

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 39

This document is a supplement to the national decision document for Nationwide Permit (NWP) 39, 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 39:

Commercial and Institutional Developments. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, storm water management facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The construction of new golf courses and new ski areas is not authorized by this NWP.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non-tidal wetlands and adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification (PCN) to the district engineer prior to commencing the activity. (See general condition 31.) (Sections 10 and 404)

Note: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided

to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

Summary of changes to NWP 39 from 2007:

For activities resulting in the loss of greater than 300 linear feet of intermittent and ephemeral stream bed the waiver provision NWP 39 has been modified to clarify that the district engineer will only issue the waiver after making a project-specific written determination that the activity will result in minimal adverse effects. The NWP has also been modified such that oil and gas well have been removed from the list of activities that cannot be authorized under NWP 39 and to require the Corps to provide a copy of the PCN and NWP to the Department of Defense Siting Clearinghouse for any activity that involves construction of a wind energy generating structure, solar tower, or overhead transmission line in order to evaluate potential effects on military activities.

1.0 Background

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

2.0 Consideration of Public Comments

2.1 General Comments

Please See the attached response to comments document (Section III)

2.2 Comments on Proposed Regional Conditions

2.2.1 Proposed Regional Condition 1

Please see the attached response to comments document.

2.2.2 Proposed Regional Condition 2

Please see the attached response to comments document.

2.2.3 Proposed Regional Condition 3

Please see the attached response to comments document.

2.2.4 Proposed Regional Condition 4

Please see the attached response to comments document.

2.2.5 Proposed Regional Condition 5

Please see the attached response to comments document.

2.2.6 Proposed Regional Condition 6

Please see the attached response to comments document.

2.2.7 Proposed Regional Condition 7

Please see the attached response to comments document.

2.2.8 Proposed Regional Condition 8

Please see the attached response to comments document.

2.2.9 Proposed Regional Condition 9

Please see the attached response to comments document.

2.2.10 Proposed Regional Condition 10

Please see the attached response to comments document.

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

3.1 Waters excluded from use of this NWP

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

Reason for Exclusion: With this regional condition, NWPs 3, 7, 12-15, 17-19, 21, 23, 25, 29, 35, 36, 39-46, and 48-52 may **not** be used to authorize the discharge of dredged or fill material into a jurisdictional special aquatic site in the State of Arizona and the Mojave and Sonoran desert regions in California, including wetlands, mudflats, vegetated shallows, and sanctuaries and refuges as defined in 40 CFR Part 230.40-45. The regional condition would require applicants to submit an application for a Standard Individual Permit subject to authorization under section 10 of the Rivers and Harbors Act, section 103 of the Marine Protection, Resource and Sanctuaries Act, and/or section 404 of the Clean Water Act (CWA). Special aquatic sites in the desert regions of the Los Angeles District support substantial aquatic resources that exhibit relatively

high physical and biological functions. Furthermore, these aquatic areas can provide important and unique habitat for endangered species, neotropical migratory birds, and other indigenous wildlife. Past construction activities in and adjacent to these special aquatic sites have degraded portions of these high value systems. Regional Condition 2 would ensure compliance with the 404(b)(1) guidelines and evaluation and mitigation, if warranted, of activities that may have an adverse effect on special aquatic sites in the otherwise arid regions of the Los Angeles District.

In the Los Angeles District, the semi-arid climate limits the extent and number of special aquatic sites. This scarcity of special aquatic sites is especially evident in Arizona and in the desert regions of California. In these areas, annual precipitation is usually below 10 inches, which precludes the development of wetlands in the majority of these desert regions. Furthermore, approximately 90 percent of wetlands in California have been affected by historic conversion to agricultural uses, grading, and filling activities. As a result, wetland areas are rare in the Los Angeles District and warrant more rigorous protection. Regional Condition 2 would serve to better protect special aquatic sites in desert regions of the Los Angeles District by requiring the additional scrutiny inherent in the Standard Individual Permit (SIP) process for most permanent discharges of dredged or fill material in these areas. The permit applicant would have to perform a 404(b)(1) alternatives analysis that would include careful examination of the purpose and need for the project and alternatives that avoid or reduce impacts to special aquatic sites. Regional Condition 2 would help ensure that discharges of dredged or fill material that would otherwise be authorized by NWP's would have minimal impacts, both individually cumulatively, to special aquatic sites in the Los Angeles District.

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

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

3.1.2 Jurisdictional Vernal Pools (Regional Condition 5)

Reason for Exclusion: This regional condition would require any project proposing to discharge dredged or fill material into a jurisdictional vernal pool to be reviewed under the standard individual permit (SIP) process, which requires a more rigorous alternatives review. This regional condition has been amended from the 2007 version to include an exception for

discharges associated with restoration, enhancement, management, or scientific study activities that qualify for 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 NWP's to include language excluding these four categories of activities from this requirement. If the success of a proposed restoration or enhancement activity is uncertain, or the subject vernal pool is of particularly high ecological value, the District would still retain the ability to review any such action as an SIP through our discretionary authority. In addition, the Corps has determined that issuance of Regional Condition 5 would not be contrary to the public interest. Overall, the implementation of Regional Condition 5, which requires an SIP for discharges of dredged or fill material in jurisdictional vernal pools (with the exception of activities associated with the restoration, enhancement, management or scientific study), would provide additional assurances that the activities permitted under the NWP's would result in minimal impacts on both an individual and cumulative basis in the Los Angeles District.

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

3.1.3 New Permanent Fills in Perennial and Intermittent Watercourses and for Projects with Greater than 0.1 Acre in Ephemeral Watercourses in Murrieta Creek and Temecula Creek Watersheds in Riverside County (Regional Condition 6)

Reason for Exclusion: Stein and Ambrose (1998¹) found that cumulative losses have adversely affected the aquatic resources in the Murrieta Creek and Temecula Creek watersheds, which are part of the Santa Margarita Watershed in Riverside and San Diego Counties. Most of the losses were attributed to development activities in these watersheds. Regional Condition 6 would exclude the use of NWP's 14, 29, 39, 42, and 43 for permanent fill activities within perennial and intermittent watercourses and for projects that would permanently impact more than 0.1 acre of ephemeral watercourses in the Murrieta Creek and Temecula Creek watersheds. Because of the cumulative losses in these watersheds, with Regional Condition 6, development-related projects in these areas would receive greater review and scrutiny through the SIP process, which includes a 404(b)(1) analysis.

For additional information please see the supplemental decision document for Regional Condition 6.

¹ Stein, E.D. and R.F. Ambrose. 1998. Cumulative impacts of Section 404 Clean Water Act permitting on riparian habitat of the Santa Margarita, California Watershed. *Wetlands* 18: 393-408.

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

Reason for Exclusion: Regional Condition 7 would exclude bank stabilization from NWP authorization in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County, and bank stabilization and grade control projects in Gaviota Creek, Mission Creek, and Carpinteria Creek in Santa Barbara County. This exclusion would require any project that would stabilize a stream bank and/or grade control in these particular watersheds receive greater review and scrutiny through the SIP process, which includes a 404(b)(1) alternatives analysis. This regional condition has been modified from the version adopted in 2007 (Regional Condition 9) to include Section 404 Letters of Permission (LOP) as an SIP that may be used following a final Environmental Impact Statement (2009) which evaluated cumulative impacts of bank stabilization in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County, California. While NWP 12, 14, 18, 25, 29, 39, 42 and 43 address utility lines, linear transportation crossings, minor discharges, structural discharges, residential development, commercial/institutional development, recreational facilities and stormwater management facilities respectively, these types of projects could also include stream bank stabilization or grade control. These watercourses were identified as vulnerable to adverse effects on endangered species and designated critical habitat associated with additional bank stabilization and grade control activities. In San Luis Obispo Creek and Santa Rosa Creek, a substantial number of bank stabilization projects have resulted in cumulative adverse impacts to flow velocity and water surface elevations during storm events. With the augmented flow velocity, channel substrate can be scoured during large storm events causing loss of vegetation and long-term channel incision. Although the existing bank stabilization projects have not resulted in the loss of a large amount of waters of the United States, the cumulative hydrogeomorphic effects of the bank stabilization have reduced the amount suitable of habitat for the threatened southern steelhead that utilizes these streams.

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

At present, there has been a cumulative adverse impact as a result of use of NWP 13, as well as other NWPs that may authorize bank stabilization and grade control structures in these stream

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

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

3.1.5 San Diego Creek and San Juan Creek/Western San Mateo Creek SAMPs (Regional Condition 8).

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

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

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

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

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

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

3.2 Waters subjected to additional pre-construction notification requirements

To qualify for NWP 39 authorization, proponents would be required to notify the Regulatory Division prior to each use. This blanket pre-construction notification requirement is considered necessary nationwide to ensure that adverse impacts on aquatic resources associated with NWP 39 are minimal, both individually and cumulatively. Therefore, section 3.2 does not apply to NWP 39.

4.0 Alternatives

4.1 No Regional Conditions

Regional conditions are proposed that would require Corps PCN or exclusions from NWP authorization in specific cases. There could be more than minimal individual and/or cumulative adverse effects to high functioning waters of the U.S. without the inclusion of regional conditions requiring notification for projects in the Santa Monica Mountains watersheds in Los Angeles and Ventura Counties, special aquatic sites and all perennial waterbodies in the State of Arizona and the Mojave and Sonoran (Colorado) desert regions in California, essential fish habitat, and in the Santa Clara River watershed. Submission of a PCN allows for project-specific review for certain projects in such sensitive resource areas that could otherwise be authorized without an appropriate analysis. For example, without a regional condition requiring notification for projects that would impact special aquatic sites or perennial watercourses or waterbodies in the State of Arizona or the Mojave and Sonoran (Colorado) desert regions in California, impacts to these relatively rare resources could occur without compensatory mitigation, contributing to more than minimal impacts, both individually and cumulatively, to aquatic resources in the Los Angeles District. In the case of NWP 39, however, a PCN is required under the terms of that nationwide permit. Because a PCN is always required to use NWP 39, regional conditions requiring Corps notification are not essential to ensuring minimal adverse effects individually and cumulatively associated with using this particular NWP; rather, those regional conditions are important to ensuring minimal adverse effects for several of the other NWPs and the NWP Program overall.

Other regional conditions would impose specific requirements in design or exclude the use of NWP authorization in certain areas or aquatic resource types because of sensitivity or rarity. Without specific design requirements for road crossings in waters supporting threatened and

endangered fish species, there could be more than minimal impacts to certain endangered species, such as southern steelhead (*Oncorhynchus mykiss*). Some aquatic habitat types are rare and sensitive; it is estimated that more than 95 percent of vernal pool habitat has been lost in the southern California area. Additional losses would have more than minimal impacts on this habitat type both individually and cumulatively. With no regional conditions, including the exclusion of vernal pools from most NWP authorization, NWP 39 could have more than minimal impacts on jurisdictional vernal pools in the Los Angeles District. Similarly, without regional conditions, NWP 39 could be used to authorize losses of wetlands, mudflats, vegetated shallows, and riffle and pool complexes in the State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California. Given their relative rarity and sensitivity, commercial and institutional development activities could have more than minimal adverse effects to them on an individual or cumulative basis. Similarly, based on research conducted by Stein and Ambrose (1998), permanent fills in perennial and intermittent streambeds and projects resulting in more than 0.1 acre of loss to ephemeral streambeds could have more than minimal adverse impacts on the Murrieta Creek and Temecula Creek watersheds in Riverside County. Moreover, additional bank stabilization in San Luis Obispo Creek or Santa Rosa Creek in San Luis Obispo County, and further bank stabilization or grade control structures in Gaviota Creek, Mission Creek, or Carpinteria Creek in Santa Barbara County, could result in more than minimal adverse effects; and therefore, all NWP authorizations involving those types of activities would be excluded in these specific locations. Finally, the Los Angeles District has developed SAMPs in the San Diego Creek and San Juan Creek/Western San Mateo Creek watersheds to establish alternative permitting procedures for certain resources to promote long-term aquatic resource conservation in these rapidly developing watersheds. Without a regional condition prohibiting use of NWP 39 in favor of alternative permitting procedures, there could more than minimal cumulative impacts over the long term. Overall, with no regional conditions, NWP 39 could adversely affect sensitive aquatic resources in some areas in the Los Angeles District, unless the Corps and/or the resource agencies are able to individually review them to ascertain an appropriate level of analysis and mitigation.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

Discharges of dredged or fill material authorized under NWP 39 are limited to 0.5 acre of non-tidal waters of the U.S. and 300 linear feet of streambed, unless for intermittent or ephemeral streambed, this 300 foot limit is waived in writing by the district engineer. Also, this NWP does not authorize any discharges in non-tidal wetlands adjacent to tidal waters, which are considered a sensitive aquatic resource. A PCN would be required in each case to use NWP 39, to ensure through case-specific review that those activities result in minimal individual and cumulative adverse effects to the aquatic environment and other public interest review factors, such as floodplain values. The new general conditions and regional conditions have further limitations on the use of NWP 39, including exclusions in certain watersheds and particularly sensitive aquatic habitat types. With these constraints, NWP 39 would result in minimal impacts to aquatic resources, both individually and cumulatively, in most of the Los Angeles District.

In the Los Angeles District, the semi-arid climate limits special aquatic sites throughout the region. In dryland areas, lack of vegetation and poorly developed soils result in high peak

discharges for large storm events. With a predominance of deep alluvial soils, dryland systems are dominated by overland flow, with groundwater recharge and throughflow only contributing a relatively small quantity to stream discharge. During the past fifty years, agriculture, development, and other activities have resulted in a loss of approximately 90 percent of wetlands and more than 95 of the vernal pools in southern California. Commercial and institutional development activities have been major contributors to these losses and are expected to further degrade aquatic resources in the future. NWP 39, would include a blanket PCN requirement enabling the Los Angeles District to examine the specifics of each proposal and ensure that NWP 39 authorizations would result in minimal adverse effects on the aquatic ecosystem throughout the Los Angeles District on an individual and cumulative basis.

As an alternative regional limit, the Los Angeles District could exclude from NWP 39 authorization all proposed discharges in special aquatic sites, including wetlands. The general scarcity of special aquatic sites in this semi-arid region, including the loss of approximately 90 percent of wetland resources in southern California, indicates there could be a need for the review of any project that would discharge dredged or fill material in a special aquatic site pursuant to the 404(b)(1) Guidelines and the public interest factors to ensure no adverse impacts to special aquatic sites. However, as discussed above, each NWP 39 would only impact a maximum of non-tidal 0.5 acre of waters of the U.S. (except non-tidal wetlands adjacent to tidal waters) and up to 300 linear feet of a streambed, unless in the case of intermittent or ephemeral streambeds, the district engineer waives in writing the 300 linear foot limit. When considering the inclusion of the constraints on NWP 39 from the general conditions, a regional condition precluding all discharges in special aquatic sites would unnecessarily increase the Los Angeles District's workload to review small-scale impacts in areas that exhibit lower physical and biological functions. Use of NWP 39 under the existing terms and conditions would require notifying the Corps prior to each use, and if the Corps determines the proposed project's impacts on the aquatic ecosystem would be more than minimal, the district engineer may take discretionary authority under 33 CFR 330.1(d) and require completing the more rigorous SIP process. As a result, the proposed exclusion for all special aquatic sites would not be practicable and would result in relatively minor environmental benefits to the aquatic ecosystem. With the proposed regional conditions, the Los Angeles District would ensure that NWP 39 has minimal impacts on both sensitive aquatic resources and watersheds without a substantial increase in workload.

Similarly, some aquatic habitat types are particularly at risk from further degradation and warrant exclusion from the NWP Program. For example, given their scarcity and sensitivity, further losses of vernal pools in the Los Angeles District and of any special aquatic sites in the desert areas of southern California and Arizona could result in more than minimal cumulative adverse impacts on an individual or cumulative basis. Thus, the Los Angeles District would eliminate the use of all NWPs (excluding NWPs 5, 6 and 27 for restoration and related activities), in jurisdictional vernal pools throughout the District, and many of the NWPs, including NWP 39, which could otherwise authorize substantial permanent fills in special aquatic sites in Arizona and the desert regions of California. In addition, development-related activities have adversely affected aquatic resources in the Murrieta Creek and Temecula Creek watersheds in Riverside County (Stein and Ambrose, 1998), and therefore, the Los Angeles District is proposing to

eliminate several NWPs, including NWP 39, from authorizing additional permanent impacts in perennial and intermittent watercourses and for individual projects that would permanently impact more than 0.1 acre of ephemeral watercourses. Similarly, past bank stabilization and grade control activities have adversely affected San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County and Gaviota Creek, Mission Creek, and Carpinteria Creek in Santa Barbara County, which is the basis for the Los Angeles District eliminating NWP authorization of future projects (except restoration projects, which could be authorized by NWP 27) that would stabilize banks or add grade control structures in these specific creeks. With the inclusion of the above modifications to NWP 39, the Los Angeles District would ensure minimal impacts to aquatic resources, both individually and cumulatively, through additional review without substantially increasing our workload.

4.3 Alternative Regional Nationwide Permit Conditions

As proposed, NWP 39 would be excluded from use in wetlands, mudflats, vegetated shallows, and riffle and pool complexes in Arizona and the desert areas of southern California. Therefore, NWP 39 and other NWPs could be used to authorize impacts in special aquatic sites outside of these areas as long as they are not disallowed by other exclusions imposed by the general conditions (e.g., critical resource waters) and other regional conditions.

As an alternative regional condition, the Los Angeles District could include resource agency coordination for all projects that require authorization under NWP 39. The Los Angeles District could forward PCNs to resource agencies following the protocol in General Condition 31 (notification) prior to verification. Requiring resource agency coordination for all NWP 39 projects, including those not involving a special aquatic site or not exhibiting relatively high physical and biological functions, would substantially increase the workload for the Los Angeles District and cause delays in project verification without commensurate benefits to aquatic resources. This is because many NWP 39 projects already avoid and minimize identifiable impacts to aquatic resources to a substantial degree to qualify for consideration under the nationwide permit. NWP 39 would require notifying the Corps prior to each use, and if the Corps determines the proposed project's impacts would be more than minimal, the district engineer may take discretionary authority under 33 CFR 330.1(d) and require completing the more rigorous SIP process. Furthermore, with the new notification requirements in General Condition 31, agency notification is now required for projects that result in the loss of greater than 300 linear feet of streambed. Regional condition 9 also specifies additional information requirements, including details on the resource proposed to be impacted, avoidance measures and other information to be included with any request to waive the 300 foot limitation on ephemeral and intermittent drainages. As a result, the Los Angeles District has determined the above alternative notification requirements would not be practicable and would result in only minor additional benefits to aquatic resources.

With the proposed modifications, the Los Angeles District has identified the aquatic resources and watersheds that warrant additional scrutiny under NWP 39. As a result, the District's proposed modifications would result in a relatively minor increase in overall workload, but would provide potentially substantial benefits to the aquatic environment in the identified areas.

5.0 Endangered Species Act

5.1 General Considerations

NWP 39 authorizes the discharge of fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional development. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use and maintenance of the commercial and institutional structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, storm water management facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The construction of new golf courses or new ski areas is not authorized by this NWP. To avoid and minimize impacts to the aquatic environment, the terms and conditions for NWP 39 contain several restrictions, including that the discharge not cause the loss of greater than 0.5 acre of non-tidal waters of the United States and no more than 300 linear feet of streambed, unless for intermittent and ephemeral streambeds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. The permittee must submit a pre-construction notification to the district engineer prior to commencing activity.

The new general and regional conditions, as discussed above, would provide further limitations on the use of NWP 39 in sensitive aquatic ecosystems. With these constraints, it is expected that NWP 39 would not result in more than 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 39, there could be more than minimal impacts in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. These areas include Murrieta Creek and Temecula Creek watersheds in Riverside County; San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County and Gaviota Creek, Mission Creek, and Carpinteria Creek in Santa Barbara County; road crossings supporting federally listed fish species; jurisdictional vernal pools throughout the Los Angeles District; and wetlands, mudflats, vegetated shallows and riffle and pool complexes in that State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California. To ensure adequate review and analysis, the use of NWP 39 is precluded or severely restricted for projects in these areas or impacting these aquatic habitat types. In addition, the NWP 39 blanket requirement for submittal of a pre-construction notification ensures the above long-term minor impacts to endangered and threatened species in the Los Angeles District would be further reduced. Moreover, given the large number of listed species in Los Angeles District, continued coordination with USFWS and NMFS is required to ensure minimal impacts to endangered species. With the continuation of the existing informal coordination procedures, the development and implementation of SLOPES, and the inclusion of additional notification requirements, the use of NWP 39 would have minimal impacts, both individually and cumulatively, to threatened and endangered species in the Los Angeles District. Finally, any use of NWP 39 that proposes a loss of greater than 300 linear

feet of intermittent or ephemeral streambed would trigger the agency coordination procedures of General Condition 31, including coordination with USFWS and/or NMFS.

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 threatened and endangered species. The Los Angeles 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

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 the NWPs with the ESA. It is anticipated there will be many situations that will not be addressed by SLOPES and a case-by-case determination will be made regarding consultation with the USFWS or NMFS pursuant to Section 7 of the ESA. In January 2003, the Corps of Engineers, Los Angeles District, Regulatory Branch and the U.S. Fish and Wildlife Service, Ventura Office finalized SLOPES for informal and formal ESA consultations. In addition, some the activities authorized by the NWPs that may adversely affect Essential Fish Habitat have been addressed by the General Concurrence dated August 5, 2003 and a Programmatic Consultation that was completed by the Corps of Engineers, Los Angeles District, Regulatory Branch and NOAA’s National Marine Fisheries Service.

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 LAD 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 39 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: On a per-project basis, NWP 39 could authorize discharges of dredged or fill material into a maximum of 0.5 acre of non-tidal waters of the U.S. (excludes non-tidal wetlands adjacent to tidal waters) and up to 300 linear feet of streambed, unless in the case of an intermittent or ephemeral streambed, this 300 linear foot limit is waived in writing by the district engineer. Based on a review of permitting data between fiscal year 2009-2011, approximately 85% of actions authorizing permanent impacts permanent impacts under NWP 39 were for less than 0.1 acre. A PCN would be required in each case to use NWP 39, which would allow the Corps to ensure that adverse effects are minimal or to take discretionary authority and require the more rigorous SIP process. The general conditions (e.g., exclusion for areas within or affecting criteria resource waters) would provide further limitations on the use of NWP 39 in waters of the U.S. With the above constraints, NWP 39 would result in minimal impacts to conservation of aquatic resources, both individually and cumulatively, in the majority of the Los Angeles District.

In addition, regional conditions for NWP 39 would preclude discharges of dredged or fill material in jurisdictional vernal pools throughout the Los Angeles District; wetlands, mudflats, vegetated shallows and riffle and pool complexes in Arizona and the desert regions of California; the Murrieta Creek and Temecula Creek watersheds for certain types of fill activities; within the San Diego Creek and San Juan Creek/Western San Mateo Creek SAMP areas; and San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County and Gaviota Creek, Mission Creek, and Carpinteria Creek in Santa Barbara County for projects involving bank stabilization or grade control structures. In many cases, compensatory mitigation would be required, including the restoration, enhancement, establishment, or preservation of aquatic habitats that would offset losses of conservation values. With the requirement to notify the Corps in each case, the noted watershed and aquatic resource exclusions, and the expectation of compensatory mitigation in most cases, long-term minor impacts to conservation of aquatic resources in the Los Angeles District would be further reduced.

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

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

(d) General environmental concerns: Activities authorized by this NWP would affect general environmental concerns, such as water, air, noise, and land pollution. The authorized work would also affect the physical, chemical, and biological characteristics of the environment. It is expected that the adverse effects of the activities authorized by this NWP on general environmental concerns would be minor. Adverse effects to the chemical composition of the aquatic environment would be controlled by General Condition 6, which states that the material used for construction must be free from toxic pollutants in toxic amounts. General condition 23 requires mitigation to minimize adverse effects to the aquatic environment through avoidance and minimization at the project site. Compensatory mitigation may be required by district engineers to ensure that the net adverse effects on the aquatic environment are minimal.

The semi-arid environment in the southern California/Arizona area limits the extent of aquatic resources. Habitat loss or modification in this area has also contributed to adverse impacts on

numerous plant and animal species, many of which are associated with aquatic resources. Regional conditions relevant to NWP 39 address many of these situations and would preclude discharges of dredged or fill material in jurisdictional vernal pools; discharges resulting in a loss of wetlands, mudflats, vegetated shallows and riffle and pool complexes in Arizona and the desert regions of California; projects involving bank stabilization or grade control in specific creeks in San Luis Obispo and Santa Barbara Counties; permanent development-related discharges in perennial and intermittent watercourses and those exceeding 0.1 acre for any project in ephemeral watercourses in the Murrieta Creek and Temecula Creek watersheds; and within the San Diego Creek and San Juan Creek/Western San Mateo Creek SAMP areas. In addition, any NWP 39 qualifying project that would include a road crossing in a waterway supporting federally listed fish species would have employ designs such as span crossings or bottomless arch culverts to ensure adverse effects to these species are avoided and/or minimized. Compensatory mitigation would be required in most cases, which would result in restoration, enhancement, establishment, or preservation of aquatic habitats to offset aquatic losses. With the inclusion of the blanket pre-construction notification requirements, the general and regional condition exclusions for NWP 39, and expectation of compensatory mitigation in most cases, adverse effects on general environmental concerns in the Los Angeles District would be further reduced through site-specific review.

(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 less than 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. Projects authorized under this NWP typically require mitigation to compensate for both temporary and permanent impacts. The activities authorized under this NWP usually result in permanent impacts, and could result in a loss of wetland functions and values, or the loss of unique or rare wetland types within the region. General Condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site and Regional Condition 3 would require a written statement specifically describing how the project has been designed to avoid and minimize impacts to waters. Compensatory mitigation may be required by district engineers to ensure that the net adverse effects on the aquatic environment are minimal. General Condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. To ensure minimal impacts to all aquatic resources, including wetlands, the terms and conditions of NWP 39 require a PCN for all activities. If the Los Angeles District determines the adverse effects of a proposal would be more than minimal on the aquatic ecosystem individually or cumulatively, the project would be evaluated under the more rigorous SIP process. In addition, there would be exclusions for discharges of dredged or fill material in jurisdictional vernal pools (a very specific type of wetland) anywhere in the Los Angeles District as well as discharges in wetlands in the State of Arizona and the desert regions of California. With the inclusion of the blanket PCN requirement, which would allow the Corps to ensure that adverse effects are minimal or to take discretionary authority and require the more rigorous SIP process, the general and regional condition exclusions for NWP 39, and the expectation of compensatory mitigation in most cases, NWP 39 would have long-term, minor impacts to wetland resources,

both individually and cumulatively, in the Los Angeles District.

(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 39. 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 to coordinate with the SHPO/THPO. This is formalized at General Condition 20. General Condition 20 also requires notification to the Corps if a project may affect any cultural resources listed on the NRHP, potentially eligible for listing on the NRHP, or if the applicant has any reason to believe the resources may be eligible for listing on the NRHP are known to occur on the project site. The applicant may not proceed until notified by the district engineer that the requirements of the NHPA have been satisfied and that the activity is authorized. To facilitate this coordination, the Regulatory project managers access the Corps database on historical sites to determine if any known sites may be affected by a proposed project. Because projects that may potentially be authorized under NWP 39 are typically 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 of potential impacts to cultural resources cannot be determined at this time. However, through the requirement that notification be provided for each project seeking authorization pursuant to NWP 39 and through coordination with the SHPO/THPO and the implementation of mitigation measures, the Corps would ensure that NWP 39 would result in minimal impacts to historic properties.

(g) Fish and wildlife values: On a per-project basis, NWP 39 would authorize discharges of dredged or fill material associated with commercial and institutional development into a maximum of 0.5 acre of non-tidal waters of the U.S. or up to 300 linear feet of streambed, unless for ephemeral or intermittent streambeds, the 300 linear foot limit is waived by the district engineer in writing. Because of the sensitivity of coastal habitats, NWP 39 could not be used to authorize regulated discharges into tidal waters or into non-tidal wetlands adjacent to tidal waters of the U.S. NWP 39 would require a PCN in each case, which would allow the Corps to ensure that adverse effects would be minimal or to take discretionary authority and require the more rigorous SIP process. In addition, the general conditions further limit the use of NWP 39 in waters of the U.S., such as within or adjacent to critical resource waters. Also, General Condition 23 requires avoidance and minimization of impacts to waters of the United States at the project site. Compensatory mitigation may be required by district engineers to ensure that the net adverse effects on the aquatic environment are minimal. The regional conditions would exclude NWP 39 authorizations for discharges of dredged or fill material in jurisdictional vernal pools (a very specific type of wetland that supports specialized flora and fauna) anywhere in the Los Angeles District; discharges resulting in a loss of wetlands, mudflats, vegetated shallows and riffle and pool complexes in the State of Arizona and the desert regions of California; permanent development-related discharges in perennial and intermittent watercourses and those exceeding 0.1 acre for any project in ephemeral watercourses in the Murrieta Creek and Temecula Creek watersheds in Riverside County; activities that would involve bank stabilization or grade control structures in certain watersheds in San Luis Obispo and Santa Barbara Counties; and within the

San Diego Creek and San Juan Creek/Western San Mateo Creek SAMP areas. In addition, any NWP 39 qualifying project that would include a road crossing in habitat for federally listed fish species incorporate designs such as spans and bottomless arch culverts to avoid or minimize impacts to these resources. With the blanket PCN requirement, the exclusions intended to protect sensitive habitat types and watersheds, and the expectation of compensatory mitigation in most cases, NWP 39 would result in minimal impacts to fish and wildlife values, both individually and cumulatively, in the Los Angeles District.

(h) Flood hazards: With the dynamic storm season typical of southern California and parts of Arizona, relatively large floods are a normal part of the hydrologic regime. Due to a general lack of soil development and vegetation coverage in semi-arid areas, peak discharges for very high magnitude storm events are potentially larger for dry-land basins than similar-sized humid region basins. Construction of commercial, institutional, and other developments in the District have substantially impacted many watercourses throughout the District, and have confined the drainages into reinforced channels often devoid of previous resource values. Continued development in many watersheds has led to the situation where previously constructed channels have insufficient capacity to convey the additional quantities of runoff generated by subsequent development in other areas of the watershed, frequently resulting in damage to older facilities. NWP 39 would substantially limit construction of commercial and institutional development sites under general permits unless the project applicant designs the project to avoid and minimize impacts to the existing drainages and provides alternative drainage scenarios. With the blanket PCN requirement, which would allow the Corps to ensure that adverse effects are minimal or to take discretionary authority and require the more rigorous SIP process, and the various general and regional conditions, it is expected that adverse effects associated with NWP 39 would not be more than minimal on an individual and cumulative basis.

(i) Floodplain values: Similar to what is discussed in the national document. General condition 10, Fills Within 100-Year Floodplains, restricts the applicability of NWP 39 and other NWPs. It requires that the activity must comply with applicable FEMA-approved state or local floodplain management requirements. NWP 39 also would include a blanket pre-construction notification requirement, which would allow the Los Angeles District to determine whether floodplain values are being adequately protected, and if necessary, take discretionary authority and require the more rigorous SIP process. This differs significantly from past development practices in the Los Angeles District where modification of drainages through channelization or other hardscaping was the norm and resulted in substantially modified watercourses in most urban areas. These modifications severely degraded known floodplain values, such as those related to riparian and wetland functions in the Los Angeles District. Floodplain-relevant regional conditions applying to NWP 39 would exclude development-related discharges in wetlands, mudflats, vegetated shallows and riffle and pool complexes in the State of Arizona and the desert regions of California, in perennial and intermittent watercourses and in ephemeral watercourses for development-related projects permanently filling more than 0.1 acre waters of the U.S. in the Murrieta Creek and Temecula Creek watersheds, and in cases involving bank stabilization or grade control in certain watersheds in Santa Barbara and San Luis Obispo Counties, thereby allowing the District to individually review projects prior to impacts occurring in these sensitive watersheds and aquatic resources. In addition, any NWP 39 qualifying project that would include

a road crossing in habitat for federally listed fish species incorporate designs such as spans and bottomless arch culverts to avoid or minimize impacts to these resources. Such crossing designs would be expected to protect more of the floodplain in most cases. Moreover, it is expected that compensatory mitigation would be required for most NWP 39 authorizations. Considering all these factors, direct, permanent impacts to floodplain values would be expected to be minimal with NWP 39 on an individual and cumulative basis.

(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 or otherwise utilized areas of southern California and Arizona, existing water quality in most watercourses is impaired by runoff from upland agricultural, residential, commercial, institutional, and industrial sources. On a per-project basis, NWP 39 would authorize discharges of dredged or fill material associated with commercial and institutional development into a maximum of 0.5 acre of non-tidal waters of the U.S. (excluding non-tidal wetlands adjacent to tidal waters) and 300 linear feet of streambed, unless for intermittent or ephemeral streambeds, the district engineer waives in writing the 300 linear foot limit. All potential permittees seeking NWP 39 would be required to notify the Corps prior to commencing activity. The Corps has discretion to determine whether a particular proposal needs to be evaluated under the more rigorous SIP process. The general conditions, such as General Condition 22, further limit the use of NWPs in waters of the U.S. In addition to requiring avoidance and minimization of impacts to waters, they require compliance with applicable FEMA-approved state or local floodplain management requirements, use of appropriate soil erosion and sediment controls, use of only suitable material, removal of temporary fills and revegetation as appropriate, avoidance of designated critical resource waters, and, as appropriate, compensatory mitigation to ensure effects on the aquatic ecosystem are minimal.

Regional conditions affecting implementation of NWP 39 would preclude discharges of dredged or fill material in jurisdictional vernal pools; in wetlands, mudflats, vegetated shallows and riffle and pool complexes in the State of Arizona and the desert regions of California; in certain creeks in Santa Barbara and San Luis Obispo Counties for activities including bank stabilization or grade control; in perennial and intermittent watercourses or in ephemeral watercourses in Murrieta Creek and Temecula Creek in Riverside County if a project would permanently fill more than 0.1 acre of the ephemeral waters of the U.S.; and within the San Diego Creek and San Juan Creek/Western San Mateo Creek SAMP areas. In addition to the restrictions on the use of this NWP imposed by the permit criteria such as submission of a PCN, the NWP general conditions, and the District's regional conditions, projects requesting authorization under NWP 39 must acquire water quality certification pursuant to Section 401 of the Clean Water Act from

the applicable Regional Water Quality Control Board on California non-tribal lands, the Arizona Department of Environmental Quality on Arizona non-tribal lands, from the U.S. Environmental Protection Agency for most tribal lands in California and Arizona, or from the those tribes with 401 authority within their respective tribal lands, to ensure the project meets water quality standards. With the required pre-construction notification and the above constraints intended to protect sensitive aquatic habitats and watersheds, NWP 39 is expected to result in minimal 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 39, there could be long-term direct and short-term indirect adverse impacts to channel substrate in the immediate vicinity of the commercial and institutional development sites. On a per-project basis, NWP 39 would authorize discharges of dredged or fill material into a maximum of 0.5 acre of non-tidal waters of the U.S. and 300 linear feet of streambed, unless for intermittent or ephemeral streambeds, the 300 linear foot limit is waived in writing by the district engineer. A PCN would be required to use NWP 39 in each case, which would allow the Corps to ensure that adverse effects are minimal or to take discretionary authority and require the more rigorous SIP process. Furthermore, the general conditions have additional limitations on the use of NWP 39 in waters of the U.S., such as exclusion in areas within or affecting critical resource waters. With the above constraints, NWP 39 would result in minimal adverse impacts to substrate, both individually and cumulatively, in the majority of the Los Angeles District.

With no regional conditions for NWP 39, there could be more than minimal impacts in specific geographic areas and certain aquatic habitat types in the Los Angeles District that exhibit relatively high physical and biological functions. The regional conditions with respect to NWP 39 would preclude discharges of dredged or fill material in jurisdictional vernal pools; in wetlands, mudflats, vegetated shallows and riffle and pool complexes in the State of Arizona and the desert regions of California (where a loss of waters is proposed); in certain creeks in Santa Barbara and San Luis Obispo Counties for projects involving bank stabilization or grade control

(other than habitat restoration projects); in Murrieta Creek and Temecula Creek watershed streams for certain types of fill activities; and within the San Diego Creek and San Juan Creek/Western San Mateo Creek SAMP areas. In addition, any NWP 39 qualifying project that would include a road crossing in habitat for federally listed fish species incorporate designs such as spans and bottomless arch culverts to avoid or minimize impacts to these resources. Such crossing designs would be expected in many cases to protect channel substrate by helping to maintain sediment passage, as described in Regional Condition 1. With the blanket PCN requirement for NWP 39 and exclusions for sensitive aquatic habitat types and watersheds, the above long-term minor impacts to channel substrate in the Los Angeles District would be further reduced, resulting in long-term minor impacts to channel substrate, both individually and cumulatively, in the Los Angeles District.

(b) Suspended particulates/turbidity: In heavily populated areas of southern California and Arizona, existing turbidity levels in most rivers have been increased by runoff from upland agricultural, residential, commercial, institutional, and industrial sources. Short-term construction activities may augment turbidity levels in waters of the U.S., but many projects must control flow and sediment runoff pursuant to their Section 401 water quality certification as well as applicable Section 402 NPDES requirements (e.g., compliance with California's General Permit for Discharges of Storm Water Associated with Construction Activity). These activities would generally result in only short-term minor changes in turbidity levels, and in some of the larger watercourses, their contributions to the sediment load are not measurable relative to ambient levels in the stream or river. On a per-project basis, NWP 39 would authorize discharges of dredged or fill material into a maximum of 0.5 acre of non-tidal waters of the U.S. (excluding non-tidal wetlands adjacent to tidal waters) and 300 linear feet of streambed, unless for intermittent or ephemeral streambeds, the district engineer waives in writing the 300 linear foot limit. Use of NWP 39 would require a PCN in each case, which would allow the Corps to ensure that adverse effects are minimal or to take discretionary authority and require the more rigorous SIP process. Furthermore, the general conditions have additional limitations on the use of NWP 39 in waters of the U.S., such as prohibition within or in areas directly affecting designated critical resource waters. With the blanket PCN requirement, the general and regional conditions, NWP 39 would result in minimal adverse impacts to turbidity levels, both individually and cumulatively, in the majority of the Los Angeles District.

Regional conditions for NWP 39 would further limit potential adverse impacts in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. The regional conditions with respect to NWP 39 would preclude discharges of dredged or fill material in jurisdictional vernal pools; in wetlands, mudflats, vegetated shallows and riffle and pool complexes in the State of Arizona and the desert regions of California; in certain creeks in San Luis Obispo and Santa Barbara Counties involving bank stabilization or grade control; in Murrieta Creek and Temecula Creek watershed streams for certain types of fill activities; and within the San Diego Creek and San Juan Creek/Western San Mateo Creek SAMP areas. With the blanket pre-construction requirements for Corps notification and the exclusions using NWP 39 to impact certain sensitive watersheds and aquatic habitat types, the above long-term minor impacts to suspended sediment levels in the Los Angeles District would be further reduced. In addition, the required 401 water quality certification and any applicable Section 402

NPDES requirements 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 these requirements and restrictions, NWP 39 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 document.

(d) Current patterns and water circulation: Activities authorized by this NWP may adversely affect the movement of water in the aquatic environment. All activities authorized by this NWP require a PCN to the district engineer, which would help ensure that adverse effects to current patterns and water circulation are minimal. Road crossings within a commercial or institutional development may alter water flow patterns and circulation. General Condition 9 requires the authorized activity to be designed to withstand expected high flows and to maintain the course, condition, capacity, and location of open waters to the maximum extent practicable. General Condition 10 requires activities to comply with applicable FEMA-approved state or local floodplain management requirements, which will reduce adverse effects to surface water flows.

Because NWP 39 is limited to 0.5 acre of permanent impacts to non-tidal waters of the U.S. (excluding non-tidal wetlands adjacent to tidal waters) and 300 linear feet of streambed, unless for intermittent and ephemeral streambeds the district engineer waives the 300 foot limit in writing, and with the additional restrictions imposed by the general conditions and regional conditions as discussed previously, this NWP would have limited applicability in the Los Angeles District. Any changes to current pattern and water circulation would be localized at the project site, and the effects would likely be attenuated within a very short distance downstream of the project site. During review of the PCN, the Corps would have discretion to require the more rigorous SIP process if the adverse effects on current patterns or water circulation are expected to be more than minimal. Therefore, NWP 39 would have relatively long-term, minor adverse impacts to current patterns and water circulation in waters of the U.S. within the Los Angeles District.

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

(f) Salinity gradients: The activities authorized by this NWP are unlikely to adversely affect salinity gradients, because the NWP is restricted to discharges of dredged or fill material into non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters.

(g) Threatened and endangered species: On a per-project basis, NWP 39 would authorize discharges of dredged or fill material into a maximum of 0.5 acre of non-tidal waters of the U.S. (excluding non-tidal wetlands adjacent to tidal waters) and 300 linear feet of streambed, unless for intermittent and ephemeral streambeds, this 300 linear foot limit is waived in writing by the district engineer. A PCN would be required for all uses of NWP 39, which would allow the Corps to ensure adverse effects are no more than minimal or to take discretionary authority and require the more rigorous SIP process. Furthermore, the general conditions have additional requirements and limitations on the use of NWP 39 in waters of the U.S., such as prohibition within or in areas directly affecting designated critical resource areas. With the above

requirements and constraints, NWP 39 by itself would be expected to result in no more than 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 39, there could be more than minimal impacts in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions and may also support threatened and endangered species. The regional conditions with respect to NWP 39 would preclude discharges of dredged or fill material in jurisdictional vernal pools in Los Angeles District; in wetlands, mudflats, vegetated shallows and riffle and pool complexes in the State of Arizona and the desert regions of California (where a loss would occur); in certain creeks in San Luis Obispo and Santa Barbara Counties for projects involving bank stabilization or grade control; in Murrieta Creek and Temecula Creek watershed streams for certain types of fill activities; and within the San Diego Creek and San Juan Creek/Western San Mateo Creek SAMP areas. With the blanket pre-construction notification requirements for NWP 39 and requirements and exclusions for specific sensitive watersheds and aquatic habitat types, the above long-term minor impacts to endangered and threatened species in the Los Angeles District would be further reduced. In addition, any NWP 39 qualifying project that would include a road crossing in habitat for federally listed fish species incorporate designs such as spans and bottomless arch culverts to avoid or minimize impacts to these resources. Such crossing designs would be expected in many cases to protect channel substrate, as described in Regional Condition 1. Finally, 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 Standard Local Operating Procedures for Endangered Species (SLOPES), and the blanket PCN requirements, the use of NWP 39 would have minimal impacts, both individually and cumulatively, on 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. On a per-project basis, NWP 39 would authorize discharges of dredged or fill material into a maximum of 0.5 acre of non-tidal waters of the U.S. (excluding non-tidal wetlands adjacent to tidal waters) and 300 linear feet of streambed, unless for intermittent and ephemeral streambeds, the 300 linear foot limit is waived in writing by the district engineer. NWP 39 would require a PCN for every use, which would allow the Corps to ensure that adverse effects would be no more than minimal or to take discretionary authority to require the more rigorous SIP process. In addition, the new general conditions impose additional requirements and limitations on the use of NWP 39 in waters of the U.S., such as prohibition within or in areas directly affecting designated critical resource waters. They also allow Regulatory Division to require mitigation to ensure adverse effects on the aquatic ecosystem, which includes wildlife, are minimal individually and cumulatively. With the blanket PCN requirements and the general condition exclusions and requirements, NWP 39 would result in no more than minimal adverse impacts to wildlife, both individually and

cumulatively, in the majority of the Los Angeles District.

With no regional conditions for NWP 39, there could be more than minimal impacts in specific geographic areas and certain aquatic habitat types that exhibit relatively high physical and biological functions. The regional conditions with respect to NWP 39 preclude discharges of dredged or fill material in jurisdictional vernal pools; in wetlands, mudflats, vegetated shallows and riffle and pool complexes in the State of Arizona and the desert regions of California (where a loss would occur); in specific creeks in San Luis Obispo and Santa Barbara Counties for projects involving bank stabilization or grade control; in the Murrieta Creek and Temecula Creek watershed streams for certain types of fill activities; and within the San Diego Creek and San Juan Creek/Western San Mateo Creek SAMP areas. With the blanket pre-construction notification requirements for NWP 39 and requirements and exclusions for specific sensitive watersheds and other aquatic habitats, the above long-term minor impacts to wildlife in the Los Angeles District would be further reduced.

(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 (long-term minor impacts).

(2) Wetlands: The activities authorized by NWP 39 would have minimal adverse effects on wetlands. The Corps would review PCNs for all activities proposed for authorization pursuant to NWP 39 to ensure that the adverse effects on the aquatic environment are minimal individually and cumulatively. Depending on the quality and quantity of the aquatic resource, the Corps has the discretion to determine that a given project would result in more than minimal adverse effects on the aquatic ecosystem and require the more rigorous SIP process. The Corps also has the authority to require mitigation for impacts, such as restoration, establishment, enhancement, or preservation of aquatic habitat, to ensure impacts are minimal individually and cumulatively. As discussed elsewhere in this supplement to the decision document, it is expected that compensatory mitigation would be required in most NWP 39 authorizations. Based on an examination of actions authorized under NWP 39 during fiscal year 2009-2011, less than 0.1 acre of permanent impact to wetlands was authorized, for which approximately 0.15 acre of compensatory mitigation was required.

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 may warrant more rigorous protection. For this reason, in the State of Arizona and the Mojave and Sonoran (Colorado) desert region of southern California, NWP 39 would be unavailable for

authorization of discharges into jurisdictional wetlands. The regional conditions with respect to NWP 39 would also preclude discharges of dredged or fill material into jurisdictional vernal pools throughout the Los Angeles District. With the blanket PCN requirements, the general and regional requirements and exclusions for NWP 39 in sensitive watersheds and other aquatic habitats, and the authority to require mitigation for impacts, long-term adverse effects to wetlands would be no more than minimal, individually and cumulatively, in the Los Angeles District.

(3) Mudflats: In the Los Angeles District, historic coastal development activities have greatly reduced the extent and number of mud flat 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. However, the activities authorized by NWP 39 would have no more than minimal adverse effects on these mudflats, because the NWP does not authorize activities in tidal waters. Additional mudflat areas associated with lake and pond fringes, and river deltas, have also been affected by a variety of activities such as dredging to maintain deeper water for aesthetic purposes, to allow boating access, and to increase circulation. As a result, mudflats are especially rare in the Los Angeles District and warrant more rigorous protection. NWP 39 would require pre-construction notification for every proposed use, thus the Corps could ensure adverse effects would not be more than minimal, which could involve requiring compensatory mitigation, or take discretionary authority and require the more rigorous SIP process. In addition, the proposed regional condition 2 would preclude the use of NWP 39 in any mudflat within the State of Arizona and desert regions of California. The blanket PCN requirements and the requirements and exclusions imposed by the general conditions and regional conditions would be expected to ensure that activities authorized by this NWP in the Los Angeles District result in no more than minimal adverse impacts to mud flats.

(4) Vegetated shallows: The activities authorized by NWP 39 would have minimal or no adverse effects on vegetated shallows in tidal waters, because the NWP does not authorize activities in tidal waters. Activities in non-tidal vegetated shallows may be authorized by this NWP if they are outside the State of Arizona and desert regions of California, but the district engineer would review all proposed NWP 39 activities per the mandatory PCN requirement to determine if those activities would result in minimal adverse effects on the aquatic environment. The Corps could require compensatory mitigation for unavoidable impacts. If the non-tidal vegetated shallows are high value and the proposed work would result in more than minimal adverse effects on the aquatic environment, the district engineer would exercise discretionary authority to require the more rigorous SIP process.

(5) Coral reefs: This is not applicable within Los Angeles District or to NWP 39, which is limited to non-tidal waters (excluding non-tidal wetlands adjacent to tidal waters).

(6) Riffle and pool complexes: In the semi-arid southern California and Arizona areas, limited water resources and the need for flood control have led to the construction of

numerous dams in the mountains of southern California and Arizona, and on the Colorado River. With the construction of these dams, many riffle and pool complexes have been eliminated by the reservoirs. Furthermore, construction of a dam also modifies the hydrologic regime of the river, which can also degrade downstream riffle and pool complexes by sediment management practices by the dam keepers, scouring events, loss of appropriate bedload material to maintain the composition, structure and location of the complexes, and other actions. As a result, riffle and pool complexes in the Los Angeles District are essentially confined to montane and foothill regions. They warrant more rigorous protection due to their relatively high production of invertebrate fauna and other contributions to riparian aquatic resources such as aeration of the water, provision of substrate for decomposers, and other factors.

To ensure minimal impacts to riffle and pool complexes, the Los Angeles District would preclude its use in any riffle and pool complex in the State of Arizona and desert regions of California. In addition, NWP 39 would require a PCN for each proposed use, so the Corps can evaluate whether that use would result in more than minimal adverse effects to the aquatic ecosystem on an individual and cumulative basis, which would require the more rigorous SIP process. The NWP general conditions would impose additional requirements and restrictions, such as prohibition within or in areas affecting designated critical resource waters, which would be expected to include some of the District's riffle and pool complexes. The Corps also has the authority to require mitigation for aquatic resource impacts to ensure adverse effects are minimal individually and cumulatively. The regional conditions would also exclude from NWP authorization discharges of dredged or fill material in specific creeks in San Luis Obispo and Santa Barbara Counties for projects involving bank stabilization or grade control (except for habitat restoration projects); in Murrieta Creek and Temecula Creek watershed streams for certain types of fill activities; and within the San Diego Creek and San Juan Creek/Western San Mateo Creek SAMP areas. In addition, any NWP 39 qualifying project that would include a road crossing in habitat for federally listed fish species incorporate designs such as spans and bottomless arch culverts to avoid or minimize impacts to these resources. Such crossing designs would be expected in many cases to protect riffle-and-pool complexes. With the blanket PCN requirements, which would afford the Corps the opportunity to evaluate each project and determine whether to take discretionary authority and require the more rigorous SIP process, and the requirements and restrictions of the general and regional conditions, NWP 39 would have minimal impacts to riffle-and-pool complexes in the Los Angeles District on an individual and cumulative basis.

(k) Municipal and private water supplies: New commercial and institutional development projects require access to a dependable water supply. Water supply is a critical issue in the arid southwest, which includes the Los Angeles District. Many municipalities and states require allocation of available water supplies through designated agencies. These agencies determine access to the available water by the new (and existing) users, with the intention that the provided water is of suitable quantity and quality. It is anticipated that these agencies would ensure that commercial and institutional projects, whether or not they impact waters of the U.S., have sufficient water supplies.

(l) Recreational and commercial fisheries: Prior to widespread urbanization or conversion to agriculture, piscine communities in southern California and Arizona were well developed and much more diverse than current conditions. With modifications to riverine and lacustrine habitats, as well as the relatively common practice of introducing non-native fish species to new watersheds or stillwater habitats, endemic species were stressed by the new conditions or out-competed by the introduced species, or in certain circumstances, hybridized with the new species. As a result, few fisheries are comprised of healthy native fish populations. Inland in the arid southwest, recreational fisheries are generally restricted to various coldwater fisheries in montane regions and warm water fisheries in reservoirs and lowland and foothill rivers and streams. NWP 39 is not expected to further adversely affect these recreational fisheries, because they are representative of modified conditions or because these recreational fisheries are usually located in areas away from new commercial and institutional development projects.

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

(n) Aesthetics: Same as discussed in the national document (long-term minor impacts).

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national document (long-term minor impacts).

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 14 times per year, resulting the loss of approximately 1.5 acres of waters of the United States. To ensure that these activities result in minimal adverse effects on the aquatic environment, individually and cumulatively, the Los Angeles District estimates that approximately 5 acres of compensatory mitigation and 2 mitigation bank/in-lieu fee credits will be required on an annual basis to offset the authorized losses of waters of the United States and ensure that the NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment.

10.0 List of Final Corps Regional Conditions for NWP 39

10.1 Regional condition 1

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

10.2 Regional condition 2

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

10.3 Regional condition 3

When a pre-construction notification (PCN) is required, the appropriate U.S. Army Corps of Engineers (Corps) District shall be notified in accordance with General Condition 31 using either the South Pacific Division PCN Checklist or a signed application form (ENG Form 4345) with an attachment providing information on compliance with all of the General and Regional Conditions. The PCN Checklist and application form are available at:

<http://www.spl.usace.army.mil/regulatory>. In addition, the PCN shall include:

- a. A written statement describing how the activity has been designed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States;
- b. Drawings, including plan and cross-section views, clearly depicting the location, size and dimensions of the proposed activity as well as the location of delineated waters of the U.S. on the project site. The drawings shall contain a title block, legend and scale, amount (in cubic yards) and area (in acres) of fill in Corps jurisdiction, including both permanent and temporary fills/structures. The ordinary high water mark or, if tidal waters, the mean high water mark and high tide line, should be shown (in feet), based on National Geodetic Vertical Datum (NGVD) or other appropriate referenced elevation. All drawings for projects located within the boundaries of the Los Angeles District shall comply with the most current version of the *Map and Drawing Standards for the Los Angeles District*

Regulatory Division (available on the Los Angeles District Regulatory Division website at: www.spl.usace.army.mil/regulatory/); and

- c. Numbered and dated pre-project color photographs showing all waters proposed to be impacted on the project site. The compass angle and position of each photograph shall be documented on the plan-view drawing required in subpart b of this regional condition.

10.4 Regional condition 5

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

10.5 Regional condition 6

Individual Permits shall be required in Murrieta Creek and Temecula Creek watersheds in Riverside County for new permanent fills in perennial and intermittent watercourses otherwise authorized under NWPs 29, 39, 42 and 43, and in ephemeral watercourses for these NWPs for projects that impact greater than 0.1 acre of waters of the United States. In addition, when NWP 14 is used in conjunction with residential, commercial, or industrial developments the 0.1 acre limit would also apply.

10.6 Regional condition 7

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

10.7 Regional condition 8

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

10.8 Regional condition 9

Any requests to waive the 300 linear foot limitation for intermittent and ephemeral streams for NWPs 29, 39, 40 and 42, 43, 44, 51 and 52 or to waive the 500 linear foot limitation along the

bank for NWP 13, must include the following:

- a. A narrative description of the stream. This should include known information on: volume and duration of flow; the approximate length, width, and depth of the waterbody and characters observed associated with an Ordinary High Water Mark (e.g. bed and bank, wrack line, or scour marks); a description of the adjacent vegetation community and a statement regarding the wetland status of the associated vegetation community (i.e. wetland, non-wetland); surrounding land use; water quality; issues related to cumulative impacts in the watershed, and; any other relevant information.
- b. An analysis of the proposed impacts to the waterbody in accordance with General Condition 31 and Regional Condition 3;
- c. Measures taken to avoid and minimize losses, including other methods of constructing the proposed project; and
- d. A compensatory mitigation plan describing how the unavoidable losses are proposed to be compensated, in accordance with 33 CFR Part 332.

10.9 Regional condition 10

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

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

Pursuant to Section 401 of the Clean Water Act (CWA), tribal or state Water Quality Certification, or waiver thereof, is required for activities authorized by NWPs that may result in a discharge of fill material into waters the U.S. In addition, any state with a federally-approved Coastal Zone Management (CZM) plan must concur with the Corps determination that activities authorized by NWPs that are either within the state's coastal zone, or will affect any land or water uses, or natural resources within the state's coastal zone, are consistent with the CZM plan. In accordance with Corps regulations at 33 CFR 330.5 (c) and (d), any state 401/CZM conditions for a particular NWP become regional conditions for that NWP. The Corps recognizes that in some tribes or states there will be a need to add regional conditions, or for individual tribal or state review for some activities to ensure compliance with water quality standards or consistency with CZM plans.

The Los Angeles District announced the proposal to reissue the Nationwide Permits and our proposed regional conditions in a Special Public Notice dated February 25, 2011. The Los

Angeles District also send letters dated March 9, 2011 to the seven federally recognized tribes within the Los Angeles District (Big Pine Tribe, Bishop Paiute Tribe, Hopi Tribe, Hualapai Tribe, Navajo Nation, White Mountain Apache Tribe, and Twenty-nine Palms Band of Mission Indians) and the Arizona Department of Environmental Quality announcing the proposed rule and our proposed regional conditions, and requesting the State of Arizona and each tribe review the information for purposes of providing water quality certification pursuant to section 401 of the Clean Water Act. Similarly, acting on behalf of the three Corps Districts in California the Sacramento District provided the same letter on February 23, 2011 to the California State Water Resources Control Board (SWRCB) and EPA requesting 401 certification in the State of California and tribal lands within EPA Region 9, respectively (excluding those tribes with delegated 401 authority). The San Francisco District provided a letter to the California Coastal Commission (CCC) on behalf of both coastal districts in California on March 3, 2011, requesting Coastal Zone Management Act (CZMA) consistency certification. Additional discussions were held among the three Corps Districts in California and the SWRCB in an effort to strategize options for certifying a broader range of NWP or NWP-eligible activities than under the 2007 NWPs.

Upon publication of the final rule in the February 21, 2012, issue of the Federal Register (77 FR 10184), the Los Angeles District again provided letters to each of the seven tribes with 401 authority, and the State of Arizona requesting final 401 certification of the 2012 NWPs within their respective geographic areas of responsibility. Copies of the final regional conditions for the Los Angeles District were also provided. Similarly, the Los Angeles District provided a letter to the CCC on behalf of both coastal districts in California requesting final CZMA consistency certification of the 2012 NWPs and the respective regional conditions (copies of the letters are provided in Section IV). Each tribe and the State of Arizona have 60 days to issue, waive or deny certification for any or all of the 2012 NWPs. The CCC has 90 days to make their final determination. Due to the fact that the final rule was published on February 21, 2012, there is not sufficient time to allow the full 60- or 90-day review period before the 2012 NWPs are scheduled to go into effect on March 19, 2012. Therefore, the final outcome of 401 and CZMA certification within in the Los Angeles District is uncertain. Individual certifications will be required for any action authorized under the 2012 NWPs where applicable (i.e. projects within or affecting the Coastal Zone and/or projects that may affect water quality) until final determinations are provided by the respective state/tribal authorities.

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

12.0 Measures to Ensure Minimal Adverse Environmental Effects

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

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

In addition, regional conditions for NWP 39 would preclude discharges of dredged or fill material in jurisdictional vernal pools throughout the Los Angeles District; discharges resulting in a loss of wetlands, mudflats, vegetated shallows and riffle and pool complexes in Arizona and the desert regions of California; the Murrieta Creek and Temecula Creek watersheds for certain types of fill activities; within the San Diego Creek and San Juan Creek/Western San Mateo Creek SAMP areas; and San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County and Gaviota Creek, Mission Creek, and Carpinteria Creek in Santa Barbara County for projects involving bank stabilization or grade control structures. In many cases, compensatory mitigation would be required, including the restoration, enhancement, establishment, or preservation of aquatic habitats that would offset losses of conservation values. With the requirement to notify the Corps in each case, the noted watershed and aquatic resource exclusions, and the expectation of compensatory mitigation in most cases, long-term minor impacts to conservation of aquatic resources in the Los Angeles District would be further reduced.

The Los Angeles District estimates that the use of NWP 39 would result in the loss of approximately 1.5 acre per year and approximately 7 acres of mitigation per year. Therefore for the five-year period NWP 39 would be valid (2012-2017) the Los Angeles District anticipates approximately 7.5 acres of waters of "loss" of waters of the United States, all of which would be mitigated at a greater than 1:1 ratio.

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.