** | **Mid-level Elevation** | **Senior-level Elevation** |
|---|---|---|
| EPA | Director, Water Division, Region IX | Regional Administrator of Region IX |
| USACE | District Commander | South Pacific Division Commander |
| Reclamation | Bay-Delta Office Manager | Regional Director |
| DWR | Deputy Director | Director |
| NMFS | Office Supervisor | Regional Administrator |
| FWS | Field Supervisor | Regional Director, Region 8 |
| | | |

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## Figure A-1. Sample Briefing Paper

| Project Name:<br><br>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.<br><br>QA: At the end of the summary of the issue, end with a question. This helps keep the decision-makers in the elevation focused.<br><br>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.<br><br>Q: | | |
| | | |
| | | |
| Resolution: | | |
| Issues Still Requiring Resolution: | | |
| Dates: Checkpoint meeting ___/___/___;<br>Request for Response ___/___/___;<br>Negative assessment or non-concurrence ___/___/___;<br>Mid-level elevation; ___/___/___;<br>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 delay resolution. Yet it is not necessary to find someone who knows the details of the BDCP EIR/EIS 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.

*Timely retention of 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. 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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