

## **SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 46**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 46, 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 46:

*Discharges in Ditches.* Discharges of dredged or fill material into non-tidal ditches that are: (1) constructed in uplands, (2) receive water from an area determined to be a water of the United States prior to the construction of the ditch, (3) divert water to an area determined to be a water of the United States prior to the construction of the ditch, and (4) are determined to be waters of the United States. The discharge must not cause the loss of greater than one acre of waters of the United States.

This NWP does not authorize discharges of dredged or fill material into ditches constructed in streams or other waters of the United States, or in streams that have been relocated in uplands. This NWP does not authorize discharges of dredged or fill material that increase the capacity of the ditch and drain those areas determined to be waters of the United States prior to construction of the ditch.

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

Summary of changes to NWP 46 from 2007: There are no changes to NWP 46.

### **1.0 Background**

In the February 16, 2011, issue of the Federal Register (76 FR 9174), the Corps of Engineers (Corps) published its proposal to reissue 48 existing NWPs and issue two new NWPs. To solicit

comments on its proposed regional conditions for these NWP's, the Los Angeles District issued a public notice on February 25, 2011. The issuance of the NWP's was announced in the February 21, 2012, Federal Register notice (77 FR 10184). After the publication of the final NWP's, the Los Angeles District considered the need for regional conditions for this NWP. The Los Angeles District's findings are discussed below.

## **2.0 Consideration of Public Comments**

### **2.1 General Comments**

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

### **2.2 Comments on Proposed Regional Conditions**

#### **2.2.1 Proposed Regional Condition 1**

Please see the attached response to comments document.

#### **2.2.2 Proposed Regional Condition 2**

Please see the attached response to comments document.

#### **2.2.3 Proposed Regional Condition 3**

Please see the attached response to comments document.

#### **2.2.4 Proposed Regional Condition 4**

Please see the attached response to comments document.

#### **2.2.5 Proposed Regional Condition 5**

Please see the attached response to comments document.

#### **2.2.6 Proposed Regional Condition 6**

Please see the attached response to comments document.

#### **2.2.7 Proposed Regional Condition 7**

Please see the attached response to comments document.

#### **2.2.8 Proposed Regional Condition 8**

Please see the attached response to comments document.

### **2.2.9 Proposed Regional Condition 9**

Please see the attached response to comments document.

### **2.2.10 Proposed Regional Condition 10**

Please see the attached response to comments document.

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

### **3.1 Waters excluded from use of this NWP**

#### **3.1.1 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 NWP's 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 NWP's, 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 NWP, a single and complete project could impact up to 0.5 acre of vernal pool habitat and be considered for NWP authorization. The District had previously been using a 0.5-acre SIP threshold for vernal pool impacts since 25 November 1997 (previous District Regional Condition 1). Despite the establishment of this earlier regional condition, the District experienced additional losses of vernal pool habitat, requiring the establishment of Regional Condition 5 as part of the 2000, 2002 and 2007 NWP Programs. Within the boundaries of the Los Angeles District, the sizes of jurisdictional vernal pools generally range from approximately 200 to 4,900 square feet (e.g. 0.00459 to 0.11248 acre). Therefore, 0.5 acre of vernal pools could include a large vernal pool complex or individual pools made up of 5 to 100 pools. Compounding this situation, mitigation for vernal pool impacts is not well developed, and often takes the form of preservation and enhancement of remaining pools, resulting in a continued net loss of vernal pool acreage, functions and services. The SIP review process includes an analysis of the propriety of the proposed fill in a special aquatic site pursuant to the 404(b)(1) Guidelines.

Vernal pools in the region comprise a severely diminished class of aquatic habitats and are fragile, easily disturbed ecosystems. Due to the decline of vernal pool habitat in the region, the District determined future impacts to vernal pools in the region would result in more than minimal adverse environmental effects both individually and cumulatively. With the proposed regional condition, any quantity of dredged or fill material discharged into a jurisdictional vernal pool that is not temporary in accordance with NWP 5 or 6 or does not result in a net increase in aquatic resources functions and services in accordance with NWP 27 would be subject to an SIP review. By requiring an SIP, the remaining jurisdictional vernal pools in the region would be afforded the maximum level of protection under the Regulatory Program which includes a 404(b)(1) analysis (i.e., under this more rigorous process, the Corps can only authorize the least environmentally damaging practicable alternative for a given project).

With the modification of Regional Condition 5, the District recognizes certain regulated activities involving restoration, enhancement, management, and scientific study of vernal pools would not contribute to the overall loss of vernal pool habitat and in such cases (with few exceptions) SIP review would not provide any additional protection or benefit to vernal pools. Therefore, this regional condition has been modified since the 2007 NWPs to include language excluding these four categories of activities from this requirement. If the success of a proposed restoration or enhancement activity is uncertain, or the subject vernal pool is of particularly high ecological value, the District would still retain the ability to review any such action as an SIP through our discretionary authority. In addition, the Corps has determined that issuance of Regional Condition 5 would not be contrary to the public interest. Overall, the implementation of Regional Condition 5, which requires an SIP for discharges of dredged or fill material in jurisdictional vernal pools (with the exception of activities associated with the restoration, enhancement, management or scientific study), would provide additional assurances that the activities permitted under the NWPs would result in minimal impacts on both an individual and cumulative basis in the Los Angeles District.

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

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

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

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

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

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

The Corps conducted extensive analyses in its environmental impact statement (EIS) for the San Juan Creek/Western San Mateo Creek Watersheds SAMP and its joint EIS/environmental impact report (EIR) with the California Department of Fish and Game Habitat Conservation Branch, South Coast Region for the San Diego Creek Watershed SAMP/Watershed Streambed Alteration Agreement (WSAA) Process. The final decision to revoke selected NWPs 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**

NWP 46 always requires a pre-construction notification to the district engineer. Therefore, this alternative is not applicable to the analysis and has been eliminated from further consideration

## **4.0 Alternatives**

### **4.1 No Regional Conditions**

The proposed NWP 46 would authorize discharges of fill material up to one acre into non-tidal jurisdictional ditches constructed in uplands. To qualify, the ditch must receive water from a water of the United States (U.S) and divert water to another water of the U.S. Ditches constructed within waters of the U.S. would not qualify for this NWP, nor would any ditches subject to Corps jurisdiction under Section 10 of the Rivers and Harbors Act (i.e. navigable waters). In addition, the activity cannot increase the capacity of the ditch such that it drains those areas determined to be waters of the U.S. prior to the construction of the ditch. Notification to the Corps is required for any use of NWP 46.

Without the inclusion of the regional conditions that would be applicable to this NWP, there is the potential for more than minimal adverse impacts to aquatic resource functions as well as contributing to substantial cumulative effects to these resources. Without a regional condition excluding use of this NWP to authorize losses in wetlands, mudflats, vegetated shallows and riffle and pool complexes in the state of Arizona, the Mojave and Sonoran (Colorado) desert regions in California (Regional Condition 2) and for any impact in jurisdictional vernal pools (Regional Condition 5) throughout Los Angeles District, impacts to these relatively rare resources could occur without compensatory mitigation, contributing to more than minimal impacts, both individually and cumulatively, to special aquatic sites and perennial waterbodies in the Los Angeles District. In Addition, without a regional condition prohibiting use of NWP 46 in the San Diego Creek and San Juan Creek/Western San Mateo Creek SAMP areas, there could be more than minimal cumulative effects in these area as described in the Records of Decision for each SAMP area.

Without a regional condition requiring notification for projects in sensitive special aquatic sites, there could be more than minimal adverse impacts, either individually or cumulative, to these resources in Los Angeles District. Finally, without a regional condition requiring notification for projects in the watersheds of the Santa Monica Mountains (Regional Condition 4), more than minimal adverse impacts and/or substantial cumulative impacts could occur in these areas resulting from the use of NWP 46 and other NWPs. The ability of the Los Angeles District to track cumulative impacts in these areas would be made more difficult without these regional conditions. Although the terms and conditions of NWP 46 require notification in all cases, regional conditions specific to the sensitive resources described above (special aquatic sites, EFH, specific watersheds) would be expected to provide better protection of those resources than the notification requirements of a given NWP as an applicant may be unclear as to the type of NWP which a project may qualify. By placing the focus on the resource itself rather than the permit type, the Los Angeles District would be better able to ensure adequate protection of those

resources.

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

An alternative regional condition would prohibit the use of NWP 46 in all special aquatic sites in the Los Angeles District.

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 minimal adverse impacts to special aquatic sites. In the Los Angeles District, the semi-arid climate limits special aquatic sites 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 through flow only contributing a relatively small quantity to stream discharge. Areas of perennial flow are relatively limited in the Los Angeles District, particularly in Arizona and the desert regions of California, and frequently provide habitat for threatened and endangered species. Over the past fifty years, agricultural and construction activities have resulted in a loss of approximately 90 percent of wetlands and 95 to more than 99 percent of the vernal pools in southern California. The above indicates further loss of special aquatic sites in southern California and Arizona, as well as perennial waterbodies in Arizona and the desert regions of California, could result in more than minimal cumulative impacts.

In order to ensure protection of these resources the Los Angeles District would preclude the use of NWP 46 to authorize losses of any jurisdictional special aquatic site (excluding coral reefs and sanctuaries and refuges) in Arizona and the desert regions of California, as well as all jurisdictional vernal pools. With the inclusion of the above modifications to NWP 46, the Los Angeles District would ensure minimal impacts to special aquatic sites through additional review without substantially increasing our workload. Lastly, certain watersheds and resources in the Los Angeles District support high physical and biological functions that are threatened by cumulative impacts at the watershed level. To ensure that NWP 46 would have minimal impacts to these resources, the Los Angeles District would require a pre-construction notification (PCN) for all projects in the Santa Monica Mountains. With the inclusion of the above modifications, the Los Angeles District would ensure minimal impacts, both individually and cumulatively, for projects authorized under NWP 46. Although the terms and conditions of NWP 46 require notification in all cases, regional conditions specific to the sensitive resources described above (special aquatic sites, specific watersheds) would be expected to provide better protection of those resources than the notification requirements of a given NWP as an applicant may be unclear as to the type of NWP which a project may qualify. By placing the focus on the resource itself rather than the permit type, Los Angeles District would be better able to ensure adequate protection of those resources.

In the Los Angeles District, the relatively few ditches for which NWP 46 would be applicable generally consist of canals and aqueducts providing municipal and agricultural water supply;

many of which are concrete-lined facilities that provide very limited aquatic resource functions. NWP 46 would include an acreage limit of one acre of permanent impacts within any applicable ditch. The regional limits and PCN thresholds in the regional conditions described above are appropriately focused on those resources for which additional protection or oversight is warranted. Additional PCN thresholds beyond those provided for NWP 46 and in the proposed regional conditions for Los Angeles District would provide little if any benefit to aquatic resources throughout Los Angeles District.

Based on the analysis above, the “Regional Limits or Notification Thresholds” alternative has been dismissed from further consideration.

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

To further ensure NWP 46 would have minimal impacts to aquatic resources, both individually and cumulatively, the Los Angeles District could augment the proposed notification requirements for NWP 46 by agency coordination for any PCN following the procedures in General Condition 31, or by eliminating its use altogether and requiring all actions be evaluated under the standard individual permit program.

Requiring notification to the Los Angeles District and resource agencies for all projects authorized under NWP 46 could substantially increase the workload for the Los Angeles District without any commensurate benefits to aquatic resources. As a result, the Los Angeles District has determined the above alternative notification requirement would not be practicable and would result in only minor additional benefits to aquatic resources. With the proposed modifications to NWP 46, the Los Angeles District has identified the resources and watersheds that warrant additional scrutiny. As a result, the Los Angeles District’s proposed modifications would result in a relatively minor increase in overall workload, but would provide potentially substantial benefits to the aquatic environment in the identified areas.

In the Los Angeles District, the semi-arid climate limits special aquatic sites 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 through flow only contributing a relatively small quantity to stream discharge. Over the past fifty years, agricultural and construction activities have resulted in a loss of approximately 90 percent of wetlands and 95 to more than 99 percent of the vernal pools in southern California. Further loss of special aquatic sites in southern California and Arizona could result in more than minimal cumulative impacts. In order to ensure protection of these resources the Los Angeles District would preclude the use of NWP 46 in any jurisdictional special aquatic site (excluding coral reefs and sanctuaries and refuges) in Arizona and the desert regions of California, as well as all jurisdictional vernal pools. Lastly, certain watersheds and resources in the Los Angeles District support high physical and biological functions that are threatened by cumulative impacts at the watershed level. To ensure that NWP 46 would have minimal impacts to these resources, the Los Angeles District would require a PCN for all projects in the Santa Monica Mountains and the Santa Clara River Watershed. With the inclusion of the above modifications, the Los Angeles District would ensure minimal impacts, both individually and cumulatively, for projects authorized under NWP 46. Although

the terms and conditions of NWP 46 require notification in all cases, regional conditions specific to the sensitive resources described above would be expected to provide better protection of those resources than the notification requirements of a given NWP as an applicant may be unclear as to the type of NWP which a project may qualify. By placing the focus on the resource itself rather than the permit type, the Los Angeles District would be better able to ensure adequate protection of those resources.

Based on the findings of the analyses above, the “Regional Nationwide Permit Conditions” alternative has been dismissed from further consideration.

## **5.0 Endangered Species Act**

### **5.1 General Considerations**

NWP 46 would authorize discharges of fill material up to one acre into jurisdictional ditches constructed in uplands. To qualify, the ditch must receive water from a water of the U.S. and divert water to another water of the U.S. Ditches constructed within waters of the U.S. would not qualify for this NWP, nor would any ditches subject to Corps jurisdiction under Section 10 of the Rivers and Harbors Act (i.e. navigable waters). In addition, the new General and Regional Conditions would provide further limitations on the use of NWP 46 in sensitive aquatic ecosystems. The regional conditions for NWP 46 limit the use of this NWP if it may result in a loss of wetlands, mudflats, vegetated shallows, or pool and riffle 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 46 also 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 46 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 46, there could be more than minimal impacts only in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions.

In addition, given the large number of listed species in the Los Angeles District, continued coordination with USFWS and the National Marine Fisheries Service (NMFS) is required to ensure minimal impacts to endangered species. With the continuation of the existing informal coordination procedures, the development and implementation of standard local operating procedures (SLOPES), and the inclusion of additional notification requirements, the use of NWP 46 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 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 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 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 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 that was completed by the Corps of Engineers, Los Angeles District, Regulatory Branch and 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, 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 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 NWPs and our proposed regional conditions, all federally recognized tribes within Los Angeles District were contacted via letter dated December 13, 2010 to provide advance notification of the Corps' intent to issue the 2012 NWPs 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 NWPs. 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 46 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 46 would only authorize discharges of dredged or fill material into a maximum of 1 acre of waters of the U.S. within a limited class of upland excavated ditches. The General Conditions would provide further limitations on the use of NWP 46 in waters of the U.S. Due to the above constraints, NWP 46 would result in minimal impacts to conservation, both individually and cumulatively, in the majority of the Los Angeles District. Regional conditions for NWP 46 would require an individual permit for discharges of dredged or fill material resulting in a loss of most types of special aquatic sites in the state of Arizona and within the Mojave and Sonoran (Colorado) desert regions of California, and for any discharge in jurisdictional vernal pools, thereby further reducing the above long-term minor impacts to conservation in the Los Angeles District.

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

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

(d) General environmental concerns: In the Los Angeles District, numerous threatened or endangered species require extensive coordination with USFWS and NMFS. The semi-arid environment limits the extent of aquatic resources in the southern California/Arizona area. Regional conditions for NWP 46 would require an individual permit for all discharges of dredged or fill material causing a loss of wetlands, mudflats, vegetated shallows, and riffle and pool complexes in the State of Arizona, within the Mojave and Sonoran (Colorado) desert regions of California, and jurisdictional vernal pools. With the inclusion of the notification requirements for NWP 46 in all special aquatic sites and perennial waterbodies in the State of Arizona and the within the Mojave and Sonoran (Colorado) desert regions of California desert regions of California, and specific sensitive watersheds, adverse effects on general environmental concerns in the Los Angeles District would be further reduced.

(e) Wetlands: In the Los Angeles District, the semi-arid climate limits the extent and number of wetland resources. This scarcity of wetlands is especially evident in Arizona and in the Mojave and Sonoran (Colorado) 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. The types of ditches which would be eligible for authorization under NWP 46 are typically concrete-lined facilities or operated and maintained in a manner that precludes the development of wetlands. In some cases wetlands may form adjacent to unlined ditches as a result of seepage; however such areas would be outside the scope of NWP 46 as it would apply only to the ditch itself. To further ensure minimal impacts to wetland resources, the

Los Angeles District would preclude use of NWP 46 to authorize losses of wetlands within the Mojave and Sonoran (Colorado) desert regions in southern California and the State of Arizona, and, for any use in jurisdictional vernal pools. With the inclusion of this modification, and in light of these considerations described above, NWP 46 would have long-term, relatively minor impacts to wetland resources in the Los Angeles District. In addition, in analyzing data from the last three (3) years of NWP 46 usage, no temporary or permanent impacts occurred to wetlands. All impacts authorized under this NWP were to ephemeral/intermittent drainages that did not support wetlands.

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

(g) Fish and wildlife values: NWP 46 would only authorize discharges of dredged or fill material into a maximum of 1 acre of waters of the U.S. within a limited class of upland excavated ditches. Within Los Angeles District, such facilities are typically limited to aqueducts and canals that provide water for municipal or agricultural uses and provide limited fish and wildlife values. Many of these facilities are concrete lined and/or regularly maintained, which further limits their fish and wildlife values. To further ensure minimal impacts to wetland resources, the Los Angeles District would preclude use of NWP 46 to authorize losses of wetlands within the Mojave and Sonoran (Colorado) desert regions in southern California and the State of Arizona, and, for any use in jurisdictional vernal pools. With the inclusion of this modification, and in light of these considerations described above, NWP 46 would have long-term, relatively minor impacts to fish and wildlife values in the Los Angeles District.

(h) Flood hazards: Same as discussed in the national decision document.

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

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

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

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

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

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

(o) Water quality: In the heavily populated areas of southern California and Arizona, existing water quality in most rivers is impaired by runoff from upland agricultural, residential and industrial sources. NWP 46 would only authorize discharges of dredged or fill material into a maximum of 1 acre of waters of the U.S. within a limited class of upland excavated ditches. Regional conditions applicable to NWP 46 would preclude discharges of dredged or fill material resulting in a loss of most types of special aquatic sites in the state of Arizona and the desert regions of California, and any use in jurisdictional vernal pools. With the inclusion of these additional restrictions on the use of NWP 46, the above long-term minor impacts to water quality

in the Los Angeles District would be minimal.

(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: Same as discussed in the national decision document.

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

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

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

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

(g) Threatened and endangered species: NWP 46 would only authorize discharges of dredged or fill material into a maximum of 1 acre of waters of the U.S. within a limited class of non-tidal, upland excavated ditches. The majority of these facilities provide limited habitat opportunities for threatened and endangered species. Furthermore, the regional conditions for NWP 46 would preclude discharges of dredged or fill material causing a loss of most types of special aquatic sites in the state of Arizona and the Mojave and Sonoran (Colorado) desert regions of California, and for any use in jurisdictional vernal pools. With the inclusion of the general notification requirements for NWP 46, the above long-term minor impacts to endangered and threatened species in the Los Angeles District would be further reduced. In addition, given the large number of listed species in Los Angeles District, continued coordination with USFWS and NMFS is required to ensure minimal impacts to endangered species. With the continuation of the existing informal coordination procedures, the development and implementation of SLOPES, and the inclusion of additional PCN requirements, the Los Angeles District would ensure project activities authorized under NWP 46 comply with the ESA and use of NWP 46 has minimal

impacts on threatened and endangered species in the Los Angeles District, as is in compliance with the ESA. In addition, in analyzing data from the last three (3) years of NWP 46 usage, no ESA consultations were required.

(h) Fish, crustaceans, molluscs, and other aquatic organisms in the food web: Same as discussed in the national decision 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 46 would only authorize discharges of dredged or fill material into a maximum of 1 acre of non-navigable waters of the U.S. within a limited class of non-tidal ditches excavated in uplands. Notification is required for any use of NWP 46. In addition, the new General Conditions and Regional Conditions limiting the use of NWP 46 that may result in a loss of wetlands in certain areas. Due to the above constraints, NWP 46 would result in minimal adverse impacts to wildlife, both individually and cumulatively, in the majority of the Los Angeles District. With no regional conditions for NWP 46, there could 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 46 limit discharges of dredged or fill material in most types of special aquatic sites in Arizona and specific desert regions of California, all jurisdictional vernal pools. With the inclusion of these additional limitations, the above long-term minor impacts to wildlife in the Los Angeles District would be further reduced.

(j) Special aquatic sites: In review of data over the last three (3) years of NWP 46 authorizations, only non-wetland waters of the U.S were impacted. The total impacts were to ephemeral drainages totaling 0.7 acre of permanent losses and 0.33 acre of temporary impacts. All temporary impacts were required to be restored to pre-construction conditions and an additional 0.7 acre of wetland and stream restoration was required to mitigate for permanent losses. Regional condition 5 would prevent the use of NWP 46 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 46 when it would result in a loss of wetlands, mudflats, vegetated shallows or pool and riffle 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 document.

(2) Wetlands: Same as discussed in the national document. 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. With the implementation of regional conditions, use of NWP 46 would be precluded authorize losses of wetlands within Arizona and desert regions of California, as wells as any impacts to jurisdictional vernal pools throughout the Los Angeles District. In addition, the terms and conditions of NWP 46 require notification for any activity. With the inclusion of additional requirements for NWP 46 in special aquatic sites and sensitive watersheds and other aquatic resources, there would be only long-term minor impacts to wetlands in the Los Angeles District.

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

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

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

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

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

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

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

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

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

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

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

Based on an analysis of the types of activities authorized by the Los Angeles District during this period, the Los Angeles District estimates that this NWP will be used approximately once per year, resulting in the loss of approximately 0.5 acre of waters of the U.S. on an annual basis, resulting in a loss of approximately 2.5 acres of waters of the U.S. within the 5-year duration of this NWP. This is a relatively conservative estimate based on a review of very infrequent past usage of the previous NWP 46. To ensure that these activities result in minimal adverse effects on the aquatic environment, individually and cumulatively, the Los Angeles District estimates that a minimum of approximately 0.5 acre of compensatory mitigation (1:1 compensatory mitigation ratio) will be required on an annual basis to offset the authorized losses of waters of the U.S. 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 46**

### **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/](http://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 4**

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

- a. All perennial waterbodies and special aquatic sites within the State of Arizona and within the Mojave and Sonoran (Colorado) desert regions of California, excluding the Colorado River in Arizona from Davis Dam to River Mile 261 (northern boundary of the Fort Mojave Indian Tribe Reservation). The desert region in California is limited to four USGS HUC accounting units (Lower Colorado -150301, Northern Mojave-180902, Southern Mojave-181001, and Salton Sea-181002).
- b. All areas designated as Essential Fish Habitat (EFH) by the Pacific Fishery Management Council (i.e., all tidally influenced areas - Federal Register dated March 12, 2007 (72 FR 11092)), in which case the PCN shall include an EFH assessment and extent of proposed impacts to EFH. Examples of EFH habitat assessments can be found at: <http://www.swr.noaa.gov/efh.htm>.
- c. All watersheds in the Santa Monica Mountains in Los Angeles and Ventura counties bounded by Calleguas Creek on the west, by Highway 101 on the north and east, and by Sunset Boulevard and Pacific Ocean on the south.
- d. The Santa Clara River watershed in Los Angeles and Ventura counties, including but not limited to Aliso Canyon, Agua Dulce Canyon, Sand Canyon, Bouquet Canyon, Mint Canyon, South Fork of the Santa Clara River, San Francisquito Canyon, Castaic Creek, Piru Creek, Sespe Creek and the main-stem of the Santa Clara River.

### **10.4 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 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 NWP 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.

## **10.6 Regional condition 10**

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

## **11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations**

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

The Los Angeles District announced the proposal to reissue the Nationwide Permits and our proposed regional conditions in a Special Public Notice dated February 25, 2011. The Los Angeles District also send letters dated March 9, 2011 to the seven federally recognized tribes within the Los Angeles District (Big Pine Tribe, Bishop Paiute Tribe, Hopi Tribe, Hualapai Tribe, Navajo Nation, White Mountain Apache Tribe, and Twenty-nine Palms Band of Mission Indians) and the Arizona Department of Environmental Quality announcing the proposed rule and our proposed regional conditions, and requesting the State of Arizona and each tribe review the information for purposes of providing water quality certification pursuant to section 401 of the Clean Water Act. Similarly, acting on behalf of the three Corps Districts in California the Sacramento District provided the same letter on February 23, 2011 to the California State Water

Resources Control Board (SWRCB) and EPA requesting 401 certification in the State of California and tribal lands within EPA Region 9, respectively (excluding those tribes with delegated 401 authority). The San Francisco District provided a letter to the California Coastal Commission (CCC) on behalf of both coastal districts in California on March 3, 2011, requesting Coastal Zone Management Act (CZMA) consistency certification. Additional discussions were held among the three Corps Districts in California and the SWRCB in an effort to strategize options for certifying a broader range of NWP or NWP-eligible activities than under the 2007 NWPs.

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

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

## **12.0 Measures to Ensure Minimal Adverse Environmental Effects**

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

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

### **13.0 Final Determination**

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