

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 23 – APPROVED CATEGORICAL EXCLUSIONS

This document is a supplement to the national decision document for Nationwide Permit (NWP) 23 – Approved Categorical Exclusions (CE), and addresses the regional modifications and conditions for this NWP. The South Pacific Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific water bodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

Text of NWP 23:

Approved Categorical Exclusions. Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where:

- (a) That agency or department has determined, pursuant to the Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (40 CFR part 1500 et seq.), that the activity is categorically excluded from environmental documentation, because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment; and
- (b) The Office of the Chief of Engineers (Attn: CECW-CO) has concurred with that agency's or department's determination that the activity is categorically excluded and approved the activity for authorization under NWP 23.

The Office of the Chief of Engineers may require additional conditions, including pre-construction notification, for authorization of an agency's categorical exclusions under this NWP.

Notification: Certain categorical exclusions approved for authorization under this NWP require the permittee to submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 31). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letters. (Sections 10 and 404)

Note: The agency or department may submit an application for an activity believed to be categorically excluded to the Office of the Chief of Engineers (Attn: CECW-CO). Prior to

approval for authorization under this NWP of any agency's activity, the Office of the Chief of Engineers will solicit public comment. As of the date of issuance of this NWP, agencies with approved categorical exclusions are the: Bureau of Reclamation, Federal Highway Administration, and U.S. Coast Guard. Activities approved for authorization under this NWP as of the date of this notice are found in Corps Regulatory Guidance Letter 05-07, which is available at:

<http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/GuidanceLetter.aspx>. Any future approved categorical exclusions will be announced in Regulatory Guidance Letters and posted on this same web site.

Summary of changes to NWP 23 from 2007:

There were no changes NWP 23.

1.0 Background

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

2.0 Consideration of Public Comments

2.1 General Comments

Please see the attached response to comments document (section III).

2.2 Comments on Proposed Regional Conditions

2.2.1 Proposed Regional Condition 1

Please see the attached response to comments document.

2.2.2 Proposed Regional Condition 2

Please see the attached response to comments document.

2.2.3 Proposed Regional Condition 3

Please see the attached response to comments document.

2.2.4 Proposed Regional Condition 4

Please see the attached response to comments document.

2.2.5 Proposed Regional Condition 5

Please see the attached response to comments document.

2.2.6 Proposed Regional Condition 6

Please see the attached response to comments document.

2.2.7 Proposed Regional Condition 7

Please see the attached response to comments document.

2.2.8 Proposed Regional Condition 8

Please see the attached response to comments document.

2.2.9 Proposed Regional Condition 9

Please see the attached response to comments document.

2.2.10 Proposed Regional Condition 10

Please see the attached response to comments document.

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

3.1 Waters excluded from use of this NWP

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 NWPs 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 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). 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 NWPs 5, 6, and 27. NWPs 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 NWPs 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 NWPs, 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 NWPs, 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 NWPs 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 Bank Stabilization Projects in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County and Bank Stabilization and Grade Control Projects in Gaviota Creek, Mission Creek, and Carpinteria Creek in Santa Barbara County (Regional Condition 7)

Reason for Exclusion: Regional Condition 7 would exclude bank stabilization from NWP authorization in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County, and bank stabilization and grade control projects in Gaviota Creek, Mission Creek, and Carpinteria Creek in Santa Barbara County. This exclusion would require any project that would stabilize a stream bank and/or grade control in these particular watersheds receive greater review and scrutiny through the SIP process, which includes a 404(b)(1) alternatives analysis. This regional condition has been modified from the version adopted in 2007 (Regional Condition 9) to include Section 404 Letters of Permission (LOP) as an SIP that may be used following a final Environmental Impact Statement (2009) which evaluated cumulative impacts of bank stabilization in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County, California. While NWP 12, 14, 18, 25, 29, 39, 40, 42 and 43 and 45 address utility lines, linear transportation crossings, minor discharges, structural discharges, residential development, commercial/institutional development, agricultural activities, recreational facilities, stormwater management facilities, and repair of upland facilities damaged by discreet events respectively, these types of projects could also include stream bank stabilization or grade control. These watercourses were identified as vulnerable to adverse effects on endangered species and designated critical habitat associated with additional bank stabilization and grade control activities. In San Luis Obispo Creek and Santa Rosa Creek, a substantial number of bank stabilization projects have resulted in cumulative adverse impacts to flow velocity and water

surface elevations during storm events. With the augmented flow velocity, channel substrate can be scoured during large storm events causing loss of vegetation and long-term channel incision. Although the existing bank stabilization projects have not resulted in the loss of a large amount of waters of the United States, the cumulative hydrogeomorphic effects of the bank stabilization have reduced the amount suitable of habitat for the threatened southern steelhead that utilizes these streams.

At present, the Los Angeles District has identified more than minimal cumulative impacts directly resulting from the use of NWP 13, and other NWPs in these stream channels. By taking discretionary authority over new bank stabilization projects in these two stream channels, the Los Angeles District will ensure future impacts are appropriately mitigated. In Gaviota Creek, Mission Creek and Carpinteria Creek in Santa Barbara County, bank stabilization and grade control structures have resulted in more than minimal cumulative impacts to flow velocity and water surface elevations during storm events. With the augmented flow velocity, channel substrate can be scoured during large storm events causing loss of vegetation and long-term channel incision. Although the bank stabilization projects have not resulted in large losses of waters of the United States, the cumulative hydrogeomorphic effects of the bank stabilization have reduced the amount suitable of habitat for the endangered California red-legged frog (*Rana draytonii*) and southern and central coast steelhead (*Oncorhynchus mykiss*) that utilize these streams and have had adverse affects on designated critical habitat.

At present, there has been a cumulative adverse impact as a result of use of NWP 13, as well as other NWPs that may authorize bank stabilization and grade control structures in these stream channels. By taking discretionary authority over new bank stabilization and grade control structure projects in these three stream channels, the Los Angeles District will ensure future impacts are appropriately evaluated and mitigated. This regional condition will allow the Los Angeles District to review bank stabilization activities in these waterways on a case-by-case basis, ensuring that only the least environmentally damaging practicable alternative is permitted. If, at a later time, there is clear unequivocal evidence that the above regional conditions do not produce the intended results, the Los Angeles District may further modify them, as warranted.

For additional information please see the supplemental decision document for Regional Condition 7.

3.2 Waters subjected to additional pre-construction notification requirements

For the new 2012 NWP 23 permit the permittee must submit a pre-construction notification in both navigable and non-navigable waters of the U.S. to the district engineer if certain categorical exclusions approved for authorization under this NWP are used. This may require the permittee to submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 31). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letters. (Sections 10 and 404)

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 the desert regions of the 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 Los Angeles District (Regional Condition 4b)

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

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 Pre-Construction Notification 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 2001¹). 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 NWPs would have minimal impacts, both individually and cumulatively, to aquatic and riparian habitat in various watersheds in the Santa Monica Mountains.

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

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 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

The alternative of having no regional conditions was reviewed by the Corps. Currently, there are five regional conditions (regional conditions Nos. 2, 5, 6, 7 and 8) that exclude or restrict certain NWPs from specific waters; this will greatly enhance the scrutiny and review of certain activities covered under a nationwide permit that may have adverse impacts in certain areas or watersheds. Additionally, Regional Condition 4 would require notification to the Corps in order for the impacts to be better assessed, evaluated, and reduced if necessary.

Regional condition 1 provides for enhanced aquatic movements of federally listed fish species through proper design of road crossings unless deemed impracticable by the Corps. Regional condition 2 provides for greater restriction on certain NWPs that would result in the loss of wetlands, mudflats, vegetated shallows, or riffle and pool complexes in the State of Arizona and desert regions of California where such aquatic resources are scarce and cumulatively under pressure from many different activities. Regional Condition 4 requires notification for any project in a perennial water or special aquatic site in certain desert areas, in Pacific Fishery Management Council-designated EFH areas, and in certain sensitive watersheds in Los Angeles and Ventura counties. Without regional conditions specifying notification for projects in these special aquatic sites and EFH, impacts to these sensitive resources could occur without compensatory mitigation, contributing to more than minimal impacts, both individually and cumulatively, to waters of the U.S. in the Los Angeles District.

The proposed regional conditions would ensure that the use of NWP 23 results in only minimal adverse impacts to the aquatic environment. Without these conditions, projects authorized under this NWP would contribute to substantial cumulative impacts in some portions of the Los Angeles District. Nationally developed RGLs indicate that many authorizations that would be issued pursuant to NWP 23 require notification under General Condition 31. However, the Los Angeles District proposes that additional notification and limitations are required to protect unique and sensitive resources within our geographic jurisdiction.

If no regional conditions were added to NWP 23, there could be more than minimal impacts to certain endangered species, such as southern steelhead (*Oncorhynchus mykiss*), in coastal watersheds from the Santa Monica Mountains in Los Angeles County to the San Luis Obispo County/Monterey County boundary. Without a regional condition requiring notification for projects in special aquatic sites, impacts to these relatively rare resources could occur without compensatory mitigation, contributing to more than minimal impacts, both individually and cumulatively, to special aquatic sites in the Los Angeles District. In addition, with no regional conditions, NWP 23 would have more than minimal impacts on jurisdictional vernal pools in the Los Angeles District. 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. As well, other specific high integrity aquatic resources, such as the Santa Clara River, Santa Monica Mountains, and the desert regions of Los Angeles District, under NWP 23 might result in greater than minimal impacts, both individually

and cumulatively. As a result of the Regional Conditions, the District expects a relatively minor increase in overall workload, but would provide potentially substantial benefits to the aquatic environment in the identified areas.

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

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

Discharges of dredged or fill material are authorized under NWP 23 for approved categorical exclusions. The new terms of NWP 23 clarifies its use, specifically noting that certain exclusions require a PCN. Except as provided for in the proposed regional conditions (see below) and the new NWP itself, the Los Angeles District has not proposed additional regional limits or pre-certification notification thresholds on NWP 23.

Discharges of dredged or fill material authorized under NWP 23 are limited to only CEs approved by the Chief of Engineers. The Chief of Engineers does solicit public comment, may require certain conditions for authorization of an agency's CE under this NWP, and must ultimately concur with the exclusion. Some activities within the approved CE may have a notification requirement to the Corps. Due to these constraints, NWP 23 would generally result in minimal impacts, both individually and cumulatively, in the majority of the Los Angeles District.

To further ensure NWP 23 would have minimal impacts to aquatic resources, both individually and cumulatively, the Los Angeles District could augment the proposed notification requirements for NWP 23 by including all coastal watersheds. Alternatively, the Los Angeles District could eliminate the use of NWP 23 in all special aquatic sites, including wetlands.

The Los Angeles District could require notification for all projects that require authorization under NWP 23. Requiring notification for all activities permitted by an approved categorical exclusion, not just those in special aquatic sites and in waters with relatively high physical and biological functions could substantially increase the workload without any commensurate benefits to aquatic resources. As a result, the Los Angeles District has determined the above alternative notification requirements would not be practicable and would result in only minor additional benefits to aquatic resources.

An alternative regional condition would prohibit the use of NWP 23 in all special aquatic sites in the Los Angeles 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 indicates there could be a need for the review of any project that would discharge dredged or fill material in a special aquatic site under the 404(b) (1) Guidelines and the public interest factors to ensure no adverse impacts to special aquatic sites. However, as discussed above, NWP 23 is limited to

discharges of dredged or fill material which have approved CEs by the Chief of Engineers. The Chief of Engineers does solicit public comment and may require certain conditions for authorization of an agency's CE under this NWP. Some activities within the approved CE may have a notification requirement to the Corps. When considering the inclusion of the constraints on NWP 23 from the General Conditions, a regional condition that precluded all discharges in special aquatic sites would unnecessarily increase our 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 relatively minor environmental benefits to the aquatic ecosystem. In conclusion, the majority of the projects that could be authorized under NWP 23 would likely have minimal impacts to the aquatic ecosystem. With the proposed regional conditions, the Los Angeles District would ensure that NWP 23 has minimal impacts on both sensitive resources and watersheds without a substantial increase in workload.

In conclusion, the majority of the projects that could be authorized under NWP 23 would result in only minimal impacts to the aquatic ecosystem. By ensuring the terms and conditions are met and the proposed regional conditions are complied with the Los Angeles District would ensure that NWP 23 has minimal individual and cumulative impacts on both sensitive resources and watersheds without a substantial increase in workload.

4.3 Alternative Regional Nationwide Permit Conditions

The Los Angeles District has proposed regional conditions that would further ensure that the NWP does not authorize activities with more than minimal adverse effects on the aquatic environment (See Section 3.0, above). With the proposed regional conditions, the Los Angeles District has identified resources and watersheds that warrant additional scrutiny under NWP 23.

An alternative regional nationwide permit condition could require the Los Angeles District to circulate PCNs to other resources agencies including the U.S. Environmental Protection Agency, U.S. Fish & Wildlife Service, and other local agencies to solicit comments on the proposed action. Such agency notification provisions are currently required for any NWP that exceeds 0.5 acre of loss, and for certain NWPs that would exceed 300 linear feet of streambed loss. Expanding the scope of activities requiring agency notification to include all NWP 23 actions would tax the Los Angeles District resources without a commensurate benefit to the aquatic environment. The Los Angeles District has the expertise to evaluate projects eligible for authorization under NWP 23 to determine if they would result in minimal impact. Adding an additional agency notification requirement is not likely to result in more effective management of the regulatory program or greater protection of resources. The existing regional conditions applicable to NWP 23, described above, provide adequate safeguards to ensure impacts to the aquatic environment would be minimal, both on an individual and cumulative basis. As a result, alternative regional nationwide conditions have been dropped from further consideration.

5.0 Endangered Species Act

The Los Angeles District believes that NWP General Condition 18 provides the necessary legal protection required to comply with the ESA and that the proposed regional conditions would provide additional protection to waterways or watersheds within Los Angeles District supporting areas of high physical and biological functions. The Los Angeles District recognizes that verifying authorization for specific activities through our NWP program is a federal activity under the ESA. As such, when those activities “may affect” listed species or “may destroy or adversely modify” designated critical habitat, the Los Angeles District has the responsibility to consult with the Service(s) pursuant to Section 7 of the ESA before final verification of authorization by a NWP can be granted. Specifically, General Condition 18 of the NWP program prohibits authorization of any activity that may affect a federally listed species or designated critical habitat unless and until Section 7 consultation has been completed or a “no effect” determination has been made by the Los Angeles District. Consequently, the Los Angeles District ensures that all NWP actions that may affect a federally listed species or critical habitat are in compliance with the ESA through consultation with the Service(s) on a project-specific basis

5.1 General Considerations

The new General and Regional Conditions provide further limitations on the use of NWP 23 in sensitive aquatic ecosystems. With these constraints, NWP 23 would result in minimal adverse impacts to threatened and endangered species, both individually and cumulatively, in the majority of the Los Angeles District. With no Regional Conditions for NWP 23, there would be more than minimal impacts only in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. The Regional Conditions for NWP 23 specify notification pursuant to General Condition 31 for all projects in the Santa Monica Mountains, the Santa Clara River watershed, special aquatic sites and perennial waterbodies in the State of Arizona and desert regions of California, and areas designated as Essential Fish Habitat. With the inclusion of these proposed notification requirements for NWP 23, long-term minor impacts to endangered and threatened species in the Los Angeles District would be further reduced. In addition, given the large number of listed species in Los Angeles District, continued coordination with USFWS and NMFS is required to ensure minimal impacts to endangered species. With the continuation of the existing informal coordination procedures, the development and implementation of SLOPES, and the inclusion of additional notification requirements, the use of NWP 23 would have minimal impacts, both individually and cumulatively, to threatened and endangered species in the Los Angeles District.

Since the Corps has used NWP 23 in the Los Angeles District only once from 2009 to 2011 with no Section 7 consultation our response has no record of ESA impacts and mitigation for such activities from 2009 to 2011. The Corps has authorized one nationwide permit confirmation under NWP 23. Los Angeles District has not consulted under ESA or requested discretionary authority but would consult if the Corps was notified by the applicant that there was an effect to listed species or critical habitat or we had other information. Requiring a PCN for projects affecting listed species or critical habitat would be duplicitous as Los Angeles District and the

other agencies have established SLOPES and other mechanisms to trigger consultations with NMFS or the FWS during the NWP process.

5.2 Local Operating Procedures for Endangered Species

The Los Angeles District has various procedures for ensuring compliance with the ESA. SLOPES formalize additional procedures between agencies to enable the agencies to ensure better compliance with the ESA. With the implementation of SLOPES, these procedures could be formally documented, facilitating the compliance the NWPs with the ESA. It is anticipated there will be many situations that will not be addressed by SLOPES and a case-by-case determination will be made regarding consultation with the USFWS or NMFS pursuant to Section 7 of the ESA. In January 2003, the Corps of Engineers, Los Angeles District, Regulatory Branch and the U.S. Fish and Wildlife Service, Ventura Office finalized SLOPES for informal and formal ESA consultations. In addition, some the activities authorized by the NWPs that may adversely affect Essential Fish Habitat have been addressed by the General Concurrence dated August 5, 2003 and a Programmatic Consultation that was completed by the Corps of Engineers, Los Angeles District, Regulatory Branch and NOAA's National Marine Fisheries Service. 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 Endangered Species Act (ESA). Per General Condition 18, if the Federal Action were determined to have a potential effect on a federally listed species, or its designated critical habitat, consultation would be required pursuant to Section 7 of the ESA. (It should be noted that the Los Angeles District would ensure all federal project activities authorized under the NWPs comply with the ESA and use of the NWPs shall be determined to have minimal impacts on threatened and endangered species in the Los Angeles District, pursuant to the ESA).

6.0 National Historic Preservation Act

6.1 General Considerations

The Los Angeles District would ensure that activities authorized by NWP 14 would comply with the National Historic Preservation Act (NHPA). The District would review the latest version of the National Register of Historic Places (NRHP) to make an effect determination that activities verified under NWP 14 would have on Historic Properties. Once an effects determination has been made the District will coordinate with the State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO), recognized Tribes, and, if necessary, the Advisory Council on Historic Preservation (ACHP) as appropriate. The District has considered the requirement of pre-construction notification for NWP activities in geographic areas of high site potential, or known locations of cultural resources including prehistoric sites, historic sites, tribal

lands, traditional cultural properties, state landmarks or National Historic Landmarks. In areas where there is a high likelihood of cultural resources within the Corps' area of potential effect (APE), the district engineer may: (1) consult with SHPO, THPO, or Tribes during the NWP review process or (2) the district engineer may assert its discretionary authority to require an individual permit for the proposed activity and initiate consultation through the individual permit process. Option 2 would only be used if there is value added that compensates for the increase in workload due to processing more SIPs. If the consultation would be conducted under the NWP process without the district asserting discretionary authority to require an SIP, then the applicant would be notified that the activity could not be verified under the NWP until all Section 106 requirements have been satisfied.

6.2 Local Operating Procedures for National Historic Preservation Act

The district engineer would ensure that NWP 14 complies with section 106 of the National Historic Preservation Act of 1966, as amended, and its implementing regulation 36 C.F.R. Part 800: Protection of Historic Properties (amended August 5, 2004), and Appendix C (33 U.S.C. 325): Procedures of Historic Properties. Under section 106, federal agencies are prohibited from approving any federal “undertaking” (e.g., the issuance of any license, permit, or approval) without taking into account the effects of the undertaking on the historic properties, and affording the ACHP a reasonable opportunity to comment on the undertaking. In order to comply with section 106, the Corps, if evaluating an undertaking, must go through the process outlined in the ACHP’s regulations at 36 C.F.R. Part 800 and Appendix C. Pursuant to 36 C.F.R. § 800.4, 800.5, and 800.6, the Los Angeles District is required to consult with the SHPO, or tribal equivalent, THPO, if the undertaking would result in a “No Effect”, “No Adverse Effect”, or “Adverse Effect” to Historic Properties. The district engineer must (a) determine the permit area/APE; (b) identify historic properties within the permit area/APE; and (c) determine whether those properties are listed or eligible for listing in the NRHP. If the district engineer determines that NWP 14 would have no potential to cause effects to Historic Properties a memorandum for the record would be prepared and no further consultation with the SHPO/THPO or recognized tribes would need to occur.

7.0 Government-to-Government Consultation with Indian Tribes

7.1 Summary of the Consultation Process

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

7.2 Local Operating Procedures for Protecting Tribal Resources

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

8.0 Essential Fish Habitat

Pursuant to the Magnuson-Stevens Fishery Management and Conservation Act, Federal agencies are required to consult with the National Marine Fisheries Service (NMFS) for actions that may adversely affect essential fish habitat (EFH). The marine and estuarine waters within the Los Angeles District contain designated EFH, which are administered by four fishery management plans (FMP): the Pacific Groundfish FMP, the Highly Migratory Species FMP, the Pacific Coast Salmon FMP, and the Coastal Pelagic Species FMP. The Los Angeles District's Regional Condition 4b requires submission of a PCN for any NWP authorization in EFH. A similar PCN requirement has been in place since the issuance of the 2002 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 Los Angeles District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: The effects are anticipated to be the same as those discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: The effects are anticipated to be the same as those discussed in the national decision document with the difference that any environmental concerns are expected to be minor because of the small number of NWP 23 permit confirmations issued in the Los Angeles District.
- (e) Wetlands: Same as discussed in the national decision document. Since the Corps has used NWP 23 in the Los Angeles District only once in the last five years with 0.16-acres of impacts to waters of the U.S. there is a limited NWP 23 record of wetlands impacts and mitigation for such activities from 2007 to 2012.
- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.

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

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

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: The effects to the substrate are anticipated to be less adverse than those discussed in the national decision document because of the rarity of NWP 23 use in the Los Angeles District.

(b) Suspended particulates/turbidity: The effects to turbidity are anticipated to be less adverse than those discussed in the national decision document because of the rarity of NWP 23 use in the Los Angeles District.

(c) Water: The effects to water are anticipated to be less adverse than those discussed in the national decision document because of the rarity of NWP 23 use in the Los Angeles District.

(d) Current patterns and water circulation: The effects to current patterns and circulation are anticipated to be less adverse than those discussed in the national decision document because of the rarity of NWP 23 use in the Los Angeles District.

(e) Normal water level fluctuations: The effects are anticipated to be the same as those discussed in the national decision document.

(f) Salinity gradients: The effects are anticipated to be the same as those discussed in the national decision document. Salinity gradients are largely driven by large-scale processes like tidal flushing and wind-driven circulation rather than localized construction and in-water operations.

(g) Threatened and endangered species: The Los Angeles District believes that NWP General Condition 18 provides the necessary legal protection required to comply with the ESA and that the proposed Regional Conditions 4 and 5 would provide additional protection to waterways or watersheds within Los Angeles District supporting areas of high physical and biological functions. The Los Angeles District recognizes that verifying authorization for specific activities through our NWP program is a federal activity under the ESA. As such, when those activities “may affect” listed species or “may destroy or adversely modify” designated critical habitat, the Los Angeles District has the responsibility to consult with the Service(s) pursuant to Section 7 of the ESA before final verification of authorization by a NWP can be granted. Specifically, General Condition 18 of the NWP program prohibits authorization of any activity that may affect a federally listed species or designated critical habitat unless and until Section 7 consultation has been completed or a “no effect” determination has been made by the Los Angeles District. Consequently, the Los Angeles District ensures that all NWP actions that may affect a federally

listed species or critical habitat are in compliance with the ESA through consultation with the Service(s) on a project-specific basis.

(h) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: The effects are anticipated to be similar to those discussed in the national decision document. Projects conducted in tidal areas have the potential to affect habitat for fish and other aquatic organisms by affecting characteristics like water quality, turbidity, the mixing zone, and substrate. In addition, structures and discharges in tidal waters may permanently alter site bathymetry, altering current patterns, introducing shading effects, and introducing potential contaminants to the aquatic environment. However, most of these habitat characteristics are driven by large-scale processes like tidal flushing, wind-driven circulation, and geological processes in the littoral zone, and seasonal patterns in biological and meteorological activity rather than by localized construction or operations. Effects on habitat for fish and other aquatic organisms would generally be temporary and localized, often resulting from temporary changes in turbidity and circulation during construction. Changes to habitat would be considered “effects” to EFH that the Los Angeles District would address pursuant to the MSFCMA.

(i) Other wildlife: The effects are anticipated to be the same as those discussed in the national decision document.

(j) Special aquatic sites: Regional Condition 4 requires notification to the Los Angeles District for all projects in wetlands, mudflats, vegetated shallows and riffle and pool complexes as defined at 40 CFR Part 230.40-230.45 within the State of Arizona and desert regions of California. Implementation of the notification process will ensure that proposed projects are subject to review and determined to result in only minimal individual and cumulative impacts to special aquatic sites before being authorized to proceed under NWP 23. The Corps has issued a Regional Guidance Letter (RGL 05-07) that approves CEs for three Federal agencies for NWP 23 and the agencies include the U.S. Coast Guard (USCG), the Bureau of Reclamation (BOR), and the Federal Highways Administration (FHWA). RGL 05-07 does require additional notification to the Corps from the USCG for projects in wetlands and from the BOR for activities with the potential to cause more than minor water quality impacts. The notification requirement from both the Regional conditions and RGL 05-07 will also facilitate Los Angeles District’s efforts to achieve no net loss of special aquatic sites and to comply with local interagency protocols and policies for addressing invasive marine species and submerged aquatic vegetation issues.

The potential impacts to specific types of special aquatic sites are discussed below:

(1) Sanctuaries and refuges: Because NWP 23 authorizes approved CEs and would be subject to NWP General Conditions and the Los Angeles District’s regional conditions; it will have minimal individual and cumulative adverse effects on aquatic resources within sanctuaries and refuges designated by federal, state, or local laws and ordinances.

(2) Wetlands: Because NWP 23 authorizes approved CEs in the Los Angeles District and would be subject to NWP General Conditions and the Los Angeles District’s Regional Conditions 2, 4 and 5. NWP 23 will have minimal individual and cumulative adverse

effects on wetlands. Also RGL 05-07 does have a notification requirement with the USCG for activities in wetlands.

(3) Mud flats: Because NWP 23 authorizes approved CEs that would be subject to NWP General Conditions and the Los Angeles District's Regional Conditions 4 and 5; NWP 23 will have minimal individual and cumulative adverse effects on mudflats.

(4) Vegetated shallows: Because NWP 23 authorizes approved CEs that generally do not occur in vegetated shallows, requires notification to the Corps when certain activities are conducted in areas inhabited by aquatic vegetation, and would be subject to NWP General Conditions and the Los Angeles District's Regional Conditions 4 and 5, NWP 23 will have minimal individual and cumulative adverse effects on vegetated shallows.

(5) Coral reefs: NWP 23 authorizes approved CEs that occur in the vicinity of coral reefs. The Los Angeles District has no coral reefs within its boundaries. NWP 23 will have no individual and/or cumulative adverse effects on coral reefs in the Los Angeles District.

(6) Riffle and pool complexes: NWP 23 authorizes approved CEs in the Los Angeles District and would be subject to NWP General Conditions and the Los Angeles District's regional conditions. NWP 23 will have minimal individual and cumulative adverse effects on riffle and pool complexes.

(k) Municipal and private water supplies: The effects are anticipated to be the same as those discussed in the national decision document.

(l) Recreational and commercial fisheries: The effects are anticipated to be the same as those discussed in the national decision document. Projects conducted in tidal areas have the potential to affect habitat for fish and other aquatic organisms by affecting characteristics like water quality, turbidity, the mixing zone, and substrate as discussed above. In addition, structures and discharges in tidal waters may permanently alter site bathymetry, altering current patterns, introducing shading effects, and introducing potential contaminants to the aquatic environment. Effects on habitat for fish and other aquatic organisms would generally be temporary and localized, often resulting from changes in turbidity and circulation during construction. Changes to habitat would be considered "effects" to EFH that the Los Angeles District would have to address pursuant to the MSFCMA. Any effects to aquatic habitat could potentially affect recreational or commercial fisheries by affecting fish stocks. Consequently, Regional Condition 4 and the reporting requirements of NWP 23 would ensure project-related impacts to recreational or commercial fisheries are minimal, both individually and cumulatively. The notification process would also allow coordination with the NMFS to ensure all appropriate measures are taken to protect EFH resources and fisheries.

(m) Water-related recreation: The effects are anticipated to be similar to those discussed in the national decision document, but more minimal in nature given the extremely small number of NWP 23 approved CEs in the Los Angeles District.

(n) Aesthetics: The effects are anticipated to be similar to those discussed in the national decision document, but more minimal in nature given the small number of approved NWP 23 approved CEs in the Los Angeles District.

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: As stated in the preceding sections, Los Angeles District Regional Conditions 4 and 5 would help the Los Angeles District to protect aquatic resources by ensuring minimal individual and cumulative impacts and coordination with the NMFS and other agencies responsible for parks and similar areas. As a result, adverse effects to sensitive areas such as parks, national and historic monuments, national seashores, wild and scenic rivers, wilderness areas, and research sites would be minimal both individually and cumulatively.

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 Los Angeles District's permit actions are tracked using the ORM (OMBIL Regulatory Module) database. This includes both temporary and permanent impacts, as well as any compensatory mitigation required. Impact and mitigation data was collected for the period of Fiscal Year 2009 through 2011 to provide a reasonable basis to examine the cumulative effects of each NWP as well as the NWP Program as a whole within the Los Angeles District. Due to the very infrequent use of NWP 23 within the Los Angeles District, it is difficult to make accurate assessments of its use and impacts within the Los Angeles District. Based on an analysis of the types of activities authorized by the Los Angeles District during this period, the Los Angeles District estimates that this NWP will be used less than once per year, resulting in the loss of approximately 0 acres of waters of the United States on an annual basis. To ensure that these activities result in minimal adverse effects on the aquatic environment, individually and cumulatively, the Los Angeles District estimates that approximately 0 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.

10.0 List of Final Corps Regional Conditions for NWP 23

10.1 Regional condition 1

For all activities in waters of the U.S. that are suitable habitat for federally-listed fish species, the permittee shall design all road crossings to ensure that the passage and/or spawning of fish is not hindered. In these areas, the permittee shall employ bridge designs that span the stream or river, including pier- or pile-supported spans, or designs that use a bottomless arch culvert with a natural stream bed, unless determined to be impracticable by the Corps.

10.2 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).

10.3 Regional condition 3

When a pre-construction notification (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 South Pacific Division 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 project 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 Los Angeles District shall comply with the most current version of the *Map and Drawing Standards for the Los Angeles District Regulatory Division* (available on the Los Angeles District Regulatory Division website at: www.spl.usace.army.mil/regulatory/); and
- c. Numbered and dated pre-project color photographs showing all waters proposed to be impacted on 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.

10.4 Regional condition 4

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

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

10.5 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 NWP 5, 6, and 27 with the submission of a PCN in accordance with General Condition 31 and Regional Condition 3.

10.6 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.

10.7 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 NWPs or NWP-eligible activities than under the 2007 NWPs.

Upon publication of the final rule in the February 21, 2012, issue of the Federal Register (77 FR 10184), the Los Angeles District again provided letters to each of the seven tribes with 401 authority, and the State of Arizona requesting final 401 certification of the 2012 NWPs within their respective geographic areas of responsibility. Copies of the final regional conditions for the Los Angeles District were also provided. Similarly, the Los Angeles District provided a letter to the CCC on behalf of both coastal districts in California requesting final CZMA consistency certification of the 2012 NWPs and the respective regional conditions (copies of the letters are provided in Section IV). Each tribe and the State of Arizona have 60 days to issue, waive or deny certification for any or all of the 2012 NWPs. The CCC has 90 days to make their final determination. Due to the fact that the final rule was published on February 21, 2012, there is not sufficient time to allow the full 60- or 90-day review period before the 2012 NWPs are scheduled

to go into effect on March 19, 2012. Therefore, the final outcome of 401 and CZMA certification within in the Los Angeles District is uncertain. Individual certifications will be required for any action authorized under the 2012 NWPs where applicable (i.e. projects within or affecting the Coastal Zone and/or projects that may affect water quality) until final determinations are provided by the respective state/tribal authorities.

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

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP.

Based on an analysis of the types of activities authorized by the Los Angeles District during the period of fiscal year 2009 through 2011, the Los Angeles District estimates that this NWP will be used approximately five times in total, resulting in no permanent loss of waters of the United States. To ensure that these activities result in minimal adverse effects on the aquatic environment, individually and cumulatively, the Los Angeles District will implement the regional conditions as well as the NEP program General Conditions and the terms and conditions of NWP 23 itself. Because it authorizes both existing, expanding existing, and new operations, the Los Angeles District estimates that little to no compensatory mitigation will be required to offset impacts resulting from NWP 23. Currently the Corps has issued only one NWP 23 permit confirmation for approved CEs and only 0.16-acres acres of impacts have occurred within the last five years.

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 7.0 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 the general conditions, the regional conditions discussed in this document and the pre-construction notification requirements of the NWP.

Through the pre-construction notification process, the Los Angeles District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual

and cumulative adverse effects on the aquatic environment.

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.