SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 40

This document is a supplement to the national decision document for Nationwide Permit (NWP) 40, and addresses the regional modifications and conditions for this NWP. The South Pacific Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1. Background:

On July 1, 1998, the Corps of Engineers (Corps) published its proposal in the Federal Register to issue six new NWPs and modify six existing NWPs to replace NWP 26. The Corps published a supplemental Federal Register notice on October 14, 1998, announcing the withdrawal of one of the proposed NWPs and soliciting comments on proposed restrictions of the NWPs within the 100-year floodplain, designated critical resource waters, and impaired waters. On March 9, 2000, the Corps published a Federal Register notice containing the final text of the NWPs and general conditions.

The Los Angles District (LAD) issued public notices on August 3, 1998 and April 21, 2000 (enclosures 1 and 2) to solicit comments on proposed regional conditions for these NWPs. In addition, LAD Regulatory personnel conducted public meetings in Los Angeles and Phoenix on September 9, 1998 and September 30, 1998, respectively. The comments received in response to these public notices and meetings are summarized below.

2. Consideration of Public Comments:

(a) General Comments: The LAD received the following general comments on the proposed NWP 40 and associated issues:

(1) The U.S. Fish and Wildlife Service (USFWS), Carlsbad Field Office, National Marine Fisheries Service (NMFS) and environmental groups requested the notification requirements for NWPs be expanded. Specifically, the USFWS requested that all NWPs include notification to both the Corps and the resource agencies. Furthermore, the USFWS recommended that Standard Local Operating Procedures for Endangered Species (SLOPES) be developed for the NWP program to ensure compliance with the Endangered Species Act (ESA). The NMFS requested the Corps to require notification for all projects affecting waters of the U.S. within coastal streams from the Santa Monica Mountains in Los Angeles County to the San Luis Obispo County/ Monterey County boundary. In contrast, one commenter requested that the notification requirement be increased to the national standard of 0.33 acre of waters of the U.S.

Response: The LAD could require notification for all projects that require authorization under NWP 40. In addition, the LAD could also forward Pre-construction Notifications to the resource agencies with all NWP 40 applications. Requiring notification for all agricultural activities authorized under NWP 40, not just those in special aquatic sites and in waters with relatively high physical and biological functions, would substantially increase the workload for the LAD without any real benefits to the aquatic ecosystem. Furthermore, forwarding Pre-construction Notifications to the agencies would represent a huge increase in workload with minimal benefits to the aquatic environment. Furthermore, the current notification threshold for NWP 40 includes post-notification for USDA participants, pre-construction notification at 0.1 acre of impact to waters of the United States for non-USDA participants, pre-construction for building pads, and pre-construction notification if combining (a) with work under subsections (c) or (d). These notification requirements are already quite low. As a result, the LAD has determined that the recommended notification requirements would not be practicable, and would only result in minor benefits to the aquatic ecosystem. With the current restrictions on NWP 40, the LAD has identified the resources and watersheds that warrant preclusion or additional scrutiny. Although the Corps has not adopted the proposed notification requirements suggested by NMFS, we have included regional conditions that would preclude all discharges of fill material under NWP 40 in perennial and intermittent watercourses, that would prohibit the construction of building pads for farm buildings in any special aquatic site, would prohibit all discharges of dredged and fill material in special aquatic sites in the State of Arizona and the Mojave and Sonoran desert regions of California, would preclude all discharges of dredged and fill material in jurisdictional vernal pools, and would preclude all discharges of dredged and fill material in spawning habitat for threatened/endangered species in the absence of a biological opinion or incidental take permit from the USFWS/NMFS, and would preclude new permanent fills in Murrieta and Temecula Creeks. Based on the above, the proposed modifications would only result in a minor increase in workload, but would result in substantial benefits to the aquatic environment. In fact, one commenter noted that the impact level should be raised to 0.33 acre. If additional data supports a threshold modification that limit could be revisited at that time. However, based on the documentation above, the Corps respectfully disagrees and has determined that the 0.25-acre threshold should be the maximum level at this time.

(2) In several letters, local flood control agencies indicated that NWPs and the associated regional conditions did not consider public safety from flood events. Furthermore, they indicated that the additional notification requirements and increased constraints could result in more than minimal impacts resulting from flood hazards. The flood control agencies also indicated that NWPs and the regional conditions increased the LAD workload without adding protection to the aquatic environment. Overall, the flood control agencies indicated that the proposed changes to the NWP program would increase regulation of projects with minimal impacts and jeopardize public safety.

Response: With NWPs and the associated regional conditions, flood control projects in areas with relatively low physical and biological functions can proceed without notification to the Corps. However, to ensure minimal impacts to the aquatic ecosystem, the Corps must place additional constraints on activities that affect special aquatic sites, sensitive watersheds, jurisdictional vernal pools, and tidal influenced waters. With the

proposed changes to the NWP program, the Corps has balanced the need for both flood safety and environmental protection. With the proposed regional conditions, it is predicted that there would likely be only a minimal increase in workload, but would result in substantial benefits to the aquatic environment. As a result, the Corps respectfully disagrees with the commenter and believes a proper balance between two important issues has been established with the regional conditions.

(3) As part of the proposed regional conditions, several environmental groups stated a need for regional standards to be developed for wetland hydrology and hydric soils in southern California. In addition, one commenter indicated that there needs to be a standard definition for what constitutes a water of the U.S., specifically for ephemeral washes.

Response: The Corps concurs that a regional standard for jurisdictional ephemeral streams, wetland hydrology and hydric soils would be a very useful tool for future wetland delineations. [In fact, a regional team is in place to define a protocol to better identify by definition waters of the U.S. that occur in the arid southwest in the field setting.] However, it would not be appropriate to develop these standards as part of the proposed regional conditions for the NWPs. Furthermore, 33 CFR Part 328 and the final version of the NWPs (FR 65:47 - March 9, 2000) provide a definition for what constitutes a jurisdictional water of the U.S., including intermittent and ephemeral streams.

(4) Several environmental groups indicated they supported the proposal to include upland buffers as part of mitigation plans to offset impacts to waters of the U.S. They recommended that wetland buffers should be required to retain existing permeable area for high water/runoff flows for a minimum 100-year flood, and maintenance of all existing functions for these areas including: pollution capture and retention, filtration, groundwater recharge, flood and erosion control, and corridors that allow the movement of native animals between the wetland and nearby upland habitats.

Response: Comment noted.

(5) A commenter indicated all discharges of dredged or fill material in wetlands should be precluded under NWP program. With the amount of historic loss of wetland resources, the commenter indicated only wetland enhancement and restoration projects should be authorized under NWPs.

Response: An alternative regional condition would prohibit the use of the proposed NWPs in all special aquatic sites in the LAD. The loss of approximately 90 percent of wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region indicates there could be a need for the review of any project which would discharge dredged or fill material in a special aquatic site under the 404(b)(1) Guidelines and the public interest factors to ensure no adverse impacts to special aquatic sites. However, the proposed NWP 40 could only be used to impact a maximum of 0.5 acre of waters of the United States and would be limited to 300 linear feet of stream bed for activities to non-wetland, waters of the United States. Furthermore, the new General Conditions for the NWP program would provide further limitations on projects authorized under NWP 40. To ensure minimal impacts to sensitive aquatic resources, the LAD

would preclude discharges under NWP 40 in all perennial and intermittent watercourses, discharges for building pads in special aquatic sites, jurisdictional vernal pools, special aquatic sites in the Arizona and the desert regions of California, Murrieta Creek watershed, Temecula Creek watershed and spawning habitat for threatened and endangered species. With the above regional conditions, the LAD has identified specific geographic areas and resource types that warrant additional protection without adversely increasing our workload. As a result, a regional condition that would preclude all discharges in special aquatic sites would unnecessarily increase our workload to review small-scale impacts in areas that exhibit lower physical and biological functions. Such a modification would not be practicable in light of the LAD's workload and would only provide relatively minor environmental benefits to the aquatic ecosystem.

(6) Several commenters indicated NWPs would result in more than minimal cumulative impacts in the Santa Margarita River watershed in Riverside and San Diego counties. As evidence for the cumulative impacts, they referenced Dr. Eric Stein's study of the impact of the Section 404 Permit Program on the above watershed.

Response: The LAD recognizes both the level of impacts to the Santa Margarita River watershed and the evidence provided by Dr. Stein in his research. In response to the above, the LAD proposes to take discretionary authority over NWPs 39, 42 and 43 that authorize new fills in perennial and intermittent watercourses in the Murrieta Creek and Temecula Creek watersheds. In addition, this discretionary authority is extended to jurisdictional ephemeral watercourses in these watersheds if the project impacts more than 0.1 acre of the ephemeral drainage. By taking discretionary authority in these two watersheds that exhibit cumulative impacts from past Section 404 permit actions, or other unauthorized activities, the LAD will ensure mitigation of future impacts, full compliance with the ESA, and protection of special aquatic sites. A regional condition for the proposed NWPs that precluded all discharges of fill material in the entire Santa Margarita River watershed would unnecessarily increase our workload to review small-scale impacts in portions of the watershed that do not exhibit the same level of cumulative impacts. This preclusion also would unnecessarily overburden the regulated community with Standard Individual Permit review in every case. As a result, elimination of all NWPs in the Santa Margarita River watershed would not be justifiable in light of the LAD's workload, the burden to the regulated public, and the minor environmental benefits to waters of the U.S. in the Santa Margarita River watershed.

(7) Several commenters opposed establishment of regional conditions for the replacement nationwide permits issued in the March 9, 2000 Federal Register notice (65 FR 12818) and requested that they be withdrawn from further consideration. Several commenters requested that a public hearing be held to allow them to personally voice their opposition. Several commenters requested that Los Angeles District extend the comment period for the April 21, 2000 public notice by at least two weeks. Several commenters requested that prior to any public hearing on the regional conditions, the Corps should provide written responses to the comments received during the written comment period. Several commenters indicated that regional conditions on the nationwide permits would be unnecessarily complex and would duplicate other existing regulatory programs, such as the reviews conducted by the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), the State Water Resources Control Board (SWRCB)

and its member Regional Water Quality Control Boards (RWQCB), the Arizona Department of Environmental Quality (ADEQ) in Arizona, the California Coastal Commission (CCC), and the State Historic Preservation Offices (SHPO). This commenter requested that findings of these agencies' reviews of the nationwide permit program in the District be addressed in a separate public notice and circulated for public comment.

Response: General permits, such as the NWPs and regional general permits established by the District or Division Engineer, can only be established if in conformance with Section 404(e). Section 404(e) enables the establishment of general permits only if they are for a relatively specific type of activity and if they have minimal adverse impacts on an individual and cumulative basis. It is unreasonable to presume that any general permit has uniform applicability across the breadth of the United States from Alaska to Florida and from Maine to Hawaii. It is equally unreasonable to presume that any general permit demonstrates the same relative level of impact to aquatic resources across the breadth of the U.S. Hence, the development of regional conditions to address the local conditions that may be affected by the implementation of the general permit.

The LAD conducted public meetings on September 9 and September 20, 1998 specifically to receive comments on proposed regional conditions. Those comments were given full consideration in subsequent public notices issued after publication of draft NWPs in the Federal Register. Comments provided at the public meetings were essentially oral recitations of the written comments provided for submittal to the record.

The comment period for the April 21, 2000 public notice was extended to allow ample opportunity for the provision of comments. However, an extension was given to all who requested it, and comments received after the close of the comment period were also accepted and are part of the public record.

Responses to written comments received were not prepared and distributed to the commenters. Responses to comments are provided in this document as part of the Corps' environmental assessment of the potential effect on the human environment of the NWPs and associated regional conditions. This is the appropriate avenue to follow under the National Environmental Policy Act (NEPA) and Section 404 of the Clean Water Act (CWA).

On a cursory level, it may appear that the Corps' regulatory responsibilities under Section 404 of the Clean Water Act, Section 10 of the River and Harbor Act approved March 3, 1899, and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 are simply duplicating the reviews conducted by other State and Federal agencies. However, each agency has specific responsibilities as directed by State or Federal statute, which cannot be delegated to another agency without considerable development of procedures, which may also require additional rulemaking and/or modifications of statutes. For instance, under Section 404 of the CWA, the Corps of Engineers was given the responsibility to regulate the discharge of dredged or fill material into waters of the U.S. by Congress. This responsibility cannot be easily delegated to another agency without their agreement and substantial additional development of procedures, not to mention funding of programs and liability issues. For these reasons, each agency is better equipped to address its responsibilities for issues related to aquatic resources at this time. We also disagree with the statement that the various agencies' responsibilities are duplicated unnecessarily. The USFWS and NMFS oversee coastal and inland wildlife resource issues; the SWRCB, ADEQ and RWQCBs address state water quality issues as directed under Section 401 of the CWA; the CCC addresses compliance with the Coastal

Zone Management Act, and the SHPO addresses potential effects of a federal action on cultural resources as directed by the National Historic Preservation Act. The Corps, as a federal action agency, must comply with all applicable federal, state and local statutes. To ensure such compliance, the Corps coordinates with these agencies and others. Just as the other agencies have no authority to regulate discharge of dredged or fill material, neither does the Corps have the authority to make absolutely unilateral decisions regarding issues pertaining to fish and wildlife issues, coastal zone resources, water quality compliance determinations, or mitigation for impacts to cultural resources. If duplication of effort is perceived, it is simply perception and not substance.

The Corps will not issue an additional public notice to simply state the findings of other agencies' reviews of the NWP program. Their comments pertaining to the issuance of the new and modified NWPs and the District's regional conditions are summarized in this document, and are followed by the District's response.

(8) One commenter stated the District couldn't establish regional conditions by public notice because such conditions must be adopted in conformance with the Administrative Procedures Act (APA). This commenter noted that public notices consist of sending information to those on the District's mailing lists or posting such notices on the District's webpage. This commenter stated that such notices do not comply with the federal requirements for adopting rules under the APA. This commenter stated the public notices issued to date do not adequately explain why the Corps decided to impose additional requirements beyond those in the proposed NWP. This commenter stated there are no compelling reasons to add regional conditions to the NWPs and that they would create unnecessary work and delay.

Response: Without greater specificity as to areas of discrepancy with the APA, the District must respectfully disagree with the commenter. In simple terms, the APA provides for, among other things, a means by which a federal agency proposing an action that may affect the public at large, issue notice of such action well in advance, to receive comment on the proposed action, make documents readily available for review by requesting parties, and document any final decisions made. The Corps issued several notices in the Federal Register as noted above. These notices specifically mentioned the development of regional conditions by each District to ensure the new and modified NWPs have minimal impacts as required the Section 404(e) of the CWA. The District followed this direction utilizing procedures already established in the implementing regulations for the Regulatory Program and issued three public notices of proposed regional conditions in response to each of three Federal Register notices on proposed and final new and modified NWPs. The District received comments on each notice that were then accepted into the public record. Full consideration was given to all comments received, written, oral, electronic or otherwise. With each iteration of the Federal Register notices and the District's subsequent public notices, the District made new assessments as to the need for regional conditions to limit the extent of the NWP, and to address sensitive resources, habitat types, or watersheds.

(9) General Comments on the proposed regional condition to require notification in accordance with general condition 13 in certain regions or watersheds: One commenter stated the District is arbitrarily and capriciously requiring notification of projects in numerous categories without justification or scientific support for isolating and treating

differently the respective areas or impacts, and that such a requirement is indiscriminate, unjustified and unnecessary.

Response: The District disagrees that it was arbitrary and capricious when it developed its regional conditions requiring notification of projects for particular sensitive resources or activity types or in particular watersheds. In response to three Federal Register notices on proposed new and modified replacement NWPs, the District issued three public notices on proposed regional conditions intended to limit potential impacts to aquatic resources within the District. In each case, the District considered anew the constraints inherent to each NWP and how it may affect resources within the District, and the level of impacts already experienced by such resources within the District. Matters pertaining to proposed limitations were thoroughly discussed with Regulatory staff and resource agencies. Following analysis of comments received and additional internal and external discussions, the District further modified its proposals. The regional conditions developed following the third public notice of April 21, 2000 reflect a continual modification process to determine what is still appropriate based upon the District's review of the new and modified NWPs, existing unmodified NWPs, and other general permits, the resource values of the aquatic resources within the District, potential impacts to these values, and cumulative impacts to these resources over time and into the reasonably foreseeable future. If a particular aquatic resource is limited and demonstrates high values for any of a number of reasons, it is appropriate to protect those remaining high values.

(b) Comments on Proposed Regional Conditions:
(1) Regional Condition 1.
(1)(a) This condition would require bridge crossings over streams that support steelhead migration, spawning, or rearing to be constructed in a manner that avoids adverse impacts to these activities. Such construction could be in the form of a span crossing or buried culverts such that passage by steelhead is unimpeded. Several commenters indicated that this regional condition would unnecessarily increase the LAD's workload with only minor benefits to the aquatic ecosystem. Several commenters, including NMFS and USFWS, indicated they supported this proposed condition and suggested additional areas that should be included in the condition.

Response: Bridge crossing designs on watercourses that support migration, spawning or rearing of southern steelhead should be designed to not impede such migration, spawning or rearing. Because projects that discharge fill material into such waters would need a permit from the Corps pursuant to Section 404 of the Clean Water Act, the Corps would have to determine whether such a discharge may affect the species or its designated critical habitat. If the Corps determines the project may affect the species or its habitat, it is obligated to consult with NMFS pursuant to Section 7 of the Endangered Species Act. This consultation would likely result in recommendations to address impediments to steelhead migration, spawning and/or rearing. Furthermore, general condition 4 states no activity may substantially disrupt movement of species indigenous to the waterbody, including migration, and that culverts must be installed to maintain low flow conditions. While some may think that this regional condition is redundant, LAD believes this condition will greatly benefit the species while provide the applicant with a higher degree of assurance that his/her proposed project obtain project and agency approvals. LAD also believes this condition would place virtually no additional workload on the LAD and is

more likely to lessen workload for such projects due to design meeting desirable parameters prior to submittal.

(1)(b) One commenter objected to the inclusion of bridge crossing design parameters to address passage of steelhead (*Oncorhynchus mykiss*), listed as threatened under the Federal Endangered Species Act. This commenter stated that wholesale inclusion of "all road crossings" is arbitrary and capricious; that no data exists to justify the mandate for one type of crossing over another, and that there is no explanation of the geographic boundaries included. This commenter stated that concern for a given species is a separate consideration from those at issue under the CWA: the issue of discharge of dredge or fill material. This commenter noted that existing general conditions, most notably general condition 11, already address potential effects on listed species or their designated critical habitat, and concluded that any further conditioning to address listed species or critical habitat is duplicative and unnecessary. This commenter recommended deleting the proposed regional condition from further consideration.

Response: The Los Angeles District disagrees with the commenter's statements. Because bridge crossings typically result in a discharge of dredged or fill material into waters of the U.S., the Corps has a responsibility to assess the proposed action's effect on aquatic resources, including listed species such as southern steelhead. If the Corps determines a proposed action may affect a listed species or its critical habitat, or a species or area proposed for listing or designation, it must consult with the USFWS or NMFS pursuant to Section 7 of the Endangered Species Act (ESA). This is a statutory requirement. Consultation pursuant to the ESA must weigh the potential detriment of the federal action (such as issuance of a Department of the Army permit) on the listed species or critical habitat. Such consultations typically result in a biological opinion rendered by USFWS or NMFS. If the Service determines the proposed action would not likely jeopardize a listed species, they would typically include an incidental take statement, often with associated non-discretionary terms and conditions to minimize take of the listed species. "Take" of a listed species is identified as the harassment, harm, pursuit, hunting, shooting, wounding, killing, trapping, capturing, or collecting of the species, or the attempt to engage in any such conduct. Interference with the normal life processes of the listed species, such as reproduction and including migration, could be construed as harm, and as such, would likely be addressed in the opinion. Terms and conditions would address bridge crossing design to minimize interference of migration of adult and juvenile steelhead. In addition, the Corps must determine if a proposed project would adversely affect designated critical habitat. If a proposed bridge design would likely result in a blockage of steelhead migration, it would be determined to be an adverse effect and consultation would be required. Consultations usually take several months to complete to arrive at a conclusion that the bridge design will have to accommodate steelhead passage. Furthermore, general condition 4 states "[n]o activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area…" Therefore, the District's decision to require a bridge crossing on a known steelhead stream to accommodate steelhead is not arbitrary and capricious, but rather demonstrates recognition of the inevitable.

Regarding the lack of data mandating one road crossing design over another, it would seem evident that some crossing designs, although adequate for transportation needs, would result in an obstacle for aquatic species that must migrate upstream to fulfill

one or more life stages. Steelhead must be able to traverse the streamcourse to successfully arrive at an appropriate spawning area. If minimization of obstacles is possible for any project, this minimization should be taken and is called for in the Regulatory Program. The simple provision of a culvert is often deficient and the regional condition seeks to avoid unnecessary delay of projects that arises out of unacceptable project design.

Regarding discussion of geographic boundaries where the regional condition would apply, it should appear evident by the condition's wording. Simply stated, the condition would apply in all coastal watercourses that have potential for supporting one or more life stages of steelhead from the Santa Monica Mountains to the District boundary at the San Luis Obispo/Monterey county line. This condition was delimited as it was because the Santa Monica Mountains have known steelhead populations in a minimum of two watersheds (Malibu Creek and Arroyo Sequit) and the species has been observed in many of the watersheds to the north. The only other known population south of the Santa Monica Mountains is San Mateo Creek at the Orange/San Diego county boundary on Marine Corps Base, Camp Pendleton. This creek is not included in this regional condition because it is not anticipated the Base will require a bridge crossing over San Mateo Creek in the near future. If it does, they would be responsible for consultation with the NMFS for steelhead issues in addition to applying for a Department of the Army permit for the crossing in waters of the U.S.

The commenter is correct that the Corps' Regulatory responsibility under Section 404 of the CWA is the regulation of dredged or fill material into waters of the U.S. However, as noted in the first paragraph of this response, that responsibility also requires compliance with all applicable statutes and regulations. The District firmly believes informing the regulated public of the requirement to design a bridge crossing in a steelhead creek to allow for the continued use of the creek by steelhead is a logical and appropriate response to its responsibilities under the CWA and ESA. Submittal of initial designs that demonstrate such compliance would save time and effort on the part of the applicant, the Corps and the NMFS.

(2) Regional Condition 2.
(2)(a) Several commenters indicated the geographic description for the desert areas of California were vague and confusing. In addition, several commenters indicated small projects in desert areas that include impacts to special aquatic sites could still meet the minimal impacts test. As a result, they believed this condition was unnecessarily restrictive. In addition, several commenters questioned the scientific basis for singling out special aquatic sites in desert areas for additional constraints. Other commenters indicated this regional condition should be expanded to include all special aquatic sites in the LAD.

Response: For the majority of projects in the desert regions of California, it will be quite clear from the geographic description whether the regional condition applies. Initially, there may be some confusion along the margins of the above desert regions; however, the prospective applicant can contact the LAD Regulatory Branch to clarify the issue. When the regional conditions are established, the LAD should be able to provide maps that more clearly depict the geographic boundaries of the desert areas. This regional condition provides needed constraints for discharges of dredged or fill material associated with new structures or facilities in jurisdictional special aquatic sites in desert regions. Special aquatic sites in the desert regions of the LAD support substantial aquatic resources that

exhibit relatively high physical and biological functions on a local and regional basis. These aquatic areas provide important and unique habitat for threatened and endangered species, such as least Bell's vireo and southwestern willow flycatcher, neotropical migratory birds, and other indigenous wildlife. In many cases, open water resources in desert regions are a critical resource for an entire suite of wildlife species. In addition, past construction activities in and adjacent to these special aquatic sites have degraded portions of these high value systems. To ensure NWPs would have minimal impacts, both individually and cumulatively, authorization by general permit for new permanent fills in jurisdictional special aquatic sites in desert regions should be precluded in the LAD. Any further proposals that may adversely impact this valuable desert resource would be reviewed under the Individual Permit process, which requires a rigorous analysis of alternatives. As a result, further impacts to special aquatic sites in the desert would be avoided and minimized to the maximum extent practicable. With this regional condition, the LAD can ensure NWPs would have minimal impacts, both individually and cumulatively, to jurisdictional special aquatic sites in the desert regions of the LAD. An alternative regional condition would prohibit the use of NWPs in all special aquatic sites in the LAD. The loss of approximately 90 percent of wetland resources in southern California along with the general scarcity of special aquatic sites in this semi-arid region indicate that there could be a need for the review of any project that discharges dredged or fill material in a special aquatic site under the 404(b)(1) Guidelines and the public interest factors to ensure no adverse impacts occur on or to these resources. However, as discussed above, this NWP would only impact a maximum of 0.5 acre of waters of the U.S. and/or up to 300 linear feet of intermittent streambed (generally, more than 300 feet of ephemeral streambed could be impacted under the NWPs). With the inclusion of the constraints on NWPs (General Conditions and NWP criteria) and other regional conditions, a regional condition that precluded all discharges in jurisdictional special aquatic sites would require us to review all small-scale impacts, even those in areas that exhibit lower physical and biological functions, and where such resources occur more frequently or have relatively lesser importance for other organisms. The LAD has determined that restrictive of a condition would substantially increase our workload without substantially benefiting the environment. As a result, precluding all discharges in special aquatic sites in the LAD would not be practicable and would result in relatively minor environmental benefits to the aquatic ecosystem at the expense of an unmanageable workload.

(2)(b) One commenter stated the District would arbitrarily and capriciously eliminate availability of NWPs to broad geographic areas without explanation or data why these areas should be subject to different treatment than the rest of the region. This commenter stated the public notice did not address why some NWPs are acceptable while others are not, and recommended deleting the proposed regional condition from further consideration.

Response: The District disagrees that it was arbitrary and capricious when it developed its regional conditions. In response to three Federal Register notices on proposed new and modified replacement NWPs, the District issued three public notices on proposed regional conditions intended to limit potential impacts to aquatic resources within the District. In each case, the District considered anew the constraints inherent to each NWP and how it may affect resources within the District, the level of impacts already experienced by such

resources within the District, and discussed matters pertaining to proposed limitations with Regulatory staff and resource agencies. Following analysis of comments received and additional internal and external discussions, the District further modified its proposals. The regional conditions developed following the third public notice of April 21, 2000 reflect a continual modification process to determine what is still appropriate based upon the District's review of the new and modified NWPs, existing unmodified NWPs, and other general permits, the resource values of the aquatic resources within the District, potential impacts to these values, and cumulative impacts to these resources over time and into the reasonably foreseeable future. If a particular aquatic resource is limited and demonstrates high values for any of a number of reasons, it is appropriate to protect those remaining high values.

(3) Regional Condition 3. This regional condition would require color photographs or color reproductions of the project area be provided for all projects subject to pre-construction notification pursuant to general condition 13. Several commenters indicated they supported this regional condition and indicated that, by requiring color photographs as part of the application, it could provide better information to decision makers and speed up the permit process. Several commenters requested that this condition be modified to include color photographs from specific reference points that are documented on a map. However, several commenters indicated this regional condition placed an unnecessary burden on applicants and that color photographs should only be required when sensitive resources are present in the project area. Overall, these commenters believed this regional condition would unnecessarily increase the cost of an application without any real benefits to decision makers.

Response: It is the position of the LAD that color photographs can provide valuable information about physical and biological functions present in a given project area. In some cases, the photographs will verify that no sensitive habitat is present, decreasing the number of site visits by the Regulatory Branch staff. We believe this condition will increase our efficiency by allowing desk assessments of affected habitat and other resources, speeding up the permit process for small projects that do not affect sensitive habitats. We also do not believe the simple provision of such documentation appreciably adds to project costs or delays. We believe this regional condition is a potentially valuable tool for the Regulatory Program and, as a result, have incorporated the suggested requirement of specific reference points indicated on an attached map.

(4) Regional Condition 5. This regional condition identified additional watersheds or resource types for which notification to the Corps would be required pursuant to general condition 13. Several commenters indicated that the geographic description for the Santa Monica Mountains area was vague and confusing. Several commenters indicated that some small projects in areas such as the Santa Monica Mountains, or in special aquatic sites, or in perennial waterbodies or watercourses in the deserts of southern California and Arizona could have such minor impacts that notification would not provide a substantial benefit to the resource. As a result, they believed the notification requirements were unnecessarily restrictive.

Response: For the majority of projects to be proposed in the Santa Monica Mountains, it should be quite clear from the geographic description whether the regional condition applies. Initially, there may be some confusion along the margins of the above area; however, the prospective applicant can contact the LAD Regulatory Branch to clarify the issue. The LAD would be able to provide maps that clearly identify the geographic boundaries of the Santa Monica Mountains area after the condition is established.

Jurisdictional waters of the U.S. in the Santa Monica Mountains watersheds support substantial aquatic resources that exhibit relatively high physical and biological functions. A number of endangered species, including southern steelhead and tidewater goby, utilize habitats in these watersheds. In addition, past construction activities in and adjacent to waters of the U.S. in these watersheds have degraded portions of these high value systems. To ensure NWPs would have minimal impacts, both individually and cumulatively, we believe Regulatory Branch should review every project. With this notification requirement, further losses in this area would be compensated with mitigation and further impacts to the aquatic ecosystem would be minimized. With this notification requirement, the LAD can ensure NWPs would have minimal impacts, both individually and cumulatively, to aquatic resources in the Santa Monica Mountains watersheds.

It is also the position of the LAD that any discharge of dredged or fill material in a special aquatic site warrants the review of Regulatory Branch. Due to the loss of approximately 90 percent of wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region, there is a need for compensatory mitigation to ensure only minimal adverse impacts occur on or to special aquatic sites. With this notification requirement, the LAD can ensure NWPs would have only minimal impacts, both individually and cumulatively, on or to special aquatic sites.

Perennial watercourses or waterbodies in the desert regions of the LAD support substantial aquatic resources that exhibit relatively high physical and biological functions. These perennial watercourses provide important and unique habitat for threatened and endangered species, including least Bell's vireo and southwestern willow flycatcher, Neotropical migratory birds, and other indigenous wildlife. Past construction activities in and adjacent to these perennial watercourses have degraded portions of these high value systems. To ensure NWPs would have only minimal impacts, both individually and cumulatively, Regulatory Branch should review each project. With this notification requirement, further losses of this valuable desert resource could be compensated with mitigation and further impacts to the aquatic ecosystem would be minimized. With this notification requirement, the LAD can ensure NWPs would have minimal impacts, both individually and cumulatively, to perennial watercourses and waterbodies in the desert regions of the LAD.

The jurisdictional waters of the U.S. in tidal areas support substantial aquatic resources that exhibit relatively high physical and biological functions also. A number of threatened or endangered species, including the California least tern, western snowy plover and tidewater goby, utilize habitats in these areas. Past construction activities in and adjacent to waters of the U.S. have degraded portions of these high value coastal systems. To ensure NWPs would have minimal impacts to resources in tidal areas, both individually and cumulatively, Regulatory Branch should review every project. With this notification requirement, further losses in these coastal areas could be compensated with mitigation and further impacts to the marine ecosystem would be minimized, and the LAD can ensure NWPs would have minimal impacts, both individually and cumulatively, to aquatic resources in tidal areas within the LAD. This modification has been designed to

be consistent with the Magnuson-Stevens Fishery Conservation and Management Act, which requires federal action agency to actively address potential effects of actions being considered in Essential Fish Habitat. As indicated above, this notification requirement would ensure further losses in these coastal areas could be identified and compensated with mitigation, ensuring further impacts to the marine ecosystem would be minimized.

With this notification requirement, the LAD can ensure NWPs would have minimal impacts, both individually and cumulatively, to such resources within the LAD.

(5) Regional Condition 6. The LAD proposed taking discretionary authority in several areas of the LAD to protect sensitive aquatic habitat types or watersheds. Several commenters indicated the proposed constraints on vernal pools were unnecessary considering other conservation measures in place to address this sensitive resource, or were too restrictive considering the small acreage involved with many projects that may affect vernal pools. Several commenters also questioned whether vernal pools could be adequately described considering the unique characteristics inherent to each pool. Several commenters noted the extreme loss experienced by this resource in southern California would warrant their exclusion from consideration of authorization by any general permit. The resource agencies and environmental community noted how the Santa Margarita River watershed has received a significant level of adverse impact to the various watersheds, leading to a variety of problems such as increased runoff and erosion, incision of channels, deposition of sediment leading to adverse flooding situations, etc. Conversely, several commenters noted the proposed restriction is not necessary and would adversely affect the Corps' workload and subsequent response time.

Response:

Loss of vernal pool habitat in the LAD is well documented, and ranges from 95 to more than 99 percent in the southern California region indicating substantial cumulative losses of this habitat type in these areas. Vernal pools not only represent a unique type of wetland habitat, but also provide essential habitat for several endangered invertebrate and plant species. It is the position of the LAD that vernal pools in the above areas are sufficiently rare that the loss of or impact to any jurisdictional vernal pool should be significantly mitigated and/or require site specific review under the Section 404(b)(1) Guidelines and public interest review factors to fairly evaluate the impacts of the proposed activity on the physical and biological functions of the aquatic ecosystem. Without the above exclusion, the NWPs would result in more than minimal impacts to special aquatic sites and endangered species in the LAD.

This regional condition also provides needed constraints for discharges of dredged or fill material associated with new structures/facilities in special aquatic sites in desert regions. Special aquatic sites in the desert regions of the LAD support substantial aquatic resources that exhibit relatively high physical and biological functions. Furthermore, these aquatic areas provide important and unique habitat for endangered species, including least Bell's vireo and southwestern willow flycatcher, Neotropical migratory birds and other indigenous wildlife. In addition, past construction activities in and adjacent to these special aquatic sites have degraded portions of these high value systems. To ensure the NWPs would have minimal impacts, both individually and cumulatively, new permanent fills in special aquatic sites in the above desert regions should be precluded in the LAD. By eliminating authorization by general permit of new permanent fills in special aquatic

sites in the desert, any further losses of this valuable desert resource would be reviewed under the Individual Permit process that requires a rigorous alternatives analysis. As a result, further impacts to the special aquatic sites in the desert would be avoided and minimized to the maximum extent practicable. With this regional condition, the LAD can ensure the NWPs would have minimal impacts, both individually and cumulatively, to special aquatic sites in the desert regions of the LAD.

Based on a cumulative impact assessment for the Santa Margarita River watershed by Dr. Eric Stein, the Murrieta Creek and Temecula Creek watersheds have been affected by a large number of past Section 404 permit actions. In addition, portions of these watersheds support riparian areas that exhibit relatively high physical and biological functions. As a result, further permanent fills in waters of the U.S. under the NWP program could result in greater than cumulative impacts to jurisdictional areas for certain types of projects in these two watersheds. By precluding authorization under NWPs 39, 42, and 43 for new permanent fills in perennial and intermittent watercourses in these two watersheds that exhibit cumulative impacts from past Section 404 permit actions, and for projects that cause the loss of more than 0.1 acre of ephemeral watercourses in these same watersheds, the LAD will ensure mitigation of future impacts, full compliance with the ESA and protection of special aquatic sites. A suggested regional condition for the NWPs which precluded all discharges in the entire Santa Margarita River watershed would unnecessarily increase our workload to review small-scale projects in areas of the watershed that do not have substantial cumulative impacts at this time. As a result, the LAD's regional condition would be practicable in light of its workload and would result in substantial environmental benefits to the aquatic ecosystem.

In Gaviota Creek, Mission Creek, and Carpinteria Creek of Santa Barbara County, and San Luis Obispo Creek and Santa Rosa Creek of San Luis Obispo County, a substantial number of bank stabilization projects have resulted in cumulative adverse impacts to flow velocity and water surface elevations during storm events. With the augmented flow velocity, channel substrate can be scoured during large storm events causing loss of vegetation and long-term channel incision. Although the bank stabilization projects have not resulted in the loss of a large amount of waters of the U.S., the cumulative hydrogeomorphic effects of the bank stabilization have eliminated habitat for the threatened southern steelhead that utilizes these streams. At present, there have been cumulative impacts to the above species directly resulting from the use of NWPs 14 and 26 in these stream channels. By taking discretionary authority over new bank stabilization projects in these two stream channels that exhibit cumulative impacts from past Section 404 permit actions, the LAD will ensure mitigation of future impacts, full compliance with the ESA and protection of special aquatic sites. A suggested regional condition for the NWPs that precluded all bank stabilization projects in the entire watersheds for the above creeks would unnecessarily increase our workload to review small-scale projects in areas of the watersheds that do not have substantial cumulative impacts from bank stabilization at this time. As a result, the LAD's proposed regional condition would be practicable in light of its workload and would result in substantial environmental benefits to the aquatic ecosystem.

3. Consideration of Available Data: Review of the existing RAMS data indicates no agricultural activities have been authorized under NWP 40. However, due to limitations of the RAMS data, there may be additional NWPs for agricultural activities where discharges of dredged or fill material for farm pads were only a small component of the overall project. However, discharges of dredged or fill material authorized under NWP 40 are limited to 0.5 acre of waters of the United States and 300 linear feet of stream bed in other waters. However, with no regional conditions imposed on NWP 40, there would be more than minimal impacts in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. The loss of approximately 90 percent of wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region indicates there is a need to preclude these areas from authorization under NWP 40. Special aquatic sites in the desert regions of the LAD 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. In addition, past construction activities in and adjacent to these special aquatic sites have degraded portions of these high value systems. Therefore, with the inclusion of the proposed restrictions on the use of NWP 40 in sensitive geographic areas and habitat types, NWP 40 would result in long-term minor impacts to the aquatic environment.

4. Waters Excluded from NWP or Subject to Additional Notification Requirements:

(a) The Corps has identified waters that will be excluded from use of this NWP. An explanation accompanies each waterbody. These waters are:

(1) All jurisdictional vernal pools.

Reason for Exclusion: Substantial loss of jurisdictional vernal pool habitat has been documented in the southern California region. Loss of vernal pools ranges from 95 to more than 99 percent in the coastal counties from Santa Maria southward to Baja California and the western Riverside County area, clearly indicating substantial cumulative losses of this habitat type in these areas. In the Los Angeles Basin area, losses are almost total. Jurisdictional vernal pools are unique wetland habitat types, and provide essential habitat for several threatened or endangered invertebrate and plant species endemic to a limited number of pools. Based on a review of data, it is the LAD's position that all remaining jurisdictional vernal pools are sufficiently rare and that the loss of or impact to any jurisdictional vernal pool should be significantly mitigated, and/or site specific review required under the Section 404(b)(1) Guidelines with the public interest review factors fairly evaluating the impacts of the proposed activity on the physical and biological functions of the aquatic ecosystem. Without the above exclusion, NWP 40 would result in more than minimal impacts to special aquatic sites and threatened or endangered species in the LAD.

(2) For the State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California in the LAD (generally north and east of the San Gabriel, San Bernardino, San Jacinto and Santa Rosa mountain ranges, and south of Little Lake, Inyo County), no NWP, except NWPs 1 (Aids to Navigation), 2 (Structures in Artificial Canals), 3 (Maintenance), 4 (Fish and Wildlife Harvesting), 5 (Scientific Measurement Devices), 6 (Survey Activities), 9 (Structures in Fleeting and Anchorage Areas), 10 (Mooring Buoys), 11 (Temporary Recreational Structures), 20 (Oil Spill Cleanup), 22 (Removal of Vessels), 27

(Stream and Wetland Restoration Activities), 30 (Moist Soil Management for Wildlife), 31 (Maintenance of Existing Flood Control Projects), 32 (Completed Enforcement Actions), 35 (Maintenance Dredging of Existing Basins), 37 (Emergency Watershed Protection and Rehabilitation), and 38 (Cleanup of Hazardous and Toxic Waste), or other nationwide or regional general permits that specifically authorize maintenance of previously authorized structures or fill, can be used to authorize the discharge of dredged or fill material into a jurisdictional special aquatic site as defined at 40 CFR Part 230.40-45 (sanctuaries and refuges, wetlands, mudflats, vegetated shallows, coral reefs and riffle-and-pool complexes)).

Reason for Exclusion: This regional condition provides necessary constraints for discharges of dredged or fill material associated with new structures or facilities in special aquatic sites in desert regions. Special aquatic sites in the desert regions of the LAD support substantial aquatic resources that exhibit relatively high physical and biological functions. These aquatic areas provide important and unique habitat for threatened and endangered species, including least Bell's vireo and southwestern willow flycatcher, 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. To ensure NWP 40 would have minimal impacts, both individually and cumulatively, authorization by general permit for new permanent fills in special aquatic sites in the above desert regions should be precluded in the LAD. Proposals for further impacts to this valuable desert resource would be reviewed under the Individual Permit process that requires a rigorous analysis of alternatives. As a result, further impacts to the special aquatic sites in the desert would be avoided and minimized to the maximum extent practicable. With this regional condition, the LAD can ensure the NWP 40 would have minimal impacts, both individually and cumulatively, to special aquatic sites in the desert regions of the LAD.

(3) Murrieta Creek and Temecula Creek watersheds in Riverside County for new permanent fills in perennial and intermittent watercourses, and in ephemeral watercourses for projects with more than 0.1 acre of impact to waters of the U.S. for NWPs 39, 42, and 43.

Reason for Exclusion:

According to a cumulative impact assessment for the Santa Margarita River watershed by Dr. Eric Stein, the Murrieta Creek and Temecula Creek watersheds have been adversely affected by a large number of past Section 404 permit actions, as well as additional unauthorized fills. In addition, portions of these watersheds support riparian areas that exhibit relatively high physical and biological functions. Further permanent fills in waters of the U.S. under certain NWPs would likely result in more than minimal impacts to jurisdictional areas in these watersheds on a cumulative basis. By taking discretionary authority over such actions in these two watersheds that exhibit cumulative impacts from past 404 permit actions, the LAD will ensure mitigation for future impacts, full compliance with the Endangered Species Act, and protection of special aquatic sites.

A proposed regional condition for the NWP is to preclude all discharges in the entire Santa Margarita River watershed. The LAD has determined that this condition would unnecessarily increase our workload by requiring a review of all small-scale projects, even in areas of the watershed that do not have substantial cumulative impacts at

this time, or which are not likely to adversely affect the watershed on an individual or cumulative basis. Therefore, this proposed regional condition would not be practicable in light of the LAD's workload and would not likely result in substantial environmental benefits to the aquatic ecosystem.

(4) San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County for bank stabilization projects.

Reason for Exclusion.

In San Luis Obispo Creek and Santa Rosa Creek, bank stabilization projects have resulted in more than minimal cumulative impacts to flow velocity and water surface elevations during storm events. With the augmented flow velocity, large storm events scour the channel substrate causing loss of vegetation and long-term channel incision. Although bank stabilization projects have not resulted large losses of waters of the U.S., the cumulative hydrogeomorphic effects of bank stabilization projects have eliminated habitat for the threatened southern steelhead and other species that utilize these streams. At present, LAD has identified more than minimal cumulative impacts directly resulting from the use of NWPs 13, 14 and 26 in these stream channels. By taking discretionary authority over new bank stabilization projects in these two stream channels, the LAD will ensure future impacts are appropriately mitigated.

A proposed regional condition that precludes all discharges in the entire San Luis Obispo Creek and Santa Rosa Creek watersheds would unnecessarily increase our workload to require review of small-scale projects even in areas of the watersheds that do not exhibit substantial cumulative impacts at this time, or which are not likely to adversely affect the watershed on an individual or cumulative basis. Therefore, this proposed regional condition would not be practicable in light of the LAD's workload and would not likely result in substantial environmental benefits to the aquatic ecosystem.

(5) Gaviota Creek, Mission Creek and Carpinteria Creek in Santa Barbara County for bank stabilization projects and grade control structures.

Reason for Exclusion:

In Gaviota Creek, Mission Creek and Carpinteria Creek, bank stabilization and grade control structure projects have resulted in more than minimal cumulative impacts to flow velocity and water surface elevations during storm events. With the augmented flow velocity, channel substrate can be scoured during large storm events causing loss of vegetation and long-term channel incision. Grade control structures effectively preclude access of reaches upstream of the structures to aquatic organisms dependent upon such access for successful reproduction. Although the bank stabilization and grade control structure projects have not resulted in large losses of waters of the U.S., the cumulative hydrogeomorphic effects of these projects have reduced the amount of habitat for the threatened southern steelhead and other species that utilize these streams. At present, there has been a cumulative adverse impact directly resulting from the use of NWPs 13, 14 and 26 in these stream channels. By taking discretionary authority over new bank stabilization and grade control structure projects in these three stream channels, the LAD will ensure future impacts are appropriately mitigated.

A proposed regional condition for the NWPs that precludes all bank stabilization and grade control structure projects in the entire Gaviota Creek, Mission Creek and Carpinteria Creek watersheds would unnecessarily increase our workload to require review small-scale projects even in areas of the watershed that do not exhibit substantial cumulative impacts from bank stabilization at this time, or which are not likely to adversely affect the watershed on an individual or cumulative basis. Therefore, this proposed regional condition would not be practicable in light of the LAD's workload and would not likely result in substantial environmental benefits to the aquatic ecosystem.

(b) The Corps has identified waters of the U.S. that will be subject to additional notification requirements for activities authorized by this NWP. An explanation accompanies each waterbody type. These waters are:

(1) Any special aquatic site in the LAD as defined at 40 CFR Part 230.40-45.

Reason for Notification Requirement: It is the position of the LAD that any discharge of dredged or fill material in a special aquatic site warrants the review of Regulatory Branch. Due to the loss of approximately 90 percent of wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region there is the need for compensatory mitigation to ensure minimal adverse impacts to special aquatic sites. With this notification requirement, the LAD can ensure NWP 40 would have minimal impacts, both individually and cumulatively, to special aquatic sites.

(2) Any jurisdictional waters of the U.S. in the Santa Monica Mountains watersheds (bounded by Calleguas Creek on the west, by Highway 101 on the north and east, and by Sunset Boulevard and the Pacific Ocean on the south).

Reason for Notification Requirement: The jurisdictional waters of the U.S. in the Santa Monica Mountains watersheds support substantial aquatic resources that exhibit relatively high physical and biological functions. Furthermore, a number of endangered species, including the steelhead and tidewater goby, utilize habitats in these watersheds. Past construction activities in and adjacent to waters of the U.S. have degraded portions of these high value systems. To ensure NWP 40 would have minimal impacts in the Santa Monica Mountains watersheds, both individually and cumulatively, each project proposing to discharge dredged or fill material into waters of the U.S. should be reviewed by Regulatory Branch. With this notification requirement, further impacts in this area would be compensated with appropriate mitigation and impacts to the aquatic ecosystem would be minimized.

(3) Any perennial watercourses or waterbodies in the State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California in the LAD (generally north and east of the San Gabriel, San Bernardino, San Jacinto and Santa Rosa mountain ranges, and south of Little Lake, Inyo County).

Reason for Notification Requirement: Perennial watercourses or waterbodies in the desert regions of the LAD support substantial aquatic resources that exhibit relatively high physical and biological functions on a local and regional basis. These watercourses provide important and unique habitat for threatened and endangered species, including

least Bell's vireo and southwestern willow flycatcher, neotropical migratory birds and other indigenous wildlife. In addition, past construction activities in and adjacent to these perennial watercourses have degraded portions of these high value systems. To ensure NWP 40 would have minimal impacts to perennial watercourses and waterbodies in the desert regions of the LAD, both individually and cumulatively, every project in these habitat types in the LAD should be reviewed.

(4) All areas designated as Essential Fish Habitat (EFH) by the Pacific Fishery Management Council (i.e., all tidally influenced areas).

Reason for Notification Requirement: Projects that occur in EFH must be reviewed for compliance with the Magnuson-Stevens Fishery Conservation and Management Act. The Corps, as a federal action agency, must make a finding whether the proposed project would affect EFH, and must coordinate with NMFS. The jurisdictional waters of the U.S. in tidal areas support substantial aquatic resources that exhibit relatively high physical and biological functions. Furthermore, a number of endangered species, including California least tern, California brown pelican, western snowy plover, and tidewater goby, utilize habitats in these areas. In addition, past construction activities in and adjacent to waters of the U.S. have degraded portions of these high value coastal systems. To ensure NWP 40 would have minimal impacts to Essential Fish Habitat, both individually and cumulatively, Regulatory Branch should review every project. With this notification requirement, any further losses in these coastal areas would be compensated with mitigation and further impacts to the marine ecosystem would be minimized. With this notification requirement, the LAD can ensure NWP 40 would have minimal impacts, both individually and cumulatively, to aquatic resources in tidal areas within the LAD.

5. Alternatives:

(a) No Regional Conditions.

Discharges of dredged or fill material authorized under NWP 40 are limited to 0.5 acres of waters of the United States and 300 linear feet of stream bed. The notification threshold for NWP 40(b) is 0.1 acre of impact to waters of the United States, and in all circumstances for (c) and for (a) when combined with (c) or (d). Furthermore, the new General Conditions would provide further limitations on the use of NWP 40. Due to the above restrictions, NWP 40 would result in minimal impacts, both individually and cumulatively, in the majority of the Los Angeles District. As a result, with no regional conditions for the proposed NWP 40, there would be more than minimal impacts in only specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions.

With no Regional Conditions, NWP 40 could have more than minimal impacts in some portions of the LAD. Without regional conditions requiring notification in the Santa Monica Mountains watershed, special aquatic sites, essential fish habitat and perennial watercourses in desert areas, there could be more than minimal impacts to waters of the United States which exhibit both high physical and biological functions and substantial cumulative impacts in some portions of the watersheds. Without a regional condition requiring notification for projects in special aquatic sites, impacts to these relatively rare resources could occur without mitigation. As a result, there would be more than minimal impacts, both individually and cumulatively to special aquatic sites in the Los Angeles District. In addition, with no regional conditions, the proposed NWP 40 could have more

than minimal impacts on jurisdictional vernal pools in the LAD. Historically, there has been over a 95 percent loss of jurisdictional vernal pool habitat in the southern California area. As a result, further losses could result in more than minimal impacts, both individually and cumulatively. Overall, with no regional conditions, the proposed NWP 40 could be utilized in areas with sensitive special aquatic sites and endangered species habitat. With no regional conditions, the proposed NWP 40 would have more than minimal impacts to sensitive watersheds/resources, special aquatic sites and jurisdictional vernal pool habitat in the LAD.

(b) Alternative Regional Limits or Notification Thresholds:

Discharges of dredged or fill material authorized under NWP 40 are limited to 0.5 acre of waters of the United States and 300 linear feet of stream bed in non-wetland, waters of the United States. The notification threshold for NWP 40 (b) is 0.1 acre of impact to waters of the United States, and in all circumstances for (c) and (a) when combined with (c) or (d). Furthermore, the new General Conditions would provide further limitations on the use of NWP 40. Due to the above restrictions, NWP 40 would result in minimal impacts, both individually and cumulatively, in the majority of the Los Angeles District. As a result, with no regional conditions for the proposed NWP 40, there would only be more than minimal impacts in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions.

In the Los Angeles District, the semi-arid climate limits the amount of special aquatic sites that occur throughout the region. In dryland areas, lack of vegetation and developed soils result in high peak discharges for large storm events. With a predominance of deep alluvial soils, dryland systems are dominated by overland flow with groundwater recharge and throughflow only contributing a small amount to stream discharge. Over the last fifty years, substantial construction activities have resulted in a loss of approximately 90 percent of wetlands and 95 percent of the jurisdictional vernal pools in southern California. The above indicates that further loss of special aquatic sites in southern California and Arizona could result in more than minimal cumulative impacts. To ensure any impact to special aquatic sites is offset by compensatory mitigation, the Los Angeles District would require notification for any project that impacts a special aquatic site. Furthermore, the LAD would eliminate the use of NWP 40 in jurisdictional vernal pools in the Santa Barbara Region, San Diego/Southern Orange County and the western Riverside County region and in special aquatic sites in Arizona and the desert regions of California. With the inclusion of the above modifications to NWP 40, the LAD would ensure minimal impacts to special aquatic sites without substantially increasing our workload. Furthermore, eliminating the use of NWP 40 in jurisdictional vernal pool areas with close to 100 percent loss of jurisdictional vernal pool habitat would ensure minimal impacts to these sensitive wetland areas. Lastly, certain watersheds and resources in the Los Angeles District support waters of the United States which support high physical and biological functions that are threatened by cumulative impacts at the watershed level. To ensure that NWP 40 would have minimal impacts to these resources, the Los Angeles District would require notification for all projects in the Santa Monica Mountain, special aquatic sites, perennial watercourses in desert regions and areas designated as Essential Fish Habitat. Furthermore, the Los Angeles District has eliminated the use of NWP 40 in the Murrieta and Temecula Creek watersheds as a result of cumulative impacts from past Section 404 permits. With the inclusion of the above modifications, the LAD would

ensure minimal impacts, both individually and cumulatively, without a substantial increase in our overall workload.

(c) Alternative Regional Nationwide Permit Conditions:

To further ensure the proposed NWP 40 would result in minimal impacts to the aquatic ecosystem, both individually and cumulatively, the LAD could augment the proposed notification requirements for NWP 40 by including all coastal watersheds. Alternatively, the LAD could eliminate the use of NWP 40 in all special aquatic sites, including jurisdictional vernal pools.

The LAD could require notification for all projects that require authorization under NWP 40. In addition, the LAD could also forward Pre-construction Notifications to the resource agencies with all NWP 40 applications. The above was requested by the USFWS both in their September 3, 1999 comment letter and our October 14, 1999 meeting. Requiring notification for all maintenance projects, not just those in special aquatic sites and in waters with relatively high physical and biological functions, would substantially increase the workload for the LAD without any real benefits to the aquatic ecosystem. Furthermore, forwarding Pre-construction Notifications to the agencies for all agricultural projects (NWP 40) would represent a substantial increase in workload with minimal benefits to the aquatic environment. As a result, the LAD has determined that the above alternative notification requirements would not be practicable and would result in minor benefits to the aquatic ecosystem. With the proposed modifications to NWP 40 (see 2 above), the LAD has identified the resources and watersheds that warrant additional scrutiny for NWP 40. The proposed modifications would likely only result in only a minor increase in workload, but would result in substantial benefits to the aquatic environment.

An alternative regional condition would prohibit the use of the proposed NWP 40 in all special aquatic sites in the LAD. The loss of approximately 90 percent of wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region indicates there could be a need for the review of any project which would discharge dredged or fill material in a special aquatic site under the 404(b)(1) Guidelines and the public interest factors to ensure no adverse impacts to special aquatic sites. However, as discussed above, NWP 40 would only impact a maximum of 0.5 acre of waters of the United States and up to 300 linear feet of stream bed. With the inclusion of all the restrictions on NWP 40 (General Conditions and the terms and conditions for NWP 40), a regional condition which precluded all discharges in special aquatic sites would unnecessarily increase our workload to review on all projects, including those with small-scale temporary impacts in disturbed areas. As a result, this proposed modification would not be practicable and would result in minimal environmental benefits to the aquatic ecosystem.

In conclusion, the majority of the projects that could be authorized under the NWP 40 along with the proposed modifications would be predicted to result in minimal impacts only on or to the aquatic ecosystem without a substantial increase in workload.

6. Endangered Species Act:

(a) General Considerations:

Discharges of dredged or fill material authorized under NWP 40 are limited to 0.5 acre of waters of the United States and 300 linear feet of stream be in non-wetland waters of the United States. The notification threshold for NWP 40 (b) is 0.1 acre of impact to waters of the United States, and in all circumstances for (b) and (a) when combined with (c) or (d). Furthermore, the new General Conditions would provide further limitations on the use of NWP 40 in waters of the United States. Due to the above restrictions, the proposed NWP 40 would result in minimal impacts, both individually and cumulatively, in the majority of the Los Angeles District. As a result, with no regional conditions for the proposed NWP 40, there would only be more than minimal impacts in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions.

In southern California, the large number of endangered species has made the general public more aware of the need to contact USFWS and NMFS for any proposed project that may affect listed species. Furthermore, General Condition 11 requires the applicant to ensure no affect to endangered species when utilizing any of the NWPs. The LAD also has substantial information, including maps, previous studies and survey data, which document areas that support endangered species. The LAD is very careful to ensure compliance with the Endangered Species Act. When the LAD receives an application for NWP 40 that is within the range of an endangered species or supports suitable habitat, USFWS or NMFS is contacted early in the review process. If no data is available for a site, the LAD also contacts USFWS or NMFS to ensure compliance with the Endangered Species Act. To facilitate compliance with the Endangered Species Act on a broader scale, the LAD has coordinated with the USFWS to complete several programmatic consultations for a number of endangered species in the Ventura/Santa Barbara/San Luis Obispo area. Overall, the number of endangered species in the LAD has required extensive coordination with both USFWS and NMFS and has made the regulated public more aware of endangered species issues.

To ensure compliance with the Endangered Species Act, the LAD has proposed additional notification requirements for special aquatic sites and sensitive resources (Santa Monica Mountains, perennial watercourses in desert regions and areas designated as Essential Fish Habitat). Areas with a higher likelihood for supporting endangered species or their critical habitat would be more likely subject to notification requirements. The LAD has also proposed a regional condition that would require road crossings to have minimal impacts to stream channels that support southern steelhead. As documented above, the LAD has allocated a substantial amount of its time and resources to compliance with the Endangered Species Act.

(b) Standard Local Operating Procedures for Endangered Species (SLOPES): As discussed above, the LAD has official and unofficial procedures for ensuring compliance with the Endangered Species Act. With the implementation of SLOPES, the above procedures could be officially documented, or otherwise facilitate the continued compliance with the Endangered Species Act. It should be recognized that Special Condition 11 requires the Corps to comply with the Endangered Species Act.

7. Supplement to National Impact Analysis:

(a) Public interest review factors (33 CFR 320.4(a)(1)): In addition to the discussion in the national decision document for this NWP, the Corps LAD has considered the local impacts expected to result from the regulated discharges authorized by this NWP, including the reasonably foreseeable cumulative effects of those discharges.

(1) Conservation: NWP 40 would only authorize discharges of dredged or fill material into a maximum of 0.5 acre of waters of the United States and 300 linear feet of stream bed in non-wetland waters of the United States. The notification threshold for NWP 40 (b) is 0.1 acre of impact to waters of the United States, and in all circumstances for (c) and for (a) when combined with subsections (c) or (d). Furthermore, the new General Conditions would provide further limitations on the use of NWP 40 in waters of the United States. Due to the above restrictions, the proposed NWP 40 would result in minimal impacts to conservation, both individually and cumulatively, in the majority of the Los Angeles District. As a result, with no regional conditions for the proposed NWP 40, there would only be more than minimal impacts in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. Regional conditions for NWP 40 would preclude discharges of dredged or fill material in perennial and intermittent watercourses, in special aquatic sites for the construction of building pads, in jurisdictional vernal pools in specific regions, in special aquatic sites in Arizona and the desert regions of California, in spawning habitat for listed species, and in the Murrieta Creek and Temecula Creek watersheds. With the inclusion of the proposed notification requirements for NWP 40 in special aquatic sites and sensitive watersheds and resources, the above long-term minor impacts to conservation in the LAD would be further reduced.

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

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

(4) General environmental concerns: In the LAD, there are a large number of endangered species that require extensive coordination with USFWS and NMFS. Consequently, regional conditions for NWP 40 would preclude discharges of dredged or fill material in jurisdictional vernal pools in specific regions, special aquatic sites in Arizona and the desert regions of California and in the Murrieta Creek and Temecula Creek watersheds, perennial and intermittent watercourses, in special aquatic sites for the construction of building pads, and in spawning habitat for federally listed species. For any installation of drainage systems, an applicant would need to demonstrate compliance with the National Pollutant Elimination System regulations if the drainage flows into any waters of the United States. With the inclusion of the proposed notification requirements for NWP 40 in special aquatic sites and sensitive watersheds/resources (see above), the above general environmental concerns in the LAD would be further reduced. With the continuation of the existing informal coordination procedures, the proposed NWP 40 would have minimal impacts on general environmental resources in the LAD.

(5) Wetlands: In the LAD, the semi-arid climate limits the extent and number of wetland resources. This scarcity of wetlands is especially evident in Arizona and in the desert regions of California. In these areas, annual precipitation is usually below 10 inches, which precludes the development of wetlands in the majority of these desert regions. As a

result, special aquatic sites (wetlands) are rare in the LAD and warrant more rigorous protection. To ensure minimal impacts to wetland resources, the LAD would require notification for all activities discharging dredged or fill material in a special aquatic site, including wetlands. In addition, the LAD would preclude the use of several NWP's, including NWP 40, in special aquatic sites within desert regions in southern California and all of Arizona. With the inclusion of this modification, NWP 40 would have minimal impacts on the aquatic ecosystem.

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

(7) Fish and wildlife values: NWP 40 would only authorize discharges of dredged or fill material into a maximum of 0.5 acre of waters of the United States and 300 linear feet of stream bed in non-wetland waters of the United States. The notification threshold for NWP 40 (b) is 0.1 acre of impact to waters of the United States, and in all circumstances for (c) and (a) when combined with subsections (c) or (d). Furthermore, the new General Conditions would provide further limitations on the use of NWP 40 in waters of the United States. Due to the above restrictions, the proposed NWP 40 would result in minimal impacts to fish and wildlife values, both individually and cumulatively, in the majority of the Los Angeles District. As a result, with no regional conditions for the NWP 40, there would only be more than minimal impacts in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. Regional conditions for NWP 40 would preclude discharges of dredged or fill material in perennial and intermittent watercourses, jurisdictional vernal pools in specific regions, special aquatic sites in Arizona and the desert regions of California, in the Murrieta Creek and Temecula Creek watersheds, in spawning habitat for federally listed species, and in special aquatic sites for the construction of building pads for farm buildings. With the inclusion of the proposed notification requirements for NWP 40 in special aquatic sites and sensitive watersheds/resources, the above long-term minor impacts to fish and wildlife values in the LAD would be further reduced.

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

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

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

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

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

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

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

(15) Water quality: In the heavily populated areas of southern California and Arizona, existing water quality in most rivers has been impaired by runoff from upland agricultural, residential and industrial sources. The proposed NWP 40 would only authorize discharges of dredged or fill material into a maximum of 0.5 acre of waters of the United States and

300 linear feet of stream bed in non-wetland, waters of the United States. As a regional condition, for any installation of drainage systems, the applicant would need to demonstrate compliance with the National Pollutant Elimination System regulations. The notification threshold for NWP 40 (b) is 0.1 acre of impact to waters of the United States, and for in all circumstances for subsection (c) and for (a) when combined with subsection (c) or (d). Furthermore, the new General Conditions would provide further limitations on the use of NWP 40 in waters of the United States. Due to the above restrictions, the proposed NWP 40 would result in minimal adverse impacts to water quality, both individually and cumulatively, in the majority of the Los Angeles District. As a result, with no regional conditions for the proposed NWP 40, there would only be more than minimal impacts in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. Regional conditions for NWP 40 would preclude discharges of dredged or fill material in jurisdictional vernal pools in specific regions, special aquatic sites in Arizona and the desert regions of California and in the Murrieta Creek and Temecula Creek watersheds. With the inclusion of the proposed notification requirements for NWP 40 in special aquatic sites and sensitive watersheds/resources, the above long-term minor impacts to water quality in the Los Angeles District would be further reduced.

(16) Energy needs: Same as discussed in the national document.

(17) Safety: With the dynamic storm season typical of southern California and parts of Arizona, large floods are normal part of the hydrologic regime. With the maintenance of existing structures in stream channels, NWP 40 would provide long-term benefits by reducing flood hazards in the LAD.

(18) Food and fiber production: Same as discussed in the national document.

(19) Mineral needs: Same as discussed in the national document.

(20) Considerations of property ownership: Same as discussed in the national document.

(b) 404(b)(1) Guidelines Impact Analysis (Subparts C-F):
(1) Substrate: With the proposed NWP 40, there would short-term adverse impacts to channel substrate in the immediate vicinity of the agricultural activities. The proposed NWP 40 would only authorize discharges of dredged or fill material into a maximum of 0.5 acre of waters of the United States and 300 linear feet of stream bed in non-wetland waters of the United States. The notification threshold for NWP 40 (b) is 0.1 acre of impact to waters of the United States, and in all circumstances for subsection (c) and (a) when combined with subsection (c) or (d). Furthermore, the new General Conditions would provide further limitations on the use of NWP 40 in waters of the United States. Due to the above restrictions, the proposed NWP 40 would result in minimal adverse impacts to substrate, both individually and cumulatively, in the majority of the LAD. As a result, with no regional conditions for the proposed NWP 40, there would only be more than minimal impacts in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. The regional conditions for NWP 40 would preclude discharges of dredged or fill material in perennial and intermittent watercourses, in jurisdictional vernal pools in specific regions, special aquatic sites in

Arizona and the desert regions of California and in the Murrieta Creek and Temecula Creek watersheds, spawning habitat for federally listed species, and in special aquatic sites when constructing a building pad. With the inclusion of the proposed notification requirements for NWP 40 in special aquatic sites and sensitive watersheds and resources, the above long-term minor impacts to channel substrate in the LAD would be further reduced. With the inclusion of the above requirements, the proposed NWP 40 would result in long-term minor impacts to channel substrate.

(2) Suspended particulates/turbidity: In the heavily populated areas of southern California and Arizona, existing turbidity levels in most rivers has been impaired by runoff from upland agricultural, residential and industrial sources. Short-term construction activities related to construction activities could augment turbidity levels in waters of the United States. However, these activities would generally only result in short-term minor changes in turbidity levels. The proposed NWP 40 would only authorize discharges of dredged or fill material into a maximum of 0.5 acre of waters of the United States and 300 linear feet of stream bed in non-wetland waters of the United States. NWP 40 would require demonstration of compliance with the National Pollution Elimination System when installing drainage systems. Furthermore, the new General Conditions would provide further limitations on the use of NWP 40 in waters of the United States. Due to the above restrictions, the proposed NWP 40 would result in minimal adverse impacts to turbidity levels, both individually and cumulatively, in the majority of the LAD. As a result, with no regional conditions for NWP 40, there would only be more than minimal impacts in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. However, the regional conditions for NWP 40 would preclude discharges of dredged or fill material in perennial and intermittent watercourses, in jurisdictional vernal pools in specific regions, special aquatic sites in Arizona and the desert regions of California, in the Murrieta Creek and Temecula Creek watersheds, in spawning habitat for federally listed species, and in special aquatic sites when construction a building pad. With the inclusion of the proposed notification requirements for NWP 40 in special aquatic sites and sensitive watersheds/resources, the above long-term minor impacts to suspended sediment levels in the LAD would be further reduced. Furthermore, the required 401 Certification would ensure long-term minimal impacts to turbidity/suspended sediment loads in the rivers/streams of the Los Angeles District. With the implementation of the above conditions, the proposed NWP 40 would have long-term minor impacts to turbidity levels in waters of the United States within the LAD.

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

(4) Current patterns and water circulation: In the coastal watersheds of the LAD, impacts to currents and water circulation could affect spawning of southern steelhead. As a result, maintenance activities associated with bridge repairs should not reduce the cross-sectional area of the channel or adversely modify the existing gradient of the stream channel. To ensure minimal impacts to steelhead, Regional Condition 1 would require all new bridge crossing designs to adhere to the above requirements. Furthermore, the LAD would require notification for any maintenance activities in identified sensitive watersheds and resources. With the inclusion of the above provisions, NWP 40 would have minimal impacts on current patterns and circulation in waters of the United States.

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

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

(7) Threatened and endangered species: As stated above, NWP 40 would only authorize discharges of dredged or fill material into a maximum of 0.5 acre of waters of the United States and 300 linear feet of stream bed in non-wetland waters of the United States. The notification threshold for NWP 40 (b) is 0.1 acre of impact to waters of the United States, and in all circumstances for subsection (c) and (a) when combined with subsection (c) or (d). Furthermore, the new General Conditions would provide further limitations on the use of NWP 40 in waters of the United States. Due to the above restrictions, the proposed NWP 40 would result in minimal adverse impacts to threatened and endangered species, both individually and cumulatively, in the majority of the LAD. As a result, with no regional conditions for the proposed NWP 40, there would only be more than minimal impacts in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. The regional conditions for NWP 40 would preclude discharges of dredged or fill material in jurisdictional vernal pools in specific regions, special aquatic sites in Arizona and the desert regions of California and in the Murrieta Creek and Temecula Creek watersheds. With the inclusion of the proposed notification requirements for NWP 40 in special aquatic sites and sensitive watersheds/resources, the above long-term minor impacts to endangered and threatened species in the Los Angeles District would be further reduced. Given the large number of endangered species in the LAD, continued coordination with USFWS and NMFS is required to ensure minimal impacts to endangered species. With the continuation of the existing informal coordination procedures and with the inclusion of the proposed notification requirements, the proposed NWP 40 would have minimal impacts on threatened and endangered species in the LAD (see the above discussion).

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

(9) Other wildlife: In the semi-arid southern California climate, rivers and streams and the associated riparian habitat represent an important resource for wildlife. NWP 40 would only authorize discharges of dredged or fill material into a maximum of 0.5 acre of waters of the United States and 300 linear feet of stream bed in non-wetland waters of the United States. The notification threshold for NWP 40 (b) is 0.1 acre of impact to waters of the United States, and in all circumstances for subsection (c) and (a) when combined with subsections (c) or (d). Furthermore, the new General Conditions would provide further limitations on the use of NWP 40 in waters of the United States. Due to the above restrictions, NWP 40 would result in minimal adverse impacts to wildlife, both individually and cumulatively, in the majority of the LAD. As a result, with no regional conditions for NWP 40, there would only be more than minimal impacts in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. The regional conditions for NWP 40 would preclude discharges of dredged or fill material in perennial and intermittent watercourses, in jurisdictional vernal pools in specific regions, special aquatic sites in Arizona and the desert regions of California, in the Murrieta Creek and Temecula Creek watersheds, in spawning habitat for federally-listed species, and in special aquatic sites when constructing building pads.

With the inclusion of the notification requirements for NWP 40 in special aquatic sites and sensitive watersheds/resources, the above long-term minor impacts to wildlife in the LAD would be further reduced.

(10) Special aquatic sites: Potential impacts to specific special aquatic sites are discussed below:

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

(b) Wetlands: In the LAD, the existing semi-arid climate limits the extent and number of wetland resources. This scarcity of wetlands is especially evident in Arizona and in the desert regions of California. In these areas, annual precipitation is usually below 10 inches which precludes the development of wetlands in the majority of these desert regions. Furthermore, approximately 90 percent of wetlands in California have been adversely affected by historic conversion to agricultural uses, grading and filling activities. As a result, wetland areas are especially rare in the LAD and warrant more rigorous protection. To ensure minimal impacts to wetland resources, the LAD would require notification for all activities discharging dredged or fill material in a special aquatic site, including wetlands. With the inclusion of this modification, the proposed NWP 40 would have only minimal impacts to wetlands in the LAD.

(c) Mud flats: In the LAD, historic coastal development activities have reduced the extent and number of mud flat resources. As a result, about 90 percent of wetlands, including coastal wetlands and mud flats, in California have been affected by historic conversion to agricultural uses, and/or grading and filling activities. As a result, mud flat areas are especially rare in the LAD and warrant more rigorous protection. To ensure minimal impacts to mud flats, the LAD would require notification for an activity discharging dredged or fill material in a special aquatic site, including mud flats. With the inclusion of this modification, NWP 40 would have only minimal impacts to mudflats in the LAD.

(d) Vegetated shallows: In the LAD, historic construction activities have reduced the extent and number of vegetated shallows. As a result, approximately 90 percent of wetlands, including vegetated shallows, in California have been affected by historic conversion to agricultural uses, and/or grading and filling activities. As a result, vegetated shallows are especially rare in the LAD and warrant more rigorous protection. To ensure minimal impacts to vegetated shallows, the LAD would require notification for all activities discharging dredged or fill material in a special aquatic site, including vegetated shallows. With the inclusion of this modification, NWP 40 would have only minimal impacts to vegetated shallows in the LAD.

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

(f) Riffle-and-pool complexes: In the semi-arid southern California and Arizona areas, limited water resources and the need for flood control have led to the construction of numerous dams in the mountains surrounding southern California and on the Colorado River in Arizona. With the construction of these large dams,

many riffle-and-pool complexes have been eliminated by large reservoirs. Furthermore, construction of the dams modifies the hydrologic regime of the river, which can also degrade downstream riffle-and-pool complexes. As a result, riffle-and-pool complexes are especially rare in the LAD and warrant more rigorous protection. To ensure minimal impacts to riffle-and-pool complexes, the LAD would require notification for any activity discharging dredged or fill material in a special aquatic site, including riffle-and-pool complexes. With the inclusion of this modification, NWP 40 would have only minimal impacts to riffle-and-pool complexes in the LAD.

(11) Municipal and private water supplies: With the semi-arid climate and the large population present in the LAD, maintenance of existing structures associated with water supply is especially important in this region. In addition, to ensure minimal impacts to water supplies, the Corps would require notification for all discharges of fill material in perennial watercourses in desert areas within the LAD. As a result, NWP 40 would have long-term minimal impacts to existing water supply structures and facilities in the LAD.

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

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

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

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

8. List of Final Corps Regional Modifications and Conditions for NWP 40: The original public notices issued by LAD to receive comments on proposed regional conditions included two with sub-paragraphs for notification requirements and for discretionary authority specific to particular aquatic types or watershed areas. For the sake of ease of use, these conditions' order is further modified below to group several that were particularly similar.

(a) For coastal watersheds from the southern reach of the Santa Monica Mountains in Los Angeles County to the San Luis Obispo County/Monterey County boundary, all road crossings must employ a bridge crossing design that ensures passage and/or spawning of steelhead (*Oncorhynchus mykiss*) is not hindered in any way. In these areas, bridge designs that span the stream or river, including designs for pier- or pile-supported spans, or designs based on use of a bottomless arch culvert simulating the natural stream bed (i.e., substrate and streamflow conditions in the culvert are similar to undisturbed stream bed channel conditions) shall be employed unless it can be demonstrated the stream or river does not support resources conducive to the recovery of federally listed anadromous salmonids, including migration of adults and smolts, or rearing and spawning. This proposal also excludes approach embankments into the channel unless they are determined to have no detectable effect on steelhead.

(b) For the State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California in LAD (generally north and east of the San Gabriel, San Bernardino, San Jacinto, and Santa Rosa mountain ranges, and south of Little Lake, Inyo County), no NWP, except NWPs 1 (Aids to Navigation), 2 (Structures in Artificial Canals), 3

(Maintenance), 4 (Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities), 5 (Scientific Measurement Devices), 6 (Survey Activities), 9 (Structures in Fleeting and Anchorage Areas), 10 (Mooring Buoys), 11 (Temporary Recreational Structures), 20 (Oil Spill Cleanup), 22 (Removal of Vessels), 27 (Stream and Wetland Restoration Activities), 30 (Moist Soil Management for Wildlife), 31 (Maintenance of Existing Flood Control Projects), 32 (Completed Enforcement Actions), 35 (Maintenance Dredging of Existing Basins), 37 (Emergency Watershed Protection and Rehabilitation), and 38 (Cleanup of Hazardous and Toxic Waste), or other nationwide or regional general permits that specifically authorize maintenance of previously authorized structures or fill, can be used to authorize the discharge of dredged or fill material into a jurisdictional special aquatic site as defined at 40 CFR Part 230.40-45 (sanctuaries and refuges, wetlands, mudflats, vegetated shallows, coral reefs, and riffle-and-pool complexes).

(c) For all projects proposed for authorization by nationwide or regional general permits where prior notification to the LAD Engineer is required, applicants must provide color photographs or color photocopies of the project area taken from representative points documented on a site map. Pre-project photographs and the site map would be provided with the permit application. Photographs should represent conditions typical or indicative of the resources before impacts.

(d) Notification pursuant to general condition 13 shall be required for projects in all special aquatic sites as defined at 40 CFR Part 230.40-45 (sanctuaries and refuges, wetlands, mudflats, vegetated shallows, coral reefs, and riffle-and-pool complexes), and in all jurisdictional perennial watercourses or waterbodies in the State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California in LAD (generally north and east of the San Gabriel, San Bernardino, San Jacinto, and Santa Rosa mountain ranges, and south of Little Lake, Inyo County).

(e) Notification pursuant to general condition 13 shall be required for projects in all areas designated as Essential Fish Habitat by the Pacific Fishery Management Council (i.e., all tidally influenced areas).

(f) Notification pursuant to general condition 13 shall be required for projects in 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.

(g) Individual permits shall be required in all jurisdictional vernal pools.

(h) Individual permits shall be required in Murrieta Creek and Temecula Creek watersheds in Riverside County for new permanent fills in perennial and intermittent watercourses otherwise authorized under NWPs 39, 42 and 43, and in ephemeral watercourses for these NWPs for projects that impact greater than 0.1 acre.

(i) Individual permits shall be required in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County for bank stabilization projects, and in Gaviota Creek, Mission Creek and Carpinteria Creek in Santa Barbara County for bank stabilization projects and grade control structures.

9. NWP 40 was issued without a 401 Water Quality Certification or a Coastal Zone Management Act Consistency Determination. As a result, each NWP 40 application would require review and approval from both the Regional Water Quality Control Board and the California Coastal Commission before the Corps could authorize any discharges of dredged or fill material (see 33 CFR Part 330.9 and 330.10).

10. Cumulative Impacts:

The cumulative impacts 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. Based on an analysis of the types of activities authorized by the LAD during previous years, the LAD estimates that this NWP will be used approximately 15 times per year, resulting in the loss of approximately 30 acres of waters of the United States, including wetlands. To insure that these activities result in minimal adverse effects on the aquatic environment, individually and cumulatively, the LAD estimates that approximately 60 acres of compensatory mitigation will 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.

Since NWP 40 is new, no historical data is available to evaluate the potential cumulative effects of this NWP in the Los Angeles District. Consequently, discharges of dredged or fill material authorized under NW40 are limited to 0.5 acre of waters of the United States and 300 linear feet of stream bed. Furthermore, the new General Conditions would provide further limitations on the use of NWP 40. Due to the above restrictions, the proposed NWP 40 would result in minimal impacts, both individually and cumulatively, in the majority of the LAD. As a result, with no regional conditions for the proposed NWP 40, there would only be more than minimal impacts in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. With the inclusion of restrictions on the use of NWP 40 in sensitive geographic areas and habitat types, the proposed NWP 40 would result in long-term minor impacts to the aquatic environment (see the above regional conditions).

The terms and conditions of the NWP, including the preconstruction notification requirements and the regional conditions listed in Section 8 of this document, will ensure that this NWP authorizes only activities with minimal and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in General Condition 25, the regional conditions discussed above and the preconstruction notification requirements of the NWP. Through the preconstruction notification process, the LAD 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 preconstruction notification process, the district engineer may also exercise discretionary authority and require an individual permit for those activities that may result in more than minimal individual and/or 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.

11. Arizona Settlement Agreement.

On October 8, 1999, a court order (as clarified on November 10, 1999) was entered by the United States District Court (Court) for the District of Arizona that enjoined the Corps from authorizing projects under NWPs 13, 14, or 26 within the range of the endangered cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*) until a Court ordered "regionally based, programmatic impact analysis" has been completed. On March 9, 2000, at the national level, the Corps announced that as replacement permits ("Replacement Permits") it was modifying six NWPs (NWPs 3, 7, 12, 14, 27, and 40) and issuing five new NWPs (NWPs 39, 41, 42, 43, and 44) to replace NWP 26. To resolve the legal question of whether or not the October 8, 1999 court order applies to the Replacement Permits the Court approved a settlement agreement ("Settlement Agreement") executed on September 22, 2000 by Center for Biological Diversity and Defenders of Wildlife (Plaintiffs) and the Corps (Defendants).

In the Settlement Agreement, the Corps agreed to satisfy certain conditions prior to making the Replacement Permits effective within the geographic area subject to the injunction in Defenders of Wildlife v. Ballard, No. CV-97-794-TUC-ACM (D. Ariz.). One condition was that the Corps agreed to solicit comments on the environmental documentation for the replacement permits and regional conditions for 45 days and delay for an additional 45 days making the replacement permits effective within the geographic area of the injunction. The Corps will give full and due consideration to these comments and will modify the replacement permits or regional conditions as necessary to ensure compliance with all federal laws. Therefore, within the geographic scope of the injunction, which includes portions of Pima and Pinal Counties in Arizona, the Corps will not use the Replacement Permits and will not require compliance with the new regional conditions for the all other non-Replacement Permits NWPs until this condition is satisfied. When the necessary conditions of the Settlement Agreement have been satisfied, the Corps will announce an effective date for the Replacement Permits and the regional conditions within the geographic area covered by the Settlement Agreement.

12. 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.

Peter T. Madsen

PETER T. MADSEN
BG, DIVISION ENGINEER
SOUTH PACIFIC DIVISION

22 May 01
DATE