

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 52

This document is a supplement to the national decision document for Nationwide Permit (NWP) 52 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 through 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 52:

Water-Based Renewable Energy Generation Pilot Projects. Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction, expansion, modification, or removal of water-based wind or hydrokinetic renewable energy generation pilot projects and their attendant features. Attendant features may include, but are not limited to, land-based collection and distribution facilities, control facilities, roads, parking lots, and stormwater management facilities.

For the purposes of this NWP, the term “pilot project” means an experimental project where the renewable energy generation units will be monitored to collect information on their performance and environmental effects at the project site.

The discharge must not cause the loss of greater than 1/2-acre of waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. The placement of a transmission line on the bed of a navigable water of the United States from the renewable energy generation unit(s) to a land-based collection and distribution facility is considered a structure under Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(b)), and the placement of the transmission line on the bed of a navigable water of the United States is not a loss of waters of the United States for the purposes of applying the 1/2-acre or 300 linear foot limits.

For each single and complete project, no more than 10 generation units (e.g., wind turbines or hydrokinetic devices) are authorized.

This NWP does not authorize activities in coral reefs. Structures in an anchorage area established by the U.S. Coast Guard must comply with the requirements in 33 CFR part 322.5(l)(2). Structures may not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, Federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR part 322.5(l)(1)), or EPA or Corps designated open water dredged material disposal areas.

Upon completion of the pilot project, the generation units, transmission lines, and other structures or fills associated with the pilot project must be removed to the maximum extent practicable unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. Completion of the pilot project will be identified as the date of expiration of the Federal Energy Regulatory Commission (FERC) license, or the expiration date of the NWP authorization if no FERC license is issued.

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

Note 1: Utility lines constructed to transfer the energy from the land-based collection facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization.

Note 2: An activity that is located on an existing locally or federally maintained U.S. Army Corps of Engineers project requires separate approval from the Chief of Engineers under 33 U.S.C. 408.

Note 3: If the pilot project, including any transmission lines, is placed in navigable waters of the United States (i.e., section 10 waters) within the coastal United States, the Great Lakes, and United States territories, copies of the pre-construction notification and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration, National Ocean Service, for charting the generation units and associated transmission line(s) to protect navigation.

Note 4: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

Summary of changes to NWP 52 from 2007:

This NWP was not available in the 2007-2012 NWP program, therefore there are no changes to report.

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

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

3.1.2 Jurisdictional Vernal Pools (Regional Condition 5)

Reason for Exclusion: This regional condition would require any project proposing to discharge dredged or fill material into a jurisdictional vernal pool to be reviewed under the standard individual permit (SIP) process, which requires a more rigorous alternatives review. This regional condition has been amended from the 2007 version to include an exception for discharges associated with restoration, enhancement, management, or scientific study activities that qualify for NWPs 5, 6, and 27. NWPs 5 and 6 authorize temporary activities and structures that could be used to further the understanding of vernal pool functions and services or for monitoring the effectiveness of enhancement, restoration, and establishment projects. NWP 27 authorizes only activities that result in net increases in aquatic resource functions and services. Per this regional condition, authorization under other NWPs cannot be considered and a PCN must be submitted in accordance with General Condition 31 and Regional Condition 3. In discussions with local land managers, Regional Condition 5 has increased project costs and timelines in order to obtain an SIP for voluntary restoration and enhancement projects. This has also limited their ability to compete for grant and other public funding with restrictions on costs and timelines. Therefore, the Los Angeles District believes that by allowing the use of these three NWPs, the scientific community and open space land managers would benefit from the streamlined process and there may ultimately be a net increase in functions and services in vernal pool ecosystems through the implementation of restoration, enhancement, and management activities.

The Los Angeles District Regulatory Branch previously determined that the 0.5-acre SIP threshold for vernal pool impacts (established by the District in 1997) would not adequately

protect remaining vernal pool resources in the region. It is estimated that 95 to more than 97 percent of the vernal pools that historically existed in the region have been lost through urbanization or agricultural practices (USFWS 1998); in some counties the loss is virtually total. Under the new and modified 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.

3.2 Waters subjected to additional pre-construction notification requirements

Pre-construction notification is required for all proposed uses of NWP 52, therefore regional conditions requiring additional pre-construction notification requirements and this section do not apply to NWP 52.

4.0 Alternatives

4.1 No Regional Conditions

Without benefit of the exclusionary regional conditions discussed above, the use of NWP 52 may result in greater than minimal impacts, individually and cumulatively, to the following high value aquatic resources:

- a) Federally-listed fish species (Regional Condition 1);
- b) Special Aquatic Sites in Arizona and Mojave and Sonoran Deserts of California (Regional Condition 2); and,
- c) Jurisdictional vernal pools (Regional Condition 5).

Without benefit of the LA District Regional Conditions, projects impacting these resources may not implement adequate avoidance and minimization measures, and may not compensate for functional losses. Calculation of jurisdictional impacts and environmental effects of activities authorized under a non-notifying NWP is difficult, but may be estimated by referencing data gathered by other resource agencies (e.g., the Regional Water Quality Control Board and California Department of Fish and Game). However, this data is not readily available to the Corps, and at best is a measure of the impacts after-the-fact. In addition, such data may or may not be an accurate indicator of jurisdiction, or past or future trends. The notification provisions written into the Los Angeles District's regional conditions will ensure that impacts within these high value areas are tracked, allowing for assessment of trends in frequency and intensity of any given NWP. If necessary, additional NWP-specific restrictions may be developed if necessary. The exclusions written into Regional Conditions 1, 2, and 7 are based in large part upon data collected through the notification process, and reflect the scarcity and/or biological productivity of specific resources.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

If necessary, the Los Angeles District could develop the following separate alternative regional limits or pre-construction notification thresholds: 1) reduce the ½-acre permanent impact acreage limit; 2) reduce the 300-linear-foot limit for permanent impacts to streambeds; 3) reduce the 10 generation-unit limit; 4) eliminate the waiver provision for greater than 300 linear feet of permanent streambed impacts within ephemeral and intermittent streams, and/or, 5) designate additional watersheds or aquatic resources to exclude or that would trigger notification.

However, Based upon the limited projected use of this NWP in the Los Angeles District (i.e., less than one (1) occasion per year), existing NWP safeguards (e.g., mandatory notification for

all proposed uses of NWP 52, ½-acre permanent impact limit, and 300-linear-foot limit to permanent impacts upon streambeds), and the additional resource-specific restrictions written into the revised Regional Conditions, the Los Angeles District has determined that the consideration of alternative or additional regional limits are unnecessary at this time to ensure minimal impacts and would adversely increase workload without commensurate benefits to the aquatic environment. Therefore, there are no practicable alternatives that include more stringent regional limits or pre-construction notification thresholds.

4.3 Alternative Regional Nationwide Permit Conditions

If necessary, the Los Angeles District could develop a separate Regional Condition that would require Agency notification for all proposed uses of this NWP, as is currently required under the General Conditions for permanent impacts exceeding 300 linear feet for ephemeral and intermittent streams. However, based upon the limited projected use of this NWP in the Los Angeles District, existing NWP safeguards, and the additional resource-specific restrictions written into the revised Regional Conditions, the Los Angeles District has determined that the consideration of alternative or additional regional conditions are unnecessary at this time to ensure minimal impacts and would adversely increase workload without commensurate benefits to the aquatic environment. Further, the implementation of alternative or additional regional conditions would be impracticable given the questionable benefit to the resource(s) and additional staff workload. With the proposed modifications to NWP 52, the Los Angeles District has identified the resources and watersheds that warrant additional scrutiny under NWP 52. As a result, the District's proposed modifications would result in a relatively minor increase in overall workload, but would provide potentially substantial benefits to the aquatic environment in the identified areas.

5.0 Endangered Species Act

5.1 General Considerations

In southern California, the large number of listed species has made the public more aware of the need to contact the U.S. Fish & Wildlife Service (USFWS) and National Marine Fisheries Service (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 conditions and LA District 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. Projects with greater than minimal adverse impacts to the aquatic environment, including Federally-listed species, would not be authorized under the NWP program. Pursuant to General Condition 23, permittees must avoid and minimize impacts to the aquatic environment to the maximum extent feasible, and shall require mitigation to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

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. As an example, the Corps of Engineers, Los Angeles District, Regulatory Branch and the U.S. Fish and Wildlife Service, Ventura Office finalized SLOPES in January 2003 for informal and formal ESA consultations within the geographic jurisdiction of the Ventura Office. The District has conducted several preliminary meetings with USFWS staff to determine the direction of further SLOPES discussions, and intends to hold additional meetings in the future. Additional avoidance and minimization of federally listed species is achieved through implementation of Regional Condition 1, which requires permittees to design all road crossings such that the passage and/or spawning of fish is not hindered within waters that are suitable habitat for federally listed fish species.

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 LAD 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 Highly Migratory Species FMP, the Pacific Coast Salmon FMP, and the Coastal Pelagic Species FMP. The Los Angeles District's Regional Condition 4b requires submission of a PCN for any NWP authorization in EFH. A similar PCN requirement has been in place since the issuance of the 2002 NWPs. The current proposed regional condition includes the additional requirement that applicants include an EFH assessment with the PCN. By requiring a PCN with an EFH assessment for all activities within designated EFH, the Los Angeles District ensures the appropriate level of consultation with NMFS is conducted and effects to EFH are adequately addressed prior to verification.

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

9.0 Supplement to National Impact Analysis

Projects with greater than minimal adverse impacts to the aquatic environment, including federally listed species, would not be authorized under the NWP program. Pursuant to General Condition 23, permittees must avoid and minimize impacts to the aquatic environment to the maximum extent feasible, and shall require mitigation to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

Additional national and regional safeguards include mandatory notification for all NWP 52 authorizations and restrictions for projects in most types of special aquatic sites in the State of Arizona and desert regions of California (Regional Condition 2), and in jurisdictional vernal pools (Regional Condition 5). Further, the use of NWP 52 is prohibited within designated critical resource waters (general condition 22).

Additional national or regional restrictions may be developed if environmental impacts are more than minimal, on an individual or a cumulative basis. As referenced in the National Decision Document for NWP 52, the Corps expects that the convenience and time savings associated with the use of this NWP will encourage applicants to design their projects within the scope of the NWP rather than request individual permits for projects which could result in greater adverse impacts to the aquatic environment.

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 52 authorizes structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction, expansion, or modification (including removal) of water-based wind or hydrokinetic renewable energy generation pilot projects and their attendant features. Attendant features may include, but are not limited to, land-based distribution facilities, roads, parking lots, stormwater management facilities, utility lines, including utility lines to transfer the energy to land-based distribution facilities.

As stated in the NWP language, following mandatory notification, this NWP would only authorize pilot renewable energy projects. These projects are intended to test the performance of these technologies on a small-scale, and to assess unforeseen environmental effects. This NWP requires the permittee to remove the generation units, transmission lines, and other structures or fills associated with the pilot project once the pilot project is completed, unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. In addition, larger-scale renewable energy projects are not allowed under this NWP, and would be authorized under either individual permit or a regional general permit.

To date, the LA District has been approached only a few times to discuss the prospect of water-based renewable energy projects. For example, in 2001 the Corps had preliminary discussions with Pacific Wavegen regarding a proposed combined wind/hydrokinetic energy project near Point Conception, California. An application was never received for this project. In an informal survey of other Corps Districts within tidally-influenced coastal areas, the proposed structures consisted of tidal generators/turbines, “tidal barrages”, “wave attenuators/turbines”, floating platforms, and off-shore wind farms all attached to the ocean floor via moorings. Many of these structures did not require the installation of undersea cables or construction of on-shore facilities, as they are by nature “pilot” projects, and are intended to test the efficacy and durability of these

technologies rather than delivery of electricity to the on-shore power grid. The LA District estimates that NWP 52 would be used less than 1 occasion per year, resulting in up to 0.5 acres of permanent impacts to subtidal (off-shore) habitats, intertidal (near-shore) habitats, and/or wetland and riparian (on-shore) habitats, including no more than 300 linear feet of impacts to streambed per project, unless the latter is waived in writing by the District Engineer.

Projects with greater than minimal adverse impacts to the aquatic environment, including federally listed species, would not be authorized under the NWP program. Additional national and regional safeguards include mandatory notification for all NWP 52 authorizations and restrictions for projects in most types of special aquatic sites in the State of Arizona and desert regions of California (Regional Condition 2), and in jurisdictional vernal pools (Regional Condition 5). Further, the use of NWP 52 is prohibited within designated critical resource waters (general condition 22). Pursuant to General Condition 19, project proponents are responsible for obtaining any take permits that may be required under the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act. Lastly, pursuant to General Condition 23, permittees must avoid and minimize impacts to the aquatic environment to the maximum extent feasible, and shall require mitigation to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal. Taken together, these conditions demonstrate that the Corps is at a minimum notified prior to proposed impacts within areas demonstrating high resource (and conservation) value. Based upon this information, NWP 52 would result in minor impacts to conservation, both individually and cumulatively, 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: As discussed in the national decision document, activities authorized by this NWP will affect general environmental concerns, such as water, air, noise, and land pollution. The authorized work will also affect the physical, chemical, and biological characteristics of the environment.

As stated in the NWP language, following mandatory notification, this NWP would only authorize pilot renewable energy projects. These projects are intended to test the performance of these technologies on a small-scale, and to assess unforeseen environmental effects. This NWP requires the permittee to remove the generation units, transmission lines, and other structures or fills associated with the pilot project once the pilot project is completed, unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. In addition, larger-scale renewable energy projects are not allowed under this NWP, and would be authorized under either individual permit or a regional general permit.

To date, the LA District has been approached only a few times to discuss the prospect of water-based renewable energy projects. For example, in 2001 the Corps had preliminary discussions with Pacific Wavegen regarding a proposed combined wind/hydrokinetic energy project near Point Conception, California. An application was never received for this project. In an informal survey of other Corps Districts within tidally-influenced coastal areas, the proposed structures

consisted of tidal generators/turbines, “tidal barrages”, “wave attenuators/turbines”, floating platforms, and off-shore wind farms all attached to the ocean floor via moorings. Many of these structures did not require the installation of undersea cables or construction of on-shore facilities, as they are by nature “pilot” projects, and are intended to test the efficacy and durability of these technologies rather than delivery of electricity to the on-shore power grid. The LA District estimates that NWP 52 would be used less than 1 occasion per year, resulting in up to 0.5 acres of permanent impacts to subtidal (off-shore) habitats, intertidal (near-shore) habitats, and/or wetland and riparian (on-shore) habitats, including no more than 300 linear feet of impacts to streambeds per project, unless the latter is waived in writing by the District Engineer.

Reference discussion under “Conservation” section for additional protective measures, including mandatory notification, general and regional conditions, and use of compensatory mitigation where necessary. Based upon this information, NWP 52 would result in minor impacts to conservation, both individually and cumulatively, in the Los Angeles District.

(e) Wetlands: In the Los Angeles District, the semi-arid climate limits the extent and number of wetland resources. This scarcity of wetlands is especially evident in Arizona and in the desert regions of California. In these areas, annual precipitation is usually below 10 inches, which often precludes the development of wetlands. In addition, approximately 90 percent of wetlands in California have been affected by historic conversion to agricultural uses, grading and filling activities. As a result, special aquatic sites, such as wetlands, are rare in the Los Angeles District and their preservation warrants special attention.

Based upon the paucity of off-shore renewable energy proposals brought to the District, it is estimated that NWP 52 would be used less than 1 occasion per year, resulting in up to 0.5 acres of permanent impacts to subtidal (off-shore) habitats, intertidal (near-shore) habitats, and/or wetland and riparian (on-shore) habitats, including no more than 300 linear feet of impacts to streambeds per project, unless the latter is waived in writing by the District Engineer.

As NWP 52 would generally be used for projects located in tidal waters and non-tidal, coastal areas, it is probable that wetland impacts would be sustained. The Corps is committed to a “no net loss” policy regarding wetland impacts, and therefore requires a minimum of 1:1 acreage replacement of lost wetland functions. Pursuant to General Condition 23, permittees must avoid and minimize impacts to the aquatic environment to the maximum extent feasible, and shall require mitigation to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal. In addition, Regional Condition 10 requires permittees to complete the construction of any compensatory mitigation before or concurrent with commencement of construction of the authorized activity, except when specifically determined to be impracticable by the Corps. To further ensure minimal impacts to high value wetland resources under demonstrable threat, the Los Angeles District would prohibit the use of NWP 52 for proposed permanent impacts (losses) to: 1) wetlands or pool and riffles complexes within the State of Arizona and within the Mojave and Sonoran (Colorado) desert regions of California (Regional Condition 2); and, 2) jurisdictional vernal pools (Regional Condition 5). Lastly, the use of NWP 52 is prohibited within designated critical resource waters (general condition 22), including wetlands adjacent to those waters. Based upon this information, NWP 52 would result in minor impacts to wetlands, both individually and cumulatively, in the Los Angeles District.

(f) Historic properties: Due to the favorable climate and relative abundance of food sources, southern California is rich in cultural history. Over the last several decades, however, these resources have been at a greater risk due to intense developmental pressure and/or vandalism. Section 106 of the NHPA requires any federal action agency to determine the eligibility of any known or discovered cultural resources that may be affected by the agency's action, and coordinate with the SHPO/THPO as appropriate. General condition 20 requires an applicant to notify the Corps prior to project initiation if the proposed activity has the potential to cause effects to listed historic properties, eligible historic properties, and potentially eligible historic properties. We expect NWP 52 would result in minor impacts to historic properties, both individually and cumulatively, in the Los Angeles District.

(g) Fish and wildlife values: The installation of off-shore renewable energy facilities and attendant on-shore features (utility lines, roads, buildings) has the potential to adversely affect fish and wildlife values found in the coastal environment, including threatened and endangered species. For additional discussion of potential effects, reference the national decision document. In addition, reference discussion under "Endangered Species Act" and "Conservation" sections for details regarding internal safeguards for environmental protection, particularly for fish and wildlife. Based upon this information, NWP 52 would result in minor impacts to fish and wildlife values, both individually and cumulatively, 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: NWP 52 authorizes structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction, expansion, or modification (including removal) of water-based wind or hydrokinetic renewable energy generation pilot projects and their attendant features. The presence of the pilot structures, their floats/mooring lines/anchors, and (in some cases) associated transmission lines may adversely effect navigation and associated commercial operations (e.g., transport of goods, recreation, fisheries). However, within the LA District these pilot structures and associated discharges are anticipated to be relatively small, predominantly temporary features in an open marine environment. This NWP requires the permittee to remove the generation units, transmission lines, and other structures or fills associated with the pilot project once the pilot project is completed, unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. Pursuant to General Condition 1:

(a) No activity may cause more than a minimal adverse effect on navigation.

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or

work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

Based upon this information, NWP 52 would result in minor impacts to navigation, both individually and cumulatively, in the Los Angeles District.

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

(m) Recreation: The presence of the pilot structures, their floats/mooring lines/anchors, and (in some cases) associated transmission lines may adversely effect navigation and associated commercial operations (e.g., transport of goods, recreation, fisheries). However, within the LA District these pilot structures and associated discharges are anticipated to be relatively small, predominantly temporary features in an open marine environment. This NWP requires the permittee to remove the generation units, transmission lines, and other structures or fills associated with the pilot project once the pilot project is completed, unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. NWP 52 would result in minor impacts to recreation, both individually and cumulatively, in the Los Angeles District.

(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 watercourses is impaired by runoff from upland agricultural, residential and industrial sources, as well as from floodplain encroachment. With the use of NWP 52, there could be short-term adverse impacts to water quality in the immediate vicinity of mooring structures, as well as short-term adverse impacts to water quality within the on-shore environment (e.g., coastal wetlands, coastal stream channels). In addition, as discussed in the national decision document, the construction and operation of water-based renewable energy generation pilot projects and their attendant features can affect water clarity, chemical content, dissolved gas concentrations, pH, and temperature. Implementation of standard best management practices, as required in the Section 401 water quality certification or Waste Discharge Requirements (Regional Water Quality Control Board) would reduce these impacts, and monitoring of water quality through the lifetime of the pilot project may be necessary to minimize adverse effects upon sensitive marine habitats (e.g., kelp beds, seagrasses, rocky reefs). General and regional conditions directed towards stabilization of exposed soils (General Condition 12) and preservation of high-value wetland functions would also preserve baseline water quality. In addition, reference discussion in the national decision document. Based upon this information, NWP 52 would result in minor impacts to water quality, both individually and cumulatively, in the Los Angeles District.

(p) Energy needs: Same as discussed in the national decision document. NWP 52 authorizes structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction, expansion, or modification (including removal) of water-based wind or hydrokinetic renewable energy generation pilot

projects and their attendant features. Up to 10 energy generation units (e.g., turbines) are allowed under this NWP. Pilot projects that are capable of transmitting power to mainland stations would benefit local energy needs to a small degree. NWP 52 would result in negligible to minor benefits to energy needs, both individually and cumulatively, in the Los Angeles District.

(q) Safety: Same as discussed in the national decision document. Also reference “Navigation” for discussion of applicable avoidance and minimization measures associated with construction and operation phases of renewable energy structures authorized under NWP 52. NWP 52 would result in minor impacts to safety, both individually and cumulatively, in the Los Angeles District.

(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: With the use of NWP 52, there would be short-term adverse impacts to marine substrate in the immediate vicinity of mooring structures, as well as short-term adverse impacts to substrate within the on-shore environment (e.g., coastal wetlands, coastal stream channels). Several NWP general conditions and Los Angeles District regional conditions have been developed to preserve channel substrate and morphology. These include mandatory notification for all NWP 52 authorizations and restrictions for projects in most types of special aquatic sites in the State of Arizona and desert regions of California (Regional Condition 2), and in jurisdictional vernal pools (Regional Condition 5). Further, the use of NWP 52 is prohibited within designated critical resource waters (general condition 22). Based upon this information, NWP 52 would result in minor impacts to substrate, both individually and cumulatively, in the Los Angeles District.

(b) Suspended particulates/turbidity: In the heavily populated areas of southern California and Arizona, existing water quality in most watercourses is impaired by runoff from upland agricultural, residential and industrial sources, as well as from floodplain encroachment. Construction activities associated with NWP 52 may result in temporary adverse impacts to water quality within on- and off-shore environments, and in particular to suspended particulates/turbidity. Implementation of standard best management practices, as required in the Stormwater Pollution Prevention Plan and the Section 401 WQ certification would reduce these impacts. General and regional conditions directed towards stabilization of exposed soils (General Condition 12) and preservation of high-value wetland functions would also preserve baseline water quality. Overall, NWP 52 would result in minor impacts to suspended particulates/turbidity, both individually and cumulatively, in the Los Angeles District.

(c) Water: Reference the national decision document and “Water Quality” section above.

(d) Current patterns and water circulation: See discussion under “Conservation” and “Flood hazards” for discussion of general and regional conditions that would preserve current patterns and water circulation. In addition, reference the national decision document for discussion of applicable general conditions (General Conditions 9 & 10). Based upon the referenced information, NWP 52 would result in minor impacts to current patterns and water circulation.

(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: The installation of off-shore renewable energy facilities and attendant on-shore features (utility lines, roads, buildings) has the potential to adversely affect threatened and endangered species found in the coastal environment. NWP 52 requires the applicant to notify the Corps under all proposed uses. As an additional protective measure, General Condition 18 explicitly requires Corps’ notification for projects that may affect Federally-listed species or their critical habitat. In such circumstances, the Corps will generally coordinate with the appropriate resource agency (e.g., USFWS or NMFS) in order to ensure that the applicant implements sufficient measures to avoid and minimize adverse impacts to listed species (e.g., project modifications, seasonal restrictions). Regional Condition 1 requires all road crossings located in suitable habitat for Federally-listed fish species to be designed to allow fish passage and/or spawning. In these areas, designs that span the river or stream, or designs based on a bottomless arch culvert simulating the natural stream bed must be used unless it is demonstrated the river or stream does not support resources conducive to the recovery of federally listed fish species. In addition, reference “Conservation” and “Endangered Species Act” sections for discussion of Los Angeles District’s efforts to further protect high value aquatic resources (e.g., special aquatic sites, perennial waters) through the development of regional conditions and SLOPES agreements. Based upon this information, NWP 52 would result in minor impacts to threatened and endangered species, both individually and cumulatively, in the Los Angeles District.

(h) Fish, crustaceans, molluscs, and other aquatic organisms in the food web: Reference the national decision document, which includes discussion of applicable General Conditions (General Conditions 3, 5, & 9). In addition, reference “Conservation” section for discussion of Los Angeles District’s efforts to further protect high value aquatic resources.

(i) Other wildlife: Reference the national decision document, which includes discussion of protective measures for migratory birds (General Condition 4). In addition, reference “Conservation” section for discussion of Los Angeles District’s efforts to further protect high value aquatic resources.

(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: See above section under “Wetlands” for discussion of potential impacts to wetlands as well as mitigation measures developed to reduce adverse impacts, including resource-based restrictions and notification provisions (Regional Conditions 2 and 4). NWP 52 would result in minor impacts to wetlands, both individually and cumulatively, in the Los Angeles District.

(3) Mud flats: Mudflats are unvegetated areas of fine-grained sediment (mud) that are sometimes flooded. They are found both in tidal areas and in freshwater lake and river systems. In terms of functions and services, mudflats are extremely productive areas for invertebrates (worms, clams and other shellfish), and provide rich foraging grounds for shorebirds (at low tides) and other birds and fish (at high tides). Mudflats often support recreational and commercial fisheries, such as clam and oysterbeds. Mudflats are generally listed as a subset of coastal wetlands under tidal influence. When compared with interior aquatic resources, coastal wetlands have been disproportionately affected by agriculture and development in southern California. Of a total of approximately 45,000-55,000 acres of coastal wetlands in the southern California bight (from Point Conception to the Mexico border), approximately 10-20% remains (Southern California Wetlands Inventory). As discussed in the national decision document, off-shore renewable energy units will be located in open waters, and attendant features will be predominantly located landward of the high tide line, with the exception of utility lines. These lines and protective covering may be up to several feet in diameter, and are either placed on the surface of the marine substrate or placed within shallow trenches and backfilled with the overburden. The placement and presence of these lines is expected to result in small, predominantly temporary impacts to mudflats. With respect to avoidance and minimization measures, General condition 11 (“Equipment”) establishes requirements for equipment working in wetlands or mudflats, including the use of mats and other materials to minimize soil disturbance. As mudflats are often found in the immediate vicinity of other wetland types that may receive additional protections, see above section under “Wetlands” for mitigation measures developed to reduce adverse impacts, including resource-based restrictions and notification provisions (Regional Conditions 2 and 4). It is expected that NWP 52 would result in minor impacts to mudflats, both individually and cumulatively, in the Los Angeles District.

(4) Vegetated shallows: As discussed in the national decision document, off-shore renewable energy units will be located in open waters, and attendant features will be predominantly located landward of the high tide line, with the exception of utility lines. These lines and protective covering may be up to several feet in diameter, and are either placed on the surface of the marine substrate or placed within shallow trenches and backfilled with the overburden. The placement and presence of these lines may result in small, predominantly temporary impacts to vegetated shallows. Vegetated shallows may qualify as essential fish habitat, as defined by NMFS. Based upon the rarity and the potentially high level of biological productivity of vegetated shallows, applicants are required to notify the Corps if their project may affect essential fish habitat (Regional Conditions 4b). In addition, pursuant to the NMFS Southern California Eelgrass Mitigation Policy (SCEMP), applicants would be required to provide compensatory mitigation at a 1.8:1 ratio for permanent impacts (including indirect, shading impacts) to

this resource. It is expected that NWP 52 would result in minor impacts to vegetated shallows, both individually and cumulatively, in the Los Angeles District.

(5) Coral reefs: Coral reefs are absent from the Los Angeles District. Accordingly, NWP 52 would result in no impacts to coral reefs, both individually and cumulatively, in the Los Angeles District.

(6) Riffle and pool complexes: The installation and construction of “attendant” features within the on-shore environment (utility lines, roads, buildings) has the potential to result in adverse effects to riffle and pool complexes within Los Angeles District. In the semi-arid southern California and Arizona areas, limited water resources and the need for flood control have led to the construction of numerous dams in the mountains of southern California and Arizona, and on the Colorado River. With the construction of these large dams, many riffle-and-pool complexes have been eliminated by the large reservoirs. Furthermore, construction of the dams also modifies the hydrologic regime of the river, which can also degrade downstream riffle-and-pool complexes. As a result, riffle-and-pool complexes in the Los Angeles District are essentially confined to montane and foothill regions. They warrant more rigorous protection due to their relatively high production of invertebrate fauna and other contributions to riparian aquatic resources such as aeration of the water, provision of substrate for decomposers, and other factors. Pursuant to General Conditions 22, permittees must avoid and minimize impacts to the aquatic environment to the maximum extent feasible, and shall require mitigation to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal. In addition, Regional Condition 10 requires permittees to complete the construction of any compensatory mitigation before or concurrent with commencement of construction of the authorized activity, except when specifically determined to be impracticable by the Corps. Further, the Los Angeles District has excluded the use of many nationwide permits, including NWP 52, for permanent impacts to riffle-and-pool complexes within the State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California (Regional Condition 2). With the inclusion of these modifications, NWP 52 would have minimal impacts to riffle-and-pool complexes in the Los Angeles District.

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

(l) Recreational and commercial fisheries, including essential fish habitat: NWP 52 authorizes structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction, expansion, or modification (including removal) of water-based wind or hydrokinetic renewable energy generation pilot projects and their attendant features. The presence of the pilot structures, their floats/mooring lines/anchors, and (in some cases) associated transmission lines may adversely effect navigation and associated commercial operations, including recreational and commercial fisheries. In order to minimize adverse effects upon vessel navigation, General Condition 1 states: 1) no activity may cause more than a minimal adverse effect on navigation, and, 2) any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the

United States. With respect to habitat for commercially-important fish species, Federal agencies are required to consult with the National Marine Fisheries Service (NMFS) for actions that may adversely affect essential fish habitat (EFH), pursuant to the Magnuson-Stevens Fishery Management and Conservation Act. The marine and estuarine waters within the Los Angeles District contain designated EFH, which are administered by four fishery management plans (FMP): the Pacific Groundfish FMP, the Highly Migratory Species FMP, the Pacific Salmon FMP, and the Coastal Pelagic Species FMP. In order to minimize potential effects upon EFH, Regional Condition 4b requires submission of a PCN for any NWP authorization proposed to occur within EFH, and also requires the submission of an EFH presence/absence survey and impact assessment. In addition, pursuant to the NMFS Southern California Eelgrass Mitigation Policy (SCEMP), applicants would be required to provide compensatory mitigation at a 1.8:1 ratio for permanent impacts (including indirect, shading impacts) to this resource. Based upon this information, including a mandatory notification requirements, it is expected that NWP 52 would result in minor impacts to recreational and commercial fisheries, including essential fish habitat, both individually and cumulatively, in the Los Angeles District.

(m) Water-related recreation: As discussed in the national decision document, activities authorized by this NWP may change the recreational uses of the area. Certain recreational activities, such as bird watching, hunting, and fishing may be restricted or eliminated from the immediate vicinity of these pilot renewable energy structures and their attendant features. However, in order to minimize adverse environmental effects, NWP 52 requires the permittee to remove the generation units, transmission lines, and other structures or fills associated with the pilot project once the pilot project is completed, unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. In order to reduce the spatial scale of such projects, a maximum of 10 energy generation units (e.g., turbines) are allowed under this NWP. Based upon this information, it is expected that NWP 52 would result in minor impacts to water-related recreation, including essential fish habitat, both individually and cumulatively, in the Los Angeles District.

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

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

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

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

approximately 0 to 0.5 acres of waters of the United States on an annual basis. To ensure that these activities result in minimal adverse effects on the aquatic environment, individually and cumulatively, the Los Angeles District estimates that approximately 0 to 1.5 acres of compensatory mitigation will be required on an annual basis to offset the authorized losses of waters of the United States and ensure that the NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. It should be noted that NWP 5 (Scientific Measurement Devices) and NWP 18 (Minor Discharges) may also be used to authorize the installation of pilot off-shore renewable energy facilities (including moorings), and NWP 12 may be used to authorize the placement of cabling in the off-shore and on-shore environment, provided that the terms of each NWP are followed.

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 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 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 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 52

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 project site. The drawings shall contain a title block, legend and scale, amount (in cubic yards) and area (in acres) of fill in Corps jurisdiction, including both permanent and temporary fills/structures. The ordinary high water mark or, if tidal waters, the mean high water mark and high tide line, should be shown (in feet), based on National Geodetic Vertical Datum (NGVD) or other appropriate referenced elevation. All drawings for projects located within the boundaries of the Los Angeles District shall comply with the most current version of the *Map and Drawing Standards for the Los Angeles District Regulatory Division* (available on the Los Angeles District Regulatory Division website at: www.spl.usace.army.mil/regulatory/); and
- c. Numbered and dated pre-project color photographs showing all waters proposed to be impacted on the project site. The compass angle and position of each photograph shall be documented on the plan-view drawing required in subpart b of this regional condition.

10.3 Regional condition 5

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

10.4 Regional condition 9

Any requests to waive the 300 linear foot limitation for intermittent and ephemeral streams for NWP 29, 39, 40 and 42, 43, 44, 51 and 52 or to waive the 500 linear foot limitation along the bank for NWP 13, must include the following:

- a. A narrative description of the stream. This should include known information on: volume and duration of flow; the approximate length, width, and depth of the waterbody and characters observed associated with an Ordinary High Water Mark (e.g. bed and bank, wrack line, or scour marks); a description of the adjacent vegetation community and a statement regarding the wetland status of the associated

- vegetation community (i.e. wetland, non-wetland); surrounding land use; water quality; issues related to cumulative impacts in the watershed, and; any other relevant information.
- b. An analysis of the proposed impacts to the waterbody in accordance with General Condition 31 and Regional Condition 3;
- c. Measures taken to avoid and minimize losses, including other methods of constructing the proposed project; and
- d. A compensatory mitigation plan describing how the unavoidable losses are proposed to be compensated, in accordance with 33 CFR Part 332.

10.5 Regional condition 10

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

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

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

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

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