

**SUPPLEMENT TO THE DECISION DOCUMENT  
FOR NATIONWIDE PERMIT 12**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 12 and addresses the regional modifications and conditions for this NWP. The South Pacific Division (“SPD”) 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, which are addressed in this document, relating to the aquatic environment. 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 12:

*Utility Line Activities.* Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.

*Utility lines:* This NWP authorizes the construction, maintenance, or repair of utility lines, including outfall and intake structures, and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in pre-construction contours. A “utility line” is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication. The term “utility line” does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The District Engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

Utility line substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2-acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

Foundations for overhead utility line towers, poles, and anchors: This NWP authorizes the construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (See 33 CFR Part 322). Overhead utility lines constructed over section 10 waters and utility lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP also authorizes temporary structures, fills, and work necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the District Engineer prior to commencing the activity if any of the following criteria are met: (1) the activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6)

permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. (See general condition 31.) (Sections 10 and 404)

*Note 1:* Where the proposed utility line is constructed or installed in navigable waters of the United States (i.e., section 10 waters) within the coastal United States, the Great Lakes, and United States territories, copies of the pre-construction notification and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the utility line to protect navigation.

*Note 2:* Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work, in accordance with the requirements for temporary fills.

*Note 3:* Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

*Note 4:* For overhead utility lines authorized by this NWP, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

#### Summary of changes to NWP 12 from 2007:

- In the general description of this NWP, the language “for each single and complete project” was added to clarify how to calculate the loss of waters of the United States for a single and complete project that involves an access road. This modification of the NWP does not change the definition of single and complete project and does not affect its implementation, except to clarify that all losses of waters of the United States associated with a single and complete project would be considered when determining whether the acreage limit or pre-construction notification (PCN) threshold is exceeded.
- Note 1: The qualifier “within the coastal United States, the Great Lakes, and United States territories” was added. The NOAA’s NOS only produces charts for waters in the coastal United States, Great Lakes, and United States territories.
- Note 4: This note was added to address a comment indicating that some utility lines and associated renewable energy projects may have unintended negative impacts on the Department of Defense mission. For example, high voltage transmission lines could potentially interfere with long-range radar surveillance, homeland defense, testing, and training missions. PCNs for NWP 12 activities involving the construction of overhead utility lines in waters of the United States shall be coordinated with the Department of Defense. The coordination process will consist of Districts sending the Department of Defense Siting Clearinghouse copies of PCNs and NWP verifications, and Clearinghouse

staff will work with project proponents to address effects to military operations. This coordination process will not interfere or delay the District Engineer's decision on the PCN, which must be made within the time frames specified in the NWP general conditions.

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 ("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 District considered the need for regional conditions for this NWP. The 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**

#### **3.1.1 Special Aquatic Sites in Arizona and Mojave and Sonoran Deserts of California (Regional Condition 2)**

Reason for Exclusion: With this regional condition, NWPs 3, 7, 12-15, 17-19, 21, 23, 25, 29, 35, 36, 39-46, and 48-52 may **not** be used to authorize the discharge of dredged or fill material into a jurisdictional special aquatic site in the State of Arizona and the Mojave and Sonoran desert regions in California, including wetlands, mudflats, vegetated shallows, and sanctuaries and refuges as defined in 40 CFR Part 230.40-45. The regional condition would require applicants to submit an application for a Standard Individual Permit subject to authorization under section 10 of the Rivers and Harbors Act, section 103 of the Marine Protection, Resource and Sanctuaries Act, and/or section 404 of the Clean Water Act (CWA). Special aquatic sites in the desert regions of the Los Angeles District support substantial aquatic resources that exhibit relatively high physical and biological functions. Furthermore, these aquatic areas can provide important and unique habitat for endangered species, neotropical migratory birds, and other indigenous wildlife. Past construction activities in and adjacent to these special aquatic sites have degraded portions of these high value systems. Regional Condition 2 would ensure compliance with the 404(b)(1) guidelines and evaluation and mitigation, if warranted, of activities that may have an adverse effect on special aquatic sites in the otherwise arid regions of the Los Angeles District.

In the Los Angeles District, the semi-arid climate limits the extent and number of special aquatic sites. This scarcity of special aquatic sites 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. Furthermore, approximately 90 percent of wetlands in California have been affected by historic conversion to

agricultural uses, grading, and filling activities. As a result, wetland areas are rare in the Los Angeles District and warrant more rigorous protection. Regional Condition 2 would serve to better protect special aquatic sites in desert regions of the Los Angeles District by requiring the additional scrutiny inherent in the Standard Individual Permit (SIP) process for most permanent discharges of dredged or fill material in these areas. The permit applicant would have to perform a 404(b)(1) alternatives analysis that would include careful examination of the purpose and need for the project and alternatives that avoid or reduce impacts to special aquatic sites. Regional Condition 2 would help ensure that discharges of dredged or fill material that would otherwise be authorized by NWP's would have minimal impacts, both individually cumulatively, to special aquatic sites in the Los Angeles District.

This regional condition has been amended from that included with the 2007 NWP's (Regional Condition 4) to clarify the definition of *desert regions of California* to include specific watersheds as defined by USGS Hydrologic Unit Code (HUC) accounting units. These include Lower Colorado (150301), Northern Mojave (180902), Southern Mojave (181001) and Salton Sea (181002). In addition, coral reefs and sanctuaries and refuges were removed from the list of special aquatic sites for which this regional condition would apply. Coral reefs were removed as they do not exist within the subject geographic area. Sanctuaries and refuges were removed as there are circumstances where a predominantly upland sanctuary or refuge may contain aquatic resources that exhibit relatively low physical and biological functions (such as a disturbed ephemeral drainage) yet nevertheless would be considered a special aquatic site. In those cases, mandatory notification (per regional condition 4a) would be sufficient to ensure a given project would have no more than minimal impacts by ensuring Corps review.

For additional information please see the supplemental decision document for Regional Condition 2.

### **3.1.2 Jurisdictional Vernal Pools (Regional Condition 5)**

Reason for Exclusion: This regional condition would require any project proposing to discharge dredged or fill material into a jurisdictional vernal pool to be reviewed under the standard individual permit (SIP) process, which requires a more rigorous alternatives review. This regional condition has been amended from the 2007 version to include an exception for discharges associated with restoration, enhancement, management, or scientific study activities that qualify for NWP's 5, 6, and 27. NWP's 5 and 6 authorize temporary activities and structures that could be used to further the understanding of vernal pool functions and services or for monitoring the effectiveness of enhancement, restoration, and establishment projects. NWP 27 authorizes only activities that result in net increases in aquatic resource functions and services. Per this regional condition, authorization under other NWP's cannot be considered and a PCN must be submitted in accordance with General Condition 31 and Regional Condition 3. In discussions with local land managers, Regional Condition 5 has increased project costs and timelines in order to obtain an SIP for voluntary restoration and enhancement projects. This has also limited their ability to compete for grant and other public funding with restrictions on costs and timelines. Therefore, the Los Angeles District believes that by allowing the use of these three NWP's, the scientific community and open space land managers would benefit from the

streamlined process and there may ultimately be a net increase in functions and services in vernal pool ecosystems through the implementation of restoration, enhancement, and management activities.

The Los Angeles District Regulatory Branch previously determined that the 0.5-acre SIP threshold for vernal pool impacts (established by the District in 1997) would not adequately protect remaining vernal pool resources in the region. It is estimated that 95 to more than 97 percent of the vernal pools that historically existed in the region have been lost through urbanization or agricultural practices (USFWS 1998); in some counties the loss is virtually total. Under the new and modified NWP, a single and complete project could impact up to 0.5 acre of vernal pool habitat and be considered for NWP authorization. The District had previously been using a 0.5-acre SIP threshold for vernal pool impacts since 25 November 1997 (previous District Regional Condition 1). Despite the establishment of this earlier regional condition, the District experienced additional losses of vernal pool habitat, requiring the establishment of Regional Condition 5 as part of the 2000, 2002 and 2007 NWP Programs. Within the boundaries of the Los Angeles District, the sizes of jurisdictional vernal pools generally range from approximately 200 to 4,900 square feet (e.g. 0.00459 to 0.11248 acre). Therefore, 0.5 acre of vernal pools could include a large vernal pool complex or individual pools made up of 5 to 100 pools. Compounding this situation, mitigation for vernal pool impacts is not well developed, and often takes the form of preservation and enhancement of remaining pools, resulting in a continued net loss of vernal pool acreage, functions and services. The SIP review process includes an analysis of the propriety of the proposed fill in a special aquatic site pursuant to the 404(b)(1) Guidelines.

Vernal pools in the region comprise a severely diminished class of aquatic habitats and are fragile, easily disturbed ecosystems. Due to the decline of vernal pool habitat in the region, the District determined future impacts to vernal pools in the region would result in more than minimal adverse environmental effects both individually and cumulatively. With the proposed regional condition, any quantity of dredged or fill material discharged into a jurisdictional vernal pool that is not temporary in accordance with NWP 5 or 6 or does not result in a net increase in aquatic resources functions and services in accordance with NWP 27 would be subject to an SIP review. By requiring an SIP, the remaining jurisdictional vernal pools in the region would be afforded the maximum level of protection under the Regulatory Program which includes a 404(b)(1) analysis (i.e., under this more rigorous process, the Corps can only authorize the least environmentally damaging practicable alternative for a given project).

With the modification of Regional Condition 5, the District recognizes certain regulated activities involving restoration, enhancement, management, and scientific study of vernal pools would not contribute to the overall loss of vernal pool habitat and in such cases (with few exceptions) SIP review would not provide any additional protection or benefit to vernal pools. Therefore, this regional condition has been modified since the 2007 NWPs to include language excluding these four categories of activities from this requirement. If the success of a proposed restoration or enhancement activity is uncertain, or the subject vernal pool is of particularly high ecological value, the District would still retain the ability to review any such action as an SIP through our discretionary authority. In addition, the Corps has determined that issuance of

Regional Condition 5 would not be contrary to the public interest. Overall, the implementation of Regional Condition 5, which requires an SIP for discharges of dredged or fill material in jurisdictional vernal pools (with the exception of activities associated with the restoration, enhancement, management or scientific study), would provide additional assurances that the activities permitted under the NWP's would result in minimal impacts on both an individual and cumulative basis in the Los Angeles District.

For additional information please see the supplemental decision document for Regional Condition 5.

### **3.1.3 San Diego Creek and San Juan Creek/Western San Mateo Creek SAMPs (Regional Condition 8).**

Reason for Exclusion: Regional Condition 8 would exclude the use of selected NWP authorizations within all jurisdictional waters of the San Diego Creek, San Juan Creek, and western San Mateo Creek and their tributaries within three watersheds. This decision to revoke selected NWP's was made in accordance with two Special Area Management Plans (SAMPs) the Corps conducted in Orange County, and pursuant to the South Pacific Division (SPD) Commander's authority at 33 C.F.R. § 330.5(c).

Concurrent with establishing watershed-specific permitting frameworks, the following 24 NWP's are being revoked for use in these watersheds covered by the two SAMPs in Orange County: 03, 07, 12, 13, 14, 16, 17, 18, 19, 21, 25, 27, 29, 31, 33, 39, 40, 41, 42, 43, 44, 46, 49, and 50. The remaining 26 NWP's would be retained for use in the watersheds covered by the two SAMPs in Orange County: 01, 02, 04, 05, 06, 08, 09, 10, 11, 15, 20, 22, 23, 24, 28, 30, 32, 34, 35, 36, 37, 38, 45, 48, 51 and 52.

The decision to revoke selected NWP's within these SAMP Watersheds involved establishing alternative permitting procedures determined to be more appropriate for the given aquatic resources in the watersheds, and promoting long-term aquatic resource conservation. This exclusion would require any project that involved a regulated activity within these particular watersheds to receive the level of permit review and evaluation in consideration of the applicable SAMP framework.

Specifically, the San Juan Creek/Western San Mateo Creek Watersheds SAMP incorporated alternative permitting procedures consisting of the establishment of a Regional General Permit (RGP) 74 for maintenance activities for use outside the targeted aquatic resource conservation areas, new LOP procedures, and a long-term Standard Individual Permit (SIP) and LOP procedures for the SAMP participants. Similarly, the San Diego Creek Watershed SAMP incorporated alternative permitting procedures consisting of new LOP procedures and RGP 74. Regulated activities ineligible for retained NWP's or the SAMPs' alternative permitting procedures would be reviewed under the SIP process, which would include a 404(b)(1) alternatives analysis.

The Corps conducted extensive analyses in its environmental impact statement (EIS) for the San

Juan Creek/Western San Mateo Creek Watersheds SAMP and its joint EIS/environmental impact report (EIR) with the California Department of Fish and Game Habitat Conservation Branch, South Coast Region for the San Diego Creek Watershed SAMP/Watershed Streambed Alteration Agreement (WSAA) Process. The final decision to revoke selected NWP's was made by the SPD Commander in his record of decision signed July 19, 2010.

For additional information please see the supplemental decision document for Regional Condition 8.

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

In accordance with the *Notification* requirements of NWP 12, the permittee must submit a PCN to the District Engineer prior to commencing the activity if any of the following criteria are met: (1) the activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials.

Regional Conditions 4a-4d expand the notification requirements for NWP 12 to provide additional protection for high function and service waters and special aquatic sites, areas designated as Essential Fish Habitat, and specific watersheds within the States of Arizona and California. These highly sensitive resources are afforded a greater protection under the Regional Conditions than is provided with the *Notification* requirements of NWP 12.

#### **3.2.1 All Perennial Waters and Special Aquatic Sites in Arizona and Desert Regions of California (Regional Condition 4a)**

Reason for Pre-Construction Notification Requirement: It is the position of the Los Angeles District that any discharges of dredged or fill material in a special aquatic site or a perennial water body in a desert area (excluding two reaches in the Colorado River) warrants the review of Regulatory Division. The loss of approximately 90% of wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region indicate the need for compensatory mitigation to ensure adverse impacts to special aquatic sites are no more than minimal individually and cumulatively. Special aquatic sites in Los Angeles District support substantial aquatic resources exhibiting relatively high physical and biological functions. Furthermore, these aquatic areas can provide important and unique habitat for endangered species, migratory birds, and other wildlife. In addition, past construction activities in and adjacent to these special aquatic sites have degraded portions of these high value systems.

Two relatively small reaches of the Colorado River have been excluded from this regional condition because these areas exhibit relatively low physical and biological functions; however,

due to a large amount of existing infrastructure and ongoing recreational activities, there are a large number of small structures and minor projects that require authorization pursuant to section 10 of the RHA and/or section 404 of the CWA. As a result, requiring notification in the above two reaches of the Colorado River would increase the District's workload substantially while only providing minimal environmental benefits. With this notification requirement, the Los Angeles District can ensure that the use of the NWP for activities proposed within the special aquatic sites would have minimal impacts, both individually and cumulatively. Activities sited within special aquatic sites that are determined to have the potential to exceed the minor impact threshold would be subject to review under the SIP process that requires a rigorous alternatives analysis. As such, further impacts to the special aquatic sites and perennial water bodies in desert areas would be avoided and minimized to the maximum extent practicable. Through the mandatory pre-construction notification process, the Los Angeles District will review the proposed discharges of dredged or fill material into special aquatic sites and perennial streams in desert areas (excluding the above two reaches in the Colorado River) on a case-by-case basis to ensure that those activities would result in minimal adverse effects on the aquatic environment, individually and cumulatively. This regional condition has been amended from that included with the 2007 NWPs (Regional Condition 4) to clarify the definition of *desert regions of California* to include specific watersheds as defined by USGS Hydrologic Unit Code (HUC) accounting units. These include Lower Colorado (150301), Northern Mojave (180902), Southern Mojave (181001), and Salton Sea (181002).

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

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

Reason for PCN 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 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.

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

### **3.2.3 Projects located in all watersheds in the Santa Monica Mountains (Regional Condition 4c)**

Reason for PCN Requirement: The Santa Monica Mountains represent an important cultural and natural resource. The region contains a variety of protected areas, and serves as a recreation destination for Los Angeles area residents. Aquatic resources in the Santa Monica Mountains are important in the regional context and are also a center of native biodiversity. Despite their ecological importance, aquatic resources in the Santa Monica Mountains have experienced heavy losses. The Corps' ongoing study of cumulative impacts in the Malibu Creek watershed, the region's largest drainage basin, indicates that most of these impacts have occurred without Corps authorization (Lilien 2001<sup>1</sup>). The Santa Monica Mountains have high natural resource values that contain 1066 ha of aquatic habitat and support a number of federally listed threatened and endangered species. As documented in Lilien 2001, despite their importance, aquatic ecosystems in the Santa Monica Mountains, particularly Malibu Creek, have experienced loss and degradation of riparian habitat and, as a result, this regional condition is required to ensure that the NWP's would have minimal impacts, both individually and cumulatively, to aquatic and riparian habitat in various watersheds in the Santa Monica Mountains.

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

### **3.2.4 Projects located in the Santa Clara River watershed (Regional Condition 4d)**

Reason for Pre-Construction Notification Requirement: The entire Santa Clara River watershed encompasses approximately 1,634 square miles in Los Angeles and Ventura Counties (the upper watershed, which includes 45 miles of the river between its headwaters and the Ventura County line, is 680 square miles, while the lower watershed, between the county line and the ocean is 954 square miles). The river flows approximately 84 miles from its headwaters east of Acton to its delta located between the cities of Ventura and Oxnard. Recent estimates (as of 2005) for the total amount of urbanization, including residential, industrial, and commercial areas, in the entire Santa Clara River watershed vary between 4 and 4.5 percent (approximately 4.5%, with most of the development located in the Santa Clarita area). Between 1988 and 2006, the Corps has issued approximately 228 permits that have resulted in actual impacts to waters of the U.S. (this number excludes permit actions where the same permit was issued multiple times, permits that were never utilized by the applicant, and permits that authorized an activity in the same location multiple times). Of these actions, more were associated with emergency repairs and maintenance than any other type of activity (approximately 25%, more than half of which were for emergency actions). The above 228 permit actions resulted in temporary impacts to approximately 480 acres and permanent impacts to approximately 149 acres of waters of the U.S., including approximately 15 acres of wetlands in the Santa Clara River watershed (temporary impacts are

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<sup>1</sup> Lilien, J.P. Cumulative Impacts to Riparian Habitat in the Malibu Creek Watershed. Dissertation, University of California, Los Angeles.

usually addressed with on-site restoration as opposed to compensatory mitigation requirements). As compensatory mitigation for the above permanent impacts to waters of the U.S., the Corps required a total of approximately 518 acres of preservation, creation, enhancement, and restoration of aquatic and riparian habitat in the Santa Clara River watershed.

To assess the current condition of the main stem of the Santa Clara River, an assessment was made to determine the condition for several reaches in the Santa Clara River downstream of the City of Santa Clarita. Based on the results of the fieldwork for the assessment, the main stem of the Santa Clara River exhibits relatively high physical and biological functions immediately downstream of the developed areas in Santa Clarita. The above assessment was completed in the summer of 2004 (and updated in 2007) and supports the results of past and present environmental assessments for Section 404 permit decisions in the Santa Clarita area that have determined that the Santa Clara River exhibits limited physical evidence of direct, indirect, and cumulative impacts from urbanization, agriculture and other land use changes in the watershed. The purpose of this regional condition is to ensure that the NWPs would continue to have minimal impacts, both individually and cumulatively, to aquatic and riparian habitat that exhibits relatively high physical and biological functions in the Santa Clara River watershed.

For additional information please see the supplemental decision documents for Regional Condition 4d.

## **4.0 Alternatives**

### **4.1 No Regional Conditions**

This alternative would not require the use of regional conditions. Without regional conditions, which require notification in all perennial waters and special aquatic sites in Arizona and the desert regions in California, within areas designated as Essential Fish Habitat, within the Santa Monica Mountains, and within the Santa Clara River watershed, there could be significant impacts to waters of the U.S. that exhibit both high physical and biological functions as some NWP 12 activities may proceed in these areas without prior notification to the Los Angeles District. Without Regional Condition 5 prohibiting use of NWP 12 in jurisdictional vernal pools, there could be more than minimal impacts to these resources. Historically, there has been a 95 to more than 99 percent loss of vernal pool habitat in the southern California area. Further losses would have more than minimal impacts both individually and cumulatively. Because NWP is often used in multiple instances for linear project, it is one of the most frequently used NWPs in the Los Angeles District. Therefore the Los Angeles District must be cognizant of the potential for more than minimal cumulative impacts resulting from its use. The regional conditions for the District generally increase protection of specific aquatic resources within specific geographical areas or require additional project information to document the aquatic resources present within the permit area and the potential impacts to these resources are minimal. If regional conditions are not used the aquatic resources that are rare, largely destroyed except for remnant sites, and/or subject to very high losses due to future development would not be adequately protected and could potentially result in more than minimal cumulative impact on the aquatic environment. With no regional conditions, some activities proposed for authorization by NWP 12 could have

substantial impacts to these sensitive areas. Based on the analysis above, the “No Regional Conditions” alternative has been dismissed from further consideration.

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

To further ensure NWP 12 would result in minimal impacts to aquatic ecosystems, both individually and cumulatively, the District Engineer could require notification for all projects that require authorization under NWP 12. Requiring notification for all utility line projects, not just those in arid special aquatic sites and in waters with relatively high physical and biological functions, could substantially increase the workload for the District without any commensurate benefits to the aquatic ecosystem. Most NWP 12 authorizations result in temporary impacts only. Based on a review of permitting data from the previous three years, approximately 84% of the total acreage of impact verified under NWP 12 consisted of temporary impacts (approximately 41 of 49 total acres over 3 years). Furthermore, approximately 91% of NWP authorizations recording a permanent impact (221 out of 240 separate impacts) were for less than 0.1 acre. Expanding PCN requirements beyond those resources and regions the Los Angeles District has identified as described in Section 3 (see Regional Condition 4) would require reviews of additional actions that would generally be expected to have only temporary or very minimal permanent impacts. In light of the increased workload, the District has determined the above alternative notification requirements would not be practicable and would result in relatively minor benefits to the aquatic ecosystem. With the proposed modifications to NWP 12, the District has identified the resources and watersheds that warrant additional scrutiny under NWP 12. With these considerations, the proposed modifications would result in a relatively minor increase in workload, but would have relatively substantial benefits to the aquatic environment.

An alternative regional condition would prohibit the use of NWP 12 in all jurisdictional special aquatic sites in the District. The loss of approximately 90 percent of wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region indicate there could be a need for the review of any project which would discharge dredged or fill material in a jurisdictional special aquatic site under the 404(b)(1) Guidelines and the public interest factors to ensure minimal adverse impacts to special aquatic sites. However, similar to alternative PCN thresholds, an alternative regional condition that precluded all discharges of dredged or fill material in special aquatic sites would unnecessarily increase workload to review small-scale impacts in areas that exhibit lower physical and biological functions. As a result, this proposed modification would not be practicable and would result in minimal additional environmental benefits to the aquatic ecosystem. NWP 12 is one of the more commonly used NWPs and a useful tool for authorizing utility line projects with minimal individual and cumulative impacts in a streamlined fashion. This allows the Los Angeles District to manage its workload effectively and also to reduce the regulatory burden on the public.

Based on the analysis above, these alternative regional limits or notification thresholds have been dismissed from further consideration.

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

The District will apply ten regional conditions to ensure that all project impacts authorized under NWP 12 are individually and cumulatively minor. These ten regional conditions will either prohibit the use of NWP 12 in certain waters of the United States, will increase notification procedures to ensure that no project with more than minor impacts is authorized under NWP 12 or will impose additional information and mitigation requirements. Application of the ten regional conditions would ensure that the majority of the projects that could be authorized under the proposed NWP 12 would have minimal impacts to waters of the United States, including both sensitive resources and watersheds, without a substantial increase in workload.

An alternative to excluding the use of NWP 12 in perennial waters and special aquatic sites in Arizona and the desert regions in California, within areas designated as Essential Fish Habitat, within the Santa Monica Mountains, and within the Santa Clara River watershed would be to require mandatory agency notification of proposed activities in these high resource areas. A PCN would be submitted by the applicant and the Corps would provide a faxed or emailed notification to specific resource agencies per the agency coordination procedures described in General Condition 31 (notification) prior to the Corps verifying the proposed activity. However, additional protection over and above what is afforded by the currently proposed regional conditions would not be provided commensurate with the amount of time and additional workload this would create for Corps project managers and agency staff.

Based on the analysis above, these alternative regional nationwide permit conditions have been dismissed from further consideration.

## **5.0 Endangered Species Act (“ESA”)**

### **5.1 General Considerations**

NWP 12 authorizes the discharge of fill material for activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States. To avoid and minimize impacts to the aquatic environment, the terms and conditions for NWP 12 contain several restrictions including a threshold allowing the loss of no greater than 0.5 acre of waters of the United States for each single and complete project; requiring a PCN if the activity involves mechanized land clearing in a forested wetland for the utility line right-of-way or if a section 10 permit is required; if the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; if the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area; if the discharges result in the loss of greater than 1/10-acre of waters of the United States; if permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or if permanent access roads are constructed in waters of the United States with impervious materials. In addition, NWP 12 limits the duration of temporary sidelaying into waters of the United States; requires the backfill to use displaced topsoil from the trench; designing of the trench to prevent draining of the wetland; stabilizing exposed surfaces; minimizing foundations of towers, poles, and anchors; and precluding the use of this nationwide

permit for construction of substations in non-tidal wetlands adjacent to tidal waters and in tidal wetlands.

In addition, the new general and regional conditions would provide further limitations on the use of NWP 12 in sensitive aquatic ecosystems. With these constraints, NWP 12 would result in minimal adverse impacts to threatened and endangered species, both individually and cumulatively, in the majority of the District. With no regional conditions for NWP 12, there would be more than minimal impacts in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. The regional conditions for NWP 12 specify notification pursuant to General Condition 31 for all projects in special aquatic sites as defined at 40 CFR Part 230.40-45, as well as for projects located in designated EFH and within other sensitive resource areas. With the inclusion of these proposed notification requirements for NWP 12, the above long-term minor impacts to endangered and threatened species in the District would be further reduced.

Further, given the large number of listed species in District, continued coordination with the U.S. Fish and Wildlife Service (“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 12 would have minimal impacts, both individually and cumulatively, to threatened and endangered species in the District.

In Arizona and southern California, the large number of listed species has made the public more aware of the need to contact the USFWS and NMFS, where applicable, 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 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 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 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 District, pursuant to the ESA).

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

The 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 of 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 Division and the USFWS, 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 Division and NOAA's NMFS. The District has completed 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 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 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 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 District, pursuant to the ESA).

## **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 District's public notice announcing the proposed rule for the 2012 NWPs and our proposed regional conditions, all federally recognized tribes within the District were contacted via letter dated December 13, 2010 to provide advance notification of the Corps' intent to issue the 2012 NWPs and the 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 NWPs. No requests for government-to-government consultation were received.

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

The 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 a PCN 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 NWPs. 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 NWPs 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 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: NWP 12 would usually only result in short-term temporary impacts to waters of the U.S; therefore, there would likely be minimal impacts, both individually and cumulatively, to aquatic resources throughout the District. In addition, regional conditions for NWP 12 would preclude discharges of dredged or fill material in highly sensitive resource areas in Arizona and the desert regions of California. Further, with the inclusion of the proposed PCN requirements provided in Regional Condition 4, the above minimal impacts would be further reduced.

(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 District, numerous threatened or endangered species require extensive coordination with USFWS and NMFS. The semi-arid environment limits the extent of aquatic resources in the southern California/Arizona area. Regional conditions for NWP 12 would preclude discharges of dredged or fill material in jurisdictional vernal pools, losses in certain special aquatic sites (wetlands, mudflats, vegetated shallows, and riffle and pool complexes) in Arizona and the desert regions of California, and in the San Diego Creek and San Juan Creek/Western San Mateo Creek watersheds. Regional Condition would require submission of a PCN for any use of NWP in special aquatic sites and perennial waters in the State of Arizona and desert regions of California, all designated EFH, watersheds of the Santa Monica Mountains, and the Santa Clara River watershed. With these exclusions to the use of NWP 12 in special aquatic sites and sensitive watersheds or other rare, high value aquatic resources, long-term minor adverse impacts on general environmental concerns in the District would be further reduced.

(e) Wetlands: In the 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 southern California. In these areas, annual precipitation is usually below 10 inches, which often precludes the development of wetlands. As a result wetlands are rare in this portion of the District and warrant more substantial protection. In addition, vernal pools are an extremely rare type of wetland within the District. To ensure minimal impacts to wetland resources, the District would prohibit the use of NWP 12 to authorize losses of wetlands, mudflats, vegetated shallows, and riffle and pool complexes in the State of Arizona and desert regions of California through Regional Condition 2. Regional condition 5 would prohibit use of NWP in jurisdictional vernal pools in all circumstances. Furthermore, the District's Regional Condition 4 requires a PCN whenever a special aquatic site, including wetlands, is impacted further ensuring that only projects with minimal impacts are authorized by NWP 12.

(f) Historic properties: Same as discussed in the national document.

(g) Fish and wildlife values: Given the temporary nature of impacts associated with most utility line activities, the impacts are relatively minor. The regional conditions would provide further limitations on the use of NWP 12. The District has regional conditions that would prohibit the use of NWP 12 and/or require additional project information. Due to these constraints, NWP 12 would result in minimal impacts to fish and wildlife, both individually and cumulatively, within

the District.

(h) Flood hazards: With the dynamic storm season typical of southern California and parts of Arizona, large floods are a normal part of the hydrologic regime. Due to a general lack of soil development and vegetation coverage in semi-arid areas, peak discharges for very high magnitude storm events are larger for dryland basins than similar sized humid-area basins. With the maintenance of existing utility structures in stream channels, NWP 12 would provide long-term benefits by reducing flood hazards in the District.

(i) Floodplain values: Same as discussed in the national document.

(j) Land use: Same as discussed in the national document.

(k) Navigation: Same as discussed in the national document.

(l) Shore erosion and accretion: Same as discussed in the national document.

(m) Recreation: Same as discussed in the national document.

(n) Water supply and conservation: With the semi-arid climate and the large existing population in the District, installation and maintenance of utility lines associated with water supply is especially important in this region. As a result, NWP 12 would provide long-term benefits by authorizing new conduits for water supply structures/facilities. Furthermore, to ensure that perennial watercourses and water bodies in desert areas would not be adversely affected by work under NWP 12, the District would require a PCN for all projects that affect perennial waters in desert regions (Regional Condition 4). NWP 12 would have beneficial effects on water supply and conservation.

(o) Water quality: In the heavily populated areas of southern California and Arizona, existing water quality in most rivers has been impaired by runoff from upland agricultural, residential and industrial sources. The required Section 401 water quality certification for NWP 12 would ensure long-term minimal impacts to water quality in the waters of the U.S. within the jurisdiction of the District. With the implementation of the above conditions, NWP 12 would have minimal impacts on water quality.

(p) Energy needs: Same as discussed in the national document.

(q) Safety: Same as discussed in the national document.

(r) Food and fiber production: Same as discussed in the national document.

(s) Mineral needs: Same as discussed in the national document.

(t) Considerations of property ownership: Same as discussed in the national document.

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

Please see the attached supplemental analysis (Section I), and the 404(b)(1) guidelines cumulative effects analysis (Section 9.4), below.

### **9.3 Section 404(b)(1) Guidelines Impact Analysis (Subparts C-F)**

(a) Substrate: With NWP 12, there would short-term impacts to channel substrate in the immediate vicinity of the construction area. Subsequent maintenance activities in proximity to existing structures would result in minimal changes to disturbed channel reaches. To ensure minimal impacts in special aquatic sites and sensitive watershed areas and sensitive resources, waters excluded from NWP 12 or additional PCN requirements would be required for NWP 12. With the inclusion of these regional conditions, NWP 12 would result in minimal impacts to channel substrate. The regional conditions for NWP 12 would preclude discharges of dredged or fill material in jurisdictional vernal pools and for losses in most special aquatic sites in Arizona and the desert regions of California. With the inclusion of the proposed PCN requirements for NWP 12 in the Santa Monica Mountains, the Santa Clara River watershed, and perennial waterbodies in Arizona and desert regions of California, the above long-term minor impacts to channel substrate in the District would be further reduced and would result in long-term minor impacts to channel substrate.

(b) Suspended particulates/turbidity: In the heavily populated areas of southern California and Arizona, existing turbidity levels in most rivers has been impaired by runoff from upland agricultural, residential and industrial sources. Short-term construction activities could augment turbidity levels in waters of the U.S. However, these activities would generally only result in a short-term minor change in turbidity. Furthermore, the issuance of a Section 401 water quality certification by the Regional Water Quality Control Board for utility line activities on federal, state, municipal, and private lands in California, by the Arizona Department of Environmental Quality on federal, state, municipal, and private lands in Arizona, and by the Environmental Protection Agency (“EPA”) on tribal lands (except White Mountain Apache Tribe that has been delegated Section 401 authority), would serve to ensure long-term minimal impacts to turbidity/suspended sediment loads in the rivers and streams of the District.

The regional conditions for NWP 12 would preclude discharges of dredged or fill material in jurisdictional vernal pools and losses in most special aquatic sites in Arizona and the desert regions of California. With the inclusion of the proposed PCN requirements for NWP 12 in the Santa Monica Mountains, the Santa Clara River watershed, and perennial waterbodies in Arizona and desert regions of California, the above long-term minor impacts to suspended sediment levels in the District would be further reduced. With the implementation of the above conditions, NWP 12 would have minimal impacts on turbidity levels in waters of the U.S. within the District.

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

(d) Current patterns and water circulation: In the coastal watersheds of the District, impacts to

currents and water circulation could affect spawning of southern steelhead. Any maintenance activities associated with utility repairs should not reduce the cross-sectional area of the channel or modify the existing gradient of the stream channel. Furthermore, the District would require a PCN for any maintenance activities in sensitive watersheds such as the Santa Monica Mountains and the Santa Clara River watershed. With the inclusion of the above provisions, NWP 12 would have minimal impacts on current patterns and circulation in waters of the U.S. within the District.

(e) Normal water level fluctuations: Same as discussed in the national document.

(f) Salinity gradients: Same as discussed in the national document.

(g) Threatened and endangered species: To further protect threatened and endangered species the District has developed and is implementing SLOPES in southern California. The District also completed a programmatic consultation for the California red-legged frog (January 26, 1999) and a programmatic consultation/conference for coastal species (August 29, 1997). The SPD has completed (November 16, 2006) a programmatic consultation for 66 listed species, distinct population segments, or evolutionary significant units in California. These three programmatic consultations in addition to standard Section 7 requirements will ensure that any project seeking authorization under NWP 12 would be in compliance with ESA requirements. Based on an average of 500 NWPs issued annually with 27 completed Section 7 consultations (9 formal, 17 informal, and 1 programmatic) between 2009 and 2011 the District anticipates approximately the same level of impacts to endangered species for the period 2012 through 2017. Therefore, programmatically, NWP 12 associated impacts to endangered species would be minor.

Effects from the construction and maintenance of utility lines and facilities are likely to involve loss, alteration, and reduction of aquatic habitat, loss and alteration of the aquatic insect assemblage, loss of riparian vegetation, sedimentation, and turbidity. Take is possible in the form of capture, trapping, harm, harassment, injury, and mortality of federally listed species. The regional conditions for NWP 12 would preclude discharges of dredged or fill material in jurisdictional vernal pools and any losses of wetlands, mudflats, vegetated shallows, and riffle and pool complexes in Arizona and the desert regions of California. A PCN is required pursuant to the General Condition 18 and through the PCN process the Corps will review certain activities on a case-by-case basis to ensure those activities result in minimal adverse effects on the aquatic environment, both individually and cumulatively.

During the PCN process, the Corps may also exercise discretionary authority and require an individual permit for those activities that may result in more than minimal individual or cumulative adverse effects on the aquatic environment. With the inclusion of the proposed prohibitions and PCN requirements for utility line activities in special aquatic sites and sensitive watersheds and resources, the above long-term minor impacts to endangered and threatened species in the District would be further reduced. Given the large number of listed species in 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 SLOPES, and the inclusion of additional PCN

requirements, the District would ensure project activities authorized under NWP 12 comply with the ESA and use of NWP 12 will have minimal impacts on threatened and endangered species in the District, pursuant with the ESA.

(h) Fish, crustaceans, molluscs, and other aquatic organisms in the food web: Same as discussed in the national document.

(i) Other wildlife: Same as discussed in the national document.

(j) Special aquatic sites: A review of District ORM data generated for Fiscal Years 2009-2011 indicates that out of 585 NWP 12 verifications, only seven impacted special aquatic sites and of those only four resulted in any losses (i.e. permanent impacts). The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The District has ten regional conditions that either preclude the use of NWP 12 or require submittal of additional information as part of the PCN process. These ten regional conditions will either require that a project be subject to a more rigorous review through the SIP review process or provide more information to document through the PCN review process that the impacts are minor and the project can be authorized under NWP 12. Given the constraints of these ten regional conditions and the requirements of NWP 12, the resulting activities that could be permitted would cause only minor adverse impacts.

(2) Wetlands: In the 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 ten inches, which precludes the development of wetlands in the majority of these desert regions. Furthermore, approximately 90 percent of wetlands in California have been affected by historic conversion to agricultural uses, grading and filling activities. As a result, wetland areas are rare in the District and warrant more rigorous protection. To ensure minimal impacts to wetlands, the District has developed a regional general condition that would preclude the use of NWP 12 in special aquatic sites, including wetlands that may be proposed in Arizona and the desert regions of California and in jurisdictional vernal pools. The PCN process required under Regional Condition 4 for specific areas/resources would allow the District Engineer an opportunity to review the merits of proposed action and if determined necessary, subject the proposed activities to the individual permit review process if the proposal has the potential to result in more than minor impacts. As a result of the inclusion of additional requirements for NWP 12 in wetlands there would be only minor adverse impacts to wetlands in the District.

(3) Mud flats: Mud flats are especially rare within the District and warrant more rigorous protection. The District has ten regional conditions that either preclude the use of NWP 12 or require submittal of additional information as part of the PCN process. These ten regional conditions will either require that a project be subject to a more rigorous review through the SIP review process or provide more information to document through the

PCN review process that the impacts are minor and the project can be authorized under NWP 12. Given the constraints of these ten regional conditions and the requirements of NWP 12 the resulting activities that could be permitted would cause only minor adverse impacts.

(4) Vegetated shallows: Vegetated shallows are especially rare within the District and warrant more rigorous protection. The District has ten regional conditions that either preclude the use of NWP 12 or require submittal of additional information as part of the PCN process. These ten regional conditions will either require that a project be subject to a more rigorous review through the SIP review process or provide more information to document through the PCN review process that the impacts are minor and the project can be authorized under NWP12. Given the constraints of these ten regional conditions and the requirements of NWP 12 the resulting activities that could be permitted would cause only minor adverse impacts.

(5) Coral reefs: There are no coral reefs as defined at 40 CFR Part 230.40-45 within the geographical areas administered by the District. Therefore, the activities authorized under NWP 12 would have no effect on any coral reefs.

(6) Riffle and pool complexes: Within the District, the semi-arid climate limits the extent and number of riffle and pool complexes. This scarcity of riffle and pool is especially evident in Arizona and in the desert regions of California. In these areas, annual precipitation is usually below ten inches, which precludes the development of riffle and pool in the majority of these desert regions. As a result, riffle and pool complexes are rare in the District and warrant more rigorous protection. To ensure minimal impacts to riffle and pool complexes, the District has developed a regional general condition that would preclude the use of NWP 12 in special aquatic sites, including riffle and pool complexes that may be proposed in Arizona and the desert regions of California. A PCN is required by Regional Condition 4 for NWP 12 for specific areas and resources. The PCN process would allow the District Engineer an opportunity to review the merits of proposed action and if determined necessary, subject the proposed activities to the individual permit review process if the proposal has the potential to result in more than minor impacts. As a result of the inclusion of additional requirements for NWP 12 in riffle and pool complexes there would be only minor adverse impacts to riffle and pool complexes in the District.

(k) Municipal and private water supplies: Same as discussed in the national document.

(l) Recreational and commercial fisheries: Same as discussed in the national document.

(m) Water-related recreation: Same as discussed in the national document.

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites,

and similar areas: Same as discussed in the national document.

#### **9.4 Section 404(b)(1) Guidelines Cumulative Effects Analysis (40 CFR 230.7(b)(3))**

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 District's permit actions are tracked using the ORM 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 District. Based on an analysis of the types of activities authorized by the District during this period, the District estimates this NWP will be used approximately 200 times per year, resulting in the permanent loss of approximately 3.0 acres of waters of the United States on an annual basis. An additional 14 acres of temporary impacts would also be expected. To ensure these activities result in minimal adverse effects on the aquatic environment, individually and cumulatively, the District estimates that approximately 40 acres of compensatory mitigation will 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.

The demand for these types of activities is likely to increase over the five-year duration of this NWP as more solar and other type of alternative energy projects are implemented. Using the current trend and allowing for an increase due to new solar and alternative energy projects, over 2,500 single and complete activities could be authorized over a five year period until this NWP expires, resulting in an approximate permanent loss of over 15 acres of waters of the United States, including jurisdictional wetlands.

Compensatory mitigation would be required to offset those impacts, however, the required mitigation would be variable depending on the resource type. Compensatory mitigation is the restoration (re-establishment or rehabilitation), establishment, enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved (see 33 CFR 332.2). The required compensatory mitigation will attenuate cumulative impacts on the Nation's aquatic resources by providing aquatic resource functions and services, so that the net effects on the aquatic environment resulting from the activities authorized by this NWP will be minimal. The Corps expects that the convenience and time savings associated with the use of this NWP will encourage applicants to design their projects within the scope of the NWP rather than request individual permits for projects which could result in greater adverse impacts to the aquatic environment.

## **10.0 List of Final Corps Regional Conditions for NWP 12**

### **10.1 Regional condition 2**

Nationwide Permits (NWP) 3, 7, 12-15, 17-19, 21, 23, 25, 29, 35, 36, or 39-46, 48-52 cannot be used to authorize structures, work, and/or the discharge of dredged or fill material that would result in the "loss" of wetlands, mudflats, vegetated shallows or riffle and pool complexes as defined at 40 CFR Part 230.40-45. The definition of "loss" for this regional condition is the same as the definition of "loss of waters of the United States" used for the Nationwide Permit Program. Furthermore, this regional condition applies only within the State of Arizona and within the Mojave and Sonoran (Colorado) desert regions of California. The desert regions in California are limited to four USGS Hydrologic Unit Code (HUC) accounting units (Lower Colorado -150301, Northern Mojave-180902, Southern Mojave-181001, and Salton Sea-181002).

### **10.2 Regional condition 3**

When a PCN is required, the appropriate U.S. Army Corps of Engineers (Corps) District shall be notified in accordance with General Condition 31 using either the SPD PCN Checklist or a signed application form (ENG Form 4345) with an attachment providing information on compliance with all of the General and Regional Conditions. The PCN Checklist and application form are available at: <http://www.spl.usace.army.mil/regulatory>. In addition, the PCN shall include:

- a. A written statement describing how the activity has been designed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States;
- b. Drawings, including plan and cross-section views, clearly depicting the location, size and dimensions of the proposed activity as well as the location of delineated waters of the U.S. on the site. The drawings shall contain a title block, legend and scale, amount (in cubic yards) and area (in acres) of fill in Corps jurisdiction, including both permanent and temporary fills/structures. The ordinary high water mark or, if tidal waters, the mean high water mark and high tide line, should be shown (in feet), based on National Geodetic Vertical Datum (NGVD) or other appropriate referenced elevation. All drawings for projects located within the boundaries of the District shall comply with the most current version of the *Map and Drawing Standards for the Los Angeles Regulatory Division* (available on the District's Regulatory Division website at: [www.spl.usace.army.mil/regulatory/](http://www.spl.usace.army.mil/regulatory/)); and
- c. Numbered and dated pre-project color photographs showing a representative sample of waters proposed to be impacted on the project site, and all waters proposed to be avoided on and immediately adjacent to the project site. The

compass angle and position of each photograph shall be documented on the plan-view drawing required in subpart b of this Regional Condition.

### **10.3 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 - Federal Register dated March 12, 2007 (72 FR 11092)), in which case the PCN shall 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.

### **10.4 Regional condition 5**

Individual Permits shall be required for all discharges of fill material in jurisdictional vernal pools, with the exception that discharges for the purpose of restoration, enhancement, management or scientific study of vernal pools may be authorized under NWPs 5, 6, and 27 with the submission of a PCN in accordance with General Condition 31 and Regional Condition 3.

### **10.5 Regional condition 7**

Individual Permits (Standard Individual Permit or 404 Letter of Permission) shall be required in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County for bank stabilization projects, and in Gaviota Creek, Mission Creek and Carpinteria Creek in Santa Barbara County for bank stabilization projects and grade control structures.

## **10.6 Regional condition 8**

In conjunction with the Los Angeles District's Special Area Management Plans (SAMPs) for the San Diego Creek Watershed and San Juan Creek/Western San Mateo Creek Watersheds in Orange County, California, the Corps' Division Engineer, through his discretionary authority has revoked the use of the following 24 selected NWP within these SAMP watersheds: 03, 07, 12, 13, 14, 16, 17, 18, 19, 21, 25, 27, 29, 31, 33, 39, 40, 41, 42, 43, 44, 46, 49 and 50. Consequently, these NWPs are no longer available in those watersheds to authorize impacts to waters of the United States from discharges of dredged or fill material under the Corps' Clean Water Act section 404 authority.

## **10.7 Regional condition 10**

The permittee shall complete the construction of any compensatory mitigation required by special condition(s) of the NWP verification before or concurrent with commencement of construction of the authorized activity, except when specifically determined to be impracticable by the Corps. When mitigation involves use of a mitigation bank or in-lieu fee program, the permittee shall submit proof of payment to the Corps prior to commencement of construction of the authorized activity.

## **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 NWP 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**

In general, the majority of impacts associated with NWP are linear, relatively minor, and temporary in nature. Most activities authorized under this NWP involve excavation of a trench with minimal and temporary sidelaying, placement of a utility line, and backfill and bedding to preconstruction contours. While this NWP is one of the most frequently-used NWPs, projects are most often designed to meet the non-notification criteria (i.e. impacts are less than .1 acre). The terms and conditions of the NWP, including the PCN 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 22 and the PCN requirements of the NWP. Specifically, regional conditions 2, 4, 5, and 8 will provide additional protection for resource areas with high functions and services as discussed in this document. Through the PCN process, 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 and may require compensatory mitigation for those impacts where appropriate. Regional condition 10, requiring compensatory mitigation be completed before or concurrent with the onset of construction will ensure further minimize temporal losses resulting from the use of this NWP. During the PCN 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.

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.