

## **SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 31**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 31, and addresses the regional modifications and conditions for this NWP. The South Pacific Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

### Text of NWP 31:

*Maintenance of Existing Flood Control Facilities.* Discharges of dredged or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, levees, and channels that: (i) were previously authorized by the Corps by individual permit, general permit, or 33 CFR 330.3, or did not require a permit at the time they were constructed, or (ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the “maintenance baseline,” as described in the definition below. Discharges of dredged or fill materials associated with maintenance activities in flood control facilities in any watercourse that have previously been determined to be within the maintenance baseline are authorized under this NWP. To the extent that a Corps permit is required, this NWP authorizes the removal of vegetation from levees associated with the flood control project. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses except when these activities have been included in the maintenance baseline. All dredged material must be placed in an area that has no waters of the United States or a separately authorized disposal site in waters of the United States, and proper siltation controls must be used.

Maintenance Baseline: The maintenance baseline is a description of the physical characteristics (e.g., depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the district engineer. The district engineer will approve the maintenance baseline based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels but which are part of the facility. The prospective permittee will provide documentation

of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the impacts to the aquatic environment are minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner.

Mitigation: The district engineer will determine any required mitigation one-time only for impacts associated with maintenance work at the same time that the maintenance baseline is approved. Such one-time mitigation will be required when necessary to ensure that adverse environmental impacts are no more than minimal, both individually and cumulatively. Such mitigation will only be required once for any specific reach of a flood control project. However, if one-time mitigation is required for impacts associated with maintenance activities, the district engineer will not delay needed maintenance, provided the district engineer and the permittee establish a schedule for identification, approval, development, construction and completion of any such required mitigation. Once the one-time mitigation described above has been completed, or a determination made that mitigation is not required, no further mitigation will be required for maintenance activities within the maintenance baseline. In determining appropriate mitigation, the district engineer will give special consideration to natural water courses that have been included in the maintenance baseline and require compensatory mitigation and/or best management practices as appropriate.

Emergency Situations: In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer before any maintenance work is conducted (see general condition 31). The pre-construction notification may be for activity-specific maintenance or for maintenance of the entire flood control facility by submitting a five-year (or less) maintenance plan. The pre-construction

notification must include a description of the maintenance baseline and the dredged material disposal site. (Sections 10 and 404)

Summary of changes to NWP 31 from 2007:

Language has been added that states, in those cases where a Corps permit is required, NWP 31 authorizes the removal of vegetation from levees associated with a flood control project.

**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 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 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.

### **3.1.2 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**

NWP 31 already requires a pre-construction notification for all actions that propose to be authorized through NWP 31. Furthermore, in accordance with General Condition 18(c), non-Federal permittees must submit a PCN to the DE if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the DE that the requirements of the Endangered Species Act (ESA) have been satisfied and that the activity is authorized. In addition, in accordance with General Condition 20(c), non-Federal permittees must submit a PCN to the DE if the authorized activity may have the potential to cause effects to any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties.

Notification: The permittee must submit a pre-construction notification to the district engineer before any maintenance work is conducted (see general condition 31). The pre-construction notification may be for activity-specific maintenance or for maintenance of the entire flood control facility by submitting a five-year (or less) maintenance plan. The pre-construction notification must include a description of the maintenance baseline and the dredged material disposal site. (Sections 10 and 404)

## **4.0 Alternatives**

### **4.1 No Regional Conditions**

Per NWP General Condition 27, *Regional and Case-By-Case Conditions*, the Corps may issue conditions on a regional basis. For the most part, the regional conditions are not applicable to NWP 31. Use of NWP 31 already requires a pre-construction notification to the district engineer pursuant to Nationwide Permit General Condition 31, and will not involve new permanent fills. Use of NWP 31 applies to only existing approved flood control facilities where a pre-construction notification has already been submitted to the district engineer. Consequently, Regional Conditions 1, 2, 4, 5, 6, 7, and 9 do not alter the requirements for NWP 31. Only Regional Conditions 3, 8 and 10 apply directly to NWP 31.

Use of the proposed NWP 31 is limited to aquatic resources previously disturbed by the original construction of flood control facilities, including debris basins, retention/detention basins, levees, and channels that were previously authorized. As a result, these areas typically support reduced physical and biological functions. In some cases, the jurisdictional areas support no vegetation,

exhibit substantial changes in hydrology, and have limited nutrient cycling functions. Use of NWP 31 requires the applicant to submit a pre-construction notification to the district engineer, pursuant to General Condition 31. Due to the reduced physical and biological functions in these disturbed jurisdictional areas and the requirement for a pre-construction notification before commencement of the activity to allow for the DE to condition the authorization, NWP 31 should result in minimal impacts, both individually and cumulatively, in the majority of the Los Angeles District (LAD).

In some cases, NWP 31 may have more than minimal impacts, individually and cumulatively, to waters of the United States. The use of NWP 31 can still have more than minimal impacts if the submitted information does not accurately describe the conditions. The purpose of Regional Condition 3 is for the district engineer to have better information when making decisions authorizing a NWP, conditionally authorizing a NWP, or requiring an individual permit. Without this condition, the LAD is more likely to authorize a project that has greater than minimal adverse impacts, to require inappropriate mitigation, or to require an individual permit even though impacts to aquatic resources are minimal. As a result, without Regional Condition 3, NWP 31 may not avoid and minimize impacts to waters of the United States to the maximum extent practicable.

With no regional conditions, NWP 31 could have more than minimal impacts in some situations in the LAD. 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**

The notification threshold for NWP 31 is zero acre of impact to waters of the U.S. Districts are prohibited from increasing notification thresholds or acreage limitations beyond what is stipulated in the terms and conditions of each NWP.

Discharges of dredged or fill material authorized under NWP 31 are not limited to any specific acreage of waters of the U.S. or linear feet of intermittent streambed. The use of NWP 31 can be limited to projects impacting areas smaller than a specified acreage threshold or linear feet threshold, with or without notification. In such cases, NWP 31 could only be used for small flood control facilities and/or small areas within flood control facilities. Larger maintenance actions in existing flood control facilities where the construction activities would result in greater than minor impacts would require an individual permit. This modification would provide little additional protection to the aquatic ecosystem. Use of NWP 31 is already limited to aquatic resources previously disturbed by the original construction of flood control facilities that were previously authorized and possess reduced physical and biological functions. Furthermore, it is predicted that most projects to be authorized under NWP 31 would only result in temporary impacts to waters of the United States. Additionally, use of NWP 31 already requires compliance with conditions on submittal of a pre-construction notification and does not authorize the removal of sediment and associated vegetation from the natural water courses except that has been included in the maintenance baseline. With the requirement to provide pre-construction notification, the LAD is provided the opportunity to determine whether a proposed use of NWP

31 would result in more than minimal impact to the aquatic ecosystem, and if so, take discretionary authority and require the more rigorous SIP review process. As a result, this proposed modification of specifying acreage or length limits would unnecessarily increase workload and would result in minimal environmental benefits to the aquatic ecosystem, given the existing terms of the NWP, general conditions, and the relevant regional condition required for the use of this NWP.

An alternative regional limit would prohibit the use of NWP 31 in all special aquatic sites in the LAD. Due to the loss of approximately 90 percent of the wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region there could be a need for the review of any project which 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 occur on or to special aquatic sites. However, as discussed above, NWP 31 would only impact previously disturbed areas that support depressed physical and biological functions. Furthermore, it is predicted that most projects to be authorized under NWP 31 would only result in temporary impacts to waters of the United States. Additionally, use of NWP 31 already requires submittal of a pre-construction notification and does not authorize the removal of sediment and associated vegetation from the natural watercourses except that has been included in the maintenance baseline. A regional condition that precludes all discharges in special aquatic sites would unnecessarily increase workload by requiring an individual permit on all such projects, including those with temporary impacts in disturbed areas. As a result, this proposed modification would not be practicable and would result in minimal environmental benefits to the aquatic ecosystem.

Based on the analysis above, this regional limit alternative has been dismissed from further consideration.

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

To further ensure NWP 31 would result in minimal impacts to the aquatic ecosystem, both individually and cumulatively, the LAD could augment the pre-construction notification requirements for NWP 31 by forwarding the pre-construction notifications to the resource agencies following the procedures outlined in General Condition 31 (notification). Forwarding pre-construction notifications to the agencies for all maintenance projects in existing flood control facilities would represent a substantial increase in workload with minimal benefits to the aquatic environment. The work would be in aquatic systems previously impacted by authorized flood control facility construction and would have depressed hydrological, biogeochemical, and habitat functions. The extra work in coordinating with the resource agencies and incorporating their comments in the decision would not result in commensurate environmental benefits. As a result, the LAD has determined that the above alternative notification requirements would not be practicable and would result in minimal benefits to the aquatic ecosystem.

Based on the analysis above, the “Alternative Regional Nationwide Permit Conditions” alternative has been dismissed from further consideration.

## 5.0 Endangered Species Act

### 5.1 General Considerations

NWP 31 authorizes the discharge of fill material for the maintenance of existing flood control facilities, including debris basins, retention/detention basins, levees, and channels. To avoid and minimize impacts to the aquatic environment, the terms and conditions for NWP 31 contain several restrictions including requirements for a pre-construction notification, conformance to a maintenance baseline, and disposal of dredged materials in upland or approved disposal sites. With these constraints, NWP 31 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 with regard to NWP 31, there would be more than minimal impacts only in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. 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 31 would have minimal impacts, both individually and cumulatively, to threatened and endangered species in the Los Angeles District.

In the past three years, the Los Angeles District has consulted twice with NMFS, and 10 times with the USFWS regarding NWP 31 requests. For the NMFS, both informal consultations were for the Steelhead (*Oncorhynchus mykiss*). One informal consultations was for the Steelhead alone and one was in combination with the USFWS for the Least Bell's Vireo (*Vireo bellii pusillus*), La Graciosa Thistle (*Cirsium loncholepis*), Tidewater Goby (*Eucyclogobius newberryi*), and California Red-Legged Frog (*Rana draytonii*). The consultation results were that the agency took no action and the NMFS/USFWS consultation resulted in no jeopardy/no adverse modification, and not likely to adversely affect the listed species, respective

For the USFWS, there were five formal and five informal consultations. Species consulted during formal consultation included the Least Bell's Vireo, Arroyo Toad (*Bufo californicus*), San Bernardino Kangaroo Rat (*Dipodomys merriami parvus*), California Red-Legged Frog, Southwestern Willow Flycatcher (*Empidonax traillii extimus*), Coastal California Gnatcatcher (*Poliophtila californica*), and Unarmored Threespine Stickleback (*Gasterosteus aculeatus williamsoni*). The results were that there was no jeopardy/no adverse modification to the listed species.

For the five informal USFWS informal consultations, additional consulted species included California least Tern (*Sterna antillarum browni*), Yuma clapper Rail (*Rallus longirostris yumanensis*), and the American bald eagle (*Haliaeetus leucocephalus*). The informal consultation results were that the Federal actions were not likely to adversely affect, and no effect to the listed species.

In Southern California, the public is generally aware of the need to contact the USFWS and NMFS for relevant projects. The Los Angeles District has substantial information, including

maps, previous studies, and survey data that document areas that support federally listed species and designated critical habitat. In addition, the Los Angeles District attempts to inform all prospective applicants of the need to comply with the ESA. If the Los Angeles District has no available species data for a proposed project, the applicant may be referred to the USFWS or NMFS for additional information. When the Los Angeles 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 Los Angeles District has coordinated with the USFWS to complete programmatic consultations for several endangered or threatened 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 Los Angeles District would ensure all Federal project activities authorized under the NWPs comply with the ESA and use of the NWPs shall be determined to have minimal impacts on threatened and endangered species in the Los Angeles District, as required by the ESA).

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

The Los Angeles District has various procedures for ensuring compliance with the ESA. SLOPES formalizes additional procedures to enable agencies to ensure better compliance 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 Los Angeles District and the USFWS, Ventura Office finalized SLOPES for informal and formal ESA consultations. In addition, some 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 Los Angeles District and NMFS. The Los Angeles District has conducted several preliminary meetings with USFWS and NMFS staff to determine the direction of further SLOPES discussions, and additional meetings will be conducted in the future.

## **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 LAD 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 NWP. 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: Because NWP 31 would typically impact areas that have been previously disturbed by construction activities, there would be minimal impacts, both individually and cumulatively, to aquatic resources throughout the LAD. This NWP does not authorize the removal of sediment and associated vegetation from the natural watercourses except that has been included in the maintenance baseline. Thus, the use of NWP 31 will not result in new impacts to pristine aquatic resources; impacts will be associated with maintenance of existing flood control facilities, which typically exhibit depressed physical and biological functions. Furthermore, use of NWP 31 involves a pre-construction notification requirement to the district engineer with a regional condition requiring a statement describing how adverse effects to waters have been avoided and minimized, detailed drawings, and color photograph documentation. Due to the types of disturbed aquatic resources impacted by NWP 31 and the above conditions, NWP 31 would result in minimal impacts to conservation, both individually and cumulatively.

(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 LAD, there is a large number of threatened and endangered species that occur and/or exist in the region, which requires extensive coordination with USFWS and NMFS, per the Endangered Species Act. In addition, the semi-arid environment limits the number of special aquatic sites in the southern California/Arizona area. With the continuation of the existing informal coordination procedures and with the inclusion of the proposed pre-construction notification requirements, NWP 31 would have only minimal impacts on general environmental resources in the LAD. The majority of the activities authorized under NWP 31 are utilized for projects that occur in areas that are part of existing flood control facilities that have been previously disturbed and exhibit relatively low physical and biological functions. In addition, this NWP does not authorize the removal of sediment and associated vegetation from the natural watercourses except that has been included in the maintenance baseline. Furthermore, use of NWP 31 involves a pre-construction notification requirement to the district engineer with a regional condition requiring a statement describing how adverse effects to waters have been avoided and minimized, detailed drawings, and color photograph documentation. As a result, NWP 31 would have minimal impacts to environmental resources in the Los Angeles District.

(e) Wetlands: In the LAD, the semi-arid climate limits the extent and number of wetland resources. This scarcity of wetlands is especially evident in Arizona and in the desert regions of California. In these areas, annual precipitation is usually below 10 inches, which precludes the

development of wetlands in the majority of these desert regions. As a result, special aquatic sites (which include wetlands) are rare in the LAD and warrant more rigorous protection. With respect to NW31, use of NWP 31 in the Los Angeles District is often limited to jurisdictional areas that support aquatic resources that have been previously disturbed by the original construction of a particular flood control and/or transportation structure. In most cases, NWP 31 authorizes maintenance activities in disturbed areas typically supporting reduced physical and biological functions. Furthermore, this NWP does not authorize the removal of sediment and associated vegetation from the natural watercourses except that has been included in the maintenance baseline. In addition, use of NWP 31 involves a pre-construction notification requirement to the district engineer with a regional condition requiring a statement describing how adverse effects to waters have been avoided and minimized, detailed drawings, and color photograph documentation. This provides an opportunity for the district engineer to determine whether the proposed use of NWP 31 would result in more than minimal adverse effect on the aquatic ecosystem, and if so, take discretionary authority and require the more rigorous SIP review process. Lastly, for the establishment of the maintenance baseline, mitigation for wetlands would be required to ensure that adverse environmental impacts are not more than minimal, both individually and cumulatively.

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

(g) Fish and wildlife values: NWP 31 would typically impact areas that have been previously disturbed by construction activities, which have lesser fish and wildlife values. This NWP does not authorize the removal of sediment and associated vegetation from the natural watercourses except that has been included in the maintenance baseline. Thus, the use of NWP 31 would not result in new impacts to pristine habitats; impacts will be associated with maintenance of existing flood control facilities, which typically exhibit reduced physical and biological functions. Furthermore, use of NWP 31 involves a pre-construction notification requirement to the district engineer with a regional condition requiring a statement describing how adverse effects to waters have been avoided and minimized, detailed drawings, and color photograph documentation. This provides an opportunity for the district engineer to determine whether the proposed use of NWP 31 would result in more than minimal adverse effect on the aquatic ecosystem, and if so, take discretionary authority and require the more rigorous SIP review process. Due to the types of disturbed aquatic resources impacted by NWP 31 and the above conditions, NWP 31 would result in minimal impacts to fish and wildlife, both individually and cumulatively.

(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 flood control facilities, NWP 31 provides long-term benefits by reducing flood hazards in the LAD. In the past, NWP 31 has been an important regulatory tool to authorize the maintenance of existing flood control facilities in preparation for El Niño rainfall events. Furthermore, the proposed modification of NWP 31 would allow work to proceed in emergency situations where a maintenance baseline has not been established when there is an unacceptable hazard to life, significant loss of property, and/or significant economic hardship, as

long as a maintenance baseline and mitigation are determined after the emergency. The effects on flood hazards would be beneficial, both individually and cumulatively.

(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: Same as discussed in the national document.

(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. To ensure minimal impacts, the use of NWP 31 requires all dredged material to be placed in upland sites or an authorized disposal site in waters of the U.S. incorporating proper siltation controls. In addition, the use of NWP 31 requires BMPs to be included in the documentation of the maintenance baseline to ensure impacts are minimal. Furthermore, the required 401 water quality certification would ensure long-term minimal impacts to water quality in the rivers and streams of the LAD. With the implementation of the above conditions, NWP 31 would have minimal impacts, both individually and cumulatively, to water quality.

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

(q) Safety: With the dynamic storm season typical of southern California and parts of Arizona, large floods are a normal part of the hydrologic regime. With the maintenance of existing structures in stream channels, NWP 31 provides long-term benefits by reducing safety hazards in the LAD. In the past, NWP 31 has been an important regulatory tool to authorize the maintenance of existing flood control facilities in preparation for El Niño rainfall events, protecting properties and people. Furthermore, the proposed modification of NWP 31 would allow work to proceed in emergency situations where a maintenance baseline has not been established when there is an unacceptable hazard to life, significant loss of property, and/or significant economic hardship, as long as a maintenance baseline and mitigation are determined after the emergency. The effects on safety would be beneficial, both individually and cumulatively.

(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 31, only short-term impacts to channel substrate in the flood control facility would occur. Nationwide Permit 31 can only be used in areas already modified for the purpose of creating a flood control facility (including debris basins, retention/detention basins, levees, and channels). With the original construction of the facility, the natural channel morphology has been permanently altered. Subsequent maintenance activities in existing flood control facilities would result in minimal changes to disturbed channel reaches, because this NWP does not authorize the removal of sediment and associated vegetation from the natural water courses except that has been included in the maintenance baseline. In addition, use of NWP 31 requires submittal of a pre-construction notification to the district engineer with a regional condition requiring a statement describing how adverse effects to waters have been avoided and minimized, detailed drawings, and color photographs. With the inclusion of the above requirements, NWP 31 would result in minimal impacts to channel substrate, individually and cumulatively.

(b) Suspended particulates/turbidity: In the heavily populated areas of southern California and Arizona, existing turbidity levels in most rivers is impaired by runoff from upland agricultural, residential, and industrial sources. Short-term construction activities related to maintenance of existing flood control facilities augment turbidity levels in waters of the United States. However, these activities would generally result in only short-term minor changes in turbidity. To ensure minimal impacts, the use of NWP 31 requires all dredged material to be placed in upland sites or an authorized disposal site in waters of the U.S. incorporating proper siltation controls. In addition, the use of NWP 31 requires BMPs to be included in the documentation of the maintenance baseline to insure impacts are minimal. Furthermore, the required 401 water quality certification would ensure long-term minimal impacts to turbidity and suspended sediment loads in the rivers and streams of the LAD. With the implementation of the above conditions, NWP 31 would have minimal impacts, individually and cumulatively, on turbidity levels in waters of the United States within the LAD.

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

(d) Current patterns and water circulation: NWP 31 can only be used in areas already hydrologically modified for the purpose of creating a flood control facility. With the original construction of a flood control facility (including debris basins, retention/detention basins, levees, and channels), natural current patterns and water circulation have been permanently altered. This NWP would only result in hydrological modifications related to re-establishing design physical characteristics, because this NWP does not authorize the additional removal of sediment and associated vegetation from the natural water courses except that has been included in the maintenance baseline. In addition, use of NWP 31 requires submittal of a pre-construction

notification to the district engineer with a regional condition requiring a statement describing how adverse effects to waters have been avoided and minimized, detailed drawings, and color photographs. With the inclusion of the above provisions, NWP 31 would have minimal impacts, both individually and cumulatively, on current patterns and circulation in waters of the United States.

(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: As stated above, the majority of the activities that could be authorized under NWP 31 would take place in waters of the United States already modified for the purpose of creating a flood control facility (including debris basins, retention/detention basins, levees, and channels). These disturbed areas typically support habitat that is less suitable for most native, sensitive species. These types of maintenance activities are generally less likely to affect threatened and endangered species and result in short-term minor impacts to the particular threatened or endangered species, if at all. Nevertheless, given the large number of threatened and endangered species in the LAD, continued coordination with USFWS and NMFS is required to ensure minimal impacts to threatened and endangered species pursuant to General Condition 17. With the continuation of existing coordination procedures and the pre-construction notification requirements and the additional regional condition requiring a statement describing how adverse effects to waters have been avoided and minimized, detailed drawings, and color photograph documentation, the use of NWP 31 would have minimal impacts on threatened and endangered species in the LAD, both individually and cumulatively (see the above discussion in section 5.0).

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

(1) Sanctuaries and refuges: Same as discussed in the national document.

(2) Wetlands: In the LAD, the existing semi-arid climate limits the extent and number of wetland resources. This scarcity of wetlands is especially evident in Arizona and in the desert regions of California. In these areas, annual precipitation is usually below 10 inches, which precludes the development of wetlands in the majority of these desert regions. Furthermore, approximately 90 percent of wetlands in California have been adversely affected by historic conversion to agricultural uses, grading, and filling activities. As a result, wetland areas are especially rare in the LAD and warrant more rigorous protection. To ensure minimal impacts to wetland resources, NWP 31 has been developed to allow maintenance work only in existing flood control facilities, which

already have significant modifications and reduced biological, chemical, and physical functions. Based on a review of permit data from the period of fiscal year 2009 through 2011, use of NWP resulted in 0.1 acre of impact to wetland waters of the U.S. for the entire period, for which 0.3 acre of wetland enhancement or establishment was required. NWP 31 does not authorize the additional removal of sediment and associated vegetation from waters of the U.S. except that has been included in the maintenance baseline. Use of NWP 31 requires the submittal of a pre-construction notification to the district engineer with a statement describing how adverse effects to waters have been avoided and minimized, detailed drawings, and color photographs as required by Regional Condition 3. To ensure minimal impacts, both individually and cumulatively, the Corps could require compensatory mitigation to offset any permanent loss of physical and biological functions associated with the proposed maintenance activities. The Corps would also take discretionary authority and require the more rigorous SIP review process if the proposed use of NWP 31 would result in more than minimal adverse effect to the aquatic ecosystem. Due to the restrictions of use of NWP 31 and the general and regional conditions, the proposed NWP 31 would have only minimal impacts, both individually and cumulatively, to wetlands in the LAD.

(3) Mud flats: In the LAD, historic coastal development activities have reduced the extent and number of mud flat resources. As a result, about 90 percent of wetlands, including coastal wetlands and mud flats, in California have been affected by historic conversion to agricultural uses, and/or grading and filling activities. As a result, mud flat areas are especially rare in the LAD and warrant more rigorous protection. To ensure minimal impacts to mud flats, NWP 31 has been developed to allow maintenance work only in existing flood control facilities, which already have significant modifications and reduced biological, chemical, and physical functions. NWP 31 does not authorize the additional removal of sediment and associated vegetation from waters of the U.S. except that has been included in the maintenance baseline. Use of NWP 31 requires the submittal of a pre-construction notification to the district engineer with a statement describing how adverse effects to waters have been avoided and minimized, detailed drawings, and color photographs as required by Regional Condition 3. The Corps could require compensatory mitigation to offset any permanent loss of physical and biological functions associated with the proposed maintenance activities. Also, the Corps would take discretionary authority and require the more rigorous SIP review process if the proposed use of NWP 31 would result in more than minimal adverse effect to the aquatic ecosystem. Due to the restrictions of use of NWP 31 and the general and regional conditions, the proposed NWP 31 would have only minimal impacts to mudflats in the LAD.

(4) Vegetated shallows: In the LAD, historic construction activities have reduced the extent and number of vegetated shallows. As a result, approximately 90 percent of wetlands, including vegetated shallows, in California have been affected by historic conversion to agricultural uses, and/or grading and filling activities. As a result, vegetated shallows are especially rare in the LAD and warrant more rigorous protection. To ensure minimal impacts to vegetated shallows, NWP 31 has been developed to allow maintenance work only in existing flood control facilities, which already have substantial

modifications and reduced biological, chemical, and physical functions. NWP 31 does not authorize the additional removal of sediment and associated vegetation from waters of the U.S. except that has been included in the maintenance baseline. Use of NWP 31 requires the submittal of a pre-construction notification to the district engineer with a statement describing how adverse effects to waters have been avoided and minimized, detailed drawings, and color photographs as required by Regional Condition 3. The Corps could require compensatory mitigation to offset any permanent loss of physical and biological functions associated with the proposed maintenance activities. Also, the Corps would take discretionary authority and require the more rigorous SIP review process if the proposed use of NWP 31 would result in more than minimal adverse effect to the aquatic ecosystem. Due to the restrictions of use of NWP 31 and the general and regional conditions, the proposed NWP 31 would have only minimal impacts to vegetated shallows in the LAD.

(5) Coral reefs: Same as discussed in the national document.

(6) Riffle and pool complexes: In the semi-arid southern California and Arizona areas, limited water resources and the need for flood control have led to the construction of numerous dams in the mountains surrounding southern California and on the Colorado River in Arizona. With the construction of these large dams, many riffle-and-pool complexes have been eliminated by large reservoirs. Furthermore, construction of the dams modifies the hydrologic regime of the river, which can also degrade downstream riffle-and-pool complexes. As a result, riffle-and-pool complexes are especially rare in the LAD and warrant more rigorous protection. To ensure minimal impacts to riffle-and-pool complexes, NWP 31 has been developed to allow maintenance work only in existing flood control facilities, which already have significant modifications and reduced biological, chemical, and physical functions. NWP 31 does not authorize the additional removal of sediment and associated vegetation from waters of the U.S. except that has been included in the maintenance baseline. Use of NWP 31 requires the submittal of a pre-construction notification to the district engineer with a statement describing how adverse effects to waters have been avoided and minimized, detailed drawings, and color photographs as required by Regional Condition 3. The Corps could require compensatory mitigation to offset any permanent loss of physical and biological functions associated with the proposed maintenance activities. Also, the Corps would take discretionary authority and require the more rigorous SIP review process if the proposed use of NWP 31 would result in more than minimal adverse effect to the aquatic ecosystem. Due to the restrictions of use of NWP 31 and the general and regional conditions, the proposed NWP 31 would have only minimal impacts to riffle-and-pool complexes in the LAD.

(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. Based on an analysis of the types of activities authorized by the Los Angeles District during previous three years, the Los Angeles District estimates that this NWP will be used approximately 40 times per year, resulting the loss of approximately 0.15 acre of waters of the United States. The vast majority of impacts associated with NWP 31 are temporary impacts, which, based on the same analysis, totals approximately 318 acres on annual basis.

Based on a review of impacts authorized by the Los Angeles District from FY 2009-2011, impacts were categorized as a discharge of fill material into waters of the United States, and the excavation of fill material from waters of the United States. Total authorized impacts were approximately 830 acres and 122 acres, respective. It should be noted that for the three years of actions analyzed, one project alone (SPL-2008-00851) accounted for 788 acres of the 830 acres of discharge of fill material into waters of the United States. Thus, 82 actions authorized under SPL-2008-00851 accounted for 788 acres, and the remaining 8 actions accounted for 42 acres, an average of 5.25 acres of temporary impact per action. Excluding SPL-2008-00851, that averages approximately three actions and 14 acres of temporary impacts per year.

Furthermore, of the 122 acres of the excavation of fill material from waters of the United States, one project alone (SPL-2010-00488) accounted for 109 acres of the 122 acres of excavation associated with the discharge of fill material into waters of the United States. Thus, of the 20 actions permitted, 19 actions accounted for only 13 acres of excavation of fill material from waters of the United States, an average of 0.68 acres of temporary impact per action. Excluding SPL-2010-00488, an average of approximately 6 actions and 4 acres of temporary impact per year.

To ensure that these activities result in minimal adverse effects on the aquatic environment, individually and cumulatively, the Los Angeles District estimates that approximately 6 acres of compensatory mitigation will be required 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 Los Angeles District estimates that this NWP may be used approximately 200 times, resulting in temporary impacts to approximately 1,590 acres of waters of the United States. However, it should be noted that the use of NWP 31 would not result in new impacts to pristine habitats and temporal losses of aquatic functions due to these temporary impacts would be minimal as they would be associated with maintenance of existing flood control facilities, which

typically exhibit reduced physical and biological functions. Furthermore, this NWP does not authorize the removal of sediment and associated vegetation from the natural watercourses except that has been included in the maintenance baseline. Use of NWP 31 in the Los Angeles District is often limited to jurisdictional areas that support aquatic resources that have been previously disturbed by the original construction of a particular flood control and/or transportation structure. However, 30 acres of mitigation will be required 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 31**

### **10.1 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 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/](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.

### **10.2 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.

### **10.3 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 NWPs 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.

### **10.4 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**

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. 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.