

## **SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 50**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 50, 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 50:

*Underground Coal Mining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal. The activities must already be authorized, or they must currently be in process as part of an integrated permit processing procedure, by the Department of Interior Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title IV or Title V of the Surface Mining Control and Reclamation Act (SMCRA) of 1977. Areas previously mined include reclaimed mine sites, abandoned mine land areas, or lands under bond forfeiture contracts.

As part of the project, the permittee may conduct new coal mining activities in conjunction with the remining activities when he or she clearly demonstrates to the district engineer that the overall mining plan will result in a net increase in aquatic resource functions. The Corps will consider the SMCRA agency's decision regarding the amount of currently undisturbed adjacent lands needed to facilitate the remining and reclamation of the previously mined area. The total area disturbed by new mining must not exceed 40 percent of the total acreage covered by both the remined area and the additional area necessary to carry out the reclamation of the previously mined area.

Notification: The permittee must submit a pre-construction notification and a document describing how the overall mining plan will result in a net increase in aquatic resource functions to the district engineer and receive written authorization prior to commencing the activity. (See general condition 31.) (Sections 10 and 404)

## Summary of changes to NWP 50 from 2007:

The Corps modified this nationwide permit by adding both a ½ acre and 300 linear foot limit for losses of stream bed. The 300 linear foot limit for losses of intermittent and ephemeral stream bed can only be waived if the district engineer makes a written determination concluding that the discharge will result in minimal adverse effects.

### **1.0 Background**

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

### **2.0 Consideration of Public Comments**

#### **2.1 General Comments**

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

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

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

Please see the attached response to comments document.

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

Please see the attached response to comments document.

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

Please see the attached response to comments document.

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

Please see the attached response to comments document.

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

Please see the attached response to comments document.

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

Please see the attached response to comments document.

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

Please see the attached response to comments document.

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

Please see the attached response to comments document.

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

Please see the attached response to comments document.

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

Please see the attached response to comments document.

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

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

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

Reason for Exclusion: With this regional condition, NWPs 3, 7, 12-15, 17-19, 21, 23, 25, 29, 35, 36, 39-46, and 48-52 may **not** be used to authorize the discharge of dredged or fill material into a jurisdictional special aquatic site in the State of Arizona and the Mojave and Sonoran desert regions in California, including wetlands, mudflats, vegetated shallows, and sanctuaries and refuges as defined in 40 CFR Part 230.40-45. The regional condition would require applicants to submit an application for a Standard Individual Permit subject to authorization under section 10 of the Rivers and Harbors Act, section 103 of the Marine Protection, Resource and Sanctuaries Act, and/or section 404 of the Clean Water Act (CWA). Special aquatic sites in the desert regions of the Los Angeles District support substantial aquatic resources that exhibit relatively high physical and biological functions. Furthermore, these aquatic areas can provide important and unique habitat for endangered species, neotropical migratory birds, and other indigenous wildlife. Past construction activities in and adjacent to these special aquatic sites have degraded portions of these high value systems. Regional Condition 2 would ensure compliance with the 404(b)(1) guidelines and evaluation and mitigation, if warranted, of activities that may have an adverse effect on special aquatic sites in the otherwise arid regions of the Los Angeles District.

In the Los Angeles District, the semi-arid climate limits the extent and number of special aquatic sites. This scarcity of special aquatic sites is especially evident in Arizona and in the desert

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

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

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

### **3.1.2 Jurisdictional Vernal Pools (Regional Condition 5)**

Reason for Exclusion: This regional condition would require any project proposing to discharge dredged or fill material into a jurisdictional vernal pool to be reviewed under the standard individual permit (SIP) process, which requires a more rigorous alternatives review. This regional condition has been amended from the 2007 version to include an exception for discharges associated with restoration, enhancement, management, or scientific study activities that qualify for NWP's 5, 6, and 27. NWP's 5 and 6 authorize temporary activities and structures that could be used to further the understanding of vernal pool functions and services or for monitoring the effectiveness of enhancement, restoration, and establishment projects. NWP 27 authorizes only activities that result in net increases in aquatic resource functions and services. Per this regional condition, authorization under other 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, the scientific community and open space land managers would benefit from the streamlined process and there may ultimately be a net increase in functions and services in vernal pool ecosystems through the implementation of restoration, enhancement, and management activities.

The Los Angeles District Regulatory Branch previously determined that the 0.5-acre SIP threshold for vernal pool impacts (established by the District in 1997) would not adequately protect remaining vernal pool resources in the region. It is estimated that 95 to more than 97 percent of the vernal pools that historically existed in the region have been lost through urbanization or agricultural practices (USFWS 1998); in some counties the loss is virtually total. Under the new and modified NWPs, a single and complete project could impact up to 0.5 acre of vernal pool habitat and be considered for NWP authorization. The District had previously been using a 0.5-acre SIP threshold for vernal pool impacts since 25 November 1997 (previous District Regional Condition 1). Despite the establishment of this earlier regional condition, the District experienced additional losses of vernal pool habitat, requiring the establishment of Regional Condition 5 as part of the 2000, 2002 and 2007 NWP Programs. Within the boundaries of the Los Angeles District, the sizes of jurisdictional vernal pools generally range from approximately 200 to 4,900 square feet (e.g. 0.00459 to 0.11248 acre). Therefore, 0.5 acre of vernal pools could include a large vernal pool complex or individual pools made up of 5 to 100 pools. Compounding this situation, mitigation for vernal pool impacts is not well developed, and often takes the form of preservation and enhancement of remaining pools, resulting in a continued net loss of vernal pool acreage, functions and services. The SIP review process includes an analysis of the propriety of the proposed fill in a special aquatic site pursuant to the 404(b)(1) Guidelines.

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

With the modification of Regional Condition 5, the District recognizes certain regulated activities involving restoration, enhancement, management, and scientific study of vernal pools would not contribute to the overall loss of vernal pool habitat and in such cases (with few exceptions) SIP review would not provide any additional protection or benefit to vernal pools. Therefore, this regional condition has been modified since the 2007 NWPs to include language excluding these four categories of activities from this requirement. If the success of a proposed restoration or enhancement activity is uncertain, or the subject vernal pool is of particularly high ecological value, the District would still retain the ability to review any such action as an SIP

through our discretionary authority. In addition, the Corps has determined that issuance of Regional Condition 5 would not be contrary to the public interest. Overall, the implementation of Regional Condition 5, which requires an SIP for discharges of dredged or fill material in jurisdictional vernal pools (with the exception of activities associated with the restoration, enhancement, management or scientific study), would provide additional assurances that the activities permitted under the NWP's would result in minimal impacts on both an individual and cumulative basis in the Los Angeles District.

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

### **3.1.3 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 NWP's 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 NWP's 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 NWP's would be retained for use in the watersheds covered by the two SAMPs in Orange County: 01, 02, 04, 05, 06, 08, 09, 10, 11, 15, 20, 22, 23, 24, 28, 30, 32, 34, 35, 36, 37, 38, 45, 48, 51 and 52.

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

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

The Corps conducted extensive analyses in its environmental impact statement (EIS) for the San

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

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

### **3.2 Waters subjected to additional pre-construction notification requirements**

The terms of NWP 50 always requires pre-construction notification to the district engineer prior to commencing the activity. Regional conditions would not expand these notification requirements, therefore discussion of additional regional conditions is not provided.

## **4.0 Alternatives**

### **4.1 No Regional Conditions**

NWP 50 requires notification for all activities to be conducted under this NWP. However, the regional conditions provide a higher level of resource protection for special aquatic sites, jurisdictional vernal pools, perennial watercourses in the State of Arizona, and specific high-value watersheds in the State of California within the Los Angeles District. Regional conditions 2, 5, and 8 would require a SIP for underground coal mining and reclamation operations to protect many of these high value resources. Historically, there has been a 95 to more than 99 percent loss of vernal pool habitat in the southern California area. Further losses would have more than minimal impacts individually and cumulatively. In the case of NWP 50, without the regional conditions 2, 5, and 8, for specific high-value areas, impacts to these areas could be greater to the physical and biological functions of those specific ecosystems if authorization could proceed under a NWP instead of an SIP. Processing by an SIP would require compliance with the Section 404(b)(1) guidelines to ensure that only the least environmentally damaging, practicable alternative (LEDPA) is permitted. The presumption of the guidelines that a less environmentally sensitive location than a special aquatic site may exist for a non-water dependent activity provides a higher level of protection for those areas. Based on this analysis, the "No Regional Conditions" alternative could result in more than minimal individual and cumulative adverse impacts to aquatic resources and, therefore, this alternative has been dismissed from further consideration.

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

Notification is required for all activities to be authorized under NWP 49. Given that this NWP has not historically been used in the Los Angeles District, alternative regional limits were deemed unnecessary.

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

Notification is required for all activities to be authorized under NWP 50. Current regional conditions provide additional resource protection through requirement of a SIP for any underground coal mining or reclamation operations which are proposed to occur in special aquatic sites, jurisdictional vernal pools, most perennial watercourses in the State of Arizona, and specific high-value watersheds in the State of California within the Los Angeles District. An alternative regional nationwide permit condition could be proposed by the Los Angeles District requiring notification to and review by all resource agencies including the U. S. Fish and Wildlife Service (USFWS), the U.S. Environmental Protection Agency (EPA), the applicable state and/or tribal fish and game departments, the State Historic Preservation Officer (SHPO), and the state and/or tribal Section 401 water quality agency of proposed underground coal mining or reclamation operations meeting the terms and conditions of NWP 50. Discharges of dredged and/or fill material into non-tidal waters of the U.S. associated with underground coal mining or reclamation operations can only be authorized under NWP 50 if the activities are already authorized or are currently being processed as part of an integrated permit processing procedure by the OSM or by states with approved programs under Title IV or Title V of the Surface Mining Control and Reclamation Act of 1977. Therefore, the proposed activities to be authorized under NWP 50 would have already been permitted or would be under current review by state and federal resource agencies. A regional condition providing additional review by resource agencies would not provide benefits to the environment which would outweigh the increase in workload in the Los Angeles District.

An additional alternative regional nationwide permit condition would prohibit the use of NWP 50 in the Los Angeles District. However, only one currently active coal mine exists within the Los Angeles District and impacts to waters of the U.S. from this coal mine has, to date, been authorized under NWP 21 “Surface Coal Mining Activities”. There are no existing active or anticipated underground coal mines in the Los Angeles District. Coal mines require extensive permitting and NEPA compliance through the OSMRE. Considering existing regional conditions and current notification requirements of NWP 50, prohibition of the use of NWP 50 in the Los Angeles District would not provide additional resource protection which would outweigh the increased workload of processing SIPs for underground coal mining and reclamation operations should an underground coal mine be proposed.

Based on this analysis, alternative regional nationwide permit conditions have been dismissed from further consideration.

## **5.0 Endangered Species Act**

### **5.1 General Considerations**

NWP 50 authorizes the discharge of fill material into non-tidal waters of the United States associated with underground coal mining and reclamation activities. To avoid and minimize impacts to the aquatic environment, the terms and conditions for NWP 50 contain several restrictions including that the activities would not result in the loss of more than ½ acre or 300 linear feet of stream bed, are already authorized, or are currently being processed as part of an

integrated permit processing procedure, by the OSMRE or by states with approved programs under Title IV or Title V of the Surface Mining Control and Reclamation Act of 1977. In addition, the permittee must provide a copy of the reclamation plan with the pre-construction notification (PCN). General and Regional Conditions would provide further limitations on the use of NWP 50 in sensitive aquatic ecosystems. With these constraints, NWP 50 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 50, there would be more than minimal impacts only in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. NWP 50 requires notification for all activities to be authorized by this NWP and Regional Conditions 2, 5, and 8 require a SIP be processed in specific higher resource value areas within the Los Angeles District. With the inclusion of these proposed notification requirements for NWP 50, 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 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 of Endangered Species (SLOPES), and the inclusion of additional notification requirements, the use of NWP 50 would have minimal impacts, both individually and cumulatively, to threatened and endangered species in the Los Angeles District.

In southern California, the large number of listed species has made the public more aware of the need to contact the USFWS and NMFS for many proposed projects. In addition, General Condition 18 requires the applicant to contact the Corps if their proposed project may affect a threatened or endangered species or critical habitat. The District has substantial information, including maps, previous studies and survey data that document areas that support endangered species. The District is also very careful to inform all prospective applicants of the need to comply with the Endangered Species Act (ESA). If the 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 District receives an application within the range of a listed species and/or the project area otherwise supports suitable habitat, the USFWS or NMFS is contacted early in the review process. To facilitate compliance with the ESA, the District has coordinated with the USFWS to complete programmatic consultations for several threatened and endangered species in Ventura, Santa Barbara, and San Luis Obispo counties.

As proposed, the NWP general and regional conditions ensure that other federal statutory requirements are met. For example, in instances where a project may impact a federally listed species or its critical habitat, the applicant would be required to submit to the Corps appropriate biological investigations and supporting documentation for an “effects determination” with respect to the ESA. Per General Condition 18, if the Federal Action were determined to have a potential effect on a federally listed species, or its designated critical habitat, consultation would be required pursuant to Section 7 of the ESA. (It should be noted that the Los Angeles District would ensure all federal project activities authorized under the NWPs comply with the ESA and use of the NWPs shall be determined to have minimal impacts on threatened and endangered species in the Los Angeles District, pursuant to the ESA). NWP 50 provides additional protection threatened and endangered species within tidal areas and non-tidal wetlands adjacent

to tidal areas by prohibiting the use of this NWP within those areas.

## **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 NWP 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 Division, and the USFWS, Ventura Office finalized SLOPES for informal and formal ESA consultations. In addition, some the 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 that was completed by the Corps of Engineers, Los Angeles District, Regulatory Division and NMFS. The District has completed conducted several preliminary meetings with USFWS and NMFS staff to determine the direction of further SLOPES discussions, and additional meetings will be conducted in the future.

As proposed, the NWP general and regional conditions ensure that other federal statutory requirements are met. For example, in instances where a project may impact a federally listed species or its critical habitat, the applicant would be required to submit to the Corps appropriate biological investigations and supporting documentation for an “effects determination” with respect to the ESA. Per General Condition 17, if the Federal Action were determined to have a potential effect on a federally listed species, or its designated critical habitat, consultation would be required pursuant to Section 7 of the ESA. (It should be noted that the Los Angeles District would ensure all federal project activities authorized under the NWP comply with the ESA and use of the NWP shall be determined to have minimal impacts on threatened and endangered species in the Los Angeles District, pursuant to the ESA). NWP 50 provides additional protection threatened and endangered species within tidal areas and non-tidal wetlands adjacent to tidal areas by prohibiting the use of this NWP within those areas.

## **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 50 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: In the Los Angeles District, the arid and semi-arid environment limits the extent of aquatic resources in the southern California/Arizona area. Regional conditions for NWP 50 would preclude underground coal mining activities in jurisdictional vernal pools (Regional Condition 5), special aquatic sites and perennial watercourses and waterbodies in Arizona and the desert regions of California (Regional Condition 2), and in the San Diego Creek and San Juan Creek/Western San Mateo Creek watersheds (Regional Condition 8) for certain types of activities. Due to the constraints provided by these conditions, NWP 50 would result in minimal impacts to conservation, both individually and cumulatively.

(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 the USFWS and NMFS. The number and extent of cultural resources in the southwest also require extensive coordination with the

appropriate SHPO and Native American Tribes. Regional conditions for NWP 50 would preclude discharges of dredged or fill material in specific high resource-value areas such as jurisdictional vernal pools, most perennial watercourses in Arizona, and specific watersheds in southern California. The regional conditions would provide additional protection for sensitive watersheds and other aquatic resources and minimize adverse effects on general environmental concerns in the Los Angeles District.

(e) Wetlands: In the Los Angeles District, the arid and semi-arid climate limits the extent and number of wetland resources. This scarcity of wetlands is especially evident in Arizona and in the desert regions of California. In these areas, annual precipitation is typically below 10 inches which often precludes the development of wetlands. As a result, special aquatic sites, such as wetlands, are relatively rare in the Los Angeles District and warrant more substantial protection. To ensure minimal impacts to wetland resources, the Los Angeles District Regional Condition 2 requires a SIP in lieu of use of most NWPs in the State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California. With the inclusion of this regional condition, use of NWP 50 would have minor impacts, both individually and cumulatively, to wetland resources in the Los Angeles District. Projects authorized under this NWP would require mitigation to compensate fully for both temporary and permanent impacts.

(f) Historic properties: Many known and unknown historic properties and cultural resources occur throughout the Los Angeles District. Many are adjacent to watercourses or other aquatic resources, and may be affected by projects proposed for authorization under NWP 50. Section 106 of the NHPA requires any federal action agency to determine the eligibility of any known or newly discovered historic or cultural resources that may be affected by the agency's action, and coordinate with the SHPO/THPO as appropriate. Because projects that may potentially be authorized under NWP 50 are brought to the attention of the Los Angeles District only when there is a specific project proposed, and because the project's relationship to the historic or cultural resource(s) may not be known until appropriate surveys are conducted, greater specificity cannot be determined at this time. Through coordination with the SHPO/THPO and the implementation of mitigation measures, the Corps would ensure that NWP 50 would result in minimal impacts to historic properties.

(g) Fish and wildlife values: The new general conditions would provide further limitations on the use of NWP 50 in waters of the U.S. Due to those constraints, NWP 50 would result in minimal impacts to fish and wildlife values, both individually and cumulatively, in the majority of the Los Angeles District. Regional conditions for NWP 50 would require an individual permit process for discharges of dredged or fill material in jurisdictional vernal pools in specific regions as well as in special aquatic sites in the State of Arizona and the deserts of southern California and within specific watersheds in southern California. With the inclusion of these conditions, the above long-term minor impacts to fish and wildlife values in the Los Angeles District would be further reduced.

(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 50 would only authorize discharges with minimal impact to waters of the U.S. The new general and regional conditions would provide further limitations on the use of NWP 50 in waters of the U.S. Due to the above constraints, NWP 50 would result in minimal adverse impacts to water quality, both individually and cumulatively, in the majority of the Los Angeles District. Regional conditions for NWP 50 would preclude discharges of dredged or fill material in sensitive resource areas. With the inclusion of these regional conditions, the long-term minor impacts to water quality in the Los Angeles District would be further reduced.
- (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: General and the regional conditions have additional limitations on the use of NWP 50 in waters of the U.S. Due to these constraints, NWP 50 would result in minimal adverse impacts to substrate, both individually and cumulatively, in the Los Angeles District. The regional conditions would limit the degree and extent of impacts into sensitive watersheds and resources. The long-term, minor impacts to channel substrates in the Los Angeles District would be further reduced by these regional conditions.
- (b) Suspended particulates/turbidity: In heavily populated areas of southern California and Arizona, existing turbidity levels in most rivers has been exacerbated by runoff from upland

agricultural, residential and industrial sources. Short-term construction activities often augment turbidity levels in waters of the U.S. However, these activities would generally only result in short-term minor changes in turbidity levels. NWP 50 restricts the discharges of dredged or fill material into waters of the U.S. for activities which have previously been permitted or are currently being reviewed by OSM. In addition, the new general conditions have additional limitations on the use of NWP 50 in specific high value waters of the U.S. Due to the above constraints, NWP 50 would result in minimal adverse impacts to turbidity levels, both individually and cumulatively, in the majority of the Los Angeles District.

(c) Water: Same as discussed in the national 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: General conditions have additional limitations on the use of NWP 50 in waters of the U.S. Due to the above constraints, NWP 50 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 50, there would be more than minimal impacts only in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. The regional conditions for NWP 50 would preclude discharges of dredged or fill material in sensitive resource areas in the Los Angeles District so the 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 50 comply with the ESA. The use of NWP 50 has minimal impacts on threatened and endangered species in the Los Angeles District, as pursuant with the ESA.

(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 50 would only authorize discharges of dredged or fill material into areas which have already been permitted or are currently under detailed NEPA review and analysis by the OSM. Both the modifications to this NWP, the inclusion of a ½ acre and 300 linear foot limit, and the general conditions have additional limitations on the use of NWP 50 in waters of the U.S. Due to the above constraints, NWP 50 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 50, there would be a potential for 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 50 preclude discharges of dredged or fill material in sensitive resource areas in the Los Angeles District so the long-term minor impacts to wildlife in the Los Angeles District would be further reduced.

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

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

(2) Wetlands: In accordance with Regional Condition 5, NWP 50 cannot be used to discharge dredged and/or fill material into any jurisdictional vernal pool within Los Angeles District. Furthermore, Regional Condition 2 prohibits the use of NWP 50 to discharge of dredged and/or fill material into any jurisdictional wetland area within the entire State of Arizona and the desert regions in California. Discharges of dredged and/or fill material into jurisdictional wetlands pursuant to NWP 50 within other regions in Los Angeles District will be reviewed on a case by case basis. Through the mandatory notification requirement, the Los Angeles District can ensure that the use of NWP 50 for discharges of dredged and/or fill material into wetlands would have minimal impacts, both individually and cumulatively. Activities sited within wetlands that are determined to have the potential to exceed the minor impact threshold would be subject to review under the SIP process that requires a rigorous alternatives analysis.

(3) Mud flats: In accordance with Regional Condition 2, NWP 50 cannot be used for the discharge of dredged and/or fill material into mudflats within the entire State of Arizona and the desert regions in California. Discharges of dredged and/or fill material into mudflats pursuant to NWP 50 within other regions in Los Angeles District would be reviewed on a case by case basis. Through the mandatory notification requirement, the Los Angeles District can ensure that the use of NWP 50 for discharges of dredged and/or fill material into mudflats would have minimal impacts, both individually and cumulatively. Activities sited within mudflats that are determined to have the potential to exceed the minor impact threshold would be subject to review under the SIP process that requires a rigorous alternatives analysis.

(4) Vegetated shallows: In accordance with Regional Condition 2, NWP 50 cannot be used for the discharge of dredged and/or fill material into vegetated shallows within the entire State of Arizona and the desert regions in California. Discharges of dredged and/or fill material into vegetated shallows pursuant to NWP 50 within other regions in the Los Angeles District would be reviewed on a case by case basis. Through the mandatory notification requirement, the Los Angeles District can ensure that the use of NWP 50 for discharges of dredged and/or fill material into vegetated shallows would have minimal impacts, both individually and cumulatively. Activities sited within vegetated shallows that are determined to have the potential to exceed the minor impact threshold would be subject to review under the SIP process that requires a rigorous alternatives analysis.

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

(6) Riffle and pool complexes: In accordance with Regional Condition 2, NWP 50 cannot be used for the discharge of dredged and/or fill material into riffle and pool complexes within the entire State of Arizona and the desert regions in California. Discharges of dredged and/or fill material into riffle and pool complexes pursuant to NWP 50 within other regions in Los Angeles District would be reviewed on a case by case basis. Through the mandatory notification requirement, the Los Angeles District can ensure that the use of NWP 50 for discharges of dredged and/or fill material into riffle and pool complexes would have minimal impacts, both individually and cumulatively. Activities sited within riffle and pool complexes that are determined to have the potential to exceed the minor impact threshold would be subject to review under the SIP process that requires a rigorous alternatives analysis.

(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 activities authorized by the Los Angeles District during this period, the Los Angeles District estimates that this NWP will be used rarely, if at all as there is only one active surface coal mine in the Los Angeles District and the Corps is unaware of any plans for an underground component to this coal mining operation. In the event that the Los Angeles District receives a permit request pursuant to this NWP, compensatory mitigation would likely be required to offset the authorized losses of waters of the United States and ensure that the NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment.

The terms and conditions of the NWP, including the PCN 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 PCN requirements of the NWP. Through the PCN

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 the NWP authorization on a case-by-case basis to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the PCN process, the district engineer will exercise discretionary authority and require an SIP for those activities that have the potential to result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

## **10.0 List of Final Corps Regional Conditions for NWP 50**

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

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

Commission (CCC) on behalf of both coastal districts in California on March 3, 2011, requesting Coastal Zone Management Act (CZMA) consistency certification. Additional discussions were held among the three Corps Districts in California and the SWRCB in an effort to strategize options for certifying a broader range of 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.