

**Stakeholder Proposals**  
**for**  
**Certification of Compliance with the Urban MOU**  
**As Part Of The**  
**CALFED Water Use Efficiency Program**

**January 7, 1999**

## Introduction

The urban areas of California currently use over seven million acre-feet of water each year. The majority of this demand is met by diverting water from the Bay-Delta system. As populations continue to grow, demands for additional water supply will also grow. While implementation of local water conservation programs has helped to reduce per capita water use in many urban areas, even with current conservation programs gross urban applied water demand is projected to grow. Developing new water supplies to meet increasing demands, treating this water to meet drinking water standards, and providing the infrastructure to deliver the water to customers is very expensive. In addition, most urban wastewater is typically released to salt sinks, such as the Pacific Ocean or San Francisco Bay, where it cannot be recovered for other uses without incurring large costs. The high costs associated with new supplies and the limited cost-effective opportunities for reuse after discharge can make many urban water conservation measures cost-effective and attractive to urban water suppliers.

The majority of California's most successful urban water conservation programs stem from implementation of cost-effective urban water conservation Best Management Practices (BMPs) by the more than 150 urban water suppliers that have signed the *Memorandum of Understanding Regarding Urban Water Conservation in California* (MOU) since 1991. Full implementation of cost-effective BMPs constitutes a significant amount of water savings potential. While efforts to reduce urban water demands are expected to continue, the rate and extent of cost-effective BMP implementation by urban water suppliers is currently thought by CALFED to be far below the full potential. CALFED has determined that higher levels of urban water use efficiency need to be achieved as part of an overall CALFED solution.

A number of programs and assurances are being proposed for the Water Use Efficiency Program (WUEP) as it relates to urban water uses, including planning and technical assistance, financing assistance, and planning and conservation implementation assurances. These programs and assurances are designed to help insure that appropriate water management planning is carried out by local agencies and that cost-effective efficiency measures are being implemented.<sup>1</sup>

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<sup>1</sup> According to the Revised Phase II Report, dated December 18, 1998, "[a]ssurances will play a critical role in the Water Use Efficiency Program element. As a prerequisite to obtaining CALFED Program benefits (for example, participating as a buyer or seller in a water transfer, receiving water from a drought water bank, or receiving water made available solely because of supply enhancements such as new, expanded, or reoperated facilities) water suppliers will need to show that they are in compliance with the applicable urban or agricultural council agreements and applicable State law... A high level of water use efficiency is also expected to be required as a condition for permitting of any new surface storage projects. Widespread demonstration of efficiency use by local water suppliers and irrigation districts will be a prerequisite to CALFED implementation of new storage projects. The definitions of 'high level of water use efficiency' and 'widespread demonstration of efficient use' will be established prior to the ROD."

## Reliance on the Urban MOU

A cornerstone of CALFED's approach to urban water use efficiency is reliance on the Urban MOU to provide a uniform, verifiable, locally directed process for implementation of cost-effective urban water conservation programs. The Urban MOU provides a recognized standard for minimum implementation of cost-effective urban water conservation programs. It is CALFED's position that all urban water suppliers reliant on the Bay-Delta system should implement conservation programs that comply with the terms of the Urban MOU. This is consistent with public policy, state law, and public comments made during scoping for the CALFED Bay-Delta program.

CALFED is recommending that the California Urban Water Conservation Council (CUWCC) or some other appropriate entity adopt a process for certification of water supplier compliance with the terms of the Urban MOU.<sup>2</sup> A process of certification coupled with appropriate mechanisms to discourage MOU non-compliance and reward MOU compliance will help assure that cost-effective BMPs are being broadly implemented. This proposed assurance mechanism will be considered together with all other Program assurance needs in developing a final package of assurances.

## Urban Stakeholder Proposals for Certification of MOU Compliance

For more than a year, representatives from urban water suppliers and environmental organizations have been discussing details for a program to certify water supplier compliance with the Urban MOU. These discussions have focused on how and to whom MOU certification would be applied, how the program would be administered, and what entity or entities would be responsible for this administration. Two proposals have emerged from these discussions. One is a joint proposal developed by the California Urban Water Agencies (CUWA) and the

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<sup>2</sup> The CUWCC is a statewide, non-profit organization comprised of urban water suppliers (referred to as Group 1 MOU signatories), environmental advocacy organizations (referred to as Group 2 MOU signatories), and other interested parties and governmental organizations (referred to as Group 3 MOU signatories). The CUWCC was created by the MOU in 1991, which grants it the following duties and responsibilities: (1) recommendation of study methodologies for BMPs, including procedures for assessing the effectiveness and reliability of urban water conservation measures; (2) development of guidelines to be used by all signatories in computing BMP benefits and costs pursuant to Exhibit 3 of the MOU; (3) collecting and summarizing information on implementation of BMPs and Potential BMPs (PBMPs); (4) adopting or modifying BMPs and PBMPs; (5) adopting or modifying reliable water conservation savings data for BMPs; (6) adopting or modifying schedules of implementation for BMPs; (7) accepting or denying new signatories to the MOU; (8) reviewing and modifying BMP report formats; and (9) making annual reports regarding BMP implementation to the State Water Resources Control Board. More than 150 urban water suppliers, environmental advocacy groups, and other interested parties across California have joined the CUWCC since 1991.

Environmental Water Caucus (EWC)<sup>3,4</sup>. The other is a proposal developed by representatives of Kern County Water Agency (KCWA) and Bear Valley CSD (BVCSD).

These proposals are based on extensive discussions among urban and environmental stakeholders actively participating in the CALFED process, as well as the interests and viewpoints of the broader urban water supplier community. The KCWA/BVCSD proposal was developed following a series of informational meetings with urban water suppliers in Sacramento, Burbank, and Bakersfield to gather input on alternative approaches to MOU certification. This proposal has been widely distributed to urban water suppliers for input as it has evolved. Similarly, the CUWA/EWC negotiations were open-door meetings and their progress was discussed at most CUWCC meetings over the last two years. Periodic presentations have been made before the Ag-Urban workgroup, the State Water Contractors, and CUWA member agencies and subagencies.

The two proposals were not developed independently of one another. Early versions of the joint proposal by CUWA/EWC served as a starting point and template for the KCWA/BVCSD proposal and KCWA/BVCSD representatives were provided draft work products and information on the status of the CUWA/EWC discussions. Similarly, CUWA/EWC representatives participated in the KCWA/BVCSD informational meetings and were provided updated versions of the KCWA/BVCSD proposal as it evolved over time.

## CALFED Synthesis

Although the structure and content of the two proposal are similar or identical in many regards, there are also a number of differences. In some cases, these differences have little or no impact on the overall structure of the proposed certification framework. In other cases, the differences have substantial impact on who the proposed certification framework would affect, what MOU certification would entail, how it would be administered, and how it would be enforced.

To highlight key differences between the two proposals and avoid unnecessary redundancy, CALFED staff in consultation with the proposals' sponsors have merged the proposals into a unified presentation. In addition, the original proposals submitted to CALFED are included as attachments to this report.

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<sup>3</sup> California Urban Water Agencies is an organization of the twelve largest urban water providers in California. CUWA agencies serve water to metropolitan areas comprising about two-thirds of the state's population. CUWA was formed to work on water supply issues of particular concern to the large urban areas of California. Its members are: Alameda County Water District, Central/West Basins MWDs, City of Sacramento, City of San Diego, Contra Costa Water District, East Bay MUD, Los Angeles DWP, Metropolitan Water District of Southern California, Municipal Water District of Orange County, San Diego County Water Authority, San Francisco PUC, and Santa Clara Valley Water District.

<sup>4</sup> The Environmental Water Caucus is a consortium of environmental organizations active in the CALFED process, including Bay Institute, California League of Conservation Voters, California Sport Fishing Protection Alliance, Clean Water Action, Environmental Defense Fund, Fishery Foundation of California, Friends of the River, League of Women Voters of San Francisco, Mono Lake Committee, Natural Heritage Institute, Natural Resources Defense Council, Nature Conservancy, Save San Francisco Bay Association, and Sierra Club, Audobon Society, Pacific Coast Federation of Fishermans Association.

Certification elements that differ between the CUWA/EWC and KCWA/BVCSD proposals are identified with text borders, as follows.

Proposal element unique to the CUWA/EWC Proposal

Proposal element unique to the KCWA/BVCSD Proposal

This document is for informational purposes only. Its purpose is not to advocate for either proposal, but rather to identify core similarities in structure and intent, to highlight key differences, and to impart to the reader a general familiarity with the two proposals. This document will serve as background for CALFED workshops during February, 1999, in which the two proposals will be presented for public comment. Following these workshops and comment period, CALFED will formulate a proposal for MOU certification to be included in the Water Use Efficiency Program Plan.

### Overview of Stakeholder Certification Proposals

Both proposals are based on the existing BMP process as specified by the MOU. As with the existing process, urban water suppliers would be responsible for implementing cost-effective BMPs and periodically reporting their implementation progress to the CUWCC. The CUWCC would continue providing outreach and technical assistance to agencies implementing BMPs, as well as conducting studies to advance new conservation technologies and programs. Cost-effectiveness would continue to serve as the primary benchmark for BMP implementation.

Both proposals also expand the current BMP implementation process in two important ways. First, urban water suppliers with more than 3,000 connections or delivering more than 3,000 acre-feet annually within the CALFED solution area would be required to demonstrate compliance with the MOU. These water suppliers would be periodically reviewed and certified as in compliance or not in compliance with the MOU. Second, assurance mechanisms would be put in place to discourage MOU non-compliance and reward MOU compliance.

Under the **KCWA/BVCSD Proposal**, water suppliers subject to MOU certification would automatically become members of the CUWCC, assuming they are not already, and would have the opportunity, but not the obligation, to participate, with all due voting rights and membership privileges.

The **CUWA/EWC proposal** does not make membership in the CUWCC automatic, but rather leaves this decision with each urban water supplier subject to certification. While both proposals recommend the CUWCC as the entity responsible for administering the MOU certification program, the **CUWA/EWC proposal** conditions this recommendation on mutually acceptable modifications to the CUWCC's governance and administrative structures to assure balanced stakeholder representation and participation in certification decisions.

For each proposal, the MOU certification framework consists of four primary elements, as follows:

1. *Agency Reporting* -- This element consists of agencies preparing BMP implementation status reports and submitting them to the CUWCC for evaluation. This element is part of the existing MOU process.
2. *Evaluation* -- This element consists of the CUWCC evaluating agency performance based on evaluation criteria contained in Exhibit 1 of the MOU. Evaluations would be based on agency implementation reports and cost-effectiveness exemption submittals. This element is also part of the existing BMP process.
3. *Certification* -- This element consists of the CUWCC adopting and implementing a process to certify water supplier compliance with the MOU. This element expands the current MOU process, and may require legislation to implement.
4. *Assurance Mechanisms* -- This element consists of using assurance mechanisms to discourage MOU non-compliance and reward MOU compliance. As with the certification element, this expands the current MOU process and may require legislation to implement.

## Water Supplier Participation

### *Retail Water Suppliers*

Both proposals recommend that only retail water suppliers hydrologically or institutionally connected to the Bay-Delta watershed be required to demonstrate MOU compliance. This roughly corresponds to retail urban water suppliers operating within the CALFED solution area, as defined in CALFED Bay-Delta Program documentation. Further, both proposals exempt retail water suppliers with fewer than 3,000 connections or serving less than 3,000 AF/Yr, even if they are within the CALFED solution area.

For both proposals, reporting frequency varies by the size of the water supplier. Water suppliers with fewer than 10,000 connections (about 50% of the urban water supply systems that would require MOU certification) would be certified every five years. Water suppliers with more than 10,000 connections would be certified every two years.

Water suppliers with more than 10,000 connections serve approximately 78% of the state's population, while suppliers with fewer than 10,000 connections, but more than 3,000, serve about 14%. The remaining 8% of the population is served by suppliers with fewer than 3,000 connections. Under a 3,000 connection/3,000 AF cutoff, approximately 92% of the state's population would be served by urban water suppliers participating in MOU certification. Further restricting MOU certification to those agencies within the CALFED solution area would reduce this figure somewhat, but not by much, since all of California's major population centers lie within the solution area.

Proposed retail agency participation in MOU Certification is summarized in the following table.

Stakeholder Urban Water Conservation Assurances Proposals  
1/11/99 - Administrative Draft 6

*Proposed MOU Certification Program Participation*

No. Connections	Within CALFED Solution Area	Outside CALFED Solution Area
Retail Supplier Less than 3,000 <sup>5</sup>	Not Required	Not Required
Retail Supplier 3,000 to 10,000	Compliance Review Every 5 Years	Not Required
Retail Supplier More than 10,000 <sup>6</sup>	Compliance Review Every 2 Years	Not Required

*Wholesale Water Suppliers*

Under both proposals wholesale water suppliers also are required to demonstrate compliance with the Urban MOU, though these requirements differ substantially from those for retail urban water suppliers. Under the MOU, wholesale water suppliers are required to implement only the subset of BMPs that do not require interaction with final end users.<sup>7</sup> The BMPs that wholesale suppliers are required to implement are BMPs 3 (System Water Audits, Leak Detection and Repair), 4 (Metering with Commodity Rates for All New Connections and Retrofit of Existing Connections), 7 (Public Information Programs), 8 (School Education Programs), 10 (Wholesale Agency Assistance Programs), 11 (Conservation Pricing), 12 (Conservation Coordinator), and 13 (Water Waste Prohibition). These BMPs are already being implemented by most urban wholesale suppliers.

Under the existing MOU, wholesale water suppliers are not required to directly implement BMPs 1 (Water Survey Programs for Single-Family Residential and Multi-Family Residential Customers), 2 (Residential Plumbing Retrofit), 5 (Large Landscape Conservation Programs and Incentives), 6 (High-Efficiency Washing Machine Rebate Programs), 9 (Conservation Programs for Commercial, Industrial, and Institutional Accounts), and 14 (Residential ULFT Replacement Programs). It should be noted, however, that many urban wholesalers do in fact directly implement and/or provide substantial support for the implementation of these BMPs.

As originally drafted, the MOU did not create any new rights, obligations or authorities between wholesale suppliers, retail agencies, cities or other water suppliers. Both proposals would modify this policy slightly by allowing wholesale water suppliers to assume responsibility for BMP implementation within their service area, but only if requested and agreed-to by their member agencies.

<sup>5</sup> Or deliveries of less than 3,000 acre-feet per year.

<sup>6</sup> As discussed later in this proposal, water suppliers with more than 10,000 connections demonstrating compliance for three consecutive reviews would be moved to the 5 year review cycle.

<sup>7</sup> Section 3.1 of the Urban MOU states that “[W]holesale water suppliers are not obligated to implement BMPs at the retail customer level except within their own retail service area, if any.”

A number of wholesalers that directly divert or export water from the Bay-Delta system have expressed concern about CALFED making Urban MOU certification a condition for water transfers, drought bank access, and new water supply from the Bay-Delta. The concern is that failure by one or more retail agencies to maintain MOU certification could jeopardize regional water supplies. To address this concern, the **CUWA/EWC proposal** includes separate and distinct wholesaler compliance requirements for those wholesalers that directly divert or export water from the Bay-Delta system.

For purposes of explication, these suppliers are referred to herein as “first tier” wholesalers. They include wholesalers that receive Bay-Delta water supply either directly from their own diversions within the Bay-Delta system or directly from the SWP or the CVP. They do not include wholesalers that receive Bay-Delta water supply indirectly, such as from another wholesale water supplier.

As long as these “first tier” wholesalers maintain compliance with at least one of the following five alternatives, CALFED agencies would be prohibited from placing restrictions on the wholesaler, stemming from lack of MOU certification within their service area, that would affect its ability to engage in water transfers, participate in the drought bank, or acquire new water supply from the Bay-Delta. Choice of which option to comply with would be at the discretion of each wholesaler.

Option 1. Conservation Budget Commitment

Under this alternative, CALFED would establish a baseline conservation program-funding requirement for regional wholesale agencies diverting/exporting water from the Bay-Delta watershed. One option would be for CALFED to set a per-acre-foot-of-diverted/exported-water funding requirement. An agency’s baseline funding requirement would then be its average annual diversions/exports multiplied by the per-acre-foot funding requirement.

Option 2 Cost Sharing Commitment

Under this alternative, a regional wholesale agency diverting/exporting water from the Bay-Delta watershed would fulfill its obligations under the Water Use Efficiency Common Program by being in compliance with the MOU and agreeing to cost-share with member agencies investments in conservation programs. To comply with this alternative, the wholesaler would agree to fund any cost-effective conservation program or new investment proposed by a subagency by an amount equal to the marginal cost of avoided water supply development or one-half the program cost, whichever is less. The wholesale agency would not be exposed to water-based sanctions as long as it maintained its cost-sharing commitment to regional conservation programs at or above this level.

Option 3 Rate Structure Assurance

Under this approach, a regional wholesale water supplier exporting/diverting water from the Bay-Delta watershed would fulfill its obligations under the Water Use Efficiency Common Program by being in compliance with the MOU and adopting a wholesale water rate structure that

included an MOU-non-compliance surcharge equal to the per acre-foot marginal cost of new water supply. All surcharge revenue would be directed to regional conservation program funding. The wholesale agency would not be exposed to water-based sanctions as long as it maintained the MOU-non-compliance surcharge. To comply with this option, the surcharge must reach the retail agency level. Thus, secondary wholesale agencies would have to pass on the surcharge for the primary wholesaler to comply with this option.

Option 4      Regional Responsibility for MOU Compliance

Under this approach, a regional wholesale water supplier exporting/diverting water from the Bay-Delta watershed would fulfill its obligations under the Water Use Efficiency Common Program by assuming regional responsibility for MOU compliance. For purposes of MOU compliance, the entire region would be evaluated as though it were a single, large retail service area. Neither the wholesaler nor underlying retailing agency would be exposed to water-based sanctions as long as the region as a whole was in compliance with the MOU. The wholesaler would assume responsibility for all retail service areas within its service area and be the one entity exposed to sanctions. This option would require consent by subagencies in the service area.

Option 5      Regional MOU Accountability

Under this approach, a regional wholesale water supplier exporting/diverting water from the Bay-Delta watershed would not be exposed to water-based sanctions as long as some percent of its service area population (to be negotiated by CALFED and CALFED stakeholders) was receiving water from a water supplier in compliance with the MOU. The regional wholesale water supplier would not have primary responsibility for implementing BMPs, as under the previous approach, but would have a strong incentive to invest regionally to assure the compliance threshold is met. If the agreed to percentage of compliance is not met, the wholesaler is exposed to sanctions. Additionally, unlike the previous option, every retailer remains responsible for their own compliance as well.

The **KCWA/BVCSD proposal** does not contemplate nor do its proponents support any obligations or assurances from “first tier” wholesale water suppliers beyond compliance with the MOU. Proponents of the KCWA proposal have expressed concerns that wholesaler obligations that extend beyond compliance with the MOU would (1) inappropriately transfer fiscal authority over certain retail supplier activities to wholesalers; and (2) put wholesalers in the position of enforcing CALFED water supply restrictions placed on their member agencies due to MOU non-compliance<sup>8</sup>.

<sup>8</sup> Proponents of both proposals have pointed out that one or more wholesale supplier often stands between a retail agency and water supplies to which CALFED could attach restrictions due to MOU non-compliance. Such restrictions could only be enforced on a retail supplier with the cooperation of its intervening wholesalers. Some urban retail water suppliers (notably, those not served by wholesalers) have commented that this may result in unbalanced exposure to CALFED enforcement actions unless wholesalers are required to comply with water supply restrictions placed on their member agencies. CUWA wholesalers have indicated a willingness to pass through targeted water supply restrictions provided this is a non-discretionary action compelled by law.

***Regional Coordination***

Under both proposals, water suppliers required to maintain MOU certification and serving adjacent areas would be able to coordinate MOU compliance for their combined service areas. Such arrangements would allow suppliers to submit a single compliance report for the combined region. This provision would apply to a wholesaler and its member agencies, a wholesaler and a subset of its member agencies, or a group of retail water suppliers.

**MOU Compliance Standard**

For purposes of this section, the term “water supplier” refers to any urban water supplier or grouping of suppliers required to maintain MOU certification.

Under both proposals, a water supplier meeting the following criteria would be certified as in compliance with the Urban MOU for purposes of the CALFED Bay-Delta program.

1. The water supplier has submitted a compliance report to the CUWCC in accordance with the reporting requirements and schedule of its certification review cycle;

If the water supplier is a CVP contractor, the **KCWA/BVCSD proposal** allows the water supplier to satisfy this requirement by meeting the urban water conservation reporting and evaluation requirements of the Central Valley Project Improvement Act. The intent of this provision is to avoid reporting redundancy.

While the CUWA/EWC proposal does not explicitly contain a similar provision, its proponents support the concept so long as USBR and CUWCC reporting requirements and evaluation criteria are consistent with one another. The USBR and CUWCC have expressed interest in working toward this objective.

2. The water supplier’s compliance report is complete in all its parts, and all information and claims presented therein can be substantiated;
3. Using the *Criteria to Determine BMP Implementation Status* set forth in Section E of Exhibit 1 of the MOU, the CUWCC determines that the water supplier’s BMP implementation meets or exceeds the minimum implementation requirements set forth in Sections A, B, and C of Exhibit 1 of the MOU.
4. The water supplier has substantiated any exemptions from implementing specific BMPs in accordance with Sections 4.4 - 4.6 of the MOU, and BMP exemptions based on cost-effectiveness are in accordance with Exhibit 3 of the MOU and the CUWCC Cost-Effectiveness Guidelines.

The **KCWA/BVCSD proposal** would modify the cost-effectiveness standard contained in Exhibit 3 of the MOU. The **KCWA/BVCSD proposal** states that “[a]n agency’s certification will not be denied due to the value it assigns to the environmental benefits/costs portion of a cost effectiveness exemption calculation. The CUWCC will adjust the process or amend the MOU to

*reflect these needs.*” Proponents of the **KCWA/BVCSD proposal** have expressed concern that the current MOU’s cost-effectiveness criteria relating to environmental costs and benefits are too subjective and susceptible to multiple interpretations. They have represented that should these criteria become more objective, then they should be included in the certification process.

The **CUWA/EWC proposal** adopts the MOU’s existing cost-effectiveness standards, as expressed in Exhibit 3 of the MOU and the CUWCC’s cost-effectiveness guidelines, and does not preclude consideration of environmental costs and benefits so long as their inclusion or exclusion conforms to current MOU requirements.

### ***BMP Implementation Variances***

Both proposals retain the MOU’s “at least as effective as” BMP implementation standard. This standard is stated in the preamble to Section A of Exhibit 1 of the MOU, which states: “*It is recognized by all parties that a single implementation method for a BMP would not be appropriate for all water suppliers. In fact, it is likely that as the process moves forward, water suppliers will find new implementation methods even more effective than those described. Any implementation method used should be at least as effective as the methods described [in the MOU].*”

The **CUWA/EWC Proposal** modifies the MOU by requiring water suppliers to obtain approval from the CUWCC prior to implementing a BMP variant.

The **KCWA/BVCSD proposal** requires a water supplier to submit a written description of the variant to the CUWCC prior to implementation, but does not require CUWCC approval.

### **CUWCC Administration of Compliance Reports**

Given that MOU compliance evaluations will require timely and complete reporting on BMPs by water suppliers, both proposals recommend that the CUWCC be given authority to administer letters of notice and nominal fines for late and/or incomplete reporting. Both proposals also give CUWCC discretion to forgive fines and extend due dates for water suppliers with legitimate and unavoidable causes for late or incomplete reporting. Both proposals have adopted the suggested schedule and administrative actions for late or incomplete reporting shown in the following table.

*Proposed Administrative Actions for Late or Incomplete Reporting*

<b>Reporting Violation</b>	<b>CUWCC Administrative Action</b>
Report not submitted by due date or report incomplete in some or all of its parts.	Written notice to water supplier alerting it that report has not been received or is incomplete.
Complete report not submitted within 30 days of due date, or first notice of incomplete report.	Written notice to water supplier alerting it that report has not been received; assessment of \$500 fine.
Complete report not submitted within 60 days of due date, or first notice of incomplete report.	Written notice to water supplier alerting it that report has not been received; assessment of administrative fine of \$1,000.
Complete report not submitted within 90 days of due date, or first notice of incomplete report.	Written notice to water supplier alerting it that report has not been received; assessment of administrative fine of \$2,000; certification status changed to suspended.

**MOU Compliance Designations**

The two proposals employ similar terminology for compliance designations, but define procedures governing each designation somewhat differently. Both proposals define three compliance designations: (1) Full Compliance, (2) Conditional Compliance, and (3) Suspended.

***Full Compliance***

A water supplier receiving a Full Compliance designation is determined to be in full compliance with the MOU. Under both proposals, a water supplier receiving this designation would be issued a Notice of Compliance and no further reporting or monitoring would be required prior to the next review date.

***Conditional Compliance***

A water supplier receiving a Conditional Compliance designation is determined to have gone out of compliance between review cycles. In these cases, the CUWCC would issue a Notice of Non-Compliance to the water supplier. This notice would specify (1) the basis of the finding; (2) necessary actions required to return to Full Compliance; and (3) technical and funding assistance available to the water supplier

Under the **CUWA/EWC Proposal**, conditional compliance lasts for twelve months. During this probationary period the water supplier has the opportunity to either (1) return to compliance or (2) if returning to compliance were expected to require more than twelve months, adopt a CUWCC-approved compliance plan. At the end of twelve months, the supplier is reviewed again by the CUWCC to verify that it has returned to compliance or has adopted and is implementing its compliance plan.

Under the **KCWA/BVCSD proposal**, the period of conditional compliance is set by the CUWCC. The CUWCC may, using its discretion to determine the duration of conditional compliance, monitor the water supplier's compliance more frequently than its normal review cycle.

### ***Suspended Compliance***

A water supplier receiving a Suspended designation is determined to have remained out of compliance and/or failed to adopt a compliance plan during its period of conditional compliance. In these cases, the CUWCC would suspend the water supplier's MOU certification. Under both proposals, once a water suppliers certification is suspended, it may be referred by the CUWCC to CALFED for enforcement action, as described in subsequent sections.

Under the **CUWA/EWC Proposal**, suspension lasts for six months. At the end of this period the water supplier is reviewed by the CUWCC. If the water supplier has returned to compliance, its designation is changed to Conditional Compliance. After its twelve month review, if the water supplier is still in compliance, its designation is changed to Full Compliance and the water supplier returns to its original review cycle.

Under the **KCWA/BVCSD proposal**, a supplier whose certification is suspended is referred to CALFED (or the appropriate CALFED agency). The proposal does not specify if additional review would occur within or outside of the CUWCC.

## **MOU Certification Decision-Making**

Under both proposals, the CUWCC's role is limited to administering a peer review process for determining and reporting MOU compliance. Neither proposal would give the CUWCC responsibility for enforcing MOU compliance. Any enforcement actions would be the responsibility of CALFED agencies, as discussed in subsequent sections.

There are differences between the proposals in how decisions regarding certification are made by the CUWCC.

The **KCWA/BVCSD proposal** presents two options:

1) The CUWCC Steering Committee, or an appointed subcommittee thereof, as duly-elected representatives of the CUWCC Plenary, would be responsible for issuing notices of compliance or non-compliance to water suppliers, based on staff recommendation, and subject to proscribed certification requirements. Certification would require majority approval by Group 1 (urban agency representatives) members voting and majority approval by Group 2 (environmental representatives) members voting, subject to CUWCC rules of quorum. Voting members of the Steering Committee would be elected according to the bylaws of the CUWCC.

2) A nine-member certification committee, with three Group 1 and three Group 2 members elected by the CUWCC Plenary, and three members-at-large elected by the six Group 1 and Group 2 representatives, would be responsible for issuing notices of compliance or non-compliance to water suppliers, based on staff recommendation, and subject to proscribed certification requirements. Certification would require simple majority approval by the committee.

Under the **CUWA/EWC Proposal**, CUWCC staff recommendations would be forwarded to a state-appointed committee called the Certification Review Committee. The Certification Review Committee would be the body within the CUWCC formally responsible for making decisions regarding MOU compliance status, and would be separate and distinct from the CUWCC Steering Committee. The committee would be comprised of three CUWCC representatives from Group 1, three CUWCC representatives from Group 2, a representative or the head of conservation from the Department of Water Resources, a representative or the head of conservation from the United States Bureau of Reclamation Mid Pacific Region, and a “representative at large” agreed-to by Groups 1 and 2.<sup>9</sup>

CUWCC committee members would be appointed by the Secretary of Resources from a list of nine nominees from each group. Nominees from each group would be formally elected by their respective memberships.<sup>10</sup> The “representative at large” would also be appointed by the Secretary of Resources from a list of three nominees. Nominees for the “representative at large” must be approved by a majority of Group 1 signatories and a majority of Group 2 signatories. Each committee member would be assigned an alternate. Alternates for CUWCC representatives would come from each representative’s group, and would be appointed by the Secretary of Resources from the submitted list of nine nominees. The alternate for the “representative at large” would also be appointed by the Secretary of Resources from the submitted list of three nominees. Alternates for DWR and USBR representatives would be appointed by each agency.

Under both proposals, certification review meetings would be open to the public and staff recommendation on certification decisions would be available for review not less than ten days before the date of the meeting. To prevent deadlocks and to minimize decision-making delays, decisions regarding certification status would have to be made by the full certification committee with no abstentions. Alternates would be substituted for committee members in cases of absence or conflict of interest.

Under both proposals, if determination of a supplier’s compliance status is delayed, the supplier would continue under its existing status until such time as a decision could be rendered. To minimize the likelihood that review of a supplier with suspended or conditional compliance status would be delayed, decisions regarding certification status would be prioritized as follows:

<sup>9</sup> CUWA/EWC are open to variations on this structure, so long as they result in balanced stakeholder representation. EWC members currently believe the DWR and USBR representatives should be the heads of respective conservation functions. CUWA currently believes it should be up to DWR and the USBR to specify the assignments. As written here, it is not meant to imply any favor for either view.

<sup>10</sup> Again, variations in the number of nominees are open for consideration. The important feature is that each stakeholder group may select qualified nominees from its ranks for consideration by the Secretary of Resources.

(1) suppliers whose certification has been suspended would have first priority for review; (2) suppliers with conditional compliance status would have second priority; and (3) suppliers with full compliance status would have last priority. Within each category, suppliers would be ranked for review according to their scheduled review dates, so that suppliers that have waited longest would have first priority for review.

### Appealing CUWCC Certification Decisions

Under both proposals, appeals would have to be filed within 45 days from the date of receipt of a notice of non-compliance. Both proposals call for a *de novo* appeals process -- i.e. all facts and evidence could be reviewed and CUWCC decisions would not be prejudicial.

The proposals differ with respect to what decisions may be appealed, who has the right to make an appeal, and what entity or entities will hear and decide appeals.

Under the **KCWA/BVCSD proposal**, any water supplier subject to a non-compliance finding would have the right to appeal the decision. No other groups within the CUWCC would have right to appeal CUWCC decisions. A water supplier would be required to state in writing the basis for its appeal. The **KCWA/BVCSD proposal** suggests two alternatives for deciding appeals. Under the first, appeals would be decided by the State Water Resources Control Board or some other CALFED regulatory agency. Under the second, appeals would be referred to a binding arbitration process for resolution.

Under either option, the proposal calls for appeals to be decided within 60 days from the date of receipt of the water supplier appeal. If a decision is not rendered within 60 days, the appeal would be deemed sustained, and full compliance status would be restored to the water supplier.

Under the **CUWA/EWC Proposal**, any supplier under review or Group 2 member of the CUWCC could appeal certification decisions, provided the issue being appealed was addressed during the certification review, and subject to the following conditions:

1. Grounds for appeal must be established by the agency responsible for deciding appeals. Only appeals meeting these criteria would be considered. Appeals not meeting these criteria would be dismissed.
2. Certification decisions stand until overturned by appeal.
3. Filing fees or outcome-dependent cost responsibility are incorporated as ways to discourage frivolous or strategic appeals.

Under the **CUWA/EWC Proposal**, appeals would be decided by a designated CALFED agency under a process separate and distinct from the CUWCC.<sup>11</sup>

## Assurances and Enforcement

A primary intention of adding certification to the MOU process is to provide a structure within which appropriate assurances for urban water use efficiency may be implemented as part of a CALFED solution. Both proposals encompass the following four mechanisms to assure urban water use efficiency for purposes of the CALFED program, as follows:

1. Provide technical and financial assistance to implement BMPs;
2. Certify urban water supplier compliance with the MOU;
3. Reward MOU compliance through
  - a. Public recognition
  - b. less frequent monitoring and evaluation
  - c. preferential water supply/treatment loan/grant access or terms
  - d. preferential State Drought Bank access or terms
4. Publicly report water supplier non-compliance;

### *CALFED Enforcement Actions*

While both proposals recognize that CALFED may choose to apply monetary and/or water supply sanctions for persistent non-compliance with the Urban MOU, each emphasizes primary reliance on positive incentives coupled with technical and financial assistance.<sup>12</sup> To the extent that CALFED actions are taken to compel compliance, both proposals emphasize that guidelines and procedures for their application must include a graduated enforcement process that (1) provides water suppliers a reasonable opportunity to come into compliance before the application

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<sup>11</sup> For instance, one option would be for the SWRCB to act as the appeal body under a waste and unreasonable use proceeding.

<sup>12</sup> Under both proposals, the CUWCC's role is limited to administering a peer review process for determining and reporting MOU compliance. Neither proposal gives the CUWCC responsibility for enforcing MOU compliance. Any non-compliance enforcement actions would be the responsibility of CALFED agencies.

of penalties; (2) focuses enforcement on persistent non-compliance; and (3) includes provisions for due process.<sup>13</sup>

The **CUWA/EWC proposal** provides the following specific guidelines for application of CALFED enforcement actions relating to MOU non-compliance. CALFED enforcement actions would be divided into three levels.

*Level 1 Enforcement* consists of public disclosure of MOU non-compliance and a modest financial penalty.<sup>14</sup> Level 1 enforcement could occur only if a water supplier's designation is changed from Conditional Certification to Suspended. That is, only if the water supplier fails to comply with the MOU or adopt and begin to implement a compliance plan during the 12 months of conditional certification following the initial non-compliance finding.

*Level 2 Enforcement* consists of public disclosure of MOU decertification and a moderate financial penalty. Level 2 enforcement could occur only if a water supplier's certification remains suspended for more than six months. That is, if the water supplier remains out of compliance with the MOU for a total of 18 months following the initial non-compliance finding.

*Level 3 Enforcement* consists of public disclosure of MOU decertification, a substantial financial penalty, and potential restrictions on water transfers, Drought Bank access, and new water supply from the Bay-Delta. Level 3 enforcement could occur only if a water supplier's certification remains suspended for more than twelve months. That is, if the water supplier remains out of compliance with the MOU for a total of 24 months following the initial non-compliance finding.

Figure 1 shows the proposed sequence for triggering each enforcement level under the **CUWA/EWC proposal**. The initial consequence of a finding of non-compliance is conditional certification. This would last for 12 months and CALFED enforcement actions could not be applied during this period. Rather, during this period, CALFED would direct any available and necessary technical and funding assistance to the supplier.

If at the end of the conditional compliance period, the supplier has returned to compliance or has adopted an approved compliance plan, full compliance would be restored until the next review period. If the supplier either has not come into compliance or has not adopted a compliance plan,

<sup>13</sup> According to the Revised Phase II Report, dated December 18, 1998, "[a]ssurances will play a critical role in the Water Use Efficiency Program element. As a prerequisite to obtaining CALFED Program benefits (for example, participating as a buyer or seller in a water transfer, receiving water from a drought water bank, or receiving water made available solely because of supply enhancements such as new, expanded, or reoperated facilities) water suppliers will need to show that they are in compliance with the applicable urban or agricultural council agreements and applicable State law... A high level of water use efficiency is also expected to be required as a condition for permitting of any new surface storage projects. Widespread demonstration of efficiency use by local water suppliers and irrigation districts will be a prerequisite to CALFED implementation of new storage projects. The definitions of 'high level of water use efficiency' and 'widespread demonstration of efficient use' will be established prior to the ROD."

<sup>14</sup> CUWA and EWC have not proposed specific fine amounts, but rather are leaving such proposals to the broader CALFED forum. If monetary sanctions are established by CALFED, CUWA and EWC agree that they should be graduated, increasing with the persistence of non-compliance; and should be neither so high as to be viewed as overly punitive, nor so low as to be viewed as inconsequential.

the supplier would be referred to a designated CALFED agency for Level 1 enforcement and certification would be suspended for 6 months. If at the end of the first 6-month suspension period the supplier has returned to compliance or has adopted an approved compliance plan, the supplier would move to conditional compliance status. If the supplier has not come into compliance and has not adopted a compliance plan, the supplier would be referred to a designated CALFED agency for Level 2 enforcement and certification would be suspended an additional 6 months.

If at the end of the second suspension period, the supplier has returned to compliance or has adopted an approved compliance plan, the supplier would move to conditional compliance. If, however, the supplier has not come into compliance and has not adopted a compliance plan, the supplier would be referred to a designated CALFED agency for Level 3 enforcement and certification would be suspended an additional 6 months. Only when a supplier reaches Level 3 enforcement, would it be exposed to CALFED water supply sanctions.

**Under the CUWA/EWC proposal**, a water supplier may appeal each CUWCC certification decision that would trigger a CALFED enforcement action (provided there are grounds for appeal). For example, Figure 1 shows that before CALFED could take a Level 3 Enforcement action against a water supplier, the supplier would have four separate opportunities to appeal CUWCC certification outcomes.

Figure 2 shows the proposed sequence for triggering each CALFED enforcement actions under the **KCWA/BVCSD proposal**. The sequencing under this proposal is similar to that under the CUWA/EWC proposal except that (1) periods of conditional certification and suspension are variable and set by the CUWCC; and (2) CALFED enforcement levels are left to CALFED's determination.

Figure 1. Flow Diagram of Urban MOU Certification Process Contained in CUWA/EWC Proposal

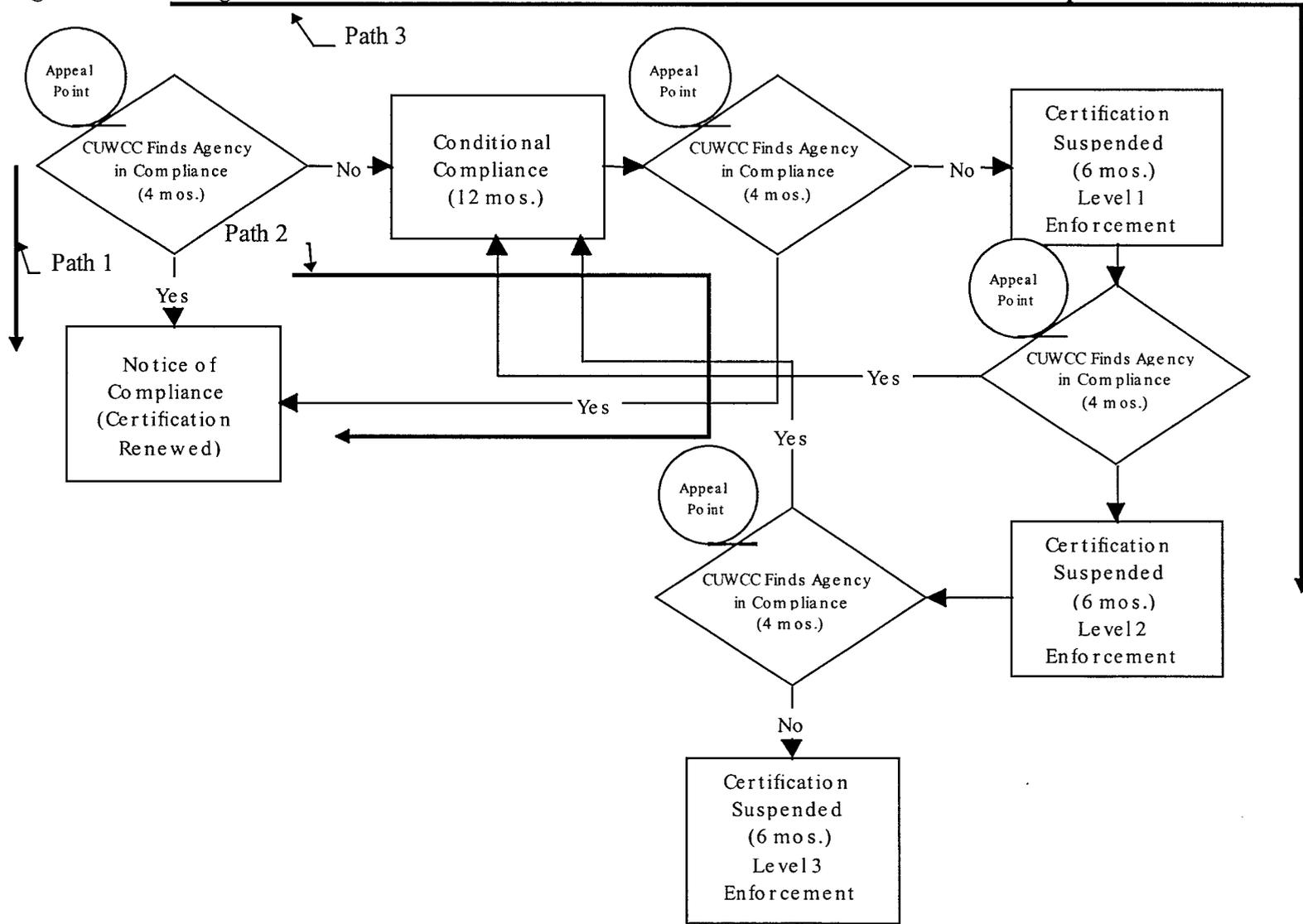
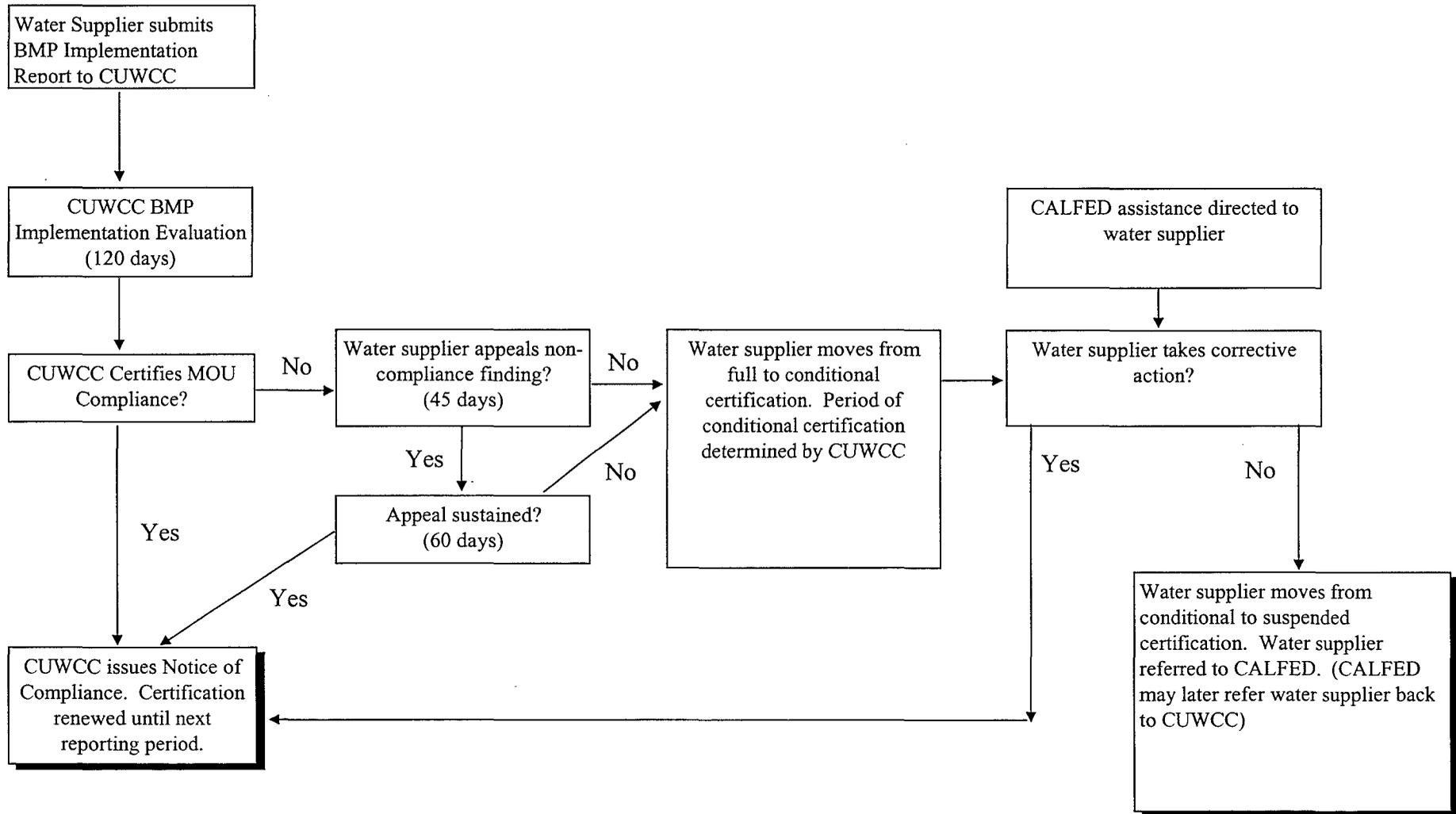


Figure 2. Flow Diagram of Urban MOU Certification Process Contained in KCWA/BVCSD Proposal



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## Framework Implementation

Both proposals identify the following CALFED Solution outcomes, funding commitments and legislative authorizations as necessary conditions for support for and implementation of any proposal for an Urban MOU certification program.

### *CALFED Solution*

Stakeholder support for and acceptance of this or any proposed urban water conservation framework by the sponsoring parties is conditional on the adoption of an acceptable CALFED Bay-Delta solution. In the absence of a mutually acceptable CALFED solution, there are no commitments to support or accept any elements of any proposed urban water conservation framework deemed to be beyond the scope of the current MOU.

### *CUWCC Acceptance*

Stakeholder support for any Urban MOU certification framework involving the CUWCC as the entity responsible for administering water supplier evaluations and making certification decisions is conditional on CUWCC acceptance of this role. Stakeholders understand that the CUWCC Plenary voted on April 8, 1998 to accept responsibility for Urban MOU certification as part of an overall CALFED solution, contingent upon its approval of the final certification program and funding package.

### *Program Funding*

Funding Commitment -- Funding commitments for the CUWCC or other certification entity necessary to assure the sustainability and integrity of the evaluation and certification process would need to be defined and secured prior to program implementation.

CALFED Financing Package -- Funding for the urban water conservation framework, including sustained funding for technical and financing assistance directed at urban water suppliers implementing cost-effective BMPs, should be addressed explicitly by the CALFED financing package. CALFED cost-sharing should be such that implementation of all BMPs that are cost-effective from a statewide perspective are implemented by local agency programs. Funding mechanisms and sources need to be defined prior to program implementation.

Committee Funding -- Group 2 participation is identified in the Urban MOU as part of the structure of the CUWCC. Funding requirements for Group 2 participation over and above that identified in the Urban MOU will need to be identified within the funding portion of the overall CALFED proposal. As declared advocates of the public's interest in the environment, both proposals support funding Group 2 participation in a manner similar to that proposed for other CALFED-generated public benefits.

***Authorizations***

Legislation is expected to be required for the CUWCC or any other entity to undertake the certification program outlined above. In particular, statutory authority is likely to be required to:

1. Make legally binding MOU compliance determinations for individual water supply agencies;
2. Levy processing fees on individual water supply agencies for MOU compliance reviews;
3. Levy administrative fines on individual water supply agencies for late or incomplete MOU compliance reports.

The final CALFED solution must contain appropriate financial and legal indemnification to protect the CUWCC or similar certification entity in its proper exercise of the functions identified and described in this proposal. Any cases brought to the CALFED agency designated to hear appeals of certification decisions must be *de novo* hearings. Additional legislative authorizations may be required for CALFED agencies to implement the proposed assurance mechanisms. In particular, legislative authority to assess non-compliance fines may be required.