

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 38

This document is a supplement to the national decision document for Nationwide Permit (NWP) 38, 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 38:

Cleanup of Hazardous and Toxic Waste. Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

Note: Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

Summary of changes to NWP 38 from 2007:

There are no changes for NWP 38 from 2007.

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

The terms of NWP 38 always requires pre-construction notification to the district engineer prior to commencing the activity. Regional conditions would not expand these notification requirements, therefore discussion of additional regional conditions is not provided.

4.0 Alternatives

4.1 No Regional Conditions

NWP 38 requires notification for all activities to be conducted under this NWP. However, other regional conditions provide a higher level of resource protection for jurisdictional vernal pools within the Los Angeles District. Regional Condition 5 would require an SIP for the cleanup of hazardous and toxic waste to protect these high value resources. Historically, there has been a 95 to more than 99 percent loss of vernal pool habitat in the southern California area. Further losses would have more than minimal impacts individually and cumulatively. In the case of NWP 38, without Regional Condition 5 or jurisdictional vernal pools, impacts to these areas could be greater to the physical and biological functions of those specific ecosystems if authorization could proceed under a NWP instead of an SIP. Processing by an SIP would require compliance with the Section 404(b)(1) guidelines to ensure that only the least environmentally damaging, practicable alternative is permitted. The presumption of the guidelines that a less environmentally sensitive location than a special aquatic site may exist for a non-water dependent activity provides a higher level of protection for those areas. Based on this analysis, the “No Regional Conditions” alternative could result in more than minimal individual and cumulative adverse impacts to aquatic resources and, therefore, this alternative has been dismissed from further consideration.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

To further ensure no greater than minimal impacts to aquatic resources, both individually and cumulatively, the Los Angeles District could prohibit the use NWP 38 in all special aquatic sites. By requiring a SIP for activities necessary for the containment, stabilization, or removal of hazardous or toxic waste in special aquatic sites, there would be a thorough case-by-case evaluation of such activities. This evaluation would include an alternatives analysis and public interest review to ensure no greater than minimal adverse impacts. Yet, for the majority of cleanup activities of hazardous or toxic waste the alternatives are usually limited (i.e., there are few options and impacts are usually temporary) and would be defined by the site conditions. Most cleanup activities of hazardous or toxic waste would also serve the public interest (primarily to prevent contamination of the water supply downstream of the project site). In addition, most special aquatic sites located in contaminated areas covered under NWP 38 would generally also be damaged or degraded without the cleanup activities. Considering all of these factors, this alternative would result in a substantial increase in workload, but would likely only provide minor benefits to the aquatic environment in the identified areas.

Another alternative would be to prohibit the use of NWP 38 within the Murrieta, Santa Clara, and Temecula Creek watersheds, and the Santa Monica Mountains. But given that NWP 38 rarely results in permanent adverse impacts and that it usually provides environmental benefits, it would not be practicable in light of the workload of the Los Angeles District. Furthermore, the majority of the projects that could be authorized under NWP 38 would likely have only minimal impacts to the aquatic ecosystem. With the proposed regional conditions, the Los Angeles District would ensure that NWP 38 has minimal impacts on both sensitive resources and watersheds without a substantial increase in workload.

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

4.3 Alternative Regional Nationwide Permit Conditions

No alternative regional nationwide permit conditions applicable to NWP 38 were identified.

5.0 Endangered Species Act

5.1 General Considerations

NWP 38 authorizes the discharge of fill material for actions taken to remediate contaminated soil or sediment within a defined project area. The remediation may take the form of containing the source of contamination, stabilizing a potentially hazardous area, or removing the contaminated soil/sediment from an area. Because this NWP does not authorize any new disposal sites or facilities, and is for the purpose of remediating an environmental pollution problem, it typically results in only temporary impacts to waters of the U.S., including wetlands. To avoid and minimize impacts to the aquatic environment, the terms and conditions for NWP 38 contain several restrictions on its use. In addition, the general and regional conditions would provide further limitations on the use of NWP 38 in sensitive aquatic ecosystems such as jurisdictional vernal pools—resources which are known to harbor threatened and endangered species. With these constraints, NWP 38 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 38, 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 U.S. Fish and Wildlife Service (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 Standard Local Operating Procedures for Endangered Species (SLOPES), and the restriction of NWP 38 use in certain sensitive aquatic ecosystems, the use of NWP 38 would have minimal impacts, both individually and cumulatively, to threatened and endangered species in the Los Angeles District.

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

in Ventura, Santa Barbara, and San Luis Obispo counties.

As proposed, the NWP general and regional conditions ensure that other federal statutory requirements are met. For example, in instances where a project may impact a federally listed species or its critical habitat, the applicant would be required to submit to the Corps appropriate biological investigations and supporting documentation for an “effects determination” with respect to the 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 (SLOPES)

The Los Angeles District has various procedures for ensuring compliance with the ESA. SLOPES formalize additional procedures between agencies to enable the agencies to ensure better compliance with the ESA. With the implementation of SLOPES, these procedures could be formally documented, facilitating the compliance the NWPs with the ESA. It is anticipated there will be many situations that will not be addressed by SLOPES and a case-by-case determination will be made regarding consultation with the USFWS or NMFS pursuant to Section 7 of the ESA. In August 1997, the Corps of Engineers, Los Angeles District, Regulatory Branch and the U.S. Fish and Wildlife Service, Ventura Office finalized a programmatic agreement for listed coastal species. In January 1999, the Corps of Engineers, Los Angeles District, Regulatory Branch and the U.S. Fish and Wildlife Service, Sacramento and Ventura Offices finalized a programmatic agreement for the California red-legged frog. In November 2006, the Corps of Engineers, South Pacific Division, the U.S. Fish and Wildlife Service, California-Nevada Operations Office, and the National Marine Fisheries Services (NMFS) Southwest Region jointly developed programmatic guidelines for permitting projects under the Nationwide Permit program for projects that will not adversely affect selected listed species found in California. In addition, some of 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 Endangered Species Act (ESA). Per General Condition 17, 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 Highly Migratory Species FMP, the Pacific Coast Salmon FMP, and the Coastal Pelagic Species FMP. The Los Angeles District's Regional Condition 4b requires submission of a PCN for any NWP authorization in EFH. A similar PCN requirement has been in place since the issuance of the 2002 NWP's. The current proposed regional condition includes the additional requirement that applicants include an EFH assessment with the PCN. By requiring a PCN with an EFH assessment for all activities within designated EFH, the Los Angeles District ensures the appropriate level of consultation with NMFS is conducted and effects to EFH are adequately addressed prior to verification.

To facilitate the consultation process, the Los Angeles District has developed an EFH general concurrence with Southwest Region of the NMFS. The general concurrence establishes a coordination procedure between NMFS and the Los Angeles District and covers a variety of Corps-regulated activities with minimal and/or temporary adverse effects to EFH. In addition, the Los Angeles District has developed a programmatic consultation with the Southwest Region of the NMFS that covers a broader range of activities that do not fit within the scope of the

general concurrence. In summary, the inclusion of Regional Condition 4b, in conjunction with Los Angeles District's well-established set of procedures for addressing the effects of regulated activities within EFH (including conducting coordination with the NMFS as appropriate) will ensure the effects to EFH from the implementation of the 2012 NWP will be minimal.

9.0 Supplement to National Impact Analysis

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

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

(a) Conservation: NWP 38 would only authorize discharges of dredged or fill material into waters of the U.S., including wetlands, for the purpose of soil/sediment remediation of contaminated sites. This NWP would authorize activities that remediate environmentally degraded sites, and thus, this NWP is not expected to result in the loss of waters of the U.S. or to have any permanent effects on the quality and persistence of the aquatic environment. There is no notification threshold for NWP 38; thus, any impacts to waters of the U.S. from this activity necessitates Corps review under this NWP. General Conditions would provide further limitations on the use of NWP 38 in waters of the U.S. Due to the above constraints, NWP 38 would result in minimal impacts to conservation, both individually and cumulatively, in the majority of the Los Angeles District. Regional Condition 5 for NWP 38 would preclude discharges of dredged or fill material in jurisdictional vernal pools, unless the discharge is for the purpose of restoration, enhancement, management or scientific study. Although Regional Condition 5 has been modified and would now allow the use of NWP 38 in jurisdictional vernal pools in limited situations, the District would still retain the ability to review any such actions as a SIP through our discretionary authority. With the inclusion of regional conditions for NWP 38, the above long-term minor impacts to conservation in the Los Angeles District would be further reduced, resulting in minor impacts, both individually and cumulatively, in the Los Angeles District.

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

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

(d) General environmental concerns: In the Los Angeles District, numerous threatened or endangered species require extensive coordination with the USFWS and NMFS. The number and extent of cultural resources in the southwest also require extensive coordination with the appropriate SHPO and Native American Tribes. The arid and semi-arid climate limits the extent of aquatic resources in southern California and Arizona. Regional conditions for NWP 38 would preclude discharges of dredged or fill material in jurisdictional vernal pools. With the inclusion of regional conditions for NWP 38 adverse effects on general environmental concerns in the Los Angeles District would be further reduced, resulting in minor impacts, both individually and cumulatively.

(e) Wetlands: In the Los Angeles District, the arid and 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. To ensure minimal impacts to these rare and sensitive resources, the Los Angeles District would preclude discharges of dredged or fill material in specific high resource-value areas such as jurisdictional vernal pool wetlands. With the inclusion of general conditions, NWP 38 would have long-term, relatively minor impacts to wetland resources in the Los Angeles District. Projects authorized under this NWP are either self-mitigating (e.g., restoration/remediation projects) or require mitigation to compensate fully for temporary and for any permanent impacts. The activities authorized under this NWP rarely result in permanent impacts; thus, it is not expected that there would be more than minimal loss in any wetland functions and values, nor the loss of any unique or rare wetland types within the region.

Based on a review of permit data over the past 3 years (01 Oct 2008 through 30 Sep 2011), the majority of the work authorized under NWP 38 results in only temporary minor impacts to waters of the U.S. Where permanent impacts do occur, the average area of waters of the U.S. impacted was 0.07 acre (16 actions). Over this period, a total of 1.19 acres (including 1.1 acres of wetland waters) of permanent impacts and 10.5 acres (including 4.25 acres of wetland waters) of temporary impacts to waters of the U.S. were authorized under NWP 38, with 4.16 acres of compensatory mitigation required. Also, by containing and removing pollutants within the aquatic environment, and ensuring that the sites are restored to their original condition, activities authorized by this NWP are expected to maintain and/or restore the various water quality functions of wetland types found throughout the region. With the inclusion of the above regional conditions, NWP 38 would have long-term minor impacts both individually and cumulatively to wetlands resources.

(f) Historic properties: Many known and unknown historic properties and cultural resources occur in 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 38. 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 38 are brought to the attention of the Corps 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; however, through coordination with the SHPO/THPO and the implementation of mitigation measures, the Corps would ensure that NWP 38 would result in minimal impacts to historic properties.

(g) Fish and wildlife values: NWP 38 authorizes discharges of dredged or fill material into waters of the U.S. for the purpose of hazardous and toxic waste cleanup activities. This also would include the restoration/rehabilitation of habitats degraded by hazardous materials and toxic waste. NWP 38 would only authorize discharges of dredged or fill material into the minimum acreage of waters of the U.S. necessary to complete the remediation activity. Pre-

construction notification is required for any activity authorized under NWP 38. In addition general conditions, such as General Conditions 2, 3, and 5 would reduce adverse effect to fish and other wildlife by prohibiting activities that would substantially disrupt the necessary life cycle movements of indigenous aquatic species, and that authorized work has minimal adverse effect on spawning areas and shellfish beds. Due to the above constraints, NWP 38 would result in minimal impacts to fish and wildlife values, both individually and cumulatively, in the Los Angeles District. Regional Condition 5 would preclude discharges of dredged or fill material in jurisdictional vernal pools under most circumstances. With the inclusion of both general and regional conditions for NWP 38, impacts to fish and wildlife values in the Los Angeles District would be further reduced, resulting in minor impacts, 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 arid and semi-arid areas, peak discharges for very high magnitude storm events are potentially larger for dryland basins than similar-sized humid region basins. With the completion of hazardous and toxic waste cleanup projects within and adjacent to stream channels, no changes in flood attenuation or hazards are expected to occur, provided that the sites are restored back to their original conditions (as is standard practice for these types of temporary impacts). Therefore, impacts to flood hazards would be minimal 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 is impaired by runoff from upland agricultural, residential, and industrial sources. NWP 38 would only authorize discharges with minimal impacts into waters of the U.S., and restoration/remediation projects that are expected to help improve or sustain the water quality functions of streams and wetlands. By removing contaminated sediments from the aquatic environment, the source of aquatic pollution is expected to be removed; thus, over time, sites are expected to begin (or re-initiate) performing various water quality functions that are beneficial to aquatic systems. NWP 38 does not have a notification threshold, therefore pre-construction notification is required for all activities authorized under this NWP. Furthermore, general conditions and regional conditions would provide further limitations on the use of NWP 38 in jurisdictional vernal pools, a particularly rare and sensitive waters of the U.S. Due to the above constraints, NWP 38 would result in minimal adverse impacts to water quality, both individually and cumulatively, in the Los Angeles District.

- (p) Energy needs: Same as discussed in the national document.
- (q) Safety: Same as discussed in the national document.
- (r) Food and fiber production: Same as discussed in the national document.
- (s) Mineral needs: Same as discussed in the national document.
- (t) Considerations of property ownership: Same as discussed in the national document.

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

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

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

(a) Substrate: With NWP 38, there may be short-term, temporary, adverse impacts to channel substrate in the immediate vicinity of the remediation activity. This NWP authorizes the removal of contaminated soils from a site; typically, the site is restored to its original condition by importing clean, non-contaminated soil from another site. NWP 38 would only authorize discharges of dredged or fill material into the minimum acreage of waters of the U.S. necessary to complete the cleanup project. Thus, activities authorized by this NWP are expected to result in a net gain of clean, non-contaminated sediments and a net-loss of contaminated sediments. The type and consistency of the substrate is not expected to be altered. Furthermore, Regional Condition 5 places additional limitations on the use of NWP 38 in jurisdictional vernal pools. Due to the above constraints, NWP 38 would result in minimal adverse impacts to substrate, both individually and cumulatively, in the majority of the Los Angeles District.

(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. NWP 38 would only authorize discharges of dredged or fill material of the minimum acreage of waters of the U.S. necessary for the remediation of contaminated sites. Projects authorized are expected to aid in the containment and removal of potential hazardous and/or toxic sediment sources. The notification threshold for NWP 38 is zero acre of impact to waters of the U.S., therefore all activities authorized under NWP 38 require pre-construction notification. Furthermore, general conditions and Regional Condition 5 have additional limitations on the use of NWP 38 in waters of the U.S., i.e. jurisdictional vernal pools. Due to the above constraints, NWP 38 would result in minimal adverse impacts to turbidity levels, both individually and cumulatively, in the majority of the Los Angeles District.

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

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

(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: The Los Angeles District supports habitat for numerous federally listed threatened and endangered species. Many of the projects authorized by NWP 38 could benefit federally listed threatened and endangered species in the long term as the purpose of NWP 38 is to remove toxic and hazardous materials from the aquatic environment. A review of the Los Angeles District's permit database for the period 1 October 2009 thru 30 September 2011 suggests that the majority of the projects qualifying for NWP 38 authorization had no effect to listed species and therefore did not require consultation with the USFWS or NMFS.

Regarding NWP 38, the Regional Conditions would under most circumstances preclude discharges of dredged or fill material in jurisdictional vernal pools in Los Angeles District. 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. Pursuant to General Condition 18, a prospective non-federal permittee shall notify the Corps if any federally listed species or designated critical habitat might be affected or is in the vicinity of the project, or is located in the designated critical habitat and shall not begin work on the activity until notified by the District Engineer that the requirements of the ESA have been satisfied and that the activity is authorized (federal prospective permittees are responsible for ensuring compliance with the ESA). With the continuation of the existing informal coordination procedures, the development and implementation of SLOPES, and the inclusion of additional notification requirements, and discharge prohibitions for vernal pools, the use of NWP 38 would have minimal impacts, both individually and cumulatively, to threatened and endangered species in the Los Angeles District.

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

(i) Other wildlife: In the semi-arid southern California climate, rivers and streams and their associated riparian habitat represent an important resource for wildlife. NWP 38 would only authorize discharges of dredged or fill material into the minimum acreage of waters of the U.S. necessary to complete a given project. The overall purpose of this NWP is to rehabilitate portions of watersheds impacted by hazardous and/or toxic materials. Thus, any permanent impacts are expected to be minimal, if not beneficial to wildlife species. The notification threshold for NWP 38 is zero acre of impact to waters of the U.S., thus all projects utilizing NWP 38 require notification to the District Engineer. In addition, the NWP General Conditions and Regional Condition 5 have additional limitations on the use of NWP 38 in waters of the U.S. Due to the above constraints, NWP 38 would result in minimal adverse impacts to wildlife, both individually and cumulatively, in the majority of the Los Angeles District.

(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 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. The terms and conditions of NWP 38 require pre-construction notification for all activities. Additionally, the regional conditions for NWP 38 would preclude discharges of dredged or fill material in jurisdictional vernal pools in specific regions of California.

Based on a review of permit data over the past 3 years (01 Oct 2008 through 30 Sep 2011), the majority of the work authorized under NWP 38 results in only temporary minor impacts to waters of the U.S. Where permanent impacts do occur, the average area of waters of the U.S. impacted was 0.07 acre per NWP 38 authorization. Over this period, a total of 1.19 acres (including 1.1 acres of wetland waters) of permanent impacts and 10.5 acres (including 4.25 acres of wetland waters) of temporary impacts to waters of the U.S. were authorized under NWP 38, with 4.16 acres of compensatory mitigation required. By containing and removing pollutants within the aquatic environment, and ensuring that the sites are restored to their original condition and contours, activities authorized by this NWP are expected to maintain and/or restore the various water quality functions of wetland types found throughout the region. Furthermore, with the inclusion of additional requirements for NWP 38 in special aquatic sites and sensitive watersheds and other aquatic resources, there would be only long-term minor impacts to wetlands in the Los Angeles District. Activities authorized by this NWP, because they remove hazardous and/or chemical pollutants from the aquatic and soil/sediment environment, are expected to improve and maintain the long-term water quality functions of wetlands. NWP 38 may result in temporary impacts, resulting in long-term minor impacts, both individually and cumulatively, to wetland resources in the Los Angeles District.

(3) Mud flats: Same as discussed in the national document.

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

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

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

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

- (l) Recreational and commercial fisheries: Same as discussed in the national document.
- (m) Water-related recreation: Same as discussed in the national document.
- (n) Aesthetics: Same as discussed in the national document.
- (o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national document.

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

The cumulative effects of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Impacts to aquatic resources authorized by the 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 be used approximately 5 times per year, resulting the permanent loss of approximately 0.35 acre and a temporary loss of approximately 3.3 acres of waters of the U.S. on an annual basis. To ensure that these activities result in minimal adverse effects on the aquatic environment, individually and cumulatively, the Los Angeles District estimates that approximately 1.3 acres, or approximately 1:3.5 ratio for permanent impacts, of compensatory mitigation will be required on an annual basis to offset the authorized losses of waters of the United States and ensure that the NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment.

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, would ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters would 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 would 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 could add special conditions to the NWP authorization on a case-by-case basis to ensure that the activity results in no more than minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer would 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 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 would be used.

10.0 List of Final Corps Regional Conditions for NWP 38

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/); 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.

10.4 Regional condition 4

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

- a. All perennial waterbodies and special aquatic sites within the State of Arizona and within the Mojave and Sonoran (Colorado) desert regions of California, excluding the Colorado River in Arizona from Davis Dam to River Mile 261 (northern boundary of the Fort Mojave Indian Tribe Reservation). The desert region in California is limited

to four USGS HUC accounting units (Lower Colorado -150301, Northern Mojave-180902, Southern Mojave-181001, and Salton Sea-181002).

- b. All areas designated as Essential Fish Habitat (EFH) by the Pacific Fishery Management Council (i.e., all tidally influenced areas - Federal Register dated March 12, 2007 (72 FR 11092)), in which case the PCN shall include an EFH assessment and extent of proposed impacts to EFH. Examples of EFH habitat assessments can be found at: <http://www.swr.noaa.gov/efh.htm>.
- c. All watersheds in the Santa Monica Mountains in Los Angeles and Ventura counties bounded by Calleguas Creek on the west, by Highway 101 on the north and east, and by Sunset Boulevard and Pacific Ocean on the south.
- d. The Santa Clara River watershed in Los Angeles and Ventura counties, including but not limited to Aliso Canyon, Agua Dulce Canyon, Sand Canyon, Bouquet Canyon, Mint Canyon, South Fork of the Santa Clara River, San Francisquito Canyon, Castaic Creek, Piru Creek, Sespe Creek and the main-stem of the Santa Clara River.

10.5 Regional condition 5

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

10.6 Regional condition 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 of 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.