

## **SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 34**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 34, 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 34:

*Cranberry Production Activities.* Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, must not exceed 10 acres of waters of the United States, including wetlands. The activity must not result in a net loss of wetland acreage. This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid.

Notification: The permittee must submit a pre-construction notification to the district engineer once during the period that this NWP is valid, and the NWP will then authorize discharges of dredge or fill material at an existing operation for the permit term, provided the 10-acre limit is not exceeded. (See general condition 31) (Section 404)

### Summary of changes to NWP 34 from 2007:

There are no changes to NWP 34 from the 2007 issuance.

## **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 NWP's, the Los Angeles District issued a public notice on February 25, 2011. The issuance of the NWP's was announced in the February 21, 2012, Federal Register notice (77 FR 10184). After the publication of the final NWP's, 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 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.

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

Nationwide Permit 34 requires that the permittee submit a pre-construction notification to the district engineer prior to commencing the activity at least once during the period that this NWP is valid, and the NWP will then authorize discharges of dredge or fill material at an existing operation for the permit term, provided the 10-acre limit is not exceeded. Consequently, regional conditions requiring NWP pre-construction notification within specific watersheds and essential fish habitat in the Los Angeles District (Regional Condition 4a-d) would not provide additional protection under NWP 34.

## **4.0 Alternatives**

### **4.1 No Regional Conditions**

NWP 34 would have the potential to result in more than minimal impacts on jurisdictional vernal pools, essential fish habitat and special aquatic sites as well as aquatic resources in Special Area Management Plans (SAMPs) 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. Without regional conditions there could be more than minimal impacts to waters of the U.S. that exhibit both high physical and biological functions. For this reason, the Los Angeles District has dismissed the “No Regional Conditions” alternative from further consideration.

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

To further ensure NWP 34 would have minimal impacts to aquatic resources, both individually and cumulatively, the Los Angeles District could augment the proposed notification requirements for NWP 34 by eliminating the use within special aquatic sites throughout the Los Angeles District, or by eliminating its use altogether and requiring all actions be evaluated under the standard individual permit program.

The number of special aquatic sites within the district is limited by the semi-arid climate where deep alluvial soils and groundwater recharge result in relatively small stream flows. To date, 90 percent of wetlands and 95 percent of vernal pools have been lost due to construction and agricultural activities in the Los Angeles District. Further loss of these special aquatic sites would result in more than minimal cumulative impacts. Elimination of use of NWP 34 within special aquatic sites in the Los Angeles District would theoretically help to ensure there would be no further loss of these resources under this NWP. However, given that there is no record of NWP 34 being used within the Los Angeles District (as the climatic conditions are not conducive to cranberry production), developing regional conditions that specifically address the implementation of NWP 34 is unnecessary.

Another alternative regional condition would prohibit the use of NWP 34 in the Los Angeles District. As with the previous alternative, elimination of NWP 34 would not offer additional protection to Los Angeles District aquatic resources, as this permit has never been issued by the

district and is not likely to be issued in the future due to the lack of the appropriate environment for the permitted activity. Based on the findings of the analyses above, alternative regional limits or pre-construction notification thresholds has been dismissed from further consideration.

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

No additional regional nationwide permit conditions were considered for NWP 34 given its lack of use within the Los Angeles District.

## **5.0 Endangered Species Act**

### **5.1 General Considerations**

NWP 34 authorizes the discharge of fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations. To avoid and minimize impacts to the aquatic environment, the terms and conditions for NWP 34 contain several restrictions including ensuring that the activity must not result in a net loss of wetland acreage. This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid. In addition, the new General and Regional Conditions would provide further limitations on the use of NWP 34 in sensitive aquatic ecosystems. With these constraints, NWP 34 would result in minimal adverse impacts to threatened and endangered species, both individually and cumulatively, in the majority of the Los Angeles District. With the inclusion of the notification requirements for NWP 34, any potential for 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 National Marine Fisheries Service (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 34 would have minimal impacts, both individually and cumulatively, to threatened and endangered species in the Los Angeles District.

In southern California, the large number of listed species has made the public more aware of the need to contact the USFWS and NMFS for many proposed projects. In addition, General Condition 18 requires the applicant to contact the Corps if their proposed project may affect a threatened or endangered species or critical habitat. The District has substantial information, including maps, previous studies and survey data that document areas that support endangered species. The District is also very careful to inform all prospective applicants of the need to comply with the ESA. If the District has no available data for a proposed project, the applicant may be referred to the USFWS or NMFS for additional information. When the District receives an application within the range of a listed species and/or the project area otherwise supports suitable habitat, the USFWS or NMFS is contacted early in the review process. To facilitate compliance with the ESA, the District has coordinated with the USFWS to complete

programmatic consultations for several threatened and endangered species in Ventura, Santa Barbara, and San Luis Obispo counties.

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

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

The Los Angeles District has various procedures for ensuring compliance with the ESA. Standard Local Operating Procedures for Endangered Species (SLOPES) formalize additional procedures between agencies to enable the agencies to ensure better compliance with the ESA. With the implementation of SLOPES, these procedures could be formally documented, facilitating the compliance of the NWPs with the ESA. It is anticipated there will be many situations that will not be addressed by SLOPES and a case-by-case determination will be made regarding consultation with the USFWS or NMFS pursuant to Section 7 of the ESA. In January 2003, the Corps of Engineers, Los Angeles District, Regulatory Branch and the U.S. Fish and Wildlife Service, Ventura Office finalized SLOPES for informal and formal ESA consultations. In addition, some the activities authorized by the NWPs that may adversely affect EFH have been addressed by the General Concurrence dated August 5, 2003 and a Programmatic Consultation that was completed by the Corps of Engineers, Los Angeles District, Regulatory Branch and 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 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 NWP's 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 NWP's and upcoming opportunity to engage in government-to-government consultation. Follow-up letters were sent to the same set of federally recognized tribes February 11, 2011 announcing the issuance of the proposed rule and formally requesting government-to-government consultation. An advance copy of the proposed rule was also included. One tribe provided a response, indicating they did not foresee a need to utilize the NWP's. No requests for government-to-government consultation were received.

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

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

## **8.0 Essential Fish Habitat**

Pursuant to the Magnuson-Stevens Fishery Management and Conservation Act, Federal agencies are required to consult with the National Marine Fisheries Service (NMFS) for actions that may adversely affect essential fish habitat (EFH). The marine and estuarine waters within the Los Angeles District contain designated EFH, which are administered by four fishery management plans (FMP): the Pacific Groundfish FMP, the Coastal Pelagic Species FMP, the Highly Migratory Species FMP and the Pacific Coast Salmon FMP, all of which occur within tidally influenced waters. As the terms and conditions of NWP 34 do not authorize its use within tidally influenced waters, its implementation would have no effect on EFH in the Los Angeles District.

## **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: NWP 34 would only authorize discharges of dredged and fill material into a maximum of 10 acres of waters of the U.S. and allow only limited activities. A PCN is required regardless of acres of waters of the U.S. impacted. The General Conditions would provide further limitations on the use of NWP 34 in waters of the U.S. Due to the above constraints, NWP 34 would result in minimal impacts to conservation, both individually and cumulatively, in the majority of the Los Angeles District. Regional conditions for NWP 34 would preclude discharges of dredged or fill material in jurisdictional vernal pools and special aquatic sites in Arizona and the desert regions of California.

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

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

(d) General environmental concerns: In the Los Angeles District, numerous threatened or endangered species require extensive coordination with USFWS and NMFS. The semi-arid environment limits the extent of aquatic resources in the southern California/Arizona area. Regional conditions for NWP 34 would preclude discharges of dredged or fill material in jurisdictional vernal pools. With the inclusion of the PCN requirements for NWP 34 regardless of acres or types of waters of the U.S. impacted, effects on general environmental concerns in the Los Angeles District would be further reduced.

(e) Wetlands: In the Los Angeles District, the semi-arid climate limits the extent and number of wetland resources. This scarcity of wetlands is especially evident in Arizona and in the desert regions of California. In these areas, annual precipitation is usually below 10 inches, which often precludes the development of wetlands. As a result, special aquatic sites, such as wetlands, are relatively rare in the Los Angeles District and warrant more substantial protection. Given that wetland habitats within the Los Angeles District are not suitable for cranberry production and NWP 34 has never been used within the Los Angeles District, no impacts to wetlands are anticipated.

(f) Historic properties: Many known and unknown historic properties and cultural resources occur in many areas of the Los Angeles District. Many of them are adjacent to watercourses or other aquatic resources, and as such, may be affected by projects proposed for authorization under NWP 34. Section 106 of the National Historic Preservation Act requires any federal action agency to determine the eligibility of any known or discovered cultural resources that may be affected by the agency's action, and coordinate with the SHPO/THPO as appropriate. Because projects that may potentially be authorized under NWP 34 are brought to the attention of the Los Angeles District only when there is a specific project proposed, and because the project's relationship to the cultural resource may not be known until appropriate surveys are conducted, greater specificity cannot be determined at this time.

(g) Fish and wildlife values: NWP 34 would only authorize discharges of dredged or fill material into a maximum of 10 acres of waters of the U.S. for limited activities with a PCN requirement for any impact. In addition, the general conditions would provide further limitations on the use of NWP 34 in waters of the U.S. Due to the above constraints, NWP 34 would result in minimal

impacts to fish and wildlife values, both individually and cumulatively, in the majority of the Los Angeles District. Regional conditions for NWP 34 would preclude discharges of dredged or fill material in jurisdictional vernal pools. With the inclusion of the proposed PCN requirements for NWP 34 in special aquatic sites and sensitive watersheds and other aquatic resources, the above long-term minor impacts to fish and wildlife values in the Los Angeles District would be further reduced.

(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: In the heavily populated areas of southern California and Arizona, existing water quality in most rivers is impaired by runoff from upland agricultural, residential and industrial sources. NWP 34 would only authorize discharges of dredged or fill material into a maximum of 10 acres of waters of the U.S. for limited activities and a PCN is required regardless of acres of waters of the U.S. impacted. Furthermore, the General Conditions would provide further limitations on the use of NWP 34 in waters of the U.S. Due to the above constraints, NWP 34 would result in minimal adverse impacts to water quality, both individually and cumulatively, in the majority of the Los Angeles District. Regional conditions for NWP 34 would preclude discharges of dredged or fill material in jurisdictional vernal pools. With the inclusion of PCN requirements for NWP 34 in jurisdictional vernal pools, the above long-term minor impacts to water quality in the Los Angeles District would be further reduced.

(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 (as there have been no historical use of this NW in the Los Angeles District, benefits are negligible).

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

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

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

The 404(b)(1) Guidelines at 40 CFR 230.11(a) define cumulative impacts as “...the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material.” If a situation arises in which cumulative effects are likely to be more than minimal and the proposed activity requires further review, or is more appropriately reviewed under the individual permit process, provisions of the NWP allow division and/or district engineers to take such action.

Based on a review of existing OMBIL Regulatory Module (ORM) data, NWP 34 has never been issued in the Los Angeles District and is not expected to be issued due to the inhospitable growing conditions for cranberry production.

See also the attached supplemental analysis (Section I), and the Section 404 (b)(1) cumulative effects analysis (Section 9.4), below.

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

(a) Substrate: NWP 34 would only authorize discharges of dredged or fill material into a maximum of 10 acres of waters of the U.S. for limited activities and a PCN is required regardless of acres of waters of the U.S. impacted. Furthermore, the General Conditions have additional limitations on the use of NWP 34 in waters of the U.S. Due to the above constraints, NWP 34 would result in minimal adverse impacts to substrate, both individually and cumulatively, in the majority of the Los Angeles District. The regional conditions for NWP 34 would preclude discharges of dredged or fill material in jurisdictional vernal pools. With the inclusion of the proposed PCN requirements for NWP 34 in jurisdictional vernal pools, any potential for long-term minor impacts to channel substrate in the Los Angeles District would be further reduced.

(b) Suspended particulates/turbidity: In heavily populated areas of southern California and Arizona, existing turbidity levels in most rivers has been exacerbated by runoff from upland agricultural, residential and industrial sources. Short-term construction activities often augment turbidity levels in waters of the U.S. However, these activities would generally only result in short-term minor changes in turbidity levels. Impacts are expected to be minimal due to the limited nature of activities authorized under NWP 34 the requirement of a PCN regardless of acres of waters of the U.S. impacted. Furthermore, the General Conditions have additional limitations on the use of NWP 34 in waters of the U.S. Due to the above constraints, NWP 34 would result in minimal adverse impacts to turbidity levels, both individually and cumulatively, in the majority of the Los Angeles District. The regional conditions for NWP 34 would preclude discharges of dredged or fill material in jurisdictional vernal pools. In addition, the required 401 certification would also address short-term and long-term minimal impacts to turbidity and suspended sediment loads in the rivers and streams in the Los Angeles District. With the implementation of the above conditions, NWP 34 would have long-term minor impacts to turbidity levels in waters of the U.S. within the Los Angeles District.

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

(d) Current patterns and water circulation: Same as discussed in the national decision document.

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

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

(g) Threatened and endangered species: NWP 34 would only authorize discharges of dredged or fill material into a maximum of 10 acres of waters of the U. S. for limited activities and requires a PCN regardless of the acres of waters of the U.S. impacted. Furthermore, the general conditions have additional limitations on the use of NWP 34 in waters of the U.S. Due to the above constraints, NWP 34 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 34, 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 34 would preclude discharges of dredged or fill material in jurisdictional vernal pools in Los Angeles District. With the inclusion of the PCN requirements for NWP 34, the above long-term minor impacts to endangered and threatened species in the Los Angeles District would be further reduced. In addition, given the large number of listed species in Los Angeles District, continued coordination with USFWS and NMFS is required to ensure minimal impacts to endangered species. With the continuation of the existing informal coordination procedures, the development and implementation of SLOPES, and the inclusion of additional PCN requirements, the Los Angeles District would ensure project activities authorized under NWP 34 comply with the ESA and use of NWP 34 has minimal impacts on threatened and endangered species in the Los Angeles District, pursuant to the ESA.

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

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

(2) Wetlands: In the Los Angeles District, the semi-arid climate limits the extent and number of wetland resources. This scarcity of wetlands is especially evident in Arizona and in the desert regions of California. In these areas, annual precipitation is usually below 10 inches, which precludes the development of wetlands in the majority of these desert regions. 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. To ensure minimal impacts to wetland resources regional conditions for NWP 34 would preclude discharges of dredged or fill material in jurisdictional vernal pools and special aquatic sites in Arizona and the desert regions of California. With the inclusion

this regional condition and in light of the inhospitable conditions for cranberry production in the Los Angeles District, there would be only long-term minor impacts to wetlands in the Los Angeles District resulting from NWP 34.

(3) Mud flats: In the Los Angeles District, historic coastal development activities have greatly reduced the extent and number of mudflat resources. Approximately 90 percent of wetlands, including coastal wetlands and mudflats, in California have been affected by historic conversion to agricultural uses, grading and filling activities. As a result, mudflats are especially rare in the Los Angeles District and warrant more rigorous protection. Pre-construction notifications are required for NWP 34. The pre-construction notification process would allow the district engineer an opportunity to review the merits of proposed action and if determined necessary, subject the proposed activities to the individual permit review process if the proposal has the potential to result in more than minor impacts. As a result of the inclusion of these modifications, NWP 34 would have minor adverse impacts, both individually and cumulatively, to all mud flats within the Los Angeles District.

(4) Vegetated shallows: Same as discussed in the national document.

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

(6) Riffle and pool complexes: as discussed in the national decision document.

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

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

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

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

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

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

The cumulative effects of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Impacts to aquatic resources authorized by the Los Angeles District's permit actions are tracked using the ORM (OMBIL Regulatory Module) database. This includes both temporary and permanent impacts, as well as any compensatory mitigation required. Impact and mitigation data was collected for the period of Fiscal Year 2009 through 2011 to provide a reasonable basis to examine the cumulative effects of each NWP as well as the NWP Program as a whole within the Los Angeles District. Based on an analysis of the types of activities authorized by the Los Angeles District during this period, the Los Angeles

District estimates that this NWP will not be used during its 5-year term. Consequently no cumulative impacts are expected to result and no mitigation would be required.

## **10.0 List of Final Corps Regional Conditions for NWP 34**

### **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 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/](http://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.

### **10.2 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 NWPs 5, 6, and 27 with the submission of a PCN in accordance with General Condition 31 and Regional Condition 3.

### **10.3 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 NWP 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 NWP 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 NWP.

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 NWP 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 NWP 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 NWP's. 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 NWP's 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 NWP's 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 NWP's 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.