

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 40**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 40, 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 40:

Agricultural Activities. Discharges of dredged or fill material into non-tidal waters of the United States for agricultural activities, including the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities.

This NWP also authorizes the construction of farm ponds in non-tidal waters of the United States, excluding perennial streams, provided the farm pond is used solely for agricultural purposes. This NWP does not authorize the construction of aquaculture ponds.

This NWP also authorizes discharges of dredged or fill material into non-tidal waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams.

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 beds 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 adjacent to tidal waters.

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

Note: Some discharges for agricultural activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4). This NWP authorizes the construction of farm ponds that do not qualify for the Clean Water Act Section 404(f)(1)(C) exemption because of the recapture provision at Section 404(f)(2).

Summary of changes to NWP 40 from 2007:

NWP 40 is reissued as proposed such that the 300 linear foot limit applies to all stream losses, not just drainage ditches constructed in streams. To waive the 300 linear foot limit for losses of intermittent or ephemeral stream bed, the district engineer would have to make a project-specific written determination that the activity will result in minimal adverse effects.

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

Reason for Exclusion: Regional Condition 7 would exclude bank stabilization from NWP authorization in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County, and bank stabilization and grade control projects in Gaviota Creek, Mission Creek, and Carpinteria Creek in Santa Barbara County. This exclusion would require any project that would stabilize a stream bank and/or grade control in these particular watersheds receive greater review and scrutiny through the SIP process, which includes a 404(b)(1) alternatives analysis. This regional condition has been modified from the version adopted in 2007 (Regional Condition 9) to include Section 404 Letters of Permission (LOP) as an SIP that may be used following a final Environmental Impact Statement (2009) which evaluated cumulative impacts of bank stabilization in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County, California. While NWP 12, 14, 18, 25, 29, 39, 40, 42 and 43 address utility lines, linear transportation crossings, minor discharges, structural discharges, residential development, commercial/institutional development, agricultural activities, recreational facilities and stormwater management facilities respectively, these types of projects could 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 Corps of Engineers 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.

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

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

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

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

3.2 Waters subjected to additional pre-construction notification requirements

The permittee must always submit a pre-construction notification to the district engineer prior to commencing the activity. Therefore this section does not apply to NWP 40.

4.0 Alternatives

4.1 No Regional Conditions

Although NWP 40 requires pre-construction notification under its terms pursuant to General Condition 31, NWP 40 could result in more than minimal impacts, individually or cumulatively, in specific geographic areas and to particular aquatic resources. Regarding the latter, without Regional Condition 5, which would preclude the use of any NWP to authorize discharges of dredged or fill material in jurisdictional vernal pools in the Los Angeles District, there could be more than minimal aquatic impacts, individually and cumulatively. Historically, there has been a 95 to more than 99 percent loss of vernal pool habitat in the southern California area. Further

losses would have more than minimal impacts, both individually and cumulatively. Furthermore, based on Corps research and analysis, any activity that involves bank stabilization in San Luis Obispo Creek or Santa Rosa Creek in San Luis Obispo County, or that involves bank stabilization or grade control structure construction in Gaviota Creek, Mission Creek, or Carpenteria Creek in Santa Barbara County, could lead to more than minimal impacts to the aquatic ecosystem, individually or cumulatively. Finally, wetlands, mudflats, vegetated shallows, and riffle and pool complexes in the desert regions of the Los Angeles District (the State of Arizona and the Mojave and Sonoran desert regions of California), which support substantial aquatic resources that exhibit relatively high physical and biological functions, have been highly degraded by past construction activities in and adjacent to these special aquatic sites. Without a regional condition requiring an individual permit for projects impacting these areas and resource types otherwise eligible for NWP 40, additional impacts could occur that would be more than minimal, both individually and cumulatively, and therefore, this alternative has been eliminated from further consideration.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

Discharges of dredged or fill material authorized under NWP 40 are limited to 0.5-acre of non-tidal waters of the United States (excluding non-tidal wetlands adjacent to tidal waters);, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects, both individually and cumulatively.

To further ensure NWP 40 would have minimal impacts to aquatic resources, both individually and cumulatively, the Los Angeles District could eliminate the use of NWP 40 in all special aquatic sites, including wetlands. The loss of approximately 90 percent of wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region indicates there could be a need for the review of any project that would discharge dredged or fill material in a special aquatic site under the 404(b)(1) Guidelines and the public interest factors to ensure no adverse impacts to special aquatic sites. However, a regional condition that precluded all discharges in special aquatic sites would unnecessarily burden the regulated public and increase our workload to review small-scale impacts in these areas. As a result, this proposed modification would not be practicable and would result in relatively minor environmental benefits to the aquatic ecosystem.

The mandatory PCN requirement for NWP 40 would enable the Los Angeles District to review all proposed actions potentially eligible for authorization under this NWP and thereby determine on a case-by-case basis assert discretionary authority and require and SIP if it determined the proposed action would have more than minimal impacts either individually or cumulatively. Additionally, the proposed regional conditions for NWP 40 would focus on those regions and resources within the Los Angeles District where impacts otherwise eligible for NWP would be more likely to have more than minimal impacts. This includes precluding discharges of dredged or fill material in all jurisdictional vernal pools; in wetlands, mudflats, vegetated shallows, and riffle and pool complexes in the State of Arizona and the desert regions of California; for any

bank stabilization in San Luis Obispo Creek or Santa Rosa Creek in San Luis Obispo County, or bank stabilization or grade control structures in Gaviota Creek, Mission Creek, or Carpinteria Creek in Santa Barbara County; and within the San Diego Creek and San Juan Creek/Western San Mateo SAMP areas.

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

4.3 Alternative Regional Nationwide Permit Conditions

As an alternative, the Los Angeles District could include resource agency notification for all projects that require authorization under NWP 40. The Los Angeles District could forward PCNs to USEPA, USFWS and other resource agencies for a 15-day review prior to verification. Requiring resource agency notification for all NWP 40 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 40 projects already avoid and minimize identifiable impacts to aquatic resources to a substantial degree to qualify for consideration under the nationwide permit. NWP 40 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 including 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.

In conclusion, the majority of the projects that could be authorized under NWP 40 would likely have only minimal impacts to the aquatic ecosystem. With the pre-construction notification requirements to review each proposed use of NWP 40 and the proposed regional conditions, the Los Angeles District would ensure that NWP 40 has minimal impacts, individually and cumulatively, on both sensitive resources and watersheds without a substantial increase in workload.

5.0 Endangered Species Act

5.1 General Considerations

NWP 40 authorizes the discharge of fill material for agricultural activities, including the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities. It also authorizes the construction of farm ponds in non-

tidal waters of the United States, excluding perennial streams, provided the farm pond is used solely for agricultural purposes. NWP 40 also authorizes discharges of dredged or fill material into non-tidal waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams. To avoid and minimize impacts to the aquatic environment, the terms and conditions for NWP 40 contain several restrictions including that the Nationwide Permit does not authorize the construction of aquaculture ponds. Also, under NWP 40, the discharges of dredged or fill material are limited to 0.5-acre of non-tidal waters of the United States (excluding non-tidal wetlands adjacent to tidal waters);, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects, both individually and cumulatively. Under NWP 40, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity.

In addition, the new general and regional conditions would provide further limitations on the use of NWP 40 in sensitive aquatic ecosystems. With these constraints, NWP 40 would result in minimal adverse impacts to threatened and endangered species, both individually and cumulatively, in the majority of the Los Angeles District. With no regional conditions for NWP 40, there would be more than minimal impacts only in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. The regional conditions for NWP 40 would preclude discharges of dredged or fill material in all 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 result); for any bank stabilization in San Luis Obispo Creek or Santa Rosa Creek in San Luis Obispo County, or bank stabilization or grade control structures in Gaviota Creek, Mission Creek, or Carpinteria Creek in Santa Barbara County; and within the San Diego Creek and San Juan Creek/Western San Mateo SAMP areas. With the inclusion of these regional conditions, long-term minor impacts to conservation in the Los Angeles District would be further reduced, resulting in long-term minor impacts. In addition, given the large number of listed species in Los Angeles District, continued coordination with USFWS and NMFS is required to ensure minimal impacts to threatened and 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 40 would have minimal impacts, both individually and cumulatively, to threatened and endangered species in the Los Angeles District.

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

compliance with the ESA, the District has coordinated with the USFWS to complete programmatic consultations for several threatened and endangered species in Ventura, Santa Barbara, and San Luis Obispo counties.

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

5.2 Local Operating Procedures for Endangered Species

The Los Angeles District has various procedures for ensuring compliance with the ESA. SLOPES formalize additional procedures between agencies to enable the agencies to ensure better compliance with the ESA. With the implementation of SLOPES, these procedures could be formally documented, facilitating the compliance of the NWPs with the ESA. It is anticipated there will be many situations that will not be addressed by SLOPES and a case-by-case determination will be made regarding consultation with the USFWS or NMFS pursuant to Section 7 of the ESA. In January 2003, the Corps of Engineers, Los Angeles District, Regulatory Branch and the U.S. Fish and Wildlife Service, Ventura Office finalized SLOPES for informal and formal ESA consultations. In addition, some the activities authorized by the NWPs that may adversely affect Essential Fish Habitat have been addressed by the General Concurrence dated August 5, 2003 and a Programmatic Consultation that was completed by the Corps of Engineers, Los Angeles District, Regulatory Branch and NOAA’s National Marine Fisheries Service. The District has completed conducted several preliminary meetings with USFWS and NMFS staff to determine the direction of further SLOPES discussions, and additional meetings will be conducted in the future.

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

6.0 National Historic Preservation Act

6.1 General Considerations

The Los Angeles District would ensure that activities authorized by NWP 14 would comply with the National Historic Preservation Act (NHPA). The District would review the latest version of the National Register of Historic Places (NRHP) to make an effect determination that activities verified under NWP 14 would have on Historic Properties. Once an effects determination has been made the District will coordinate with the State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO), recognized Tribes, and, if necessary, the Advisory Council on Historic Preservation (ACHP) as appropriate. The District has considered the requirement of pre-construction notification for NWP activities in geographic areas of high site potential, or known locations of cultural resources including prehistoric sites, historic sites, tribal lands, traditional cultural properties, state landmarks or National Historic Landmarks. In areas where there is a high likelihood of cultural resources within the Corps' area of potential effect (APE), the district engineer may: (1) consult with SHPO, THPO, or Tribes during the NWP review process or (2) the district engineer may assert its discretionary authority to require an individual permit for the proposed activity and initiate consultation through the individual permit process. Option 2 would only be used if there is value added that compensates for the increase in workload due to processing more SIPs. If the consultation would be conducted under the NWP process without the district asserting discretionary authority to require an SIP, then the applicant would be notified that the activity could not be verified under the NWP until all Section 106 requirements have been satisfied.

6.2 Local Operating Procedures for National Historic Preservation Act

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

7.0 Government-to-Government Consultation with Indian Tribes

7.1 Summary of the Consultation Process

Prior to the issuance of the Los Angeles District's public notice announcing the proposed rule for the 2012 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 40 do not authorize its use within tidally influenced waters, its implementation would have no effect on EFH in the Los Angeles District.

9.0 Supplement to National Impact Analysis

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

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

(a) Conservation: NWP 40 would only authorize discharges of dredged or fill material into waters of the U.S., including wetlands, for the purpose of improving agricultural production and the construction of building pads for farm buildings, up to 0.5-acre of non-tidal waters impact (excluding non-tidal waters adjacent to tidal waters), and only with mitigation the district engineer considers appropriate for the impact to ensure no more than minimal effect to aquatic resources, individually and cumulatively. Pre-construction notification is required per General Condition 31. Furthermore, this NWP does not authorize the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. The general conditions, such as General Condition 22 (Designated Critical Resource Waters), would provide further limitations on the use of NWP 40 in waters of the U.S. Due to the above constraints, NWP 40 would result in minimal impacts to conservation, both individually and cumulatively, in the majority of the Los Angeles District.

Regional conditions for NWP 40 would preclude discharges of dredged or fill material in all 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 result); for any bank stabilization in San Luis Obispo Creek or Santa Rosa Creek in San Luis Obispo County, or bank stabilization or grade control structures in Gaviota Creek, Mission Creek, or Carpinteria Creek in Santa Barbara County; and within the San Diego Creek and San Juan Creek/Western San Mateo SAMP areas. With the inclusion of these regional conditions, long-term minor impacts to conservation in the Los Angeles District would be further reduced, resulting in long-term minor impacts.

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

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

(d) General environmental concerns: In the Los Angeles District, numerous threatened or endangered species require extensive coordination with USFWS and NMFS. The semi-arid environment limits the extent of aquatic resources in the southern California/Arizona area. Regional conditions for NWP 40 would preclude discharges of dredged or fill material in all 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 result); for any bank stabilization in San Luis Obispo Creek or Santa Rosa Creek in San Luis Obispo County, or bank stabilization or grade control structures in Gaviota Creek, Mission Creek, or Carpinteria Creek in Santa Barbara County; and within the San Diego Creek and San Juan Creek/Western San Mateo SAMP areas. With the inclusion of these regional conditions, long-term minor impacts to conservation in the Los Angeles District would be further reduced, resulting in long-term minor impacts.

(e) Wetlands: In the Los Angeles District, the semi-arid climate limits the extent and number of wetland resources. This scarcity of wetlands is especially evident in Arizona and in the desert regions of California. In these areas, annual precipitation is usually below 10 inches, which often precludes the development of wetlands. As a result, special aquatic sites, such as wetlands, are

relatively rare in the Los Angeles District and warrant more substantial protection. To ensure minimal impacts to wetland resources, pre-construction notification per General Condition 31 is required prior to using this NWP. Moreover, regional conditions for NWP 40 would preclude discharges of dredged or fill material in all 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 result); for any bank stabilization in San Luis Obispo Creek or Santa Rosa Creek in San Luis Obispo County, or bank stabilization or grade control structures in Gaviota Creek, Mission Creek, or Carpinteria Creek in Santa Barbara County; and within the San Diego Creek and San Juan Creek/Western San Mateo SAMP areas. With the inclusion of these regional conditions, long-term minor impacts to conservation in the Los Angeles District would be further reduced, resulting in long-term minor impacts.). Projects authorized under this NWP are either self-mitigating or require mitigation to compensate fully for both temporary and any permanent impacts. Based on information from our Regulatory Analysis and OMBIL Regulatory Module Database (ORM2) over the last three years, no discharges of dredged or fill material into wetland waters of the United States were authorized under NWP 40; thus, it is not expected that there would be more than minimal loss in any wetland functions and values, both individually and cumulatively, nor the loss of any unique or rare wetland types within the region.

(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 40. Section 106 of the NHPA requires any federal action agency to determine the eligibility of any known or discovered cultural resources that may be affected by the agency's action, and coordinate with the SHPO and/or THPO. Because projects that may potentially be authorized under NWP 40 are brought to the attention of the Corps only when there is a specific project proposed, and because the project's relationship to the cultural resource may not be known until appropriate surveys are conducted, greater specificity cannot be determined at this time; however, through coordination with the SHPO/THPO and the implementation of mitigation measures, the Corps would ensure that NWP 40 would result in minimal impacts to historic properties.

(g) Fish and wildlife values: To ensure minimal impacts to aquatic resources, pre-construction notification per General Condition 31 is required prior to using this NWP. In addition, the general conditions would provide further limitations on the use of NWP 40 in waters of the U.S., such as exclusion from use within and in areas affecting designated critical resource water (General Condition 22). Due to the above constraints, NWP 40 would result in minimal impacts to fish and wildlife values, both individually and cumulatively, in the majority of the Los Angeles District.

Regional conditions for NWP 40 would preclude discharges of dredged or fill material in all 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 result); for any bank stabilization in San Luis Obispo Creek or Santa Rosa Creek in San Luis Obispo County, or bank stabilization or grade control structures in Gaviota Creek, Mission Creek, or Carpinteria Creek in Santa Barbara County; and within the San Diego Creek and San

Juan Creek/Western San Mateo SAMP areas. With the inclusion of these regional conditions, long-term minor impacts to conservation in the Los Angeles District would be further reduced, resulting in long-term minor impacts. With the inclusion of these regional conditions, the above long-term minor impacts to fish and wildlife values in the Los Angeles District would be further reduced, resulting in long-term minor impacts.

(h) Flood hazards: With the dynamic storm season typical of southern California and parts of Arizona, large floods are a normal part of the hydrologic regime. Due to a general lack of soil development and vegetation coverage in semi-arid areas, peak discharges for very high magnitude storm events are potentially larger for dryland basins than similar-sized humid region basins. Because this NWP authorizes the relocation of existing serviceable drainage ditches constructed in waters of the U.S., this NWP has the potential to help alleviate flood hazards at project specific locations. Therefore, it is not anticipated that this NWP would result in adverse flood hazards.

(i) Floodplain values: Same as discussed in the national document.

(j) Land use: Same as discussed in the national document.

(k) Navigation: Same as discussed in the national document.

(l) Shore erosion and accretion: Same as discussed in the national document.

(m) Recreation: Same as discussed in the national document.

(n) Water supply and conservation: Same as discussed in the national document.

(o) Water quality: In the heavily populated areas of southern California and Arizona, existing water quality in most rivers is impaired by runoff from upland agricultural, residential, and industrial sources. NWP 40 would only authorize discharges with minimal impact to waters of the U.S. The general conditions would provide further limitations on the use of NWP 40 in waters of the U.S., such as exclusion from use within or in areas affecting designated critical resource waters (General Condition 22). Due to the above constraints, NWP 40 would result in minimal adverse impacts to water quality, both individually and cumulatively, in the majority of the Los Angeles District.

Regional conditions for NWP 40 would preclude discharges of dredged or fill material in all 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 result); for any bank stabilization in San Luis Obispo Creek or Santa Rosa Creek in San Luis Obispo County, or bank stabilization or grade control structures in Gaviota Creek, Mission Creek, or Carpinteria Creek in Santa Barbara County; and within the San Diego Creek and San Juan Creek/Western San Mateo SAMP areas. With the inclusion of these regional conditions, long-term minor impacts to conservation in the Los Angeles District would be further reduced, resulting in long-term minor impacts.

- (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: NWP 40 would only authorize discharges of dredged or fill material into a minimum acreage of non-tidal waters of the U.S. necessary to complete the project (and not to exceed 0.5 acre for any single and complete project). The general conditions have additional limitations on the use of NWP 40 in waters of the U.S., such as exclusion from use within or in areas affecting designated critical resource waters (General Condition 22). Due to the above constraints, NWP 40 would result in minimal adverse impacts to substrate, both individually and cumulatively, in the majority of the Los Angeles District.

In addition, the regional conditions for NWP 40 would preclude discharges of dredged or fill material in all 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 result); for any bank stabilization in San Luis Obispo Creek or Santa Rosa Creek in San Luis Obispo County, or bank stabilization or grade control structures in Gaviota Creek, Mission Creek, or Carpinteria Creek in Santa Barbara County; and within the San Diego Creek and San Juan Creek/Western San Mateo SAMP areas. With the inclusion of these regional conditions, long-term minor impacts to conservation in the Los Angeles District would be further reduced, resulting in long-term minor impacts.

(b) Suspended particulates/turbidity: In heavily populated areas of southern California and Arizona, existing turbidity levels in most rivers have been exacerbated by runoff from upland agricultural, residential, and industrial sources. Short-term construction activities often increase turbidity levels in waters of the U.S. However, these activities would generally only result in short-term minor changes in turbidity levels. NWP 40 would only authorize discharges of dredged or fill material that impact the minimum acreage of non-tidal waters of the U.S. necessary for the project (and not to exceed 0.5 acre for any single and complete project). The general conditions have additional limitations on the use of NWP 40 in waters of the U.S., such as exclusion from use within or in areas affecting designated critical resource waters (General Condition 22). Due to the above constraints, NWP 40 would result in minimal adverse impacts to turbidity levels, both individually and cumulatively, in the majority of the Los Angeles

District.

The regional conditions for NWP 40 would preclude discharges of dredged or fill material in all 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 result); for any bank stabilization in San Luis Obispo Creek or Santa Rosa Creek in San Luis Obispo County, or bank stabilization or grade control structures in Gaviota Creek, Mission Creek, or Carpinteria Creek in Santa Barbara County; and within the San Diego Creek and San Juan Creek/Western San Mateo SAMP areas. With the inclusion of these regional conditions, long-term minor impacts to conservation in the Los Angeles District would be further reduced, resulting in long-term minor impacts. In addition, the required 401 water quality certification would also address short-term and long-term minimal impacts to turbidity and suspended sediment loads in the rivers and streams in the Los Angeles District. With the implementation of the above conditions, NWP 40 would have long-term minor impacts to turbidity levels in waters of the U.S. within the Los Angeles District, both individually and cumulatively.

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

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

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

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

(g) Threatened and endangered species: NWP 40 would only authorize discharges of dredged or fill material into the minimum acreage non-tidal waters of the U.S. necessary to complete the project (and not to exceed 0.5 acre for any single and complete project). The general conditions have additional limitations on the use of NWP 40 in waters of the U.S., such as exclusion from use within or in areas affecting designated critical resource waters (General Condition 22). Due to the above constraints, the future use of NWP 40 would result in minimal adverse impacts to threatened and endangered species, both individually and cumulatively, in the majority of the Los Angeles District.

The regional conditions for NWP 40 would preclude discharges of dredged or fill material in all 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 result); for any bank stabilization in San Luis Obispo Creek or Santa Rosa Creek in San Luis Obispo County, or bank stabilization or grade control structures in Gaviota Creek, Mission Creek, or Carpinteria Creek in Santa Barbara County; and within the San Diego Creek and San Juan Creek/Western San Mateo SAMP areas. With the inclusion of these regional conditions, long-term minor impacts to conservation in the Los Angeles District would be further reduced, resulting in long-term minor impacts.

In addition, given the large number of listed species found within the 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 inclusion of additional notification requirements, the use of NWP 40 would have minimal impacts, both individually and cumulatively, to threatened and endangered species in the Los Angeles District.

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

(i) Other wildlife: In the semi-arid southern California climate, rivers and streams and their associated riparian habitat represent an important resource for wildlife. NWP 40 would only authorize discharges of dredged or fill material into the minimum acreage of non-tidal waters of the U.S. necessary to complete the project (and not to exceed 0.5 acre for any single and complete project). The general conditions have additional limitations on the use of NWP 40 in waters of the U.S. , such as exclusion from use within or in areas affecting designated critical resource waters (General Condition 22). Due to the above constraints, NWP 40 would result in minimal adverse impacts to wildlife, both individually and cumulatively, in the majority of the Los Angeles District.

The regional conditions for NWP 40 would preclude discharges of dredged or fill material in all 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 result); for any bank stabilization in San Luis Obispo Creek or Santa Rosa Creek in San Luis Obispo County, or bank stabilization or grade control structures in Gaviota Creek, Mission Creek, or Carpinteria Creek in Santa Barbara County; and within the San Diego Creek and San Juan Creek/Wesestern San Mateo SAMP areas. With the inclusion of these regional conditions, long-term minor impacts to conservation in the Los Angeles District would be further reduced, resulting in long-term minor impacts.

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

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

(2) Wetlands: In the Los Angeles District, the semi-arid climate limits the extent and number of wetland resources. This scarcity of wetlands is especially evident in Arizona and in the desert regions of California. In these areas, annual precipitation is usually below 10 inches, which precludes the development of wetlands in the majority of these desert regions. Furthermore, approximately 90 percent of wetlands in California have been affected by historic conversion to agricultural uses, grading, and filling activities. As a result, wetland areas are rare in the Los Angeles District and warrant more rigorous protection. To ensure minimal impacts to wetland resources, the regional conditions for NWP 40 would preclude discharges of dredged or fill material in all jurisdictional vernal pools and to authorize any losses of wetlands in the State of Arizona and the desert regions of California. With the inclusion of these regional conditions for special aquatic

sites and sensitive watersheds and other aquatic resources, there would be only long-term minor impacts to wetlands in the Los Angeles District.

Based on information from our Regulatory Analysis and OMBIL Regulatory Module Database (ORM2) over the last three years, no discharges of dredged or fill material into wetland waters of the United States were authorized under NWP 40; thus, it is not expected that there would be more than minimal loss in any wetland functions and values, both individually and cumulatively, nor the loss of any unique or rare wetland types within the region.

(3) Mud flats: Most of these coastal resources exist around estuaries at the downstream end of watersheds. 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 mud flats, in California have been affected by historic conversion to agricultural uses, grading, and filling activities. As a result, mud flats are especially rare in the Los Angeles District and warrant more rigorous protection. To ensure minimal impacts to mud flats, the regional conditions for NWP 40 would preclude discharges of dredged or fill material in all jurisdictional vernal pools and to authorize losses of mud flats in the State of Arizona and the desert regions of California. With the inclusion of these regional conditions for special aquatic sites and sensitive watersheds and other aquatic resources, there would be only long-term minor impacts to mud flats in the Los Angeles District.

(4) Vegetated shallows: In the Los Angeles District, historic agricultural and construction activities have reduced the extent and number of vegetated shallows. Approximately 90 percent of wetlands in California, including some vegetated shallows, have been affected by historic conversion to agricultural uses, grading, and filling activities, such as marina construction. As a result, vegetated shallows are especially rare in the Los Angeles District and warrant more rigorous protection. To ensure minimal impacts to vegetated shallows, the Los Angeles District would preclude discharges of dredged or fill material where a loss of vegetated shallows in the State of Arizona and the desert regions of California. With the inclusion of these regional conditions, NWP 40 would have minimal impacts on vegetated shallows in the Los Angeles District.

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

(6) Riffle and pool complexes: In the semi-arid southern California and Arizona areas, limited water resources and the need for flood control have led to the construction of numerous dams in the mountains of southern California and Arizona, and on the Colorado River. With the construction of these large dams, many riffle-and-pool complexes have been eliminated by the large reservoirs. Furthermore, construction of the dams also modifies the hydrologic regime of the river, which can also degrade downstream riffle-and-pool complexes. 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 regional conditions for NWP 40 would preclude discharges of dredged or fill material in all jurisdictional vernal pools and in riffle-and-pool complexes in the State of Arizona and the desert regions of California (where a loss would result). With the inclusion of these regional conditions for special aquatic sites and sensitive watersheds and other aquatic resources, there would be only long-term minor impacts to riffle-and-pool complexes in the Los Angeles District.

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

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

The cumulative effects of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Impacts to aquatic resources authorized by the Los Angeles District's permit actions are tracked using the ORM (OMBIL Regulatory Module) database. This includes both temporary and permanent impacts, as well as any compensatory mitigation required. Impact and mitigation data was collected for the period of Fiscal Year 2009 through 2011 to provide a reasonable basis to examine the cumulative effects of each NWP as well as the NWP Program as a whole within the Los Angeles District. Based on an analysis of the types of activities authorized by the Los Angeles District during this period, the Los Angeles District estimates that this NWP will be used approximately 1 time every three years, resulting the loss of approximately 0.12 acre of waters of the United States on an annual basis. To ensure that these activities result in minimal adverse effects on the aquatic environment, individually and cumulatively, the Los Angeles District estimates that approximately 0.22 acre of compensatory mitigation will be required on an annual basis to offset the authorized losses of waters of the United States and ensure that the NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment.

10.0 List of Final Corps Regional Conditions for NWP 40

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

10.5 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.

10.6 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.

10.7 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 mitigation plan describing how the unavoidable losses are proposed to be compensated.

10.8 Regional condition 10

Any compensatory mitigation required by special conditions of the NWP verification shall be completed 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, proof of payment shall be submitted to the appropriate Corps district prior to commencement of construction of the authorized activity.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

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

The Los Angeles District announced the proposal to reissue the Nationwide Permits and our proposed regional conditions in a Special Public Notice dated February 25, 2011. The Los Angeles District also sent letters dated March 9, 2011 to the seven federally recognized tribes within the Los Angeles District (Big Pine Tribe, Bishop Paiute Tribe, Hopi Tribe, Hualapai Tribe, Navajo Nation, White Mountain Apache Tribe, and Twenty-nine Palms Band of Mission Indians) and the Arizona Department of Environmental Quality announcing the proposed rule and our proposed regional conditions, and requesting the State of Arizona and each tribe review the information for purposes of providing water quality certification pursuant to section 401 of the Clean Water Act. Similarly, acting on behalf of the three Corps Districts in California the Sacramento District provided the same letter on February 23, 2011 to the California State Water Resources Control Board (SWRCB) and EPA requesting 401 certification in the State of California and tribal lands within EPA Region 9, respectively (excluding those tribes with delegated 401 authority). The San Francisco District provided a letter to the California Coastal Commission (CCC) on behalf of both coastal districts in California on March 3, 2011, requesting Coastal Zone Management Act (CZMA) consistency certification. Additional discussions were held among the three Corps Districts in California and the SWRCB in an effort to strategize options for certifying a broader range of NWPs or NWP-eligible activities than under the 2007 NWPs.

Upon publication of the final rule in the February 21, 2012, issue of the Federal Register (77 FR 10184), the Los Angeles District again provided letters to each of the seven tribes with 401 authority, and the State of Arizona requesting final 401 certification of the 2012 NWPs within

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

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

12.0 Measures to Ensure Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 10.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the Los Angeles District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to an NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

If, at a later time, there is clear, unequivocal evidence that use of the NWP would result in more than minimal adverse effects on the aquatic environment, individually or cumulatively, the modification, suspension, or revocation procedures at 33 CFR 330.4(e) or 33 CFR 330.5 will be used.

13.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that this NWP, including its terms and conditions, all regional conditions, and limitations, will authorize only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively.