SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 10

This document is a supplement to the national decision document for Nationwide Permit (NWP) 10, and addresses the regional modifications and conditions for this NWP. The San Francisco Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the September 26, 2006, issue of the Federal Register (71 FR 56258), the Corps of Engineers (Corps) published its proposal to reissue the existing NWPs and issue six new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the San Francisco District (District) issued a public notice on October 4, 2006. The issuance of the NWPs was announced in the March 12, 2007, Federal Register notice (72 FR 11092). 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

The San Francisco District received general comments on all NWPs and the District's proposed Regional Conditions.

2.1 General Comments

(a) National Marine Fisheries Service (NMFS), in a letter dated December 8, 2006, recommended that the Corps provide an Essential Fish Habitat (EFH) Assessment (pursuant to Magnuson-Stevens Fishery Conservation and Management Act) as a means of initiating consultation for all NWPs occurring within EFH. NMFS stated that this process will provide conservation recommendations that will contribute to the regional conditioning.

Response: The District partially concurs with this comment from NMFS. At this time it

is not feasible to complete a programmatic level EFH habitat assessment for the NWP program. It is, however, becoming standard practice for the District to provide EFH assessments to NMFS when initiating consultation for activities with potential adverse effects to EFH. In our experience, this process promotes more efficient assessment of project impacts and provides for more practicable conservation recommendations that help safeguard aquatic resources. General regional conditions 3 and 4 address activities proposed to occur within Eelgrass Beds or EFH; respectively. Both regional conditions require notification in order to facilitate consultation with the NMFS. The modified regional conditions require a habitat assessment be included with the notification.

(b) Citizens Committee to Complete the Refuge (CCCR), in a letter dated December 4, 2006; Libby Lucas in a letter dated December 15, 2006; and Guadalupe – Coyote Resource Conservation District (GC RCD), in a letter dated December 4, 2006; all expressed concern that NWPs must ensure minimal impacts, both individually and cumulative, to the aquatic resource. These organizations recommend the following to achieve this goal a) NWP should only authorize activities that are *individually and cumulatively* minimal, b) NWP should be accompanied by strong regional conditions, and c) adequate tracking of watershed level impacts, compensatory mitigation, and cumulative impacts analysis should occur. CCCR believes information regarding specific nationwide permit authorizations should be published in a quarterly report and made available on the District's webpage for public comment.

Response: The NWPs are intended to authorize certain activities that both have minimal adverse effects on the aquatic environment and comply with the related laws cited in 33 CFR 320.2. The terms and conditions of the NWPs, such as Pre-construction Notification (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. Regional conditions provide additional assurances for the protection of unique or fragile resources found in a particular region or state. Regional conditions are an important mechanism to ensure that impacts to the aquatic environment authorized by the NWP are minimal, both individually and cumulatively. The District strives to provide regional conditions which adequately safeguard our unique aquatic resource and to keep careful records of NWP authorizations, associated impacts, and compensatory mitigation. This document discusses the rationale used in determining appropriate regional conditions and addresses comments received during the regional condition public comment period. Currently, software is being developed at the national level that will track national and local regulatory trends even more efficiently. Information is available to the public on specific nationwide permit authorizations in compliance with the Freedom of Information Act (FOIA). While publicly available quarterly reporting will be available when the new database is operational, NWP public comment is not feasible.

(c) Citizens Committee to Complete the Refuge (CCCR), in a letter dated December 4, 2006, recommended that the District Engineer utilize discretionary authority to revoke NWP

use for activities with proposed impacts to wetlands and/or riparian habitat. CCCR believes the losses in these areas are well documented in California and are apparent within the District.

Response: NWPs help relieve regulatory burdens on small entities that need to obtain Department of the Army (DA) 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. Prohibiting the use of NWP in the majority of waters regulated by the District would result in a significant increase in Corps work load and project proponent regulatory burden without achieving increased protections of aquatic resources.

(d) Citizens Committee to Complete the Refuge (CCCR), in a letter dated December 4, 2006 and the Guadalupe – Coyote Resource Conservation District (GC RCD), in a letter dated December 4, 2006, recommended prohibiting NWP authorization of activities within the 100-year floodplain, within Corps jurisdictional vernal pools on the Santa Rosa Plain, and within all jurisdictional vernal pools in the District. These organizations believe these activities should be evaluated with individual permit applications.

Response: General condition 10 states that activities proposed within the 100-year floodplain must comply with applicable Federal Emergency Management Agency (FEMA) approved state or local floodplain management. Further, NWPs are only used to authorize projects with minimal impacts to the aquatic resource. General regional condition 2, states that all activities proposed for the Santa Rosa Plain require a PCN. It is believed that, through case-by-case analyses of proposed activities and inter-agency coordination, the Corps can ensure NWPs only authorize minimal impacts, both individually and cumulatively, within the 100-year floodplain and within Corps jurisdictional vernal pools on the Santa Rosa Plain. In many cases, where jurisdictional vernal pools support federally listed species, these wetlands receive additional review by the USFWS in accordance with general condition 17. As the District Engineer understands the importance of vernal pools as an aquatic resource, activities proposed in these areas receive careful review on a case-by-case basis.

(e) Guadalupe – Coyote Resource Conservation District (GC RCD), in a letter dated December 4, 2006, commented that an emphasis should be placed on protecting anadromous fish species and their habitat from project impacts. CCCR further iterated this concern by recommending required fish passages that safeguards successful migration of steelhead (*Onchorhynchus mykiss*) in coastal watersheds and identified salmonid streams.

Response: There are currently multiple safeguards in place to protect coastal waters and identified salmonid streams. Consultation with the NMFS occurs on all proposed activities 'likely to affect' federally-listed species including listed anadromous fish

species or their critical habitat. Through this process, activity-specific special conditions are developed on a case-by-case basis for proposed activities. Additionally, general condition 2 prohibits NWP verification of any activity that may disrupt the life cycle movements of those species of aquatic life indigenous to the water body; including migratory species. General condition 3 prohibits authorization by NWP activities that cause physical destruction of spawning areas and requires notification for any activity which is proposed to occur in EFH. Proposed activities determined to potentially affect EFH will be referred to NMFS for conservation recommendations. Many anadromous fish species in the District are further protected by the Endangered Species Act (ESA). General condition 17 states that no activity can be authorized under any NWP which is likely to jeopardize the continued existence of a federally listed species, or a species proposed for such designation. No activity can be authorized under any NWP which 'may affect' a listed species or critical habitat, unless Section 7 consultation addressing the effect of the proposed activity occurs. The District contends that general conditions 2, 3, & 17 and the District's general regional condition 4, effectively protect anadromous fish species and their migration corridors within the range of the District. In addition, regional conditions specific to NWPs 3, 13, and 14 all require that new or additional bank stabilizations must incorporate structures or modifications beneficial to fish and wildlife. NWP 14, which may verify culverts, has an added condition (No. 3) encouraging the use of bottomless and embedded culverts.

(f) Citizens Committee to Complete the Refuge (CCCR), in a letter dated December 4, 2006, expressed concern that mitigation for projects authorized by NWP be properly implemented such that all functions and values are replaced. CCCR believes project proponents should be required to complete compensatory mitigation *prior* to initiation of a project and that in-lieu fees should be prohibited. CCCR also expressed concern over the proposal that riparian mitigation may be the only compensatory mitigation required for projects in or near streams or other areas next to open waters. Guadalupe – Coyote Resource Conservation District (GC RCD), in a letter dated December 4, 2006, believes when evaluating compensatory mitigation, strict consideration must be given to hydrologic conditions.

Response: The Corps is strongly committed to assuring that the functional value of unavoidable impacts is offset by compensatory mitigation. The District's general regional condition 5 requires that compensatory mitigation be completed prior to or concurrently with project construction. When the project proponent proposes to use a mitigation bank or in lieu fee to offset project impacts, the required payment must be made prior to commencement of construction. The District places a priority on requiring in-kind mitigation for impacts to the aquatic resource. In rare instance when in-kind mitigation is not possible, mitigation will be achieved through increased compensatory mitigation ratios. In-lieu fees are seldom used by the District but can be an effective way of offsetting impacts to the aquatic environment. General condition 20 and Regulatory Guidance Letter 02-2 outline factors to be considered when determining appropriate and practicable mitigation to ensure minimal adverse effect to the aquatic environment both permanently and temporally. This includes in-kind mitigation for impacts to streams.

Evaluation of hydrologic conditions is standard practice when compensatory mitigation is reviewed.

(g) Citizens Committee to Complete the Refuge (CCCR), in a letter dated December 4, 2006 and the Guadalupe – Coyote Resource Conservation District (GC RCD), in a letter dated December 4, 2006, 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.

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 7 further requires that all activity must be constructed to withstand expected high flows. As discussed above, proposed activities in endangered species habitat requires further review in accordance with general condition 17. Thus case-by-case review and general condition requirements ensure impacts associated with riprap replacement be minimal and thus obviate the need for the requested prohibition. Regional conditions for NWP 13 & 14 activities proposing 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.

(h) Libby Lucas, in a letter dated December 15, 2006, indicated that projects in Santa Clara County may not receive adequate review under NWP due to special constraints of this watershed and its conduits to underground aquifers. Ms. Lucas highlighted her concern by citing the HWY 85, Guadalupe River deepening between 101 and 237, and Matadero Creek Flood Control projects.

Response: The Corps has the discretionary authority to increase the level of review if a proposed project involves impacts to the aquatic environment that are more than minimal. Higher level permit reviews will determine if the proposed fill is in the public interest and is in compliance with Section 404 of the Clean Water Act. The Corps contends that through regional conditions, PCN requirements, acreage and linear foot thresholds, and requirements to coordinate with other resource agencies that sufficient safeguards are in place to provide the necessary adequate protection of the Santa Clara County watershed as well as all aquatic resources within the District.

2.1.1 NWP 10 General Comments

The San Francisco District did not receive general comments on NWP 10.

2.2 Comments on the District's Proposed General Regional Conditions

The District received comments on the following general regional conditions that apply to all NWPs.

2.2.1 Proposed Regional Condition 1

Notification to the Corps (in accordance with General Condition No. 27) 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** (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 20(a)).

(a) No comments on regional condition 1 were received.

2.2.2 Proposed Regional Condition 2

Notification to the Corps (in accordance with General Condition No. 27) 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 1). 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. 20(a).

(a) No comments on regional condition 2 were received.

2.2.3 Proposed Regional Condition 3

Notification to the Corps (in accordance with General Condition No. 27), 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**.

(a) No comments on regional condition 3 were received.

2.2.4 Proposed Regional Condition 4

Notification to the Corps (in accordance with General Condition No. 27) is required for any activity permitted by NWP in **Essential Fish Habitat** (EFH) designated by the Pacific Fishery Management Council (examples of designated EFH are, but not limited to: the Pacific Ocean, estuaries like Tomales, San Francisco and Humboldt Bays, and watersheds utilized by coho and chinook salmon). Notification shall include a habitat assessment and extent of proposed-project impacts to EFH. Notification under this regional condition is not required if another Federal agency has completed consultation with the National Marine Fisheries Service on EFH, and the project is either authorized by a non-reporting NWP or does not require notification by another regional condition.

(a) National Marine Fisheries Service (NMFS), in a letter dated December 8, 2006, recommended that the Corps provide an Essential Fish Habitat (EFH) Assessment (pursuant to Magnuson-Stevens Fishery Conservation and Management Act) as a means of initiating consultation for all NWPs occurring within EFH.

Response: See section 2.1(a)

2.2.5 Proposed Regional Condition 5

Mitigation that is required by special condition to the permitted activity shall be completed before or concurrent with project construction. Where project mitigation involves the use of a mitigation bank or in-lieu fee, the required payment must be made before commencing construction of the permitted activity. If the permittee cannot comply with this condition, the permittee shall provide the Corps with sound reasoning why this condition cannot be met, and shall propose reasonable alternatives to ensure the required mitigation will be fully met and completed in a timely manner.

(a) San Francisco Bay Regional Water Quality Control Board (RWQCB), letter dated November 20, 2006, supports general regional condition 5 (formally general regional condition 4). The RWQCB recommends the condition state that additional mitigation may be required to compensate for temporal losses that may occur between the time at which mitigation is constructed and when the mitigation achieves full habitat function.

Response: The Corps concurs with the RWQCB and works to attain full replacement of function and value of the aquatic environment including compensation for temporal losses as outlined in Regulatory Guidance Letter 02-2 and general condition 20. For wetlands, the objective is to provide, at a minimum "no net loss" with a margin of safety to reflect anticipated success.

2.2.6 Proposed Regional Condition 6

Any request to waive the 300 linear foot limitation for intermittent and ephemeral streams must include the following:

a) an analysis of the impacts to the stream environment;
b) measures taken to avoid and minimize losses;
c) other project alternatives that would considered but were found not to be practical;
d) a mitigation plan as to how the unavoidable losses will be offset.

(a) Citizens Committee to Complete the Refuge (CCCR), letter dated December 4, 2006, and Guadalupe – Coyote Resource Conservation District (GC RCD), in a letter dated December 4, 2006, recommended the waiver of the 300 linear foot (LF) limit be prohibited. The organizations also recommend an imposition of a strict 300 LF limit on the placement of fill in perennial, intermittent, and ephemeral streams because the level of review under the NWP is insufficient, in their opinion,

to properly evaluate the proposed activities impacts.

Response: We contend that the waiver process should not be prohibited at this time since the Corps reviews proposed activities to determine if activities will result in more than minimal impacts to the aquatic environment. At the time of NWP renewal in 2002, similar concerns regarding the waiver process were expressed by The Ocean Conservancy. The Corps has not observed more than minimal impacts associated with activities for which the waiver has been utilized since that time. 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 is also normally required to offset the losses of waters of the U.S.

2.2.7 Proposed Regional Condition 7

General Condition No. 27(b), Contents of Pre-Construction Notification: Accurate drawings are **always** required. The drawings can be schematic but should contain, at minimum, an appropriate title block, legends and scales (if practical), amount (in cubic yards) and size (in acreage or fraction thereof) of fill or activity in Corps jurisdiction, including both permanent and temporary fills/structures. If a waterbody is involved, the ordinary high water mark, estimated highest tide line, or mean high water mark should be shown (in feet); if possible, based on NGVD or other appropriate referenced elevation. The drawings should clearly depict the project location, and include plan and cross-section views.

(a) No comments on regional condition 7 were received.

2.3 Comments on Proposed Regional Conditions NWP 10.

The District did not propose regional conditions applicable only to NWP 10. The District also did not receive comments suggesting additional regional conditions.

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

3.1 Waters excluded from use of this NWP

No waters are excluded from the NWPs except those restrictions already stated in the general conditions of the March 12, 2007 Federal Register.

3.2 Waters subjected to additional pre-construction notification requirements

3.2.1 Waters or Wetlands of the U.S. Located within the San Francisco Bay Diked Baylands

The District's general regional condition 1 requires a PCN be provided for any fill

discharge verified by a NWP within the San Francisco Bay diked baylands, including undeveloped areas currently behind levees that are within the historic margin of the Bay. In accordance with general condition 20(a) PCN evaluation will ensure avoidance and minimization of losses of waters or wetlands to the maximum extent practicable. Through PCNs the Corps will also be able to better ensure CWA compliance for activities within San Francisco Bay diked baylands, and will ensure careful record keeping of impacts and consequent cumulative impacts analysis and required mitigation.

3.2.2 Santa Rosa Plain

See discussion in General Comments Section above 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. General regional condition 2 requires a PCN for any proposed fill discharge verified by a NWP. In previous years, pre-construction notification for fill discharges in the Santa Rosa Plain (figure 1a) required a complete Habitat Quality Evaluation (HQE) be performed according to the most recent version of the "Training Manual to Evaluate Habitat Quality of Vernal Pool Ecosystem Sites in Santa Rosa Plain." The purpose of the HQE process was to provide a uniform assessment of the quality of the vernal pool ecosystem within the Santa Rosa Plain to be used in consultation with the USFWS. The HQE was further used to determine which activities would qualify to be appended to the "*Programmatic Formal Consultation for U.S. Army Corps of Engineers 404 permitted projects that May Affect Four Endangered Species on the Santa Rosa Plain, California*" dated July 17, 1998. Currently the USFWS is rewriting this Biological Opinion to encompass all fill discharges proposed to occur on the Santa Rosa Plain regardless of HQE outcomes. For this reason, it is not currently necessary to require the HQE as part of the PCN. However, the HQE is still available as a tool to assess the wetland functions at the proposed discharge site in order to formulate an approximate compensatory mitigation proposal.

Please note that Santa Rosa Plan Figure 1a will be replaced by Figure 1b. 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 the listed plant species. PCN for all authorizations on the Santa Rosa Plain, however, are required to ensure adequate evaluation of impacts to the aquatic resources and to ensure compliance with the CWA and ESA.

3.2.3 Eel Grass Beds

The District's general regional condition 3 requires a PCN, habitat assessment, extent of impacts assessment, and compensatory mitigation plan for any fill discharge verified by a NWP proposed to take place 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.

3.2.4 Essential Fish Habitat

The District's general regional condition 4 requires a PCN for any proposed fill discharge verified by a NWP proposed to take place in EFH. As discussed in Section 6.0 below, pursuant to Magnuson-Stevens Fishery Conservation and Management Act, fill discharges with 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 aerial extent of affected area) will ensure timely and efficient consultation.

3.2.5 Requests to Waive the 300 Linear Foot Limit

In accordance with general regional condition 6, 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 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 Corps to gain a better perspective on proposed project's total impacts in order to make a case-by-case assessment regarding minimal effects.

4.0 Alternatives

4.1 No Action Alternative (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 District's general regional conditions 1 – 7 apply to NWP 10. Revoking these regional general conditions would reduce the ability of the District to properly evaluate fill discharges potentially affecting aquatic resources within the San Francisco Bay Diked Baylands, Eel Grass Beds, and EFH (see section 3.2 (1) (3) and (4)). In addition, provision of 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. 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 section 2.1(b) and (f) multiple organizations expressed concern that the District requires proper mitigation that meets the "no net loss" policy of the Corps, including safeguard against temporal losses of aquatic function. The implementation of general regional conditions 1-7 ensures that the District both evaluates projects in specified waters (i.e. EFH, Eel Grass beds, and Bay 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 10 including increased threshold limits in EFH, Eel Grass beds, and Bay Diked Baylands. The District also considered implication of revoking NWP 10 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 for aquatic resources discussed in section 3.2 (1), (3), and (4) 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 10 does not authorize activities with more than minimal adverse effects on the aquatic environment. Implementation of additional regional conditions would only create unnecessary regulatory burdens or increased applicant cost. Recommendations for additional regional conditions for NWP 10 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 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

During the re-issuance of the 2002 NWPs, the District participated in preliminary discussions concerning Standard Local Operating Procedures for Endangered Species (SLOPES) with the USFWS field offices in Sacramento and Arcata. The development of SLOPES was never completed due to a variety of factors. The District will continue to consult on federally-listed species as described in Section 5.1 above.

6.0 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 CFR Part 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 CFR Part 600, subpart K. See above section 2.0 (a) and (f) for further discussion.

7.0 Supplement to National Impact Analysis

The District has fully considered all the comments submitted and to the maximum extent possible incorporated the concerns of the public into its regional conditions for this NWP.

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

In addition to the discussion in the national decision document for this NWP, the 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.

(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 10 authorizations will carefully consider possible impacts to federally-listed species in compliance with general condition 17 and the Magnuson-Stevens Fishery Conservation and Management Act Provisions for EFH. The District will follow protocols outlined in Section 5.0 & 6.0 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.

(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. The State Water Resources Control Board (SWRCB) elected to issue a 401 water quality certification for this NWP.

(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.

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

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

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

(c) Water: No impact on potable 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 7.1 (g).

(h) Fish, crustaceans, molluscs, and other aquatic organisms in the food web: Same as discussed in the national decision document. The required notification will also help ensure minimal impact to aquatic organisms in the food web.

(i) Other wildlife: See item (h) above.

(j) Special aquatic sites: This NWP authorizes activities pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. Section 403).

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

(2) Wetlands: Same as discussed in the national decision document. See section 7.1 (e).

(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. With notification, these sites will be appropriately reviewed to ensure impacts are minimal.

8.0 List of Final Corps Regional Conditions for NWP 10.

There are no regional conditions applicable only to NWP 10.

9.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

In a letter dated May 1, 2007 the State Water Resources Control Board (SWRCB) elected to issue certifications for those NWPs covering activities that are categorically exempt from the California Environmental Quality Act (CEQA). This resulted in certification for 14 of the 49 NWPs (Nos. 1, 4, 5, 6, 9, **10**, 11, 20, 22, 24, 28, 32, 34, and 38) contingent on adherence to associated conditions (see conditions in attached letter). Any authorization for NWPs not certified by the SWRCB must receive independent evaluation through the Section 401 water quality certification process.

In a letter dated April 17, 2007 the California Coastal Commission stated that re-issuance of the NWP program was not consistent with Section 30233 of the California Coast Act. The Commission recommended that procedures followed during the previous five years by the Corps and the Commission continue to be implemented for the NWP program in the next five years.

In a letter dated November 22, 2006 the San Francisco Bay Conservation and Development Commission (BCDC) 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, in a letter dated January 11, 2007, provided conditional water quality certification of the NWPs for activities proceeding on tribal lands within Region 9. In San Francisco District, only 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. Thirty of the NWPs were programmatically certified and fifteen were certified with permit-specific conditions (see conditions in attached letter). In addition, notification submitted to EPA Region 9 is required for any activity proposed to occur on tribal land (with the exception of Hoopa Valley tribal lands).

10.0 Cumulative Impacts

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. Based on an analysis of the types of activities authorized by the San Francisco District during previous five years, the San Francisco District estimates that this NWP will be rarely used (0-1 times in the next five years), resulting the loss of approximately 1/10 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 San Francisco District estimates that approximately1/10 of an acre of compensatory mitigation will be required to offset the authorized losses of waters of the United States and ensure that the NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment.

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 8.0 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 19, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, the San Francisco District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to the NWP authorization on a case-by-case basis to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

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

11.0 Final Determination

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

the aquatic environment, individually or cumulatively.

Date:_____

_____
John R. McMahon
Brigadier General, U.S. Army
Division Engineer