

## **SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 2**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 2 and addresses the regional modifications and conditions for this NWP. The South Pacific Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

### Text of NWP 2:

*Structures in Artificial Canals:* Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). (Section 10)

### Summary of changes to NWP 2 from 2007:

There were no changes to NWP 2.

## **1.0 Background**

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Los Angeles District issued a public notice on February 25, 2011. The issuance of the NWPs was announced in the February 21, 2012, Federal Register notice (77 FR 10184). After the publication of the final NWPs, the Los Angeles District considered the need for regional conditions for this NWP. The Los Angeles District's findings are discussed below.

## **2.0 Consideration of Public Comments**

### **2.1 General Comments**

Please see the attached response to comments document (Section III)

## **2.2 Comments on Proposed Regional Conditions**

### **2.2.1 Proposed Regional Condition 1**

Please see the attached response to comments document.

### **2.2.2 Proposed Regional Condition 2**

Please see the attached response to comments document.

### **2.2.3 Proposed Regional Condition 3**

Please see the attached response to comments document.

### **2.2.4 Proposed Regional Condition 4**

Please see the attached response to comments document.

### **2.2.5 Proposed Regional Condition 5**

Please see the attached response to comments document.

### **2.2.6 Proposed Regional Condition 6**

Please see the attached response to comments document.

### **2.2.7 Proposed Regional Condition 7**

Please see the attached response to comments document.

### **2.2.8 Proposed Regional Condition 8**

Please see the attached response to comments document.

### **2.2.9 Proposed Regional Condition 9**

Please see the attached response to comments document.

### **2.2.10 Proposed Regional Condition 10**

Please see the attached response to comments document.

### **3.0 Waters Excluded from NWP or Subject to Additional Pre-Construction Notification Requirements**

#### **3.1 Waters excluded from use of this NWP**

As NWP 2 is restricted to artificial canals subject to the Corps' regulatory authority under section 10 of the Rivers and Harbors Act. As there are no waters excluded by the regional condition that fall within this category. Therefore this section does not apply to NWP 2.

#### **3.2 Waters subjected to additional pre-construction notification requirements**

##### **3.2.1 All areas designated as Essential Fish Habitat (EFH) in the Los Angeles District (Regional Condition 4b)**

Reason for Pre-Construction Notification Requirement: The EFH regional condition has been developed to ensure compliance with the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), as amended. The 2007 NWPs included Regional Condition 5, which required notification for any project located in EFH. Regional Condition 4b would replace Regional Condition 5 and include the additional requirement to include an EFH assessment as part of the notification package. The EFH mandates of the MSFCMA are to integrate fisheries management and habitat management by stressing the ecological relationships between fishery resources and the environments upon which they depend, and ensure a consultation process by which federal agencies explicitly consider the effects of their actions on important habitats, with the goal of supporting the sustainable management of marine fisheries. The consultation process for any federal project or action that may adversely affect EFH requires submission of an EFH assessment to the National Marine Fisheries Service (NMFS). The inclusion of the requirement for applications to provide an EFH assessment places the burden of preparing the assessment on the permit applicant rather than the Corps, however, the Corps has generally relied on permit applicants to provide this information to meet the requirements of the consultation process associated with the permit action. Therefore, the Los Angeles District does not believe this will create an unduly burdensome requirement on permit applicants relative to current procedures. Regional Condition 4b also includes a link to sample EFH assessments provided by NMFS.

The scope for this Environmental Assessment is to identify and/or develop practicable, regional alternatives for proposed activities that could impact EFH in tidal waters of the U.S. and comply with the MSFCMA. To further define the EFH regional condition and to ensure that any adopted regional condition complies with applicable regulations, alternatives have been evaluated to ensure the proposed regional condition is practicable and meet the requirements of the MSFCMA.

For additional information please see the supplemental decision document for Regional Condition 4b.

## **4.0 Alternatives**

### **4.1 No Regional Conditions**

This alternative would not require use of Regional Conditions.

Because notification is not required for projects authorized under NWP 2, the proposed Regional Conditions would ensure that any impacts to sensitive aquatic sites and other aquatic resources are evaluated and offset by compensatory mitigation. Los Angeles District Regional Condition 4b requires notification for projects in areas designated as EFH by the Pacific Fishery Management Council. Without Regional Conditions specifying notification for projects in EFH, impacts to these sensitive resources may occur without compensatory mitigation, contributing to more than minimal impacts, both individually and cumulatively, to waters of the U.S. in the Los Angeles District.

As the Regional Conditions above would ensure specific review and ensure projects result in no more than minimal impacts in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions, including EFH and other aquatic resources, and would not substantially increase the Los Angeles District workload, the “No Regional Conditions” alternative has been dismissed from further consideration.

### **4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds**

Limits placed on structures and work in waters of the U.S., including placement of navigation aids and markers, prohibit that which unduly obstructs navigation or endangers sensitive aquatic sites. Additional limits are not necessary for NWP 2 to avoid and minimize impacts to sensitive aquatic sites. Reduced limits would increase the likelihood of impacts to sensitive aquatic sites and are therefore not proposed.

Notification is not required for NWP 2 under the General Conditions. However, Regional Conditions would require notification for projects in areas designated as EFH. Lowering notification thresholds to include all activities would increase the regulatory burden on applicants and increase the District’s workload for activities that result in minimal adverse effects on the aquatic environment, and would not provide sensitive aquatic resources with further protection from adverse effects. Higher notification thresholds would increase the likelihood of impacts to sensitive aquatic sites and are not proposed. With the currently proposed conditions, NWP 2 would generally result in minimal impacts, both individually and cumulatively, in the majority of the Los Angeles District, while allowing for normal maritime activities.

Based on the analysis above, the “Regional Limits or Pre-Construction Notification Thresholds” alternative has been dismissed from further consideration.

### **4.3 Alternative Regional Nationwide Permit Conditions**

To further ensure NWP 2 would have minimal impacts on aquatic resources, both individually and cumulatively, the Los Angeles District could propose alternative Regional Conditions that

prohibit the use of NWP 2 in areas designated as EFH.

Considering the inclusion of constraints on NWP 2 from the General Conditions and proposed Regional Conditions, a Regional Condition that precludes use of NWP 2 in areas designated as EFH would not be necessary. This change would unfairly burden applicants by forcing them to utilize the Standard Individual Permit process for even relatively low impact projects. This condition would increase the District's workload without commensurate benefit to the aquatic ecosystem. A review of cumulative impacts resulting from the use of NWP 2 bears this out (see Section 9).

As the majority of projects that could be authorized under NWP 2 would likely have minimal impacts on the aquatic ecosystem and the proposed Regional Conditions would further ensure that NWP 2 has minimal impacts on sensitive resources without a substantial increase in workload, the "Regional Nationwide Permit Conditions" alternative has been dismissed from further consideration.

## **5.0 Endangered Species Act**

### **5.1 General Considerations**

NWP 2 authorizes the construction of structures in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). To avoid and minimize impacts to the aquatic environment, the terms and conditions for NWP 2 contain several restrictions including its use in artificial canals that were previously authorized by the Corps. In addition, the new General and Regional Conditions would provide further limitations on the use of NWP 2 in sensitive aquatic ecosystems. With these constraints, NWP 2 would result in minimal adverse impacts to threatened and endangered species, both individually and cumulatively, in the majority of the Los Angeles District. With no Regional Conditions for NWP 2, there would be more than minimal impacts only in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. The Regional Conditions for NWP 2 specify notification pursuant to General Condition 31 for all projects located in designated EFH. With the inclusion of these proposed notification requirements for NWP 2, the above long-term minor impacts to endangered and threatened species in the Los Angeles District would be further reduced. In addition, given the large number of listed species in Los Angeles District, continued coordination with USFWS and NMFS is required to ensure minimal impacts to endangered species. With the continuation of the existing informal coordination procedures, the development and implementation of Standard Local Operating Procedures for Endangered Species (SLOPES), and the inclusion of additional notification requirements, the use of NWP 2 would have minimal impacts, both individually and cumulatively, to threatened and endangered species in the Los Angeles District.

In southern California, the large number of listed species has made the public more aware of the need to contact the USFWS and NMFS for many proposed projects. In addition, General Condition 18 requires the applicant to contact the Corps if their proposed project may affect a threatened or endangered species or critical habitat. The District has substantial information,

including maps, previous studies and survey data that document areas that support endangered species. The District is also very careful to inform all prospective applicants of the need to comply with the Endangered Species Act (ESA). If the District has no available data for a proposed project, the applicant may be referred to the USFWS or NMFS for additional information. When the District receives an application within the range of a listed species and/or the project area otherwise supports suitable habitat, the USFWS or NMFS is contacted early in the review process. To facilitate compliance with the ESA, the District has coordinated with the USFWS to complete programmatic consultations for several threatened and endangered species in Ventura, Santa Barbara, and San Luis Obispo counties.

As proposed, the NWP general and regional conditions ensure that other federal statutory requirements are met. For example, in instances where a project may impact a federally listed species or its critical habitat, the applicant would be required to submit to the Corps appropriate biological investigations and supporting documentation for an “effects determination” with respect to the Endangered Species Act (ESA). Per General Condition 18, if the Federal Action were determined to have a potential effect on a federally listed species, or its designated critical habitat, consultation would be required pursuant to Section 7 of the ESA. (It should be noted that the Los Angeles District would ensure all federal project activities authorized under the NWPs comply with the ESA and use of the NWPs shall be determined to have minimal impacts on threatened and endangered species in the Los Angeles District, pursuant to the ESA).

## **5.2 Local Operating Procedures for Endangered Species**

The Los Angeles District has various procedures for ensuring compliance with the ESA. SLOPES formalize additional procedures between agencies to enable the agencies to ensure better compliance with the ESA. With the implementation of SLOPES, these procedures could be formally documented, facilitating the compliance the NWPs with the ESA. It is anticipated there will be many situations that will not be addressed by SLOPES and a case-by-case determination will be made regarding consultation with the USFWS or NMFS pursuant to Section 7 of the ESA. In January 2003, the Corps of Engineers, Los Angeles District, Regulatory Branch and the U.S. Fish and Wildlife Service, Ventura Office finalized SLOPES for informal and formal ESA consultations. In addition, some the activities authorized by the NWPs that may adversely affect EFH have been addressed by the General Concurrence dated August 5, 2003 and a Programmatic Consultation that was completed by the Corps of Engineers, Los Angeles District, Regulatory Branch and NMFS. The District has conducted several preliminary meetings with USFWS and NMFS staff to determine the direction of further SLOPES discussions, and additional meetings will be conducted in the near future.

As proposed, the NWP general and regional conditions ensure that other federal statutory requirements are met. For example, in instances where a project may impact a federally listed species or its designated critical habitat, the applicant would be required to submit to the Corps appropriate biological investigations and supporting documentation for an “effects determination” with respect to the ESA. Per General Condition 18, if the Federal Action were determined to have a potential effect on a federally listed species, or its designated critical habitat, consultation would be required pursuant to Section 7 of the ESA. (It should be noted that the Los Angeles District would ensure all federal project activities authorized under the

NWPs comply with the ESA and use of the NWPs shall be determined to have minimal impacts on threatened and endangered species in the Los Angeles District, as pursuant with the ESA.) As with the ESA requirements, per Regional Condition 4b, an applicant would be required to submit to the Corps the appropriate biological investigations and supporting documentation for an “effects determination” with respect to the MSFCMA, under the EFH clause, for projects that may impact tidal waters. Such a requirement may trigger additional consultation with NMFS pursuant to the MSFCMA.

## **6.0 National Historic Preservation Act**

### **6.1 General Considerations**

The Los Angeles District would ensure that activities authorized by NWP 14 would comply with the National Historic Preservation Act (NHPA). The District would review the latest version of the National Register of Historic Places (NRHP) to make an effect determination that activities verified under NWP 14 would have on Historic Properties. Once an effects determination has been made the District will coordinate with the State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO), recognized Tribes, and, if necessary, the Advisory Council on Historic Preservation (ACHP) as appropriate. The District has considered the requirement of pre-construction notification for NWP activities in geographic areas of high site potential, or known locations of cultural resources including prehistoric sites, historic sites, tribal lands, traditional cultural properties, state landmarks or National Historic Landmarks. In areas where there is a high likelihood of cultural resources within the Corps’ area of potential effect (APE), the district engineer may: (1) consult with SHPO, THPO, or Tribes during the NWP review process or (2) the district engineer may assert its discretionary authority to require an individual permit for the proposed activity and initiate consultation through the individual permit process. Option 2 would only be used if there is value added that compensates for the increase in workload due to processing more SIPs. If the consultation would be conducted under the NWP process without the district asserting discretionary authority to require an SIP, then the applicant would be notified that the activity could not be verified under the NWP until all Section 106 requirements have been satisfied.

### **6.2 Local Operating Procedures for National Historic Preservation Act**

The district engineer would ensure that NWP 14 complies with section 106 of the National Historic Preservation Act of 1966, as amended, and its implementing regulation 36 C.F.R. Part 800: Protection of Historic Properties (amended August 5, 2004), and Appendix C (33 U.S.C. 325): Procedures of Historic Properties. Under section 106, federal agencies are prohibited from approving any federal “undertaking” (e.g., the issuance of any license, permit, or approval) without taking into account the effects of the undertaking on the historic properties, and affording the ACHP a reasonable opportunity to comment on the undertaking. In order to comply with section 106, the Corps, if evaluating an undertaking, must go through the process outlined in the ACHP’s regulations at 36 C.F.R. Part 800 and Appendix C. Pursuant to 36 C.F.R. § 800.4, 800.5, and 800.6, the Los Angeles District is required to consult with the SHPO, or tribal equivalent, THPO, if the undertaking would result in a “No Effect”, “No Adverse Effect”, or “Adverse Effect” to Historic Properties. The district engineer must (a) determine the permit

area/ APE; (b) identify historic properties within the permit area/APE; and (c) determine whether those properties are listed or eligible for listing in the NRHP. If the district engineer determines that NWP 14 would have no potential to cause effects to Historic Properties a memorandum for the record would be prepared and no further consultation with the SHPO/THPO or recognized tribes would need to occur.

## **7.0 Government-to-Government Consultation with Indian Tribes**

### **7.1 Summary of the Consultation Process**

Prior to the issuance of the Los Angeles District's public notice announcing the proposed rule for the 2012 NWP's and our proposed regional conditions, all federally recognized tribes within LAD were contacted via letter dated December 13, 2010 to provide advance notification of the Corps' intent to issue the 2012 NWP's and upcoming opportunity to engage in government-to-government consultation. Follow-up letters were sent to the same set of federally recognized tribes February 11, 2011 announcing the issuance of the proposed rule and formally requesting government-to-government consultation. An advance copy of the proposed rule was also included. One tribe provided a response, indicating they did not foresee a need to utilize the NWP's. No requests for government-to-government consultation were received.

### **7.2 Local Operating Procedures for Protecting Tribal Resources**

The Los Angeles District will avoid or minimize adverse effects to tribal lands, historic properties, sacred sites, or trust resources. This may involve identifying categories of activities that require pre-construction notification and/or conducting consultation with Tribes for specific activities in a particular geographic area. If coordination with recognized tribes is required the District Engineer will obtain a list of recognized tribes from the Native American Heritage Commission. From that list provided the District Engineer will initiate a 30-day coordination period to obtain comments on the project. The District Engineer will review comments and address as appropriate.

## **8.0 Essential Fish Habitat**

Pursuant to the Magnuson-Stevens Fishery Management and Conservation Act, Federal agencies are required to consult with the National Marine Fisheries Service (NMFS) for actions that may adversely affect essential fish habitat (EFH). The marine and estuarine waters within the Los Angeles District contain designated EFH, which are administered by four fishery management plans (FMP): the Pacific Groundfish FMP, the Highly Migratory Species FMP, the Pacific Coast Salmon FMP, and the Coastal Pelagic Species FMP. The Los Angeles District's Regional Condition 4b requires submission of a PCN for any NWP authorization in EFH. A similar PCN requirement has been in place since the issuance of the 2002 NWP's. The current proposed regional condition includes the additional requirement that applicants include an EFH assessment with the PCN. By requiring a PCN with an EFH assessment for all activities within designated EFH, the Los Angeles District ensures the appropriate level of consultation with NMFS is conducted and effects to EFH are adequately addressed prior to verification.

To facilitate the consultation process, the Los Angeles District has developed an EFH general concurrence with Southwest Region of the NMFS. The general concurrence establishes a coordination procedure between NMFS and the Los Angeles District and covers a variety of Corps-regulated activities with minimal and/or temporary adverse effects to EFH. In addition, the Los Angeles District has developed a programmatic consultation with the Southwest Region of the NMFS that covers a broader range of activities that do not fit within the scope of the general concurrence. In summary, the inclusion of Regional Condition 4b, in conjunction with Los Angeles District's well-established set of procedures for addressing the effects of regulated activities within EFH (including conducting coordination with the NMFS as appropriate) will ensure the effects to EFH from the implementation of the 2012 NWP will be minimal..

## **9.0 Supplement to National Impact Analysis**

### **9.1 Public interest review factors (33 CFR 320.4(a)(1))**

In addition to the discussion in the national decision document for this NWP, the Los Angeles District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

(a) Conservation: Same as discussed in the national decision document.

(b) Economics: Same as discussed in the national decision document.

(c) Aesthetics: Same as discussed in the national decision document.

(d) General environmental concerns: In the Los Angeles District numerous threatened or endangered species require extensive coordination with USFWS and NMFS. In addition, the semi-arid environment limits the extent of aquatic resources in the southern California/Arizona area. To ensure projects that may impact sensitive aquatic sites receive adequate review, the proposed Regional Conditions for NWP 2 specify notification pursuant to General Condition 31 for all projects located in designated EFH. With the inclusion of the proposed notification requirements, adverse effects on general environmental concerns in the Los Angeles District would be further reduced.

(e) Wetlands: In the Los Angeles District, the semi-arid climate limits the extent and number of wetland resources. This scarcity of wetlands is especially evident in Arizona and in the desert regions of California. In these areas, annual precipitation is usually below 10 inches, which precludes the development of wetlands in the majority of these desert regions. As a result, special aquatic sites (wetlands) are rare in the Los Angeles District and warrant more rigorous protection. General condition 23 avoidance and minimization of impacts to waters of the U.S. and special aquatic sites, including wetlands. The activities authorized under this NWP are usually located in open water; thus, it is expected that there would be minimal loss in any wetland functions and values, and minimal the loss of any unique or rare wetland types within the region due to activities authorized under NWP 2. Between March 19, 2007 and March 18, 2012, NWP 2 was not used and was not used to authorize any impacts to wetlands. NWP 2 would have minimal impacts, both individually and cumulatively, to wetland resources in

southern California and Arizona.

- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

## **9.2 National Environmental Policy Act Cumulative Effects Analysis (40 CFR 1508.7)**

The cumulative effects of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Impacts to aquatic resources authorized by the Los Angeles District's permit actions are tracked using the ORM (OMBIL Regulatory Module) database. This includes both temporary and permanent impacts, as well as any compensatory mitigation required. Impact and mitigation data was collected for the period of Fiscal Year 2009 through 2011 to provide a reasonable basis to examine the cumulative effects of each NWP as well as the NWP Program as a whole within the Los Angeles District. Based on an analysis of the types of activities authorized by the Los Angeles District during this period, the Los Angeles District found that the last issuance of NWP 2 occurred in 1996, and the Los Angeles District has received no requests for authorization under this permit since. Infrequent use is not expected to change within the next five years. Regardless, to ensure that these activities result in minimal

adverse effects on the aquatic environment, individually and cumulatively, the Los Angeles District estimates that minimal compensatory mitigation would be required on an annual basis to offset the authorized losses of waters of the United States and ensure that the NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment.

In addition, please see the attached supplemental analysis (Section I).

## **10.0 List of Final Corps Regional Conditions for NWP 2**

### **10.1 Regional condition 4**

Submission of a PCN pursuant to General Condition 31 and Regional Condition 3 shall be required for all regulated activities in the following locations:

- a. All perennial waterbodies and special aquatic sites within the State of Arizona and within the Mojave and Sonoran (Colorado) desert regions of California, excluding the Colorado River in Arizona from Davis Dam to River Mile 261 (northern boundary of the Fort Mojave Indian Tribe Reservation). The desert region in California is limited to four USGS HUC accounting units (Lower Colorado -150301, Northern Mojave-180902, Southern Mojave-181001, and Salton Sea-181002).
- b. All areas designated as Essential Fish Habitat (EFH) by the Pacific Fishery Management Council (i.e., all tidally influenced areas). The PCN shall also include an EFH assessment and extent of proposed impacts to EFH. Examples of EFH habitat assessments can be found at: <http://www.swr.noaa.gov/efh.htm>.
- c. All watersheds in the Santa Monica Mountains in Los Angeles and Ventura counties bounded by Calleguas Creek on the west, by Highway 101 on the north and east, and by Sunset Boulevard and Pacific Ocean on the south.
- d. The Santa Clara River watershed in Los Angeles and Ventura counties, including but not limited to Aliso Canyon, Agua Dulce Canyon, Sand Canyon, Bouquet Canyon, Mint Canyon, South Fork of the Santa Clara River, San Francisquito Canyon, Castaic Creek, Piru Creek, Sespe Creek and the main-stem of the Santa Clara River.

## **11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations**

Pursuant to Section 401 of the Clean Water Act (CWA), tribal or state Water Quality Certification, or waiver thereof, is required for activities authorized by NWPs that may result in a discharge of fill material into waters the U.S. In addition, any state with a federally-approved Coastal Zone Management (CZM) plan must concur with the Corps determination that activities authorized by NWPs that are either within the state's coastal zone, or will affect any land or water uses, or natural resources within the state's coastal zone, are consistent with the CZM plan. In accordance with Corps regulations at 33 CFR 330.5 (c) and (d), any state 401/CZM conditions

for a particular NWP become regional conditions for that NWP. The Corps recognizes that in some tribes or states there will be a need to add regional conditions, or for individual tribal or state review for some activities to ensure compliance with water quality standards or consistency with CZM plans.

The Los Angeles District announced the proposal to reissue the Nationwide Permits and our proposed regional conditions in a Special Public Notice dated February 25, 2011. The Los Angeles District also send letters dated March 9, 2011 to the seven federally recognized tribes within the Los Angeles District (Big Pine Tribe, Bishop Paiute Tribe, Hopi Tribe, Hualapai Tribe, Navajo Nation, White Mountain Apache Tribe, and Twenty-nine Palms Band of Mission Indians) and the Arizona Department of Environmental Quality announcing the proposed rule and our proposed regional conditions, and requesting the State of Arizona and each tribe review the information for purposes of providing water quality certification pursuant to section 401 of the Clean Water Act. Similarly, acting on behalf of the three Corps Districts in California the Sacramento District provided the same letter on February 23, 2011 to the California State Water Resources Control Board (SWRCB) and EPA requesting 401 certification in the State of California and tribal lands within EPA Region 9, respectively (excluding those tribes with delegated 401 authority). The San Francisco District provided a letter to the California Coastal Commission (CCC) on behalf of both coastal districts in California on March 3, 2011, requesting Coastal Zone Management Act (CZMA) consistency certification. Additional discussions were held among the three Corps Districts in California and the SWRCB in an effort to strategize options for certifying a broader range of NWPs or NWP-eligible activities than under the 2007 NWPs.

Upon publication of the final rule in the February 21, 2012, issue of the Federal Register (77 FR 10184), the Los Angeles District again provided letters to each of the seven tribes with 401 authority, and the State of Arizona requesting final 401 certification of the 2012 NWPs within their respective geographic areas of responsibility. Copies of the final regional conditions for the Los Angeles District were also provided. Similarly, the Los Angeles District provided a letter to the CCC on behalf of both coastal districts in California requesting final CZMA consistency certification of the 2012 NWPs and the respective regional conditions (copies of the letters are provided in Section IV). Each tribe and the State of Arizona have 60 days to issue, waive or deny certification for any or all of the 2012 NWPs. The CCC has 90 days to make their final determination. Due to the fact that the final rule was published on February 21, 2012, there is not sufficient time to allow the full 60- or 90-day review period before the 2012 NWPs are scheduled to go into effect on March 19, 2012. Therefore, the final outcome of 401 and CZMA certification within in the Los Angeles District is uncertain. Individual certifications will be required for any action authorized under the 2012 NWPs where applicable (i.e. projects within or affecting the Coastal Zone and/or projects that may affect water quality) until final determinations are provided by the respective state/tribal authorities.

The Los Angeles District believes, in general, that these NWPs and our regional conditions comply with State Water Quality Certification standards and are consistent with the Coastal Zone Management Plans.

## **12.0 Measures to Ensure Minimal Adverse Environmental Effects**

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 23, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Los Angeles District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

Proposed activities that could impact EFH in tidal waters of the U.S. would require consultation with NMFS and evaluating any conservation measures in order to comply with the MSFCMA. NWP 2 is not expected to be used frequently. Regardless, to ensure that these activities result in minimal adverse effects on the aquatic environment, individually and cumulatively, the Los Angeles District would require compensatory mitigation to offset the authorized losses of waters of the United States and ensure that the NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment.

If, at a later time, there is clear, unequivocal evidence that use of the NWP would result in more than minimal adverse effects on the aquatic environment, individually or cumulatively, the modification, suspension, or revocation procedures at 33 CFR 330.4(e) or 33 CFR 330.5 will be used.

## **13.0 Final Determination**

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that this NWP, including its terms and conditions, all regional conditions, and limitations, will authorize only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively.