

**SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 37**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 37, and addresses the regional modifications and conditions for this NWP. The South Pacific Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

Text of NWP 37 :

Emergency Watershed Protection and Rehabilitation. Work done by or funded by:

- (a) The Natural Resources Conservation Service for a situation requiring immediate action under its emergency Watershed Protection Program (7 CFR part 624);
- (b) The U.S. Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 2509.13);
- (c) The Department of the Interior for wildland fire management burned area emergency stabilization and rehabilitation (DOI Manual part 620, Ch. 3);
- (d) The Office of Surface Mining, or states with approved programs, for abandoned mine land reclamation activities under Title IV of the Surface Mining Control and Reclamation Act (30 CFR Subchapter R), where the activity does not involve coal extraction; or
- (e) The Farm Service Agency under its Emergency Conservation Program (7 CFR part 701).

In general, the prospective permittee should wait until the district engineer issues an NWP verification or 45 calendar days have passed before proceeding with the watershed protection and rehabilitation activity. However, in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the emergency watershed protection and rehabilitation activity may proceed immediately and the district engineer will consider the information in the pre-construction notification and any comments received as a result of agency

coordination to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

Notification: Except in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the permittee must submit a preconstruction notification to the district engineer prior to commencing the activity (see general condition 30). (Sections 10 and 404).

Summary of changes to NWP 37 from 2007:

The citation in subpart (b) has been updated. In addition, the phrase "...or 45 calendar days have passed" was added to the discussion regarding general procedures. Finally, an exception to the PCN requirement was added for situations where an unacceptable hazard to life or property or a significant loss of property or economic hardship will occur.

1.0 Background

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

2.0 Consideration of Public Comments

For a summary of the public comments received in response to the February 16, 2011, Federal Register notice, refer to the preamble in the Federal Register notice announcing the reissuance of this NWP. The substantive comments received in response to the February 16, 2011, Federal Register notice were already responded to for the Los Angeles District and are further discussed in the following paragraphs.

2.1 General Comments

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

2.2 Comments on Proposed Regional Conditions

2.2.1 Proposed Regional Condition 1

Please see the attached response to comments document.

2.2.2 Proposed Regional Condition 2

Please see the attached response to comments document.

2.2.3 Proposed Regional Condition 3

Please see the attached response to comments document.

2.2.4 Proposed Regional Condition 4

Please see the attached response to comments document.

2.2.5 Proposed Regional Condition 5

Please see the attached response to comments document.

2.2.6 Proposed Regional Condition 6

Please see the attached response to comments document.

2.2.7 Proposed Regional Condition 7

Please see the attached response to comments document.

2.2.8 Proposed Regional Condition 8

Please see the attached response to comments document.

2.2.9 Proposed Regional Condition 9

Please see the attached response to comments document.

2.2.10 Proposed Regional Condition 10

Please see the attached response to comments document.

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

3.1 Waters excluded from use of this NWP

3.1.1 Jurisdictional Vernal Pools (Regional Condition 5)

Reason for Exclusion: This regional condition would require any project proposing to discharge dredged or fill material into a jurisdictional vernal pool to be reviewed under the standard individual permit (SIP) process, which requires a more rigorous alternatives review. This regional condition has been amended from the 2007 version to include an exception for discharges associated with restoration, enhancement, management, or scientific study activities that qualify for NWPs 5, 6, and 27. NWPs 5 and 6 authorize temporary activities and structures that could be used to further the understanding of vernal pool functions and services or for

monitoring the effectiveness of enhancement, restoration, and establishment projects. NWP 27 authorizes only activities that result in net increases in aquatic resource functions and services. Per this regional condition, authorization under other NWPs cannot be considered and a PCN must be submitted in accordance with General Condition 31 and Regional Condition 3. In discussions with local land managers, Regional Condition 5 has increased project costs and timelines in order to obtain an SIP for voluntary restoration and enhancement projects. This has also limited their ability to compete for grant and other public funding with restrictions on costs and timelines. Therefore, the Los Angeles District believes that by allowing the use of these three NWPs, the scientific community and open space land managers would benefit from the streamlined process and there may ultimately be a net increase in functions and services in vernal pool ecosystems through the implementation of restoration, enhancement, and management activities.

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

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

With the modification of Regional Condition 5, the District recognizes certain regulated

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

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

3.1.2 Bank Stabilization Projects in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County and Bank Stabilization and Grade Control Projects in Gaviota Creek, Mission Creek, and Carpinteria Creek in Santa Barbara County (Regional Condition 7)

Reason for Exclusion: Regional Condition 7 would exclude bank stabilization from NWP authorization in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County, and bank stabilization and grade control projects in Gaviota Creek, Mission Creek, and Carpinteria Creek in Santa Barbara County. This exclusion would require any project that would stabilize a stream bank and/or grade control in these particular watersheds receive greater review and scrutiny through the SIP process, which includes a 404(b)(1) alternatives analysis. This regional condition has been modified from the version adopted in 2007 (Regional Condition 9) to include Section 404 Letters of Permission (LOP) as an SIP that may be used following a final Environmental Impact Statement (2009) which evaluated cumulative impacts of bank stabilization in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County, California. While NWP 12, 14, 18, 25, 29, 37, 39, 40, 42 and 43 and 45 address utility lines, linear transportation crossings, minor discharges, structural discharges, residential development, emergency watershed protection, commercial/institutional development, agricultural activities, recreational facilities, stormwater management facilities, and repair of upland facilities damaged by discreet events respectively, these types of projects could also include stream bank stabilization or grade control. These watercourses were identified as vulnerable to adverse effects on endangered species and designated critical habitat associated with additional bank stabilization and grade control activities. In San Luis Obispo Creek and Santa Rosa Creek, a substantial number of bank stabilization projects have resulted in cumulative adverse impacts to flow velocity and water surface elevations during storm events. With the augmented flow velocity, channel substrate can be scoured during large storm events causing loss of vegetation and long-term channel incision. Although the existing bank stabilization projects have not resulted in the loss of a large amount of waters of the United States, the cumulative hydrogeomorphic effects of the bank stabilization have reduced the amount suitable of habitat

for the threatened southern steelhead that utilizes these streams.

At present, the Los Angeles District has identified more than minimal cumulative impacts directly resulting from the use of NWP 13, and other NWPs in these stream channels. By taking discretionary authority over new bank stabilization projects in these two stream channels, the Los Angeles District will ensure future impacts are appropriately mitigated. In Gaviota Creek, Mission Creek and Carpinteria Creek in Santa Barbara County, bank stabilization and grade control structures have resulted in more than minimal cumulative impacts to flow velocity and water surface elevations during storm events. With the augmented flow velocity, channel substrate can be scoured during large storm events causing loss of vegetation and long-term channel incision. Although the bank stabilization projects have not resulted in large losses of waters of the United States, the cumulative hydrogeomorphic effects of the bank stabilization have reduced the amount suitable of habitat for the endangered California red-legged frog (*Rana draytonii*) and southern and central coast steelhead (*Oncorhynchus mykiss*) that utilize these streams and have had adverse affects on designated critical habitat.

At present, there has been a cumulative adverse impact as a result of use of NWP 13, as well as other NWPs that may authorize bank stabilization and grade control structures in these stream channels. By taking discretionary authority over new bank stabilization and grade control structure projects in these three stream channels, the Los Angeles District will ensure future impacts are appropriately evaluated and mitigated. This regional condition will allow the Los Angeles District to review bank stabilization activities in these waterways on a case-by-case basis, ensuring that only the least environmentally damaging practicable alternative is permitted. If, at a later time, there is clear unequivocal evidence that the above regional conditions do not produce the intended results, the Los Angeles District may further modify them, as warranted.

For additional information please see the supplemental decision document for Regional Condition 7.

3.2 Waters subjected to additional pre-construction notification requirements

Pre-construction notification is required for all proposed uses of NWP 37, except in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. Therefore regional conditions requiring additional pre-construction notification requirements and this section do not apply to NWP 37.

4.0 Alternatives

4.1 No Regional Conditions

Under this alternative, regional conditions would not be applied to NWP 37. The following regional conditions apply specifically to this NWP: Regional Conditions 1 (fish passage), 3 (PCN checklist requirements), 5 (vernal pools), and 10 (compensatory mitigation). Most commonly, fill and discharge may occur in streams during an emergency situation and fish passage may be blocked or spawning habitat may be filled. Implementation of Regional Condition 1 would require the agency to remove the fill and allow fish passage or spawning.

Under this alternative, the fill would remain in the stream, and fish passage and spawning habitat would be permanently lost. Permanent loss of spawning habitat or fish passage could lead to a decline in fish populations and federal listing of more fish species.

In general, a PCN would be submitted post emergency. Under this alternative, Regional Condition 3 would not be implemented and appropriate mapping, engineering diagrams, and geographical information system would not be provided to the Corps. Without this information, the Corps database would be incomplete and disorganized.

Without implementation of Regional Condition 5, if vernal pools were disturbed, graded, or excavated, these specialized rare habitats would not be restored or rehabilitated. The impacts to vernal pools, which are a rare habitat type, would not be mitigated or restored or rehabilitated. The loss and degradation of vernal pools, the loss of these specialized habitat would continue to decline and degrade over time, potentially leading to federal listing or jeopardy of the species that inhabit the vernal pools. Without Regional Condition 5, vernal pool habitat would be continually degrade and decline.

Regional Condition 10 requires compensatory mitigation to be completed before or concurrent with commencement of construction of the authorized activity, except when specifically determined to be impracticable by the Corps. When mitigation involves use of a mitigation bank or in-lieu fee program, proof of payment is submitted to the appropriate Corps district prior to commencement of construction of the authorized activity. Without this regional condition, compensatory mitigation could likely occur anytime after the project is completed and potentially without an “end date” for the mitigation requirement. By allowing compensatory mitigation to occur after the project is completed, it is more likely that compensatory mitigation will not be completed. Additionally, this language is in accordance with the Compensatory Mitigation for Losses of Aquatic Resources; Final Rule [33 CFR 325 and 332 and 40 CFR 230].

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

The Los Angeles District could impose an alternative regional limit by excluding projects or emergency projects located within a Special Area Management Plan (SAMP) area, such as the Orange County SAMP area that would otherwise be eligible for NWP 37. This would be problematic because although SAMP areas have government localized and specific permitting processes, these processes do not specifically address the emergency watershed protection measures. For example, not having a quick response to hydrological problems resulting from wildfires could lead to flooding downstream in more urban areas in the future. Another example is, during a wildfire, the agency may have had to fill a stream to cross it to fight fires, and thus blocked fish passage or filled in wetlands. Without NWP 37, the timeframe for removing the fill in the stream could be delayed until potentially the following year because of a requirement to use a Standard Individual Permit or other longer permit process. Based on the above analysis, the use of alternative regional limits or PCN thresholds was not selected.

4.3 Alternative Regional Nationwide Permit Conditions

The Los Angeles District could include an alternative regional condition that would mandate agency coordination procedures to the Environmental Protection Agency (EPA), Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), and other state agencies as outlined in General Condition 31 (notification). Agency coordination would likely result in delays in reviewing projects eligible for NWP 37—projects that by their nature require a timely response. In addition, many of the applicable programs tied to use of NWP 37 already incorporate some level of agency coordination. Notification of other agencies would likely burden these agencies and slow the permitting process. Based on the above analysis, this alternative was not selected.

5.0 Endangered Species Act

5.1 General Considerations

Each activity authorized under a NWP is subject to general condition 18, which states that “no activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species.” In addition, general condition 18 explicitly states that the NWP does not authorize the taking of threatened or endangered species, without a Biological Opinion providing incidental take provisions. General condition 18 also requires non-federal permittees to notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat. This general condition also states that, in such cases, non-federal permittees shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized.

Under the current Corps regulations (33 CFR 325.2(b)(5)), the district engineer must review all permit applications for potential impacts on threatened and endangered species or critical habitat. For the NWP program, this review occurs when the district engineer evaluates the pre-construction notification or request for verification. Based on the evaluation of all available information, the district engineer will initiate consultation with the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS), as appropriate, if he or she determines that the regulated activity may affect any threatened and endangered species or critical habitat. If ESA consultation is conducted during the NWP authorization process without the district engineer exercising discretionary authority, then the applicant will be notified that he or she cannot proceed with the proposed activity until ESA consultation is complete. If the district engineer determines that the activity will have no effect on any threatened and endangered species or critical habitat, then the district engineer will notify the applicant that he or she may proceed under the NWP authorization (assuming all other requirements have been satisfied).

The Los Angeles District has established informal and formal procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps the Los Angeles District determine if a proposed activity may affect endangered species or their critical habitat and, if necessary, initiate consultation. The Los Angeles District also utilizes maps and databases that identify locations of populations of threatened and endangered species and their critical habitat. Where necessary, regional conditions are added to NWP to require notification for activities that occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received during the preconstruction notification review process will be used by the district engineer to make a “no effect” or “may affect” decision.

The Los Angeles District continues to coordinate closely with local representatives of the USFWS and NMFS to establish or modify existing procedures, where necessary, to ensure that the Corps has the latest information regarding the existence and location of any threatened or endangered species or their critical habitat. Through formal consultation under Section 7 of the Endangered Species Act, or through other coordination with the USFWS and/or the NMFS, as appropriate, the Corps will establish procedures to ensure that the NWP will not jeopardize any threatened and endangered species or result in the destruction or adverse modification of designated critical habitat. Such procedures may result in special conditions to be added to an NWP authorization by the district engineer.

5.2 Local Operating Procedures for Endangered Species

For this NWP, no section 7 consultations were conducted between 2007 and 2011. A standard operating procedure (SLOPES) is used in the Los Angeles District for section 7 consultation. This includes those procedures identified in the Endangered Species Act of 1973: making a determination, initiating section 7 consultation, and encompassing conditions of a biological opinion in a NWP. A NWP 35 requires conditions, general conditions, regional conditions, which all minimize and avoid impacts not only to wetlands, but also federally listed species including fish. These comply with the Endangered Species Act and ensure that a project under a NWP 35 will not jeopardize the continued existence of any federally listed species or result in the destruction or adverse modification of critical habitat of a federally listed species. Current local procedures in Corps districts are effective in ensuring compliance with ESA.

6.0 National Historic Preservation Act

6.1 General Considerations

The Los Angeles District would ensure that activities authorized by NWP 14 would comply with the National Historic Preservation Act (NHPA). The District would review the latest version of the National Register of Historic Places (NRHP) to make an effect determination that activities verified under NWP 14 would have on Historic Properties. Once an effects determination has been made the District will coordinate with the State Historic Preservation Officer (SHPO),

Tribal Historic Preservation Officer (THPO), recognized Tribes, and, if necessary, the Advisory Council on Historic Preservation (ACHP) as appropriate. The District has considered the requirement of pre-construction notification for NWP activities in geographic areas of high site potential, or known locations of cultural resources including prehistoric sites, historic sites, tribal lands, traditional cultural properties, state landmarks or National Historic Landmarks. In areas where there is a high likelihood of cultural resources within the Corps' area of potential effect (APE), the district engineer may: (1) consult with SHPO, THPO, or Tribes during the NWP review process or (2) the district engineer may assert its discretionary authority to require an individual permit for the proposed activity and initiate consultation through the individual permit process. Option 2 would only be used if there is value added that compensates for the increase in workload due to processing more SIPs. If the consultation would be conducted under the NWP process without the district asserting discretionary authority to require an SIP, then the applicant would be notified that the activity could not be verified under the NWP until all Section 106 requirements have been satisfied.

6.2 Local Operating Procedures for National Historic Preservation Act

The district engineer would ensure that NWP 14 complies with section 106 of the National Historic Preservation Act of 1966, as amended, and its implementing regulation 36 C.F.R. Part 800: Protection of Historic Properties (amended August 5, 2004), and Appendix C (33 U.S.C. 325): Procedures of Historic Properties. Under section 106, federal agencies are prohibited from approving any federal "undertaking" (e.g., the issuance of any license, permit, or approval) without taking into account the effects of the undertaking on the historic properties, and affording the ACHP a reasonable opportunity to comment on the undertaking. In order to comply with section 106, the Corps, if evaluating an undertaking, must go through the process outlined in the ACHP's regulations at 36 C.F.R. Part 800 and Appendix C. Pursuant to 36 C.F.R. § 800.4, 800.5, and 800.6, the Los Angeles District is required to consult with the SHPO, or tribal equivalent, THPO, if the undertaking would result in a "No Effect", "No Adverse Effect", or "Adverse Effect" to Historic Properties. The district engineer must (a) determine the permit area/ APE; (b) identify historic properties within the permit area/APE; and (c) determine whether those properties are listed or eligible for listing in the NRHP. If the district engineer determines that NWP 14 would have no potential to cause effects to Historic Properties a memorandum for the record would be prepared and no further consultation with the SHPO/THPO or recognized tribes would need to occur.

7.0 Government-to-Government Consultation with Indian Tribes

7.1 Summary of the Consultation Process

Prior to the issuance of the Los Angeles District's public notice announcing the proposed rule for the 2012 NWPs and our proposed regional conditions, all federally recognized tribes within LAD were contacted via letter dated December 13, 2010 to provide advance notification of the Corps' intent to issue the 2012 NWPs and upcoming opportunity to engage in government-to-government consultation. Follow-up letters were sent to the same set of federally recognized tribes February 11, 2011 announcing the issuance of the proposed rule and formally requesting government-to-government consultation. An advance copy of the proposed rule was also

included. One tribe provided a response, indicating they did not foresee a need to utilize the NWP. No requests for government-to-government consultation were received.

7.2 Local Operating Procedures for Protecting Tribal Resources

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

8.0 Essential Fish Habitat

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

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

9.0 Supplement to National Impact Analysis

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

In addition to the discussion in the national decision document for this NWP, the Los Angeles District has considered the local impacts expected to result from the activities authorized by this

NWP, including the reasonably foreseeable cumulative effects of those activities.

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

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

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

(d) General environmental concerns: Activities authorized by this NWP will affect general environmental concerns, such as water, air, noise, and land pollution. The authorized work will also affect the physical, chemical, and biological characteristics of the environment. The adverse effects of the activities authorized by this NWP on general environmental concerns will be minor, since the NWP authorizes emergency watershed protection and rehabilitation activities. Adverse effects to the chemical composition of the aquatic environment will be controlled by general condition 6, which states that the material used for construction must be free from toxic pollutants in toxic amounts. General condition 23 requires mitigation to minimize adverse effects to the aquatic environment through avoidance and minimization at the project site. Compensatory mitigation may be required by district engineers to ensure that the net adverse effects on the aquatic environment are minimal. It is important to note that the Corps scope of review is usually limited to impacts to aquatic resources. Specific environmental concerns are addressed in other sections of this document.

(e) Wetlands: Same as discussed in the national decision document.

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

(g) Fish and wildlife values: Same as discussed in the national decision document.

(h) Flood hazards: Environmental conditions in the Los Angeles District create conditions that promote natural disasters such as floods and wildfires. As a result of the Santa Ana winds, which typically dry vegetation and create conditions that inspire wildfires to quickly begin and spread, the loss of vegetation from these wildfires is a serious condition, which must be met with by a quick response of re-vegetation and hydrologic restoration. Re-vegetation and restoring hydrologic conditions in a watershed damaged by wildfires is one of the primary objectives of NWP 37. Without NWP 37, hydrologic restoration and re-vegetation would not occur as quickly as is possible under this NWP and without these, flashing flooding and debris flows would be more common in the Los Angeles District.

The geography of the mountains in the Los Angeles District is such that erosion occurs under conditions of rain and wind. If vegetation is absent or takes time to re-establish and hydrologic restoration does not occur post wildfires, then flooding and debris jams become a long term threat and are more difficult to control. NWP 37 would provide a useful regulatory tool to ensure these potential hazards are addressed in a timely fashion.

(i) Floodplain values: The activities authorized by this NWP may affect the flood-holding capacity of 100-year floodplains, including surface water flow velocities. Changes in the flood-holding capacity of 100-year floodplains may impact human health, safety, and welfare. Compliance with general condition 9 will also reduce flood hazards. This general condition requires the permittee to maintain, to the maximum extent practicable, the preconstruction course, condition, capacity, and location of open waters, except under certain circumstances. Much of the land area within 100-year floodplains is upland, and outside of the Corps scope of review.

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

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

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

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

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

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

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

(q) Safety: Same as discussed in the national decision document.

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

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

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

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

Please see the attached supplemental analysis (Section I), and the 404(b)(1) guidelines cumulative effects analysis (Section 9.4), below.

9.3 Section 404(b)(1) Guidelines Impact Analysis (Subparts C-F)

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

(b) Suspended particulates/turbidity: Same as discussed in the national decision document.

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

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

- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Same as discussed in the national decision document.
- (g) Threatened and endangered species: Same as discussed in the national decision document. The Los Angeles District did not complete any consultations for activities associated with NPW 37 during the period from fiscal year 2009 through 2011.
- (h) Fish, crustaceans, molluscs, and other aquatic organisms in the food web: Same as discussed in the national decision document.
- (i) Other wildlife: Same as discussed in the national decision document.
- (j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:
- (1) Sanctuaries and refuges: Same as discussed in the national decision document.
 - (2) Wetlands: The activities authorized by this NWP will have minimal adverse effects on wetlands and vernal pools. Projects authorized under NWP 37 would not be likely to occur in vernal pools because the type of projects that would be permitted under NWP 37 include hydrologic projects that control flooding post wildfires or stabilize large streams. Vernal pools are typically found on top of mesas in a specialized soil where vegetation is generally less and topography is typically flat. This type of natural environment is unlikely to deliver debris jams downstream or cause flooding, and less likely to require hydrologic restoration post wildfire.
 - (3) Mud flats: Same as discussed in the national decision document.
 - (4) Vegetated shallows: Same as discussed in the national decision document.
 - (5) Coral reefs: Same as discussed in the national decision document.
 - (6) Riffle and pool complexes: Same as discussed in the national decision document.
- (k) Municipal and private water supplies: Same as discussed in the national decision document.
- (l) Recreational and commercial fisheries: Same as discussed in the national decision document.
- (m) Water-related recreation: Same as discussed in the national decision document.
- (n) Aesthetics: Same as discussed in the national decision document.
- (o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

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

The cumulative effects of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Impacts to aquatic resources authorized by the Los Angeles District's permit actions are tracked using the ORM (OMBIL Regulatory Module) database. This includes both temporary and permanent impacts, as well as any compensatory mitigation required.

Impact and mitigation data was collected for the period of Fiscal Year 2009 through 2011 to provide a reasonable basis to examine the cumulative effects of each NWP as well as the NWP Program as a whole within the Los Angeles District. An analysis of the types of activities authorized by the Los Angeles District during previous three years indicates NWP 37 was used 2 times, resulting temporary impacts to approximately 0.725 acre of waters of the United States. As these were temporary impacts, no mitigation was required. Use of NWP 37 is heavily dependent on the magnitude and scale of events such as floods and wildfires that are inherently difficult to predict, therefore it is difficult to estimate the cumulative use and impact of NWP 37 during its 5-year term of implementation. The Los Angeles District will employ standard procedures and regional conditions described in this document to ensure that these activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. This may include compensatory mitigation requirements 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.

10.0 List of Final Corps Regional Conditions for NWP 37

10.1 Regional condition 1

For all activities in waters of the U.S. that are suitable habitat for federally listed fish species, the permittee shall design all road crossings to ensure that the passage and/or spawning of fish is not hindered. In these areas, the permittee shall employ bridge designs that span the stream or river, including pier- or pile-supported spans, or designs that use a bottomless arch culvert with a natural stream bed, unless determined to be impracticable by the Corps.

10.2 Regional condition 3

When a pre-construction notification (PCN) is required, the appropriate U.S. Army Corps of Engineers (Corps) District shall be notified in accordance with General Condition 30 using either the South Pacific Division PCN Checklist or a signed application form (ENG Form 4345) with an attachment providing information on compliance with all of the General and Regional Conditions. The PCN Checklist and application form are available at:

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

- a. A written statement describing how the activity has been designed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States;

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

10.3 Regional condition 4

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

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

10.4 Regional condition 5

Individual Permits shall be required for all discharges of fill material in jurisdictional vernal pools, with the exception that discharges for the purpose of restoration, enhancement,

management or scientific study of vernal pools may be authorized under NWPs 5, 6, and 27 with the submission of a PCN in accordance with General Condition 31 and Regional Condition 3.

10.5 Regional condition 7

Individual Permits (Standard Individual Permit or 404 Letter of Permission) shall be required in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County for bank stabilization projects, and in Gaviota Creek, Mission Creek and Carpinteria Creek in Santa Barbara County for bank stabilization projects and grade control structures.

10.6 Regional condition 10

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

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

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

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

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

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

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

12.0 Measures to Ensure Minimal Adverse Environmental Effects

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

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

13.0 Final Determination

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