



May 9, 2002

ARMY CORPS OF ENGINEERS  
SUMMARY OF RESPONSES  
TO COMMENTS RECEIVED ON  
PN 02-01, PROPOSED REGIONAL CONDITIONS  
TO THE NATIONWIDE PERMITS

A. Background

The Corps of Engineers, San Francisco District, issued Public Notice (PN) 02-01, dated January 31, 2002, requesting public comments on its proposed regional conditions to the recently finalized nationwide permits (NWP) published in the Federal Register on January 15, 2002 (67 FR 2020). The comment period closed on February 28, 2002. Most of the proposed regional conditions were a reiteration of existing regional conditions, with some modifications, that were in effect since May 4, 2001. A few others were new proposed conditions.

Regional conditions may be developed by the District Engineer (DE) to consider regional differences in aquatic resource functions and values and to implement mechanisms for their protection. After identifying the geographic extent of important aquatic systems, the DE may either change "notification" thresholds, or require "notification" for all activities within a particular watershed, waterbody or geographical area to ensure that NWP use and authorization only occurs for activities with minimal individual and cumulative adverse effects. Regional conditions can also be used to require project proponents to notify district engineers prior to construction for case-by-case review. Effective regional conditioning of permits protects aquatic systems at the local level and helps to ensure that Corps District remains in compliance with statutory requirements, whereby activities authorized by NWPs have no more than minimal individual or cumulative adverse effects on the aquatic environment.

The following summarizes the regional conditions that are effective in the San Francisco District (see Public Notice No. 02-01 (Final) dated May 9, 2002 for details):

- (1) Notification requirement for activities permitted by NWP within the San Francisco diked baylands, in eel grass beds, and in designated Essential Fish Habitat (EFH);

- (2) Notification requirement for activities authorized by NWPs 12, 14, and 39-42 in the Santa Rosa Plain;
- (3) Notification requirement for inclusion of drawings;
- (4) Notification requirement for fills in ephemeral watercourses authorized under NWPs 39, 40, 42 and 43;
- (5) Notification requirement for NWPs 23 and 35;
- (6) Mitigation should be completed before or concurrent with project construction, and mitigation banks or in-lieu fee payments made prior to commencing construction;
- (7) Sound justification required for vegetation buffers
- (8) Best management practices for NWPs 3, 7, 12, 13 and 14; and
- (9) Revocation of NWP 12(ii) and NWP 44.

B. Consideration of Comments Received:

1. General Comments:

- a. One commenter recommends revocation of all changes made to the NWP program within the last few years because the NWP program has increasingly allowed more activities with more than minimal impacts to be authorized.

Response: The issue of revocation of changes made to the NWP program was addressed by the Corps in the preamble of the final rule for the nationwide permit program (67 FR 2020, January 15, 2002). In some respects, more activities have been authorized by recent changes but more restrictions, conditions (both general and regional), and notifications to the Corps have also been added to ensure aquatic impacts would only be minimal.

- b. A commenter recommends a regional condition to prohibit use of NWPs in all areas of high ecological value, such as California's 34 Areas of Special Biological Significance (ASBS).

Response: While state-designated ASBSs are important ecological areas, we believe the California Coastal Commission (CCC), and the Regional Water Quality Control Boards (RWQCBs) have the appropriate regulatory tools to ensure impacts to those areas will be kept to a minimum. If we receive NWP notifications for proposed activities in ASBS, we will notify and coordinate with the CCC and the appropriate RWQCBs, and will give the values of ASBS full consideration under the Corps' public interest review. At this time, we do not believe it is necessary to add a regional condition to prohibit the use of NWPs in designated ASBS.

- c. One commenter opposes any regional condition unless it can be shown to be necessary in order to assure NWP activities have only minimal effects.

Response: The District is adding regional conditions to certain, sensitive areas; such as, the San Francisco diked baylands, the Santa Rosa Plain, and eel grass beds because it has been shown that these aquatic areas have had cumulative, adverse impacts from a variety of sources over time, and therefore they require closer review. Regional conditions for the San Francisco diked baylands have been in effect since May 4, 2001, and for the Santa Rosa Plain since July 18, 1997. Rationale for adding regional conditions for these two important areas were addressed in the District's supplemental decision documents to the national decision documents for several of the nationwide permits, signed by the South Pacific Division Engineer on 18 April 2001.

Given that over 75 percent of the San Francisco Bay's tidal wetlands have been filled or reclaimed for other purposes, and the great public interest in restoring historic baylands, the District believes greater scrutiny of activities is required but not to the point of requiring all activities in the diked baylands to go through a full public interest review (i.e., individual permit review procedure). The additional information and review provided by a PCN will give the District the opportunity to ensure that proposed activities will have only a minimal environmental effect in the historic baylands.

Cumulative impacts to seasonal wetlands and vernal pools in the Santa Rosa Plain have resulted in the listing of three endemic plants as endangered and one endemic plant as threatened. The District has a long history of working with the U. S. Fish and Wildlife Service, U. S. Environmental Protection Agency, California Department of Fish and Game, Regional Water Quality Control Board, and local governments to pursue a permitting strategy that would allow development to proceed while protecting habitat for the listed plants. The "Programmatic Formal Consultation for U.S. Army Corps of Engineers 404 Permitted Projects That May Affect Four Endangered Plant Species on the Santa Rosa Plain, California" dated July 17, 1998, is an interim step for implementing such a strategy. Until a local permitting strategy is in operation, the District will continue to require notification for all proposed fills in the Santa Rosa Plain regardless of size. In addition, the District will require applicants to submit a habitat quality evaluation performed according to the most recent version of the "Training Manual to Evaluate Habitat Quality of Vernal Pool Ecosystem Sites in Santa Rosa Plain." This evaluation, in consultation with the resource

agencies, will assist the District in determining whether a proposed project has minimal environmental effects and may therefore be authorized by nationwide permit. The requirement for this evaluation replaces earlier regional conditions for the Santa Rosa Plain that were often difficult for the regulated public to interpret.

Activities affecting designated Essential Fish Habitat (EFH) requires consultation with the National Marine Fisheries Service because many EFHs (such as San Francisco Bay and watersheds utilized by coho and chinook salmon) have been severely impacted as well (67 FR 2029). Regional conditions for specific NWP are also considered necessary to insure impacts will be minimal since those activities in certain instances have had more than minimal impacts based on the District's overall experience.

In short, regional conditions are added to certain NWPs to ensure authorized activities have no more than minimal effects.

2. Comments on specific NWPs with proposed regional conditions.

a. NWP 3:

1) A commenter recommends NWP 3(iii) be revoked or at minimum, impose the following regional conditions: ½ acre maximum per applicant to limit the potential cumulative impacts of the permit, and develop a LOP process for bank restoration of river systems that have been heavily developed.

Response: NWP 3(iii) is limited to restoring uplands or preventing further upland erosion due to discrete, natural disaster events. We believe the limitations imposed under this NWP (such as, restoration work cannot exceed contours that existed before the damage; dredging to remove obstructions is limited to 50 cys and cannot be done to obtain fill material) provide the necessary safeguards against more than minimal impacts. Also, regional conditions for NWP 3 will add further to protecting the waterbody to only minimal impacts. The notification requirement will allow the Corps to assess whether NWP 3(iii) is being abused or not.

2) A couple of commenters suggest the following regional conditions for NWP 3: prohibit new riprap, prohibit removal of accumulated sediments in special aquatic sites, and limit dredging or excavation to 25 cys. Absent revocation of NWP 3(iii), the Corps should limit impacts to 0.25 acres.

Response: The national decision document on NWP 3 addresses this issue. Furthermore, we believe the limitations already imposed under NWP 3(ii) and (iii), together with the regional conditions for NWP 3 will ensure the impacts are kept to a minimum. New riprap under NWP 3(ii) must be the minimum necessary to protect and ensure the safety of the structure. Any new riprap proposed under NWP 3(iii) cannot exceed the contours that existed before the damage, so any new armoring will not encroach further into the waterbody. If there is severe erosion of uplands due to a natural disaster, it is more likely that riprap will be placed to prevent further erosion (damage control); thus, when the disaster is over, the waterbody or river will likely have a greater surface area than before the damage. In a disaster, it is unlikely that special aquatic sites exist where accumulated sediments need to be removed because the accumulated material would be a direct result of the disaster. Also, for public safety reasons, the obstructions will need to be removed. Because the magnitude of disasters varies, we believe limiting excavation to 50 cys is reasonable, and should not be limited to NWP 19 excavation limits of 25 cys.

3) A commenter recommends the 1<sup>st</sup> proposed regional condition for NWP 3 is impractical because limiting discharges to only incidental fallback generally cannot be met for most culvert cleaning and sediment removal, and therefore prevents use of NWP 3 for these routine activities.

Response: The comment is valid and this proposed regional condition would have had the effect of eliminating these and other similar activities that have only minimal impacts from using NWP 3. The first proposed regional condition to NWP 3 is deleted.

4) Another commenter suggests the 2<sup>nd</sup> proposed regional condition to NWP 3 encourages work to be conducted uplands at the risk of possible greater environmental damage to the upland site than to the aquatic site.

Response: The intent of this regional condition is to minimize aquatic impacts but not at the expense of possible greater impact to upland habitat. The regional condition is rewritten to clarify this.

5) One commenter opposes the proposed limitation of 30 feet of riprap as a regional condition to NWP 3(ii) and recommends 50 feet.

Response: Upon further consideration, it will be difficult for the Corps to set any meaningful limit for riprap because of many

variables involved. In some instances, the 30-foot (or any other set distance) limitation would be too liberal and in other instances, it would be too restrictive. Accordingly, this proposed regional condition is deleted. Instead, the district will rely on the wording in NWP 3 that limits new riprap to the minimum amount necessary to protect the structure. The amount will be reviewed for each activity as part of the notification procedure.

b. NWP 7:

1) One commenter recommends: withdrawal of section (ii) since NWP 19 is available; limiting the amount to be excavated to 25 cys; prohibiting removal of accumulated sediments in special aquatic sites; prohibiting removal of sediments in small impoundments; and imposing a threshold of 25 cys for excavation or maintenance dredging.

Response: The notice on the final NWPs (67 FR 2032) and the national decision document on NWP 7 respond to these issues. Since the purpose of NWP 7(ii) is to allow maintenance of intake/outfall structures, limiting the maximum amount of excavation to 25 cys would be too limiting. In addition, purely excavation with no discharge (other than incidental fallback) is not regulated under Section 404 and thus the Corps would not be able to impose limits on the amount of excavation. However, Condition (b) to NWP 7(ii) limits excavation (assuming there is more than an incidental discharge) to only the minimal amount to restore to the structure's original design capacity. Condition (a) requires the permittee to notify the Corps (and must include information about the original design capacities and configurations of the structures and area where excavation is proposed – see general condition 13 (b)(5)). Both conditions should provide adequate oversight to ensure impacts are minimal. Also, mandatory compliance with general conditions 4 (aquatic life movements), 11 (endangered species), 17 (shellfish beds), 19 (mitigation), 20 (spawning areas) and 23 (waterfowl breeding areas), and the District's regional condition will help provide adequate protection of special aquatic sites and small impoundments.

c. NWP 11:

1) A commenter recommends use of NWP 11 not be allowed in riparian wetlands and special aquatic sites.

Response: We believe the notification requirement for any temporary recreational structures proposed in wetlands and

vegetated shallows, along with the mandatory compliance with the general conditions, provides sufficient oversight to protect such sensitive areas. This regional condition for notification has been in effect since April 18, 2001, and the Corps has not received any request thus far to place temporary recreational structures in wetlands or in any other special aquatic sites.

d. NWP 12:

1) A couple of commenters recommend revoking NWP 12, or at minimum: prohibiting its use in endangered species habitat and special aquatic areas; prohibiting side-casting of material into wetlands; prohibiting the construction of permanent access roads; limiting total impacts to 0.3 acres; temporary impacts must be included in the calculation of impact; and adopting conditions 1,2, and 4 proposed by the USFWS in PN 98-3. One commenter supports revoking paragraph (ii) as proposed by the District, and another commenter recommends the BMPs currently used for road exemptions be added.

Response: In addition to complying with the regional conditions (including the BMPs), we believe the impacts of utility line activities are minimal as long as all the limitations and thresholds of this NWP, and the general and regional conditions are adhered to, including conditions that deal with endangered species (general condition 11) and avoiding and minimizing impacts (general condition 19(a)). Also, NWP 12 states sidecasted material must be removed within 3 months and the material cannot be placed in such a manner that currents or other forces will disperse it.

2) A commenter states that utility trenches typically are backfilled with non-native granular backfill because it aids in future digging to locate the utility line, and as a warning to unauthorized digging operations that they are approaching a utility line. The commenter further recommends the proposed regional condition 1 to NWP 12 be revised to allow backfill of non-native material but require the top 2 feet of backfill to be native.

Response: After further consideration, the recommendation appears reasonable and regional condition 1 to NWP 12 is revised accordingly.

3) One commenter believes lowering the notification threshold from 500 feet to 200 feet (NWP 12(iv)) has not been justified since the District can exercise its discretion on a case-by-case basis when appropriate.

Response: The threshold for notification of 200-feet has been in existence since May 4, 2001, after opportunity for public comment (San Francisco District Public Notice dated May 4, 2001). We believe activities required for the construction, maintenance and repair of utility lines and associated activities have the potential for more than minimal impacts, even for utility lines less than 500 feet, and thus lowering the notification requirement to 200 feet appears reasonable.

e. NWP 13:

1) A commenter recommends prohibiting the use of this NWP with other NWPs (stacking) and limiting bank stabilization to 300 linear feet. The commenter further states the 1<sup>st</sup> regional condition for NWP 13 appears inconsistent with NWP 13's condition of prohibiting placement of riprap in special aquatic sites.

Response: The final notice of the NWPs (67 FR 2035) addresses stacking and the 300 linear foot limitation. Also, this and other NWPs cannot be used more than once for a single and complete project as stated in General Condition 15 and if stacking occurs, the acreage loss of waters cannot exceed the highest specified acreage limit of any one of the NWPs used. For example, if NWPs 14 and 13 are used for a single project in tidal waters, the maximum acreage loss cannot exceed 1/3 acre. The 500 linear feet limitation appears to be a reasonable balance between overburdening the Corps staff with individual reviews of greater size projects from smaller projects. The regional conditions will add to the protection of the aquatic environment. The 1<sup>st</sup> condition under this regional condition was added to clarify that *removal* of wetlands greater than 1/10 acre would require notification to the Corps. This condition does not allow bank stabilization to occur in wetlands but sometimes in the process of adding bank stabilization in a non-wetland area, removal (without adding fill) of wetlands might be necessary. This condition is to clarify the need to notify the Corps if removal of wetlands is considered necessary.

2) A second commenter states the notification for removal of wetlands of 1/10 acre or greater should be at a higher threshold, and the "the maximum extent practicable" is an inappropriate standard for the evolving science of bioengineering. Recently, eroded natural banks or berms should not be counted against the one cubic yard per running foot limitation (i.e., delete regional condition 2 to NWP 13). Regional condition 6 to NWP 13 is not clear.

Response: Using the 1/10-acre threshold is consistent with other thresholds for notification in other NWPs (see for example, NWPs 14, 39 and 41) and is retained here. Since bioengineering is an evolving science, no fixed standard is appropriate either. The emphasis is to use bioengineering methods where appropriate and practicable based on the current science of bioengineering and professional judgment. Regional condition 2 to NWP 13 was added to clarify the limit already imposed by NWP 13 (67 FR 2080, NWP 13 b). Note that under NWP 3(iii), uplands lost as a result of a storm, flood or other discrete event can be replaced without a Section 404 permit provided the uplands are restored to their original pre-event location. Regional condition 6 to NWP 13 is to ensure the project's indirect impacts are considered. Often, too much attention is focused on solving the immediate problem without much consideration of their indirect and long-term effects.

3) One commenter urges limiting new armoring structures to the absolute minimum necessary, and to use avoidance or practicable alternatives where possible. Siting of new structures should be planned with adequate setbacks to avoid having to install bank stabilization structures.

Response: NWP 13 specifically states that no material is to be placed in excess of the minimum needed for erosion protection, and General condition 19(a) specifies the project must be designed and constructed to avoid and minimize adverse effects to waters of the U.S. to the maximum extent practicable. Siting new structures are often outside the Corps jurisdiction and thus the Corps authority to require setbacks is limited. However, as part of the notification process, the Corps can request further information concerning alternatives to stabilization, including setbacks. Furthermore, the Regional Water Quality Control Board has broad jurisdiction over water quality impacts and do consider setbacks as an option.

f. NWP 14:

1) A commenter recommends prohibiting the use of this NWP for: new linear transportation or spur projects because of growth inducing potential, and for previously permitted projects to avoid piece-mealing. The commenter further suggests reducing the impact threshold to 0.3 acres and restricting the linear footage of total stream course fill to 100 feet. Another commenter disagrees with the Corps' national decision to eliminate the 200 linear foot restriction and requested the San Francisco District to reinstate it.

Response: Although this NWP can authorize new linear transportation or spur projects, indirect effects such as potential growth inducement must still be consider by the lead agency. This NWP does not authorize the entire transportation project but focuses primarily on the crossing of waterways (and practicable alternatives) and the effects on the aquatic environment. Expansion of previously permitted, linear transportation projects does have a potential for piece-mealing but the threshold for determining whether it should be covered by NWP is whether the aquatic impacts of the crossings are greater than minimal individually or cumulatively. At this time, we do not believe it is necessary to change the acreage threshold or add a linear footage limitation to ensure minimal impacts because the notification requirement will initiate a case-by-case review of the project, and the permittee must comply with the regional, general and any special conditions that may be added as part of the review process.

2) One commenter expressed concern over the 2<sup>nd</sup> regional condition to NWP 14 that requires incorporating bioengineering methods to the maximum extent practicable because “maximum extent practicable” is not an appropriate standard for an evolving science, such as bioengineering.

Response: Since bioengineering is an evolving science, no fixed standard is appropriate either. The emphasis is to use bioengineering methods where appropriate and practicable based on the current science of bioengineering and professional judgment. In deciding whether to use bioengineering techniques, the Corps recognizes such factors as, risk, safety, context and project scope, and the applicant can provide a rationale for the choice of bank stabilization design and materials as part of the notification process.

g. NWP 23:

1) A commenter requests NWP 23 be revoked because it places no limit on impacts, is not activity specific, and relegates the responsibility to determine minimal impacts to another agency.

Response: Each Federal agency has its independent responsibility to assess impacts over projects that it has control and responsibility pursuant to NEPA. The Corps does not give up its authority under NWP 23 because when the Corps considers whether an agency’s categorical exclusions have no more than minimal adverse effects on the aquatic environment and whether their activities could be included under NWP 23, the Corps seeks public comment and

publishes the proposal in the Federal Register (67 FR 2043, 2082). If the category is included under NWP23, the District reviews the specific activities to ensure impacts are minimal under the regional notification process.

2) Another commenter requests the regional condition reflect designated non-Federal representatives can consult informally and prepare biological assessments for section 7 ESA purposes.

Response: Comment noted and the regional condition is revised accordingly.

h. NWP 27:

1) Although there were no specific regional conditions proposed for NWP 27, two commenters recommended: prohibiting the relocation of aquatic habitat types on the project site; limiting the use of this NWP to 250 linear feet of stream or 0.25 acres of wetlands; limiting wetlands enhancement projects to 5 acres to ensure adverse effects are minimal; prohibiting use of armoring; requiring any agreements be approved by the Corps and other resource agencies; restricting use of this NWP to federal and state agencies or to projects approved or sponsored by such agencies; prohibiting use of this NWP for construction of mitigation banks.

Response: Much of the concerns expressed above were addressed in the national decision document and in the final notice of the NWP program (67 FR 2044). The purpose of NWP 27 is to facilitate restoration (including creation) of aquatic habitat while minimizing unnecessary, permit procedural steps. Often public agencies and non-profit organizations would receive grants to restore or enhance stream habitat for fish, and restore degraded wetlands. These grants often have strict time limits to completing the restoration project. NWP 27 would minimize the time needed to acquire Corps approval, and allow the project to be completed in a timelier manner. NWP 27 does require oversight by the U.S. Fish and Wildlife Service (USFWS), the Natural Resource Conservation Service (NRCS) or some other federal agency in certain situations (see NWP 27 (a)(1) and (2), 67 FR 2082). If there is no oversight by other federal agencies, then the project proponent must notify the Corps in accordance with NWP 27(a)(3). To limit the use of this NWP to only state and federal agencies or projects they sponsor would preclude non-profit organizations (e.g., Ducks Unlimited, Audubon Society, as well as others) that receive grants to enhance aquatic functions. These organizations are required to submit detailed plans to the Corps (if not to another appropriate federal

agency) for review to insure the restoration is proper and will have a net environmental gain.

NWP 27 does not circumvent or preclude the adopted, federal procedures for reviewing establishment of mitigation banks. Establishing, using, and operating mitigation banks are governed by the Interagency Federal Mitigation Banking Guidance, which the San Francisco District adheres to. As part of the Mitigation Banking Guidance procedure, a public notice is issued to request public input. Once a bank is established, and before additional credits are sold, resource agencies will have an opportunity to review specific proposals to use the bank to insure there is no net loss of aquatic functions and the bank is used for its intended purpose. This agency review process is embodied in the mitigation bank agreement.

Although use of riprap can be abused and cause more than minimal impact, small amounts in the right places might be appropriate and useful, especially if there are no suitable alternatives that would meet the purpose of armoring and have lesser impacts. Any engineered structures will be reviewed for their necessity and appropriateness, and will be kept to a minimum under the pre-construction notification process (PCN) to the Corps.

As far as relocating habitat types on the project site (presumably the site to be restored to higher quality or quantity of aquatic functions), it would depend on the existing quality of the existing habitat types on the project site, and the purpose of the restoration project. Relocation of habitat types (especially degraded ones) will be reviewed on a case-by-case situation. Also, there are restrictions to conversion of one habitat to another in the language of this NWP.

At this time, the Corps does not believe limiting the acreage of wetlands to be enhanced or the lineal feet of stream to be improved would provide any added protection to the aquatic environment.

i. NWP 31:

1) A commenter recommends a regional condition to prohibit use of NWP 31 in areas that are not constructed channels because it believes riverine systems that do not have constructed channels cannot be considered flood control facilities and believes these activities would result in more than minimal impacts.

Response: The incorporation of channels where there has not been any construction into the overall flood control facility is allowable once the maintenance baseline is established. This NWP does not authorize discharges that exceed the baseline and thus does not authorize further loss of aquatic areas in the flood control facility. Once the baseline is established, the physical parameters of the channels, including unconstructed channels in the flood control facility, can be maintained but not exceeded. Compliance with the BMPs and the general conditions of the NWPs should further minimize adverse effects. Also, the notification requirement under NWP 31 will allow enable case-by-case review to ensure impacts are minimal.

j. NWP 35:

1) No comments were received on the proposed regional conditions to NWP 35.

k. NWP 39:

1) A commenter recommends revocation or at minimum: retaining the 300 linear foot prohibition of fill in all streams (including ephemeral streams); reducing fill acreage to 1/3 acre; requiring PCN to the Corps and resource agencies; requiring compensatory mitigation for unavoidable impacts; retaining pre-existing wording regarding subdivisions (so that this clause pertains to any real estate subdivision and not just to residential subdivisions). Another commenter expressed similar concerns and believes the 1/2 acre provision should apply only once and should not be used for any projects that are physically connected to each other and developed by the same applicant.

Response: We believe neither revocation nor reducing the 1/2 acre threshold to 1/3 acre is necessary at this time because the limitations imposed under this NWP and the NWP general conditions (e.g., must avoid and minimize impacts to the maximum extent practicable, and a compensatory mitigation plan is normally required for NWP 39) provide the necessary safeguards against more than minimal impacts. The notification requirement will allow individual activity review.

Only 16 NWP 39 verification letters were issued between June 7, 2000 (when NWP 39 first became effective) and March 31, 2002. We believe the authorized activities have had minimal impacts to the aquatic environment. We also believe the District's regional condition to include ephemeral streams as part of the 300 linear

feet count and notification (PCN) will enable the Corps to gain a better perspective of the total stream impacts in order to make a case-by-case assessment about minimal effects. Review of instream fills will be coordinated with other agencies, including the California Department of Fish and Game, the Regional Water Quality Control Boards, and as appropriate, with the National Marine Fisheries Service and the U.S. Fish and Wildlife Service. As part of the PCN review, the Corps will consider cumulative effects from projects that are physically connected to each other and developed by the same applicant (phased development). The District will follow the mitigation requirement set forth in General Conditions 13(b)(13) and 19.

Regarding subdivisions, the Corps believes simplifying the subdivision provision is appropriate because the original clause caused confusion. Although the modified subdivision provision is specific to residential projects, it does not preclude the Corps from reviewing related commercial or other real estate subdivisions to determine piece-mealing or cumulative impacts.

2) Several commenters oppose regional conditions A.5 and B.39.2 to include ephemeral streams in the overall count of intermittent streams for notification purposes. The reasons for the opposition are: it will not provide additional protection to the aquatic resources; it will substantially increase workload for the District, and cost and delays to the applicants; and it is inconsistent with the rationale for adding regional conditions for ephemeral streams as specified in the preamble to the final NWP regulations (i.e., only to prohibit *specific activities* that would result in more than minimal impacts). Another commenter also opposes regional conditions A.5 and B.39.2. A.5 should also be clarified that the analysis of avoidance and minimization measures are on-site and not off-site.

Response: Many headwater streams, including ephemeral streams, in San Francisco District may be small but are not necessarily devoid of value. They are a contributing source of water for downstream environments and often connect to other tributaries within the drainage basin. The upper reaches of small, seasonal streams within the District are commonly associated with plunge pools that offer breeding habitat for amphibians, aquatic invertebrates and contribute incrementally to the overall water quality and wetland functions of the watercourse. These seasonal streams contribute to sediment retention, reduced downstream erosion, water storage, flood desynchronization, wildlife habitat, movement corridors for wildlife, etc. Many aquatic scientists have affirmed the qualities and values of headwater streams (e.g., letter

dated 5 October 2001 to the Corps of Engineers in response to the Corps' proposal to reissue and modify the nationwide permits published in 66 FR 42070, dated August 9, 2001).

The requirement for notification for ephemeral streams has been in effect since May 4, 2001 (San Francisco District Public Notice dated May 4, 2001), and this has not caused a substantial increase in workload. From May 4, 2001 to March 31, 2002, the total number of NWP 39, 40, 42, and 43 verification letters issued was only 10. We believe the debate and possible studies to determine ephemeral vs. intermittent streams would cause much more delays and increase cost to applicants than the notification procedure because many seasonal watercourses in our District are not readily obvious as to whether they are intermittent or ephemeral. There can be a gradient between ephemeral and intermittent on the same watercourse, which can be difficult to determine. Although most headwater streams in the San Francisco District are seasonal, many are sustained by shallow, perched water tables (a form of groundwater) along with the rain during the winter and spring months. In other words, many of these headwater streams do not dry up after a storm event but have a continual surface flow over an extended period through a normal rainy season.

The rationale for adding regional conditions to restrict or prohibit specific activities in ephemeral streams is stated in the preamble to the final NWP regulations. The preamble states another reason for requiring regional conditions for ephemeral streams: "to require project proponents to notify district engineers prior to construction for case-by-case review" (67 FR 2021).

The requirement for an analysis of avoidance and minimization measures is in keeping with NWP General Condition No. 13 (b)(12) to focus the analysis on-the project site, and A.5 will be revised to clarify that point.

3) One commenter endorses the inclusion of ephemeral streams in the 300 linear foot limitation for notification but recommends the waiver process be prohibited.

Response: We do not believe the waiver process should be prohibited at this time because the Corps as well as other agencies will be reviewing these activities to determine whether impacts will be more than minimal. Furthermore, the project proponent must avoid and minimize discharges into waters of the U.S. to the maximum extent practicable, and must include a written statement explaining how avoidance and minimization were achieved.

Compensatory mitigation will normally be required to offset the losses of waters of the U.S. (NWP 39 (f)).

I. NWP 40:

1) A commenter recommends NWP 40 be revoked or at minimum, impose the following regional conditions: do not allow changes in use from one agricultural type to another (e.g. from grazing to vineyards); that acreage limitations be indexed to no more than 1% of a tract; that avoidance is pursued; that all impacts be fully mitigated; that a hydrologist report documenting the extent of impacts of the project be presented with the notification; and that the Corps reviews and approves mitigations under all sections of this NWP. Another commenter also recommends revocation or at minimum, impose the following regional conditions: restrict aggregate impact threshold to 0.3 acres and require notification for all impact amounts; prohibit its use in areas that would alter the hydrology of wetlands; prohibit any activity and conversion that would bring new areas into production; revoke paragraph (e); and require compensatory mitigation. A third commenter requests the 300 linear foot waiver be withdrawn.

Response: We believe neither revocation nor lowering the thresholds is necessary at this time because the limitations imposed under this NWP, the NWP general conditions (e.g., avoid and minimize impacts to the maximum extent practicable, and the required compensatory mitigation plan) and the notification requirement provide the necessary safeguards against more than minimal impacts. Also, regional conditions for NWP 40 will add further to protecting the waterbody to only minimal impacts.

2) There were several commenters opposing regional condition A.5 that affects notification to the Corps under NWP 40.

Response: See response to a similar comment under NWP 39, above.

m. NWP 41:

1) A couple of commenters recommend revocation because it will encourage the drainage, degradation and further loss of waters/wetlands. If not revocation, the Corps should limit the linear footage of fill and impact to 250 feet in all streams and total acreage of fill impact to ¼ acre. Also, compensatory mitigation must be required.

Response: To date, NWP 41 has been used infrequently in San Francisco District so its resulting aquatic impacts have been minimal. This NWP is intended to authorize reshaping of existing drainage ditches in a manner that benefits the aquatic environment and improving water quality (67 FR 2055). For example, it would allow regarding a ditch with gentler slopes, which could reduce erosion, increase growth in vegetation, increase uptake of nutrients and other substances by vegetation, etc. Also, limitations imposed in NWP 41 do not allow increasing the drainage capacity or expanding the area drained. For these reasons, it would not be reasonable to revoke NWP 44. Because of the purpose of this NWP, limiting the linear feet and acreage is not necessary. However, in certain sensitive habitats, such as the Santa Rosa Plain and the San Francisco diked baylands, notification will be required to the Corps even if reshaping is less than 500 linear feet. If the Corps determines impacts need to be offset, compensatory mitigation will be required as per the 1<sup>st</sup> regional condition to this NWP.

2) One commenter is concerned about the notification because it has the potential of requiring a large volume of PCNs for routine, roadside ditch maintenance activities.

Response: We do not believe the notification requirement will add a large number of PCNs to the Corps because most roadside ditches are not considered waters of the U.S. (67 FR 2087). We have deleted the proposed condition for notification if there is proposed regrading, discharging or lining the drainage ditch because it was ambiguous and NWP 41 is intended to authorize regrading and discharges within certain limits.

n. NWP 42:

1) A commenter recommends revocation or at minimum: limit impact to waters of the U.S. to 1/3 acre of fill; prohibit construction of buildings, stables or parking lots; prohibit habitat conversion; prohibit its use in special aquatic sites and in areas supporting federally listed species or critical habitat; require compensatory mitigation at a minimum one-for-one replacement; and prohibit use of vegetated buffers as mitigation.

Response: We believe neither revocation nor reducing the ½ acre threshold to 1/3 acre is necessary at this time because the limitations imposed under this NWP and the NWP general conditions (e.g., notification procedure, must avoid and minimize impacts to the maximum extent practicable, and a compensatory

mitigation plan is required for NWP 42) provide the necessary safeguards against more than minimal impacts. The required review through the PCN will enable the Corps to determine whether attendant buildings, stables or parking lots will have more than minimal effects. Regional condition 2 to NWP 42 requires the applicant to evaluate other on-site alternatives if buildings are proposed to be built in waters of the U.S., including wetlands. In addition, the other regional conditions for NWP 42 will add further to protecting the waterbody from unnecessary impacts. General Condition 11 covers protection of federally listed species or critical habitat. Vegetated buffers will be allowed only if there is added value to the aquatic environment. The project proponent must be able to provide a sound justification as to how buffers will help offset project losses to the aquatic system (e.g., District's regional amendment to General Condition 19(f)).

2) There were several commenters opposing regional condition A.5 that affects notification to the Corps under NWP 42.

Response: See response to a similar comment under NWP 39, above.

3) One commenter endorses the inclusion of ephemeral streams in the 300 linear foot limitation for notification but recommends the waiver process be prohibited.

Response: We do not believe the waiver process should be prohibited at this time because the Corps as well as other agencies will be reviewing these activities to determine whether impacts will be more than minimal. Furthermore, the project proponent must avoid and minimize discharges into waters of the U.S. to the maximum extent practicable, and must include a written statement explaining how avoidance and minimization are to be achieved. Compensatory mitigation will normally be required to offset the losses of waters of the U.S. (NWP 42 (g)).

o. NWP 43:

1) A commenter recommends revocation or at minimum: assess impacts (not just loss of waters of the U.S.); reduce the fill threshold to 0.25 acres; prohibit impacts in excess of 250 linear feet in streams; prohibit its use in areas that support federally listed species or critical habitat, in streams that support anadromous fish, in special aquatic sites and areas with riparian vegetation; prohibit construction of in-stream retention or detention basins and do not consider these areas as compensatory mitigation if regular

maintenance will be required; require that base-flows of the stream be maintained during periods of low flows to protect the downstream environment; and prohibit construction of concrete or riprapped channels.

2) Another commenter recommends restricting this NWP to the maintenance of existing storm-water management facilities; disallowing the use of storm-water management facilities as compensatory mitigation sites and disallowing new construction under this NWP.

3) A third commenter recommends revocation of this NWP or at least withdraw the 300 linear foot waiver.

Response: We believe neither revocation nor reducing the other thresholds is necessary at this time because the limitations imposed under this NWP and the NWP general conditions (e.g., notification procedure, must avoid and minimize impacts to the maximum extent practicable, and a compensatory mitigation plan is required for NWP 42) provide the necessary safeguards against more than minimal impacts. The required review through the PCN will enable the Corps to determine whether the specific activity (new or maintenance) will have more than minimal effects. General Condition 11 covers protection of federally listed species or critical habitat. The permittee will be required to adhere to the compensatory mitigation policy set forth in General Condition 19, as well as to any other special condition the District Engineer may add in specific cases.

4) Several commenters oppose regional condition A.5 that affects notification to the Corps under NWP 43.

Response: See response to similar comments under NWP 39.

o. NWP 44:

1) One commenter supports the revocation of NWP 44.

Response: Comment noted. The San Francisco District has already authorized most major gravel activities within the District with adopted Letter of Permission (LOP) procedures or with individual permits. The LOP procedures authorize gravel extraction within Humboldt and Del Norte Counties. There are additional permits for gravel extraction with associated discharges in Mendocino, Sonoma and Trinity Counties. The other areas of instream mining is in the Salinas River basin, including the San

Benito River and other tributaries to the Salinas River but they are relatively few compared to Humboldt and Del Norte Counties, and have been permitted by other types of NWPs.

3. Comments on the general conditions, and on the regional conditions to general conditions to the NWPs.

a. General Condition 19, Mitigation:

1) Several commenters oppose General Condition 19 because of the case-by-case waiver of the requirement of one-for-one mitigation for wetland impacts. Upland buffers do not contribute to the goal of no-net loss. They recommend modifying General Condition 19 that would only consider other forms of mitigation as part of an overall compensatory mitigation requirement once no net loss is obtained. Also, conservation easements or deed restrictions should be required. Another commenter recommends adding a provision to General Condition 19 that emphasizes avoidance and use of practicable alternatives that have minimal impacts to wetlands and waters. One commenter opposes the District's proposed amendment to General Condition 19 to require documentation as to how vegetated buffers might be better for the aquatic environment than more wetland compensatory mitigation. The basic purpose of compensatory mitigation is to mitigate the effects of the proposed project; not necessarily to better the overall aquatic environment. Another commenter requests compensatory mitigation be provided for all unavoidable impacts to waters of the U.S. and in lieu fees should be prohibited.

Response: The Corps commented extensively on these and other concerns in the preamble of the final rule for the NWP program (67 FR 2064). The preamble specifically states the applicant should provide sound justification with a waiver request. The San Francisco District's regional condition will make the need for a sound justification clear. Since vegetated buffers could result in less wetland being created or restored, the justification needs to show how the proposed buffer protects or enhances the aquatic environment, and will have greater benefits than just more compensatory wetland mitigation. Any proposed wetlands mitigation, with or without buffers, will be coordinated with the appropriate state regulatory agencies as part of the 401/coastal consistency certification process or as required by state law. General Condition 19(a) already states that the project must be designed and constructed to avoid and minimize adverse effects on waters/wetlands to the maximum extent practicable, so there is no need to add a regional condition to that effect. Most unavoidable

impacts to waters of the U.S. do require mitigation either by the Corps or by the state regulatory agencies. In lieu fees can provide an appropriate form of mitigation especially when other forms of mitigation are impractical and impacts are small. The U.S. Fish and Wildlife Service and the California Department of Fish and Game support in lieu fees. Also, the majority of in lieu fee mitigation involves restoration, creation or enhancement of aquatic areas.

b. General Condition 21, Management of Water Flows:

1) One commenter opposes the policy of not requiring detailed studies of post-project flows.

Response: The Corps commented on the concerns expressed over the modification of General Condition 21 in the preamble of the final rule for the NWP program and decided to adopt the proposed language without change (67 FR 2070). The San Francisco District believes General Condition 21 as written provides adequate management of water flows, and sees no compelling reason to modify this general condition at this time.

c. General Condition 26, Fills within the 100 year Floodplain:

1) A commenter recommends revocation of this condition because not all floodplains have been mapped and they provide important hydrologic and wildlife functions.

Response: The Corps commented on this concern in the final notice of the NWPs (67 FR 2071), and do not dispute that some floodplains have important hydrologic and wildlife functions. Specifically, if there are no FEMA-approved floodplain maps available for a given area, then General Condition 26 does not apply. The Regional Water Quality Control Board often requires some hydrological analysis to ensure flood storage capacity of the stream is not diminished, and the Corps can require additional documentation when appropriate.

d. Proposed Regional Conditions:

1) Regional Conditions A1, A2 and A3 (notification requirement for any activity permitted by NWP in the San Francisco diked baylands, in eel grass beds and in Essential Fish Habitat respectively): Several commenters are concerned about the cost and time to prepare the notification and the limited resources the agencies have to review these notifications. Another commenter is concerned about regional condition A3, notification requirement in

Essential Fish Habitat, for similar reasons. A third commenter suggests eliminating the notification requirement to the Corps if it is already subject to Section 7 ESA consultation by another Federal agency. One commenter took the opposite viewpoint and believes regional conditions A1-A3 are not adequate enough to ensure adverse impacts would be minimal.

Response: The San Francisco District considers the San Francisco diked baylands, eel grass beds, and designated Essential Fish Habitat (EFH) important aquatic resources that require closer scrutiny than other aquatic areas. Furthermore, the Corps is required to consult with the National Marine Fisheries Service on activities that may affect aquatic resources in designated EFH (see 67 FR 2029). If a project is authorized by a non-reporting NWP, and another Federal agency has conducted the EFH coordination on the same project, the Corps will accept the other agency's findings, and no notification to the Corps is required under this regional condition. Regional condition A3 is rewritten to clarify this point. With respect to the San Francisco diked baylands and eel grass beds, it is the Corps' policy to identify important aquatic resources that may require regional conditions to insure impacts resulting from NWP authorized activities are minimal (see 67 FR 2028). The Corps recognizes the notification process in these areas could add to the burden on those wishing or needing to conduct activities in these aquatic areas. That is the primary reason the Corps limited notification to only certain important aquatic areas. With respect to the adequacy of these regional conditions to ensure impacts from NWP activities are minimal, we believe the notification process will encourage NWP permittees to pay closer attention to the design of their projects to ensure project impacts will be minimal in order to qualify for NWP if practicable. In response to cost of notification, the Regional Water Quality Control Boards, BCDC and the CCC already require some form of notification for these and other areas, so the added cost of notifying the Corps should be minimal.

2) Regional Condition A4, Mitigation completion. A couple of commenters are concerned that for many large public projects, they cannot complete the mitigation before or concurrent with project construction, especially if the mitigation is on-site. The proposed regional condition may also produce programming and contract difficulties. In addition, payments to a mitigation bank or in-lieu fee before construction poses procedural difficulties that can delay public project construction. Other commenters strongly support this regional condition.

Response: The Corps recognizes that there can be appropriate reasons for not being able to meet this regional condition. The regional condition will be rewritten to allow the permittee to provide sound reasons why this condition cannot be met and to propose alternatives to ensure any required mitigation will be fully met in a timely manner. However, the intent of the condition is to accomplish the mitigation as soon as possible and, with modification, will be retained.