

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 45

This document is a supplement to the national decision document for Nationwide Permit (NWP) 45, 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 45:

Repair of Uplands Damaged by Discrete Events. This NWP authorizes discharges of dredged or fill material, including dredging or excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events. This NWP authorizes bank stabilization to protect the restored uplands. The restoration of the damaged areas, including any bank stabilization, must not exceed the contours, or ordinary high water mark, that existed before the damage occurred. The district engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this NWP. The work must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period.

This NWP does not authorize beach restoration or nourishment.

Minor dredging is limited to the amount necessary to restore the damaged upland area and should not significantly alter the pre-existing bottom contours of the waterbody.

Notification: The permittee must submit a pre-construction notification to the district engineer (see general condition 31) within 12-months of the date of the damage. The pre-construction notification should include documentation, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. (Sections 10 and 404)

Note: The uplands themselves that are lost as a result of a storm, flood, or other discrete event can be replaced without a section 404 permit, if the uplands are restored to the ordinary high water mark (in non-tidal waters) or high tide line (in tidal waters). (See also 33 CFR 328.5.) This NWP authorizes discharges of dredged or fill material into waters of the United States associated with the restoration of uplands.

Summary of changes to NWP 45 from 2007:

This NWP was modified to clarify that it does not authorize beach restoration. The Note was also modified to clarify that the NWP authorizes discharges of dredged or fill material into waters of the United States associated with the restoration of uplands.

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.

3.1.4 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, 40, 42 and 43 and 45 address utility lines, linear transportation crossings, minor discharges, structural discharges, residential development, commercial/institutional development, agricultural activities, recreational facilities, stormwater management facilities, and repair of upland facilities damaged by discreet events respectively, these types of projects also 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 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.

3.2 Waters subjected to additional pre-construction notification requirements

This NWP 45 always requires a pre-construction notification to the district engineer. In addition, to qualify for NWP 45 a pre-construction notification is required within 12-months of the date of the damage. Therefore this section does not apply to NWP 45.

4.0 Alternatives

4.1 No Regional Conditions

Nationwide Permit 45 allows for the restoration of non-jurisdictional uplands that are damaged by discrete events, such as storms and floods. Reclamation of such damaged lands is not regulated by this NWP, but other actions necessary to enable this reclamation, such as temporary stream diversions, cofferdams and the like, are regulated under NWP 45. This NWP requires

notification to the Corps within 12 months of the date of the damage, and work must commence or be under contract to commence within two years of the date of the damage. If restoration can be accomplished by simple replacement within the area bounded by the original contours or ordinary high water mark, projects could proceed beyond the reach of the Corps' jurisdictional authorities. However, if a Corps permit were necessary to conduct otherwise non-regulated aspects of the upland restoration project in the absence of regional conditions, NWP 45 could authorize projects in certain types of special aquatic sites identified as particularly important on a regional basis, such as those in the desert regions (Regional Condition 2), or in other areas where individual review is desirable for certain activities, such as in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County or on Gaviota Creek, Mission Creek and Carpinteria Creek in Santa Barbara County (Regional Condition 7) or for projects that will be impacting jurisdictional vernal pools (Regional Condition 5). Without regional conditions to directly impose a higher degree of project review for aquatic resources in these areas, the more rigorous alternatives analysis inherent to the individual permit process would have to be imposed on a case-by-case basis through discretionary authority. Alternatively, if such constraints are imposed by regional conditions, project proponents can approach their project from different perspectives, potentially resulting in environmentally preferable projects. Furthermore, for projects that could legitimately proceed without Corps regulation but could affect a species listed as threatened or endangered under the federal Endangered Species Act (ESA), or is proposed for such listing, or adversely modify designated critical habitat for a listed species, the project proponent would be required to individually consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (NMFS) pursuant to Section 10 of the ESA. It is reasonable to presume, given the character of NWP 45's ability to regulate certain aspects of a restoration activity but not all, that absence of regional conditions could have more than minimal impacts in specific geographic areas and in certain habitat types.

With no regional conditions, NWP 45 could result in more than minimal impacts in waters of the United States that exhibit relatively high physical and biological functions in certain areas of the Los Angeles District.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

The proposed NWP 45 could result in impacts to waters of the United States that have been altered by recent discrete storm and flood events. A review of past NWP 45 authorizations indicates very few (approximately two) were specific to such restoration, and generally resulted in minor temporary impacts to waters of the United States, ranging from less than 0.1 acre to approximately 0.55 acres resulting from temporary surface water diversion structures during construction of the restoration area. In addition, data collected in the usage of this NWP within a 3 year period demonstrated that less than 0.1 acre of permanent impacts were authorized for individual NWP 45 authorizations.

In the Los Angeles District, the semi-arid climate limits the amount of special aquatic sites that occur throughout the region. In dryland areas, lack of vegetation and 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 small amount to stream discharge. This indicates that further loss of special aquatic sites in southern California and Arizona could result in more than minimal cumulative impacts. The notification requirement inherent to NWP 45 would ensure specific review for all projects in areas and sensitive resource types identified in the regional conditions. With the inclusion of regional conditions to require individual permits in certain regions, watersheds or sensitive aquatic resources, the Los Angeles District would ensure minimal impacts, both individually and cumulatively, without a substantial increase in overall workload. Additional limits on NWP 45 would not be warranted because it generally would restore conditions to a state prior to the discrete event being addressed and is not anticipated to result in additional loss of waters of the U.S.

4.3 Alternative Regional Nationwide Permit Conditions

NWP 45 would authorize only those activities necessary to enable the restoration of eroded non-jurisdictional upland areas lost by discrete storm or flood events. This is a reasonable response to a property owner's concern for a viable use of his property. NWP 45 already limits authorized activities to the minimum necessary as well as requires a pre-construction notification to be submitted to the district engineer within 12-months of the date of the damage. In addition, the work authorized under this NWP must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. These limitations incorporated into the NWP ensure that this NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period. This NWP does not authorize permanent structures or fill to conduct the activities except for the potential use of armoring of reconstituted slopes at the former extent of the ordinary high water mark. The notification requirement of NWP 45 allows for specific review of projects in the Santa Monica Mountains watersheds, special aquatic sites and perennial watercourses in desert areas, and in Essential Fish Habitat to ensure these relatively rare or important resources would receive an appropriate level of protection to avoid greater than minimal impacts, individually and cumulatively. Therefore, additional regional conditions specific to this NWP are not necessary.

5.0 Endangered Species Act

5.1 General Considerations

NWP 45 authorizes the discharges of dredged or fill material, including dredging or excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events. This NWP authorizes bank stabilization to protect the restored uplands. The restoration of the damaged areas, including any bank stabilization, must not exceed the contours, or ordinary high water mark, that existed before the damage occurred. The district engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this NWP. The work must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period. Minor dredging is limited to the amount necessary to restore the damaged upland area and should not significantly

alter the pre-existing bottom contours of the waterbody. The permittee must submit a pre-construction notification to the district engineer per general condition 31 and regional condition 3 within 12 months of the date of the damage. Uplands lost as a result of a storm, flood, or other discrete event can be replaced without a section 404 permit, if the uplands are restored to the ordinary high water mark (in non-tidal waters) or high tide line (in tidal waters). This NWP does not authorize beach restoration or nourishment.

In addition, the new General and Regional Conditions would provide further limitations on the use of NWP 45 in sensitive aquatic ecosystems. The regional conditions for NWP 45 limit the use of this NWP if it may result in a loss of wetlands, mudflats, vegetated shallows, or riffle and pool complexes as defined at 40 CFR Part 230.40-45 within the State of Arizona and within the Mojave and Sonoran (Colorado) desert regions of California. The desert region in California is limited to four USGS Hydrologic Unit Code (HUC) accounting units (Lower Colorado -150301, Northern Mojave-180902, Southern Mojave-181001, and Salton Sea-181002). In addition, regional conditions for NWP 45 require individual permits in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County for bank stabilization projects; require individual permits in Gaviota Creek, Mission Creek and Carpinteria Creek in Santa Barbara County for bank stabilization projects and grade control structures, and require individual permits for impacts to vernal pools (with the exception that discharges for the purpose of restoration, enhancement, management or scientific study of vernal pools). With these constraints, NWP 45 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 45, there would be more than minimal impacts only in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. With the inclusion of these limitations for NWP 45, the above long-term minor impacts to endangered and threatened species in the Los Angeles District would be further reduced. In addition, given the large number of listed species in Los Angeles District, continued coordination with USFWS and NMFS would be required to ensure minimal impacts to endangered species. With the continuation of existing informal coordination procedures, and the development and implementation of Standard Local Operating Procedures for Endangered Species (SLOPES), the use of NWP 45 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. NWP 45 always requires a pre-construction notification to the district engineer per general condition 31 and regional condition 3, therefore the Los Angeles District will be able to ensure that the ESA requirements are met prior to authorizing the activity. 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 Los Angeles District has substantial information, including maps, previous studies and survey data that document areas that support 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 Los Angeles District has no available data for a proposed project, the applicant may be referred to the USFWS or NMFS for additional information. When the Los Angeles District

receives an application within the range of a listed species and/or the project area otherwise supports suitable habitat, the USFWS or NMFS is contacted early in the review process. To facilitate compliance with the ESA, the Los Angeles District has coordinated with the USFWS to complete programmatic consultations for several threatened and endangered species in Ventura, Santa Barbara, and San Luis Obispo counties.

As proposed, the NWP general and regional conditions ensure that other federal statutory requirements are met. For example, in instances where a project may impact a federally listed species or its critical habitat, the applicant would be required to submit to the Corps appropriate biological investigations and supporting documentation for an effects determination with respect to the ESA. Per General Condition 18, if the Corps were to determine a proposed project would 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. The Los Angeles District would ensure all 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 are 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. However, in January 2003, the Corps of Engineers, Los Angeles District, Regulatory Division and the U.S. Fish and Wildlife Service, Ventura Office finalized SLOPES for informal and formal ESA consultations. In addition, some of 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, dated August 12, 2004 that was completed by the Corps of Engineers, Los Angeles District, Regulatory Division and the National Oceanic and Atmospheric Administration's (NOAA) NMFS. The Los Angeles District has conducted several preliminary meetings with USFWS and NMFS staff to determine the direction of further SLOPES discussions, and additional meetings will be conducted in the future.

As proposed, NWP 45 always requires a pre-construction notification to the district engineer per general condition 31 and regional condition 3, therefore the Los Angeles District will be able to ensure that the ESA requirements are met prior to authorizing the activity. In addition, the NWP general and regional conditions ensure that other federal statutory requirements are met. For example, in instances where a project may impact a federally listed species or its critical habitat, the applicant would be required to submit to the Corps appropriate biological investigations and supporting documentation for an effects determination with respect to the ESA. Per General Condition 18, if the Corps were to determine a proposed project would 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 NWP's comply with the ESA and use of the NWP's 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 the Los Angeles District were contacted via letter dated December 13, 2010 to provide advance notification of the Corps' intent to issue the 2012 NWP's and upcoming opportunity to engage in government-to-government consultation. Follow-up letters were sent to the same set of federally recognized tribes February 11, 2011 announcing the issuance of the proposed rule and formally requesting government-to-government consultation. An advance copy of the proposed rule was also included. One tribe provided a response, indicating they did not foresee a need to utilize the NWP's. No requests for government-to-government consultation were received.

7.2 Local Operating Procedures for Protecting Tribal Resources

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

8.0 Essential Fish Habitat

Pursuant to the Magnuson-Stevens Fishery Management and Conservation Act, Federal agencies are required to consult with the National Marine Fisheries Service (NMFS) for actions that may adversely affect essential fish habitat (EFH). The marine and estuarine waters within the Los Angeles District contain designated EFH, which are administered by four fishery management plans (FMP): the Pacific Groundfish FMP, the Highly Migratory Species FMP, the Pacific Coast Salmon FMP, and the Coastal Pelagic Species FMP. The Los Angeles District's Regional Condition 4b requires submission of a PCN for any NWP authorization in EFH. A similar PCN requirement has been in place since the issuance of the 2002 NWP's. The current proposed regional condition includes the additional requirement that applicants include an EFH assessment with the PCN. By requiring a PCN with an EFH assessment for all activities within designated EFH, the Los Angeles District ensures the appropriate level of consultation with NMFS is conducted and effects to EFH are adequately addressed prior to verification.

To facilitate the consultation process, the Los Angeles District has developed an EFH general concurrence with Southwest Region of the NMFS. The general concurrence establishes a

coordination procedure between NMFS and the Los Angeles District and covers a variety of Corps-regulated activities with minimal and/or temporary adverse effects to EFH. In addition, the Los Angeles District has developed a programmatic consultation with the Southwest Region of the NMFS that covers a broader range of activities that do not fit within the scope of the general concurrence. In summary, the inclusion of Regional Condition 4b, in conjunction with Los Angeles District's well-established set of procedures for addressing the effects of regulated activities within EFH (including conducting coordination with the NMFS as appropriate) will ensure the effects to EFH from the implementation of the 2012 NWP's will be minimal.

9.0 Supplement to National Impact Analysis

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

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

(a) Conservation: Same as discussed in the national decision document.

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

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

(d) General environmental concerns: Same as discussed in the national decision document.

(e) Wetlands: Review of past usage (within a three year timeframe) of NWP 45 demonstrated that it has had resulted in no losses to wetland waters of the U.S. In light of the regional conditions for NWP 45 that limit the use of this NWP if it may result in a loss of wetlands within the State of Arizona and within the Mojave and Sonoran (Colorado) desert regions of California, this trend of no to minimal impacts to wetlands is expected to continue through the 5-year duration of the NWP program. In addition, regional conditions for NWP 45 require individual permits in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County for bank stabilization projects; require individual permits in Gaviota Creek, Mission Creek and Carpinteria Creek in Santa Barbara County for bank stabilization projects and grade control structures, and require individual permits for impacts to vernal pools (with the exception that discharges for the purpose of restoration, enhancement, management or scientific study of vernal pools). With these additional constraints, NWP 45 would result in minimal impacts to wetlands.

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

(g) Fish and wildlife values: It is anticipated that activities authorized by NWP 45 may affect one or more species listed as threatened or endangered under the federal ESA, or adversely modify designated critical habitat for such species. However, by requiring individual permits for impacts to special aquatic sites in specific locations and watersheds, and when impacting vernal pools through implementation of the regional general conditions, the most rare and valuable resources

will be reviewed at a higher level. In addition, the Corps of Engineers, Los Angeles District, Regulatory Division and the U.S. Fish and Wildlife Service, Ventura Office finalized SLOPES in January 2003, for informal and formal ESA consultations. Activities authorized by the NWP that may adversely affect EFH have been addressed by the General Concurrence dated August 5, 2003 and a Programmatic Consultation dated August 12, 2004 that was completed by the Corps of Engineers, Los Angeles District, Regulatory Division and NOAA's NMFS. These procedures allow for better coordination between the agencies as well as more efficient compliance with ESA.

(h) Flood hazards: In the Los Angeles District the stochastic nature of the region's rainfall and runoff events often results in severe erosion events that require restoration of uplands and occasional bank stabilization. These events will often relocate the channel thalweg and corresponding ordinary high water mark and therefore require surface water diversions to implement upland restoration, including potential bank stabilization. The implementation of Regional Conditions 2 and 7 would serve to restrict the use of NWP 45 in specific sensitive resources including wetlands, mudflats, vegetated shallows and riffle and pool complexes in the State of Arizona and desert regions of California, as well as for bank stabilization projects in 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. The restoration of uplands eroded by discrete events is not expected to have more than minimal adverse effects on flood hazards as it would not authorize fill to be placed beyond (channelward) the ordinary high water mark that existed prior to the event.

(i) Floodplain values: In the arid and semi-arid southwest, floodplains offer a unique and valuable aquatic resource in the dry landscape. In general, waterways and undeveloped floodplains mitigate large flood events and also provide habitat for many federally threatened and endangered species. The stochastic nature of the region's rainfall and runoff events help to shape this complex landscape feature, but are also responsible for the severe erosion events that require restoration of uplands and occasional bank stabilization. Bank stabilization activities are often completed in response to floodplain encroachment (i.e., development) and the resultant destruction of riparian vegetation. In a study of authorized bank stabilization structures in the District, Vandersande (2006) found that less riparian vegetation was observed at the toe of the existing structures than undisturbed sections of streambank. Bank stabilization activities have the potential to adversely affect floodplains by modifying the sediment transport dynamics and disconnecting the floodplain from the active channel (i.e., preventing overbank flows). Mitigation sequencing can avoid, minimize, and compensate these impacts but it must be done with a proper understanding of the hydrologic system. Specifically, impacts can be avoided by reducing the size of the structure, while minimization typically involves incorporating riparian vegetation into the design of the structure. Compensation for the destruction of floodplain resources can typically be achieved on-site through enhancement of the existing plant communities.

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

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

- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

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

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: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Climatic conditions in Los Angeles District (generally wet winters and dry summers) allow for consideration of conducting authorized work during the extended dry season from May through November each year. As such, suspended particulates or increased turbidity issues tend to be of minor consideration. When certain projects cannot be delayed and must be conducted during the wet season, local conditions often allow work during periods of lower perennial or intermittent flows that can be effectively addressed with minimal contributions to suspended particulates.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: Based on data for the last three (3) years, none of the authorizations of this NWP required ESA consultations within the Los Angeles District. In

addition, the Corps of Engineers, Los Angeles District, Regulatory Division and the U.S. Fish and Wildlife Service, Ventura Office finalized SLOPES in January 2003, for informal and formal ESA consultations. The Corps of Engineers, Los Angeles District, Regulatory Division also have addressed NWP's that may have an adversely affect on EFH with NOAA's NMFS through the completion of a General Concurrence, dated August 5, 2003 and a Programmatic Consultation, dated August 12, 2004. These procedures allow for better coordination between the agencies as well as more efficient compliance with ESA.

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

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

(j) Special aquatic sites: In review of data over the last three (3) years of NWP 45 authorizations, only non-wetland waters of the U.S were impacted. The majority of impacts authorized were temporary in nature and totaled 0.55 acre of non-wetland waters of the U.S. and permanent impacts totaling 0.02 acre of non-wetland waters of the U.S. All temporary impacts were required to be restored to pre-construction conditions and an additional 0.69 acre of stream enhancement was required to mitigate for temporal losses. Regional condition 2 would prevent the use of NWP 45 when it would result in a loss of wetlands, mudflats, vegetated shallows, or riffle and pool complexes within the State of Arizona and within the Mojave and Sonoran (Colorado) desert regions of California. Special aquatic sites in the desert regions of the Los Angeles District 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.

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

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

(2) Wetlands: Regional condition 5 would prevent use of NWP 45 in jurisdictional vernal pools, a type of wetland, except when the purpose is restoration or enhancement of those pools. In addition, regional condition 2 would prevent the use of NWP 45 when it would result in a loss of wetlands within the State of Arizona and within the Mojave and Sonoran (Colorado) desert regions of California. Based on past authorizations under this NWP, impacts to Corps jurisdictions were predominately temporary in nature, therefore future authorizations under this NWP are expected to have minimal losses of wetlands and non-wetland waters of the U.S.

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

- (4) Vegetated shallows: Same as discussed in the national decision document
- (5) Coral reefs: Same as discussed in the national decision document
- (6) Riffle and pool complexes: In addition, regional condition 2 would prevent the use of NWP 45 when it would result in a loss of riffle and pool complexes within the State of Arizona and within the Mojave and Sonoran (Colorado) desert regions of California.
- (k) Municipal and private water supplies: Same as discussed in the national decision document.
- (l) Recreational and commercial fisheries: Same as discussed in the national decision document.
- (m) Water-related recreation: Same as discussed in the national decision document.
- (n) Aesthetics: Same as discussed in the national decision document.
- (o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

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

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

Based on an analysis of the types of activities authorized by the Los Angeles District during this period, the Los Angeles District estimates that this NWP will be used approximately once per year, resulting the loss of approximately 0.02 acre of waters of the United States and temporary impacts to approximately 0.5 acre 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 0.5 acre of restoration to pre-construction conditions will be required on an annual basis to offset the authorized temporary impacts to waters of the United States (primarily through revegetation of reconstructed slopes) and ensure that the NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. Based on past NWP authorizations, it is predicted that each future individual authorization will result in less than a tenth (0.10) acre of losses to waters of the U.S.

Because this estimate is based on very infrequent use of NWP 45 in the Los Angeles District it is difficult to make unqualified predictions about its use. In light of the nature of NWP 45, its use under the 2012 NWP program could increase substantially as a result of flood-related natural

disasters (necessitating extensive reclamation of damaged uplands), which are inherently unpredictable. Per general condition 20(c) the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in minimal adverse effects on the aquatic environment.

10.0 List of Final Corps Regional Conditions for NWP 45

10.1 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).

10.2 Regional condition 3

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

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

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

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

10.3 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.

10.4 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.

10.5 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.

Past use of NWP 45 has been very infrequent in the Los Angeles District. Absent unpredictable natural disasters which could result in a substantial increase in request for authorization under NWP 45, the Los Angeles District anticipates this trend to continue. 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.