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 San Francisco District's 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. The District Engineer has determined that terms and conditions and general regional conditions (see Section 10.0) of the NWP are adequate to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment within the San Francisco District (District) and has therefore determined that no regional conditions specific to the NWP are required.

1.0 Background

In the February 16, 2011, issue of the Federal Register, 76 Fed. Reg. 9,174, the U.S. Army 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 District issued public notices on February 17 and November 28, 2011. The issuance of the NWPs was announced in the February 21, 2012, Federal Register, 77 Fed. Reg. 10,184. After the publication of the final NWPs, the District considered the need for regional conditions for this NWP. The District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

a) In a letter dated April 6, 2011, the Environmental Protection Agency (EPA) requested the addition of a regional condition that states, "*unless determined impracticable by the District Engineer, all waters of the U.S. proposed to be avoided on a project site shall be preserved in perpetuity with protections designed to maintain the natural functions and services of the avoided waters of the U.S. Options include recording new and separate parcel numbers for all avoided waters of the U.S. and appropriate upland buffers, and using conservation easements or restrictive covenants to ensure functions are maintained. If the District determines that sufficient information has been provided by the applicant to determine that it is impracticable to require permanent preservation of the avoided waters, additional mitigation may be required in order to compensate for indirect impacts to the waters of the U.S.*"

Response: The NWP program is specifically targeted for projects with minimal impacts; this proposed requirement would raise many issues regarding implementation and would represent an unreasonable regulatory burden. In order for the District to implement the

proposed condition, a clearer procedure for quantifying avoidance would be required. It would be difficult to determine if an applicant would be required to protect, in perpetuity, the entire creek, just the portion within their parcel, or just the area within their immediate project footprint. Often applicants do not own or have the rights to creeks in which they are working in or are proposing repeat routine maintenance. The District believes that the mitigation requirements outlined within the "*Compensatory Mitigation for Losses of Aquatic Resources; Final Rule,*" 40 C.F.R. pt. 230, published on April 10, 2008 (2008 Mitigation Rule), adequately address the EPA's concerns as protection of riparian buffers associated with jurisdictional waters is included within the 2008 Mitigation Rule.

b) In a letter dated April 6, 2011, the EPA recommended the District develop a regional condition similar to Sacramento District's Regional Condition 8 for post-construction reporting for all NWPs in which a pre-construction notification (PCN) is not required. Within 30 days following completion of all construction activities, EPA believes dischargers should submit a post-construction report to the District that demonstrates compliance with all NWP general and regional conditions, and contains a brief project description (including geographic coordinates), the amount and type of material discharged into any waters of the U.S., and project photos taken before and after construction.

Response: Projects for which a PCN is not required have reduced thresholds or involve very small volumes of fill (e.g. less than 1/10 of an acre). Use of staff time to review post-construction reports for projects involving extremely small impact areas and minimal volumes of fill would not be an efficient use of District resources. Also, enforcement associated with this review would be unlikely and difficult as no authorization letter with special conditions was issued and projects conducted under non-reporting NWPs would likely qualify for authorization under a NWP. Traditionally EPA enforcement has focused on unauthorized fills impacting acreages above the NWP threshold. This requirement would therefore increase District workload but would not necessarily result in increased protection of the aquatic environment or improved enforcement.

c) In a letter dated April 6, 2011, the EPA requested the addition of a regional condition that states, "*the limits of project disturbance shall be clearly identified in the field with highly visible markers such as construction fencing or silt barriers prior to commencement of construction activities within waters of the U.S. Such identification shall be properly maintained until construction is completed and the soils have been stabilized. Equipment, materials, or any other substances or activity that impact waters of the U.S. outside of the permit limits (as shown on the permit drawings), is prohibited. This requirement is only waived if no avoidance of waters of the U.S. is practicable on-site and if there are no off-site waters within 100-feet from the project site*."

Response: It is rare for a project to be proposed that does not already incorporate this type of best management practice. A regional condition of this nature would therefore be unnecessary.

d) In a letter dated April 6, 2011, the EPA recommended the District develop a regional condition similar to Sacramento District's requiring a PCN for all activities that would result in discharge of dredged or fill material into vernal pools. In letters dated April 11 and December 23, 2011, the Citizens Committee to Complete the Refuge (CCCR) expressed a similar recommendation. CCCR further requests the prohibition of the use of NWPs on the Santa Rosa Plain and in all jurisdictional vernal pools.

Response: Within the District, vernal pools are largely located on the Santa Rosa Plain or provide suitable habitat for listed species. For this reason, this regional condition would be redundant with General Regional Condition 2 which requires a PCN for any activity on the Santa Rosa Plain and General Conditions 18 and 31 which require a PCN for activities that may affect federally listed species. Prohibiting the use of the NWPs in the Santa Rosa Plain and for all projects proposed to occur within vernal pools would overly restrict the NWP program. Where jurisdictional vernal pools support federally listed species, additional review is required with the United States Fish and Wildlife Service (USFWS) in accordance with General Conditions 18 and 31.

e) In a letter dated April 6, 2011, the EPA requested the addition of a regional condition that states, "*no construction activities shall occur within standing or flowing waters, unless it can be demonstrated by the applicant that the activity will have minor impacts to indigenous organisms and water quality. For ephemeral or intermittent streams, this may be accomplished through construction during the dry season. In perennial streams, this may be accomplished through dewatering of the work area. All proposed dewatering plans must be approved, in writing, by the District prior to commencement of construction activities. Approach fills shall not be located below the ordinary high water mark or, if tidal waters, the high tide line of waters of the U.S., or within any special aquatic sites.*"

Response: This condition would be redundant with General Condition 12 which states, "*permittees are encouraged to perform work within waters of the U.S. during periods of low-flow or no-flow*." In addition, it is very rare for applicants to propose to work in standing or flowing waters in California due to state requirements (e.g. California Department of Fish and Game and Regional Water Quality Control Board). In the rare occasion that work is proposed to occur in flowing waters, individual project review would be completed to demonstrate that the work in flowing waters is required due to special site specific circumstances that preclude de-watering or work in the dry season. Nationwide Permit 33, which authorizes *Temporary Construction, Access, and Dewatering*, always requires a PCN; therefore there is already a requirement that dewatering plans be approved by the district engineer in writing.

f) In a letter dated April 6, 2011, the EPA suggested the District consider a regional condition that explicitly allows Corps and EPA representatives to inspect authorized activities, including any mitigation areas, at any time deemed necessary to determine compliance with the terms and conditions of the NWP verification. EPA recommended the District adopt the regional condition for inspections being proposed by Sacramento and Los Angeles Districts.

Response: This condition was not adopted because the District was concerned that inclusion of this regional condition would give District staff a "false sense of security" regarding protection against trespassing laws. It is advisable that when completing inspections, explicit permission from the property owner to enter the premise must be obtained. If this permission is not appropriately obtained, information gathered during the site visit may not be admissible in court. Inclusion of this regional condition would not adequately protect staff from potential trespass actions.

g) In letters dated April 11 and December 23, 2011, CCCR indicated that they believe riprap should be prohibited in areas adjacent to endangered species populations, refuges, special aquatic sites, and wetland areas that support woody vegetation. They believe riprap fragments riparian habitat and may displace plant communities. CCCR further believes that placement of riprap near endangered species populations, refuges, special aquatic sites, and wetland areas represents more than minimal impacts, especially given the proposal to allow discretionary waiver of compensatory mitigation for projects impacting less than 1/10 of an acre.

Response: General Condition 6 states that no activity may use unsuitable material (e.g. trash, debris, car bodies, asphalt, etc) and that material used for construction or discharge must be free from toxic levels of pollutants. General Condition 9 further requires that all activity must be constructed to withstand expected high flows. Regional conditions associated with NWPs 13 and 14 require authorization of fill greater than 300 linear feet consider effects to the opposite side of the streambank and on adjacent property upstream and downstream of the activity. As discussed above, proposed activities in endangered species habitat require further review in accordance with General Condition 18. Case-by-case review and application of general condition requirements ensure impacts associated with riprap replacement are minimal and thus make the requested prohibition unnecessary.

h) In letters dated April 11 and December 23, 2011, the CCCR stated information regarding specific NWP authorizations should be published in a quarterly report and made available on the District's webpage for public comment. Additionally, CCCR requests pre-construction notifications be provided on the District website for public information.

Response: Information is available to the public on specific NWP authorizations in compliance with the Freedom of Information Act. NWP public comment is not feasible or required in the regulations. There is no procedure for handling comments provided by the public in regard to general permit decisions. Summary information on all permit decisions is provided on our website (http://www.spn.usace.army.mil/regulatory/sum.html). The District does its best to allocate resources as efficiently as possible to keep the website updated.

i) In an email dated May 27, 2011, the Lytton Band of Pomo Indians requested that a regional condition applicable to all NWPs be added that clearly requires an initial cultural resources survey. The Tribe is also concerned that there is adequate upfront investigation of a project

area to determine the likelihood or potential for discovery of unknown resources during project development. The Tribe underscores the importance of adhering to the Section 106 procedures by setting an Area of Potential Affect (APE) which follows the Advisory Council of Historic Properties more expansive definition of APE. The Tribe also states it is important to provide adequate conditions should inadvertent discoveries occur during project development. The Tribe believes appropriate tribal monitors should be required to safeguard unknown remains and artifacts. The Tribe continues to encourage early coordination to develop project specific safeguards of historic properties and appropriate mitigation, if necessary.

Response: The District concurs that early upfront coordination is important to development of project specific requirements to safeguard historic properties and will continue to work toward improved collaboration with the Tribe. Regarding addition of a general regional condition addressing inadvertent discovery, clauses please see the comment below in reference to General Regional Condition 7. The below sections 6.0 and 7.0 further outline the District's procedures for addressing treatment of potential historic properties that may occur within a project site. The District continues to follow procedures outlined in Appendix C of 33 C.F.R. pt. 325, "*Procedures for Protection of Historic Properties*".

j) In a letter dated December 23, 2011, the CCCR stated that the Public Notices regarding the announcement of the District's Regional Conditions is inadequate and does not provide enough information regarding cumulative effects of the program to allow for substantive comment.

Response: The District would not be able to provide cumulative effects analysis in the form of a public notice. National and District decision documents (which includes the cumulative effects analysis) are provided on Corps' websites as soon as these documents are finalized. Further, these documents dating back multiple 5-year NWP cycles are available upon request through the Freedom of Information Act.

2.1.1 General Comments Applicable to Multiple NWPs

a) In a letter dated April 6, 2011, the EPA and the State Water Resources Control Board (DWQ, letter dated April 18, 2011) stated that submission of a PCN pursuant to General Condition 31 and Regional Condition 1 should be required for NWPs 7, 13, 14, 28, 29, 39, 42, 43, 44, A, and B in any Clean Water Act 303(d) impaired waters. Additionally, due to the role of the states in the protection of water quality, agency notification should be extended to state agencies for these proposed activities in impaired water bodies. EPA and DWQ also suggest the applicant be required to prepare a statement of how the proposed activity does not contribute to existing water quality impairments, and whether the activity is consistent with existing Total Daily Maximum Loads (TMDLs). DWQ believes this requirement should apply to all NWPs.

Response: The same review is completed for projects located in all jurisdictional waters. Consistent with General Condition 25, no NWP authorization is valid without a state

Clean Water Act section 401 certification to ensure the activity does not result in more than minimal degradation of water quality. Additionally General Condition 6 requires that no activity may use unsuitable material and that construction material must be free from toxic pollutants. The District does not believe the requirement to submit a PCN in impaired waters would improve protection of water quality as there is no established additional review to be applied to impaired creeks beyond what would be implemented in a non-impaired creek. Additionally, per General Condition 25 the appropriate state agency notification is already required.

b) In many of their comments, in letters dated April 11 and December 23, 2011, the CCCR stated that NWPs (e.g. NWPs 3, 11, 12, 13, 18, 29, 31, 33, 35, 42, 43, and 48) should be prohibited if a project may affect endangered species, is located in endangered species critical habitat, and/or is located in a special aquatic site.

Response: Section 7 of Endangered Species Act (ESA) requires federal agencies to consult with the appropriate resource agency to ensure any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any federally-listed species or result in the adverse modification of designated critical habitat. General Condition 19 further requires full compliance with ESA and enumerates procedures to be followed prior to authorization of a project that "may affect" a federally-listed species. As stated in section 5.0 of this document, careful procedures requiring coordination with the appropriate resource agency and multiple levels of review occur for any activity authorized by a NWP that may have an effect on federally-listed species or on designated critical habitat. Elevation of these projects to a standard permit review would only increase workload and regulatory burden without providing additional safeguard of endangered species and their habitat. After careful evaluation, the District feels that NWPs can be successfully implemented in the District while still protecting important resources such as endangered species and their critical habitat.

Special aquatic sites are also afforded additional safeguards under the NWP program as some activities are restricted in special aquatic sites and thresholds are established specifically for special aquatic sites (e.g. NWP 13 for Bank Stabilization, 36 for Boat Ramps). The vast majority of special aquatic sites are occupied by federally listed species and therefore receive additional resource agency review. Section 230.7 of the 404(b)(1) Guidelines also does not prohibit the use of NWPs to authorize discharges of dredged or fill material into special aquatic sites. Further, standard practices protect special aquatic sites such as the 2008 Mitigation Rule, avoidance and minimization requirements, and the no net loss policy. We have therefore determined that the current procedures and policies adequately protect special aquatic sites.

c) In letters dated April 11 and December 23, 2011, the CCCR suggested regional conditions should be established, for many of the NWPs (e.g. NWPs 29, 39, 40, 41, and 42), requiring compensatory mitigation be provided for all unavoidable impacts to jurisdictional waters and wetlands.

Response: For impacts authorized under Section 404, compensatory mitigation is not considered until after all appropriate and practicable steps have been taken to first avoid and then minimize adverse impacts to the aquatic ecosystem pursuant to 40 C.F.R. pt. 230 (i.e., the CWA Section 404(b)(1) Guidelines). Compensatory mitigation is required to offset unavoidable adverse impacts to wetlands, streams, and other aquatic resources consistent with the 2008 Mitigation Rule. This document improves the planning, implementation, and management of compensatory mitigation projects. General Condition 23 addresses mitigation policies specifically in reference to the NWP program. Joint General Regional Condition 5 requires that project mitigation occur prior to or concurrently with project implementation. The District believes the 2008 Mitigation Rule, the avoidance and minimization and no net loss policies, general conditions and regional conditions adequately provide the necessary safeguards to ensure appropriate compensatory mitigation is required.

d) In letters dated April 11 and December 23, 2011, the CCCR stated regional conditions should be established to require post-construction documentation that demonstrates pre-construction conditions have been restored, that re-vegetation efforts have been successfully implemented, and that temporary fills have been removed for many of the NWPs (e.g. NWPs 3, 12, 33, 39, 40, 41, and 42).

Response: Authorization letters for NWPs include special conditions that list requirements for the permittee. It is at the District's discretion to include special conditions that allow for submittal of appropriate project specific monitoring. Often monitoring is required in support of the terms and conditions of the NWP being used to authorize the project. The District believes that by allowing discretionary authority we will continue to facilitate efficient use of our resources and staff time to require project appropriate reporting. Certificates of compliance are also required for all authorized NWPs.

e) In a letter dated April 8, 2011, the Marin Audubon Society stated that linear feet and acreage restriction of many of the NWPs that would allow for the loss of 300 linear feet (e.g. NWPs 29, 39, 40, and 42) and up to 1/10 acre (NWP 6) are too large. In our Mediterranean Climate, where wetlands and riparian areas are limited, the limit threshold should be further reduced. Audubon believes the threshold for NWPs 13 and 14 should be reduced to 100 linear feet or the NWP should be prohibited.

Response: The District has not observed authorization of projects that result in more than minimal impact to aquatic resources in the past five years. The "*Compensatory Mitigation for Losses of Aquatic Resources; Final Rule*," 40 C.F.R. pt. 230, published on April 10, 2008 applies consistently to all Department of the Army permits, including general permits and standard permits. By further reducing the NWP threshold the District would be requiring many projects be reviewed under the standard permit procedures. This increased level of review would not result in a difference in the mitigation or minimization requirements. Thus, the District does not believe that reducing the limit would result in an improvement in the protection of these aquatic resources.

In 2007 the District introduced regional conditions for NWPs 13 and 14 that require notification for fills in excess of 300 linear feet reducing the threshold by 200 linear feet compared to the national threshold. This has proven useful in our evaluation in the Mediterranean Climate. Further reductions however, would result in increased regulatory burden without improving protection of the aquatic resource.

f) In letters dated April 11 and December 23, 2011, the CCCR suggested many NWPs (e.g. NWPs 12, 14, 18, 29, 29, 40, 41, 42, 43, and 44) be prohibited within wetlands adjacent to perennial streams and wetlands within woody vegetation adjacent to any stream course.

Response: NWPs help relieve regulatory burdens on small entities that need to obtain Department of the Army permits for proposed minor impacts to aquatic resources. They provide an expedited form of authorization under defined conditions. The terms and conditions of the NWPs, such as PCN requirements and acreage or linear foot limits, are imposed to ensure that the NWPs authorize only those activities that result in minimal adverse impacts on the aquatic environment and other public interest factors. Many of the wetlands regulated by the District would qualify as, "wetlands adjacent to perennial streams and wetlands within woody vegetation adjacent to any stream course". Thus, prohibiting the use of NWP in these wetlands would result in a significant increase in District work load and project proponent regulatory burden without achieving increased protection of these aquatic resources.

g) In letters dated April 11 and December 23, 2011, the CCCR indicated many NWPs (e.g. NWPs 13, 14, 29, 39, 40, 41, 42, 43, and 44) should not be used to expand previously permitted projects to avoid piece-mealing in accordance with the avoidance and minimization requirement.

Response: According to General Condition 28, the use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the U.S. authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. If a previously permitted project is proposed for expansion then the district engineer is required to consider the cumulative impacts of the proposed activity. If it is determined that the cumulative impacts represent more than minimal impacts, the district engineer has the authority to require an evaluation under a standard permit procedure. The District therefore believes that General Condition 28 and case-by-case review provides adequate protection and therefore addition of this proposed regional condition would be redundant and unnecessary. A regional condition was added regarding the use of NWP 14 within a previously authorized linear transportation project.

h) In a letter dated April 6, 2011, the EPA suggested the addition of a regional condition to many of the NWPs (e.g. NWPs 29, 39, 40, 42, and 43) that states, "*unless specifically determined, in writing, to be impracticable by the district engineer, upland vegetated buffers shall be established and maintained in perpetuity next to all preserved open waters, streams and wetlands including created, restored, enhanced or preserved waters*

of the U.S., consistent with General Condition 22. Except in unusual circumstances, as determined by the District, vegetated buffers shall be at least 50 feet in width (i.e., 25' minimum landward of each OHWM or wetland boundary)."

Response: The Corps regulates the discharge of dredged or fill material below the plane of ordinary high water in non-tidal waters of the United States, below the high tide line in tidal waters of the United States, and within the lateral extent of wetlands adjacent to these waters. Placing programmatic requirements on "upland buffers" outside of our jurisdiction would represent a significant increase in our Regulatory authority. We understand the potential value of preserving upland buffers; however, this should be handled on a project specific level, when appropriate, due to project specific implications that make this requirement prudent.

2.1.2 General Comments Applicable to General Regional Conditions that apply to all NWPs in the Sacramento, San Francisco, and Los Angeles Districts:

General Regional Condition 1:

a) In letters dated April 11 and December 23, 2011, the CCCR stated this condition should require the applicant also discuss the direct and indirect impacts of the proposed project as well as the cumulative impacts of the project.

Response: General Condition 31 requires that the applicant provide a description of direct and indirect adverse environmental effects. Thus, addition of the suggested language to the regional conditions would be redundant with the current NWP general conditions. Cumulative effects of the NWP program are analyzed consistent with the 404(b)(1) guidelines and the National Environmental Policy Act (NEPA) on a five-year cycle during the NWP renewal process.

General Regional Condition 2:

a) The Marin Audubon Society (letter dated April 8, 2011) and the CCCR (letters dated April 11 and December 23, 2011) suggested NWPs should be revoked where there are eelgrass beds because they are so rare and difficult to restore. CCCR also suggests revoking the NWPs in essential fish habitat (EFH).

Response: This general regional condition was developed in collaboration with the Sacramento and Los Angeles Districts. The condition requires the submittal of a PCN, with the appropriate documentation, to allow for consultation with the National Marine Fisheries Service (NMFS) pursuant to Section 305(b)(2) of Magnuson-Stevens Fishery Conservation and Management Act of 1996, as amended (MSFCMA) which requires federal agencies to consult with the NMFS on all proposed actions authorized, funded, or undertaken by the agency that may adversely affect essential fish habitat (EFH). EFH is defined as those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity and therefore includes all eelgrass beds. This consultation with subject

matter experts (i.e. NMFS) should ensure that resources crucial to fish for spawning, breeding, feeding or growth to maturity, including eelgrass beds are safe guarded. Requiring standard permits for all projects occurring in eelgrass beds, and generally within EFH, would not improve review of the project in light of effects to eelgrass or EFH.

General Regional Condition 3:

a) In letters dated April 11 and December 23, 2011, the CCCR stated this condition should clarify that for project locations that support endangered species, essential fish habitat, or historic properties, authorization should not be assumed by the project proponent until compliance with these regulations has been determined and confirmed in writing by the Corps.

Response: The intent of this regional condition is to require the submittal of the appropriate documentation that demonstrates the federal lead is in compliance with all appropriate federal laws. The project proponent/applicant could not proceed with the project until written authorization from the District is received. Thus, the addition of this language to the regional condition would be redundant with the standard program practices.

General Regional Condition 4:

a) In a letter dated April 8, 2011, the Marin Audubon Society and the CCCR, in letters dated April 11 and December 23, 2011, stated their support of this regional condition. In a letter dated April 6, 2011 the EPA also indicated support of the regional condition but recommended expanding the applicability of this regional condition. Commenters suggested the District require crossing designs that ensure passage and spawning for all indigenous and migratory aquatic organisms and other wildlife associated with aquatic ecosystems. The EPA also recommend the physical and hydrological channel characteristics be maintained consistent with Subparts C&D of the 404(b)(1) Guidelines that require the consideration of effects to the physical and biological ecosystem. The EPA recommended revising Regional Condition 1 to be consistent with General Condition 2 and Sacramento District's Regional Condition 6 that includes additional protections for channel flows (i.e. sizing the culvert for high flow conditions).

Response: This regional condition was established in collaboration with the Los Angeles and Sacramento Districts. Expanding the condition to cover all indigenous species was discussed; however, it was determined impractical as District staff does not necessarily have the training or expertise to ensure compliance with a regional condition written so broadly. Staff would be required to have knowledge of all indigenous aquatic species and have the engineering expertise to evaluate the proposed project. Limiting the regional condition to listed species allows staff, in coordination with resource agencies, to ensure full compliance with the regional condition. This would also represent a redundant review, as state agencies such as California Fish and Game evaluate suitability of projects for indigenous species.

b) In letters dated April 11 and December 23, 2011, the CCCR stated they would like the words, "*unless determined to be impracticable by the Corps*" to be deleted. CCCR would also like the words, "*unless it can be confirmed by the National Marine Fisheries Service (NMFS)…*" added to the regional condition.

Response: The phrase regarding impracticability was added to the language to maintain flexibility within the NWP program. This regional condition applies to all of the NWPs. It is important that the concepts outlined in the regional condition are uniformly applied. However, it is also important that discretionary authority be maintained. As currently written we believe the condition strikes that balance. The following language was removed from the regional condition, "*unless it can be demonstrated that the subject waters do not contribute to the recovery of Federally-listed species*." This language was determined to be confusing.

General Regional Condition 5:

a) In a letter dated April 6, 2011, the EPA indicated their support of this condition. In letters dated April 11 and December 23, 2011, the CCCR indicated their support of this condition.

b) In letters dated April 11 and December 23, 2011, the CCCR stated in-lieu fee mitigation should be prohibited in the District.

Response: There are currently no approved in-lieu fee programs in the District. If in-lieu fee programs become available, the use of these programs in conjunction with the NWP program would be considered. This prohibition is unnecessary at this time.

General Regional Condition 6:

a) The EPA (letter dated April 6, 2011), the San Francisco Regional Water Quality Control Board (RWQCB, letter dated April 18, 2011) and CCCR (letters dated April 11 and December 23, 2011) stated this condition requires certain types of information be provided when requests for waivers of the linear footage threshold for NWPs 13, 29, 39, 40, and 42 are made. EPA is pleased to see this modification, but suggests including NWPs 43, A, and B. Additionally, EPA believes agency notifications should also be included for any project which requires a waiver. Notifications would provide opportunity for review of projects with increased footprints and aid in tracking the extent and frequency with which thresholds are waived. SFRWQCB remains concerned by the waiver provisions for the 300-foot limit on NWPs 29, 39, 40, and 42, and the 500-foot limit on NWP 13. RWQCB stated General Regional Condition 6 provides useful safeguards to limiting negative impacts associated with these waivers. CCCR believes the District should adhere strictly to the restrictions of authorization of no more than 300 linear feet of stream impacts for NWPs. Failing that, the District should substantively analyze the cumulative effects before considering waiving restrictions on the linear footage threshold.

Response: The regional general condition has been made applicable to NWPs 43, A, and B. General condition 31 paragraph (d)(2) was modified to clarify that all NWP activities resulting in the loss of greater than 1⁄2-acre of waters of the United States require agency coordination. Further, agency coordination would be required for certain NWPs when the proposed activity would result in the loss of greater than 1,000 linear feet of intermittent and ephemeral stream bed, in cases where the district engineer is considering waiving the 300 linear foot limit.

At the time of NWP renewal in 2002 and 2007, similar concerns regarding the waiver process were expressed by various environmental organizations. In 2007 the District reduced the threshold for NWPs 13 and 14 to 300 linear feet. A review of the use of waivers over the past three years (2009-2011) was conducted. For NWPs 13 and 14, only 5% of projects authorized by these two NWPs required use of the waiver. For NWPs 29, 39, 40, and 42, only one waiver was issued during the three year period. This demonstrates how rarely the NWP threshold is waived in the District. Additionally, the waiver process has been updated (see General Condition 31) to require the district engineer make a written determination that the NWP activity will result in minimal adverse effects and requiring agency notification. The factors to be considered by the district engineer are also enumerated within the general condition.

The District has not observed more than minimal impacts associated with projects authorized requiring a waiver of the linear footage threshold. The District has demonstrated that the waivers are rarely implemented. Furthermore, the project proponent must continue to 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 is achieved. Compensatory mitigation is also required to offset the losses of waters of the U.S. consistent with the 2008 Mitigation Rule. Thus, we believe it is appropriate to rely on case-by-case analysis to determine if a waiver of the linear foot acreage limit is appropriate.

General Regional Condition 7:

a) The Dry Creek Rancheria Band of Pomo Indians (letter dated December 20, 2011) and the Federated Indians of Graton Rancheria (letter dated March 18, 2011) commented that the proposed regional condition should include the following language, “culturally-affiliated tribes” as participants in coordination required “to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.” The Tribes state, it is vital that tribes are included in procedures designed to protect against adverse impacts to historical, cultural, or archaeological remains discovered during construction because tribes have unique interest in such resources and have legal rights specific to those vital interests. Among those interests are protections for traditional tribal cultural places including prehistoric, archaeological, cultural, spiritual, and ceremonial sites essential to tribal cultural traditions, heritages, and identities.

Response: General Condition 7 was removed from the joint conditions when it became apparent that it is redundant with General Condition 21 that was added to the NWP program which addresses the discovery of previously unknown remains and artifacts. We believe that the general condition adequately addresses the Tribe's concerns.

2.1.3 General Comments Applicable to San Francisco District's General Regional Conditions:

San Francisco District's General Regional Condition 1:

a) In letters dated April 11 and December 23, 2011, the CCCR made the argument that this regional condition is not within the discretion of the district engineer, as requiring a PCN in Diked Baylands implies that authorizations would be issued under NWPs 29, 39, 40, and 42. This represents a broadening of authority under the NWP program, not a narrowing of authority as required by 33 C.F.R. 330.4(e). Further the terms and conditions of these NWPs state, "*this NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.*" CCCR believes that by definition Diked Baylands and the non-tidal wetlands that occur within them are adjacent to the San Francisco Bay, a tidal water.

Response: Based on comments received the District added a regional condition prohibiting the use of NWPs 29 and 39 in the Diked Baylands. This was determined necessary due to the fact that 95% of wetlands within the Diked Baylands of San Francisco Bay have been lost as a result of development. The District, however, maintains that requiring the submittal of a PCN in no way implies authorization with a NWP. Further, the requirement to submit a PCN does not broaden the District's authority under the NWP program. The requirement to submit a PCN simply ensures adequate informed review by the district engineer. During review of the pre-construction notification, the District has the responsibility to demonstrate that the project is in compliance with all terms and conditions of the NWP including the NWPs 29, 39, 40 and 42 prohibitions on authorizing fill of into non-tidal wetlands adjacent to tidal waters.

2.2 Specific Comments Received by the District in Reference to NWP 37

The District did not propose regional conditions, beyond those that apply to all NWPs, specific to NWP 37. No comments were received regarding NWP 37.

3.0 Waters Subject to Additional Pre-Construction Notification Requirements

3.1 Waters excluded from use of this NWP

The District did not propose to prohibit the use of this NWP in any jurisdictional features.

3.2 Waters subject to additional pre-construction notification requirements

3.2.1 <u>Waters or Wetlands of the U.S. Located within the San Francisco Bay Diked</u>

Baylands

The District's General Regional Condition 1 requires a PCN be provided for any fill discharge verified by a NWP within the Diked Baylands, including undeveloped areas currently behind levees that are within the historic margin of the Bay. Submittal of a PCN in accordance with General Condition 30 and General Regional Condition 1 will ensure appropriate information is provided for case-by-case evaluation. The evaluation will include review of proposed compensatory mitigation and avoidance and minimization measures. The requirement to submit a PCN will also enable record keeping of impacts and consequent cumulative impacts analysis.

3.2.2 Santa Rosa Plain

See additional discussion in the General Comments Section (2.1) regarding activities proposed for the Santa Rosa Plain. This regional condition was included as a requirement for NWPs 12, 14, 18, 29, 39, 40, 41, 42, & 43 in previous years. In 2007, this regional condition was made applicable to all NWPs. Broad application of this regional condition was useful during the 2007-2012 NWP cycle and has therefore been maintained for the next five years. Requirement of a PCN on the Santa Rosa Plain ensures compliance with the requirements of the Endangered Species Act and provides for better tracking of effects in this geographic area.

The Santa Rosa Plain figure was also updated. This figure has been revised by the USFWS to include the range of the Sonoma County population of the California tiger salamander as well as federally-listed plant species (see map attached to the Public Notice dated November 28, 2011).

3.2.3 Eelgrass Beds

The District's General Regional Condition 3 requires a PCN, habitat assessment, extent of impacts assessment, and compensatory mitigation plan for projects proposed to occur in eelgrass beds. Eelgrass beds are considered to be a valuable shallow-water habitat, providing shelter, feeding, and breeding habitat for many species of invertebrates, fishes, and some waterfowl. Eelgrass beds supply organic material to nearshore environments, and their root systems stabilize area sediments. These plants grow in relatively few locations within the Bay and require special conditions to flourish. Cultivation of eelgrass is difficult and efforts to grow eelgrass in San Francisco Bay thus far have not succeeded. Activities potentially impacting eelgrass require evaluation through a PCN to ensure minimal impacts given mitigation constraints and provide necessary information for efficient consultation with NMFS pursuant to the Magnuson-Stevens Fishery Conservation and Management Act.

3.2.4 Essential Fish Habitat

A joint Regional General Condition similar to the District's former General Regional Condition 4, requiring a PCN for any proposed fill discharge verified by a NWP proposed to take place in EFH, was developed. This condition is being applied consistently within the Sacramento, San Francisco, and Los Angeles Districts. As discussed in Section 8.0 below, pursuant to Magnuson-Stevens Fishery Conservation and Management Act, fill discharges with an adverse effect to EFH must be referred to NMFS so that they may provide recommendations to minimize impacts and enhance EFH. Required PCN for fill discharge, structures, or work within EFH will ensure consultation occurs; required additional PCN information (i.e. type of habitat and estimate of areal extent of affected area) will ensure timely and efficient consultation.

3.2.5 Requests to Waive the 300 Linear Foot Limit

General Regional Condition 6 was developed in coordination with the Sacramento and Los Angeles Districts. In accordance with this condition, any request to waive the 300 linear foot limitation for intermittent and ephemeral streams must include an analysis of potential effects on the stream environment. Such analysis should include information on measures taken to avoid and minimize losses, other measures to avoid and minimize filling that were found not to be practical, and a mitigation plan detailing how the unavoidable losses will be offset.

Headwater streams, including ephemeral streams, in the District are very important to the downstream ecosystem and often connect with many tributaries within a watershed. 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 also 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 de-synchronization, wildlife habitat, movement corridors for wildlife, etc. We believe the District's regional condition requirement to provide the above information will enable the District to gain a better perspective on proposed project's total impacts in order to make case-by-case assessments regarding minimal effects.

4.0 Alternatives

4.1 No Regional Conditions

The purpose of the regional conditions is to ensure that NWPs only authorize activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively, when applied in the District. Only the joint General Regional Conditions 1-7 and the District's General Regional Conditions 1 – 3 apply to NWP 37. Revoking these regional general conditions would reduce the ability of the District to properly evaluate fill discharges potentially affecting aquatic resources within the Diked Baylands, eelgrass beds, and EFH (see section 3.2 (1-5)). In addition,

the provision requiring a PCN for activities proposed to occur in these areas allows the District to track and evaluate cumulative effects of multiple NWP authorizations to the above mentioned aquatic resources. The joint General Regional Condition 5 further requires that mitigation be provided by the project proponent prior to or concurrently with commencement of construction. As stated in general comments section 2.1, multiple organizations expressed concern that the District requires proper mitigation that meets the "no net loss" policy of the Corps, including safeguards against temporal losses of aquatic function. The implementation of joint general regional conditions and general regional conditions ensure that the District both evaluates projects in specified waters (i.e. EFH, eelgrass beds, and Diked Baylands) at an appropriate level and that mitigation for unavoidable losses is attained.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

The District considered possible outcomes of implementing further limitations on NWP 37 including increased threshold limits in EFH, eelgrass beds, and Diked Baylands. The District also considered implication of revoking NWP 37 in EFH and eelgrass beds. In all of these areas it was determined that current NWPs, national PCN thresholds, and regional limits already effectively ensure that only minimal adverse effects on the aquatic environment, individually or cumulatively, are authorized by the NWP. Thus implementing additional regional limits or lowering PCN thresholds would not effectively safeguard against more than minimal impacts, and would lead to increased District workload, less timely evaluation of proposals, and increased regulatory burden for the applicant. Additionally, it is believed that requiring a PCN for all activities proposed to occur within specified aquatic resources will ensure case-by-case review and coordination with the USFWS and NMFS in compliance with the CWA, ESA, and the Magnuson-Stevens Fishery Conservation and Management Act.

4.3 Alternative Regional Nationwide Permit Conditions

Additional regional conditions, beyond those stated above, were not considered necessary as the District believes current general conditions and guidelines provide the appropriate safeguards to ensure that NWP 37 does not authorize activities with more than minimal adverse effects on the aquatic environment. Implementation of additional regional conditions would only create unnecessary regulatory burden and increased applicant cost. Recommendations for additional regional conditions for NWP 37 were not received during the comment period.

5.0 Endangered Species Act

5.1 General Considerations

Information available on federally-listed species for the District includes the California Natural Diversity Database, county species lists, reports provided by the applicant, recovery plans, programmatic Biological Opinions, and institutional knowledge. The District ensures that activities authorized by NWP comply with the ESA by reviewing all applications for possible effects on federally-listed species and their critical habitat. If the District determines that a proposed activity will have 'no effect' on a federally listed species (or a species proposed for

federal listing), or on critical habitat, then the District does not initiate consultation with the appropriate Service and proceeds to complete the application evaluation. If the District determines that a proposed project is 'not likely to adversely affect' a federally listed species (or a species proposed for federal listing), or a critical habitat, then the District initiates informal consultation in writing with the appropriate Service and requests a written concurrence with the District's determination within 30 days. If the District determines that a proposed project 'may affect' a listed or proposed species or critical habitat, then the District initiates formal consultation with the appropriate Service. In the cases of informal and formal consultation, the District notifies the applicant that construction may not proceed until consultation is completed and the District issues a written authorization. The process has successfully safeguarded federally-listed species within the District in the previous five years. No changes have been recommended to this process.

5.2 Local Operating Procedures for Endangered Species

The District will continue to consult on federally-listed species with the appropriate resource agencies as described in Section 5.1 above. There are multiple species-specific programmatic agreements that are often utilized in the District. Additionally, staff from the USFWS California-Nevada Operations Office, Corps South Pacific Division, and NMFS Southwest Region jointly developed guidelines (*U.S. Army Corps of Engineers Proposed Procedures for Permitting Projects that will Not Adversely Affect Selected Listed Species in California* dated November 16, 2006) regarding proposed actions that are determined to not likely adversely affect 66 listed species, distinct population segments (DPS), or evolutionarily significant units (ESU). District staff will continue to utilize these programmatic agreements when determined appropriate.

6.0 National Historic Preservation Act

6.1 General Considerations

Section 106 of National Historic Preservation Act (NHPA) requires federal agencies to consult with the appropriate State Historic Preservation Officer (SHPO) to take into account the effects of their undertakings on historic properties listed in or eligible for listing in the National Register of Historic Places (historic properties). Section 106 of NHPA further requires federal agencies to consult with the appropriate Tribal Historic Preservation Officer (THPO) or any Indian Tribe to take into account the effects of their undertakings on historic properties, including traditional cultural properties, trust resources, and sacred sites, to which Indian Tribes attach historic, religious, and cultural significance. The requirements under Section 106 of NHPA apply to both standard and general permits.

6.2 Local Operating Procedures for National Historic Preservation Act

In accordance with Appendix C of 33 C.F.R. pt. 325 and 36 C.F.R. pt. 800, implementing procedures for complying with Section 106 of the National Historic Preservation Act, as amended, 16 U.S.C. § 470f, the District ensures that activities authorized by NWPs comply with the NHPA by reviewing all applications for possible effects on historic properties. Provided

information generally includes archival research at the Northwest Information Center, Sonoma State University and often field surveys of the project features within the Area of Potential Effect. If the District determines the project may affect a historic property, based on the provided information, then consultation is completed with the State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO), recognized Tribes, and, if necessary, the Advisory Council on Historic Preservation (ACHP). The applicant is notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied. Additionally, the district engineer may assert discretionary authority to require an individual permit for the proposed activity and initiate consultation through the individual permit process. If the District determines that the activity would have no potential to cause effects on any historic properties, the District proceeds to a NWP authorization without further consultation.

7.0 Government-to-Government Consultation with Indian Tribes

7.1 Summary of the Consultation Process

On December 7, 2010, each Tribe within our area of responsibility was contacted through formal correspondence to provide an early notification of the anticipated reissuance of the Corps' NWPs and associated District's Regional Conditions. On February 11, 2011 additional correspondence was provided which included draft documents of the proposed NWPs and the District's Regional Conditions. The Lytton Band of Pomo Indians, Federated Indians of Graton Rancheria, and Yocha Dehe Wintun Nation responded to the District request for Government-to-Government consultation. Consultation was concluded with the Lytton Band of Pomo Indians through their formal submission of comments on May 27, 2011. These comments have been incorporated into the general comments section (2.1) above. The Federated Indians of Graton Rancheria responded with a request to review all NWPs requests within the Graton Rancheria's ancestral territory. The District agreed to continue to work with Graton Rancheria to establish a procedure for providing appropriate information to the tribe for review. The District determined this type of agreement for programmatic level review would best be accomplished with a Memorandum of Agreement (MOA) between the District and the Tribe. The District made multiple unsuccessful efforts to arrange a meeting with representatives from the Federated Indians of Graton Rancheria and the Yocha Dehe Winton Nation. Consultation was concluded with these tribes on November 10, 2011. The District hopes to continue to work with Graton Rancheria towards the establishment of a MOA which addresses the Tribe's request.

7.2 Local Operating Procedures for Protecting Tribal Resources

The District has no procedures beyond those described in sections 6.1 and 6.2 above.

8.0 Essential Fish Habitat

In accordance with the Magnuson-Stevens Fishery Conservation and Management Act Provisions for EFH, NMFS has established guidelines to assist in the identification of adverse effects to EFH and has identified actions required to conserve and enhance EFH. NMFS' regulations detail procedures for federal agencies to coordinate, consult, or provide

recommendations on actions that may adversely affect EFH, 50 C.F.R. pt. 600. In addition to these regulations, the District abides by procedures for coordination, consultation, and recommendation requirements of section 305(b)(1)(D) and 205 (b)(2-4) of the Magnuson-Stevens Act as provided in 50 C.F.R. pt. 600, subpart K. See above sections 2.1, 3.2.3, and 3.2.4 for further discussion.

On October 11, 2011 a programmatic consultation with NMFS was completed. This consultation pertained to construction and maintenance of overwater structures in the San Francisco Bay area and considered new or replacement overwater structure construction, modification, maintenance, and associated indirect activities. District staff will continue to utilize this programmatic agreement when determined appropriate.

9.0 Supplement to National Impact Analysis

9.1 Public interest review factors (33 C.F.R. 320.4(a)(1))

In addition to the discussion in the national decision document for this NWP, the 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. Also, there may be an incremental increase in cost associated with required supplemental PCN information and increased cost associated with additional review time by the District. Any mitigation that might be required could also add to the cost of a project, however, these costs would also be required by state regulatory agencies.

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

(d) General environmental concerns: Same as discussed in the national decision document.

(e) Wetlands: Same as discussed in the national decision document. The regional conditions for required notification for activities occurring within the San Francisco Diked Baylands, EFH, eelgrass beds, or within the Santa Rosa Plain will help ensure minimal impacts to wetlands. Regional Condition 5 will ensure mitigation for temporary impacts to wetlands to protect against temporal loss of aquatic function.

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

(g) Fish and wildlife values: Same as discussed in the national decision document. NWP 37 authorizations will carefully consider possible impacts to federally-listed species in compliance with general condition 18 and the Magnuson-Stevens Fishery Conservation and Management Act Provisions for EFH. The District will follow protocols outlined in Section 5.0 & 8.0 of this document.

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

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

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

(k) Navigation: Same as discussed in the national decision document. Application to the Coast Guard is required for permits to construct bridges across or over navigable waters.

(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 C.F.R. 1508.7)

The terms and conditions of the NWP, including the PCN requirements and the regional conditions discussed above, 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 PCN process, the District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to the NWP authorization on a case-by-case basis to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the PCN process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number

of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. In 2007 the San Francisco District estimated that this NWP would be used rarely (0-1 times per year), resulting in the loss of approximately 1/10th of an acre of waters of the United States. Review of the number of NWP 37 authorizations issued during the last three years showed that no authorizations under NWP 37 were issued by our District.

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: When necessary it is standard for the District to require implementation of Best Management Practices to ensure that there is no more than a minimal increase in suspended particulates or turbidity in waters of the U.S.

(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. See section 9.1 (g).

(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: Same as discussed in the national decision document. The required PCN for activities proposed on the Santa Rosa Plain will also help ensure that no more than minimal adverse effects are authorized.

(3) Mud flats: Same as discussed in the national decision document. Mitigation could be required for special aquatic sites as necessary to ensure that impacts are no more than minimal.

(4) Vegetated shallows: Same as discussed in the national decision document. Mitigation

could be required for vegetated shallows as necessary to ensure that impacts are no more than minimal.

(5) Coral reefs: Not applicable.

(6) Riffle and pool complexes: Same as discussed in the national decision document. Mitigation could be required for riffle and pool complexes as necessary to ensure impacts are no more than minimal.

(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 C.F.R. 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. Based on an analysis of the types of activities authorized by the District during previous years, the District estimates that this NWP will continue to rarely (0-1 times per year) be used resulting the loss of approximately 0.10 – 0.25 of an acre of waters of the United States. To ensure that these activities result in minimal adverse effects on the aquatic environment, individually and cumulatively, the District estimates that compensatory mitigation at an appropriate minimum 1:1 or higher ratio would occur to offset the authorized losses of waters of the United States. This mitigation requirement in combination with all of the NWP terms and conditions (national and regional) will 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

No specific Regional Conditions applicable to only NWP 37 were determined necessary. Only the general regional conditions listed below would be applicable to NWP 37.

A. General Regional Conditions that apply to all NWPs in the Sacramento, San Francisco, and Los Angeles Districts:

1. When pre-construction notification (PCN) is required, the permittee shall notify the U.S. Army Corps of Engineers, San Francisco District (Corps) in accordance with General Condition 31 using either the South Pacific Division Preconstruction Notification (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. In addition, the PCN shall include:

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

b. Drawings, including plan and cross-section views, clearly depicting the location, size and dimensions of the proposed activity, as well as the location of delineated waters of the U.S. on the site. The drawings shall contain a title block, legend and scale, amount (in cubic yards) and area (in acres) of fill in Corps jurisdiction, including both permanent and temporary fills/structures. The ordinary high water mark or, if tidal waters, the mean high water mark and high tide line, should be shown (in feet), based on National Geodetic Vertical Datum (NGVD) or other appropriate referenced elevation. All drawings for activities located within the boundaries of the Los Angeles District shall comply with the September 15, 2010 Special Public Notice: *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 a representative sample of waters proposed to be impacted on the site, and all waters of the U.S. proposed to be avoided on and immediately adjacent to the activities site. The compass angle and position of each photograph shall be identified on the plan-view drawing(s) required in subpart b of this Regional Condition.

2. The permittee shall submit a PCN, in accordance with General Condition 31, For all activities located in areas designated as Essential Fish Habitat (EFH) by the Pacific Fishery Management Council (i.e., all tidally influenced areas - Federal Register dated March 12, 2007, 72 C.F.R. 11,092, in which case the PCN shall include an EFH assessment and extent of proposed impacts to EFH. Examples of EFH habitat assessments can be found at: http://www.swr.noaa.gov/efh.htm.

3. For activities in which the Corps designates another Federal agency as the lead for compliance with Section 7 of the Endangered Species Act (ESA) of 1973 as amended, 16 U.S.C. §§ 1531-1544, Section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act (EFH), 16 U.S.C. § 1855(b)(4)(B) and/or Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended , 16 U.S.C. §§ 470-470h, the lead Federal agency shall provide all relevant documentation to the appropriate Corps demonstrating any previous consultation efforts, as it pertains to the Corps Regulatory permit area (for Section 7 and EFH compliance) and the Corps Regulatory area of potential effect (APE) (for Section 106 compliance). For activities requiring a PCN, this information shall be submitted with the PCN. If the Corps does not designate another Federal agency as the lead for ESA, EFH and/or NHPA, the Corps will initiate consultation for compliance,

as appropriate.

4. 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.

5. 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.

6. Any requests to waive the 300 linear foot limitation for intermittent and ephemeral streams for NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51 and 52, or to waive the 500 linear foot limitation along the bank for NWP 13, must include the following:

    a. A narrative description of the stream. This should include known information on: volume and duration of flow; the approximate length, width, and depth of the waterbody and characteristics observed associated with an Ordinary High Water Mark (e.g. bed and bank, wrack line or scour marks); a description of the adjacent vegetation community and a statement regarding the wetland status of the adjacent areas (i.e. wetland, non-wetland); surrounding land use; water quality; issues related to cumulative impacts in the watershed, and; any other relevant information;

    b. An analysis of the proposed impacts to the waterbody, in accordance with General Condition 31;

    c. Measures taken to avoid and minimize losses to waters of the U.S., including other methods of constructing the proposed activity(s); and

    d. A compensatory mitigation plan describing how the unavoidable losses are proposed to be offset, in accordance with 33 C.F.R. 332.

B. General Regional Conditions that apply to all NWPs in the San Francisco District:

1. Notification to the Corps (in accordance with General Condition No. 31) is required for any activity permitted by NWP if it will take place in waters or wetlands of the U.S. that are within the **San Francisco Bay diked baylands** (see figure 1) (undeveloped areas currently behind levees that are within the historic margin of the Bay. Diked historic baylands are those areas on the Nichols and Wright map below the 5-foot contour line, National Geodetic Vertical Datum (NGVD) (see Nichols, D.R., and N. A. Wright. 1971. Preliminary

map of historic margins of marshland, San Francisco Bay, California. U.S. Geological Survey Open File Map)). The notification shall explain how avoidance and minimization of losses of waters or wetlands are taken into consideration to the maximum extent practicable (see General Condition 23).

2. Notification to the Corps (in accordance with General Condition No. 31) is required for any activity permitted by NWP if it will take place in waters or wetlands of the U.S. that are within the **Santa Rosa Plain** (see figure 2). The notification will explain how avoidance and minimization of losses of waters or wetlands are taken into consideration to the maximum extent practicable in accordance with General Condition No. 23.

3. Notification to the Corps (in accordance with General Condition No. 31), including a compensatory mitigation plan, habitat assessment, and extent of proposed-project impacts to Eelgrass Beds are required for any activity permitted by NWP if it will take place within or adjacent to **Eelgrass Beds**.

11.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

Pursuant to Section 401 of the Clean Water Act, 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 United States. In accordance with Corps regulations at 33 C.F.R. 330.5 (c) and (d), State 401 conditions for a particular NWP become regional conditions for that NWP. The District recognizes that for some Tribes there may be a need to add regional conditions, or for individual Tribal review for some activities to ensure compliance with water quality standards.

Similarly the California Coastal Commission (CCC) must determine if the re-issuance of the NWP program is consistent with Section 30233 of the California Coast Act. In the past the CCC has determined the NWP is not consistent with the California Coast Act and has recommended that procedures followed during the previous years by the Corps and the Commission continue to be implemented for the NWP program. The San Francisco Bay Conservation and Development Commission (BCDC) must also review the NWP in light of the California Coast Act. In the past, BCDC has requested that Corps state that NWP verifications shall not become effective until the Commission has issued a Commission permit that authorizes the proposed activity. The inclusion of this language with NWP authorizations will continue to be standard practice for the District.

The Environmental Protection Agency must also provide conditional water quality certification of the NWPs for activities proceeding on tribal lands within Region 9. In San Francisco District, the Hoopa Valley Tribe has been delegated certifying authority by EPA. The EPA’s conditional water quality certification does not apply to activities proposed to occur within the Hoopa Tribe's lands but would apply on other tribal lands.

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 PCN requirements of the NWP. Through the PCN process, the 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 C.F.R. 330.4(e) or 33 C.F.R. 330.5 will be used.

13.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 C.F.R. 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.

Date:_____ _____

Michael C. Wehr, P.E.
Col (P), EN
Division Engineer
South Pacific Division