

**DRAFT**  
**MEMORANDUM OF AGREEMENT ON IMPLEMENTING CLEAN WATER ACT**  
**SECTION 404(b)(1) FOR ACTIVITIES PROPOSED UNDER**  
**THE CALFED BAY DELTA PROGRAM**

**RECITALS**

These recitals provide background and context for the Memorandum of Agreement that follows.

1. The Clean Water Act (Act) establishes a goal of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. Under Section 404(a) of the Act, the United States Army Corps of Engineers (Corps) issues permits for the discharge of dredged or fill material into waters of the United States, in compliance with guidelines developed by the United States Environmental Protection Agency (EPA) under Section 404(b)(1) of the Act (Guidelines). These Guidelines impose a high standard of protection, requiring that no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. In addition, the Guidelines prohibit any discharge of dredged or fill material that would cause or contribute to a violation of State water quality standards, jeopardize the continued existence of a threatened or endangered species, violate toxic effluent standards, violate marine sanctuary requirements, or cause or contribute to significant degradation of waters of the United States. Moreover, the Guidelines require that unavoidable impacts be offset through appropriate and practicable mitigation.

An important requirement of the Guidelines is that only the least environmentally damaging practicable alternative (LEDPA) that achieves the applicant's overall project purpose is permissible. To determine the LEDPA, it is necessary to weigh the alternatives in light of the presumptions set forth in the Guidelines. In particular, two critical presumptions must be addressed:

1. that practicable alternatives exist that do not involve discharges to special aquatic sites (wetlands, etc.); and
2. these practicable nonstructural alternatives are presumed to be less environmentally damaging than alternatives which involve Section 404 discharges.

Guidelines requirements pertaining to compliance with water quality standards, marine sanctuary requirements and the Endangered Species Act are primarily the responsibility of other agencies, and so are not addressed by this Agreement. In addition, Guidelines requirements pertaining to

significant degradation, compensatory mitigation and compliance with toxic effluent standards, are not, as a general matter, amenable to detailed analysis at a programmatic level.

2. In 1994, the Governor's Water Policy Council of the State of California and the Federal Ecosystem Directorate entered into a Framework Agreement to establish a comprehensive program for coordination and communication with respect to environmental protection and water supply dependability in the Bay-Delta Estuary. This Framework Agreement served as the basis for the CALFED Bay-Delta Program.

3. The mission of the CALFED Bay-Delta Program is to develop a long-term comprehensive plan that will restore ecological health and improve water management for beneficial uses of the Bay-Delta system. The CALFED Bay-Delta Program is also guided by solution principles adopted by CALFED agencies. According to the solution principles, a successful Bay-Delta solution must reduce conflicts in the system, be equitable, be affordable, be durable, be implementable, and have no significant redirected impacts.

4. To achieve its purposes, the CALFED Bay-Delta Program has developed eight broad program as elements of the CALFED programmatic preferred alternative. These Program Elements are:

1. Ecosystem Restoration Program
2. Levee System Protection Program
3. Storage Facilities
4. Conveyance Facilities
5. Water Use Efficiency Program
6. Water Quality Program
7. Water Transfers
8. Watershed Management

The CALFED Bay-Delta Program intends to initiate implementation of its preferred alternative after execution of a Record of Decision. The 30-year implementation period following the Record of Decision is referred to as Phase III of the Program. The CALFED Bay-Delta Program has defined the first seven years after execution of a Record of Decision as Stage 1 of Phase III of the CALFED Bay-Delta Program.

5. The CALFED Program elements will include projects and/or actions that involve discharges of dredged or fill material, as defined by Section 404(b)(1) of the Act. Some of these projects and/or actions will be initiated during Stage 1.

## PURPOSE

A. This Memorandum of Agreement (Agreement) describes the process by which compliance with the Guidelines can be demonstrated for those actions or projects of the CALFED Bay-Delta program requiring Section 404 permits. The intent of this Agreement is to streamline the Section 404 permitting process while at the same time ensuring that the supporting documentation satisfies the requirements of the Guidelines.

B. This Agreement includes certain general conclusions about the CALFED Bay Delta Program. These conclusions will assist in making final determinations of compliance with the Guidelines for particular CALFED Projects or Actions.

C. This Agreement includes interim assessments for specific CALFED Program elements, and describes the conditions under which the Corps will rely on these specific interim assessments in its subsequent determination of compliance with the Guidelines for CALFED Projects or Actions.

D. The interim assessments in this Agreement do not include site-specific analyses, which will be conducted in Phase III. In that respect, these are partial assessments. Where appropriate, this Agreement specifies information and analysis needed in Phase III before the Corps can complete a determination of compliance for a particular CALFED Project or Action.

## DEFINITIONS

**"Agency Signatories"** are [literally list them by formal name; it may include any CALFED agency]

**"CALFED Actions"** are activities carried out with the express approval of the CALFED Policy Team in order to implement the CALFED Bay Delta Program.

**"CALFED Policy Group"** is a coordination group composed of representatives from federal and California agencies, formed under the [cite the organic document, assuming we have one], or its successor.

**"CALFED Projects"** are projects carried out with the express approval of the CALFED Policy Team in order to implement the CALFED Bay Delta Program.

**"Existing 404 Process"** means the Clean Water Act Section 404 permitting process applicable to a CALFED Action or CALFED Project in the absence of this Memorandum of Agreement.

**"Guidelines"** are the guidelines promulgated by EPA under Clean Water Act Section 404(b)(1) and published at 40 CFR Section 230.

**"Non-Agency Signatories"** are any individuals or entities that have the express authorization of the CALFED Policy Group to implement a CALFED Project or CALFED Action and that have executed this Agreement.

**"Signatories"** include Agency Signatories and Non-Agency Signatories.

**"Stage 1 Actions or Projects"** are those CALFED Actions and CALFED Projects that have been designated by the CALFED Policy Group to begin implementation during Stage 1, the seven-year period immediately following execution of the Record of Decision on the CALFED Bay Delta Program.

## AGREEMENTS

### I. AGREEMENTS ON CALFED BAY DELTA PROGRAM

A. The Signatories acknowledge the integrated nature of the CALFED Bay Delta Program. This Agreement articulates the extent and manner in which this acknowledgment affects the analysis of compliance with Section 404 of the Act.

B. The Signatories agree that this Agreement makes no conclusions about the need for, nature of, or extent of mitigation requirements for unavoidable site-specific adverse impacts to resources identified in site-specific evaluations. The Signatories agree further that mitigation of unavoidable adverse indirect or cumulative impacts to resources identified at either the site-specific or programmatic level will generally be addressed through the adequate implementation of the CALFED Ecosystem Restoration Program; however, the Signatories recognize that the Corps must verify the adequacy of the CALFED Ecosystem Restoration Program in mitigating for adverse indirect and cumulative impacts of specific projects as part of the permitting process for a specific project.

C. The Signatories agree on the program purpose statement for the CALFED program, incorporated by reference into this Agreement as Appendix A.

D. The Guidelines require the Corps to conduct an evaluation of the probable impacts of a proposed project and its intended use on the public interest. Factors considered in the public interest review include water conservation, economics, aesthetics, environmental quality, historic values, fish and wildlife values, flood control, land use, navigation, recreation, water supply and water quality, energy needs, safety, food production, and the general public and private need and welfare. Signatories to this Agreement agree that the CALFED Bay Delta Program is an integrated package of actions that, viewed in its entirety, is in the public interest. However, the Signatories agree further that this Agreement does not confer any project-level determination of public interest, recognizing that the Corps must make public interest determinations at the project level when projects are fully described and application for permits is made.

E. When making permit decisions for storage facilities, the Corps intends to employ the assessment of the adequacy of the non-structural alternatives in meeting water supply needs provided for by this document as an element of its determination whether supplemental storage facilities proposed for water supply reliability purposes comply with the Guidelines.

## II. AGREEMENTS ON EVALUATING CALFED STORAGE PROJECTS

*[Ed. Note: This discussion focuses on storage for water supply. The approach for storage for water quality or for environmental water, or for multipurpose projects has not been determined or discussed.]*

The CALFED programmatic preferred alternative includes an evaluation of additional storage facilities in the Integrated Storage Initiative. Practicable, nonstructural water management tools exist which can contribute to achieving CALFED water supply reliability goals. These water management tools do not generally involve discharges of dredged or fill material into waters of the United States ; thus, they are presumed under the Guidelines to be less environmentally damaging than alternatives that involve discharges. This Agreement describes performance criteria or levels of effort for all nonstructural water management tools that must be implemented as part of the least environmentally damaging practicable combination of water management tools. Implementation of such less environmentally damaging water management tools to the extent practicable (as defined by the performance measures) provides one of the critical bases for determining whether surface storage is needed to address water supply reliability needs. This Agreement further provides that the existence of project beneficiaries willing to pay the full costs for the least environmentally damaging surface storage project despite the availability and aggressive implementation of the nonstructural alternatives would be highly relevant evidence that the water supply reliability needs of the project purpose have not been adequately addressed through nonstructural alternatives. Accordingly:

A. The Signatories agree that the following water management tools will be implemented to the maximum extent practicable to reduce or eliminate the need for new or expanded surface storage in a CALFED programmatic preferred alternative:

- a. Programs to provide incentives for or require urban water conservation
- b. Programs to provide incentives for or require agricultural water conservation
- c. Programs to provide incentives for or require water conservation on managed wetlands
- d. A facilitated and properly regulated water transfers market
- e. Programs to provide incentives for or require recycling of urban wastewater

- f. Groundwater banking and conjunctive use with developed surface supplies
- g. Programs to provide incentives for or require the temporary fallowing of agricultural land to shift water demand and make water available for transfer to other beneficial uses
- h. Programs to encourage or require the permanent retirement of agricultural land to improve water quality with potential ancillary water supply benefits
- i. Financing provisions assuring that beneficiaries pay the full mitigated marginal cost [Ed. Note: Needs a definition] of any water derived from new or expanded surface storage projects.

For purposes of this Agreement, the Signatories agree further that implementation of these water management tools will be found to be "to the maximum extent practicable" if and only if the performance measures for each of these listed water management tools contained in Appendix B, are assured of being substantially attained according to the manner and schedule included in Appendix B.

B. The Signatories agree that the existence of project beneficiaries willing to pay the full mitigated marginal costs to develop new water supplies through new and/or expanded storage facilities would be relevant to a demonstration that nonstructural alternatives are not sufficient to achieve the water supply reliability component of CALFED's project purpose.

C. The Signatories agree that the list of potential surface storage projects listed in Appendix C was developed in a process that is consistent with screening criteria appropriate under Section 404. In particular, the Signatories agree that development of this list did not impermissibly screen out potential surface storage projects that may constitute the least environmentally damaging practicable alternative. The Signatories further acknowledge that no final determinations have been made as to the practicability of these projects in achieving CALFED's project purposes, nor as to which of these projects is least environmentally damaging.

D. The Signatories acknowledge that site-specific environmental studies, such as field surveys for all special status species in and around potential surface storage sites, have not been completed. Therefore, this Agreement is not a guarantee that any specific surface storage project can proceed, despite good-faith compliance with the terms of this Agreement.

E. The Signatories acknowledge that the CALFED Bay Delta Program's full evaluation of potential surface storage sites at the programmatic level included only those sites listed in Appendix C and, cumulatively, for surface and groundwater storage volumes ranging from zero to 6 million acre feet. The Signatories agree that this Agreement does not apply to, nor create any implications for, evaluations or permitting of surface storage facilities that are not in Appendix C or that, cumulatively, exceed this stated range of capacity. In addition, the

Signatories acknowledge that water management in California is increasingly coordinated among federal, state, and local agencies and private parties. Signatories further acknowledge that completion of the CALFED Integrated Storage Investigation and implementation of a facilitated and properly regulated water transfers market will contribute to a further increase in coordination among various public and private water management entities. Therefore, the Signatories agree that any new or expanded surface storage facilities, with a project purpose that will contribute to CALFED water supply reliability objectives outside the area of origin of the new or expanded facility will be included in computing exceedances of the cumulative ranges of storage capacity, regardless of whether the project is a CALFED Project or CALFED Action, is carried out by a Signatory or an unrelated third part, or is listed in Appendix C.

### **III. AGREEMENTS ON EVALUATING CALFED CONVEYANCE PROJECTS**

[TO BE ADDED]

### **IV. AGREEMENTS ON EVALUATING CALFED ECOSYSTEM RESTORATION PROGRAM PROJECTS**

[TO BE ADDED]

### **V. AGREEMENTS ON EVALUATING CALFED WATER QUALITY PROGRAM PROJECTS**

[TO BE ADDED]

### **VI. AGREEMENTS ON EVALUATING CALFED LEVEE PROJECTS**

[TO BE ADDED]

### **VII. AGREEMENTS ON EVALUATING CALFED STAGE 1 ACTIONS**

A. The Signatories acknowledge that the CALFED Bay-Delta Program has identified a set of Stage 1 Action Bundles. These bundles are described in Appendix D, attached and incorporated into this Agreement.

B. The Signatories acknowledge that certain actions in the Stage 1 Action Bundles may involve discharges of dredged or fill material to waters of the United States, and so may require authorization under Section 404 of the Act. The Signatories further recognize that there is no conceptual benefit to a programmatic assessment of compliance with the Guidelines with respect to the Stage 1 actions, and agree that compliance with the Guidelines for these actions (if

applicable) will be determined on a project-specific basis, consistent with the permit streamlining procedures set forth below.

### **VIII. AGREEMENTS ON PERMIT STREAMLINING**

Implementation of the CALFED Bay Delta Program will require permitting of numerous actions. The Signatories agree that establishing a framework of cooperation to facilitate CALFED permitting will reduce workload for permitting agencies and result in more timely approval of projects.

*[Remainder of section will describe any additional streamlining arrangements, establish an expedited Corps dispute resolution process, extend the one-year time limit on commencing projects, commit signatories to expeditious review of permit applications, describe use of nationwide permits, general permits, concurrent permitting of functionally bundled actions.]*

### **ADDITIONAL PROVISIONS**

#### **A. Applicability of this Agreement**

Any Signatory can elect to proceed with compliance with Clean Water Act Section 404 as to any CALFED Project or CALFED Action in which that Signatory is participating under the terms of this Agreement. This election shall be communicated in writing to the Corps, EPA, and the CALFED Policy Group as soon as possible after the specific approval of such CALFED Project or CALFED Action by the CALFED Policy Group. If more than one Signatory is involved in a particular CALFED Project or CALFED Action, all such Signatories must make this election in order for the election to be complete.

If a Signatory declines to comply with Section 404 as described in this Agreement, that CALFED Project or CALFED Action shall proceed under the Existing 404 Process without regard to this Agreement. In that case, nothing in this Agreement shall create any inferences, presumptions, or conclusions for purposes of the Existing 404 Process, and the Signatory may not rely on any commitments made by any Signatory in this Agreement in Existing 404 Process.

#### **B. Reservation of Authorities**

This Agreement does not modify existing agency authorities by reducing, expanding, or transferring any of the statutory or regulatory authorities and responsibilities of any of the signatory agencies.

**C. Revisions to Agreement**

*[Ed. Note: A carefully articulated revision process is necessary. It should account for a changeable set of signatories, accommodate different classes of signatories including central ones such as Corps and EPA, others that may be non-agency signatories.]*

**D. Reservation of Agency Position**

No Signatory to this Agreement waives any administrative claims, positions, or interpretations it may have with respect to the applicability or enforceability of the Act except as described herein.

**E. Obligation of Funds, Commitment of Resources**

Nothing in this Agreement shall be construed as obligating any of the parties to the expenditure of funds in excess of appropriations authorized by law or otherwise commit any of the agencies to actions for which it lacks statutory authority.

**F. Nature of Agreement**

Except as explicitly provided for above, this Agreement is not intended to, and does not, create any other right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, the State of California, any agencies thereof, any officers or employees thereof, or any other person.

**G. Effective Date**

This Agreement will become effective upon signature by each of the parties hereto and issuance of a programmatic Record of Decision for the CALFED Bay-Delta Program.

**H. Termination/Withdrawal Provisions**

[TO BE ADDED]

**I. Effect of Subsequent Execution of this Agreement by Either Agency or Non Agency Parties; Effect of Amendments on Continued Participation; Applicable Agreement**

*[Ed. Note: Need to have process enabling subsequent parties to join MOA; Need to come to agreement on how this will bind successors and/or new entities]*

## **ATTACHMENTS**

- Appendix A. CALFED Bay-Delta Program Purpose Statement
- Appendix B. Water Management Tools and Associated Performance Measures
- Appendix C. List of Applicable Potential Surface Storage Locations
- Appendix D. Stage 1A Action Bundles