



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, LOS ANGELES DISTRICT
915 WILSHIRE BOULEVARD, SUITE 930
LOS ANGELES, CALIFORNIA 90017-3489

November 16, 2021

Office of
District Counsel

Che Fitchett
Legal Fellow
Center for Food Safety
303 Sacramento Street, 2nd Fl
San Francisco, CA 94111

Dear Mr. Fitchett,

This letter concerns your Freedom of Information Act (FOIA) request dated November 16, 2021. Your request has been assigned number FA-22-0015, copy enclosed. Please use this reference number in any further correspondence.

For your information, requests for access to federal agency records are processed only under the Freedom of Information Act. Requests must be in writing, must reasonably describe the records requested, contain an adequate fee declaration and be received by the FOIA Officer before they are considered properly received. Once a request is deemed received, an agency has twenty working days to determine whether to comply with the request, unless unusual circumstances exist, 5 U.S.C. §552(a)(6)(A)(i) and 5 U.S.C. §552(a)(6)(B)(iii). I have classified you as an All Others requester under 32 C.F.R. § 518.85(b)(2)(iii).

We are currently processing your request. Please be advised that disruption to normal operations caused by the COVID-19 public health emergency may result in responses to FOIA requests being delayed. Your patience and cooperation in this matter are appreciated. If you have any questions, please contact me at hannah.gae@usace.army.mil.

Sincerely,

A handwritten signature in cursive script that reads "Hannah Gae".

Hannah Gae
Paralegal Specialist

Enclosure

November 16, 2021

U.S. Army Corps of Engineers
Los Angeles Office of Counsel
Attn: FOIA Officer, CESPL-OC
915 Wilshire Blvd.
Los Angeles, CA 90017
Email: foia-spl@usace.army.mil

SUBMITTED VIA EMAIL

RE: Freedom of Information Act Request

To the United States Army Corps of Engineers (USACE) FOIA Officer:

The Center for Food Safety (CFS) is a 501(c)(3) national non-profit public interest and environmental advocacy organization working to protect human health and the environment by curbing the use of harmful food production technologies and by promoting organic and other forms of sustainable agriculture. CFS works to maintain strong government regulations and policies related to commercial aquaculture operations. Consistent with this mission and pursuant to 7 C.F.R. Part 510 and the Freedom of Information Act, 5 U.S.C. § 552, CFS respectfully requests the following information:

1. **Any final Supplemental Decision Document from the Los Angeles District of the U.S. Army Corps of Engineers regarding the 2021 Nationwide Permit (NWP) 55 for seaweed aquaculture.**
2. **Any final Supplemental Decision Document from the Los Angeles District of the U.S. Army Corps of Engineers regarding the 2021 NWP 56 for finfish aquaculture.**

“All documents” includes but is not limited to all correspondence, minutes, memoranda, communications and/or other documents received from or given to other agencies, maps, plans, drawings, emails, reports, databases, and phone notes. This request includes all documents that have ever been within your custody or control, whether they exist in agency “working,” investigative, retired, electronic mail, or other files currently or at any other time.

This request is being sent to the USACE FOIA officer with the understanding that it will be forwarded to other officers, offices, or departments with information pertinent to this request.

REQUEST FOR FEE-WAIVER

CFS requests that pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), USACE waive all fees in connection with the procurement of this information. As demonstrated below, the nature of this request meets the test for fee waiver as expressed in the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(iii).

In deciding whether the fee waiver criteria is satisfied, CFS respectfully reminds USACE that FOIA is inclined toward disclosure and that the fee waiver amendments were enacted to allow further disclosure to nonprofit, public interest organizations. See 132 Cong. Rec. S. 14270-01, (statement of Sen. Leahy) (“[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information.”) Furthermore, the Ninth Circuit Court of Appeals has interpreted this fee waiver section broadly, holding that the section “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy).

I. THE PRESENT DISCLOSURE IS IN THE PUBLIC INTEREST BECAUSE IT WILL SIGNIFICANTLY CONTRIBUTE TO PUBLIC UNDERSTANDING OF THE OPERATIONS OR ACTIVITIES OF GOVERNMENT.

The requested disclosure will contribute to public understanding of the operations or activities of the government. 5 U.S.C. § 552(a)(4)(A)(iii).

A. The subject of the disclosure concerns “the operations and activities of the government.”

The requested information pertains to USACE’s regulation of commercial aquaculture operations in accordance with its obligations under the Rivers and Harbors Act. USACE is the agency within the Department of Defense responsible for issuing permits pursuant to Section 10 of the Rivers and Harbors Act, and in particular NWP 55 and 56 for Commercial Seaweed Aquaculture and Commercial Finfish Aquaculture activities. It is irrefutable that USACE’s regulatory oversight of and issuance of permits for commercial aquaculture is a clearly identifiable operation of the government. This disclosure will demonstrate to the public at large the nature of USACE’s regulation of commercial seaweed and finfish aquaculture and the frequency at which USACE is granting NWP 55 and 56 in California.

B. The disclosure is “likely to contribute significantly to public understanding” of government operations or activities.

As discussed in the previous section, the present disclosure will inform the public at large about USACE’s regulatory oversight of commercial aquaculture pursuant to the agency’s duties under Section 10 of the Rivers and Harbors Act. The requested documents and communications are not already public and will help demonstrate to the public at large USACE’s analytic process,

conclusions, and generally held knowledge concerning the issuance of NWP 55 and 56 to commercial operations in California.

CFS is a nonprofit, public interest organization that empowers people, supports farmers, and protects the environment from the harms of industrial food production. CFS works to promote strong label standards that adequately disclose the process and ingredients that comprise food products. With over 970,000 farmer and consumer supporters nationwide, CFS informs, educates, and counsels the public – via legal action, publicity campaigns, our website, our True Food Network, books, and reports – about the harm done to human health, animal welfare, and the environment by industrial agriculture. Through nearly two decades of involvement in technical analysis, environmental litigation, and policymaking as it relates to food and environmental impacts, CFS has demonstrated its ability to take technical information provided by government agencies and distill it into a format that is accessible to the public. CFS puts out reports on a variety of topics, including genetically engineered foods, aquaculture, pesticides, food and feed additives, organic standards, and other topics that tend to be difficult for the layperson to understand without professional assistance. CFS and its membership, along with the general public, are concerned about the safety and impacts of their food production on the environment, and specifically the impacts of seaweed and finfish production in California on native wildlife and nearshore ecosystems of California. Accordingly, CFS is an effective vehicle to disseminate information pertaining to USACE’s regulatory oversight and issuance of NWP 55 and 56 to carry out commercial aquaculture operations in California.

Simultaneously, this FOIA will help CFS fulfill its well established function of public oversight of government action. Public oversight of agency action in particular is a vital component in our democratic system and is the bedrock upon which FOIA stands.

II. OBTAINING THE INFORMATION IS OF NO COMMERCIAL INTEREST TO THE CENTER.

The Center for Food Safety is a 501(c)(3) non-profit environmental advocacy organization that works to address the impacts of our food production system on human health, animal welfare, and the environment. CFS works to achieve its goals through grassroots campaigns, public education, media outreach, and litigation. Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. *See e.g.*, OMB Fee Guidelines, 52 Fed. Reg. 10017-18. Such interests are not present in this request. In no manner does CFS seek information from the USACE for commercial gain or interest. CFS respectfully files this FOIA request pursuant to its goal of educating the general public on USACE’s regulatory oversight and decision-making process in issuing NWP 55 and 56 to commercial aquaculture operations in California. Upon request and free of charge, CFS will provide members of the public with relevant information obtained from USACE as a result of this request.

Based upon the foregoing, CFS requests that this FOIA be classified within the USACE’s fee waiver category and that USACE send the requested information as required by law. As this is a matter of extreme importance to CFS, we look forward to your reply within twenty working days

as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i). If the responsive records are voluminous please contact me to discuss the proper scope of the response. If any exemption from FOIA's disclosure requirement is claimed, please describe in writing the general nature of the document and the particular legal basis upon which the exemption is claimed. Should any document be redacted, please indicate the location of the redaction through the use of black ink. Please provide any and all non-exempt portions of any document which may be partially exempt due to some privilege as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

Please send all materials to cfitchett@centerforfoodsafety.org. Electronic materials are preferred but if records must be mailed, please send to 303 Sacramento Street, 2nd Floor, San Francisco, CA 94111. Please call me at 415-533-7815 or email me at cfitchett@centerforfoodsafety.org if you have any further questions about this request. Thank you for your attention to this request.

Sincerely,

/s/ Che Fitchett

Che Fitchett

Legal Fellow

Center for Food Safety

303 Sacramento Street, 2nd Floor

San Francisco, CA 94111

P: 415-533-7815

cfitchett@centerforfoodsafety.org



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT
1325 J STREET
SACRAMENTO CA 95814-2922
April 6, 2022

Office of Counsel

SUBJECT: Freedom of Information Act Request No. FA-22-0082: Any Final Supplemental Decision Documents from the United States Army Corps of Engineers (USACE) Sacramento District Regarding the 2021 Nationwide Permit (NWP) 55 for Seaweed Aquaculture and the 2021 NWP 56 for Finfish Aquaculture

Ms. Che Fitchett
Legal Fellow
Center for Food Safety
303 Sacramento Street, 2nd Floor
San Francisco, California 94111

Dear Ms. Fitchett,

On March 9, 2022, our office received your Freedom of Information Act (FOIA) request for copies of any final supplemental decision documents from the USACE Sacramento District regarding the 2021 NWP 55 for seaweed aquaculture and the 2021 NWP 56 for finfish aquaculture.

I have determined that your request meets all statutory requirements for a complete fee waiver; therefore, no payment is required for this request.

A copy of the redacted any final supplemental decision documents from the USACE Sacramento District regarding the 2021 NWP 55 for seaweed aquaculture and the 2021 NWP 56 for finfish aquaculture is enclosed.

Although the bulk of the requested information has been provided, names and phone numbers of Department of Defense (DoD) employees contained in the headers of e-mails and other similar lists of names within the records have been redacted pursuant to 5 U.S.C. § 552 (b)(6) of the Freedom of Information Act. In response to the terrorist attacks on the United States in the fall of 2001, DoD revised its policies which implement the Freedom of Information Act. At that time, the decision was made to withhold lists of names and phone numbers of all DoD employees. The court upheld this policy decision stating, "The privacy interest protected by exemption six of the Freedom of Information Act encompasses not only the addresses, but also the names of federal employees." See Judicial Watch, Inc. v. United States, 84 Fed. Appx. 335 (4th Cir. (2004)).

Because your request has been partially denied, you are advised of your right to appeal this determination through this office to the Secretary of the Army (ATTN: General Counsel). Your appeal must be postmarked or electronically transmitted within

90 days of the date of this letter. The envelope containing the appeal should bear the notation "Freedom of Information Act Appeal" and should be sent to: U. S. Army Corps of Engineers, Sacramento District, ATTN: CESPCK-OC, 1325 J Street, Room 1440, Sacramento, California 95814.

For any further assistance or to discuss any aspect of your request, you have the right to contact the U.S. Army Corps of Engineers FOIA Public Liaison. Additionally, you have the right to contact the Office of Government Information Services (OGIS) to inquire about FOIA mediation services they offer. Contact Information:

U.S. Army Corps of Engineers
FOIA Public Liaison
441 G. Street, NW
ATTN: CECC-L (Emily Green)
Washington, DC 20314-1000
Email: foia-liaison@usace.army.mil
Phone: 202-761-4791

Office of Government Information Services
National Archives and records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740-6001
E-Mail: ogis@nara.gov
Phone: 202-741-5770 or
Toll Free: 877-684-6448

If you have any questions regarding the provided information, please contact Andrea Vaiasicca, FOIA Specialist, by email at Andrea.L.Vaiasicca@usace.army.mil or by phone at (916) 550-9104.

Sincerely,



A. L. Faustino
Initial Denial Authority
District Counsel

APPENDIX A

*CWA Section 401 WQC
Memorandum for
Record and 401 WQCs*

MEMORANDUM FOR RECORD

SUBJECT: Section 401 Water Quality Certifications for the State of California for the 2021 Nationwide Permits

1. On January 13, 2021, the U.S. Army Corps of Engineers (Corps) published a final rule in the Federal Register (86 FR 2744) announcing the reissuance of twelve existing nationwide permits (NWP) and four new NWP, as well as the reissuance of NWP general conditions and definitions with some modifications. The 16 NWP that will go into effect on March 15, 2021, are NWP 12, 21, 29, 39, 40, 42,43, 44, 48, 50, 51, 52, 55, 56, 57, and 58. The remaining NWP will expire on March 19, 2022, and are not being evaluated in this memo.
2. In October 2020, the Los Angeles (SPL), Sacramento (SPK), and San Francisco (SPN) Districts requested 401 water quality certification (WQC) for the proposed 2021 NWP (except NWP 55 and 56) from certifying agencies in California as follows:
 - a. SPL: On October 15, 2020, SPL requested WQC from Bishop Paiute Tribe, Big Pine Paiute Tribe, Cabazon Band of Mission Indians, Twenty-Nine Palms Band of Mission Indians, Morongo Band of Mission Indians, Pala Band of Mission Indians, and Rincon Band of Luiseño Indians.
 - b. SPN: On October 16, 2020, SPN requested WQC from Hoopa Valley Indian Reservation, Dry Creek Rancheria Band of Pomo Indians, Quartz Valley Indian Community, and Karuk Tribe.
 - c. SPK: On October 13, 2020, SPK requested WQC from California State Water Resources Control Board (SWRCB), U.S. Environmental Protection Agency, Region 9 (USEPA), and Kletsel Dehe Wintun Nation. As the lead District for California, SPK requested WQC from the SWRCB and USEPA on behalf of SPL and SPN.
3. Because no responses were received from the Cabazon Band of Mission Indians (SPL), Kletsel Dehe Wintun Nation (SPK), Quartz Valley Indian Community (SPN) and Karuk Tribe (SPN) within the reasonable period of time, the 401 WQCs are waived per 40 CFR 121.9(a)(2)(i).
4. We have reviewed the responses received from the certifying agencies for compliance with Section 401 of the Clean Water Act, including compliance with 40 CFR 121.7(d)(2) and 121.7(e)(2).
 - a. Bishop Paiute Tribe: On December 7, 2020, the Bishop Paiute Tribe denied certification for all NWP. The denial meets the requirements of 40 CFR 121.7(e)(2). Thus, individual certification is required for the 16 NWP.

b. Big Pine Paiute Tribe: On December 15, 2020, the Big Pine Paiute Tribe denied certification for all NWP. The denial meets the requirements of 40 CFR 121.7(e)(2). Thus, individual certification is required for the 16 NWP.

c. Twenty-Nine Palms Band of Mission Indians: On December 7, 2020, the Twenty-Nine Palms Band of Mission Indians denied certification for all NWP. The denial meets the requirements of 40 CFR 121.7(e)(2). Thus, individual certification is required for the 16 NWP.

d. Morongo Band of Mission Indians: On December 11, 2020, the Morongo Tribe granted certification for eleven NWP (21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52), and denied certification for three NWP (12, 57, and 58). The certified NWP would be subject to four conditions. The conditions meet the requirements 40 CFR 121.7(d)(2) and the denials meet the requirements of 40 CFR 121.7(e)(2). Thus, NWP 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, and 52 are granted with conditions, and NWP 12, 57, and 58 are denied and require individual certification.

e. Pala Band of Mission Indians: On December 14, 2020, the Pala Band of Mission Indians granted WQC for all 16 NWP, subject to three conditions. The conditions meet the requirements of 40 CFR 121.7(d)(2). Thus, NWP 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 57, and 58, are certified with condition.

f. Rincon Band of Luiseño Indians: On December 15, 2020, the Rincon Band of Luiseño Indians denied certification for all NWP. The denial meets the requirements of 40 CFR 121.7(e)(2). Thus, individual certification is required for the 16 NWP.

g. Hoopa Valley Indian Reservation: On December 14, 2020, the Hoopa Valley Indian Reservation denied certification for all NWP. The denial meets the requirements of 40 CFR 121.7(e)(2). Thus, individual certification is required for the 16 NWP.

h. Dry Creek Rancheria Band of Pomo Indians: On December 15, 2020, the Dry Creek Rancheria Band of Pomo Indians denied certification for twelve of NWP (12, 21, 29, 39, 40, 42, 43, 44, 50, 51, 57, and 58) and did not respond to the certification request for two of the NWP (48 and 52). The denial meets the requirements of 40 CFR 121.7(e)(2). Thus, individual certification is required for NWP 12, 21, 29, 39, 40, 42, 43, 44, 50, 51, 57, and 58, and is waived for NWP 48 and 52.

i. USEPA, Region 9: On December 12, 2020, USEPA Region 9 responded to the certification request, granting WQC for one NWP (NWP 43), denying certification for nine NWP (12, 29, 39, 40, 42, 44, 51, 57, and 58, and expressly waiving certification for four NWP (21, 48, 50, and 52). Certification for NWP 43 would be subject to two conditions. The conditions meet the requirements 40 CFR 121.7(d)(2) and the denials meet the requirements of 40 CFR 121.7(e)(2). There is no action to be taken on the waived NWP. Thus, NWP 21, 48, 50, and 52 are waived, NWP 43 is granted with condition, and NWP 12, 29, 39, 40, 42, 44, 51, 57, and 58 are denied and will require individual certification.

j. California SWRCB: On December 9, 2020, the SWRCB granted certification with conditions for three of the NWP's (12, 57, and 58), and denied certification for thirteen (21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, and 56). The denials meet the requirements of 40 CFR 121.7(e)(2). In their WQC, the SWRCB added reopener clauses, conditions that do not meet the requirements of 40 CFR 121.7(d)(2), conditions that modify the Regulatory process, place additional burden on the Districts or are unenforceable, or conditions that severely limit the applicability of the 401 WQC to be used.

(1) Reopener Clause: Findings 5 and 7, and General Conditions 1, D(4), and E(4) contain reopener clauses that either identify that the SWRCB has authority to modify or revoke the WQC or that the SWRCB may require individual certification for activities covered under the WQC. These types of reopener clauses are not allowed by the Clean Water Act (CWA). As identified in the Section 401 Certification Rule issued by the USEPA, which went into effect on September 11, 2020 (40 CFR 121.6(e)), certifying agencies are "not authorized to take any action to extend the reasonable period of time other than specified in §121.6(d)." A full discussion of these reopener clauses and the reasons they are neither authorized by nor consistent with Section 401 CWA is in preamble of the Final Rule issued by USEPA (85 FR 42279-42280). The reopener clauses added by SWRCB apply to all NWP's for which WQC was granted.

(2) Conditions do not meet the requirements of 40 CFR 121.7(d)(2): A number of conditions of the WQC issued by the SWRCB do not meet the requirements of 40 CFR 121.7(d)(2). For example, the justification for General Conditions A(1) through A(3) state only that they are being added as required by the California Code of Regulations, and do not explain why the conditions are necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements. Failure to meet the requirements of 40 CFR 121.7(d)(2) can be found in other conditions of the WQC, including, but not limited to Condition A(5) and A(17)(d)-(f).

(3) Conditions that modify the Corps' Regulatory Process, place additional burden on the Districts, or are unenforceable: A number of conditions placed on the WQC, while meeting the requirements of 40 CFR 121.7(d)(2), either modify the Corps' processes, place additional burdens on the Districts, or are unenforceable. Condition B(17) contains requirements for waters of the state, many of which are not waters of the U.S. under the our jurisdiction, and therefore are not enforceable. Condition E requires that the notification provided to the Regional Board contain information not required by 40 CFR 121.5. Conditions G(2), G(3), and G(4) require compensatory mitigation for permanent impacts to waters of the state for NWP's 12, 57, and 58; require that prior to submitting notification for an individual project, the applicant submit a letter of credit in favor of the SWRCB for the purchase of mitigation bank or in-lieu fee program credits to offset the total anticipated permanent impacts for all proposed projects for the current year; require the submittal of a draft mitigation plan every year; and identify a required compensatory mitigation ratio for permanent impacts. These requirements in G(2), G(3), and G(4) modify the Corps' compensatory mitigation requirements in General Condition 23, require the applicant take action on projects that may not be covered under the 401 WQC or require a Corps' permit, and place burdens for multiple mitigation plans to be submitted.

(4) The conditions placed severely limit the applicability of the WQC to be used for projects. The SWRCB only certified NWP 12, 57, and 58, then further limited the use of these NWPs with the conditions placed on the WQC. These include precluding the use of the WQC for activities: involving a hydroelectric facility requiring FERC license or amendment except in certain cases (Condition B(2); where we issue a written waiver (Condition B(9)); where more than one NWP is being issued (except NWP 12, 58, and 59) (Condition B(10)); that require compensatory mitigation except in certain cases (Condition B(11)); and that impact histosols, fens, bogs, peatlands, wetlands contiguous with fens, and vernal pools (Condition B(12)). Condition C(8) of the WQC further restricts its use by requiring that excavated material be disposed of in an upland area, unless utilized for restoration. In addition, Condition F(2) provides more extensive limits to the threshold for impacts under NWP 12, 57, and 58, limiting permanent impacts to 0.005 acre and 50 linear feet, and temporary impacts to 0.5 acre and 400 linear feet. Finally, Conditions G(2)(a), G(3)(a), and G(4)(4) prohibit the use of NWP 12, 57, and 58, within the Lake Tahoe hydrologic unit code (HUC), the Truckee River HUC, and the Little Truckee River HUC, and provides other restrictions on the use of NWP 12, 57, and 58.

A number of actions could be taken to address the issues identified above, including deferring decisions related to reopener clauses until a later date, waiving certain conditions that do not meet the requirements of 40 CFR 121.7(d)(2), and declining certain conditions. However, taking multiple action for different parts of the WQC would lead to substantial confusion for both staff and the regulated public when the WQC issued by the SWRCB has been restricted such that it has limited utility for use. Thus, the WQC is declined and individual certification will be required for each of the 16 NWPs being issued.

5. The information for each WQC, as described above, will be incorporated into the final supplements we are preparing for the twelve reissued NWPs and four new NWPs. In addition, we will provide written notification to HQUSACE, USEPA, and the certifying authorities of any waiver of certification requirements, conditions, or denials, as required in 40 CFR 121.9(c). For the remaining 40 NWPs that have not been issued, a determination on the 401 WQCs will be made at a later time, consistent with this memorandum.

(b) (6)

CHIEF, REGULATORY DIVISION



State Water Resources Control Board

Certified Mail: 7018 1830 0000 3999 9878

December 9, 2020

(b) (6)

U.S. Army Corps of Engineers, Sacramento District
1325 J Street
Sacramento, CA 95814-2922

RE: GENERAL ORDER FOR CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION ACTION FOR THE U.S. ARMY CORPS' NATIONWIDE PERMITS (SB20031GN)

(b) (6) :

Enclosed please find a GENERAL ORDER FOR CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION ACTION, authorized by State Water Resources Control Board Executive Director, Eileen Sobeck. This General Order is issued to the U.S. Army Corps of Engineers for the State Water Board Certification and Denial of the Nationwide Permits. Attachments A through E of the Enclosure are also part of the General Order.

This General Order is issued in response to a certification request submitted by the U.S. Army Corps of Engineers on October 13, 2020, for proposed discharges to waters of the state, to ensure that the water quality standards for all waters of the state impacted by the Project are met.

If you require further assistance, please contact Paul Hann by phone at (916) 341-5726 or by email at Paul.Hann@waterboards.ca.gov. You may also contact Beth Payne, Chief of the Wetlands Permitting and Planning Unit by phone at (916) 341-5579 or by email at Elizabeth.Payne@waterboards.ca.gov.

Sincerely,

Eileen Sobeck, Executive Director

Enclosure (1): General Order for Clean Water Act Section 401 Water Quality Certification Action for the U.S. Army Corps' Nationwide Permits

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

cc: [Via email only] (w/ enclosure):

Sam Ziegler
Chief, Wetlands Regulatory Office (WTR-8)
U.S. Environmental Protection Agency, Region 9
Ziegler.Sam@epa.gov

(b) (6)

Acting Chief, Regulatory Branch
South Pacific Division, San Francisco District
U.S. Army Corps of Engineers
James.C.Mazza@usace.army.mil

(b) (6)

Chief, Regulatory Branch
South Pacific Division, Los Angeles District
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David.J.Castanon@usace.army.mil

(b) (6)

Ecologist
South Pacific Division, Sacramento District
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Joshua Grover
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Karen Mogus, Deputy Director
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State Water Resources Control Board
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Patrick Pulupa
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Mike Plaziak
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Paula Rasmussen
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Hope Smythe
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Executive Officer
San Diego Regional Water Quality Control Board
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Gil Falcone
Regional Program Manager
North Coast Regional Water Quality Control Board
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Ryan Bey
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Ryan.Bey@waterboards.ca.gov

Keith Lichten
Program Manager
San Francisco Bay Regional Water Quality Control Board
Keith.Lichten@waterboards.ca.gov

Phil Hammer
Program Manager
Central Coast Regional Water Quality Control Board
Phillip.Hammer@waterboards.ca.gov

Celine Gallon
Program Manager
Los Angeles Regional Water Quality Control Board
Celine.Gallon@waterboards.ca.gov

Stephanie Tadlock
Water Quality Certifications Unit Supervisor
Central Valley Regional Water Quality Control Board, Sacramento
Stephanie.Tadlock@waterboards.ca.gov

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Lynn Coster
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Kai Dunn
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Kai.Dunn@waterboards.ca.gov

David Woelfel
Program Manager
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David.Woelfel@waterboards.ca.gov

Eric Becker
Program Manager
San Diego Regional Water Quality Control Board
Eric.Becker@waterboards.ca.gov

State Water Resources Control Board

**GENERAL ORDER FOR CLEAN WATER ACT
SECTION 401 WATER QUALITY CERTIFICATION ACTION
ORDER NO. 2020-0039-EXEC**

Effective Date: Effective date of the reissued Nationwide Permits, anticipated 2021

Reg. Meas. ID: 441304

SWRCB ID: SB20031GN

Program Type: Fill/Excavation

Project: State Water Board Certification and Denial of the Corps' Nationwide Permits (Project)

Applicant: Department of the Army, Corps of Engineers
Applicant Contact: (b) (6)
Chief, Regulatory Division
U.S. Army Corps of Engineers, Sacramento District
1325 J Street
Sacramento, CA 95814-2922
Phone: (916) 557-6605
Email: (b) (6) @usace.army.mil

State Water Board Staff: Jean Bandura
Environmental Scientist
1001 I Street, 15th floor
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I. Summary

This State Water Board Clean Water Act section 401 Water Quality Certification action and General Order (General Order), which includes attachments A through E, conditionally certifies 18 and denies 39 of the U.S. Army Corps of Engineers' (Corps) Nationwide Permits (NWP). Certification is granted to NWPs 1, 3(a), 4, 5, 6, 9, 10, 11, 12, C, D,¹ 14, 20, 22, 28, 32, 36, and 54, subject to this General Order's terms and conditions. All other NWPs are denied. See Attachment E List of Certified Nationwide Permits. This General Order conditionally certifies or denies the NWPs as described in the Corps' September 15, 2020 proposed NWPs, which is available as docket ID number COE-2020-0002 on the [Federal Register website](https://www.federalregister.gov/documents/2020/09/15/2020-17116/proposal-to-reissue-and-modify-nationwide-permits) (<https://www.federalregister.gov/documents/2020/09/15/2020-17116/proposal-to-reissue-and-modify-nationwide-permits>) (85 Fed. Reg. 57298-57395 (Sep. 15, 2020)). The State Water Board's Certification of the 2017 Nationwide Permits remains in effect until the effective date of the Corps' final Nationwide Permits, which is anticipated in 2021.

II. Findings

1. This Order is adopted pursuant section 401 of the Clean Water Act and the California Porter-Cologne Water Quality Control Act (Cal. Water Code §§ 13000, et seq.). Discharges to waters of the state are prohibited except when in accordance with Water Code section 13264. Notwithstanding any determinations made by the U.S. Army Corps or other federal agency pursuant to 40 C.F.R. section 121.9, dischargers must comply with the entirety of this Order because the General Order also serves as waste discharge requirements in accordance with State Water Board Water Quality General Order No. 2003-0017-DWQ. Discharges to waters of the state are prohibited except when in accordance with Water Code section 13264.
2. Failure to comply with any condition in this General Order shall constitute a violation of the Porter-Cologne Water Quality Control Act and the Clean Water Act. The discharger may then be subject to administrative and/or civil liability pursuant to Water Code section 13385.
3. In the event of any violation or threatened violation of the conditions of this General Order, the violation or threatened violation shall be subject to any remedies, penalties, process, or sanctions as provided for under state and federal law.
4. In response to a suspected violation of any condition of this General Order, the Water Board may require a discharger with authorization under this General Order to furnish, under penalty of perjury, any technical or monitoring reports the Water Board deems appropriate, provided that the burden, including costs, of the reports shall bear a reasonable relationship to the need for the reports and the benefits to be

¹ NWP "C" and "D" will be assigned numbers when the Corps publishes the final NWPs. When numbers are assigned, this Order will be updated to refer to the numbers.

obtained from the reports. The additional monitoring requirements ensure that the permitted dischargers and activities comport with any applicable effluent limitations, water quality standards, and/or other appropriate requirement of state law.

5. The certifying agency may review and revise or revoke (change) a general certification pursuant to California Code of Regulations, title 23, chapter 28, section 3861. Any change to a general certification made by the certifying agency pursuant to this subsection shall not apply to activities subject to a federal license or permit issued before such a change is made. If there are material changes to the NWP's from the version published on September 15, 2020, the State Water Board may consider modifications to this General Order.
6. This General Order and all of its conditions contained herein continue to have full force and effect regardless of the expiration or revocation of any license or permit issued for the project.
7. Notwithstanding the provisions of this General Order, the State Water Board or Regional Water Quality Control Boards (collectively Water Boards) may deny any Notice of Intent (NOI) and instead require a discharger to apply for an individual certification or a certification under another general order. A discharger may choose to apply for an individual water quality certification.
8. This General Order does not provide coverage under the Construction General Permit. As applicable, dischargers shall maintain compliance with conditions described in, and required by, NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities (Order No. 2009-0009-DWQ; NPDES No. CAS000002). For ground disturbing activities that do not require enrollment in Order No. 2009-0009-DWQ, project plans included with the NOI shall include appropriate erosion and sediment control measures as described in section VI.B (Stormwater Condition 18) below.
9. This General Order does not authorize any act which results in the taking of a threatened, endangered or candidate species, which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish & G. Code, §§ 2050-2097) or the federal Endangered Species Act (16 U.S.C. §§ 1531-1544). If a "take" will result from any act authorized under this General Order, the discharger must obtain authorization for the take prior to any construction or operation of the portion of the project that may result in a take. The discharger is responsible for meeting all requirements of the applicable endangered species act for the project authorized under this General Order.
10. This General Order does not authorize any activity adversely impacting a significant historical or archeological resource; directly or indirectly destroying a unique paleontological resource or site or unique geologic feature; disturbing any human remains; or eliminating important examples of the major periods of California history or prehistory, unless the activity is authorized by the appropriate historical resources agencies.

11. This General Order includes monitoring and reporting requirements pursuant to Water Code section 13267. The burden of preparing these reports, including costs, are reasonable to the need and benefits of obtaining the reports. The reports confirm that the best management practices required under this General Order are sufficient to protect beneficial uses and water quality objectives. The reports related to accidental discharges also ensure that corrective actions, if any, that are necessary to minimize the impact or clean up such discharges can be taken as soon as possible. The anticipated costs are minimal as the reporting obligations require only visual monitoring and notification reporting.

III. Summary of NWP's

The Corps issues NWP's to authorize certain activities that require Corps permits under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbor Act of 1899. The NWP's include general conditions that modify, suspend, or revoke NWP's for specific activities or within specific geographic regions. In addition, districts or divisions add other conditions, called regional conditions, to the general conditions. The Corps proposed reissuing 52 existing NWP's, general conditions, and definitions, with modifications, and also proposed authorizing five new NWP's.

IV. Project Location

An individual project authorized by the Water Board under this General Order may occur anywhere within California except as restricted herein. The nine California Regional Water Boards are the: North Coast Regional Water Board, San Francisco Regional Water Board, Central Coast Regional Water Board, Los Angeles Regional Water Board, Central Valley Regional Water Board, Lahontan Regional Water Board, Colorado River Regional Water Board, Santa Ana Regional Water Board and San Diego Regional Water Board (collectively Regional Water Boards). The jurisdictional boundaries of each board can be found on the [State Water Board's map website](https://www.waterboards.ca.gov/waterboards_map.html) (https://www.waterboards.ca.gov/waterboards_map.html).

V. Description of Direct Impacts to Waters of the State

Projects proposed under the Corps' Nationwide Permits cover a wide variety of activities. A complete list of activities, including Corps' supplemental decision documents, is available on the [Federal Register website](https://www.federalregister.gov/documents/2020/09/15/2020-17116/proposal-to-reissue-and-modify-nationwide-permits) for the Nationwide Permits (<https://www.federalregister.gov/documents/2020/09/15/2020-17116/proposal-to-reissue-and-modify-nationwide-permits>) (docket ID number COE-2020-0002).

Direct impacts to waters of the state may include temporary fill activities such as placement of temporary stream crossings, or permanent impacts such as placement of permanent structures in waterways. These activities may result in temporary impacts to water quality, or may result in a permanent loss of waters. Impacts are generally of limited scope individually. To ensure that project impacts do not cumulatively cause adverse impacts to waters or interfere with compliance with water quality standards or

objectives, this certification includes only a subset of those permits as listed in Attachment E.

VI. Conditions

This General Order provides reasonable assurance that projects authorized under this General Order will comply with state and federally approved water quality requirements, provided that the following conditions are adhered to.

A. General Conditions

1. This General Order is subject to modification or revocation upon administrative or judicial review, including review and amendment pursuant to Water Code section 13330, and California Code of Regulations, title 23, chapter 28, Article 6 commencing with section 3867.
2. This General Order is not intended and shall not be construed to apply to any activity involving a hydroelectric facility requiring a Federal Energy Regulatory Commission (FERC) license or an amendment to a FERC license, unless the pertinent certification application was filed pursuant to subsection 3855(b) of chapter 28, title 23 of the California Code of Regulations, and that application specifically identified that a FERC license or amendment to a FERC license for a hydroelectric facility was being sought.
3. This General Order is conditioned upon total payment of any fee required under title 23 of the California Code of Regulations.
 - a. Fees are not required for NWP's 1, 4, 9, and 11. An application fee is required for NWP's 3(a), 5, 6, 12, C, D, 14, 20, 22, 28, 32, and 54 under this General Order. The application fee amount is determined as required by the California Code of Regulations, title 23, sections 3833(b)(3) and 2200(a)(3). Annual fees may apply. Fees are periodically adjusted. Dischargers should confirm the correct fee amount prior to submitting an NOI.
4. **Cumulative Impacts:** Activities permitted under this General Order shall not result in impacts that are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.
5. **Avoidance and Minimization:** Projects authorized under this General Order shall be designed to avoid and minimize impacts to waters of the state to greatest practicable extent.
6. Permitted actions must not cause a violation of any applicable water quality standards, including impairment of designated beneficial uses for receiving waters as adopted in the water quality control plans by any applicable Regional Water Board or any applicable State Water Board water quality control plan or policy

(including the California Ocean Plan). The source of any such discharge must be eliminated as soon as practicable.

- 7. Site Access:** The discharger shall grant Water Board staff or an authorized representative (including an authorized contractor acting as a Water Board representative), upon presentation of credentials and other documents as may be required by law, permission to:

 - a. Enter upon the project or compensatory mitigation site(s) premises where a regulated facility or activity is located or conducted, or where records are kept.
 - b. Have access to and copy any records that are kept and are relevant to the project or the requirements of this General Order.
 - c. Inspect any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this General Order.
 - d. Sample or monitor for the purposes of assuring General Order compliance.
- 8.** The discharger shall be responsible for work conducted by its consultants, contractors, and any subcontractors. A copy of this General Order shall be provided to any consultants, contractors, and subcontractors working on this project. Copies of this General Order shall remain at the project site from the duration of this General Order. All personnel performing work on the project shall be familiar with the content of this General Order and its posted location at the project site.
- 9.** This General Order shall not apply to projects for which any NWP conditions or regional conditions have been waived by the Corps' District Engineer.
- 10.** This General Order shall not apply to projects for which more than one NWP has been issued by the Corps except as provided in NWPs 12, C, D, and 14.
- 11.** This General Order shall not apply to projects requiring compensatory mitigation for permanent impacts to waters except as provided in NWPs 3(a), 12, C, D, and 14 and section VI.C.
- 12.** Projects impacting histosols, fens, bogs, peatlands, in wetlands contiguous with fens and vernal pools are prohibited.
- 13. Lake and Streambed Alteration Agreement:** If issued, the discharger shall submit a signed copy of the Department of Fish and Wildlife's lake and streambed alteration agreement to the Water Board prior to any discharge to waters of the state.

B. Construction Conditions

1. All materials and supplies necessary for implementing these construction conditions must be on-site and ready for use at the start of the construction activity and must remain in supply and ready for implementation throughout the construction process. All non-structural best management practice (BMP) materials (e.g., training documents, compliance tracking procedures) must be ready for use at the start of construction.
2. Construction material, debris, rubbish, spoils, soil, silt, sawdust, rubbish, steel, welding slag, welding rods, waste material, waste containers, other organic or earthen material, or any other substances which could be detrimental to water quality or hazardous to aquatic life that is discharged as a result of project related activities shall be prevented from entering waters of the state. Spoils from excavations shall not be stored in waters of the state.
3. Environmentally sensitive areas and environmentally restricted areas, including any avoided waters of the state, must be clearly identified in the field for exclusion prior to the start of construction. Such identification must be properly maintained until construction is completed and the soils have been stabilized. Equipment, materials, or any other substances or activities that may impact waters of the state outside of the limits of project disturbance are prohibited.
4. The number of access routes, number and size of staging areas, and the total area of the activity must be limited to the minimum necessary to achieve the project goal. Routes and work area boundaries must be clearly demarcated.
5. Bridges, culverts, dip crossings, or other structures must be installed so that water and in-stream sediment flow is not impeded. Appropriate design criteria, practices and materials must be used in areas where access roads intersect waters of the state.
6. Temporary materials placed in any water of the state must be removed as soon as construction is completed at that location, and all temporary roads must be removed or re-contoured and restored according to approved re-vegetation and restoration plans.
7. A method of containment must be used below any temporary bridge, trestle, boardwalk, and/or other stream crossing structure to prevent any debris or spills from falling into the waters of the state. Containment must be maintained and kept clean for the life of the temporary crossing structure.
8. Unless authorized for restoration, material excavated to prepare a site for placement of the permitted fill material must be properly disposed of in an upland area. The disposal site must be located at a sufficient distance away from flowing or standing water such that the excavated material does not erode or move in any way into any water of the state. The disposal area shall be identified in the project NOI.

- 9. Topsoil:** For any excavation, including utility line trenches, the top 6 to 12 inches of topsoil shall be removed and stockpiled separately during construction. Following installation, the topsoil shall be replaced and seeded with native vegetation.
- 10.** Any structure, including but not limited to, culverts, pipes, piers, and coffer dams, placed within a stream where fish (as defined in Fish and Game Code section 45) exist or may exist, must be designated, constructed, and maintained such that it does not constitute a barrier to upstream or downstream movement of aquatic life, or cause an avoidance reaction by fish due to impedance of their upstream or downstream movement. This includes, but is not limited to, maintaining the supply of water and maintaining flows at an appropriate depth, temperature, and velocity to facilitate upstream and downstream fish migration. If any structure results in a long-term reduction in fish movement, the discharger shall be responsible for restoration of conditions as necessary (as determined by the Water Board) to secure passage of fish across the structure.
- 11. Dust Abatement:** Dust abatement chemicals added to water can be hazardous to wildlife and, if allowed to enter streams, detrimental to water quality. Therefore, dust abatement activities shall be conducted so that sediment or dust abatement chemicals are not discharged into waters of the state. Dust abatement products or additives that are known to be detrimental to water quality or wildlife shall not be used, unless specific management needs are documented, and product-specific application plans are approved by Water Board staff.
- 12. Use of Mechanized Equipment:** Activities permitted under this General Order shall be conducted in a manner that minimizes ground disturbance, soil compaction, rutting and other mechanical impacts. Equipment shall be operated and maintained in a manner that reduces the risk of spills or the accidental exposure of fuels or hazardous materials to water bodies or wetlands. Appropriate project specific BMPs shall be specified by the discharger and shall be provided as part of the project description included in the NOI.
- 13. Piers or Piles:** Piers or piles placed in the stream channel to support a linear transportation structure over a creek channel must be aligned parallel with the direction of flow to prevent erosive eddies.

14. Culvert Replacement and Maintenance

- a.** Cured in Place Pipe (CIPP) is prohibited where it could cause detrimental physiological responses to human, plant, animal, or aquatic life, or cause discharges to waters of the state that do not comply with water quality objectives or goals.
- b.** Replacement of culverts acting as grade control structures is prohibited. A vertical gap between the outlet of the culvert and the immediate downstream invert of the stream channel indicates that the culvert likely functions as a grade control structure.

- c. Projects proposing to replace culverts must repair any existing scour or headcutting actively discharging sediment, caused by prior culvert design.
- d. The replaced or maintained culvert shall be in alignment with the stream channel upstream and downstream of the culvert.
- e. Any replacement culvert or culvert that is to be left in place by a repair or maintenance project must be placed at a gradient and orientation that will not result in erosional scour at the outlet.
- f. Replacement of a culvert with a similarly sized culvert is allowable only where there is no visual indication that the existing culvert is undersized. Visual indications of undersized culverts include, but are not limited to: sediment aggradation upstream of the culvert; evidence of flow over the top of the culvert (e.g., erosional rills in dirt road surfaces or erosion of shoulders adjacent to paved road surfaces), erosion of the fill cell between the culvert and the road surface, scour pools at the culvert outlet, or erosion of creek banks immediately downstream of the culvert.
- g. Culverts with solid bottoms (e.g., cylindrical culverts or box culverts) may be replaced with arch culverts or free-span bridges, if the existing culvert is not acting as a grade control structure.
- h. The culvert must not be located in a meander bend of the stream channel.
- i. Replacement culverts must be sized to convey a 100-year flow event with debris, without pressurizing flow passing through the culvert. The 100-year flow event should be modeled under climate change projections, if available.

15. Toxic and Hazardous Materials

- a. Activities permitted under this General Order shall not discharge toxic substances in concentrations that produce detrimental physiological responses to human, plant, animal, or aquatic life.
- b. Discharge of unset cement, concrete, grout, damaged concrete spoils, or water that has contacted uncured concrete or cement, or related washout to surface waters, ground waters, or land is prohibited. If concrete washout is necessary at the site, washout containment shall be used to prevent any discharge. Wastewater may only be disposed by delivery to a sanitary wastewater collection system/facility (with authorization from the facility's owner or operator) or a properly licensed disposal or reuse facility.
- c. Appropriate BMPs must be implemented throughout project activities to prevent and control potential leaks/spills/drainage of potentially hazardous materials such as: non-petroleum hydraulic fluid; epoxies; paints and other protective coating materials; cement concrete or asphalt concrete; and washings and cuttings thereof.

- d.** Activities permitted under this General Order shall not discharge waste classified as “hazardous” as defined in California Code of Regulations title 22, section 66261 and Water Code section 13173. Appropriate BMPs for hazardous substances shall be included in project plans provided in the NOI. These BMPs shall include, at a minimum:
- i.** All personnel handling fuels and other hazardous materials shall be properly trained.
 - ii.** Adequate spill prevention and cleanup equipment and materials shall be present on site at all times during project implementation.
 - iii.** All mechanized equipment shall be maintained in good operating order and inspected on a regular basis.
 - iv.** All on site fuel trucks or fuel containers shall be stored in an area where risk of contamination of water bodies by leaks or spills is minimized.
 - v.** All equipment shall be fueled, maintained, and/or parked overnight in an upland area at least 100 feet from any delineated waters of the state.
 - vi.** Hazardous materials, including chemicals, fuels, and lubricating oils, shall not be stored within 100 feet of any delineated waters of the state, and shall be stored in appropriate containers with appropriate secondary containment.
 - vii.** Pumps or other stationary equipment operating within 100 feet of a waterbody or wetland shall utilize appropriate secondary containment systems to prevent spills.
 - viii.** Any spills or leaks of hazardous materials, chemicals, fuels, lubricants or any other potential pollutants shall be promptly and completely treated using appropriate materials and equipment.
 - ix.** Spill containment supplies shall be on site in all work areas in sufficient quantities to allow immediate remediation of fuel, oil, hydraulic fluid or similar leaks and spills.
 - x.** A staging area for equipment and vehicle fueling and storage shall be designated at least one-hundred (100) feet away from waters of the state, in a location where fluids or accidental discharges cannot flow into waters of the state.

- e. Projects that create new or affect existing wetland areas shall be designed to include features or management measures to reduce the production of methylmercury in the wetland, including minimizing the wetting and drying of soils by keeping wetlands flooded and sediment control measures to reduce the transport of total mercury or methylmercury out of the wetland.

16. Invasive Species and Soil Borne Pathogens

- a. The discharger is responsible for ensuring that all project personnel follow proper weed control practices, and that appropriate weed prevention measures are included in project plans.
- b. Any straw, hay or other unprocessed plant material used for any purpose must be certified or documented as being weed free.
- c. Soil borne pathogens are any nematodes, or any bacterial, protozoan, viral or fungal pathogens that can cause disease or death to native plants, agricultural crops or ornamental plants (e.g., *Phytophthora ramorum*, the cause of sudden oak syndrome, and *Phytophthora lateralis*, the cause of Port Orford cedar root disease). Any equipment entering or leaving the project area from an area of known soil borne pathogen infestation shall be thoroughly cleaned using methods appropriate for the known pathogen before entering or leaving the project area. The fungus that causes Valley Fever, *Coccidioides spp.*, is not considered a soil borne pathogen in this certification.

17. Work in Delineated Waters of the State

- a. Work in waters of the state must not cause or contribute to an exceedance of water quality objectives in the receiving waters. Work in delineated waters commences at the onset of the regulated activity and continues until the activity is finished and all restoration of the affected work area is complete. The term "work" means any ground disturbing activities in any delineated waters of the state that are permitted under this General Order, regardless of the presence or absence of flowing or standing water.
- b. Temporary diversions or impoundments of water, cofferdams, or similar structures installed for the purpose of temporary dewatering work areas may be permitted if the project description provided by the discharger in the NOI includes: (a) an adequate description of the proposed dewatering structures, including design criteria, (b) appropriate BMPs for the installation, operation, maintenance and removal of those structures, and (c) appropriate monitoring for water quality upstream and downstream of diversion structures as required in section VI.D.5 of this General Order.
- c. All surface waters, including ponded waters, shall be diverted away from areas undergoing grading, construction, excavation, vegetation removal, and/or any other activity which may result in a discharge to waters of the state.

- d. Except for the following conditions, equipment must not be operated in standing or flowing waters without site specific approval from Water Board staff:
- i. All construction activities must be effectively isolated from water flows to the greatest extent possible. This may be accomplished by working in the dry season or dewatering the work area in the wet season. When work in standing or flowing water is required, structures for isolating the in-water work area and/or diverting the water flow must not be contaminated by construction activities. All open flow temporary diversion channels must be lined with filter fabric or other appropriate liner material to prevent erosion. Structures used to isolate the in-water work area and/or diverting the water (e.g., coffer dam, geotextile silt curtain) must not be removed until all disturbed areas are stabilized.
 - ii. Cofferdams and water barrier construction must be adequate to prevent seepage into or from the work area to the greatest extent feasible.
 - iii. Flow diversions must be conducted in a manner that prevents pollution and/or siltation and in a manner that restores pre-project flows (except for variation in flows due to seasonality, upstream diversions, etc.) upon completion of the activity. Diverted flows must be of sufficient quality and quantity, and of appropriate temperature, to support existing fish and other aquatic life both above and below the diversion. Diversions must be designed, installed, and maintained to reduce erosion. Pre-project flows must be restored to the affected surface water body upon completion of work at that location.
- e. If groundwater dewatering is required for the project, the discharger shall consult with the Water Board to determine if additional permits are required. If additional Water Board permits relating to dewatering are required, the designated Water Board staff contact identified in the project's Notice of Applicability (NOA) must be notified and copied on pertinent correspondence pertaining to those other required permits.
- f. All temporary dewatering methods shall be designed to have the minimum necessary impacts to waters of the state. All dewatering methods shall be installed such that natural flow is maintained upstream and downstream of the diversion area. Any temporary dams or diversions shall be installed such that the diversion does not cause sedimentation, siltation, or erosion upstream or downstream of the diversion area. All dewatering methods shall be removed immediately upon completion of activities for which diversions are needed.

- g. All temporary dewatering activities are subject to the work-in-water reporting and monitoring conditions presented in sections VI.D below.

18. Stormwater: Dischargers that require enrollment in the NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities (Order No. 2009-0009-DWQ; NPDES No. CAS000002) shall maintain compliance with that Order. Compliance with that Order constitutes compliance with Erosion and Sediment Control Conditions 18.a.i-ii and Stormwater Management Condition 18.b.i-ii, below.

For ground disturbing activities that do not require enrollment in Order No. 2009-0009-DWQ, project plans included with the NOI shall include the appropriate erosion and sediment control and stormwater management conditions described below.

a. Erosion and Sediment Control

- i. No later than 24 hours prior to the start of a likely rain event, the discharger shall ensure that disturbed areas that drain to waters of the state are protected with correctly installed erosion control measures (e.g., jute, straw, coconut fiber erosion control fabric, coir logs, straw, etc.) or revegetated with propagules (seeds, cuttings, divisions) of locally collected native plants. The likely rain event is defined as any weather pattern that is forecast to have a 50 percent or greater probability of producing precipitation in the project area. The discharger shall obtain on a daily basis a printed copy of the precipitation forecast information (and keep for record) from the National Weather Service Forecast Office.
- ii. The timing for installation of the post-construction stormwater BMP subdrains, soils, mulch, and plants shall be scheduled to ensure that the installed bioretention areas do not receive runoff from exposed or disturbed areas that have not been landscaped. The constructed post-project stormwater BMPs shall not receive site runoff until all project landscaping is planted, and effective erosion control measures implemented to ensure that the stormwater features are protected from sediment accumulation.

b. Stormwater Management:

- i. Disturbed areas must be temporarily stabilized to prevent erosion and accidental discharge into waters of the state no later than 24 hours prior to any likely precipitation event. A likely precipitation event is any weather pattern that is forecast to have a 50 percent probability of producing precipitation in the project area, as predicted by the National Weather Service. If commencement of a precipitation event is predicted to begin less than 24 hours after the

forecast is issued, temporary stabilization of the disturbed in-water work areas must begin immediately.

- ii. No individual construction activity that could discharge sediment or other pollutants may be initiated if that activity and its associated erosion control measures cannot be completed prior to the onset of precipitation. After any rain event, the discharger shall inspect all sites currently under construction and all sites scheduled to begin construction within the next 72 hours for erosion and sedimentation problems and take corrective action as needed. Seventy-two hour weather forecasts from the National Weather Service shall be consulted prior to start-up of any phase of the project that may result in sediment-laden runoff to the project site, and construction plans made to meet this condition.

C. Mitigation for Temporary Impacts

1. The discharger shall restore all areas of temporary impacts to waters of the state and all project site upland areas of temporary disturbance which could result in a discharge of waters of the state as described in an approved restoration plan. The restoration plan shall be submitted for written acceptance by Water Board staff with the NOI. The restoration plan shall provide the following: a schedule; plans for grading of disturbed areas to pre-project contours; a planting palette with plant species native to the project area; seed collection location; invasive species management; performance standards; and maintenance requirements (e.g., watering, weeding, and replanting).
2. In cases where implementation actions in the restoration plan cannot be reasonably conducted within one year, or where the adverse temporary impacts result in temporary loss of aquatic resource function(s), the discharger may be required to provide compensatory mitigation to offset temporal loss of waters of the state. Examples of additional mitigation include, but are not limited to, enhancement activities such as increasing the presence of native species and reducing dominance of non-native/invasive species, native willow stalking, planting of native riparian vegetation and trash removal.
3. The Water Board may extend the monitoring period beyond requirements of the restoration plan upon a determination by Water Board staff that the performance standards have not been met or are not likely to be met within the monitoring period.

D. Notifications and Reports

The following notifications and reports are required, as applicable:

- 1. Accidental Discharges of Hazardous Materials.**² Following an accidental discharge of a reportable quantity of hazardous material, sewage, or an unknown material, the following applies (Wat. Code § 13271):
 - a. As soon as (A) discharger has knowledge of the discharge or noncompliance, (B) notification is possible, and (C) notification can be provided without substantially impeding cleanup or other emergency measures then:
 1. First call – 911 (to notify local response agency)
 2. Then call – Office of Emergency Services (OES) State Warning Center at: (800) 852-7550 or (916) 845-8911
 3. Lastly, follow the required OES procedures as set forth in:
[http://www.caloes.ca.gov/FireRescueSite/Documents/CalOES-Spill Booklet Feb2014 FINAL BW Acc.pdf](http://www.caloes.ca.gov/FireRescueSite/Documents/CalOES-Spill%20Booklet%20Feb2014%20FINAL%20BW%20Acc.pdf)
 - b. Following notification to OES, the discharger shall notify the Water Board, as soon as practicable (ideally within 24 hours). Notification may be via telephone, e-mail, delivered written notice, or other verifiable means.
 - c. Within five (5) working days of notification to the Water Board, the discharger must submit an Accidental Discharge of Hazardous Material Report to the Water Board.
- 2. Violation of Compliance with Water Quality Standards:** The discharger shall notify the Water Board of any event causing a violation of compliance with water quality standards. Notification may be via telephone, e-mail, delivered written notice, or other verifiable means.
 - a. Examples of noncompliance events include: lack of storm water treatment following a rain event, discharges causing a visible plume in a water of the state, and water contact with uncured concrete.

² “Hazardous material” means any material that, because of its quantity, concentration, or physical or chemical characteristics, poses a significant present or potential hazard to human health and safety or to the environment if released into the workplace or the environment. “Hazardous materials” include, but are not limited to, hazardous substances, hazardous waste, and any material that a handler or the administering agency has a reasonable basis for believing that it would be injurious to the health and safety of persons or harmful to the environment if released into the workplace or the environment. (Health and Saf. Code § 25501.)

- b. This notification must be followed within (3) working days by submission of a Violation of Compliance with Water Quality Standards Report.

3. In-Water Work:

- a. The discharger shall notify the Water Board at least forty-eight (48) hours prior to initiating work in flowing or standing water or stream diversions. Notification may be via telephone, e-mail, delivered written notice, or other verifiable means.
- b. Within three (7) working days following completion of in-water work or stream diversions, an In-Water Work/Diversions Water Quality Monitoring Report must be submitted to the Water.

4. **Modifications to Project:** The discharger shall give advance notice to the Water Board if project implementation as described in the application materials is altered in any way or by the imposition of subsequent permit conditions by any local, state or federal regulatory authority by submitting a Modifications to Project Report. The discharger shall inform the Water Board of any project modifications that will interfere with the compliance with this General Order.

5. Water Quality Monitoring

- a. **General:** In work areas during construction, visual monitoring shall be conducted to detect accidental discharge of construction related pollutants (e.g. oil and grease, turbidity plume, or uncured concrete).
- b. **Accidental Discharges/Noncompliance:** Upon occurrence of an accidental discharge of hazardous materials or a violation of compliance with a water quality standard, the Water Board may require water quality monitoring based on the discharge constituents and/or related water quality objectives and beneficial uses.
- c. **In-Water Work or Diversions:** For projects involving planned work in water or stream diversions, a water quality monitoring plan shall be submitted to the Water Board for acceptance at least 30 days in advance of any discharge to the affected water body. Water quality monitoring shall be conducted in accordance with the approved plan.
- d. **Post-Construction:** If the proposed project includes ground disturbance, the discharger shall visually inspect the project site during the rainy season (October 1 – April 30) until a Notice of Completion is issued to ensure excessive erosion, stream instability, or other water quality pollution is not occurring in or downstream of the project site. If water quality pollution is occurring, the discharger shall contact the Water Board staff member overseeing the project within three (3) working days. The Water Board may require the submission of a Violation of Compliance with Water Quality

Standards Report. Additional permits may be required to carry out any necessary site remediation.

E. Application for Coverage and Termination

The following sections describe the reporting and notification types and timing of submittals. Requirements for the content of these reporting and notification types are detailed in Attachment B, including specifications for photo and map documentation. Written reports and notifications must be submitted using the Reporting and Notification Cover Sheet located in Attachment B, which must be signed by the legally responsible person or authorized representative.

1. **Request for Authorization.** The administrative process for authorization by this General Order varies according to NWP, as follows:
 - a. Dischargers shall submit an NOI for certification under NWPs 3(a), 5, 6, 12, C, D, 14, 20, 22, 28, 32, 36, and 54 at least 45 days before any project activity. The NOI shall describe all proposed direct project impacts and project design steps taken to first avoid, and then minimize, impacts to waters of the state to the maximum extent practicable. The NOI shall also include a delineation of impact sites. The NOI must also comply with the instructions set forth in Attachment A.
 - b. Other than the accidental discharge of hazardous materials reporting, dischargers with projects authorized under NWPs 1, 4, 9, 10, and 11 need not submit other notifications or reports to the Water Board identified in this General Order. Dischargers shall comply with all other applicable General Order conditions.
2. All document submittals shall comply with the signatory requirements set forth in Attachment D of this General Order.
3. **Project Status Notifications**
 - a. **Commencement of Construction:** The discharger shall submit a Commencement of Construction Notice at least seven (7) days prior to start of initial disturbance activities.
 - b. **Request for Notice of Project Complete Letter:** This request shall be submitted to the Water Board within thirty (30) days following completion of all project activities including post-construction monitoring of restoration sites. Upon approval of the request, the Water Board shall issue a Notice of Project Complete Letter to the discharger. Annual fees will be terminated concurrent with the date of the Project Complete Letter.

4. Project Reporting

- a. **Annual Reporting:** If required in the NOA, the discharger shall submit an Annual Report each year on the date specified in the NOA. Annual reporting shall continue until a Notice of Project Complete Letter is issued to the discharger. The discharger shall provide at least one annual report, in the event the project is completed in less than one year.

5. Transfer of Property Ownership:

Authorization by this General Order is not transferable in its entirety or in part to any person or organization except after notice to the Water Board in accordance with the following terms:

- a. The discharger must notify the Water Board of any change in ownership or interest in ownership of the project area by submitting a Transfer of Property Ownership Report. The discharger and purchaser must sign and date the notification and provide such notification to the Water Board at least 10 days prior to the transfer of ownership. The purchaser must also submit a written request to the Water Board to be named as the discharger in a revised order.
- b. Until such time as this Order has been modified to name the purchaser as the discharger, the discharger named on the NOI shall continue to be responsible for all requirements set forth in this Order.

6. Transfer of Long-Term Best Management Practices Maintenance:

If maintenance responsibility for post-construction best management practices is legally transferred, the discharger must submit to the Water Board a copy of such documentation and must provide the transferee with a copy of a Long-Term Best Management Practices Maintenance Plan that complies with manufacturer or designer specifications. The discharger must provide such notification to the Water Board with a Transfer of Long-Term Best Management Practices Maintenance Report at least 10 days prior to the transfer of best management practices maintenance responsibility.

F. Nationwide Specific Impact Size Limits

1. NWP 3(a) – Maintenance; and NWP 14 – Linear Transportation Projects:

Total impacts (temporary plus permanent) and permanent impacts to waters of the state are subject to the project size limits and restrictions below. This General Order does not authorize any activities seeking coverage under NWP 3 category (b) (removal of accumulation of sediments and debris), or NWP 3 category (c) (temporary structures, fills, and work necessary to conduct maintenance activity).

a. Individual Project Impact Size Limits to Waters of the State:

- i. **Permanent Impact Acreage:** The project shall not result in more than one hundredth (0.01) of an acre of permanent impacts to waters of the state.

- ii. **Total Impact Acreage:** The project shall not result in more than two-tenths (0.2) of an acre of total impacts to waters of the state.
 - iii. **Permanent Impact Length:** The project shall not result in more than 100 linear feet of permanent impacts to waters of the state.
 - iv. **Total Impact Length:** The project shall not result in more than 300 linear feet of total impacts to waters of the state.
- 2. **NWP 12 – Oil or Natural Gas Pipeline Activities; NWP C – Electric Utility Line and Telecommunication Activities; and NWP D – Utility Line and Activities for Water and Other Substances:** Temporary and permanent impacts to waters of the state are subject to the project size limits and restrictions below.
 - a. **Individual Project Impact Size Limits to Waters of the State:**
 - i. **Permanent Impact Acreage:** The project shall not result in more than five thousandths (0.005) of an acre of permanent impacts to waters of the state.
 - ii. **Temporary Impact Acreage:** The project shall not result in more than one half (0.5) of an acre of total impacts to waters of the state.
 - iii. **Permanent Impact Length:** The project shall not result in more than 50 linear feet of permanent impacts to waters of the state.
 - iv. **Temporary Impact Length:** The project shall not result in more than 400 linear feet of total impacts to waters of the state.

G. Nationwide Specific Compliance

- 1. **NWP 3(a) – Maintenance:** This General Order authorizes impacts resulting from the repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, subject to the size limits in section VI.F.1 and all other applicable General Order conditions, including:
 - a. **NWP 3(a) Prohibitions:**
 - i. **Lahontan Water Board:** Any NWP 3(a) activity within the Lake Tahoe Hydrologic Unit (HUC; 634.00), the Truckee River HUC (635.00), and the Little Truckee River HUC (636.00) is prohibited.
 - ii. **Riparian Vegetation:** Repair, rehabilitation, or replacement is only authorized when trimming of riparian vegetation does not result in significant adverse effects to water quality, or impair beneficial uses.

- iii. **Riparian Tree Removal:** If a project involves removal of riparian trees list the following information on the project NOI form for each adult tree proposed for removal: species; common name; diameter breast height; and whether part of the riparian understory or overstory. Any tree removal that results in adverse effects to water quality is prohibited.
 - iv. **Roads:** Maintenance of access roads under this General Order shall be confined to the previously existing road prism, except for minor, targeted widening or improvements. Grading of throughcut roads (any road having a running surface lower than the surrounding terrain on both sides of the road) is prohibited.
 - v. **Armoring Facilities:** Placement of in-stream armor above streambed elevation is prohibited, except as otherwise authorized by the Water Boards.
 - vi. **Gabions:** Use of gabions ("rock gabions" and similar wire basket structures) in waters of the state is prohibited.
 - vii. **Riprap Installation:** New riprap installed as part of the maintenance of existing structures shall not increase the footprint of the structure in jurisdictional waters by more than 15 percent or place new fill across the complete width of the active channel in a manner that creates a new grade control structure in the channel.
 - viii. **Grouted Riprap:** Use of grouted riprap in waters of the state is prohibited.
 - ix. Construction, replacement, or expansion of facilities in any ocean, bay, tidal waters or shores thereof are prohibited.
- b. **NWP 3(a) Compensatory Mitigation Requirements:** Compensatory mitigation is required to offset permanent impacts to waters of the state, unless the discharger has demonstrated that the project authorized by this General Order was designed to restore or improve the ecological function of the impacted aquatic resource. When compensatory mitigation is required, the discharger shall provide the following:
- i. A draft compensatory mitigation plan at a level of detail sufficient to accurately evaluate whether compensatory mitigation offsets the adverse impacts attributed to the project considering the overall size and scope of impact.
 - ii. Compensatory mitigation at a minimum of a one-to-one mitigation ratio, measured in area or length. The Water Board will require a higher overall mitigation ratio where necessary to ensure replacement of lost aquatic resource functions.

- iii. Subject to Water Board approval, the mitigation may be satisfied using any of the following compensatory mitigation methods: restoration, enhancement, establishment, and/or preservation.³
 - iv. Compensatory mitigation shall be provided through a mitigation bank or in-lieu fee program, where feasible. If no mitigation bank or in-lieu fee program options are available, mitigation may be provided through on-site or off-site permittee responsible mitigation, subject to Water Board approval.
 - v. No discharge of dredged or fill material to waters of the state shall occur prior to Water Board approval of a final mitigation plan.
2. **NWP 12 – Oil or Natural Gas Pipeline Activities:** This General Order authorizes the following activity types only when associated with the construction, maintenance, or repair of oil or natural gas pipelines. This General Order authorizes projects for which one or more NWP 12 has been authorized subject to the size limits in section VI.F.2 and all other applicable General Order conditions, including:
- a. **NWP 12 Prohibitions:**
 - i. **Lahontan Water Board:** Any NWP 12 activity within the Lake Tahoe Hydrologic Unit (HUC; 634.00), the Truckee River HUC (635.00), and the Little Truckee River HUC (636.00) is prohibited.
 - ii. **Riparian Vegetation:** Repair, rehabilitation, or replacement is only authorized when trimming of riparian vegetation does not result in significant adverse effects to water quality, or impair beneficial uses.
 - iii. **Riparian Tree Removal:** If a project involves removal of riparian trees list the following information on the project NOI form for each adult tree proposed for removal: species; common name; diameter breast height; and whether part of the riparian understory or overstory. Any tree removal that results in adverse effects to water quality is prohibited.
 - iv. **Roads:** Maintenance of access roads under this General Order shall be confined to the previously existing road prism, except for minor, targeted widening or improvements. Grading of throughout

³ Restoration should generally be the first option considered because the likelihood of success is greater and the impacts to potentially ecologically important uplands are reduced compared to establishment, and the potential gains in terms of aquatic resource functions are greater, compare to enhancement and preservation.

roads (any road having a running surface lower than the surrounding terrain on both sides of the road) is prohibited.

- v. **Armoring Facilities:** Placement of in-stream armor above streambed elevation is prohibited, except as otherwise authorized by the Water Boards.
 - vi. **Gabions:** Use of gabions ("rock gabions" and similar wire basket structures) in waters of the state is prohibited.
 - vii. **Grouted Riprap:** Use of grouted riprap in waters of the state is prohibited.
 - viii. Construction, replacement, or expansion of facilities in any ocean, bay, tidal waters or shores thereof are prohibited.
- b. **NWP 12 Directional Drilling:** The following conditions shall apply to all drilling operations under waters of the state.
- i. The discharge of bentonite, drilling muds, lubricants or any drilling compounds into waters of the state is prohibited. A draft HDD or drilling plan shall be prepared and shall be subject to review by Water Board staff at least 30 days before drilling activities under waters of the state. No HDD or other drilling operations under waters of the state shall commence until the HDD plan is approved by Water Board staff.
 - ii. Release of bentonite, drilling muds, lubricants through fractures in the streambed or bank substrate during drilling is referred to as a "frack-out". Because of the potential for frack outs to occur, the HDD or drilling plan shall include a frack out response plan. The frack-out response plan shall specify all measures to be initiated if frack-outs should occur during HDD operations.
 - iii. For all HDD and other drilling sites, a means of containment (e.g., damming, fluming) or screening capable of capturing all of the potential discharge shall be described in the HDD plan. The downstream end of any such containment structure shall be capable of containing all bentonite or other drilling muds or debris that may be released during boring or drilling. Any drilling mud, spoils, etc. must be completely removed from the streambed prior to removal of the containment structure (e.g., dam, flume, and screen).
 - iv. An environmental monitor shall provide monitoring for compliance with the HDD or drilling plan throughout drilling operations under waters of the state.

- v. Any HDD or other drilling operation shall be designed and directed in such a way as to minimize the risk of spills and discharges of all types including the frack-out release of drilling lubricants through fractures in the streambed or bank substrates. In substrates where frack-outs are likely to occur, HDD contractors shall employ all reasonable means and methods available to minimize potential for frack-out.
- vi. All drilling muds or compounds shall be contained and properly disposed of after drilling activities are completed.
- vii. If bore pits are excavated to support drilling operations, spoils shall be stored a minimum of 25 feet from the top of the bank of streams or wetland/riparian boundary, where feasible; if site specific conditions warrant storing spoils less than 25 feet from the top of the bank of streams or wetland/riparian boundary this request must be provide in the HDD or drilling plan submitted to the Water Board prior to any drilling activities with potential impacts to waters of the state. Spoils shall be stored behind a sediment barrier and covered with plastic or otherwise stabilized (i.e., tackifiers, mulch, or detention).

c. NWP 12 Authorized Permanent Impacts:

- i. **Facility Replacements:** such as underground lines, foundations, and other activities associated with pipelines or their access roads (e.g., wet crossings, culverts, bridge abutments) and appurtenances (e.g., valves, flanges, fittings, end modules, end terminals) located more than thirty feet from the original location. May also include structure removals.
- ii. **Access Road Crossing Repair, Improvements, and Upgrades:** the replacement or repair of existing culverts and associated outlets/headwalls, bridge abutments, or other road crossings, repairs, or resurfacing in waters of the state. The repair of existing or installation of new minor non-grouted riprap, armoring or other erosion control measures to protect existing access roads or existing structures from scour or erosion.
- iii. **New Access Road Crossings/Structures/Outfalls and Widening of Existing Roads:** includes new structures, outfalls, bridge abutments, road repairs or resurfacing, installation of new culverts or associated outlets, and erosion control/dissipation devices to protect the existing access roads. For example, the installation of concrete or non-grouted riprap on an existing access road to create a low-water (Arizona) crossing. Also includes the minor widening of existing roads.

- iv. **Structure Upgrades:** includes the installation of similar facilities with upgrades (e.g., new caissons), upgrades to larger facilities or facilities of different composition. Also includes the installation of new caissons, non-grouted riprap, or other armoring to protect existing structures from scour and erosion.
- v. **Underground Linear Activities:** excavation for inspection or repair of underground facilities, installation of new pipes across streams, placement of structures or erosion control to protect under-stream pipes, and installation of new valves or other appurtenances.
- vi. **Other:** includes facility drainage system repair, maintenance, or installation of existing facilities and other bank stabilization efforts.

d. NWP 12 Specially Designated Temporary Impacts

- i. **Culvert Relocation:** Culvert relocation within thirty feet is considered a temporary impact as long as the replacement footprint does not exceed the original footprint by more than ten percent, and the original footprint is completely restored.
- ii. **Roadside Ditches:** Impacts to roadside ditches are considered temporary if the roadside ditch has the following characteristics:
 - 1. the feature is artificially constructed (e.g., man-made);
 - 2. the feature is not in or part of a stream channel or other waters of the state, or in a stream channel or other waters of the state that has been relocated in uplands;
 - 3. the feature would not cause or contribute to an impairment of downstream beneficial uses; and
 - 4. the feature is restored following construction such that the pre-construction course, condition and capacity are retained to the maximum extent practicable.

e. NWP 12 Compensatory Mitigation Requirements: The discharger shall adhere to the process below for any proposed projects that would result in permanent impacts to waters of the state:

- i. Prior to submitting an NOI for an individual project, the discharger shall submit a letter of credit in favor of the State Water Board for the purchase of mitigation bank or in-lieu fee program credits sufficient to offset total anticipated permanent impacts for all proposed projects for the current year.

- ii. By January 15 of each year, the discharger shall submit to the State Water Board a draft mitigation plan that includes elements as outlined in Dredge or Fill Procedures, § IV.A.1.h; Appendix A: State Supplemental Dredge or Fill Guidelines, Subpart J, § 230.94(c)(5)-(6) and the following:
 1. A report of permanent impacts incurred through December 31 of the previous year as detailed in Attachment B; and
 2. Proposed credit purchase to offset the previous year's permanent impacts from a Corps approved mitigation bank or in-lieu fee program.

The following mitigation ratios apply towards the purchase of establishment or reestablishment credits. If enhancement or preservation credits are proposed, mitigation ratios will be determined on an individual project basis:

- a. In-kind, in watershed = 1:1 mitigation ratio
- b. In-kind, outside of watershed = 2:1 mitigation ratio
- c. Out-of-kind, in watershed = 3:1 mitigation ratio
- d. Out-of-kind, outside of watershed = 4:1 mitigation ratio

These ratios apply only if credits are purchased within eighteen months of permanent impacts, otherwise mitigation ratios may be increased to account for temporal loss.

3. **NWP C – Electric Utility Line and Telecommunications Activities:** This General Order authorizes the following activity types only when associated with the construction, maintenance, or repair of electrical utility lines. This General Order authorizes projects for which one or more NWP C has been authorized subject to the size limits in section VI.F.2 and all other applicable General Order conditions, including:
 - a. **NWP C Prohibitions:**
 - i. **Lahontan Water Board:** Any NWP C activity within the Lake Tahoe Hydrologic Unit (HUC; 634.00), the Truckee River HUC (635.00), and the Little Truckee River HUC (636.00) is prohibited.

- ii. **Riparian Vegetation:** Repair, rehabilitation, or replacement is only authorized when trimming of riparian vegetation does not result in significant adverse effects to water quality, or impair beneficial uses.
 - iii. **Riparian Tree Removal:** If a project involves removal of riparian trees list the following information on the project NOI form for each adult tree proposed for removal: species; common name; diameter breast height; and whether part of the riparian understory or overstory. Any tree removal that results in adverse effects to water quality is prohibited.
 - iv. **Roads:** Maintenance of access roads under this General Order shall be confined to the previously existing road prism, except for minor, targeted widening or improvements. Grading of throughcut roads (any road having a running surface lower than the surrounding terrain on both sides of the road) is prohibited.
 - v. **Armoring Facilities:** Placement of in-stream armor above streambed elevation is prohibited, except as otherwise authorized by the Water Boards.
 - vi. **Gabions:** Use of gabions ("rock gabions" and similar wire basket structures) in waters of the state is prohibited.
 - vii. **Grouted Riprap:** Use of grouted riprap in waters of the state is prohibited.
 - viii. Construction, replacement, or expansion of facilities in any ocean, bay, tidal waters or shores thereof are prohibited.
- b. **NWP C Directional Drilling:** The following conditions shall apply to all drilling operations under waters of the state.
- i. The discharge of bentonite, drilling muds, lubricants or any drilling compounds into waters of the state is prohibited. A draft HDD or drilling plan shall be prepared and shall be subject to review by Water Board staff at least 30 days before drilling activities under waters of the state. No HDD or other drilling operations under waters of the state shall commence until the HDD plan is approved by Water Board staff.
 - ii. Release of bentonite, drilling muds, lubricants through fractures in the streambed or bank substrate during drilling is referred to as a "frack-out". Because of the potential for frack outs to occur, the HDD or drilling plan shall include a frack out response plan. The frack-out response plan shall specify all measures to be initiated if frack-outs should occur during HDD operations.

- iii. For all HDD and other drilling sites, a means of containment (e.g., damming, fluming) or screening capable of capturing all of the potential discharge shall be described in the HDD plan. The downstream end of any such containment structure shall be capable of containing all bentonite or other drilling muds or debris that may be released during boring or drilling. Any drilling mud, spoils, etc. must be completely removed from the streambed prior to removal of the containment structure (e.g., dam, flume, and screen).
- iv. An environmental monitor shall provide monitoring for compliance with the HDD or drilling plan throughout drilling operations under waters of the state.
- v. Any HDD or other drilling operation shall be designed and directed in such a way as to minimize the risk of spills and discharges of all types including the frack-out release of drilling lubricants through fractures in the streambed or bank substrates. In substrates where frack-outs are likely to occur, HDD contractors shall employ all reasonable means and methods available to minimize potential for frack-out.
- vi. All drilling muds or compounds shall be contained and properly disposed of after drilling activities are completed.
- vii. If bore pits are excavated to support drilling operations, spoils shall be stored a minimum of 25 feet from the top of the bank of streams or wetland/riparian boundary, where feasible; if site specific conditions warrant storing spoils less than 25 feet from the top of the bank of streams or wetland/riparian boundary this request must be provide in the HDD or drilling plan submitted to the Water Board prior to any drilling activities with potential impacts to waters of the state. Spoils shall be stored behind a sediment barrier and covered with plastic or otherwise stabilized (i.e., tackifiers, mulch, or detention).

c. NWP C Authorized Permanent Impacts:

- i. **Facility Replacements:** such as poles, underground lines, foundations for overhead utility line towers, and other activities associated with utility lines or their access roads (e.g., wet crossings, culverts, bridge abutments) and appurtenances (e.g., guy wires, anchors, grounding wires, valves, flanges, fittings, end modules, end terminals) located more than thirty feet from the original location. May also include structure removals.

- ii. **Access Road Crossing Repair, Improvements, and Upgrades:** the replacement or repair of existing culverts and associated outlets/headwalls, bridge abutments, or other road crossings repairs or resurfacing in waters of the state. The repair of existing or installation of new minor non-grouted riprap, armoring or other erosion control measures to protect existing access roads or existing structures from scour or erosion.
- iii. **New Access Road Crossings/Structures/Outfalls and Widening of Existing Roads:** includes new structures, outfalls, bridge abutments, road repairs or resurfacing, installation of new culverts or associated outlets, and erosion control/dissipation devices to protect the existing utility access roads. For example, the installation of concrete or non-grouted riprap on an existing utility access road to create a low-water (Arizona) crossing. Also includes the minor widening of existing roads.
- iv. **Utility Structure Upgrades:** includes the installation of similar poles with upgrades (e.g., new caissons), upgrades to larger poles or poles of different composition, conversion of overhead to underground, etc. Also includes the installation of new caissons, non-grouted riprap, or other armoring to protect existing structures from scour and erosion, and new minor line extensions.
- v. **Underground Linear Activities:** excavation for inspection or repair of underground facilities, installation of new pipes/cables across streams, placement of structures or erosion control to protect under-stream pipes/cables, and installation of new valves or other appurtenances.
- vi. **Other:** includes facility drainage system repair, maintenance, or installation of existing facilities such as substations and other bank stabilization efforts.

d. NWP C Specially Designated Temporary Impacts

- i. **Poles or Culvert Relocation:** Poles or culvert relocation within thirty feet is considered a temporary impact as long as the replacement footprint does not exceed the original footprint by more than ten percent, and the original footprint is completely restored.
- ii. **Roadside Ditches:** Impacts to roadside ditches are considered temporary if the roadside ditch has the following characteristics:
 - 1. the feature is artificially constructed (e.g., man-made);

2. the feature is not in or part of a stream channel or other waters of the state, or in a stream channel or other waters of the state that has been relocated in uplands;
 3. the feature would not cause or contribute to an impairment of downstream beneficial uses; and
 4. the feature is restored following construction such that the pre-construction course, condition and capacity are retained to the maximum extent practicable.
- e. NWP C Compensatory Mitigation Requirements:** The discharger shall adhere to the process below for any proposed projects that would result in permanent impacts to waters of the state:
- i. Prior to submitting an NOI for an individual project, the discharger shall submit a letter of credit in favor of the State Water Board for the purchase of mitigation bank or in-lieu fee program credits sufficient to offset total anticipated permanent impacts for all proposed projects for the current year.
 - ii. By January 15 of each year, the discharger shall submit to the State Water Board a draft mitigation plan that includes elements as outlined in 40 CFR § 230.94(c)(5)-(6) and the following:
 1. A report of permanent impacts incurred through December 31 of the previous year as detailed in Attachment B; and
 2. Proposed credit purchase to offset the previous year's permanent impacts from a Corps approved mitigation bank or in-lieu fee program.

The following mitigation ratios apply towards the purchase of establishment or reestablishment credits. If enhancement or preservation credits are proposed, mitigation ratios will be determined on an individual project basis:

- a. In-kind, in watershed = 1:1 mitigation ratio
- b. In-kind, outside of watershed = 2:1 mitigation ratio
- c. Out-of-kind, in watershed = 3:1 mitigation ratio
- d. Out-of-kind, outside of watershed = 4:1 mitigation ratio

These ratios apply only if credits are purchased within eighteen months of impacts, otherwise mitigation ratios may be increased to account for temporal loss.

3. By June 1, the discharger shall submit to the State Water Board proof of credit purchase that offset the previous year's permanent impacts.
4. **NWP D – Utility Line Activities for Water and Other Substances:** This General Order authorizes the following activity types only when associated with the construction, maintenance, or repair of utility lines for water and other substances. This General Order authorizes projects for which one or more NWP D has been authorized subject to the size limits in section VI.F.2 and all other applicable General Order conditions, including:
- a. **NWP D Prohibitions:**
 - i. **Lahontan Water Board:** Any NWP D activity within the Lake Tahoe Hydrologic Unit (HUC; 634.00), the Truckee River HUC (635.00), and the Little Truckee River HUC (636.00) is prohibited.
 - ii. **Riparian Vegetation:** Repair, rehabilitation, or replacement is only authorized when trimming of riparian vegetation does not result in significant adverse effects to water quality, or impair beneficial uses.
 - iii. **Riparian Tree Removal:** If a project involves removal of riparian trees list the following information on the project NOI form for each adult tree proposed for removal: species; common name; diameter breast height; and whether part of the riparian understory or overstory. Any tree removal that results in adverse effects to water quality is prohibited.
 - iv. **Roads:** Maintenance of access roads under this General Order shall be confined to the previously existing road prism, except for minor, targeted widening or improvements. Grading of throughcut roads (any road having a running surface lower than the surrounding terrain on both sides of the road) is prohibited.
 - v. **Armoring Facilities:** Placement of in-stream armor above streambed elevation is prohibited, except as otherwise authorized by the Water Boards.
 - vi. **Gabions:** Use of gabions ("rock gabions" and similar wire basket structures) in waters of the state is prohibited.
 - vii. **Grouted Riprap:** Use of grouted riprap in waters of the state is prohibited.

- viii.** Construction, replacement, or expansion of facilities in any ocean, bay, tidal waters or shores thereof are prohibited.
- b. NWP D Directional Drilling:** The following conditions shall apply to all drilling operations under waters of the state.
- i.** The discharge of bentonite, drilling muds, lubricants or any drilling compounds into waters of the state is prohibited. A draft HDD or drilling plan shall be prepared and shall be subject to review by Water Board staff at least 30 days before drilling activities under waters of the state. No HDD or other drilling operations under waters of the state shall commence until the HDD plan is approved by Water Board staff.
 - ii.** Release of bentonite, drilling muds, lubricants through fractures in the streambed or bank substrate during drilling is referred to as a “frack-out”. Because of the potential for frack outs to occur, the HDD or drilling plan shall include a frack out response plan. The frack-out response plan shall specify all measures to be initiated if frack-outs should occur during HDD operations.
 - iii.** For all HDD and other drilling sites, a means of containment (e.g., damming, fluming) or screening capable of capturing all of the potential discharge shall be described in the HDD plan. The downstream end of any such containment structure shall be capable of containing all bentonite or other drilling muds or debris that may be released during boring or drilling. Any drilling mud, spoils, etc. must be completely removed from the streambed prior to removal of the containment structure (e.g., dam, flume, and screen).
 - iv.** An environmental monitor shall provide monitoring for compliance with the HDD or drilling plan throughout drilling operations under waters of the state.
 - v.** Any HDD or other drilling operation shall be designed and directed in such a way as to minimize the risk of spills and discharges of all types including the frack-out release of drilling lubricants through fractures in the streambed or bank substrates. In substrates where frack-outs are likely to occur, HDD contractors shall employ all reasonable means and methods available to minimize potential for frack-out.
 - vi.** All drilling muds or compounds shall be contained and properly disposed of after drilling activities are completed.
 - vii.** If bore pits are excavated to support drilling operations, spoils shall be stored a minimum of 25 feet from the top of the bank of streams

or wetland/riparian boundary, where feasible; if site specific conditions warrant storing spoils less than 25 feet from the top of the bank of streams or wetland/riparian boundary this request must be provide in the HDD or drilling plan submitted to the Water Board prior to any drilling activities with potential impacts to waters of the state. Spoils shall be stored behind a sediment barrier and covered with plastic or otherwise stabilized (i.e., tackifiers, mulch, or detention).

c. NWP D Authorized Permanent Impacts:

- i. Facility Replacements:** underground lines, foundations, and other activities associated with pipelines or their access roads (e.g., wet crossings, culverts, bridge abutments) and appurtenances (e.g., valves, flanges, fittings, end modules, end terminals) located more than thirty feet from the original location. May also include structure removals.
- ii. Access Road Crossing Repair, Improvements, and Upgrades:** the replacement or repair of existing culverts and associated outlets/headwalls, bridge abutments, or other road crossings repairs or resurfacing in waters of the state. The repair of existing or installation of new minor non-grouted rip rap, armoring or other erosion control measures to protect existing access roads or existing structures from scour or erosion.
- iii. New Access Road Crossings/Structures/Outfalls and Widening of Existing Roads:** includes new structures, outfalls, bridge abutments, road repairs or resurfacing, installation of new culverts or associated outlets, and erosion control/dissipation devices to protect the existing access roads. For example, the installation of concrete or non-grouted riprap on an existing access road to create a low-water (Arizona) crossing. Also includes the minor widening of existing roads.
- iv. Structure Upgrades:** includes the installation of similar facilities with upgrades (e.g., new caissons), upgrades to larger facilities or facilities of different composition. Also includes the installation of new caissons, non-grouted riprap, or other armoring to protect existing structures from scour and erosion.
- v. Underground Linear Activities:** excavation for inspection or repair of underground facilities, installation of new pipes across streams, placement of structures or erosion control to protect under-stream pipes, and installation of new valves or other appurtenances.

- vi. **Other:** includes facility drainage system repair, maintenance, or installation of existing facilities and other bank stabilization efforts.

d. NWP D Specially Designated Temporary Impacts

- i. **Culvert Relocation:** Culvert relocation within thirty feet is considered a temporary impact as long as the replacement footprint does not exceed the original footprint by more than ten percent, and the original footprint is completely restored.
- ii. **Roadside Ditches:** Impacts to roadside ditches are considered temporary if the roadside ditch has the following characteristics:
 - 1. the feature is artificially constructed (e.g., man-made);
 - 2. the feature is not in or part of a stream channel or other waters of the state, or in a stream channel or other waters of the state that has been relocated in uplands;
 - 3. the feature would not cause or contribute to an impairment of downstream beneficial uses; and
 - 4. the feature is restored following construction such that the pre-construction course, condition and capacity are retained to the maximum extent practicable.

e. NWP D Compensatory Mitigation Requirements: The discharger shall adhere to the process below for any proposed projects that would result in permanent impacts to waters of the state:

- i. Prior to submitting an NOI for an individual project, the discharger shall submit a letter of credit in favor of the State Water Board for the purchase of mitigation bank or in-lieu fee program credits sufficient to offset total anticipated permanent impacts for all proposed projects for the current year.
- ii. By January 15 of each year, the discharger shall submit to the State Water Board a draft mitigation plan that includes elements as outlined in 40 CFR § 230.94(c)(5)-(6) and the following:
 - 1. A report of permanent impacts incurred through December 31 of the previous year as detailed in Attachment B; and
 - 2. Proposed credit purchase to offset the previous year's permanent impacts from a Corps approved mitigation bank or in-lieu fee program.

The following mitigation ratios apply towards the purchase of establishment or reestablishment credits. If enhancement or preservation credits are proposed, mitigation ratios will be determined on an individual project basis.

- a. In-kind, in watershed = 1:1 mitigation ratio
- b. In-kind, outside of watershed = 2:1 mitigation ratio
- c. Out-of-kind, in watershed = 3:1 mitigation ratio
- d. Out-of-kind, outside of watershed = 4:1 mitigation ratio

These ratios apply only if credits are purchased within eighteen months of impacts, otherwise mitigation ratios may be increased to account for temporal loss.

3. By June 1, the discharger shall submit to the State Water Board proof of credit purchase that offset the previous year's permanent impacts.

5. NWP 14 – Linear Transportation Projects: This General Order authorizes projects for which one or more NWP 14 has been authorized as long as the individual project size limits in section VI.F.1 are not exceeded. This General Order authorizes impacts resulting from the repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, subject to the size limits in section VI.F.1 and all other applicable General Order conditions, including:

a. NWP 14 Prohibitions:

- i. **Lahontan Water Board:** Any NWP 14 activity within the Lake Tahoe Hydrologic Unit (HUC; 634.00), the Truckee River HUC (635.00), and the Little Truckee River HUC (636.00) is prohibited.
- ii. **Riparian Vegetation:** Repair, rehabilitation, or replacement is only authorized when trimming of riparian vegetation does not result in significant adverse effects to water quality, or impair beneficial uses.
- iii. **Riparian Tree Removal:** If a project involves removal of riparian trees list the following information on the project NOI form for each adult tree proposed for removal: species; common name; diameter breast height; and whether part of the riparian understory or overstory. Any tree removal that results in adverse effects to water quality is prohibited.

- iv. **Roads:** Maintenance of access roads under this General Order shall be confined to the previously existing road prism, except for minor, targeted widening or improvements. Grading of throughcut roads (any road having a running surface lower than the surrounding terrain on both sides of the road) is prohibited.
 - v. **Armoring Facilities:** Placement of in-stream armor above streambed elevation is prohibited, except as otherwise authorized by the Water Boards.
 - vi. **Gabions:** Use of gabions ("rock gabions" and similar wire basket structures) in waters of the state is prohibited.
 - vii. **Riprap Installation:** New riprap installed as part of the maintenance of existing structures shall not increase the footprint of the structure in jurisdictional waters by more than 15 percent or place new fill across the complete width of the active channel in a manner that creates a new grade control structure in the channel.
 - viii. **Grouted Riprap:** Use of grouted riprap in waters of the state is prohibited.
 - ix. Projects impacting any ocean, bay, tidal waters or shores thereof are prohibited.
- b. **NWP 14 Compensatory Mitigation Requirements:** Compensatory mitigation is required to offset permanent impacts to waters of the state, unless the discharger has demonstrated that the project authorized by this General Order was designed to restore or improve the ecological function of the impacted aquatic resource. When compensatory mitigation is required, the discharger shall provide the following:
- i. A draft compensatory mitigation plan at a level of detail sufficient to accurately evaluate whether compensatory mitigation offsets the adverse impacts attributed to a project considering the overall size and scope of impact.
 - ii. Compensatory mitigation at a minimum of a one-to-one mitigation ratio, measured in area or length. A higher overall mitigation ratio shall be used where necessary to ensure replacement of lost aquatic resource functions.
 - iii. Subject to Water Board approval, the mitigation may be satisfied using any of the following compensatory mitigation methods: restoration, enhancement, establishment, and/or preservation.
 - iv. Compensatory mitigation shall be provided through a mitigation bank or in-lieu fee program, where feasible. If no mitigation bank or

in-lieu fee program options are available, mitigation may be provided through on-site or off-site permittee responsible mitigation, subject to Water Board approval.

- v. No discharge of dredged or fill material to waters of the state shall occur prior to Water Board approval of a final mitigation plan.

6. NWP 36 – Boat Ramps:

- a. **Lahontan Water Board:** Any NWP 36 activity within the Lake Tahoe Hydrologic Unit (HUC; 634.00), the Truckee River HUC (635.00), and the Little Truckee River HUC (636.00) is prohibited.
- b. To prevent the release of uncured cement components into water, use of concrete in areas where ramps may be submerged before the concrete is fully cured is prohibited.

VII. California Environmental Quality Act (CEQA)

The State Water Board has determined that the projects authorized by this General Order are exempt from review under CEQA pursuant to California Code of Regulations, title 14, section 15061. Specifically, the issuance of this Order and the activities described herein meet the exemption criteria under California Code of Regulations, title 14, section(s) listed in the table provided in Attachment E List of Certified Nationwide Permits. Additionally, the State Water Board concludes that no exceptions to the CEQA exemption apply to the activities approved by this Order. The State Water Board will file a Notice of Exemption with the State Clearinghouse within five (5) working days from the issuance of this Order (Cal. Code Regs., tit 14 § 15062).

VIII. Public Notice

On September 15, 2020, the Corps' noticed a proposal to issue five new NWPs and reissue 52 existing NWPs with general conditions and revised definitions in the Federal Register (85 Fed. Reg. 57298-57395 (Sep. 15, 2020)). On October 13, 2020, the State Water Board received the Corps' request to certify the proposed NWPs. On October 16, 2020, the Corps established a 60-day reasonable time period for the State Water Board to act on the request, by December 12, 2020.

In addition to the Corps public notice, the State Water Board provided public notice of the proposed certification of the Corps' NWPs pursuant to California Code of Regulations, title 23, section 3861 from October 16, 2020, to November 30, 2020. The State Water Board received one late comment from The Citizens Committee to Complete the Refuge, Center for Biological Diversity, California Coastkeeper Alliance, San Francisco Baykeeper, AquAlliance and Defenders of Wildlife. The comment letter raised a number of concerns regarding the process by which the NWPs are being reissued, including that the Corps failed to comply with applicable federal regulations, and substantive portions of the NWPs, including the removal of linear foot restrictions. The comment letter expressed support for conditional certification of a limited number of

NWPs and denial of the remaining NWPs. Although the comment letter was late, State Water Board staff considered the recommendations set forth in the letter but notes that many of the concerns expressed in the letter cannot be addressed through this General Order.

IX. General Order Expiration

Except for reporting obligations and enforcement purposes, authorization under this General Order shall extend until the NWPs expire. If a project authorized by the NWPs and by an NOA under this General Order has commenced or is under contract to commence on or before the expiration date of the NWPs, the applicant has up to one year from the General Order expiration to complete the project under the terms of this General Order. If a project has not commenced or is not under contract to commence by the NWPs' expiration date, a new Notice of Intent, or individual application, and applicable fees will be required.

X. Petitions for Reconsideration

Any person aggrieved by this action may petition the State Water Board to reconsider this General Order in accordance with California Code of Regulations, title 23, section 3867. A petition for reconsideration must be submitted in writing and received within 30 calendar days of the issuance of this General Order.

XI. Nationwide Permits Denied

The following NWPs are denied: 2, 3(b), 3(c), 7, 8, 13, 15, 16, 17, 18, 19, 21, 23, 24, 25, 27, 29, 30, 31, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, A, B, and E. The State Water Board does not have reasonable assurance that the denied NWPs will comply with the applicable provisions of sections 301, 302, 303, 306 and 307 of the Clean Water Act and appropriate requirements of state law. (See 33 USC § 1341.) Consistent with 40 C.F.R. section 121.8(a), this denial does not preclude an applicant from submitting a new certification request. Information required pursuant to 40 C.F.R. section 121.7(e)(2) is set forth in Attachment C. Consistent with 40 C.F.R. section 121.8(a), this denial does not preclude an applicant from submitting a new certification request. Clean Water Act section 401 certification action on projects authorized by these denied NWPs will be considered on an individual, project-specific basis.

XII. Water Quality Certification

I hereby issue the General Order for the State Water Board Certified Corps' Nationwide Permits Project (file number SB20031GN) certifying that as long as all of the conditions listed in this General Order are met, any discharges authorized by NWPs 1, 3(a), 4, 5, 6, 9, 10, 11, 12, C, D, 14, 20, 22, 28, 32, 36, and 54 will comply with the applicable provisions of Clean Water Act sections 301 (Effluent Limitations), 302 (Water Quality Related Effluent Limitations), 303 (Water Quality Standards and Implementation Plans), 306 (National Standards of Performance), and 307 (Toxic and Pretreatment Effluent

Standards). The State Water Board will file a Notice of Exemption (NOE) at the SCH within five (5) working days of issuance of this General Order.

In addition to a section 401 certification, this General Order serves as Waste Discharge Requirements pursuant to the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.) as set forth in State Water Board Water Quality General Order No. 2003-0017-DWQ. Notwithstanding any determinations made by the U.S. Army Corps or other federal agency pursuant to 40 C.F.R. section 121.9, dischargers must comply with the entirety of this Order. Discharges to waters of the state are prohibited except when in accordance with Water Code section 13264.

Except insofar as may be modified by any preceding conditions, all General Order actions are contingent on: (a) the discharge being limited and all proposed mitigation being completed in strict compliance with the conditions of this General Order and the attachments to this General Order; and, (b) compliance with all applicable requirements of Statewide Water Quality Control Plans and Policies, the Regional Water Boards' Water Quality Control Plans and Policies.

Eileen Sobeck  Digitally signed by Eileen Sobeck
Date: 2020.12.09 13:31:00 -08'00'

Eileen Sobeck, Executive Director

Date

- Attachment A Notice of Intent**
- Attachment B Reporting and Notification Requirements**
- Attachment C 40 CFR Part 121.7 Compliance**
- Attachment D Signatory Requirements**
- Attachment E List of Certified Nationwide Permits**

Attachment A – Notice of Intent Instructions

How to Apply

Applicants seeking General Order authorization for Nationwide Permits (NWP) 3(a), 5, 6, 12, C, D, 14, 20, 22, 28, 32, 36, and 54 from are required to submit a Notice of Intent (NOI) to the appropriate Water Board. A [map showing regional water board jurisdictional boundaries](http://www.waterboards.ca.gov/waterboardsmap.shtml) is available on the Water Board's website (<http://www.waterboards.ca.gov/waterboardsmap.shtml>). Addresses and contact information can be found in the online [Staff Directory](https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/staffdirectory.pdf) (https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/staffdirectory.pdf).

Regional Water Board NOI Submission

NWPs 3(a), 5, 6, 14, 20, 22, 28, 32, 36, and 54: submit the NOI to the Regional Water Board with jurisdiction where the proposed project impacts would occur, with the application fee. For projects that cross a regional board boundary, submit the NOI to the State Water Board as directed below.

State Water Board NOI Submission

NWPs 12, C, and D, or for projects that cross a regional board boundary: submit the NOI to the State Water Board with the application fee. The appropriate Regional Board(s) should also be provided a copy of any NOI submitted to the State Water Board. For State Water Board NOIs, mail to:

State Water Resources Control Board, Division of Water Quality
1001 I Street; 15th Floor
Sacramento, CA 95814

Notice of Intent Review Process

To avoid project delays, submit an NOI as early as possible. Within 30 days of NOI receipt, Water Board staff will determine if the NOI is complete.

- Incomplete NOIs will be returned to the applicant with a request to provide information needed to determine the NOI complete. In cases where the NOI is incomplete and the applicant fails to provide the requested information, the Water Board may issue a Notice of Exclusion (NOE).
- If the NOI is determined complete, within 45 days of NOI receipt, the Water Board will either issue a Notice of Applicability (NOA) or an NOE.
 - If the Water Board does not issue an NOA or NOE within 45 days of receiving a complete NOI, the discharger may proceed with the project according to all applicable General Order conditions.
- An NOA authorizes the proposed activity for enrollment under the General Order. An NOE denies authorization and enrollment of the proposed activity under the General Order.

Definitions

Consider the following definitions while completing your NOI.

Permanent aquatic resource impacts will permanently change an aquatic resource to a non-aquatic habitat type or permanently changes the bottom elevation of an aquatic resource. Permanent impacts can result in physical loss of area and ecological degradation.

Temporary aquatic resource impacts are impacts that temporarily cause a physical loss or ecological degradation of an aquatic resource. The impact must be restored to pre-project conditions through natural ecological processes or active restoration in order to be classified as temporary. If the impact is not restored to pre-project condition, it is classified as permanent.

Form Instructions

Section 1: Nationwide Permit Number

Identify the NWP number that applies to the project.

Section 2: Legally Responsible Party and Duly Authorized Representative Information

Legally Responsible Party, Contact Name, and Title: Provide the full, legal company name of the responsible party (applicant). Most commonly, the applicant is the property and/or facility owner. If the applicant is an individual and not a company, indicate that a company name is not applicable. If the applicant is an agency, company, corporation or other organization, a contact name (first, middle initial, last) of the main representative of the company and their title must be provided. The applicant will be the entity or individual responsible for compliance with state and federal regulations, including the Clean Water Act, California Water Code, applicable Water Quality Control Plans, and General Order Conditions.

Legally Responsible Party Contact Information: Telephone number, email address, and the company's mailing address (not the project address) including the street, city, state, and zip code must be provided. **Note that the company's mailing address will also be used for billing purposes.**

Duly Authorized Representative Name and Title: The Duly Authorized Representative (agent) is authorized to certify and submit applications or reports to the Water Boards on behalf of the Legally Responsible Party. Telephone number, email address, and the agent's mailing address (not the project address) including the street, city, state, and zip code must be provided. It is not a requirement to have an agent. If you choose to be represented by an agent, provide the agent's information in this section. If you choose to not be represented by an agent leave this section blank.

Section 3: Fees

Fee amounts are determined according to the [Cal. Code Regs., tit. 23, § 2200\(a\)\(2\) fee schedule](https://govt.westlaw.com/calregs/Document/IEEE14760D45A11DEA95CA4428EC25FA0?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)) ([https://govt.westlaw.com/calregs/Document/IEEE14760D45A11DEA95CA4428EC25FA0?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/calregs/Document/IEEE14760D45A11DEA95CA4428EC25FA0?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))).

- An [excel fee calculator](https://www.waterboards.ca.gov/resources/fees/water_quality/docs/dredgefillcalculator.xlsm) is available online (https://www.waterboards.ca.gov/resources/fees/water_quality/docs/dredgefillcalculator.xlsm) and may be used to **estimate** fees.
- Include only the application fee with your NOI. Water Board staff will determine whether any additional project fees are required during NOI review.
- Fees may be paid online or by check, money order, or cashier check. Information on how to make an online payment is available at the State Water Board's [Fee Payment Website](https://www.waterboards.ca.gov/make_a_payment/) (https://www.waterboards.ca.gov/make_a_payment/). If fees are paid online prior to application submission, attach payment receipt to the NOI. Although fees should be included with the NOI and submitted to the appropriate Water Board, **make all checks, money orders, and cashier checks payable to the "State Water Board."**
- Fees are subject to change.

Section 4: Other Agency Permits, Licenses, Agreements, Plans, and Email Correspondence

Provide the following information for each permit from other agencies:

- **Have you applied?** Indicate yes if you have applied for the specified permit; indicate no if you have not.
- **Have you received the permit?** Indicate yes if you have received the permit; indicate no if you have not.
- **Permit Type:** Provide the name of the permit.
- **ID Number:** Provide the permit's identification number or unique identifier.

Section 5: Project Information

Project Name: Provide the project name. The project name will be used in all correspondence referencing the project. Be sure the project name is consistent with other agency permits and applications for the same project, and is consistent on all maps, drawings, and reports. The project name should be clearly relevant to the project (e.g., Blue Creek Bridge Project; Jones Subdivision Road Widening Project).

Project Address: Provide the street address of the project location and the Assessor's Parcel Number (APN). If the proposed project does not have a physical street address, be as descriptive as possible in this section. For example, "Leisure Town Rd., 5.5 miles south of the intersection of I-80 and Leisure Town Rd."

Coordinates: Indicate the location for the center point of your project in decimal degrees (approximate location is acceptable). Assistance in determining a project's coordinates is widely available through various free online services or your local library.

Construction Timeline: Provide the estimated start and end dates for the proposed project.

Project Description/Purpose: Provide a detailed, technically accurate narrative description of the proposed project purpose, project design, all activities planned to complete the design. Include total impacts, area of ground disturbance and area of impact to all aquatic resources on the site (i.e., any and all streams, wetlands, lakes, ponds, beaches, shorelines, etc). If temporary diversions or impoundments of water, cofferdams, or similar structures are proposed include a dewatering plan as required in General Order section VII.B.20. If trimming of riparian vegetation is proposed, describe the species impacted and explain why trimming is necessary to complete the project.

Section 6: Avoidance, Minimization, and Cumulative Impacts

Avoidance and Minimization: Describe steps taken to avoid impacts to waters and measures incorporated into the project design to minimize loss of, or significant adverse impacts to, beneficial uses of waters of the state, including on-site restoration of the project area. A description may include actions or methods proposed for erosion control, including winterization strategies to stabilize bare soils and revegetation proposals. A map may be included to indicate the approximate location and area of soil, land and vegetation disturbance, and proposed erosion and sediment control best management practices (BMPs) proposed to avoid and minimize project impacts to waters of the state, including BMPs for hazardous substances. Refer to the Procedures' state Supplemental Dredge or Fill Guidelines, subpart H, for actions to minimize adverse impacts to waters of the state. If the effects of impervious surfaces will be minimized through implementation of Low Impact Development treatments, describe those minimization treatments.

Cumulative Impacts: Include a discussion of any potential cumulative impacts. Provide a brief description, including estimated adverse impacts of any projects implemented by the project applicant within the last five years or planned for implementation by the applicant within the next five years that are in any way related to the proposed activity or that may impact the same receiving water body(ies) as the proposed activity. For the purpose of this item, the waterbody extends to a named source or stream segment identified in the relevant Regional Water Quality Control Plan (Basin Plan). Water Board Basin Plans are found on the applicable Regional Board Basin Plan webpage, and also located on the [State Water Board's Plans and Policies website](https://www.waterboards.ca.gov/plans_policies/) (https://www.waterboards.ca.gov/plans_policies/).

Section 7: Temporary Impacts, Permanent Impacts, and Compensatory Mitigation

Riparian Tree Removal: Indicate yes if your project results in the removal of riparian trees; indicate no if it will not. If yes, populate Table 1 with the requested information, or attach a similar table if additional rows are needed.

- Species name
- Common name
- Diameter at breast height (DBH)
- Indicate if the tree(s) are part of the riparian overstory or understory

Temporary Impacts: Indicate yes if your project will result in temporary impacts to waters of the state. Provide the total temporarily impacted area in acres, to the nearest thousandths of an acres. Provide the total temporarily impacted length to the nearest whole foot. These quantities must match the sum of the temporary impact quantities provided in Table 3. If you are proposing temporary impacts attach a restoration plan, that contains all General Order requirements (a schedule; plans for grading of disturbed areas to pre-project contours; a planting palette with plan species native to the project area; seed collection location; invasive species management; performance standards; and maintenance requirements (e.g., watering, weeding, and replanting). A restoration plan must be provided before your NOI may be determined complete.

Permanent Impacts: Indicate yes if your project would result in permanent impacts; indicate no if it would not. Provide the total permanently impacted area in acres, to the nearest thousandth of an acre. Provide the total temporarily impacted length to the nearest whole foot.

Table 2: Receiving Waters Information: Populate Table 2 with the requested information as described below.

- **Impact Site ID:** Identify the impact site with a site ID. Site IDs should correspond to those used in project maps and other agency application materials.
- **Waterbody Name:** List the waterbody name found in the applicable Basin Plan. If the impact site ID occurs in an unnamed waterbody enter “unnamed” and provide the first named downstream receiving water. Contact Water Board staff for Basin Plan maps or general assistance completing this section, if needed. Regional Board Basin Plans are also located on the [State Water Board's Plans and Policies website](https://www.waterboards.ca.gov/plans_policies/) (https://www.waterboards.ca.gov/plans_policies/).
- **Impacted Aquatic Resource Type:** For each impact site ID, identify the impacted aquatic resource type from the following list: lake, ocean, bay, estuary, riparian zone, stream channel, vernal pool, or wetland. (More refined or precise resource classifications may be used in project plans and related documents.)
- **Water Board Hydrologic Units:** Identify the Water Board Basin Plan hydrologic unit code (HUC). Note that the Basin Plan HUC is not the same as a U.S. Geological Survey HUC. If unknown, indicate UNK and this information will be completed by Water Board staff.
- **Receiving Waters:** List the first downstream waterbody with beneficial use designation in the Water Board Basin Plan. If unknown, indicate UNK and this information will be completed by Water Board staff.
- **Receiving Waters Beneficial Uses:** List the beneficial use designation. If unknown, indicate UNK and this information will be completed by Water Board staff.

- **303d Listing Pollutant:** List pollutants for receiving waters that have a 303(d) impairment designation, if the water is not listed, indicate NA. If unknown, indicate UNK and this information will be completed by Water Board staff.
- **eCRAM ID:** If a California Rapid Assessment Method (CRAM) assessment has been performed at this location, provide the CRAM assessment area ID and attach the CRAM score sheet to the NOI.

Table 3 - Individual Direct Impact Information: Populate Table 3 with the requested information as described below. This table may be used for dredge or fill/excavation activities.

- **Impact Site ID:** Identify the impact site with a site ID; site IDs should correspond with those used in Table 2.
- **Latitude:** Provide the center coordinate of the impact site in decimal degrees.
- **Longitude:** Provide the center coordinate of the impact site in decimal degrees.
- **Permanent or Temporary:** Indicate if the impact at the impact site ID is permanent or temporary.
- **Acres, Cubic Yards, and Linear Feet:** Provide the area in acres, volume in cubic yards dredged (if applicable), and length in linear feet for each impact site. For acres, round to the nearest thousandth of an acre.
- **Dredge or Fill/Excavation?** For each impact site, identify if the impact is from dredging or from fill/excavation activities.

Section 8: Documentation

Use the checklist to confirm the necessary documentation is attached to your NOI. If you determine one of the listed items does not pertain to your project, leave the checkbox empty:

- **Fee Check or Online Payment Receipt**
- **Riparian Trees Proposed for Removal**
- **Other Agency Correspondence, Permits, and Permit Applications:** Attach other agency permits, applications, or correspondence as required in Section 4. If the Corps requires submittal of a Pre-Construction Notification (PCN), include a copy with the NOI.
- **Aquatic Resource Delineation Report:** Include if available.
- **Drawings, or Design Plans:** As applicable, attach 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 on the site. The drawings should contain a title block, legend and scale, amount (in cubic yards, if applicable) and area (in acres) of fill, including both permanent and temporary impacts. 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 and design plans. Maps prepared according to the description below may satisfy some or all of this information.
- **Temporary Impact Restoration Plan**

- **Map(s):** Submit maps of sufficient detail to clearly illustrate all project elements, site characteristics, and impacts, with a scale of at least 1:24000 (1" = 200'). Acceptable map formats, listed in order of preference, are:
 - **GIS shapefiles:** Shapefiles must depict the boundaries of all project areas, site characteristics, and extent of aquatic resources impacted or avoided. Each shapefile should be attributed with the extent/type of aquatic resources impacted. Features and boundaries should be accurate to within 33 feet (10 meters). Identify datum/projection used and, if possible, provide map with north American datum of 1983 (NAD 83) in the California Teale Albers projection in feet.
 - **KLM files:** Saved from online mapping services. Maps must show the boundaries of all project areas and extent/type of aquatic resources impacted. Include URL(s) of maps. If this format is used, include a spreadsheet with the object ID and attributed with the extent/type of aquatic resources impacted.
 - **Other electronic format:** (CAD or illustration format) that provides a context for location (inclusion of landmarks, known structures, geographic coordinates, or USGS DRG or DOQQ). Maps must show the boundaries of all project areas and extent/type of aquatic resources impacts. If this format is used, include a table with the object ID and attributed with the extent/type of aquatic resources impacted.
 - Aquatic resource maps marked on paper **USGS 7.5 minute topographic maps or Digital Orthophoto Quarter Quads (DOQQ):** Original or legible copies are acceptable. Maps must show boundaries of all project areas and extent/type of aquatic resources impacted. If this format is used, include a spreadsheet with the object ID and attributed with the extent/type of aquatic resources impacted.
- **Pre-Project Photographs:** Include a unique identifier, date stamp, written description of photo details, and latitude/longitude (in decimal degrees) or map indicating location of photo. Successive photos should be taken from the same vantage point to compare pre/post construction conditions.
- **Proposed Dewatering Plan:** If not included in project description.
- **Additional Pages and/or Supplemental Information:** For example, if the requested information does not fit in the space provided on the form, or if you would like to provide supplemental information not requested in the NOI.

Section 9: Legally Responsible Party and Duly Authorized Representative Signature

The Legally Responsible Party (LRP) must comply with the eligibility requirements described below (and set forth in Attachment D). The LRP shall sign and submit the NOI to the appropriate Water Board. Water Board mailing addresses are located in the [Staff Directory](https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/staffdirectory.pdf) (https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/staffdirectory.pdf).

The attestation on the NOI form must be signed by the LRP. LRP eligibility is as follows:

1. For a corporation: The NOI must be signed by a responsible corporate officer of at least the level of vice-president.

2. For a partnership or sole proprietorship: by a general partner or the proprietor, respectively.
3. For a municipality, state, federal, or other public agency: by either a principal executive officer or ranking elected official. This includes the chief executive officer of the agency or the senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., Regional Administrators of the U.S. EPA).



State Water Board Certification of the Nationwide Permits: **Notice of Intent**

Section 1: Nationwide Permit Number¹

Select the applicable Nationwide Permit (NWP):

- NWP 3(a) Maintenance
- NWP 5 Scientific Measurement Devices
- NWP 6 Survey Activities
- NWP 12 Oil or Natural Gas Pipeline Structures
- NWP C Electric Utility Line and Telecommunication Activities
- NWP D Utility Live Activities for Water and Other Substances
- NWP 14 Linear Transportation Projects
- NWP 20 Response Operations for Oil and Hazardous Substances
- NWP 22 Removal of Vessels
- NWP 28 Modification of Existing Marinas
- NWP 32 Completed Enforcement Actions
- NWP 36 Boat Ramps
- NWP 54 Living Shorelines

Section 2: Legally Responsible Party (Applicant) and Duly Authorized Representative Information

Information	Legally Responsible Party	Duly Authorized Representative (optional)
Company/Agency Name		
Name of Contact		
Title		
Address		
City, State, Zip		
Phone Number(s)		
Email Address		

Section 3: Fees

Pay the application fee online or include a check, money order or cashier check, payable to the State Water Board, with your NOI.

¹ Refer to Attachment A of the General Order for instructions on how to fill out this Notice of Intent.

Section 4: Other Agency Permits, Licenses, Agreements, Plans, and Email Correspondence

Attach application if final action not yet taken.

Permit	Have you applied? (yes/no)	If yes, have you received the permit? (yes/no)	Permit Type	ID Number (e.g. Corps file number)
Corps NWP PCN				
USFWS Incidental Take Permit				
NMFS Incidental Take Permit				
Other Federal Permits				
CDFW Lake or SAA				
Coastal Development Permit				
Other State Permits				
Local Permit(s)				
SWPPP				

Section 5: Project Information

Project Name:
Project Address (Include city, zip code, county, and APN):
Coordinates (decimal degrees):
Construction Timeframe (Provide approximate start and end dates):
Project Description/Purpose:

Section 6: Avoidance, Minimization, and Cumulative Impacts

Avoidance and Minimization:
Cumulative Impacts:

Section 7: Temporary Impacts, Permanent Impacts, and Compensatory Mitigation

Riparian Tree Removal: Would your project result in the removal of riparian trees _____? If yes, use the table below for each adult tree proposed for removal (or attach a similar table if additional rows are needed).

Table 1: Riparian Tree Removal

Species	Common Name	Diameter Breast Height	Indicate whether the tree is part of the Overstory or Understory

Temporary Impacts: Would your project result in temporary impacts _____? If yes, attach the restoration plan.

Total Temporary Impacts: _____ acres; _____ linear feet

Permanent Impacts: Would your project result in permanent impacts?

Total Permanent Impacts: _____ acres; _____ linear feet

If submitting an NOI for NWP 12/C/D, has your irrevocable letter of credit been submitted (yes/no)? If no, do not proceed with this NOI.

Table 2: Receiving Waters Information²

Impact Site ID	Waterbody Name	Impacted Aquatic Resource Type	Water Board Hydrologic Units	Receiving Waters	Receiving Waters Beneficial Uses	303(d) Listing Pollutant	eCRAM ID

Table 3: Individual Direct Impact Information

Impact Site ID	Latitude	Longitude	Permanent or Temporary Impact?	Acres	Cubic Yards	Linear Feet	Dredge or Fill/Excavation?

² Attach additional tables or add rows to the tables as needed. For receiving waters information (e.g., beneficial uses, watershed identification, etc.) refer to the Regional Water Basin Plans on the applicable Regional Water Board website or the [State Water Board's Plans and Policies website](https://www.waterboards.ca.gov/plans_policies/) (https://www.waterboards.ca.gov/plans_policies/).

Section 8: Documentation

Check any of the following documents that are applicable to your project and attach copies to your NOI.

- Fee Check or Online Payment Receipt
- Riparian Trees Proposed for Removal
- Other Agency Correspondence, Permits and Permit Applications
- Aquatic Resource Delineation Report
- Drawings, or Design Plans
- Temporary Impact Restoration Plan
- Map(s)
- Pre-Project Photographs
- Proposed Dewatering Plan
- Additional Pages and/or Supplemental Information

Section 9: Legally Responsible Party and Duly Authorized Representative Signature

See NOI Instructions for Legally Responsible Party eligibility.

Legally Responsible Party Attestation

I certify under penalty of law that this application and all attachments were prepared under my direction or supervision in accordance with a process designed to assure that qualified personnel properly gather and evaluate the information submitted. The information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Print Legally Responsible Person Name (Not the Duly Authorized Representative)

X

Legally Responsible Person's Signature

Duly Authorized Representative assignment is as follows (optional):

The authorization shall specify that a person designated as a Duly Authorized Representative has responsibility for the overall operation of the regulated facility or activity, such as a person that is a manager, operator, superintendent, or another position of equivalent responsibility, or is an individual who has overall responsibility for environmental matters for the company.

Optional Duly Authorized Representative Assignment

I hereby authorize [Print Duly Authorized Representative's Name] to act on my behalf as the Duly Authorized Representative in the processing of this NOI, and to furnish upon request, supplemental information in support of this NOI.

Print Legally Responsible Person Name (not the Duly Authorized Representative)

X

Legally Responsible Person's Signature

For Internal Water Board Use Only

Reviewer:

Date Received:

Reg Measure ID:

WDID:

Check Number:

Attachment B – Report and Notification Requirements

Report Submittal Instructions:

1. Check the box on the Report and Notification Cover Sheet (page 9 and 10 of Attachment B) next to the report or notification you are submitting. See the General Order and Notice of Applicability (NOA) for report and notification requirements specific to your project.
2. Complete and sign the Report and Notification Cover Sheet and attach all information requested for the Report or Notification Type.
3. Submit the signed Report and Notification Cover Sheet and required information via email to the Water Board staff assigned to your project.
4. Submit **NWP 12, C, and D** Reports and Notifications to:
SWBNWP@waterboards.ca.gov.
5. Include in the subject line of the email:
ATTN: [Staff Name] and [Reg Measure ID] Report

Map/Photo Instructions:

Map Format Information: Preferred map formats of at least 1:24000 (1" = 2000') detail (listed in order of preference):

- **GIS shapefiles:** The shapefiles must depict the boundaries of all project areas and extent of aquatic resources impacted. Each shape should be attributed with the extent/type of impacted aquatic resources. Features and boundaries should be accurate to within 33 feet (10 meters). Identify datum/projection used and if possible, provide map with a North American Datum of 1983 (NAD83) in the California Teale Albers projection in feet.
- **Google KML files** saved from Google Maps: My Maps or Google Earth Pro. Maps must show the boundaries of all project areas and extent/type of aquatic resources impacted. Include URL(s) of maps. If this format is used include a spreadsheet with the object ID attributed with the extent/type of each impacted aquatic resource.
- **Other electronic format** (CAD or illustration format) that provides a context for location (inclusion of landmarks, known structures, geographic coordinates, or USGS DRG or DOQQ). Maps must show the boundaries of all project areas and extent/type of aquatic resources impacted. If this format is used include a spreadsheet with the object ID and attributed with the extent/type of aquatic resources impacted.
- Aquatic resource maps marked on paper **USGS 7.5 minute topographic maps** or **Digital Orthophoto Quarter Quads (DOQQ)** printouts. Maps must show the boundaries of all project areas and extent/type of aquatic resources impacted. If this format is used include a spreadsheet with the object ID and attributed with the extent/type of aquatic resources impacted.

Photo-Documentation: Include a unique identifier, date stamp, written description of photo details, and latitude/longitude (in decimal degrees) or map indicating location of photo. Successive photos should be taken from the same vantage point to compare pre/post construction conditions.

Part A – Annual Reports

Report Type 1 – Annual Report

1. **Report Purpose** - Notify the Water Board staff of project status throughout the duration of the project.
2. **When to Submit** – If required in the NOA, the discharger shall submit an annual report each year by the date specified in the NOA until a Notice of Project Complete Letter is issued to the discharger.
3. **Report Contents** - The contents of the annual report shall include the topics indicated below. Report contents are outlined in Annual Report Topics below.
 - **Topic 1: Construction Summary**
 - **Topic 2: Mitigation for Temporary Impacts Status**
 - **Topic 3: Compensatory Mitigation for Permanent Impacts Status**
 - a. **Annual Report Topic 1 - Construction Summary** - Project progress and schedule including initial ground disturbance, site clearing and grubbing, road construction, site construction, and the implementation status of construction storm water best management practices (BMPs). If construction has not started, provide estimated start date and reasons for delay.
 - i. Map showing general project progress.
 - ii. Summary of Conditional Notification and Report Types 6 and 7 (Part C below), if applicable.
 - b. **Annual Report Topic 2 - Mitigation for Temporary Impacts Status**
 - i. Planned date of initiation and map showing locations of mitigation for temporary impacts to waters of the state and all upland areas of temporary disturbance which could result in a discharge to waters of the state.
 - ii. If mitigation for temporary impacts has already commenced, provide a map and information concerning attainment of performance standards contained in the restoration plan.
 - c. **Annual Report Topic 3 - Compensatory Mitigation for Permanent Impacts Status - *If not applicable report “N/A.”**
 - **NWP 3(a) and 14 Projects:** Include the following as required by the approved Compensatory Mitigation Plan:
Permittee Responsible:
 - If mitigation has not been installed, the planned installation date(s).
 - If installation is in progress, a map of what has been completed to date.

- If installation is complete, provide a final map and information concerning attainment of performance standards contained in the compensatory mitigation plan.

Mitigation Bank or In-Lieu Fee (ILF):

- Status or proof of purchase of credit types and quantities.
 - The name of bank/ILF program and contact information.
 - If ILF, project location and type, if known.
- **NWP 12, C, and D Projects:** By January 15 of each year, provide the following for all NWP 12, C, and D projects that require compensatory mitigation to offset permanent impacts to waters of the state. This information may be provided within the Annual Report, or as a separate report submission:
 - Regulatory measure ID.
 - NOA effective date.
 - Summary of total permanent impacts incurred through December 31 of the previous year including:
 - Impacted water body type(s) (lake, ocean, bay, estuary, stream channel, riparian zone, or wetland); and
 - Permanent impact quantity (acres and linear feet).
 - Proposed credit purchase or proof of purchase to offset the previous year's permanent impacts from a Corps approved mitigation bank or ILF, including:
 - Credit types and quantities;
 - The name of bank/ILF program and contact information; and
 - If ILF, project location and type, if known.
 - If applicable, mitigation required by California Department of Fish and Wildlife for riparian impacts.

Part B – Project Status Notifications

Report Type 2 - Commencement of Construction

1. **Report Purpose** - Notify Water Board staff prior to the start of construction.
2. **When to Submit** - Must be received at least seven (7) days prior to start of initial ground disturbance activities.
3. **Report Contents** -
 - a. Date of commencement of construction.
 - b. Anticipated date when discharges to waters of the state will occur.
 - c. Project schedule milestones including a schedule for onsite compensatory mitigation, if applicable.
 - d. Construction Storm Water General Permit WDID No., if applicable.

Report Type 3 - Request for Notice of Project Complete Letter

1. **Report Purpose** - Notify Water Board staff that construction and/or any post-construction monitoring is complete, and no further project activity is planned. Water Board staff will review the request and send a Project Complete Letter to the discharger upon approval. Termination of annual invoicing of fees will correspond with the date of the Project Complete Letter.
2. **When to Submit** - Must be received by Water Board staff within thirty (30) days following completion of all project activities.
3. **Report Contents** -
 - a. **Part A: Stormwater Compliance**
 - i. Status of post-construction stormwater BMP installation, pursuant to the General Order.
 - b. **Part B: Mitigation for Temporary Impacts**
 - i. A report establishing that the performance standards outlined in the restoration plan have been met for project site upland areas of temporary disturbance which could result in a discharge to waters of the state.
 - ii. A report establishing that the performance standards outlined in the restoration plan have been met for restored areas of temporary impacts to waters of the state. Pre- and post-photo documentation of all restoration sites.
 - c. **Part C: Permittee Responsible Compensatory Mitigation**
 - i. A report establishing that the performance standards outlined in the compensatory mitigation plan have been met.

- ii.** Status on the implementation of the long-term maintenance and management plan and funding of endowment.
- iii.** Pre- and post-photo documentation of all compensatory mitigation sites.
- iv.** Final maps of all compensatory mitigation areas (including buffers).

Part C – Conditional Notifications and Reports

Report Type 4 - Accidental Discharge of Hazardous Material Report

1. **Report Purpose** - Notifies Water Board staff that an accidental discharge of hazardous material has occurred.
2. **When to Submit** - Within five (5) working days following the date of an accidental discharge. Continue reporting as required by Water Board staff.
3. **Report Contents** -
 - a. The report shall include the Office of Emergency Services (OES) Incident/Assessment Form, a full description and map of the accidental discharge incident (i.e. location, time and date, source, discharge constituent and quantity, aerial extent, and photo documentation). If applicable, the OES Written Follow-Up Report may be substituted.
 - b. If applicable, any required sampling data, a full description of the sampling methods including frequency/dates and times of sampling, equipment, locations of sampling sites.
 - c. Locations and construction specifications of any barriers, including silt curtains or diverting structures, and any associated trenching or anchoring.

Report Type 5 - Violation of Compliance with Water Quality Standards Report

1. **Report Purpose** - Notifies Water Board staff that a violation of compliance with water quality standards has occurred.
2. **When to Submit** - The discharger shall report any event that causes a violation of water quality standards within three (3) working days of the noncompliance event notification to Water Board staff.
3. **Report Contents** - The report shall include: the cause; the location shown on a map; and the period of the noncompliance including exact dates and times. If the noncompliance has not been corrected, include: the anticipated time it is expected to continue; the steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance; and any monitoring results if required by Water Board staff.

Report Type 6 - In-Water Work and Diversions Water Quality Monitoring Report

1. **Report Purpose** - Notifies Water Board staff of the completion of in-water work.
2. **When to Submit** - Within seven (7) working days following the completion of in-water work. Continue reporting in accordance with the approved water quality monitoring plan.
3. **Report Contents** - As required by the approved water quality monitoring plan.

Report Type 7 - Modifications to Project Report

1. **Report Purpose** - Notifies Water Board staff if the project, as described in the application materials, is altered in any way or by the imposition of subsequent permit conditions by any local, state, or federal regulatory authority.
2. **When to Submit** - If project implementation as described in the application materials is altered in any way or by the imposition of subsequent permit conditions by any local, state, or federal regulatory authority.
3. **Report Contents** - A description and location of any alterations to project implementation. Identification of any project modifications that will interfere with the discharger's compliance with the Order.

Report Type 8 - Transfer of Property Ownership Report

1. **Report Purpose** - Notifies Water Board staff of change in ownership of the project or permittee-responsible mitigation area.
2. **When to Submit** - At least 10 working days prior to the transfer of ownership.
3. **Report Contents** -
 - a. A statement that the discharger has provided the purchaser with a copy of the Order and that the purchaser understands and accepts:
 - i. The Order's requirements and the obligation to implement them or be subject to administrative and/or civil liability for failure to do so; and
 - ii. Responsibility for compliance with any long-term BMP maintenance plan requirements in the Order.
 - iii. A statement that the discharger has informed the purchaser to submit a written request to the Water Board to be named as the discharger in a revised order.

Report Type 9 - Transfer of Long-Term BMP Maintenance Report

1. **Report Purpose** - Notifies Water Board staff of transfer of long-term BMP maintenance responsibility.
2. **When to Submit** - At least 10 working days prior to the transfer of BMP maintenance responsibility.
3. **Report Contents** - A copy of the legal document transferring maintenance responsibility of post-construction BMPs.

Report and Notification Cover Sheet

Project: [Project Name]
Discharger: [Applicant]
WDID/File Number: [#####]
Reg. Meas. ID: [#####]
Place ID: [#####]
Order Effective Date:¹ [Click here to enter a date](#)

Report Type Submitted

A. Part A – Project Reporting

Report Type 1 Annual Report

B. Part B – Project Status Notifications

Report Type 2 Commencement of Construction

Report Type 3 Request for Notice of Project Complete Letter

C. Part C – Conditional Notifications and Reports

Report Type 4 Accidental Discharge of Hazardous Material Report

Report Type 5 Violation of Compliance with Water Quality Standards Report

Report Type 6 In-Water Work/Diversions Water Quality Monitoring Report

Report Type 7 Modifications to Project Report

Report Type 8 Transfer of Property Ownership Report

Report Type 9 Transfer of Long-Term BMP Maintenance Report

¹ The date the NOA was issued. If an NOA or Notice of Exclusion (NOE) was not issued for the project, the effective date is 45 days from the date the discharger submitted a complete Notice of Intent (NOI) to the Water Boards.

“I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.”

Print Name¹	Affiliation and Job Title
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Signature	Date
------------------	-------------

¹STATEMENT OF AUTHORIZATION (include if authorization has changed since application was submitted)

I hereby authorize _____ to act in my behalf as my representative in the submittal of this report, and to furnish upon request, supplemental information in support of this submittal.

Signature	Date
------------------	-------------

*This Report and Notification Cover Sheet must be signed by a Duly Authorized Representative and included with all written submittals.

Attachment C - Compliance with 40 CFR Part 121.7

The purpose of Attachment C is to comply with Title 40, Code of Federal Regulations (CFR) Part 121.7(d)(2), which requires all general certification conditions to provide an explanation of why the condition is necessary to assure that any discharge authorized under the General Order will comply with water quality requirements, and a citation to federal, state, or tribal law that authorizes the condition. For those Nationwide Permits that are denied by this General Order, Attachment C also complies with 40 CFR Part 121.7(e)(2), which requires for any denial of general certification to include:

- i. The specific water quality requirements with which discharges that could be authorized by the General Order will not comply;
- ii. A statement explaining why discharges that could be authorized by the General Order will not comply with the identified water quality requirements; and
- iii. If the denial is due to insufficient information, the denial must describe the types of water quality data or information, if any, that would be needed to assure that the range of discharges from potential projects will comply with water quality requirements.

Notwithstanding any determinations by the U.S. Army Corps or other federal agency made pursuant to 40 C.F.R. section 121.9, dischargers must comply with the entirety of this General Order because the General Order also serves as waste discharge requirements in accordance with State Water Board Water Quality General Order No. 2003-0017-DWQ.

Certification Conditions and Compliance with Title 40, Code of Federal Regulations (CFR) Part 121.7 (d) (2)

Attachment C uses the same organizational structure as section VI, and the statements below correspond with the conditions set forth in section VI. Sections I through V, and VII through XII are not “conditions” as used in 40 CFR section 121.7.

Attachment C includes citations to some sources of authority that are applicable to all conditions. These sources are specifically identified where they are most relevant but are also generally applicable to the conditions below. California Code of Regulations, title 23,¹ Chapter 28 sets forth regulations pertaining to water quality certifications. As set forth in section 3861, the State Water Board may issue a general certification for discharges for a class or classes of activities only if those activities will not individually or cumulatively result in significant adverse impacts or violations of water quality objectives. Accordingly, the State Water Board imposes the conditions set forth in this General Order to assure that the discharge complies with water

¹ Unless as otherwise noted, all citations are to title 23 of California Code of Regulations.

quality objectives adopted or approved under Sections 13170 or 13245 of the Water Code. These conditions are also generally required to comply with the state's Anti-Degradation Policy (State Board Resolution No. 68-16), which requires that for any "activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the state will be maintained." All Regional Board Water Quality Control Plans incorporate the state's Anti-Degradation Policy by reference. The state Anti-Degradation Policy incorporates the federal Antidegradation Policy (40 CFR Part 131.12 (a)(1)), which requires "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." According to U.S. EPA, for dischargers of dredged or fill material comply with the federal Antidegradation Policy by complying with U.S. EPA's section 404(b)(1) Guidelines. The State Water Boards adopted a modified version of U.S. EPA's section 404(b)(1) Guidelines in the Dredge or Fill Procedures (State Supplemental Guidelines).

VI. Conditions

A. General Conditions

1. Standard Condition CCR section 3860(a) for "subject to modification or revocation upon review..."

This is a standard condition that "shall be included as conditions of all water quality certification actions." (Cal. Code of Regs., section 3860(a).)

2. Standard Condition CCR section 3860(b) for "FERC..."

This is a standard condition that "shall be included as conditions of all water quality certification actions." (Cal. Code of Regs., section 3860(a).)

3. Standard Condition CCR section 3860(c) for "fees..."

This is a standard condition that "shall be included as conditions of all water quality certification actions." (Cal. Code of Regs., section 3860(a).) This fee requirement condition is also required pursuant to California Code of Regulations, sections 3861(c)(4) and 3833(b), which requires payment of fees by project proponents enrolling in this General Order.

4. Cumulative impacts

This condition related to cumulative impacts is required pursuant to California Code of Regulations, section 3861(d), which requires that for a general certification, the category of activities to be certified individually or cumulatively will not have any of the following impacts,

taking into account the probable effectiveness of any conditions or certification in avoiding or mitigating such impacts:

- a. Significant adverse impacts on water quality that could feasibly be avoided if individual certification, for the proposed activities seeking individual federal licenses or permits, was issued.
- b. Violation of any water quality objectives adopted or approved under Sections 13170 or 13245 of the Water Code.
- c. The taking of any candidate, threatened, or endangered species or the violation of the federal Endangered Species Act (16 USC Section 1531 et seq.) or the California Endangered Species Act (Fish and Game Code Section 2050 et seq.).
- d. Exposure of people or structures to potential substantial adverse effects – including the risk of loss, injury, or death – from flooding, landslides, or soil erosion.

This General Order also authorizes only projects that meet a CEQA exemption, and for which no exceptions to the exemptions apply. Accordingly, this condition is required pursuant to California Code of Regulations, tit. 14, section 15300.2(b) that "All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant."

5. Avoidance and Minimization

Conditions that require avoidance and minimization measures are consistent with the Dredge or Fill Procedures, section IV.B.1.a (Cal. Code of Reg., section 3013),² which requires applicants to demonstrate that a "sequence of actions has been taken to first avoid, then to minimize, and lastly compensate for adverse impacts that cannot be practicably avoided or minimized to waters of the state." A description of avoidance and minimization measures are also required pursuant to the California Code of Regulations, section 3856(h)(6), which requires dischargers to provide a "description of any other steps that have been or will be

² The State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State (Dredge or Fill Procedures) was adopted on April 2, 2019 and went into effect on May 28, 2020. The Dredge or Fill Procedures were adopted pursuant to the State Water Board's authority under Water Code section 13140 (state policy for water quality control) and 13170 (water quality control plan), and accordingly have regulatory effect. Consistent with Government Code, section 11353, a clear and concise summary of the Dredge or Fill Procedures is available in California Code of Regulations, section 3013. A full version of the Dredge or Fill Procedures is available on the State Water Board's website. Although general orders are not directly subject to the procedural requirements set forth for individual orders, the Procedures do not preclude the incorporation of similar requirements in general orders and provide useful guidance that was adopted by the Water Boards for dredge or fill projects.

taken to avoid, minimize, or compensate for loss of or significant adverse impacts to beneficial uses of waters of the state.” This condition is also consistent with the State Supplemental Guidelines, section 230.10.

6. Permitted actions must not cause violation of applicable water quality standards...

Conditions related to compliance with water quality objectives and designated beneficial uses are required pursuant to the state’s Anti-Degradation Policy (State Board Resolution No. 68-16), which requires that for any “activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the state will be maintained.” All of the Water Quality Control Plans incorporate the state’s Anti-Degradation Policy by reference. The state Anti-Degradation Policy incorporates the federal Antidegradation Policy (40 CFR Part 131.12 (a)(1)), which requires “[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.”. According to U.S. EPA, for dischargers of dredged or fill material comply with the federal Antidegradation Policy by complying with U.S. EPA’s section 404(b)(1) Guidelines. The State Water Boards adopted a modified version of U.S. EPA’s section 404(b)(1) Guidelines in the Dredge or Fill Procedures (State Supplemental Guidelines).

These conditions are also required pursuant to California Code of Regulations section 3861(d), which requires that discharges comply with any water quality objectives adopted or approved under sections 13170 or 13245 of the Water Code.

7. Site Access

Conditions related to site access requirements are authorized pursuant to the Water Boards’ authority to investigate the quality of any waters of the state within its region under Water Code section 13267. Water Code section 13267(c) provides that “the regional board may inspect the facilities of any person to ascertain whether the purposes of this division are being met and waste discharge requirements are being complied with.”

8. The discharger shall be responsible for work...

This condition requires site personnel and agencies to be familiar with the content of the General Order and availability of the document at the project site. This condition is required to assure that any authorized discharge will comply with the terms and conditions of the General Order, which requires compliance with all of the water quality objectives and beneficial uses adopted or approved under sections 13170 or 13245 of the Water Code.

9. Waiver of NWP conditions or regional conditions

If conditions are waived, the State Water Board would need to determine the effect of any such waiver on the proposed project's impacts to waters of the state. This condition is necessary to ensure that the activity does not individually or cumulatively violate water quality objectives or result in significant adverse impacts, and are more appropriately regulated under an individual certification action than under a general certification (Cal. Code of Regs., § 3861(d)). Water Code section 13264 prohibits any discharge that is not specifically authorized in this General Order, which was drafted based on the conditions set forth in the proposed NWPs noticed on September 15, 2020 and regional conditions.

10. More than one NWP has been issued except as provided by NWPs 12, C, D, and 14

This General Order must comply with the requirements set forth in CEQA, Cal. Code of Regs., section 3861(c)(5), which includes the requirements that the permitting authority consider the project, which means the "whole of the action." (Cal. Code of Regs., tit. 14, § 15378.) Projects relying on permitting under more than one NWP are more likely to have significant or cumulative impacts of water quality when considering the whole of the project.

11. Not applicable to projects requiring compensatory mitigation except as otherwise provided.

Except as specifically provided in this General Order, compensatory mitigation plans are more appropriate to consider on an individual basis to ensure compliance with Subpart J of the State Supplemental Guidelines. Given the potential for significant water quality impacts from projects authorized under this General Order must meet CEQA exemption criteria, this condition is also required pursuant to California Code of Regulations, tit. 14, section 15300.2(b) that "All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant." This condition is necessary to ensure that the exception set forth in California Code of Regulations, tit. 14, section 15300.2(b) ("All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.") does not apply, and the project does not have a significant effect on the environment and is accordingly exempt from the California Environmental Quality Act.

12. Projects impacting histosols, fens, bogs, peatlands, in wetlands contiguous with fens and vernal pools are prohibited.

Water Code section 13264 prohibits any discharge that is not specifically authorized in this order. This condition is necessary to protect certain aquatic resources that are rare and difficult to replace. (California Code of Regulations, section 3861(d).) For example, vernal pools are small seasonal wetlands that are ecologically diverse and difficult to replace once lost. They support endemic rare plant and animal species, including many that are designated

by federal and state government as rare, threatened, or endangered. In 2005 the U.S. Fish and Wildlife Service finalized its Recovery Plan for Vernal Pool Ecosystems of California and Southern Oregon that addresses 33 plant and animal species of interest that are endemic to vernal pools, including 15 plants that are listed as threatened or endangered under the California Endangered Species Act.³ Most of the historical vernal pool habitat in California has been destroyed (estimates are around 90% compared to pre-Spanish exploration), due to agriculture and development, so any loss of vernal pools due to dredge or fill activities would be considered a significant adverse impact, would conflict with or violate Water Quality Control Plans designated uses for RARE, and would not meet CEQA exemption criteria.

13. Lake and Streambed Alteration Agreement

Condition 13 is required pursuant to California Code of Regulations section 3856(e), which requires that copies be provided to the Water Boards of “any final and signed federal, state, and local licenses, permits, and agreements (or copies of the draft documents, if not finalized) that will be required for any construction, operation, maintenance, or other actions associated with the activity. If no final or draft document is available, a list of all remaining agency regulatory approvals being sought shall be included.”

B. Construction Conditions

1. All materials and supplies necessary...

On-site availability of materials and supplies assures best management practices can be reasonably implemented and that the discharge complies with water quality objectives. This condition and other conditions related to best management practices are consistent with the Water Board's authority to establish, “[w]ater quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area” pursuant to Water Code section 13241(c). The activities authorized under this General Order have the potential to result in a discharge that exceed water quality objectives and work in waters of the state must not cause an exceedance of water quality objectives. As required by Water Code section 13369, all Water Quality Control Plans incentivize the use of best management practices to prevent prohibited discharges into waters of the state.

2. Construction material, debris, rubbish....

Water Code section 13264 prohibits any discharge that is not specifically authorized in this General Order. This condition is necessary to prevent violation of state discharge prohibitions that protect water quality objectives. Water Quality Control Plans prohibit the discharge of construction materials and byproducts from being discharged into waters of the state. For example, "The discharge of soil, silt, bark, slash, sawdust, or other organic and earthen

³ California Department of Fish and Wildlife, Vernal Pools at <<https://wildlife.ca.gov/Conservation/Plants/Vernal-Pools>> [as of Nov. 30, 2020].

material from any logging, construction, or associated activity of whatever nature into any stream or watercourse in the basin in quantities deleterious to fish, wildlife, or other beneficial uses is prohibited" (Water Quality Control Plan for the North Coast Region, section 4.2.1).

This condition prohibiting discharge of materials detrimental to water quality or hazardous to aquatic life is also consistent with the Dredge or Fill Procedures, Appendix A, Subpart H, which requires actions to minimize and avoid adverse effects, including actions concerning the location, the material, and controlling the material after the discharge (§ 230.70 et seq.).

3. Environmentally sensitive areas and environmentally restricted...

This condition is necessary to assure that the project discharge will comply with state discharge prohibitions that protect beneficial uses and water quality objectives. A description and delineation of impact sites is necessary to assure that the discharge from the proposed project will comply with water quality objectives established for surface waters (California Code of Regulations, title 23, section 3856(h); Dredge or Fill Procedures section IV.A.1(c); Water Quality Control Plan for the San Francisco Bay Region, section 4.23.2).

In addition, Water Quality Control Plans prohibit the discharge of construction materials and byproducts from being discharged into waters of the state, including areas that may be environmentally sensitive, such as vernal pools or eel grass beds. For example, "The discharge of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature into any stream or watercourse in the basin in quantities deleterious to fish, wildlife, or other beneficial uses is prohibited" (Water Quality Control Plan for the North Coast Region, section 4.2.1). Identification and visible demarcation of areas of avoidance must be obvious to all on-site personnel, to ensure that impacts only occur within the permitted boundaries of project disturbance and to prevent unauthorized discharges to other waters of the state, including environmentally sensitive areas. Furthermore, waters that are not quantified and mapped as either a temporary or permanent impact site in a water quality certification must be fully avoided throughout the duration of the construction activity. This condition is necessary to ensure protection of aquatic resources where no discharge is authorized to occur. Furthermore, excavated material that is improperly exposed can produce or contribute to runoff that results in an unintentional discharge to waters of the state, which is prohibited (Water Quality Control Plan for the North Coast Region, section 4.2.1).

4. The number of access routes, number and size of staging areas,...

5. Bridges, culverts, dip crossings, or other structures...

6. Temporary materials places in any water of the state...

7. A method of containment must be used below any temp. bridge, trestle...

Conditions 4, 5, 6, and 7 limit activities such as construction or maintenance of access roads, staging areas, water crossings, and temporary structures to assure that the activities are minimally impacting and comply with water quality objectives. These types of activities commonly require grading, construction, excavation, and vegetation removal, and may result in erosion and increased sediment loads, turbidity, etc., that adversely affect water quality. These conditions are required to assure that the discharges from such activities do not exceed water quality objectives established in Water Quality Control Plans, including water quality objectives for oil and grease, pH, sediment, settleable materials, temperature, and turbidity. For example, the sediment water quality objective requires that, "the suspended sediment load and suspended sediment discharge rate to surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses" (Water Quality Control Plan for the North Coast Region, section 3.3.11). Additionally, improperly designed and/or installed roads and bridges may also create physical barriers to fish passage and impair the beneficial use of fish spawning (Water Quality Control Plan for the San Francisco Basin, section 7.8.4.1).

8. Unless authorized for restoration, material excavated to prepare a site...

Condition 8 is required pursuant to the Water Quality Control Plans, and the water quality objectives therein prohibiting excavated material erosion or disposal into waters of the state. For example, the North Coast Water Quality Control Plan prohibits waters from containing settleable material in concentrations that result in the deposition of material that causes nuisance or adversely affects beneficial uses (Section 3.3.12), and prohibits waters from containing suspended material in concentrations that cause nuisance or adversely affect beneficial uses (Section 3.3.13).

9. Topsoil

This condition is consistent with the requirements set forth in Nationwide Permits 12, C, and D which require that the top 6 to 12 inches of a dig to be backfilled with native topsoil in order to ensure that temporary impacts can be considered as such. The top 6 to 12 inches of topsoil tend to be richer in organic matter than other soil horizons below this depth. Therefore, it is essential to stockpile the topsoil layer separately from the rest of the soil in order to ensure survivorship of riparian vegetation populations upon completion of the project.

Backfilling of native topsoil is necessary to assure that the discharge from the proposed project will comply with water quality objectives established for surface waters. "Operations and activities should be planned and conducted in a manner that will not disturb extensive areas of soil or that will disrupt local drainage. Areas where soil is disturbed should be promptly reseeded or stabilized to prevent erosion." (Water Quality Control Plan for the Tulare Lake

Basin, section 4.1.7.) Backfilling of native topsoil also assures that the pre-project hydrologic regime is not altered or adversely impacted by introduction of new backfill materials. “The stream flow regimen should be stabilized and maintained, and soil control measures should be applied in a timely manner.” (Water Quality Control Plan for the Tulare Lake Basin, section 4.1.7.) “Limit disturbance of natural drainage features and vegetation.” (Water Quality Control Plan for the North Coast, Appendix D, page 4-104, Urban and Suburban Runoff Management Measures.)

10. Any structure, including but not limited to culverts, pipes, piers, and coffer dams, placed within a stream...

Conditions related to placement of structures within waters are required to assure that they do not create physical barriers to fish passage and spawning activities. “Any barrier to migration or free movement of migratory fish is harmful. Natural tidal movement in estuaries and unimpeded river flows are necessary to sustain migratory fish and their offspring. A water quality barrier, whether thermal, physical, or chemical, can destroy the integrity of the migration route and lead to the rapid decline of dependent fisheries” (Water Quality Control Plan for the San Francisco Region, section 2.1.10). Furthermore, barriers to migration or free movement may result in an impairment of state water quality objectives, including but not limited to Rare, Threatened, or Endangered Species (RARE), Spawning, Reproduction, and/or Early Development (SPWN), Cold Fresh Water Habitat (COLD), or Warm Fresh Water Habitat (WARM), which occur in all regions of the state.

The Water Quality Control Plan for the North Coast Region sets a numeric target of “zero human-caused barriers” for migration barriers on Class I watercourses (Section 4.2.8). Barriers would also impair beneficial uses designated in the Water Quality Control Plans including “migration of aquatic organisms,” “spawning, reproduction, and/or early development,” “fish migration,” and “fish spawning” (Water Quality Control Plan for the North Coast Region, section 2.2; Water Quality Control Plan for the San Francisco Region, sections 2.1.10 and 2.1.18).

“Hydromodification is a general term that encompasses effects of projects on the natural hydrologic, geochemical and physical functions of streams and wetlands that maintain or enhance water quality.” (Water Quality Control Plan for the San Francisco Region, section 4.26.7.) Conditions related to placement of structures within waters of the state are required to assure that they do not result in adverse impacts related to hydromodification. Failure to comply with these conditions may trigger bank failure, channel incision, or headcutting along the channel thalweg, creating excess sediment and barriers to fish passage. These impacts can impair beneficial uses including fish migration, fish spawning, wildlife habitat, cold freshwater habitat, preservation of rare and endangered species, and warm freshwater habitat (Water Quality Control Plan for the San Francisco Region, section 2.1). “The discharge of sand, silt, clay, or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity or discoloration in

waters of the state or which unreasonably affect, or threaten to affect, beneficial uses of such waters is prohibited" (Water Quality Control Plan for the San Diego Region, section 4.18).

11. Dust Abatement

This dust abatement condition is required to assure that the discharge from the proposed project will comply with water quality objectives established for surface waters. Chemicals used in dust abatement activities can result in a discharge of chemical additives and treated waters to surface waters of the state. Therefore, dust abatement activities shall be conducted so that sediment or dust abatement chemicals are not discharged into waters of the state. The Water Quality Control Plan for the San Francisco Region, section 3.3.8, requires that all waters should be free of toxic substances in concentrations that are lethal to or that produce significant alterations in population or community ecology or receiving water biota. In addition, the health and life history characteristics of aquatic organisms in waters affected by controllable water quality factors should not differ significantly from areas unaffected by controllable water quality factors, such as toxicity. This condition will ensure that the discharge will not adversely affect beneficial uses of the receiving water or cause a condition of nuisance. (Water Quality Control Plan for the North Coast Region, section 4.1.8; Water Code section 13267; Dredge or Fill Procedures section IV. A.2(c)).

12. Use of Mechanized Equipment

This condition is necessary to prevent violation of state discharge prohibitions that protect water quality objectives. By altering an aquatic resource's surface topography and reducing hydrologic connectivity and capacity, the use of mechanized equipment can cause a direct loss of aquatic resource area and degrade beneficial uses of waters of the state, including designations that protect listed species habitat. These impacts would result in violations of water quality objectives that have been set in Water Quality Control Plans. For example, the Water Quality Control Plan for the Santa Ana Regional Board, section 4.6, requires that, "Inland surface water communities and populations, including vertebrate, invertebrate, and plant species, shall not be degraded as a result of the discharge of waste." Additionally, fuels and lubricants associated with the use of mechanized equipment have the potential to result in toxic discharges to waters of the state. The North Coast Regional Water Board's toxicity water quality objective prohibits waters from containing toxic substances in concentrations that are toxic to, or that, "produce detrimental physiological responses in human, plant, animal, or aquatic life" (Water Quality Control Plan for the North Coast Region, section 3.3.16).

13. Piers or Piles

14. Culvert Replacement and Maintenance

Conditions related to structures within waters (such as conditions 13 and 14), including placement of instream piers or piles, and culvert replacement and maintenance activities, are required to assure that they do not create physical barriers to fish passage and spawning

activities. “Any barrier to migration or free movement of migratory fish is harmful. Natural tidal movement in estuaries and unimpeded river flows are necessary to sustain migratory fish and their offspring. A water quality barrier, whether thermal, physical, or chemical, can destroy the integrity of the migration route and lead to the rapid decline of dependent fisheries” (Water Quality Control Plan for the San Francisco Region, section 2.1.10).

The Water Quality Control Plan for the North Coast Region sets a numeric target of “zero human-caused barriers” for migration barriers on Class I watercourses.(Section 4.2.8). Barriers would also impair beneficial uses designated in the Water Quality Control Plans including “migration of aquatic organisms,” “spawning, reproduction, and/or early development,” “fish migration,” and “fish spawning” (Water Quality Control Plan for the North Coast Region, section 2.2; Water Quality Control Plan for the San Francisco Region, sections 2.1.10 and 2.1.18).

“Hydromodification is a general term that encompasses effects of projects on the natural hydrologic, geochemical and physical functions of streams and wetlands that maintain or enhance water quality.” (Water Quality Control Plan for the San Francisco Region, section 4.26.7.) Conditions related to culverts and other instream structures are required to assure that they do not result in adverse impacts related to hydromodification. Failure to comply with these conditions may trigger bank failure, channel incision, or headcutting along the channel thalweg, creating excess sediment and barriers to fish passage. These impacts can impair beneficial uses including fish migration, fish spawning, wildlife habitat, cold freshwater habitat, preservation of rare and endangered species, and warm freshwater habitat (Water Quality Control Plan for the San Francisco Region, sections 2.1). “The discharge of sand, silt, clay, or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity or discoloration in waters of the state or which unreasonably affect, or threaten to affect, beneficial uses of such waters is prohibited” (Water Quality Control Plan for the San Diego Region, section 4.18).

15. Toxic and Hazardous Materials

These conditions are required pursuant to the Water Quality Control Plans, and the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP)⁴, which prohibit the discharge of substances in concentrations toxic to human, plant, animal, or aquatic life. For example, the North Coast Water Quality Control Plan prohibits waters from containing toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life. The concentrations of toxic substances in the water column, sediments or biota shall not adversely affect beneficial uses (Water Quality Control Plan for the North Coast Region, section 3.3.16). All waters should be free of toxic substances in concentrations that are lethal to or that

⁴ The SIP implements criteria for priority toxic pollutants contained in the California Toxics Rule promulgated by the U.S. Environmental Protection Agency (USEPA).

produce significant alterations in population or community ecology or receiving water biota. In addition, the health and life history characteristics of aquatic organisms in waters affected by controllable water quality factors should not differ significantly from areas unaffected by controllable water quality factors, such as toxicity (Water Quality Control Plan for the San Francisco Bay Region, section 3.3.8).

Toxic compounds impair the beneficial uses of cold fresh water habitat, estuarine habitat, marine habitat, preservation of rare and endangered species, fish migration, fish spawning, warm fresh water habitat, and wildlife habitat (Water Quality Control Plan for the San Francisco Bay Region, sections 2.1.3; 2.1.5; 2.1.9; 2.1.14; 2.1.10; 2.1.18; 2.1.19; & 2.1.20).

Conditions related to concrete/cement are required pursuant to the Water Quality Control Plans, which prohibit discharges to waters that adversely raise or lower pH levels. For example, the North Coast Water Quality Control Plan prohibits discharges from lowering pH levels below 6.5 or raising them above 8.5, or raising/lowering the pH to a level that causes a nuisance or impairs beneficial uses. Concrete/cement is an alkaline component that has the potential to raise the pH of water resources to levels that would negatively affect beneficial uses (Water Quality Control Plan for the North Coast Region, section 3.3.16).

Conditions related to toxic and hazardous materials are necessary to assure that discharges comply with any water quality objectives adopted or approved under sections 13170 or 13245 of the Water Code.

Many waters in California are high in mercury either naturally or due to historic mining activities. This mercury, when discharged to waters of the state can become bioavailable and impair beneficial uses including Subsistence Fishing (SUB) and Tribal Subsistence Fishing (T-SUB). Effective sediment control is required under the Tribal and Subsistence Fishing Beneficial Uses and Mercury Provisions (Cal. Code of Reg., section 3010).

16. Invasive Species and Soil Borne Pathogens

Soil borne pathogens cause disease and death to native plants, agricultural crops, and ornamental plants. Non-native invasive plant species can alter ecosystem processes such as nutrient cycling, hydrological cycles, and frequencies of wildfires, erosion and sediment deposition. They interfere in ecosystem functions by outcompeting and displacing native plants and animals, by providing refuge for non-native animals, and by hybridizing with native species.⁵

Conditions related to invasive species and soil borne pathogens are required pursuant to the California Code of Regulations, section 3861 (d) (2) that prohibits discharges that violate any water quality objectives adopted or approved under Section 13170 or 13245 of the Water Code, including the Water Quality Control Plans in California. Invasive species and soil borne

⁵ Bossard et al. (2000) *Invasive Plants of California's Wildlands*. University of California Press.

pathogens adversely affect beneficial uses designated in the Water Quality Control Plans, such as RARE, WILD, and BIOL. RARE (rare, threatened, or endangered species) is a designated beneficial use for “waters that support habitat necessary, at least in part, for the survival and successful maintenance of plant or animal species established under state or federal law as rare, threatened, or endangered” (Water Quality Control Plan for the Central Coast Region, section 2.2.20; Water Quality Control Plan for the San Francisco Region, section 2.1.14). WILD (wildlife habitat) is a designated beneficial use of water that supports “terrestrial ecosystems including, but not limit to, preservation and enhancement of terrestrial habitats, vegetation, wildlife (e.g., mammals, birds, reptiles, amphibians, invertebrates), or wildlife water and food supplies.” (Water Quality Control Plan for the Central Coast Region, section 2.2.18). BIOL (preservation of biological habitats of special significance) is a designated beneficial use of water that supports “designated areas or habitats, such as established refuges, parks, sanctuaries, ecological reserves, or Areas of Special Biological Significance (ASBS), where the preservation or enhancement of natural resources requires special protection” (Water Quality Control Plan for the Central Coast Region, section 2.2.19).

Invasive species and soil borne pathogen control practices prevent their uncontrolled spread to waters of the state and are necessary to assure that the discharge from the proposed project will comply with water quality objectives established for surface waters. The spread of soil borne pathogens devastates host species populations in riparian ecosystems, such as *Phytophthora lateralis*, the cause of Port Orford cedar root disease, and threatens the stability of native and commercial cedar populations worldwide. Invasive weeds degrade physical and chemical water quality characteristics, and overgrown vegetation reduces special species habitat and reduces aquatic resource capacity.

Furthermore, in State Water Board Resolution No. 2017-0012, the State Water Board resolved that the state shall update plans, permits, and policies to improve “ecosystem resilience to the impacts of climate change, including but not limited to actions that protect headwaters, facilitate restoration, enhance carbon sequestration, build and enhance healthy soils, and reduce vulnerability to and impacts from fires.”

Lastly, species diversity and growth anomalies, which are adversely affected by invasive species and soil borne pathogens, are measures of water quality health as it relates to water quality objectives for toxic substances. “All waters shall be maintained free of toxic substances in concentrations that produce detrimental physiological responses in human, plant, animal, or aquatic life. This objective applies regardless of whether the toxicity is caused by a single substance or the interactive effect of multiple substances. Compliance with this objective will be determined by analyses of indicator organisms, species diversity, population density, growth anomalies, and biotoxicity tests of appropriate duration or other methods as specified by the Regional Water Board” (Central Valley Regional Board Basin Plan, section 3.1.20).

17. Work in Delineated Waters of the State

Conditions related to work in delineated waters are required pursuant to the California Code of Regulations, section 3861 (d) (2) which prohibits discharges that violate any water quality objectives adopted or approved under sections 13170 or 13245 of the Water Code. Work in waters of the state must not cause exceedances of water quality objectives; accordingly, these conditions require implementation of best practicable treatments and controls to prevent pollution and nuisance, and to maintain water quality. Consistent with the Dredge or Fill Procedures, section IV.A.2.c, water quality monitoring plans are required for any in-water work. These conditions are required to assure that 1) the discharge shall not adversely affect the beneficial uses of the receiving water or cause a condition of nuisance; 2) the discharge shall comply with all applicable water quality objectives; and 3) treatment and control of the discharge shall be implemented to assure that pollution and nuisance will not occur and the highest water quality is maintained (Water Quality Control Plan for the North Coast Region, section 4.1.8; Water Code section 13267).

Conditions related to dewatering and diversions or impoundments of water are required pursuant to the California Code of Regulations, section 3861(d)(2) which prohibits discharges that violate any water quality objectives adopted or approved under sections 13170 or 13245 of the Water Code. Work in waters of the state and temporary diversions must not cause exceedances of water quality objectives; accordingly, these conditions require implementation of best practicable treatments and controls to prevent pollution and nuisance, and to maintain water quality.

These conditions are also required pursuant to the state's Anti-Degradation Policy (State Board Resolution No. 68-16), which requires that for any "activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the state will be maintained." All of the Water Quality Control Plans incorporate the state's Anti-Degradation Policy by reference.

If surface waters or ponded waters are not appropriately diverted from areas undergoing grading, construction, excavation, and/or vegetation removal, the waters will be susceptible to erosion and increased sediment loads, contamination and pollution from construction equipment, temperature fluctuations, etc. Diverting waters away from these areas will ensure that the discharge will not exceed water quality objectives, adversely affect beneficial uses of the receiving waters, or cause a condition of nuisance. Dewatered areas must also be stabilized prior to a rainfall event to assure that the discharge from the proposed project will comply with water quality objectives established for surface waters. For example, the Water Quality Control Plan for the Central Coast Region, section 3.3.2, prohibits alteration of the suspended sediment load and suspended sediment discharge rate of surface waters in such

as manner as to cause nuisance or adversely affect beneficial uses. Similarly, the Water Quality Control Plan for the San Francisco Bay Region, section 4.19, requires stabilization prior to a rainfall event as necessary to prevent sediment contributions to water bodies.

Consistent with the Dredge or Fill Procedures, section IV.A.2.c, water quality monitoring plans are required for any in-water work, including temporary dewatering or diversions. These conditions are required to assure that 1) the discharge shall not adversely affect the beneficial uses of the receiving water or cause a condition of nuisance; 2) the discharge shall comply with all applicable water quality objectives; and 3) treatment and control of the discharge shall be implemented to assure that pollution and nuisance will not occur and the highest water quality is maintained (Water Quality Control Plan for the North Coast Region, section 4.1.8; Water Code section 13267).

Conditions related to groundwater permits is required pursuant to the Cal. Code of Regs, title 23, section 3856(e), which requires complete copies of any final and signed federal, state, or local licenses, permits, and agreements (or copies of drafts if not finalized) that will be required for any construction, operation, maintenance, or other actions associated with the activity.

18. Stormwater

a. Erosion and Sediment Control

Discharges that are not covered under the State Water Board's Stormwater Construction General Permit are required to comply with the conditions in this section (VI.B.a through VI.B.b) pursuant to the California Code of Regulations, section 3861(d)(2), which prohibits discharges that violate any water quality objectives adopted or approved under sections 13170 or 13245 of the Water Code. Conditions related to erosion and sediment control design requirements are required to sustain fluvial geomorphic equilibrium. Improperly designed and installed BMPs result in excess sediment, which impairs surface waters, adversely affect beneficial uses, and results in exceedance of water quality objectives in the Water Quality Control Plans in California. Water Quality Control Plans impose design requirements to ensure excess stormwater sediment does not exceed water quality objectives in the plans. For example, "[t]he discharge of sand, silt, clay, or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity or discoloration in waters of the state or which unreasonably affect, or threaten to affect, beneficial uses of such waters is prohibited" (Water Quality Control Plan for the San Diego Region, section 4.18). "Waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses. Increases from normal background light penetration for turbidity relatable to waste discharge shall not be greater than 10 percent in areas where natural turbidity is greater than 50 NTU. (Water Quality Control Plan for the San Francisco Region, section 3.3.19.)

Conditions on projects that result in a hydromodification to a water of the state are necessary to assure that the discharge from the proposed project will comply with water quality objectives established for surface waters. "Hydromodification is a general term that encompasses effects of projects on the natural hydrologic, geochemical, and physical functions of streams and wetlands that maintain or enhance water quality." "Protecting beneficial uses within the Region consistent with the federal Clean water Act and Porter-Cologne Act requires careful consideration of projects that result in hydrogeomorphic changes and related adverse impacts to the water quality and beneficial uses of waters of the state." (Water Quality Control Plan for the San Francisco Region, section 4.26.7.) Improper project design and installation of any project that results in a hydromodification to a waters of the state may trigger bank failure and channel incision which results in excess sediment impacts to downstream beneficial uses.

Many waters in California are high in mercury either naturally or due to historic mining activities. This mercury, when discharged to waters of the state can become bioavailable and impair beneficial uses including Subsistence Fishing (SUB) and Tribal Subsistence Fishing (T-SUB). Effective sediment control is required under the Tribal and Subsistence Fishing Beneficial Uses and Mercury Provisions (Cal. Code of Reg., section 3010.)

b. Stormwater Management

In addition, disturbed areas in delineated waters must be stabilized prior to a rainfall event to assure that the discharge from the proposed project will comply with water quality objectives established for surface waters. For example, the Water Quality Control Plan for the Central Coast Region, section 3.3.2, prohibits the suspended sediment load and suspended sediment discharge rate of surface waters not to be altered in such a manner as to cause nuisance or adversely affect beneficial uses. Similarly, the Water Quality Control Plan for the San Francisco Bay Region, section 4.19, requires stabilization prior to a rainfall event as necessary to prevent sediment contributions to water bodies.

Conditions related to stormwater management are required to comply with the Water Quality Control Plans and to assure that the discharge complies with water quality objectives adopted or approved under Sections 13170 or 13245 of the Water Code. Post-rain erosion and sedimentation problems can contribute to significant degradation of the waters of the state; therefore, it is necessary to take corrective action to eliminate such discharges in order to avoid or minimize such degradation. Implementation of control measures and best management practices (BMPs) described in the condition will assure compliance with water quality objectives including sediment, turbidity, temperature, suspended material, and settleable material. For example, "[w]aters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses. Increases from normal background light penetration for turbidity attributable to waste discharge shall not be greater than 10 percent in areas where natural turbidity is greater than 50 NTU" (Water Quality Control Plan for the San Francisco Region, section 3.3.19). The Water Quality Control Plan for the Central Coast Region, section 3.3.2, prohibits alternation of the suspended sediment load and suspended

sediment discharge rate of surface waters in such as manner as to cause nuisance or adversely affect beneficial uses. The Water Quality Control Plan for the San Francisco Bay Region, section 4.19, requires stabilization prior to a rainfall event as necessary to prevent sediment contributions to water bodies.

C. Mitigation for Temporary Impacts

Conditions in this section related to restoration and/or mitigation of temporary impacts are required pursuant to California Code of Regulations, section 3861(d), which requires the inclusion of conditions to avoid and mitigate all project impacts, and to assure that the discharge complies with water quality objectives adopted or approved under Sections 13170 or 13245 of the Water Code. These conditions are also consistent with the Dredge or Fill Procedures, which requires "in all cases where temporary impacts are proposed, a draft restoration plan that outlines design, implementation, assessment, and maintenance for restoring areas of temporary impacts to pre-project conditions." (Dredge or Fill Procedures section IV. A.2(d) & B.4.)

D. Notifications and Reports

- 1. Accidental Discharges of Hazardous Materials**
- 2. Violation of Compliance with Water Quality Standards**

Conditions 1 and 2, related to the accidental discharge of hazardous materials are necessary to assure that discharges comply with any water quality objectives adopted or approved under sections 13170 or 13245 of the Water Code. Conditions related to notification and reporting requirements in the event of an accidental discharge of hazardous materials are required pursuant to section 13271 of the Water Code, which requires immediate notification of the Office of Emergency Services of the discharge in accordance with the spill reporting provision of the state toxic disaster contingency plan adopted pursuant to Article 3.7 (commencing with Section 8574.16) of Chapter 7 of Division 1 of Title 2 of the Government Code.

Conditions related to monitoring and reporting are required pursuant to California Code of Regulations, section 3861(c)(3), which requires the inclusion of "appropriate monitoring and agency-reporting requirements for all activities subject to federal licenses and permits issued in reliance on such certification." These monitoring and reporting requirements are also consistent with the Water Boards' authority to investigate the quality of any waters of the state within its region under Water Code section 13267. The burden of preparing these reports, including costs, are reasonable to the need and benefits of obtaining the reports. The reports confirm that the best management practices required under this order are sufficient to protect beneficial uses and water quality objectives. The reports related to accidental discharges also ensure that corrective actions, if any, that are necessary to minimize the impact or clean up

such discharges can be taken as soon as possible. The anticipated costs are minimal as the reporting obligations require only visual monitoring and notification reporting.

3. In-Water Work

Conditions related to monitoring and reporting are required pursuant to California Code of Regulations, section 3861(c)(3), which requires the inclusion of “appropriate monitoring and agency-reporting requirements for all activities subject to federal licenses and permits issued in reliance on such certification.” These monitoring and reporting requirements are also consistent with the Water Boards’ authority to investigate the quality of any waters of the state within its region under Water Code section 13267. The burden of preparing these reports, including costs, are reasonable to the need and benefits of obtaining the reports. The reports confirm that the best management practices required under this order are sufficient to protect beneficial uses and water quality objectives. The reports related to accidental discharges also ensure that corrective actions, if any, that are necessary to minimize the impact or clean up such discharges can be taken as soon as possible. The anticipated costs are minimal as the reporting obligations require only visual monitoring and notification reporting.

4. Modifications to Project

Authorization under this General Order is granted based on the application information submitted. This condition is necessary to ensure that if there are modifications to the project, that the project remains eligible for coverage under this General Order. Water Code section 13264 prohibits any discharge that is not specifically authorized in this General Order.

5. Water Quality Monitoring

Conditions in this section related to monitoring and reporting are required pursuant to California Code of Regulations, section 3861(c)(3), which requires the inclusion of “appropriate monitoring and agency-reporting requirements for all activities subject to federal licenses and permits issued in reliance on such certification.” These monitoring and reporting requirements are also consistent with the Water Boards’ authority to investigate the quality of any waters of the state within its region under Water Code section 13267. The burden of preparing these reports, including costs, are reasonable to the need and benefits of obtaining the reports. The reports confirm that the best management practices required under this order are sufficient to protect beneficial uses and water quality objectives. The reports related to accidental discharges also ensure that corrective actions, if any, that are necessary to minimize the impact or clean up such discharges can be taken as soon as possible. The anticipated costs are minimal as the reporting obligations require only visual monitoring and notification reporting.

Conditions related to the accidental discharge of hazardous materials are necessary to assure that discharges comply with any water quality objectives adopted or approved under sections 13170 or 13245 of the Water Code. Conditions related to notification and reporting

requirements in the event of an accidental discharge of hazardous materials are required pursuant to section 13271 of the Water Code, which requires immediate notification of the Office of Emergency Services of the discharge in accordance with the spill reporting provision of the state toxic disaster contingency plan adopted pursuant to Article 3.7 (commencing with Section 8574.16) of Chapter 7 of Division 1 of Title 2 of the Government Code.

These conditions are also necessary to assure that 1) the discharge shall not adversely affect the beneficial uses of the receiving water or cause a condition of nuisance; 2) the discharge shall comply with all applicable water quality objectives; and 3) treatment and control of the discharge shall be implemented to assure that pollution and nuisance will not occur and the highest water quality is maintained. (Water Quality Control Plan for the North Coast Region, section 4.1.8; Water Code section 13267; Dredge or Fill Procedures section IV. A.2(c).) For example, what needs to be monitored will depend on the project. (E.g., Water Quality Control Plan for the San Francisco Bay region, section 3.3.12 (sediment).)

E. Application for Coverage and Termination

1. Request for Authorization

These conditions requiring dischargers to identify impacts in a notification are required pursuant to the California Code of Regulations, section 3856(h)(4), which requires dischargers identify “for each water body reported...the total estimated quantity of waters of the United States that may be adversely impacted...” This condition is also consistent with the Dredge or Fill Procedures, section IV.A.1.c and f, which requires applicants to provide a “description of the waters proposed to be impacted by the dredge or fill activity.” (Cal. Code of Reg., section 3013.) (Also see Water Quality Control Plan for the San Francisco Bay Region, section 4.23.2.)

These conditions requiring a description of avoidance and minimization measures are also required pursuant to the California Code of Regulations, section 3856(h)(6), which requires dischargers to provide a “description of any other steps that have been or will be taken to avoid, minimize, or compensate for loss of or significant adverse impacts to beneficial uses of waters of the state.” These conditions are also consistent with the Dredge or Fill Procedures, section IV.B.1.a, which requires applicants to demonstrate that a “sequence of actions has been taken to first avoid, then to minimize, and lastly compensate for adverse impacts that cannot be practicably avoided or minimized to waters of the state.” (Cal. Code of Reg., section 3013.)

2. Signatory Requirements

Condition 2 for signatory requirements is required pursuant to Water Code section 13267, which requires any person discharging waste that could affect the quality of waters to provide to the Water Boards, under penalty of perjury, any technical or monitoring program reports as

required by the Water Boards. The signatory requirements are consistent with 40 C.F.R. section 122.22.

3. Project Status Notifications

4. Project Reporting

Conditions related to notifications, monitoring, and reporting are required pursuant to California Code of Regulations, section 3861(c)(3), which requires the inclusion of “appropriate monitoring and agency-reporting requirements for all activities subject to federal licenses and permits issued in reliance on such certification.” These monitoring and reporting requirements are also consistent with the Water Boards’ authority to investigate the quality of any waters of the state within its region under Water Code section 13267. The burden of preparing these reports, including costs, are reasonable to the need and benefits of obtaining the reports. The reports confirm that the best management practices required under this order are sufficient to protect beneficial uses and water quality objectives. The reports related to accidental discharges also ensure that corrective actions, if any, that are necessary to minimize the impact or clean up such discharges can be taken as soon as possible. The anticipated costs are minimal as the reporting obligations require only visual monitoring and notification reporting.

5. Transfer of Property Ownership

Authorization under this General Order is granted based on the application information submitted, including the legally responsible party. Notification is necessary to confirm whether the new owner wishes to assume legal responsibility for compliance with this General Order. If not, the original discharger remains responsible for compliance with this Order. Water Code section 13264 prohibits any discharge that is not specifically authorized in this General Order.

6. Transfer of Long-Term Best Management Practices Maintenance

Authorization under this General Order is granted based on the application information submitted, including the legally responsible party. Notification is necessary to confirm whether liability for long-term best management practices maintenance is accepted by another entity. If not, the original discharger remains responsible for compliance with this Order. Water Code section 13264 prohibits any discharge that is not specifically authorized in this General Order.

F. Nationwide Specific Impact Size Limits

1. NWP 3(a) – Maintenance; NWP 14 – Linear Transportation Projects

2. NWP 12 – Oil or Natural Gas Pipeline Activities; NWP C – Electric Utility Line and Telecommunication Activities; and NWP D – Utility Line and Activities for Water or Other Substances

Because of the number, geographic scale, and variety of potential environmental impacts that are possible under NWPs 3(a), 12, C, D, and 14, temporary and permanent impacts to waters of the state are subject to the project impact size limits and restrictions as described in the General Order, Section VI.F. Project impacts greater than the General Order allows for these NWPs would be more appropriately regulated under an individual certification because they would require additional information and analysis to ensure that they are minimally impacting. The State Water Board would need additional project-specific information, including but not limited to, the location of activities, the receiving water bodies affected, the BMPs proposed, avoidance and minimization measures taken, proposed compensatory mitigation, and a restoration plan for temporary impacts before taking a certification action. For example, projects best management practices may depend on their proximity to waters of the state and whether they are in a floodplain.

These conditions related to project impact size limits are also required pursuant to the California Code of Regulations, section 3861(d), which requires that for a general certification, the category of activities to be certified individually or cumulatively will not have any of the following impacts, taking into account the probable effectiveness of any conditions or certification in avoiding or mitigating such impacts:

- a. Significant adverse impacts on water quality that could feasibly be avoided if individual certification, for the proposed activities seeking individual federal licenses or permits, was issued.
- b. Violation of any water quality objectives adopted or approved under Sections 13170 or 13245 of the Water Code.
- c. The taking of any candidate, threatened, or endangered species or the violation of the federal Endangered Species Act (16 USC Section 1531 et seq.) or the California Endangered Species Act (Fish and Game Code Section 2050 et seq.).
- d. Exposure of people or structures to potential substantial adverse effects – including the risk of loss, injury, or death – from flooding, landslides, or soil erosion.

G. Nationwide Specific Compliance

1. NWP 3 (a) – Maintenance

a. NWP 3(a) Prohibitions

i. Lahontan Water Board

This condition is required pursuant to the Water Quality Control Plan for the Lahontan Region, sections 4.1 and 5.2, which prohibit discharges of waste or deleterious material to surface

waters in certain Hydrologic Units. Section 13243 of the Water Code gives Regional Boards, in Basin Plans (i.e., Water Quality Control Plans) or waste discharge requirements, authority to “specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted.”

ii. Riparian Vegetation

iii. Riparian Tree Removal

Conditions G.1.a.ii and G.1.a.iii above are required to assure that riparian vegetation removal does not significantly affect water quality and its designated uses, and to assure that the activity complies with state water quality objectives or federal water quality standards. Riparian vegetation removal frequently results in increased erosion potential, temperature fluctuations, creating space for invasive species, etc. All Water Quality Control Plans require protection of beneficial uses. For example, in the Water Quality Control Plan for the San Francisco Bay Basin, section 2.1.3, riparian vegetation is an essential component of sustaining cold freshwater habitat (beneficial use of COLD). In addition to providing shade to moderate stream temperature, riparian vegetation provides allochthonous inputs of nutrients to the stream channel in the form of both vegetation and invertebrates.

iv. Roads

v. Armoring Facilities

vi. Gabions

vii. Riprap Installation

viii. Grouted Riprap

Conditions G.1.a.iv through G.1.a.viii above are required to assure that discharges will comply with state water quality requirements. Specifically, activities associated with road maintenance have the potential to exceed water quality objectives established in all the Water Quality Control Plans, including objectives for oil and grease, pH, sediment, settleable materials, temperature, and turbidity. For example, the sediment water quality objective requires that, “the suspended sediment load and suspended sediment discharge rate to surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses” (Water Quality Control Plan for the North Coast Region, section 3.3.11).

Conditions related to roads and bridges, and other facilities such as riprap, gabions, and armoring facilities that are within or cross waters of the state, are required to assure that they do not create physical barriers to fish passage and spawning activities. “Any barrier to migration or free movement of migratory fish is harmful. Natural tidal movement in estuaries and unimpeded river flows are necessary to sustain migratory fish and their offspring. A water quality barrier, whether thermal, physical, or chemical, can destroy the integrity of the migration

route and lead to the rapid decline of dependent fisheries” (Water Quality Control Plan for the San Francisco Region, section 2.1.10).

The Water Quality Control Plan for the North Coast Region sets a numeric target of “zero human-caused barriers” for migration barriers on Class I watercourses. (Section 4.2.8). Barriers would also impair beneficial uses designated in the Water Quality Control Plans including “migration of aquatic organisms,” “spawning, reproduction, and/or early development,” “fish migration,” and “fish spawning” (Water Quality Control Plan for the North Coast Region, section 2.2; Water Quality Control Plan for the San Francisco Region, sections 2.1.10 and 2.1.18).

“Hydromodification is a general term that encompasses effects of projects on the natural hydrologic, geochemical and physical functions of streams and wetlands that maintain or enhance water quality.” (Water Quality Control Plan for the San Francisco Region, section 4.26.7.) Conditions related to roads and bridges, and other facilities such as riprap, gabions, and armoring facilities that are within or cross waters of the state, are required to assure that they do not result in adverse impacts related to hydromodification. Failure to comply with these conditions may trigger bank failure, channel incision, or headcutting along the channel thalweg, creating excess sediment and barriers to fish passage. These impacts can impair beneficial uses including fish migration, fish spawning, wildlife habitat, cold freshwater habitat, preservation of rare and endangered species, and warm freshwater habitat (Water Quality Control Plan for the San Francisco Region, section 2.1). “The discharge of sand, silt, clay, or other earthen materials from any activity, including land grading and construction, in quantities which cause deleterious bottom deposits, turbidity or discoloration in waters of the state or which unreasonably affect, or threaten to affect, beneficial uses of such waters is prohibited” (Water Quality Control Plan for the San Diego Region, section 4.18).

ix. Construction, replacement, or expansion of facilities in any ocean, bay, tidal waters or shores thereof are prohibited

This condition prohibiting impacts to oceans, bays, tidal waters, and shores thereof, is required pursuant to the California Code of Regulations, section 3861(d)(1), which requires that activities authorized under this General Order not result in significant adverse impacts on water quality that could feasibly be avoided if individual certification was issued. This condition applies only to this General Order's authorization of projects under NWP 3(a), 12, C, D, and 14. This prohibition does not apply to NWP 1, 4, 5, 6, 9, 10, 11, 20, 22, 28, 32, 36, and 54, which include activities that are largely dependent on occurring in marine waters. For example, NWP 9 authorizes placement of structures to facilitate mooring of vessels within anchorage areas established by the U.S. Coast Guard, and NWP 10 allows non-commercial, single-boat mooring buoys. Discharges resulting from these types of activities, as long as they meet all conditions of this General Order, will be minimally impacting and not result in adverse impacts to water quality, either individually or cumulatively. Unlike NWP 1, 4, 5, 6, 9, 10, 11,

20, 22, 28, 32, 36, and 54, which do allow discharges to ocean, bay, tidal waters, or shores thereof, projects authorized under NWPs 3(a), 12, C, D, and 14 are generally not marine-water dependent. They include classes of activities that individually or cumulatively may result in significant environmental effects if they were to occur within ocean, bay, or tidal waters, or the shores thereof; therefore it is more appropriate to regulate these activities pursuant an individual water quality certification. Furthermore, the state's Water Quality Control Plan for Ocean Waters of California (revised 2019) states that "protection of the quality of the ocean waters for use and enjoyment by the people of the state requires control of the discharge of waste to ocean waters," and discharges associated with activities related to NWP 3(a), 12, C, D, and 14 may individually or cumulatively impact designated beneficial uses of ocean waters of the state (beneficial uses of ocean water are designated as: industrial water supply; water contact and non-contact recreation, including aesthetic enjoyment; navigation; commercial and sport fishing; mariculture; preservation and enhancement of designated Areas of Special Biological Significance (ASBS); rare and endangered species; marine habitat; fish migration; fish spawning and shellfish harvesting).

x. NWP 3(a) Compensatory Mitigation Requirements

Conditions regarding compensatory mitigation are necessary to ensure compliance with state and federal anti-degradation policies. Compensatory mitigation requirements are consistent with State Supplemental Guidelines, section 230.10, restrictions on discharge and the Dredge or Fill Procedures, section IV.B.1.a (Cal. Code of Regs., section 3013), which requires that the Water Boards will approve a project only after it has been determined that a sequence of actions has been taken to first avoid, then to minimize, and lastly compensate for adverse impacts that cannot be practicably avoided or minimized. (See also Cal. Code of Regs., section 3856(h) (requiring submittal of proposed mitigation and description of steps taken to avoid, minimize, or compensate). Compensatory mitigation conditions are consistent with Executive Order W-59-93 commonly referred to as California's "no net loss" policy for wetlands. Compensatory mitigation requirements are also authorized by Water Code, section 13263, which requires the imposition of requirements that implement water quality control plans, takes into consideration the beneficial uses to be protected, and the need to prevent nuisance.

These conditions related to mitigation requirements are consistent with the Dredged or Fill Procedures, section IV.B.1.a, which requires that the Water Boards will approve a project only after it has been determined that a sequence of actions has been taken to first avoid, then to minimize, and lastly compensate for adverse impacts that cannot be practicably avoided or minimized. Accordingly, compensatory mitigation is required for projects that would result in permanent impacts.

2. NWP 12 – Oil or Natural Gas Pipeline Activities

a. NWP 12 Prohibitions

i. Lahontan Water Board

For condition G.2.a.i, see justification for NWP 3(a) (condition G.1.a.i), above.

ii. Riparian Vegetation

iii. Riparian Tree Removal

For conditions G.2.a.ii and G.2.a.iii, see justification for NWP 3(a) (conditions G.1.a.ii and G.1.a.iii), above.

iv. Roads

v. Armoring Facilities

vi. Gabions

vii. Grouted Riprap

For conditions G.2.a.iv through G.2.a.vii, see justification for NWP 3(a) (conditions G.1.a.iv through G.1.a.viii), above.

viii. Construction, replacement, or expansion of facilities in any ocean, bay, tidal waters or shores thereof are prohibited

For condition G.2.a.ix, see justification for NWP 3(a) (condition G.1.a.ix), above.

b. NWP 12 Directional Drilling

The conditions related to directional drilling are necessary given the risks posed by an inadvertent return of drilling fluids to waters. Given the likely toxicity of the discharge and the proximity to the impacted water, significant adverse impacts to waters would be expected and remediation would be difficult. All Water Quality Control Plans prohibit the discharge of substances in concentrations toxic to human, plant, animal, or aquatic life. Horizontal directional drilling, and similar drilling operations, may result in the unintentional discharge of drilling fluids to waters of the state. These conditions are necessary to ensure that 1) the discharge shall not adversely affect the beneficial uses of the receiving water or cause a condition of nuisance; 2) the discharge shall comply with all applicable water quality objectives; and 3) treatment and control of the discharge shall be implemented to assure that pollution and nuisance will not occur and the highest water quality is maintained. For example, the North Coast Water Quality Control Plan prohibits waters from containing toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life. "The concentrations of toxic substances in the water column, sediments or biota shall not adversely affect beneficial uses" (Water Quality Control Plan for the North Coast Region, section 3.3.16).

c. NWP 12 Authorized Permanent Impacts

- i. Facility Replacements**
- ii. Access Road Crossing, Repair, Improvements, and Upgrades**
- iii. New Access Road Crossings/Structure/Outfalls and Widening of Existing Roads**
- iv. Structure Upgrades**
- v. Underground Linear Activities**
- vi. Other**

Section G.2.c.i-vi includes a list of authorized permanent impacts from specific types of activities. The State Water Board has determined that these types of activities are more appropriately regulated under a general certification action than under individual actions, and that the activities will not individual or cumulatively violate water quality objectives or result in significant adverse impacts as long as they comply with all of the eligibility requirements and conditions in this General Order (Cal. Code of Regs., § § 3861 (b)(3) and (d)).

d. NWP 12 Specially Designated Temporary Impacts

Section G.2.d includes a list of specially designated temporary impacts from specific types of activities. The State Water Board has determined that these types of activities are more appropriately regulated under a general certification action than under individual actions, and that the activities will not individual or cumulatively violate water quality objectives or result in significant adverse impacts as long as they comply with all of the eligibility requirements and conditions in this General Order (Cal. Code of Regs., §§ 3861(b)(3) and (d)).

e. NWP 12 Compensatory Mitigation Requirements

Conditions regarding compensatory mitigation are necessary to ensure compliance with state and federal anti-degradation policies. Compensatory mitigation requirements are consistent with State Supplemental Guidelines, section 230.10, restrictions on discharge and the Dredge or Fill Procedures, section IV.B.1.a (Cal. Code of Regs., section 3013), which requires that the Water Boards will approve a project only after it has been determined that a sequence of actions has been taken to first avoid, then to minimize, and lastly compensate for adverse impacts that cannot be practicably avoided or minimized. (See also Cal. Code of Regs., section 3856(h) (requiring submittal of proposed mitigation and description of steps taken to avoid, minimize, or compensate). These compensatory mitigation conditions are consistent with Executive Order W-59-93 commonly referred to as California's "no net loss" policy for wetlands. Compensatory mitigation requirements are also authorized by Water Code, section 13263, which requires the imposition of requirements that implement water quality control

plans, takes into consideration the beneficial uses to be protected, and the need to prevent nuisance.

Compensatory mitigation requirements must comply with subpart J of the Supplemental State Guidelines. Conditions related to financial assurances, in the form of a letter of credit, are also required to ensure that compensatory mitigation will be provided. (State Supplemental Dredge or Fill Guidelines, section 230.93(n)(1).)

3. NWP C – Electric Utility Line and Telecommunication Activities

a. NWP C Prohibitions

i. Lahontan Water Board

For condition G.3.a.i, see justification for NWP 3(a) (condition G.1.a.i), above.

ii. Riparian Vegetation

iii. Riparian Tree Removal

For conditions G.3.a.ii and G.3.a.iii, see justification for NWP 3(a) (conditions G.1.a.ii and G.1.a.iii), above.

iv. Roads

v. Armoring Facilities

vi. Gabions

vii. Grouted Riprap

For conditions G.3.a.iv through G.3.a.vii, see justification for NWP 3(a) (conditions G.1.a.iv through G.1.a.viii), above.

viii. Construction, replacement, or expansion of facilities in any ocean, bay, tidal waters or shores thereof are prohibited

For condition G.3.a.viii, see justification for NWP 3(a) (condition G.1.a.ix), above.

b. NWP C Directional Drilling

For condition G.3.b, see justification for NWP 12 (condition G.2.b), above.

c. NWP C Authorized Permanent Impacts

i. Facility Replacements

ii. Access Road Crossing, Repair, Improvements, and Upgrades

- iii. **New Access Road Crossings/Structure/Outfalls and Widening of Existing Roads**
- iv. **Utility Structure Upgrades**
- v. **Underground Linear Activities**
- vi. **Other**

For conditions G.3.c.i through G.3.c.vi, see justification for NWP 12 (conditions G.2.c.i through G.3.c.vi), above.

d. NWP C Specially Designated Temporary Impacts

For condition G.3.d, see justification for NWP 12 (condition G.2.d), above.

e. NWP C Compensatory Mitigation Requirements

For condition G.3.e, see justification for NWP 12 (condition G.2.e), above.

4. NWP D – Utility Line Activities for Water and Other Substances

a. NWP D Prohibitions

i. Lahontan Water Board

For condition G.4.a.i, see justification for NWP 3(a) (condition G.1.a.i), above.

ii. Riparian Vegetation

iii. Riparian Tree Removal

For conditions G.4.a.ii and G.4.a.iii, see justification for NWP 3(a) (conditions G.1.a.ii and G.1.a.iii), above.

iv. Roads

v. Armoring Facilities

vi. Gabions

vii. Grouted Riprap

For conditions G.4.a.iv through G.4.a.vii, see justification for NWP 3(a) (conditions G.1.a.iv through G.1.a.viii), above.

viii. Construction, replacement, or expansion of facilities in any ocean, bay, tidal waters or shores thereof are prohibited

For condition G.4.a.viii, see justification for NWP 3(a) (condition G.1.a.ix), above.

b. NWP D Directional Drilling

For condition G.4.b, see justification for NWP 12 (condition G.2.b), above.

c. NWP D Authorized Permanent Impacts

- i. Facility Replacements**
- ii. Access Road Crossing, Repair, Improvements, and Upgrades**
- iii. New Access Road Crossings/Structure/Outfalls and Widening of Existing Roads**
- iv. Utility Structure Upgrades**
- v. Underground Linear Activities**
- vi. Other**

For conditions G.4.c.i through G.4.c.vi, see justification for NWP 12 (conditions G.2.c.i through G.2.c.vi), above.

d. NWP D Specially Designated Temporary Impacts

For condition G.4.d, see justification for NWP 12 (condition G.2.d), above.

e. NWP D Compensatory Mitigation Requirements

For condition G.4.e, see justification for NWP 12 (condition G.2.e), above.

5. NWP 14 – Linear Transportation Projects

a. NWP 14 Prohibitions

i. Lahontan Water Board

For condition G.5.a.i, see justification for NWP 3(a) (condition G.1.a.i), above.

ii. Riparian Vegetation

iii. Riparian Tree Removal

For conditions G.5.a.ii and G.5.a.iii, see justification for NWP 3(a) (conditions G.1.a.ii and G.1.a.iii), above.

iv. Roads

v. Armoring Facilities

vi. Gabions

vii. Riprap Installation

viii. Grouted Riprap

For conditions G.5.a.iv through G.5.a.viii, see justification for NWP 3(a) (conditions G.1.a.iv through G.1.a.viii), above.

ix. Construction, replacement, or expansion of facilities in any ocean, bay, tidal waters or shores thereof are prohibited

For condition G.5.a.ix, see justification for NWP 3(a) (condition G.1.a.ix), above.

f. NWP 14 Compensatory Mitigation Requirements

For condition G.5.f, see justification for NWP 3 (a) (condition G.1.b), above.

6. NWP 36 – Boat Ramps

a. Lahontan Water Board Prohibition

For condition G.6.a, see justification for NWP 3(a) (condition G.1.a.i), above.

b. Uncured cement

Concrete/cement is an alkaline component that has the potential to raise the pH of water resources to levels that would negatively affect beneficial uses. This condition is required pursuant to the Water Quality Control Plans in California, which require compliance with water quality objectives for pH. For example, the Water Quality Control Plan for the North Coast Region, section 3.3.9, requires that the “pH shall conform to those limits listed in Table 3-1. For waters not listed in Table 3-1 and where pH objectives are not prescribed, the pH shall not be depressed below 6.5 nor raised above 8.5. Changes in normal ambient pH levels shall not exceed 0.2 units in waters with MAR or SAL beneficial uses nor 0.5 units within the range specified above in fresh waters with COLD or WARM beneficial uses.” The Water Quality Control Plan for the San Francisco Region, section 3.3.9 requires the “pH shall not be depressed below 6.5 nor raised above 8.5. This encompasses the pH range usually found in waters within the basin. Controllable water quality factors shall not cause changes greater than 0.5 units in normal ambient pH levels.”

XI. Denial and Compliance with 40 CFR Part 121.7(e)(2)

The following NWPs are denied: 2, 3(b), 3(c), 7, 8, 13, 15, 16, 17, 18, 19, 21, 23, 24, 25, 27, 29, 30, 31, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, A, B, and E. These NWPs are denied because the State Water Board does not have reasonable assurance that the denied NWPs will comply with the applicable provisions of sections 301, 302, 303, 306 and 307 of the Clean Water Act and appropriate requirements of state law. (See

33 USC § 1341.) Any future Clean Water Act section 401 certification action on projects authorized by these denied NWPs will be considered on an individual, project-specific basis.

The State Water Board is able to certify the NWPs specified in Attachment E because they are similar activities that will cause similar impacts, have very small, mostly temporary impacts to waters of the state, and more predictable impacts to waters. In contrast, it is not possible to determine whether all the activities authorized by the denied NWPs will comply with California Code of Regulations, section 3861(d), which prohibits the issuance of a general certification unless the activities to be certified will not have any of the following impacts:

- (1) Significant adverse impacts on water quality that could feasibly be avoided if individual certification, for the proposed activities seeking individual federal licenses or permits, was issued.
- (2) Violation of any water quality objectives adopted or approved under Sections 13170 or 13245 of the Water Code.
- (3) The taking of any candidate, threatened, or endangered species or the violation of the federal Endangered Species Act (16 USC Section 1531 et seq.) or the California Endangered Species Act (Fish and Game Code Section 2050 et seq.).
- (4) Exposure of people or structures to potential substantial adverse effects – including the risk of loss, injury, or death – from flooding, landslides, or soil erosion.

The denied NWPs may individually or cumulatively have the above impacts. NWP projects may occur anywhere within California and include a broad range of activities. NWPs authorize impacts of up to 0.5 acres of waters. Pursuant to California Code of Regulations, section 3837, a certification request may be denied when compliance with water quality standards and other appropriate requirements is not yet determined. The State Water Board would need additional project-specific information, including but not limited to, the location of activities, the receiving water bodies affected, the BMPs proposed, avoidance and minimization measures taken, proposed compensatory mitigation, and a restoration plan for temporary impacts before taking a certification action. For example, projects best management practices may depend on their proximity to waters of the state and whether they are in a floodplain. In another example, the Corps does not require compensatory mitigation for impacts of 0.10 acres or less. The Water Boards routinely required compensatory mitigation for impacts smaller than that threshold pursuant to their authority under Water Code, section 13263 and as is consistent with Dredge or Fill Procedures, section IV.B.5 and subpart J of the State Supplemental Guidelines. Without this information, the State Water Board cannot determine potential impacts on beneficial uses. Specifically, the State Water Board would need additional information regarding significant adverse impacts on water quality to determine what environmental documentation would be necessary, if any, to comply with CEQA. (See, e.g., Pub. Res. Code §§ 21081; 21082.3, 21092.) Pursuant to California Code of Regulations,

section 3856(f), “the certification agency shall be provided with and have ample time to properly review a final copy of valid CEQA documentation before taking a certification action.” Accordingly, certification action for these NWP’s is more appropriate on an individual basis. California Code of Regulations, section 3861(c)(5) requires that general certifications meet all applicable requirements of CEQA.

ATTACHMENT D – SIGNATORY REQUIREMENTS

All documents submitted in compliance with this Order shall meet the following signatory requirements:

- 1.** All applications, reports, or information submitted to the Water Board must be signed and certified by the legally responsible party as follows:
 - a.** For a corporation, by a responsible corporate officer of at least the level of vice-president.
 - b.** For a partnership or sole proprietorship, by a general partner or proprietor, respectively.
 - c.** For a municipality, or a state, federal, or other public agency, by either a principal executive officer or ranking elected official. This includes the chief executive officer of the agency or the senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., Regional Administrators of the U.S. EPA).
- 2.** A duly authorized representative of the legally responsible party may sign documents if:
 - a.** The authorization is made in writing by the legally responsible party.
 - b.** The authorization specifies either an individual or position having responsibility for the overall operation of the regulated activity.
 - c.** The written authorization is submitted to the Water Board Staff Contact prior to submitting any documents listed in item 1 above.
- 3.** Any person signing a document under this section shall make the following certification:

“I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.”

Attachment E – Certified Nationwide Permits

As listed below, this General Order conditionally certifies 18 NWP. The remaining 39 NWP are denied without prejudice.

NWP No.	Nationwide Permit	Decision	CCR Title 14 Section/Exemption
1	Aids to Navigation: Allows the placement of U.S. Coast Guard (USCG)-approved navigational aids.	Certify subject to conditions	§15304/Minor Alterations to Land; and §15311 Accessory Structures
3(a)	(a) Maintenance: Allows the repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill.	Certify subject to conditions, specific activity restrictions, and notification requirements	§15301/Existing Facilities; §15302 Replacement of Reconstruction; §15303 New Construction or Conversion of Small Structures; §15304 Minor Alterations to Land; and §15309 Inspections
4	Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities: Allows fish and wildlife harvesting devices and activities.	Certify subject to conditions and specific activity restrictions	§15304 Minor Alterations to Land
5	Scientific Measurement Devices: Allows the placement of scientific gages, recording devices, water quality testing and improvement devices, and similar structures; allows the construction of weirs and flumes constructed primarily to record water quantity data and velocity.	Certify subject to conditions and notification requirements	§15306 Information Collection
6	Survey Activities: Allows core sampling, seismic exploration, and plugging exploration bore holes.	Certify subject to conditions and notification requirements	§15304 Minor Alterations to Land
9	Structures in Fleeting and Anchorage Areas: Allows placement of structures to facilitate mooring of vessels within anchorage areas established by the USCG.	Certify subject conditions	§15301 Existing facilities; and §15304 Minor Alterations to Land

NWP No.	Nationwide Permit	Decision	CCR Title 14 Section/Exemption
10	Mooring Buoys: Allows non-commercial, single-boat mooring buoys.	Certify subject to conditions	§15304 Minor Alterations to Land
11	Temporary Recreational Structures: Allows the temporary placement of buoys, markers, small floating docks, and similar structures placed during special water events.	Certify subject to conditions	§15304 Minor Alterations to Land
12	Oil or Natural Gas Pipeline Activities: Allows activities required for construction, maintenance, repair, and removal of oil or natural gas pipelines and associated facilities.	Certify subject to conditions, specific activity restrictions and notification requirements	§15301 Existing Facilities; §15302 Replacement or Reconstruction; §15303 New Construction or Conversion of Small Structures; §15304 Minor Alterations to Land; and §15309 Inspections
C ¹	Electric Utility Line and Telecommunications Activities: Allows activities required for construction, maintenance, repair, and removal of electric utility and telecommunication lines and associated facilities.	Certify subject to conditions, specific activity restrictions and notification requirements	§15301 Existing Facilities; §15302 Replacement or Reconstruction; §15303 New Construction or Conversion of Small Structures; §15304 Minor Alterations to Land; and §15309 Inspections
D	Utility Line Activities for Water and Other Substances: Allows activities required for construction, maintenance, repair, and removal of pipelines for water and other substances and associated facilities.	Certify subject to conditions, specific activity restrictions and notification requirements	§15301 Existing Facilities; §15302 Replacement or Reconstruction; §15303 New Construction or Conversion of Small Structures; §15304 Minor Alterations to Land; and §15309 Inspections
14	Linear Transportation Projects: Allows the repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill associated with linear transportation projects (e.g., roads, highways, railways).	Certify subject to conditions, specific activity restrictions and notification requirements	§15301 Existing Facilities; §15302 Replacement or Reconstruction; §15303 New Construction or Conversion of Small Structures; §15304 Minor Alterations to Land; and §15309 Inspections

¹ NWP “C” and “D” will be assigned numbers when the Corps publishes the final NWPs. When numbers are assigned, this Attachment will be updated to refer to the numbers.

NWP No.	Nationwide Permit	Decision	CCR Title 14 Section/Exemption
20	<p>Response Operations for Oil and Hazardous Substances: Allows cleanup of oil and hazardous substances provided the work activity is done in accordance with federal regulations and any existing State contingency plans, and has the concurrence of the federal Regional Response Team</p>	<p>Certify subject to conditions and notification requirements</p>	<p>§15307 Actions by Regulatory Agencies for Protection of Natural Resources; §15308 Action by Regulatory Agencies for Protection of the Environment; and §15330 Minor Actions to Prevent, Minimize, Stabilize, Mitigate or Eliminate the Release or Threat of Release of Hazardous Waste or Hazardous Substances</p>
22	<p>Removal of Vessels: Allows minor discharges of fill in connection with removal of disabled or abandoned vessels or manmade obstructions to navigation. This NWP does not authorize maintenance dredging, shoal removal, or river snagging.</p>	<p>Certify subject to conditions</p>	<p>§15301 Existing facilities; and §15303 New Construction or Conversion of Small Structures</p>
28	<p>Modifications of Existing Marinas: Allows the reconfiguration existing dock space in an authorized marina. No dredging or expansion of any kind would be permitted.</p>	<p>Certify subject to conditions and notification requirements</p>	<p>§15301 Existing facilities; and §15303 New Construction or Conversion of Small Structures</p>
32	<p>Completed Enforcement Actions: Allows any structure, work, or discharge that is in compliance with a final federal court decision, consent decree, or settlement agreement resulting from a federal enforcement violation action under section 404 or section 10.</p>	<p>Certify subject to conditions and notification requirements</p>	<p>§15321 Enforcement Action by Regulatory Agencies</p>
36	<p>Boat Ramps: Activities required for the construction of boat ramps.</p>	<p>Certify subject to conditions, specific activity restrictions and notification requirements</p>	<p>§15303 New Construction or Conversion of Small Structures; and §15304 Minor Alterations to Land</p>

NWP No.	Nationwide Permit	Decision	CCR Title 14 Section/Exemption
54	Living Shorelines: Activities required for the construction and maintenance of living shorelines to stabilize banks and shores in coastal waters.	Certify subject to conditions and notification requirements	§15304 Minor Alterations to Land; and §15333 Small Habitat Restoration Projects



Hoopa Valley Tribal Council Land Management Division

Tribal Environmental Protection Agency
Phone (530) 625-5515 ~ Fax (530) 625-5446
PO Box 1348 ~ Hoopa, CA 95546

Realty Department
Phone (530) 625-4903 ~ Fax (530) 625-5446
PO Box 1130 ~ Hoopa, CA 95546



(b) (6)

Chief, Regulatory Division
U.S. Army Corps of Engineers
450 Golden Gate Avenue
San Francisco, CA 94102

Subject: Clean Water Act § 401 certification of the 2020 U.S. Army Corps of Engineers Nationwide Permits on the Hoopa Valley Indian Reservation (HVIR).

Dear (b) (6) :

The Hoopa Valley Tribe (HVT) has completed its review of the U.S. Army Corps of Engineers' (USACE's) "Proposal to Reissue and Modify Nationwide Permits," 85 Fed. Reg. 57298 (Sept. 15, 2020). The HVT submits the following Clean Water Act (CWA) § 401 water quality certification decisions to the San Francisco District.

This letter notifies the USACE that the HVT does not waive water quality certification for any of the Nationwide Permits and therefore will require that the HVT certify each individual permit. Accordingly, each individual applicant will need to apply for § 401 permit from HVT's Tribal Environmental Protection Agency (TEPA). By reviewing and certifying each individual permit request, the HVT ensures that individuals that apply for a Nationwide Permit within the HVIR will comply with § 301, § 302, § 303, § 306, and § 307 of the CWA, the HVT's Water Quality Control Plan 2002 <http://www.hoopatepa.org/WQCP/Water%20Quality%20Control%20Plan-2018.09.25.docx> and other applicable HVT requirements. These certifications will provide reasonable assurance that the permitted activities will be conducted in a manner that will not violate HVT's water quality standards or any provisions of the CWA. Therefore, the HVT respectfully DENY water quality certification for all 2020 Nationwide Permits.

HVT is aware that the U.S. Environmental Protection Agency (USEPA) recently promulgated a new CWA § 401 Rule (Rule). This letter addresses Section 121.7(e)(2) of

the Rule regarding the denial of certification for issuance of a general or permits requires:

- (i) The specific water quality requirements with which discharges that could be authorized by the general license or permit will not comply.*
- (ii) A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements; and*
- (iii) If the denial is due to insufficient information, the denial must describe the types of water quality data or information, if any that would be needed to assure that the range of discharges from potential projects will comply with water quality requirements.*

HVT Response One

Section 121.7(e)(2) of the Rule regarding the denial of certification for issuance of a general license or permit requires:

- (i) The specific water quality requirements with which discharges that could be authorized by the general license or permit will not comply*

The specific water quality requirements with which discharges that could be authorized by the general license or permit will not comply include, but are not limited to, the HVT's water quality standard 2002 sections: 2.0 Beneficial Uses, 2.1 Use Designation, 3.0 Water Quality Criteria, 3.3 General Conditions, 3.4 Numeric Criteria, 3.5 Specific Use Criteria, 3.6 Narrative Criteria, 3.7 Antidegradation Policy, Appendix C - Preliminary Remediation Goals, Appendix D – California Toxics Rule and HVT's Riparian Protection and Surface Mining Ordinance.

HVT Response Two

- (ii) A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements;*

First, the NWP's do not provide sufficient information as to all the discharges that may be authorized, and therefore the HVT cannot provide all the requirements which will not be met for every possible discharge occurring under those NWP's, as discussed above. However, HVT is providing the following examples of ways in which such discharges may violate the HVT's water quality requirements.

*For example, USACE is proposing to remove the 300 linear foot limit for losses of stream bed and instead rely on a 1/2-acre limit for NWP's 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. The USACE is proposing an alternative hybrid approach to establishing consistent quantitative limits for losses of stream bed where 1st through 6th order streams are given a quantitative limit in linear feet as a function of mean stream width in the different order stream segment which presumes to include the 1/2-acre equivalent for losses of stream bed. The proposed 1/2-acre threshold corresponds to an estimated 3,470 linear feet of allowable impacts to first order streams averaging seven feet in width, and more than 2,000 linear feet for second order streams. The USACE *has not provided sufficient information* to demonstrate that removing the 300 linear foot limit for losses of stream bed and instead relying on a 1/2-acre limit and/or using the proposed hybrid approach *will not violate the HVT's water quality standards, including but not limited to:**

- Section 3.1 – HVT standards shall provide a mechanism for managing and safeguarding the quality and use of all water bodies within HVIR by establishing water quality criteria, and providing a legal basis for regulatory controls.

- Section 3. 6.1 – 3.6.3

- 3.6.1 Surface Waters: All surface waters of the Reservation, including mixing zones, shall be free from substances attributable to human activity in accordance with the following:
 - 3.6.1.1 Benthic Macroinvertebrate Populations: Site specific species composition shall not be degraded in both abundance and structure to a level that would threaten fish habitat conditions, water quality, and general watershed health. Bioassessment procedures for identifying macroinvertebrates in the laboratory and information analysis are set forth and standardized in the California Stream Bioassessment Procedure (CSBP) document. Biological monitoring maybe implemented to determine impacts on aquatic organisms from both point and non-point source pollution.

 - 3.6.1.2 Biostimulatory Substances: Waters shall not contain biostimulatory substances in concentrations that promote aquatic growths to the extent that such growths cause nuisance or adversely affect beneficial uses.

 - 3.6.1.3 Bottom Substrate: Suitable substrate particle size distributions shall be maintained to ensure successful fish spawning as well as attachment of macroinvertebrates and algal components.

- 3.6.1.4 Color: Waters shall be free of unnatural coloration, which causes nuisance or impairs the designated beneficial uses.
- 3.6.1.5 Dioxins: Dioxins are known to be some of the most toxic manmade compounds known. Recent research has indicated that these compounds may be several orders of magnitude more toxic than was originally indicated (EPA 1985). Criteria established for such compounds are likely to be below the levels one could reasonably expect to be able to detect. No dioxin compounds will be discharged to any water within the Reservation boundaries.
- 3.6.1.6 Floating Material: Waters shall not contain floating material, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses.
- 3.6.1.7 Nitrate: Levels of Nitrates in waters with municipal or domestic supply use shall not exceed 10 mg/l. In other bodies of water, the levels of nitrate shall not be increased by human related activity above the levels consistent with preservation of the specified beneficial uses.
- 3.6.1.8 Nitrite: Levels of nitrites shall not be increased, in any body of water, by human related activity above the levels consistent with preservation of the specified beneficial use corresponding to that water body.
- 3.6.1.9 Oil and Grease: Waters shall not contain oils, greases, waxes, or other materials in concentrations that result in a visible film or coating on the surface of the water or on objects in the water, that cause nuisance, or that otherwise adversely affect beneficial uses.
- 3.6.1.10 Pentachlorophenol: No discharge of pentachlorophenol will be allowed to any water body within the boundaries of the Reservation. Any existing point or non-point source causing increased levels of PCP shall be addressed as a noncompliance condition under the antidegradation plan.
- 3.6.1.11 Petroleum Hydrocarbons: No increase above background levels of petroleum hydrocarbons will be allowed due to human related activity in any water body within the Reservation boundaries.
- 3.6.1.12 Pesticides: No individual pesticide or combination of pesticides shall be present in concentrations that adversely affect beneficial uses. There shall be no bioaccumulation in pesticide concentrations found in bottom sediments or aquatic life. Waters designated for use, as domestic or municipal supply shall not

contain concentrations of pesticides in excess of the limiting conditions set forth in Appendix D. Any existing point or non-point source causing increased levels of pesticides shall be addressed as a noncompliance condition under the antidegradation plan.

- 3.6.1.13 Phosphates: In order to preserve the existing quality of water within the Reservation boundaries from existing and to avoid potential eutrophication of phosphorous in any water body shall not be increased by human related activity above levels consistent with preservation of the specified beneficial uses.
- 3.6.1.14 Radioactivity: Radionuclides shall not be present in concentrations which are deleterious to human, plant, animal or aquatic life nor which result in the accumulation of radionuclides in the food web to an extent which presents a hazard to human, plant, animal or indigenous aquatic life.
- 3.6.1.15 Sediment: The suspended sediment load and suspended sediment discharge rate of waters shall not be altered in such a manner as to cause impairment or adversely affect beneficial uses.
- 3.6.1.16 Settable Material: Waters shall not contain substances in concentrations that result in deposition of material that causes nuisance or adversely affect beneficial uses.
- 3.6.1.17 Suspended Material: Waters shall not contain suspended material in concentrations that cause impairment or adversely affect beneficial uses.
- 3.6.1.18 Tastes and Odors: Waters shall not contain taste or odor producing substances in concentrations that impart undesirable tastes or odors to fish flesh or other edible products of aquatic origin, or that cause nuisance or adversely affect beneficial uses.
- 3.6.1.19 Tetrachlorophenol: No discharge of tetrachlorophenol will be allowed to any water body within the boundaries of the Reservation. Any existing point or non-point source causing increased levels of TCP shall be addressed as a non-compliant condition under the antidegradation plan.
- 3.6.1.20 Total Dissolved Solids: The total dissolved solids shall not exceed 100.0 mg/l unless specifically authorized by the Riparian Review Committee upon such conditions as it may deem necessary to carry out the general intent of this plan and to protect the beneficial uses specified in this document.

- 3.6.1.21 Toxicity: All waters shall be maintained free of toxic substances in concentrations that produce detrimental physiological responses in human, plant, animal, or aquatic life. This objective applies regardless of whether the toxicity is caused by a single substance or the interactive effect of multiple substances. Compliance with this objective will be determined by analysis of indicator organisms, species diversity, population density, growth anomalies, biotoxicity tests of appropriate duration, or other methods as specified by the Riparian Review Committee.
- (i). The survival of aquatic life in surface waters subjected to a waste discharge, or other controllable pollution factors, shall not be less than that for the same water body in areas unaffected by the waste discharge. For other control water bodies, the requirements for "experimental water" are described in Methods for Measuring Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms, latest edition, and Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Water to Freshwater Organisms, latest edition.
- (ii) Effluent limits based upon acute bioassay of effluent will be prescribed where appropriate. Additional numerical receiving water standards for specific toxicants will be established as sufficient data become available. Source control of toxic substances will be encouraged.
- (iii) Waters designated for use as domestic or municipal supply shall not contain concentrations of toxic compounds in excess of the limiting concentrations set forth in Appendix D.
- 3.6.1.22 Other Chemical Constituents: Surface water used for domestic or municipal supply shall not contain concentrations of chemical constituents in excess of the limiting concentrations set forth in Appendix D. Waters designated for use as agricultural supply shall not contain concentrations of chemical constituents in amounts that adversely affect such beneficial use.
- 3.6.2 Ground Waters
- In general groundwater standards and criteria will be the same as those for surface waters. The designated uses specified for those waters derived from groundwater sources will dictate the specific standards that apply.
- Groundwater shall not contain chemical constituents, toxicants, radionuclides, pesticides or substances which produce tastes or odors in concentrations that

produce detrimental physiological responses in human, plant, animal or aquatic life associated with the beneficial uses.

- Groundwater used for domestic or municipal supply shall not contain concentrations of contaminants in excess of the maximum contaminant limits set forth in EPA's Safe Drinking Water Act.
-
- Additional groundwater protection is provided under Section 5., Wellhead Protection, of Ordinance No. 3-95 of the Hoopa Valley Tribe.
- 3.6.3 Wetlands
- Determination of wetland jurisdiction and wetland delineation will be made in accordance with the protocols outlined in the *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* (Interagency Cooperative Publication, January 1989). The Riparian Review Committee or their respective department representatives will be responsible for wetland determination.
- There shall be no net loss of wetlands on the Reservation. This means that no activity shall convert a wetland to non-wetland status when a feasible alternative exists. If no feasible alternative exists, then a wetland of equal or greater size must be constructed or rehabilitated in another area (preferably within the same watershed) as mitigation.
- When water is present at the surface or extracted from the subsurface in a wetland, the above criteria for surface and groundwater applies.
- Vegetation removal within wetlands shall be avoided where a feasible alternative exists. If no feasible alternative exists, the wetland is to be replanted or expanded to mitigate for the area where vegetation has been removed.
- Dumping waste of any kind is prohibited in wetlands. Dumping in wetlands will be considered a Class II Moderate violation.

Numeric Targets for Designated Uses of Major Drainages on HVIR.in Table 2.1 will not be violated.

Section 3.4 Numeric Criteria

3.4.1-(A) Toxic substances shall not be introduced into waters within the boundaries of the Reservation. Numeric criteria concentrations, which have the potential to either singularly or cumulatively adversely, affect beneficial water uses, cause acute or chronic toxicity to

the most sensitive biota, or adversely affect public health. Additional criteria for toxins that cause adverse effects from bioaccumulation are listed in Appendix D.

(D) Numeric and narrative criteria shall be applied to all surface waters of the Reservation for the protection of aquatic life and human health. Selecting values for regulatory purposes will depend on the most sensitive beneficial use to be protected, and what level of protection is necessary for aquatic life and human health.

(F) The pH of surface waters within the Trinity River shall be maintained at a level of **5.0 – 9.0** for (MUN) use designations and will be maintained at a level of **7.0 - 8.5** for all other beneficial uses. The pH in the Klamath River shall be maintained within **7.0 - 8.5** at all times.

Section 3.5 Specific Use Criteria

3.5.1 Specific Use Criteria: HVT implemented specific use attainability analysis in the development of temperature and turbidity criteria. The rest of the following water quality criteria were designated based on data and information provided in U.S. EPA Quality Criteria for Water 1986 (Gold Book).

(A) Waters listed with the designated uses of Municipal and Domestic Supply (**MUN**), Cultural (**CUL**), Preservation of Threatened and Endangered Species (**T&E**), Preservation of Areas of Special Biological significance (**BIOL**), Cold Freshwater Habitat (**COLD**), Fish Spawning (**SPWN**), Wildlife habitat (**WILD**) and/or Contact Recreation (**REC-1**) shall meet the following criteria over the entire length of the stream including connecting tributaries within the jurisdiction of the HVT:

(ii) Dissolved Oxygen – Allowable dissolved oxygen ranges.

(vi) Nutrients - Allowable nutrient ranges.

(vii) Microcystins & Microcystis - Allowable values of microcystis aeruginosa and microcystin criteria for the Klamath River on HVIR (Table 3.3)

(ix) Temperature – Trinity River criteria for HVIR (Table 3.4)

HVT Response Three

(iii) If the denial is due to insufficient information, the denial must describe the types of water quality data or information, if any, that would be needed to assure that the range of discharges from potential projects will comply with water quality requirements.

The purpose of the HVT's water quality standards is found in Section 3.0 Water Quality Criteria, which states:

"The standards provided herein are established to restore, maintain and protect the chemical, physical, biological, and cultural integrity of the surface waters of the Reservation; to promote the health, social welfare, and economic well-being of the Hoopa Valley Tribe, its people, and all the residents of the Reservation; to achieve a level of water quality that provides for all potential uses; and to provide for full protection of threatened and endangered species.

These standards will provide designation of the existing and potential uses for the surface waters of the Hoopa Valley Tribe and water quality standards (narrative and numeric) to sustain the designated uses and protect existing water quality.

The water uses and quality provisions set forth herein are established in conformance with present and potential water uses of the surface waters of the Reservation and in consideration of the natural water quality potential and limitations of the same.

The Hoopa Valley Tribe recognizes that the Water Quality Control Plan does not contain all water quality pollutants; therefore, the Tribe shall use EPA Region IX Preliminary Remediation Goals (PRGs) guidelines (Appendix C) to evaluate risk contamination to soil and water bodies of the Reservation.

In addition, the Hoopa Valley Tribe has reviewed the California Toxics Rule (CTR) as promulgated by the U.S. Environmental Protection Agency (40 CFR Part §131.38) and has determined that for the purposes of consistency, the water quality criteria for priority pollutants in the CTR apply to waters of the Reservation as outlined in Appendix D".

By denying 401 Certification for the Nationwide Permits, HVT can continue to ensure that discharges on the HVIR comply with the HVT's water quality standards and that the HVT can review each discharge to determine whether additional information is required to certify that the activity will not violate the HVT's water quality standards. There is a vast amount of water quality data and other information which might be needed to guarantee compliance with water quality requirements, and in particular with the HVT's water quality standards. One of the purposes of HVT's denying certification of the NWP's is so the HVT's has the ability on a case-by-case basis to determine what information is required to comply with the HVT's water quality standards and other applicable regulations. The HVT's environmental staff are professional and experienced and cannot make case-specific decisions based on insufficient information.

For the reasons discussed in other parts of this letter, it is impossible to know in advance what additional information might be needed without knowing the details of

the discharges at issue. For example, the types of water quality data or information required to ensure compliance with the HVT's water quality standards and that the HVT would request *could be*: geomorphological studies, riparian habitat studies, surface water sampling, water quality studies including monitoring and assessment reporting, flow studies, HEC modeling, toxicity studies, fish tissue studies, and quality assurance plans to name a few.

As another example, with reference to HVT Response One, the HVT's Section 3.0 Water Quality Criteria reference both EPA Region IX Preliminary Remediation Goals guidelines (Appendix C) to evaluate risk contamination to soil and water bodies of the Reservation and California Toxics Rule (CTR) as promulgated by the U.S. Environmental Protection Agency (40 CFR Part §131.38) apply to waters of the Reservation as outlined in (Appendix D). There are hundreds of applicable standards in appendices C and D. Sufficient information required to assure under all circumstances for all discharges that not a single applicable standard is violated in these appendices could require detailed pollution prevention/control plans and subsequent sampling and reporting. As one can imagine this would require a tremendous amount of resources for the regulators and the regulated community. The HVT would be more than happy to discuss in detail the HVT's water quality standards Sections listed in HVT's Response One and arrive at a situation where sufficient information is agreed upon which will make it impossible to violate any section of the HVT's water quality standards in the NWP's.

In sum, anyone requesting to perform NWP activities on the HVIR must first obtain a project-specific Section 401 Certification from the HVT before proceeding under a Nationwide Permit. HVT's environmental staff Water Quality Program staff will be available to work with your office regarding this matter.

If the USACE have any questions, please contact Ken Norton, Environmental Director at (530) 625 -5515.

Sincerely,

A handwritten signature in black ink that reads "Ken Norton". The signature is written in a cursive, flowing style.

Ken Norton, Environmental Director
Hoopa Valley Tribal Environmental Protection Agency

Cc:

USEPA, Region IX – Thomas Torres, Director, Water Division, 75 Hawthorne Street, San Francisco, CA 94105.



**DRY CREEK RANCHERIA
BAND OF POMO INDIANS**

RESPONSE TO 2020 USACE NWP CERTIFICATION REQUESTS

Date: December 15, 2020

Permits Affected: 2020 Army Corps of Engineers Nationwide Permits

Applicant: Department of Army, Corps of Engineers

Contact: (b) (6)
San Francisco District
450 Golden Gate Avenue
San Francisco, California 94102
(b) (6) @usace.army.mil
(415) 503-6763

CERTIFICATION DECISIONS:

I. Background

The Dry Creek Rancheria Band of Pomo Indians (“Dry Creek”) obtained treatment as a state status under the Clean Water Act (“CWA”) for purposes of Section 401 water quality certification on October 17, 2011. Dry Creek has a responsibility to exercise this authority to protect and preserve waters within its jurisdiction for the sake and use of its members. The quality of waters and aquatic habitat are particularly significant to Dry Creek because of the central importance of on-reservation streams as homeland-sustaining resources.¹

On September 15, 2020, the United States Army Corps of Engineers (“Army Corps”) published notice of its proposal to reissue the Clean Water Act Nationwide Permits (“NWP”) with certain modifications. 85 Fed. Reg. 57298. On October 16, 2020, (b) (6) Chief of the Army Corps’ Regulatory Division wrote to Dry Creek requesting water quality certification of “those NWP that may result in a discharge in waters of the United States on Dry Creek Rancheria,” within 60 days. Dry Creek requested additional time to review the proposed NPWs, but Chief (b) (6) promptly denied the request without explanation on December 4, 2020.

The 60-day time period established by the Army Corps for review of the NWP is significantly shorter than the Army Corps’ usual practice.² The Army Corps has not yet completed

¹See Letter from John Terrell, Special Indian Agent, to Cato Sells, Commission of Indian Affairs (1915), attachment to Dry Creek Articles of Association at 6 (recognizing importance of on-reservation streams for establishing tribal homeland).

²In issuing the 2017 NWP, the Corps first published its draft proposal on June 1, 2016, allowed time for public comment, issued the final proposal on January 6, 2017, and requested certification from tribes and states by March 19, 2017 for a total review time of over eight months. 81 Fed. Reg. 35186, 35189 (June 1, 2016); 82 Fed. Reg. 1860, 1863 (Jan. 6, 2017). In issuing the 2012 NWP, the Corps first issued its draft proposal on February 16, 2011, allowed time for public comment, issued the final proposal on February 21, 2012, and requested certification from tribes and states by March 19, 2012 for a total review time of over fourteen months. 76 Fed. Reg. 9174 (Feb. 16, 2011); 77 Fed. Reg. 10184, 10184 (Feb. 21, 2012). The Corps justified its 60-day time period for action on the 2020 NWP by



**DRY CREEK RANCHERIA
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its analysis of or incorporated any public comments to the September 15 draft proposal and has not issued a final proposal.

The expedited review period has deprived Dry Creek of the opportunity for full investigation into the NWP's and their likely impacts to Dry Creek's jurisdictional waters, for consultation with neighboring jurisdictions, and to receive meaningful input from its members. The expedited procedure employed by the Army Corps is also inconsistent with the federal government's unique trust relationship with Indian tribes, under which the federal government must work with tribes on a government-to-government basis to meaningfully address tribes' concerns relating to tribal resources. *See* U.S. Army Corps of Engineers Tribal Consultation Policy, § 5(b), (c); Executive Order 13175, § 2(b). Executive Order 13175 requires each federal agency to "ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." *Id.* at § 5(a). In implementing this requirement, the Army Corps issued its Tribal Consultation Policy which explicitly provides, "potentially affected Tribes, as determined by the Corps, including Tribes whose aboriginal territories extend to the lands where an activity would occur, will be contacted by letter, telephone or e-mail sufficiently early to allow a timely review of the proposed action." *Id.* at § 5(d)(1). Moreover, the Consultation Policy requires the Army Corps to "ensure it addresses Tribal concerns regarding protected tribal resources" and "protect and allow access to protected tribal resources under USACE jurisdiction to the extent practicable." *Id.* at § 5(b)(3), (4). To that end, the Corps must ensure that tribes whose tribal resources may be affected by a particular activity "are contacted and their comments taken into consideration." *Id.* at § 5(d)(4). None of this has occurred with respect to the present certification request.

II. Permitting Decisions

A. Permits Certified

Dry Creek certifies the following NWP's: 5, 6, 13, 20, 22, 24, 27, 30, 32, 37, 38.

Dry Creek has determined that discharges from the foregoing proposed permits will comply with water quality requirements.

B. Permits Denied

Dry Creek denies certification for the following NWP's: 3, 4, 7, 12, 14, 16, 18, 19, 21, 23, 25, 29, 31, 33, 34, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, C, D

C. Bases for Denial

referring to 33 C.F.R. § 330.4(c)(6) and 325.2(b)(1)(ii), 85 Fed. Reg. 57298, 57305 (Sept. 15, 2020); however, these regulations appear to contemplate individual permit requests from single applicants for specific permits, not NWP's. The Corps also claimed that the 60-day time period is consistent with the EPA's Clean Water Act Section 401 Rule, which merely states that certification must be provided within a "reasonable period of time," not to exceed one year. 40 C.F.R. § 121.6(a).



**DRY CREEK RANCHERIA
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Dry Creek denies certification for the NWP's identified in subsection (B) above on the basis of insufficient information pursuant to 40 CFR § 121.7(e)(2)(iii). In order to take certification action, Dry Creek would require additional project-specific information that Dry Creek was unable to obtain in the expedited time period provided by the Army Corps with respect to this certification request. Such information includes: the location of activities, the waters of the United States potentially affected by such activities, proposed mitigation measures, proposed best management practices, and proposed restoration plans.

In the event Dry Creek's denial due to insufficient information is not effective for any reason, Dry Creek denies certification for the NWP's identified in subsection (B) above on the basis of the specific water quality requirements and explanatory statements provided in Appendix A.

Dry Creek Rancheria Band of Pomo Indians:

Christopher Ott, Environmental Director
Dry Creek Rancheria Band of Pomo Indians
1450 Airport Boulevard, Suite 200A
Santa Rosa, California 95403
Chris.Ott@riverrockcasino.com
(707) 814-4150



**DRY CREEK RANCHERIA
BAND OF POMO INDIANS**

APPENDIX A

Denied NWP	Water Quality Requirements	Explanation
3, 18, 19, 25, 29, 31, 33, 41, 42, 43, 45, 46, C, D	Dry Creek Rancheria Water Quality Standards (“WQS”), §§ VI (e), (g), (i), (n), (o), (p), (q) & (t), VII, Table 1 (C)(b) &(c); Dry Creek Rancheria Water Quality Ordinance, Chap. 5, §§3 (A), (B), (C), (D), (E), (H) & (I), 6(A) & (B), 7	Discharges that could be authorized under these NWP’s will foreseeably result in impermissible degradation to the unnamed stream within the Tribe’s jurisdiction, commonly known as “Rancheria Creek,” and other surface waters within the Tribe’s jurisdiction by creating unacceptable physical and hydrological conditions, creating unacceptable levels of suspended and floating materials, sediment and turbidity, and adversely impacting stream banks, substrate, water color, taste and odor, materially interfering with current contact and non-contact recreational, biological preservation, fish migration, fish spawning, wildlife habitat, and tribal and cultural beneficial uses, causing harm to non-aberrational resident species, and impairing the biological community as it naturally occurs.
4	Dry Creek Rancheria WQS, §§ VI (i), VII, Table 1 (C)(b) &(c); Dry Creek Rancheria Water Quality Ordinance, Chap. 5, §§ 6(A) & (B), 7	Discharges that could be authorized under this NWP will foreseeably result in impermissible degradation to the unnamed stream within the Tribe’s jurisdiction, commonly known as “Rancheria Creek,” and other surface waters within the Tribe’s jurisdiction by materially interfering with current contact recreational, biological preservation, fish migration, fish spawning, wildlife habitat, and tribal and cultural beneficial uses, causing harm to non-aberrational resident species, and impairing the biological community as it naturally occurs due to physical processes and adverse impacts to substrate.
7, 16, 23	Dry Creek Rancheria WQS, §§ VI (a), (b), (e), (g), (h), (i), (j), (n), (o), (p), (q), (s), & (t), VII, Table 1 (C)(b) &(c); Dry Creek Rancheria Water Quality Ordinance,	Discharges that could be authorized under these NWP’s will foreseeably result in impermissible degradation to the unnamed stream within the Tribe’s jurisdiction, commonly known as “Rancheria Creek,” and other surface waters within the Tribe’s jurisdiction by creating unacceptable levels of suspended and floating materials, toxicity, pesticides, biostimulatory substances, bacteria, coliform, oil and grease, sediment and turbidity, and adversely impacting stream banks, substrate, water color, taste and



**DRY CREEK RANCHERIA
BAND OF POMO INDIANS**

	Chap. 5, §§3 (A), (B), (C), (D), (E), (F), (G), (H), (I), (L) & (N), 6(A) & (B), 7	odor, materially interfering with current contact and non-contact recreational, biological preservation, fish migration, fish spawning, wildlife habitat, and tribal and cultural beneficial uses, causing harm to non-aberrational resident species, and impairing the biological community as it naturally occurs.
12, 50, 51	Dry Creek Rancheria WQS, §§ VI (e), (g), (h), (i), (n), (o), (p), (q), (s) & (t), VII, Table 1 (C)(b) &(c); Dry Creek Rancheria Water Quality Ordinance, Chap. 5, §§3 (A), (B), (C), (D), (E), (F), (H), (I) & (N), 6(A) & (B), 7	Discharges that could be authorized under these NWP's will foreseeably result in impermissible degradation to the unnamed stream within the Tribe's jurisdiction, commonly known as "Rancheria Creek," and other surface waters within the Tribe's jurisdiction by creating unacceptable physical and hydrological conditions, creating unacceptable levels of suspended and floating materials, oil and grease, toxicity, sediment and turbidity, and adversely impacting stream banks, substrate, water color, taste and odor, materially interfering with current contact and non-contact recreational, biological preservation, fish migration, fish spawning, wildlife habitat, and tribal and cultural beneficial uses, causing harm to non-aberrational resident species, and impairing the biological community as it naturally occurs.
14, 39	Dry Creek Rancheria WQS, §§ VI (e), (g), (h), (i), (n), (o), (p), (q) & (t), VII, Table 1 (C)(b) &(c); Dry Creek Rancheria Water Quality Ordinance, Chap. 5, §§3 (A), (B), (C), (D), (E), (F), (H) & (I), 6(A) & (B), 7	Discharges that could be authorized under these NWP's will foreseeably result in impermissible degradation to the unnamed stream within the Tribe's jurisdiction, commonly known as "Rancheria Creek," and other surface waters within the Tribe's jurisdiction by creating unacceptable physical and hydrological conditions, creating unacceptable levels of suspended and floating materials, oil and grease, sediment and turbidity, and adversely impacting stream banks, substrate, water color, taste and odor, materially interfering with current contact and non-contact recreational, biological preservation, fish migration, fish spawning, wildlife habitat, and tribal and cultural beneficial uses, causing harm to non-aberrational resident species, and impairing the biological community as it naturally occurs.
21, 44, 49	Dry Creek Rancheria WQS, §§ VI (e), (g), (i), (n), (o), (p), (q), (s) & (t), VII, Table 1 (C)(b) &(c); Dry	Discharges that could be authorized under these NWP's will foreseeably result in impermissible degradation to the unnamed stream within the Tribe's jurisdiction, commonly known as "Rancheria Creek," and other surface waters within the Tribe's jurisdiction by creating unacceptable physical and hydrological conditions, creating



**DRY CREEK RANCHERIA
BAND OF POMO INDIANS**

	Creek Rancheria Water Quality Ordinance, Chap. 5, §§3 (A), (B), (C), (D), (E), (H), (I) & (N), 6(A) & (B), 7	unacceptable levels of suspended and floating materials, toxicity, sediment and turbidity, and adversely impacting stream banks, substrate, water color, taste and odor, materially interfering with current contact and non-contact recreational, biological preservation, fish migration, fish spawning, wildlife habitat, and tribal and cultural beneficial uses, causing harm to non-aberrational resident species, and impairing the biological community as it naturally occurs.
34	Dry Creek Rancheria WQS, §§ VI (a), (b), (e), (g), (i), (j), (n), (o), (p), (q) & (t), VII, Table 1 (C)(b) &(c); Dry Creek Rancheria Water Quality Ordinance, Chap. 5, §§3 (A), (B), (C), (D), (E), (G), (H), (I) & (L), 6(A) & (B), 7	Discharges that could be authorized under this NWP will foreseeably result in impermissible degradation to the unnamed stream within the Tribe’s jurisdiction, commonly known as “Rancheria Creek,” and other surface waters within the Tribe’s jurisdiction by creating unacceptable levels of suspended and floating materials, pesticides, biostimulatory substances, bacteria, coliform, sediment and turbidity, and adversely impacting stream banks, substrate, water color, taste and odor, materially interfering with current contact and non-contact recreational, biological preservation, fish migration, fish spawning, wildlife habitat, and tribal and cultural beneficial uses, causing harm to non-aberrational resident species, and impairing the biological community as it naturally occurs.
40	Dry Creek Rancheria WQS, §§ VI (a), (b), (e), (f), (g), (i), (j), (n), (o), (p), (q) & (t), VII, Table 1 (C)(b) &(c); Dry Creek Rancheria Water Quality Ordinance, Chap. 5, §§3 (A), (B), (C), (D), (E), (G), (H), (I), (K) & (L), 6(A) & (B), 7	Discharges that could be authorized under this NWP will foreseeably result in impermissible degradation to the unnamed stream within the Tribe’s jurisdiction, commonly known as “Rancheria Creek,” and other surface waters within the Tribe’s jurisdiction by creating unacceptable levels of suspended and floating materials, pesticides, dissolved oxygen, biostimulatory substances, bacteria, coliform, sediment and turbidity, and adversely impacting stream banks, substrate, water color, taste and odor, materially interfering with current contact and non-contact recreational, biological preservation, fish migration, fish spawning, wildlife habitat, and tribal and cultural beneficial uses, causing harm to non-aberrational resident species, and impairing the biological community as it naturally occurs.



TWENTY-NINE PALMS BAND OF MISSION INDIANS

46-200 Harrison Place . Coachella, California . 92236 . Ph. 760.863.2444 . Fax: 760.863.2449

December 7, 2020

(b) (6)

U.S. Army Corps of Engineers
Los Angeles District
915 Wilshire Boulevard, Suite 930
Los Angeles, CA 90017

Dear (b) (6)

This letter is in response to the **U.S. Army Corps of Engineers' (USACE) October 15, 2020 request for certification under the Clean Water Act (CWA) § 401 by the Twenty-Nine Palms Band of Mission Indians (Tribe) for the proposed issuance of the Nationwide Permits (NWP)s**. The Tribe reserves all rights and obligations stemming from tribal sovereignty and Treatment as a State under the CWA and recognizes that the USACE issues NWP)s in accordance with the CWA. The Tribe understands that USACE has made a good faith effort to develop proposed NWP)s which are both protective of Waters of the U.S. and that meet Tribal Water Quality Standards (TWQS). However, the Tribe is deeply concerned with the USACE's proposal removing the previous 300 linear foot limit for loss of stream bed and replacing it with a 0.5-acre limit for NWP)s thresholds. This significant change may result in *more* than minimal adverse environmental impacts that would not comply with TWQS. Furthermore, the Tribe is apprehensive about reviewing and being asked to certify *draft* permits which may be subject to future modification. Any changes that occur to the permits after a certification action could result in missing or inappropriate conditions, leaving the Tribe without an opportunity to remedy a deficient certification. This absence of information regarding a procedure to address any changes in the final permits is a glaring issue that impedes the Tribe's ability to adequately assess and certify the NWP)s.

Potential projects authorized under one of these proposed NWP)s, which relies solely on the 0.5-acre limit, could result in the loss of approximately 2,540 linear feet of a stream with a mean width of 8.6 feet (Downing et al. 2012) without being considered to have more than "minimal adverse effects." The mean width of the Whitewater River (River), located within the exterior boundaries of the Tribe's reservation, is the largest water body and only perennial water body, is approximately 8.5 feet for the segment that bisects the Tribe's land. This means that permittees would be allowed to impact roughly 2,500 linear feet of the nearly 4,500 feet of the River segment that passes through the reservation under a single project without compensatory mitigation.

Use designations specified in TWQS for the River include Groundwater Recharge, Municipal Domestic Supply, Agricultural Supply, Primary and Secondary Contact Recreation, Culturally Significant Wildlife and Livestock Habitat, and Warm Freshwater Habitat. Thus, the discharges permitted under the proposed NWP's will not comply with these water quality requirements. By allowing impacts up to 0.5 acre, adverse individual and cumulative impacts are likely.

The Culturally Significant use designation for this River describes water use for cultural purposes that may involve body contact with the water and provision of adequate flow for ceremonial purposes and plant gathering. The Tribe does not believe that a project can successfully demonstrate impacting up to 2,500 linear feet of a stream can be accomplished without adversely affecting this and the other listed TWQS designated uses, nor does the USACE provide any other assurances.

While there is a clear problem with the proposed review and certifying process, the draft proposed rule also does not outline a process for the Tribe to address changes made to the permit language in the final rule. The current procedure requires the Tribe to certify draft permits without a clearly articulated process for the Tribe to address any changes made in the final permits. The Tribe has a right and responsibility to know exactly what it is certifying to ensure discharges authorized by NWP's comply with TWQS. Future modifications to the NWP's may conceivably result in discharges that do not conform to the Tribe's TWQS. Considering this level of uncertainty and lack of information regarding potential changes, the Tribe cannot reasonably be asked to provide a water quality certification for a draft permit. In the spirit of transparency and cooperation, the Tribe has an obligation to review and issue a water quality certification decision on the final NWP's.

The Twenty-Nine Palms Band of Mission Indians hereby **denies** CWA § 401 certification for the USACE's proposed issuance of the NWP's as described in its October 15, 2020 letter due to the potential impacts on designated uses specified in TWQS and insufficient information related to addressing potential changes from the draft to final NWP's. Thank you for your request for water quality certification and your coordination with the Twenty-Nine Palms Tribal Environmental Protection Agency. Should you have questions or need additional information please contact Mrs. Shawn Muir, Tribal Programs Director at (760) 398-6767 or smuir@29palmsbomi-nsn.gov.

Sincerely,

A handwritten signature in blue ink that reads "Darrell Mike". The signature is fluid and cursive, with the first name "Darrell" and the last name "Mike" clearly legible.

Darrell Mike
Tribal Chairman

cc. Shawn Muir, Tribal Programs Director



BIG PINE PAIUTE TRIBE OF THE OWENS VALLEY

Big Pine Paiute Indian Reservation

P.O. Box 700 · 825 South Main Street · Big Pine, CA 93513

(760) 938-2003 · fax (760) 938-2942

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December 15, 2020

(b) (6)

Regulatory Division Chief
Department of the Army
Los Angeles District Corps of Engineers
P.O. Box 532711
Los Angeles, CA 90053-2325

RE: Request for Water Quality Certification under Clean Water Act Section 401

Dear (b) (6):

The Big Pine Paiute Tribe of the Owens Valley (“Tribe”) understands the 2020 Reissuance (and Modification) of Nationwide Permits (“NWP”) will allow the Department of the Army’s Los Angeles District Corps of Engineers (“Corps”) to authorize certain activities that the Corps determines will have minimal adverse effects on the aquatic environment. Activities resulting in more than minimal adverse effects on the aquatic environment, individually or cumulatively, cannot be authorized by NWPs. It is also understood that the Tribe has no control over the Corps’ determination of activities that have a minimal adverse effect on waters of the United States. Therefore, the Tribe denies the Corps’ request for water quality certification for NWPs.

The Tribe has broad authority to review proposed activities in and/or affecting the Reservation’s waters requiring state or federal permits or licenses. The Tribe’s Water Quality Standards were established to protect public health and aquatic life and to maintain or enhance water quality in relation to the beneficial uses of the water. According to the Big Pine Water Quality Standards in Section VII(e):

“If a proposed action has the possibility to adversely affect the water quality of Big Pine Creek, an application must be filed with the Tribal Environmental Office. The application must describe the action proposed and its effects on the Creek, how this information was derived, and a justification for the action. Upon satisfying these requirements, the Tribal Environmental Office will recommend or not recommend this proposal to be considered by the Tribal Council. Tribal Council will make a determination whether to consider the proposal further. If the Tribal Council wishes to consider the application further, the public participation process will take place (see paragraph VII(d)). The Tribal Council has the sole authority in permitting projects which pose a risk to water quality in Big Pine Creek where it traverses the Big Pine Paiute Reservation. If the Tribal Council makes the decision to allow degradation, they will submit their decision to the USEPA for review and approval.”

The Tribe denies the Corps request for water quality certification for NWP's due to insufficient information included in the draft/proposed permits. The draft/proposed permits fail to meet objectives listed in Tables 4, 6, 7, 8, 9, and 10 of the Big Pine Water Quality Standards, outlined below. The water quality standards are intended to protect the public health and welfare, and to maintain or enhance water quality in relation to the existing and/or potential beneficial uses of the water. The water quality objectives listed below are the allowable limits or levels of water quality constituents or characteristics established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area. These water quality objectives provide a basis for detecting any future trend toward degradation or enhancement of Reservation waters. Any issuance of NWP's that do not meet the criteria of water quality data listed in Tables 4, 6, 7, 8, 9, and 10 would violate the Big Pine Tribe Water Quality Standards. The Tribe will deny any requests for NWP's that do not meet these standards, and prohibits any unauthorized discharge into Reservation waters.

Table 4
Maximum Contaminant Levels
Inorganic Chemicals

<i>Chemical</i>	<i>Maximum Contaminant Level, mg/L</i>
Aluminum	1.
Antimony	0.006
Arsenic	0.05
Asbestos	7 MFL*
Barium	1.
Beryllium	0.004
Cadmium	0.005
Chromium	0.05
Cyanide	0.15
Fluoride	2.0
Mercury	0.002
Nickel	0.1
Nitrate (as NO ₃)	45.
Nitrate=Nitrite (sum nitrogen)	10.
Nitrite (as Nitrogen)	1.
Selenium	0.05
Thallium	0.002

*MFL = million fibers per liter; MCL for fibers exceeding 10 µm in length

Table 6
Maximum Contaminant Levels
Volatile Organic Chemicals (VOCs)

<i>Chemicals</i>	<i>Maximum Contaminant Level, mg/L</i>
Benzene	0.001
Carbon	0.0005
1,2-Dichlorobenzene	0.6
1,4-Dichlorobenzene	0.005
1,1-	0.005
1,2-	0.0005
1,1-	0.006

Cis-1,2-Dichloroethylene	0.006
Trans-1,2-Dichloroethylene	0.01
Dichloromethane	0.005
1,2-Dichloropropane	0.005
1,3-Dichloropropane	0.0005
Ethylbenzene	0.3
Methyl- <i>tert</i> -butyl	0.013
Monochlorobenzene	0.07
Styrene	0.1
1,1,2,2-Tetrachloroethane	0.001
Tetrachloroethylene	0.005
Toluene	0.15
1,2,4-Trichlorobenzene	0.005
1,1,1-Trichloroethane	0.200
1,1,2-Trichloroethane	0.005
Trichloroethylene	0.005
Trichlorofluoromethane	0.15
1,1,2-Trichloro-1,2,2-Trifluoroethane	1.2
Vinyl Chloride	0.0005
Xylenes	1.750*

Table 7
Maximum Contaminant Levels
Non-Volatile Synthetic Organic Chemicals (SOCs)

<i>Chemical</i>	Maximum Contaminant Level, mg/L
Alachor	0.002
Atrazine	0.001
Bentazon	0.018
Benzo(a)pyrene	0.0002
Carbofuran	0.018
Chlordane	0.0001
2,4-D	0.07
Dalapon	0.2
Dibromochloropropane	0.0002
Di(2-ethylhexyl)adipate	0.4
Di(2-ethylhexyl)	0.004
Dinoseb	0.007
Diquat	0.02
Endothall	0.1
Endrin	0.002
Ethyl Dibromide	0.00005
Glyphosate	0.7
Heptachlor	0.00001
Heptachlor Epoxide	0.00001
Hexachlorobenzene	0.001
Hexachlorocyclopentadiene	0.05
Lindane	0.0002
Methoxychlor	0.03
Molinate	0.02

Oxamyl	0.05
Pentachlorophenol	0.001
Picloram	0.5
Polychlorinated Biphenyls	0.0005
Simazine	0.004
Thiobencarb	0.07
Toxaphene	0.003
2,3,7,8-TCDD (Dioxin)	3 x 10 ⁻⁸
2,4,5-TP (Silvex)	0.05

*MCL is for either a single isomer or the sum of the isomers.

Table 8
Secondary Maximum Contaminant Levels
Consumer Acceptance Limits

<i>Constituents</i>	Maximum Contaminant Levels/Units
Aluminum	0.2 mg/L
Color	15 Units
Copper	1.0 mg/L
Corrosivity	Non-corrosive
Foaming Agents (MBAS)	0.5 mg/L
Iron	0.3 mg/L
Manganese	0.05 mg/L
Methyl-tert-butyl ether (MTBE)	0.005 mg/L
Odor—Threshold	3 Units
Silver	0.1 mg/L
Thiobencarb	0.001 mg/L
Turbidity	5 Units
Zinc	5.0 mg/L

Table 9
Secondary Maximum Contaminant Levels – Ranges

<i>Constituent, Units</i>	<i>Recommended</i>	<i>Upper</i>	<i>Short Term</i>
Total Dissolved Solids, mg/L	500	1,000	1,500
Or Specific Conductance, micromhos	900	1,600	2,200
Chloride, mg/L	250	500	600
Sulfate, mg/L	250	500	600

Table 10
Water Quality Criteria For Ambient Dissolved Oxygen Concentration
(Values are in mg/L, NA = Not Applicable)

	Beneficial Use Class	Beneficial Use Class	Beneficial Use Class	Beneficial Use Class
	COLD & SPWN ¹	COLD	WARM & SPWN	WARM
30 Day Mean	NA	6.5	NA	5.5

7 Day Mean	9.5 (6.5)	NA	6.0	NA
7 Day Mean Minimum	NA	5.0	NA	4.0
1 Day Minimum	8.0 (5.0)	4.0	5.0	3.0

¹ SPWN Includes all embryonic and larval stages and all juvenile forms to 30 days following hatching.

**Table 11
MCL Radioactivity**

<i>Constituent</i>	Maximum Contaminant Level, pCi/l
Combined Radium-226 and Radium-228	5
Gross Alpha particle activity (including Radium-226 but excluding Radon and Uranium)	15
Tritium	20,000
Strontium-90	8
Gross Beta particle activity	50
Uranium	20

The Tribe denies any issuance of NWP's listed under the proposed 401 certification due to insufficient water quality data to ensure Big Pine Water Quality Standards are met. Since any 2020 NWP's listed under the proposed 401 certification fails to meet the water quality objectives shown in Table(s) 4, 6, 7, 8, 9, 10, the Tribe denies the Corps request for water quality certification for NWP's. The Tribe requests that the Corps deny water quality certification for activities authorized by the NWP's within the Tribe's land and have the permit holder comply with the above described protocol so the Tribe can make a determination on water quality certification.

Finally, the Tribe is currently being challenged by the COVID-19 pandemic, which has disrupted typical work flow in the Tribal Offices. It may not be easy to reach the Tribe at the phone number above. If you should have any questions regarding this letter, please contact me at n.williams@bigpinepaiute.org.

Sincerely,



Noah Williams
Tribal Water Program Coordinator

C: James E. Rambeau, Sr., Tribal Chairman



**BISHOP PAIUTE TRIBE
ENVIRONMENTAL MANAGEMENT OFFICE**

50 Tu Su Lane
Bishop, CA 93514
Phone 760-873-3584
Fax 760-873-4614



December 8, 2020

(b) (6)

Regulatory Division Chief
Department of the Army
Los Angeles District Corps of Engineers
P.O. Box 532711
Los Angeles, CA 90053-2325

RE: Reissuance of Nationwide Permits
Request for Water Quality Certification under Clean Water Act Section 401

Dear (b) (6):

The Bishop Paiute Tribe received correspondence from your office dated October 15, 2020, requesting water quality certification under Clean Water Act Section 401 for the reissuance of Nationwide Permits (NWP). It is understood that the proposed NWPs will allow the Corps to authorize certain activities that have minimal adverse effects on the aquatic environment and that activities resulting in more than minimal adverse effects on the aquatic environment, individually or cumulatively, cannot be authorized by NWPs. It is also understood that the Tribe has no control over the Corps determination of activities that have a minimal adverse effect on waters of the United States.

Bishop Creek, both up and downstream of the Bishop Paiute Reservation, is in the process of being listed on the Clean Water Act, Section 303(d) list for *E. coli* levels that are and have been above the water quality standards established by both, the Bishop Paiute Tribe and the State of California. The *E. coli* levels within the Reservation boundaries also exceed the Tribe's water quality standards. Because Bishop Creek is already an impaired water body, discharges to Bishop Creek that could be authorized by the general license or permit which result in any level of degraded water quality will not comply with the Bishop Paiute Tribe's water quality standards (denial of certification [section 121.7(e)(2) requirement (i)]. The Bishop Paiute Tribe finds any discharge to Bishop Creek will further compromise the currently impaired water quality, and therefore will not comply with the Tribe's water quality standards (denial of certification [section 121.7(e)(2) requirement (ii)].

Based on this determination and in accordance with Corps regulations at 33 CFR 330.4(c), the Bishop Paiute Tribe denies Water Quality Certification (WQC) for activities authorized by NWPs within the tribal lands of the Bishop Paiute Tribe. Anyone wishing to perform such activities will first be required to obtain a project specific WQC or waiver thereof from the Tribe's Environmental Management Office before proceeding under any NWP.

The authority for this determination is made pursuant to the following tribal laws and authorization as follows: According to the Bishop Paiute Tribal Environmental Protection Ordinance (No. 98-02, Sect. 101(c)): "The Tribal Council, pursuant to its inherent sovereignty and federal law, possesses the authority to provide for the comprehensive regulation of environmental quality within the exterior boundaries of the Reservation." The U.S. Environmental Protection Agency Region 9 granted CWA Section 401 and CWA Section 404 authority was granted to the Tribe on April 11, 2006. Water quality standards have been established for the surface waters within the Reservation and are provided in the Bishop Paiute Tribe Water Quality Control Plan (approved by US EPA Region 9 on August 15, 2008).

If you should have any questions regarding the NWPs water quality certification denial, please contact BryAnna Vaughan, Water Quality Coordinator, at BryAnna.Vaughan@BishopPaiute.org.

Sincerely,

Brian Adkins
Environmental Management Office Director

CC:
Gloriana M. Bailey, MBA, Tribal Administrator
Sabrina Renteria, Chief Operations Officer I
Tilford Denver, Tribal Council Chairman
Tribal Environmental Protection Agency
File

**Morongo Band of Mission Indians
Clean Water Act Section 401 Certification
2020 Army Corps of Engineers Nationwide Permits**

This is the conditional CWA §401 Certification of the 2020 NWP for projects on the Morongo Reservation. Section 401(a)(1) of the CWA requires Applicants for Federal permits and licenses that may result in discharges into waters of the U.S. to obtain certification that the discharge will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307. The Morongo Band of Mission Indians has received Treatment as a State authority to issue certification.

Applicable Water Quality Requirements

In exercising authority under 33 U.S.C. § 1341, the Tribe has reviewed the proposed permits for consistency with the following:

1. Applicable water quality-based, technology-based, and toxic or pretreatment effluent limitations as provided under 33 U.S.C. §§1311, 1312, 1313, 1316, and 1317 (FWPCA §§ 301, 302, 303, 306 and 307);
2. Federally approved water quality standards contained in California Water Quality Standards in the Water Quality Control Plan for the Colorado River Basin Region and authorized by 33 U.S.C. §1313 for protection of downstream waters;
3. Water quality objectives and protections provided for in the Morongo Band of Mission Indians Surface Water Quality Protection Ordinance (Ordinance 39); and
4. All known, available and reasonable methods to prevent and control pollution of waters of the U.S. (40 CFR 125.3).

This certification provides reasonable assurance that projects will comply with these federally approved water quality requirements, provided that the following conditions are adhered to.

General Conditions

1. Notification

Pre-construction notification requirements provide the Corps and the Tribe the opportunity to evaluate certain NWP activities on a case-by-case basis to ensure the proposed activity will cause no more than minimal adverse environmental effects individually and cumulatively. Notification allows the Corps to evaluate project impacts at a regional scale (e.g., waterbody or watershed) and determine whether to restrict NWP use in sensitive resource areas. The Corps can also add conditions to NWPs such as best management practices or compensatory mitigation to offset authorized losses of waters of the U.S., including wetlands.

The Tribe has the expertise to evaluate effects of NWPs issued on tribal land and ensure water quality requirements will be met. Additionally, tribal law requires notice to the Environmental Protection Department prior to an activity that will result in a discharge to tribal waters, within 24 hours of emergency activity, and in the case of an unpermitted discharge.¹ Notification for projects on tribal land

¹ Morongo Band of Mission Indians Surface Water Protection Ordinance Sections VI(C), VI(D), and VI(E).

will also ensure compliance with the protection of downstream waters under the jurisdiction of the State of California. Without notification, there is no way to determine whether effects will be minimal or meet water quality requirements found in tribal law.²

All NWP-authorized projects proceeding on the Morongo Reservation must submit notification to the Tribe. In the case where a PCN is required by the Corps, the applicant shall submit a copy of the PCN to the Morongo Environmental Protection Department (MEPD). In the case where a PCN is not required by the Corps, the applicant must submit either a notification as outlined in NWP General Condition 32 or a modified notification subject to the criteria below. If a waiver of impact limits is proposed beyond what is approved under this certification, applicants must include written determinations specified in this Certification's General Condition 2 *Waivers* for Tribal approval.

- 1) Timing. Applicants shall submit notice to the MEPD as early as possible and at least 30 days before initialing a project under a NWP. When a Tribal approval is required by condition in this certification, the Tribe will act within 30 days of receiving a complete notification.
- 2) Content. The notification must be in writing (email is acceptable) and include the following information:
 - a. Name, address, email address, and telephone numbers of the applicant and any agents or representatives;
 - b. Location of the proposed project;
 - c. A description of the proposed project and impacts sufficiently detailed to determine compliance with NWP and Tribal 401 conditions including:
 - i. The project purpose;
 - ii. Direct and indirect adverse environmental effects the project would cause, including the proposed acreages and linear feet (for streams) of waters impacted, avoided, and where applicable, created or otherwise mitigated;
 - iii. Any other permits used or intended to be used to authorize any part of the proposed project or related activity;
 - iv. A written statement describing how the activity has been designed to avoid or minimize adverse effects, both temporary and permanent, to waters of the United States;
 - v. Drawings, including plan and cross-section views, clearly depicting the location, size and dimensions of the proposed activity;

² Morongo Band of Mission Indians Surface Water Protection Ordinance 39 states "The purpose of this Ordinance is to carry out the provisions of the Morongo Environmental Protection Ordinance, Section IV(C)(1), to protect surface water quality on the Reservation. Carrying out this purpose includes, among other things, protecting the health, safety and welfare of Tribal members and all other persons within the exterior boundaries of the Reservation; preventing the deterioration of water quality and other natural resources resulting from surface water pollution; and protecting the cultural, social, and economic stability of the Reservation. The Tribe intends to carry out the purpose of this Ordinance by reducing and/or controlling present and future sources of surface water pollution within the exterior boundaries of the Reservation in a manner that achieves a quality of water that maintains the chemical, physical, and biological integrity of the waters within the jurisdiction of the Tribe in order to preserve and enhance the environment within the Reservation and on the lands immediately surrounding the Reservation.

- d. A description of proposed construction best management practices (BMPs) to be used during construction of the proposed activities. If no BMPs are proposed, the notification shall include a description of why their use is not practicable or necessary;
- e. For activities proposed for the purpose of temporary access and construction which would result in the placement of dredged or fill material into the waters of the U.S., provide:
 - i. The reason(s) why avoidance of temporary fill is not practicable;
 - ii. A description of the proposed temporary fill, including the type and amount (in cubic yards) or material to be placed;
 - iii. The area (in acres) and length (in linear feet) of waters where the temporary fill is proposed to be placed; and
 - iv. A proposed plan for restoration of the temporary fill area to pre-project contours and conditions'
- f. Consistent with this Certification General Condition 2 *Waivers*, a written demonstration that any proposed impact limit waiver that may be allowable under this certification will result in minimal impacts to aquatic resource functions;
- g. The name(s) of any species listed as endangered or threatened under the Endangered Species Act which may be adversely affected by the proposed work, either directly or by impacting designated critical habitat;
- h. Identification of any cultural or historic properties listed in, or eligible for listing in, the National Register of Historic Places that may be adversely affected by the proposed work.

Correspondence should be submitted to:

Morongo Band of Mission Indians
Environmental Protection Department
12700 Pumarra Road
Banning, CA 92220
Email: epd@morongo-nsn.gov

2. *Waivers*

For Certain NWP, Corps District Engineers may waive impact thresholds by making written documentation that that the discharges will result in minimal adverse effects. To ensure that tribal waters receive an adequate level of protection, and to prevent the NWP Program from having more than minimal adverse impacts to the aquatic environment, all proposed impact limit waivers are denied under this certification unless the Tribe approves a written determination that the waiver will not exceed minimal impacts to aquatic resource functions. Tribal waiver review is consistent with the avoidance of "substantial" impacts required in Morongo Ordinance 39 and will allow for compliance with all tribal laws relating to water quality impacts.³ Without tribal waiver review, there is not sufficient information that the discharge from the NWP activity will comply with water quality requirements.

³ Morongo Band of Mission Indians Surface Water Protection Ordinance 39 states "Any activity shall not cause substantial alteration of hydroperiod, flows, groundwater or surface water quality, or fish and wildlife habitat. All activities shall comply with all applicable federal and Morongo Band of Mission Indian laws, including those related

The Tribe will act within 30 days of receiving a complete PCN or modified notification as outlined in General Condition 1 *Notification* when tribal approval is required for a waiver.

3. Retention of 300 Foot Linear Limit

The Corps' 2020 NWP eliminates the 300 linear foot (LF) limit for streambed losses that currently applies to 10 NWPs. The 300 LF limit helps ensure that using these 10 NWPs results in no more than minimal individual and cumulative adverse environmental effects as required by the CWA.

The 2017 NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 include a two-part threshold for use: impacts can't exceed 1/2-acre or 300 LF of a streambed loss. The two-part threshold ensures that adverse impacts covered by these NWPs are no more than minimal.

The existing process to assess stream impacts is an efficient and defensible two-part threshold to estimate the magnitude of impact. Looking at area alone (1/2-acre threshold) does not provide a reliable measure of the extent of impact. Many tribal waters are narrow and a 1/2-acre threshold may result in thousands of feet of impact that could potentially exceed minimal adverse effects and no longer comply with water quality requirements such as limits on sediment and suspended solids as outlined in Morongo Ordinance 39.⁴ Tribal law requires the avoidance of substantial impacts including but not limited to flow, surface water quality, and fish habitat.⁵ In many of the narrow, headwater streams that exist on the Reservation, impacted stream length will affect the aquatic function along the longitudinal gradient.⁶

To ensure that they will cause no more minimal adverse environmental effects individually and cumulatively, 300 LF limits are included in the conditions for NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52.

Specific Nationwide Permits

1. Aids to Navigation

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

2. Structures in Artificial Canals

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

to sediment control, pollution control, floodplain restrictions, storm water management, and on-site wastewater disposal. All activities that could potentially cause a discharge shall follow all appropriate best management practices associated with that activity or required by the applicable permit.

⁴ Morongo Band of Mission Indians Surface Water Protection Ordinance Section V(A).

⁵ Morongo Band of Mission Indians Surface Water Protection Ordinance Section VI(A).

⁶ The linear or longitudinal gradient along streams is important in maintaining functions such as organic carbon and detrital biomass export, particulate retention, biogeochemical processes, and habitat interspersions and connectivity.

3. Maintenance

Subject to the General Conditions above, this NWP is hereby programmatically certified.

4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

5. Scientific Measurement Devices

Subject to the General Conditions above, this NWP is hereby programmatically certified.

6. Survey Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

7. Outfall Structures and Associated Intake Structures

Subject to the General Conditions above, this NWP is hereby programmatically certified.

8. Oil and Gas Structures on the Outer Continental Shelf

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

9. Structures in Fleeting and Anchorage Areas

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

10. Mooring Buoys

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

11. Temporary Recreational Structures

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

12. Oil or Natural Gas Pipeline Activities

Use of this NWP is not covered by this programmatic certification, and prospective users on tribal lands must seek individual project certification from the Tribe in all cases. There is insufficient information to ensure that projects proposed under this NWP will comply with water quality requirements.

This NWP is denied due to the potential for discharges to violate the Tribe's turbidity standard of "waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses."⁷ Oil and natural gas pipeline activities may need to cross a waterbody multiple times, have access roads created, and require linear excavation. These activities have the potential to discharge sediment to waterbodies in quantities that may exceed minimal impacts and could create an adverse effect to beneficial uses. Additionally, Hathaway Creek, Potrero Creek, and Deep Creek are all streams with headwaters in the Reservation and are listed on California's 2018 303(d) list for turbidity.⁸ While the listing does not apply to waters on the Reservation, the off-Reservation portions have been listed as impaired for turbidity and total maximum daily loads (TMDLs) will be required. There is insufficient information in the NWP to determine if discharges from the activities will be protective of downstream waters as required by 33 U.S.C. §1313 and meet criteria protective of the State's water quality standards as required by 40 CFR 131.10(b).⁹ Activity types, existence of multiple crossings, temporary impacts, access roads, potential for water drainage, and extent of pipeline trenches will need to be known prior to determining if discharges will comply with water quality requirements.

CWA section 401 certification for this NWP is denied without prejudice. Applicants for projects on tribal lands must apply to the Tribe for individual certification if this NWP is proposed to be used.

13. Bank Stabilization

Subject to the General Conditions above, this NWP is hereby programmatically certified.

14. Linear Transportation Projects

Subject to the General Conditions above, this NWP is hereby programmatically certified.

15. U.S. Coast Guard Approved Bridges

Subject to the General Conditions above, this NWP is hereby programmatically certified.

16. Return Water from Upland Contained Disposal Areas

Subject to the General Conditions above, this NWP is hereby programmatically certified.

17. Hydropower Projects

Subject to the General Conditions above, this NWP is hereby programmatically certified.

18. Minor Discharges

Subject to the General Conditions above, this NWP is hereby programmatically certified.

19. Minor Dredging

⁷ Morongo Band of Mission Indians Surface Water Protection Ordinance Section V(A)(15).

⁸ 2018 California Integrated Report (Clean Water Act Section 303(d) List and 305(b) Report)

⁹ Pursuant to sections 303 and 101(a) of the Clean Water Act, the federal regulation at 40 CFR 131.10(b) requires that "In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters."

Subject to the General Conditions above, this NWP is hereby programmatically certified.

20. Response Operations for Oil or Hazardous Substances

Subject to the General Conditions above, this NWP is hereby programmatically certified.

21. Surface Coal Mining Activities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

22. Removal of Vessels

Subject to the General Conditions above, this NWP is hereby programmatically certified.

23. Approved Categorical Exclusions

Subject to the General Conditions above, this NWP is hereby programmatically certified.

24. Indian Tribe or State Administered Section 404 Programs

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

25. Structural Discharges

Subject to the General Conditions above, this NWP is hereby programmatically certified.

26. [Reserved]

This NWP is not used and does not require section 401 water quality certification.

27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

28. Modifications of Existing Marinas

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

29. Residential Developments

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

30. Moist Soil Management for Wildlife

Subject to the General Conditions above, this NWP is hereby programmatically certified.

31. Maintenance of Existing Flood Control Facilities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

32. Completed Enforcement Actions

Subject to the General Conditions above, this NWP is hereby programmatically certified.

33. Temporary Construction, Access, and Dewatering

Subject to the General Conditions above, this NWP is hereby programmatically certified.

34. Cranberry Production Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

35. Maintenance Dredging of Existing Basins

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

36. Boat Ramps

Subject to the General Conditions above, this NWP is hereby programmatically certified.

37. Emergency Watershed Protection and Rehabilitation

Subject to the General Conditions above, this NWP is hereby programmatically certified.

38. Cleanup of Hazardous and Toxic Waste

Subject to the General Conditions above, this NWP is hereby programmatically certified.

39. Commercial and Institutional Developments

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

40. Agricultural Activities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

41. Reshaping Existing Drainage Ditches

Subject to the General Conditions above, this NWP is hereby programmatically certified.

42. Recreational Facilities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

43. Stormwater Management Facilities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

44. Mining Activities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

45. Repair of Uplands Damaged by Discrete Events

Subject to the General Conditions above, this NWP is hereby programmatically certified.

46. Discharges in Ditches

Subject to the General Conditions above, this NWP is hereby programmatically certified.

47. [Reserved]

This NWP is not used and does not require section 401 water quality certification.

48. Commercial Shellfish Mariculture Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

49. Coal Remining Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

50. Underground Coal Mining Activities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

51. Land-Based Renewable Energy Generation Facilities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

52. Water-Based Renewable Energy Generation Pilot Projects

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

53. Removal of Low-Head Dams

Subject to the General Conditions above, this NWP is hereby programmatically certified.

54. Living Shorelines

Subject to the General Conditions above, this NWP is hereby programmatically certified.

A. Seaweed Mariculture Activities

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

B. Finfish Mariculture Activities

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

C. Electric Utility Line and Telecommunications Activities

Use of this NWP is not covered by this programmatic certification, and prospective users on tribal lands must seek individual project certification from the Tribe in all cases. There is insufficient information to ensure that projects proposed under this NWP will comply with water quality requirements.

This NWP is denied due to the potential for discharges to violate the Tribe's turbidity standard of "waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses."¹⁰ Electric utility lines and telecommunications activities may need to cross a waterbody multiple times, have access roads created, and require linear excavation. These activities have the potential to discharge sediment to waterbodies in quantities that may exceed minimal impacts and could create an adverse effect to beneficial uses. Additionally, Hathaway Creek, Potrero Creek, and Deep Creek are all streams with headwaters in the Reservation and are listed on California's 2018 303(d) list for turbidity.¹¹ While the listing does not apply to waters on the Reservation, the off-Reservation portions have been listed as impaired for turbidity and total maximum daily loads (TMDLs) will be required. There is insufficient information in the NWP to determine if discharges from the activities will be protective of downstream waters as required by 33 U.S.C. §1313 and meet criteria protective of the State's water quality standards as required by 40 CFR 131.10(b). Activity types, existence of multiple crossings, temporary impacts, access roads, potential for water drainage, and extent of pipeline trenches will need to be known prior to determining if discharges will comply with water quality requirements.

CWA section 401 certification for this NWP is denied without prejudice. Applicants for projects on tribal lands must apply to the Tribe for individual certification if this NWP is proposed to be used.

D. Utility Line Activities for Water and Other Substances

Use of this NWP is not covered by this programmatic certification, and prospective users on tribal lands must seek individual project certification from the Tribe in all cases. There is insufficient information to ensure that projects proposed under this NWP will comply with water quality requirements.

This NWP is denied due to the potential for discharges to violate the Tribe's turbidity standard of "waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses."¹⁰ Electric utility lines and telecommunications activities may need to cross a waterbody multiple times, have access roads created, and require linear excavation. These activities have the potential to discharge sediment to waterbodies in quantities that may exceed minimal impacts and could create an adverse effect to beneficial uses. Additionally, Hathaway Creek, Potrero Creek, and Deep Creek are all streams with headwaters in the Reservation and are listed on California's 2018 303(d) list for turbidity.¹¹ While the listing does not apply to waters on the Reservation, the off-Reservation portions have been listed as impaired for turbidity and total maximum daily loads (TMDLs) will be required. There is insufficient

¹⁰ Morongo Band of Mission Indians Surface Water Protection Ordinance Section V(A)(15).

¹¹ 2018 California Integrated Report (Clean Water Act Section 303(d) List and 305(b) Report)

information in the NWP to determine if discharges from the activities will be protective of downstream waters as required by 33 U.S.C. §1313 and meet criteria protective of the State's water quality standards as required by 40 CFR 131.10(b). Activity types, existence of multiple crossings, temporary impacts, access roads, potential for water drainage, and extent of pipeline trenches will need to be known prior to determining if discharges will comply with water quality requirements.

CWA section 401 certification for this NWP is denied without prejudice. Applicants for projects on tribal lands must apply to the Tribe for individual certification if this NWP is proposed to be used.

E. Water Reclamation and Reuse Facilities

Subject to the General Conditions above, this NWP is hereby programmatically certified.



**PALA BAND OF
MISSION INDIANS**

PMB 50, 35008 Pala Temecula Road
Pala, CA 92059
Phone 760-891-3500 | Fax 760-742-1411

December 14, 2020

(b) (6)
U.S. Army Corps of Engineers
Chief, Regulatory Division
Los Angeles District
915 Wilshire, Suite 930
Los Angeles, CA 90013

Re: Pala Band of Mission Indians – Conditional Section 401 Water Quality Certification 2020
Nationwide Permits

Dear (b) (6):

The Pala Band of Mission Indians (PBMI) is a federally recognized Native American Tribe authorized to implement the Section 401 water quality certification requirements of the Clean Water Act (CWA) under the CWA's "treatment as a state" provisions. In accordance with that authority, PBMI has reviewed the proposed reissuance of Nationwide Permits (NWP) by the United States Army Corps of Engineers (Corps) under CWA Section 404 as published in the Federal Register on September 15, 2020. PBMI provides the following programmatic water quality certification for all the proposed NWPs subject to the conditions described below, which shall be binding requirements for work on the Pala Reservation in San Diego County, California.

PBMI has adopted the water quality standards established by the State of California applicable to those watercourses that are located on or flow through the Pala Reservation. This is a link to the Regional Board's website which specifies the standards for those watercourses.

<https://www.waterboards.ca.gov/sandiego/waterissues/programs/basinplan/docs/R9BasinPlan.pdf> Based on the information on the NWPs that has been provided, PBMI cannot conclude that the discharges authorized by the NWPs discharges will comply with applicable provisions of the CWA and PBMI's water quality standards as required under 40 C.F.R. § 121.7(f). Consequently, PBMI has determined that specific conditions are required under Section 401 to ensure that the Tribe's water quality standards are not violated and to protect the (1) public health and welfare of PBMI and its members and other residents of its Reservation, and (2) present and future use of surface water and groundwater on the Reservation for public, domestic, fish and wildlife, recreation, agricultural, cultural, commercial, industrial, and other uses.

As part of this certification, PBMI requires that any authorized project that cannot comply with these general conditions is denied Section 401 certification without prejudice and the applicant must apply to the PBMI Environmental Department (PED) for an individual water quality certification. If an individual certification is required, PED will use its best efforts to issue, deny, or waive certification within 60 days of receipt of complete project information.

PBMI's Section 401 water quality certification applies only to projects that are eligible for coverage under the NWPs, as limited by any Regional Conditions applicable in the Corps'

Los Angeles District. This certification also does not apply to any project that requires an individual CWA Section 404 permit. Any project that qualifies for an NWP but fails to meet the conditions described in this certification will not be eligible for coverage under this programmatic certification and must obtain individual project certification from PBMI. This conditional certification will remain in effect for the authorization period of the reissued 2020 NWPs.

Condition 1: Notification

The applicant for any NWP-authorized project on the Pala Reservation shall provide notification to PED when the application for an NWP is submitted to the Corps. If an NWP requires a pre-construction notice (PCN), the applicant can satisfy this condition by providing a copy of the PCN to PED as its 401 notification in advance of any authorization letter from the Corps allowing the applicant to proceed under an NWP. If an NWP does not require a PCN, the applicant still must notify PED prior to receipt of an authorization letter from the Corps allowing the applicant to proceed under an NWP. In either situation, submittals shall be written, may be electronic, and shall be made to:

Pala Environmental Department
35008 Pala Temecula Road
Pala, CA 92059
Attn: Section 401 Group

All submittals for projects using one of the conditionally certified NWPs shall include the following information:

- a) The name, address, telephone numbers, and e-mail addresses of the applicant and any of its agents, representatives or contact persons
- b) The purpose of the proposed project
- c) The location and dimensions of the project, including the area of any temporary and/or permanent fill in WUS
- d) The best management practices (BMPs) to be used during construction, and if BMPs are not proposed, why their use is not practicable or necessary
- e) The source and quality of any fill to be used in the project
- f) Any proposed compensatory mitigation for project impacts.

PBMI has determined that this condition is necessary to assure that the Tribe is aware of any activities that are covered by an NWP or which the Corps approves that will occur within the PBMI Reservation, an area over which PBMI has jurisdiction as a sovereign nation. This condition also is required to assure compliance with PBMI's strict water quality standards. For example, the water quality standards PBMI has adopted for the San Luis Rey River and all its tributaries on the PBMI Reservation are 500 mg/l for total dissolved solids (TDS) and 20 NTU for turbidity. These water quality standards, and those for other water quality criteria, could easily be exceeded in Tribal watercourses by projects that involve discharges into WUS. Requiring notice of work to be conducted within the boundaries of the Pala Reservation also is authorized by PBMI's sovereign authority over its Reservation lands and all activities on those lands and by its authority to enforce PBMI Ordinance No. 15, which prohibits the discharge of any pollutant into any waters on the PBMI Reservation.

Condition 2: Best Management Practices

Except as allowed by the applicable NWP, no debris, silt, sand, cement, concrete, oil or petroleum, organic material, or other construction materials or wastes shall enter any WUS or be stored where it may be washed by runoff into any WUS. Silt fences, straw wattles, and other techniques shall be employed as appropriate to protect WUS from such discharges. Permittees and their contractors shall minimize channel and bank erosion within the WUS.

PBMI has determined that this condition is necessary to assure compliance with PBMI's strict water quality standards. For example, the water quality standards for the San Luis Rey River and all its tributaries on the PBMI Reservation are 500 mg/l for TDS and 20 NTU for turbidity. These water quality standards, and those for other water quality criteria, could easily be exceeded in Tribal watercourses by projects that involve discharges into WUS. This condition also is authorized by PBMI's sovereign authority over its Reservation lands and all activities on those lands and by its authority to enforce PBMI Ordinance No. 15, which prohibits the discharge of any pollutant into any waters on the PBMI Reservation.

Condition 3: Inspections

The permittee shall allow PED to inspect the authorized activity and any mitigation areas at any reasonable time that PED deems necessary to determine if the project complies with the terms and conditions of the NWP and this certification or any project-specific certification.

PBMI has determined that this condition is necessary to assure compliance with PBMI's strict water quality standards. For example, the water quality standards adopted by PBMI for the San Luis Rey River and all its tributaries on the PBMI Reservation are 500 mg/l for TDS and 20 NTU for turbidity. These water quality standards, and those for other water quality criteria, could easily be exceeded in Tribal watercourses by projects that involve discharges into WUS. This condition also is authorized by PBMI's sovereign authority over its Reservation lands and all activities on those lands and by its authority to enforce PBMI Ordinance No. 15, which prohibits the discharge of any pollutant into any waters on the PBMI Reservation.

With these conditions, PBMI hereby conditionally certifies the 2020 NWPs under its Section 401 authority. Please contact Shasta Gaughen, Pala Environmental Director, at (760) 891-3515 or sgaughen@palatribe.com if you have any questions concerning this conditional certification.

Sincerely,



Robert Smith, Chairman
Pala Band of Mission Indians

Cc: Shasta Gaughen, Environmental Director

Rincon Band of Luiseño Indians

One Government Center Lane | Valley Center | CA 92082
(760) 749-1051 | Fax: (760) 749-8901 | rincon-nsn.gov



VIA E-MAIL ONLY

David.J.Castanon@usace.army.mil
antal.j.szijj@usace.army.mil

December 15, 2020

(b) (6)
Chief, Regulatory Division
Los Angeles District

Department of the Army
U.S. Army Corps of Engineers
Los Angeles District
915 Wilshire Boulevard, Suite 930
Los Angeles, California 90017

RE: RINCON BAND DENIES WATER QUALITY CERTIFICATION UNDER SECTION 401 OF THE CLEAN WATER ACT FOR PROPOSED NATIONWIDE PERMITS

Dear (b) (6):

Thank you for submitting your letter to the Rincon Band of Luiseño Indians (the “Tribe”), dated October 15, 2020, requesting water quality certification under Section 401 of the Clean Water Act for the proposed issuance of Nationwide Permits (NWP) that may result in a discharge in waters of the United States within the exterior boundaries of the Rincon Reservation. It has been noted that a pre-filing meeting request, was submitted to the Tribe on September 14, 2020, 31 days prior to the filing of this request.

The Tribe is treated in the same manner as a state for purposes of Section 401 of the Clean Water Act and is presently working with the Environmental Protection Agency, Region IX (“EPA”) to adopt water quality standards as a matter of Tribal Law. However, until those tribal water quality standards are approved, the Tribe is using federal water quality criteria established by EPA.

Your request has been reviewed, and unfortunately water quality certification under Section 401 of the Clean Water Act is being denied by the Tribe for all requested NWPs. The certification action for each NWP is as indicated in the table below.

Nationwide Permit	Description	Certification Action
NWPs Authorizing Activities That May Result in a Discharge Requiring Section 401 Water Quality Certification		
NWP 15	U.S. Coast Guard Approved Bridges	Deny ¹
NWP 16	Return Water From Upland Contained Disposal Areas	Deny ¹
NWP 17	Hydropower Projects	Deny ¹
NWP 18	Minor Discharges	Deny ¹
NWP 21	Surface Coal Mining Activities	Deny ¹
NWP 25	Structural Discharges	Deny ¹
NWP 29	Residential Developments	Deny ¹
NWP 30	Moist Soil Management for Wildlife	Deny ¹
NWP 34	Cranberry Production Activities	Deny ¹
NWP 39	Commercial and Institutional Developments	Deny ¹
NWP 40	Agricultural Activities	Deny ¹
NWP 41	Reshaping Existing Drainage and Irrigation Ditches	Deny ¹
NWP 42	Recreational Facilities	Deny ¹
NWP 43	Stormwater Management Facilities	Deny ¹
NWP 46	Discharges in Ditches	Deny ¹
NWP 49	Coal Remining Activities	Deny ¹
NWP 50	Underground Coal Mining Activities	Deny ¹
NWP E	Water Reclamation and Reuse Facilities	Deny ¹

Nationwide Permit	Description	Certification Action
NWPs Authorizing Activities, Some of Which May Result in a Discharge Requiring Section 401 Water Quality Certification		
NWP 3	Maintenance (a) Repair, rehabilitation, or replacement of previously authorized, currently serviceable structures or fills b) Discharges associated with removal of accumulated sediments and debris in the vicinity of existing structures, including intake and outfall structures and associated canals (c) Temporary structures, fills, and work necessary to conduct maintenance activity	Deny ¹
NWP 4	Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities	Deny ¹
NWP 5	Scientific Measurement Devices	Deny ¹
NWP 6	Survey Activities	Deny ¹
NWP 7	Outfall Structures and Associated Intake Structures	Deny ¹
NWP 12	Oil or Natural Gas Pipeline Activities	Deny ¹
NWP 13	Bank Stabilization	Deny ¹
NWP 14	U.S. Coast Guard Approved Bridges	Deny ¹
NWP 19	Minor Dredging	Deny ¹
NWP 20	Response Operations for Oil or Hazardous Substances	Deny ¹
NWP 22	Removal of Vessels	Deny ¹
NWP 23	Approved Categorical Exclusions	Deny ¹
NWP 27	Aquatic Habitat Restoration, Enhancement, and Establishment Activities	Deny ¹
NWP 31	Maintenance of Existing Flood Control Facilities	Deny ¹
NWP 32	Completed Enforcement Actions	Deny ¹
NWP 33	Temporary Construction, Access, and Dewatering	Deny ¹

Nationwide Permit	Description	Certification Action
NWP 36	Boat Ramps	Deny ¹
NWP 37	Emergency Watershed Protection and Rehabilitation	Deny ¹
NWP 38	Cleanup of Hazardous and Toxic Waste	Deny ¹
NWP 44	Mining Activities	Deny ¹
NWP 45	Repair of Uplands Damaged by Discrete Events	Deny ¹
NWP 48	Commercial Shellfish Mariculture Activities	Deny ¹
NWP 51	Land-Based Renewable Energy Generation Facilities	Deny ¹
NWP 52	Water-Based Renewable Energy Generation Pilot Projects	Deny ¹
NWP 53	Removal of Low-Head Dams	Deny ¹
NWP 54	Living Shorelines	Deny ¹
NWP C	Electric Utility Line and Telecommunications Activities	Deny ¹
NWP D	Utility Line Activities for Water and Other Substances	Deny ¹

¹ Based upon our review, we have determined that discharges resulting from projects implemented under the above nationwide permits could result in exceeded water quality standards of waters within Rincon Tribal lands. In accordance with 40 CFR 121.7(e)(2), the reason for denying CWA 401 water quality certification for the above nationwide permits is due to insufficient information being provided that would allow the Rincon Tribe to confirm that project impacts would comply with the applicable provisions of sections 301, 302, 303, 306, and 407 of the Clean Water Act, and Tribal regulatory requirements for point source discharges into waters of the United States. Specifically, there is insufficient information provided to determine whether projects implemented under these Nationwide permits will meet water quality requirements for the following water quality parameters: pH, dissolved oxygen, nitrate (as N), E. coli, Total Suspended Solids (TSS), Total Dissolved Solids (TDS), Biological Oxygen Demand (BOD), and Chemical Oxygen Demand (COD).

Specific water quality data/information required to assure that the discharge will comply with water quality requirements:

U.S. EPA has developed surface water quality criteria for parameters including the following: metals, organochlorine pesticides, organophosphorus pesticides, N-Methylcarbamate herbicides, total trihalomethanes, general minerals, nitrite and nitrate (as N), total suspended solids (TSS) and total dissolved solids (TDS), physical parameters such as pH, dissolved oxygen, specific conductivity, cyanide, ammonia, biological oxygen demand (BOD), chemical oxygen demand (COD), total coliform and E. Coli, total organic carbon (TOC), and radionuclides (gross alpha, gross beta, RAD 226 & 228, uranium).

If a proposed project has the potential to affect any one or more of these water quality parameters, then the Tribe requires that all applicable water chemistry, discharge volume information, exact location of the discharge, and information relating to the timing and frequency of discharge must be provided to the Tribe along with the CWA Section 401 Water Quality Certification request, in order to properly analyze potential impacts that ensure that proposed projects will not cause avoidable environmental impacts to water quality and protected riparian buffers both on a per occurrence basis, and collectively over time.

In the event you have any questions, comments or concerns about this letter, please direct them to Ms. Camille Merchant, Director, Rincon Environmental Resources Department by telephone at (760) 749-1051 or email at cmerchant@rincon-nsn.gov. Thank you.

Sincerely,

RINCON BAND OF LUISEÑO INDIANS

A handwritten signature in black ink, appearing to read "Bo Mazzetti". The signature is written in a cursive, flowing style.

Bo Mazzetti
Tribal Chairman

Cc: Camille Merchant, Director, Rincon Environmental Department
Denise Turner Walsh, Attorney General, Rincon Band of Luiseño Indians

MEMORANDUM FOR RECORD

SUBJECT: Addendum to the Section 401 Water Quality Certification Memorandum for Record for the State of California for the 2021 Nationwide Permits regarding Kletsel Dehe Wintun Nation's denial of certification.

1. On January 13, 2021, the U.S. Army Corps of Engineers (Corps) published a final rule in the Federal Register (86 FR 2744) announcing the reissuance of twelve existing nationwide permits (NWP) and four new NWP, as well as the reissuance of NWP general conditions and definitions with some modifications. The 16 NWP that will go into effect on March 15, 2021, are NWP 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, 56, 57, and 58. The remaining NWP will expire on March 19, 2022, and are not being evaluated in this memo.
2. On February 2, 2021, the Sacramento District (SPK) prepared a Memorandum for Record (MFR) regarding the 401 water quality certifications (WQC) received from certifying agencies, including tribes. The February 2, 2021, MFR identified the status of the requested WQCs, including those where the certifying agency did not respond to the request. In the February 2, 2021, MFR, SPK identified that because the Kletsel Dehe Wintun Nation did not respond to the WQC request within the reasonable period of time, the WQC is waived. As such, we responded on February 18, 2021, that the certification was waived.
3. On February 23, 2021, Ms. Brenda Tomaras of Tomaras & Ogas, LLP, provided (via email) a copy of the Tribe's October 30, 2020, response to our request for certification. Until Ms. Tomaras email, we were unaware of the letter's existence due to an error in the email address for (b) (6). In addition, we did not receive a hardcopy of the October 30, 2020, letter.
4. Despite not receiving the letter on October 30, 2020, we acknowledge that the Tribe made a decision on certification within the reasonable period of time and denied certification for all 2021 NWP. The denial, however, does not satisfy the requirement(s) set forth in 40 CFR 121.7(e)(2) because it does not include the required information. Thus, certification is waived for all 2021 NWP on Kletsel Dehe Wintun Nation lands, per 40 CFR 121.9(a)(2)(iii).
5. As required by 40 CFR 121.9(c), SPK will provide written notice of the waiver to Kletsel Dehe Wintun Nation and the U.S. Environmental Protection Agency, Region 9.

(b) (6)

CHIEF, REGULATORY DIVISION



KLETSEL DEHE WINTUN NATION

P.O. Box 1630 ♦ Williams, CA 95987 ♦ www.kletseldehe.org

October 30, 2020

(b) (6)

Chief, Regulatory Division

US Army Corps of Engineers

Sacramento District

Sent via email: (b) (6) [@usace.army.mil](mailto:(b) (6)@usace.army.mil)

Re: Denial of Certification for all activities under the Nationwide Permit for 401 Certification.

Dear (b) (6):

The Kletsel Dehe Wintun Nation would like to thank you for the opportunity to comment on the new U.S. Army Corps of Engineers proposal to reissue the Nationwide Permits (NWP). First, the Nation has chosen to deny 401 certifications for all activities under the NWPs. Any proposed projects which impact the Nation's waters will be addressed on a case-by-case basis.

In addition, we have taken time to review the document and only wish to add a few comments.

Page 59 @ 25. Water Quality: We believe that there needs to be further detail stating that this section needs to ensure that Tribal Water Quality and its antidegradation policy shall also be adhered to.

Page 67 @4. If the district engineer/Nation determines that the adverse environmental effects of the proposed activity are more than minimal, . . .

Thank you for your attention to this matter.

Sincerely,

Charlie Wright

Tribal Chairman

Cc: KERA

Adminstration

APPENDIX B

*2017-2020 ORM2
SUMMARY TABLES*

NWP Verifications Issued

March 19, 2017 Through March 18, 2020

State	CA
District	(All)
Action	Action

NWP No.	Total Issued
NWP 12*	789
NWP 29	168
NWP 39	121
NWP 40	7
NWP 42	30
NWP 43	89
NWP 44	7
NWP 48	3
NWP 51	12
Grand Total	1226

*NWP 12 verifications issued during this period include other types of utility lines (e.g. electrical, water, etc) as allowed under the 2017 version of NWP 12

NWP Permanent Impact Summary

March 19, 2017 Through March 18, 2020

District	(All)
State	CA
Impact Duration	Permanent
Impact Type	(All)
Impact Perm Loss	(All)

NWP No.	Total Area of Permanent Impact (Acres)*
NWP 12**	4.261212
NWP 29	24.6031974
NWP 39	14.5496378
NWP 40	1.0624023
NWP 42	1.870757
NWP 43	6.2258191
NWP 44	0.7312066
NWP 48	7.73
NWP 51	1.9838201
Grand Total	63.0180523

*Permanent impacts are based on the definition of "loss" in the NWP regulations and may include impacts that do not convert waters to dry land

**NWP 12 verifications issued during this period include other types of utility lines (e.g. electrical, water, etc) as allowed under the 2017 version of NWP 12

NWP Temporary Impact Summary

March 19, 2017 Through March 18, 2020

District	(All)
State	CA
Impact Duration	Temporary
Impact Type	(All)
Impact Perm Loss	(All)

NWP No.	Total Area of Temporary Impact (Acres)
NWP 12*	148.1597966
NWP 29	5.3043223
NWP 39	0.7380369
NWP 42	5.3360229
NWP 43	28.6746225
NWP 44	1.934961
NWP 48	48.2
NWP 51	0.458
Grand Total	238.8057622

*NWP 12 verifications issued during this period include other types of utility lines (e.g. electrical, water, etc) as allowed under the 2017 version of NWP 12

NWP Mitigation Summary March 19, 2017 through March 18, 2020

District	(All)
State	CA

NWP no.	Mitigation Required (Acres)	Sum of Credits Required
NWP 12*	0	7.026
NWP 29	45.6239707	30.995
NWP 39	16.5218027	14.457
NWP 40	0.47	3.258
NWP 42	1.06	0.812
NWP 43	17.341	2.974
NWP 44	0	0.99
NWP 48	0	0
NWP 51	4.64	1.664
Grand Total	85.6567734	62.176

*NWP 12 verifications issued during this period include other types of utility lines (e.g. electrical, water, etc) as allowed under the 2017 version of NWP 12

**Final 2021 Nationwide Permit (NWP) Regional Conditions
for the State of California**

*(NWPs 12, 21, 29, 39, 40, 42-44, 48, 50-52, and 55-58,
Effective March 15, 2021 until March 15, 2026)*

A. Regional Conditions for the State of California:

1. The permittee shall submit a pre-construction notification (PCN) for all 2021 NWPs, in accordance with General Condition 32, in the following circumstances:

a. Activities involving new bank stabilization that do not incorporate bioengineering techniques. Bioengineering techniques include using live plants alone or in combination with dead or inorganic materials, including rock, sand, or gravel;

b. Activities resulting in a discharge of dredged or fill material in waters of the U.S. on Tribal Lands;

c. Activities involving the permanent channelization, realignment, or relocation of streams; and,

d. Activities that have the potential to adversely affect Essential Fish Habitat (EFH), as designated by the Pacific Fishery Management Council. The PCN shall include an EFH assessment and analysis of effects of the action on EFH, in accordance with 50 C.F.R. § 600.920 (e). For Federal permittees, if a PCN is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the Magnuson-Stevens Fishery Conservation and Management Act.

2. In the desert regions of Los Angeles District (USGS Hydrologic Unit Code accounting units: *Lower Colorado* - 150301, *Northern Mojave* - 180902, *Southern Mojave* - 181001, and *Salton Sea* - 181002), the use of NWP 12, 21, 29, 39, 40, 42, 43, 44, 50, 51, 52, 57 and 58 resulting in greater than 0.10-acre loss of wetlands, mudflats, vegetated shallows, or riffle and pool complexes, as defined at 40 CFR Part 230.40-45, is prohibited.

3. In the Los Angeles District, NWPs 29, 39, 42 and 43, and NWP 14 combined with any of those NWPs, cannot authorize a loss of waters of the United States greater than 0.25 acre within the Murrieta Creek and Temecula Creek watersheds in Riverside County.

4. In the Los Angeles District, all 2021 NWPs are revoked within the Special Area Management Plan areas of the San Diego Creek Watershed and San Juan Creek/Western San Mateo Creek Watersheds in Orange County, California.

5. In the Los Angeles District, the permittee shall submit a pre-construction notification (PCN) for all 2021 NWPs, in accordance with General Condition 32, in the following circumstances:

a. Activities that would result in a loss of waters of the United States within the Murrieta and Temecula Creek watersheds in Riverside County, California; and,

b. Activities that would result in a loss of waters of the United States within Santa Clara River watershed in Los Angeles and Ventura County, California, including but not limited to Aliso Canyon, Agua Dulce Canyon, Sand Canyon, Bouquet Canyon, Mint Canyon, South Fork of the Santa Clara River, San Francisquito Canyon, Castaic Creek, Piru Creek, Sespe Creek and the main-stem of the Santa Clara River; and,

c. Activities that would result in a loss of waters of the United States within all watersheds in the Santa Monica Mountains in Los Angeles and Ventura County, California, bounded by Calleguas Creek on the west, by Highway 101 on the north and east, and by Sunset Boulevard and Pacific Ocean on the south; and,

d. Activities that would result in a loss of waters of the United States within all perennial waterbodies and special aquatic sites.

6. In the San Francisco District, the use of NWP 29 and 39 is prohibited within the San Francisco Bay diked baylands¹ (see figure 1).

7. In the San Francisco District, the permittee shall submit a pre-construction notification (PCN), in accordance with General Condition 32, for all 2021 NWP activities that will take place in waters or wetlands of the U.S. that are within the San Francisco Bay diked baylands¹ (see figure 1).

8. In the Sacramento District, the use of any 2021 NWP authorizing the discharge of dredged or fill material in peatlands² containing histosols, including bogs and fens, is prohibited.

¹The San Francisco Bay diked baylands are defined as undeveloped areas that are currently behind levees and are within the historic margin of the Bay. The historic margin of the Bay is defined as areas on the Nichols and Wright map (see figure 1) below the 5-foot contour line, National Geodetic Vertical Datum (NGVD) (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).

²A peatland is defined as a wetland with saturated organic soil (greater than or equal to 16 inches in thickness) that is classified as a histosol in the Natural Resources Conservation Service (NRCS) Field Indicators of Hydric Soils in the United States (Version 8.0, 2016). A copy of the document can be obtained from the NRCS at: [http://www.nrcs.usda.gov/Internet/ DOCUMENTS/nrcs142p2_053171.pdf](http://www.nrcs.usda.gov/Internet/DOCUMENTS/nrcs142p2_053171.pdf)

B. 401 Water Quality Certification (401 WQC) Regional Conditions for California:

1. The following conditions from the attached December 11, 2020, 401 WQC granted by the U.S. Environmental Protection Agency (EPA), shall apply to NWP 43 on tribal lands within U.S. EPA Region 9³ boundaries in the State of California:

a. All applicants must provide notice to EPA Region 9 prior to commencing construction to provide EPA Region 9 with the opportunity to inspect the activity for the purposes of determining whether any discharge from the proposed project will violate this water quality certification. Where the Corps requires a PCN for the applicable NWP, the applicant should also provide the PCN to Region 9. Within 30 days, EPA Region 9 will provide written verification to the applicant that the proposed project will not violate the water quality certification of the NWP.

b. Projects or activities are not authorized under the NWP if the project will involve point source discharge into an active channel of a water of the U.S. identified as a section 303(d) or TMDL listed impaired waterbody and the discharge may result in further exceedance of a specific parameter (e.g. total suspended solids, dissolved oxygen, temperature) for which the waterbody is listed. The current lists of 303(d) and TMDL listed waterbodies are available on EPA Region 9's web site at: <https://www.epa.gov/tmdl/impaired-waters-and-tmdls-pacific-southwest-region-9>

2. The following conditions from the attached December 11, 2020, 401 WQC granted by the Morongo Band of Mission Indians, shall apply to NWPs 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, and 52, on the Morongo Reservation within the **Los Angeles District** boundaries in the State of California:

a. All NWP-authorized projects proceeding on the Morongo Reservation must submit notification to the Tribe. In the case where a PCN is required by the Corps, the applicant shall submit a copy of the PCN to the Morongo Environmental Protection Department (MEPD). In the case where a PCN is not required by the Corps, the applicant must submit either a notification as outlined in NWP General Condition 32 or a modified notification subject to the criteria outlined in the attached December 11, 2020, 401 water quality certification granted by the Morongo Band of Mission Indians. If a waiver of impact limits is proposed beyond what is approved under this certification, applicants must include written determinations specified in this Certification's General Condition 2 Waivers for Tribal approval.

³The EPA 401 WQC does not apply to activities proceeding in the territories of the 23 tribes in Region 9 that have been approved as Section 401 certifying authorities —the Navajo Nation, Hualapai Tribe, Paiute-Shoshone of the Bishop Community, Big Pine Paiute-Shoshone Tribe, Twenty-Nine Palms Band of Mission Indians, Hoopa Valley Tribe, Hopi Tribe, Pyramid Lake Paiute Tribe, Dry Creek Rancheria of Pomo Indians, Pala Band of Mission Indians, Cortina Band of Wintun Indians, Walker River Paiute Tribe, Yerington Paiute, Duck Valley, Confederated Tribes of the Goshute Reservation, Gila River Indian Community, San Carlos Apache, Morongo Band of Mission Indians, Big Pine Paiute Tribe of the Owen Valley, Rincon Band of Luiseno Indians, Cabazon, Quartz Valley, Karuk and White Mountain Apache Tribe. In limited circumstances, some lands within tribal boundaries fall outside a tribe's Section 401 certifying authority and are subject to this certification.

b. To ensure that tribal waters receive an adequate level of protection, and to prevent the NWP Program from having more than minimal adverse impacts to the aquatic environment, all proposed impact limit waivers are denied under this certification unless the Tribe approves a written determination that the waiver will not exceed minimal impacts to aquatic resource functions.

c. To ensure authorized activities will cause no more minimal adverse environmental effects, individually and cumulatively, 300 linear foot limits are included in the conditions for NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52.

d. For NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52: impacts are limited to either 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed, plus any other losses of jurisdictional wetlands and waters caused by the NWP activity, cannot exceed 1/2-acre.

3. The following conditions from the attached December 14, 2020, 401 WQC granted by the Pala Band of Mission Indians, shall apply to all 2021 NWPs on the Pala Reservation within the **Los Angeles District** boundaries in the State of California:

a. The applicant for any NWP-authorized project on the Pala Reservation shall provide notification to the Pala Band of Mission Indians Environmental Department (PED) when the application for an NWP is submitted to the Corps. If an NWP requires a PCN, the applicant can satisfy this condition by providing a copy of the PCN to PED as its 401 notification in advance of any authorization letter from the Corps allowing the applicant to proceed under an NWP. If an NWP does not require a PCN, the applicant still must notify PED prior to receipt of an authorization letter from the Corps allowing the applicant to proceed under an NWP. In either situation, submittals shall be written, may be electronic, and shall be made to Pala Environmental Department, 35008 Pala Temecula Road Pala, CA 92059, Attn: Section 401 Group. All submittals for projects using one of the conditionally certified NWPs shall include the criteria outlined in the attached December 14, 2020, 401 water quality certification granted by the Pala Band of Mission Indians.

b. Except as allowed by the applicable NWP, no debris, silt, sand, cement, concrete, oil or petroleum, organic material, or other construction materials or wastes shall enter any waters of the U.S. or be stored where it may be washed by runoff into any waters of the U.S. Silt fences, straw wattles, and other techniques shall be employed as appropriate to protect waters of the U.S. from such discharges. Permittees and their contractors shall minimize channel and bank erosion within the waters of the U.S.

c. The permittee shall allow PED to inspect the authorized activity and any mitigation areas at any reasonable time that PED deems necessary to determine if the project complies with the terms and conditions of the NWP and this certification or any project-specific certification.

**Morongo Band of Mission Indians
Clean Water Act Section 401 Certification
2020 Army Corps of Engineers Nationwide Permits**

This is the conditional CWA §401 Certification of the 2020 NWP for projects on the Morongo Reservation. Section 401(a)(1) of the CWA requires Applicants for Federal permits and licenses that may result in discharges into waters of the U.S. to obtain certification that the discharge will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307. The Morongo Band of Mission Indians has received Treatment as a State authority to issue certification.

Applicable Water Quality Requirements

In exercising authority under 33 U.S.C. § 1341, the Tribe has reviewed the proposed permits for consistency with the following:

1. Applicable water quality-based, technology-based, and toxic or pretreatment effluent limitations as provided under 33 U.S.C. §§1311, 1312, 1313, 1316, and 1317 (FWPCA §§ 301, 302, 303, 306 and 307);
2. Federally approved water quality standards contained in California Water Quality Standards in the Water Quality Control Plan for the Colorado River Basin Region and authorized by 33 U.S.C. §1313 for protection of downstream waters;
3. Water quality objectives and protections provided for in the Morongo Band of Mission Indians Surface Water Quality Protection Ordinance (Ordinance 39); and
4. All known, available and reasonable methods to prevent and control pollution of waters of the U.S. (40 CFR 125.3).

This certification provides reasonable assurance that projects will comply with these federally approved water quality requirements, provided that the following conditions are adhered to.

General Conditions

1. Notification

Pre-construction notification requirements provide the Corps and the Tribe the opportunity to evaluate certain NWP activities on a case-by-case basis to ensure the proposed activity will cause no more than minimal adverse environmental effects individually and cumulatively. Notification allows the Corps to evaluate project impacts at a regional scale (e.g., waterbody or watershed) and determine whether to restrict NWP use in sensitive resource areas. The Corps can also add conditions to NWPs such as best management practices or compensatory mitigation to offset authorized losses of waters of the U.S., including wetlands.

The Tribe has the expertise to evaluate effects of NWPs issued on tribal land and ensure water quality requirements will be met. Additionally, tribal law requires notice to the Environmental Protection Department prior to an activity that will result in a discharge to tribal waters, within 24 hours of emergency activity, and in the case of an unpermitted discharge.¹ Notification for projects on tribal land

¹ Morongo Band of Mission Indians Surface Water Protection Ordinance Sections VI(C), VI(D), and VI(E).

will also ensure compliance with the protection of downstream waters under the jurisdiction of the State of California. Without notification, there is no way to determine whether effects will be minimal or meet water quality requirements found in tribal law.²

All NWP-authorized projects proceeding on the Morongo Reservation must submit notification to the Tribe. In the case where a PCN is required by the Corps, the applicant shall submit a copy of the PCN to the Morongo Environmental Protection Department (MEPD). In the case where a PCN is not required by the Corps, the applicant must submit either a notification as outlined in NWP General Condition 32 or a modified notification subject to the criteria below. If a waiver of impact limits is proposed beyond what is approved under this certification, applicants must include written determinations specified in this Certification's General Condition 2 *Waivers* for Tribal approval.

- 1) Timing. Applicants shall submit notice to the MEPD as early as possible and at least 30 days before initialing a project under a NWP. When a Tribal approval is required by condition in this certification, the Tribe will act within 30 days of receiving a complete notification.
- 2) Content. The notification must be in writing (email is acceptable) and include the following information:
 - a. Name, address, email address, and telephone numbers of the applicant and any agents or representatives;
 - b. Location of the proposed project;
 - c. A description of the proposed project and impacts sufficiently detailed to determine compliance with NWP and Tribal 401 conditions including:
 - i. The project purpose;
 - ii. Direct and indirect adverse environmental effects the project would cause, including the proposed acreages and linear feet (for streams) of waters impacted, avoided, and where applicable, created or otherwise mitigated;
 - iii. Any other permits used or intended to be used to authorize any part of the proposed project or related activity;
 - iv. A written statement describing how the activity has been designed to avoid or minimize adverse effects, both temporary and permanent, to waters of the United States;
 - v. Drawings, including plan and cross-section views, clearly depicting the location, size and dimensions of the proposed activity;

² Morongo Band of Mission Indians Surface Water Protection Ordinance 39 states "The purpose of this Ordinance is to carry out the provisions of the Morongo Environmental Protection Ordinance, Section IV(C)(1), to protect surface water quality on the Reservation. Carrying out this purpose includes, among other things, protecting the health, safety and welfare of Tribal members and all other persons within the exterior boundaries of the Reservation; preventing the deterioration of water quality and other natural resources resulting from surface water pollution; and protecting the cultural, social, and economic stability of the Reservation. The Tribe intends to carry out the purpose of this Ordinance by reducing and/or controlling present and future sources of surface water pollution within the exterior boundaries of the Reservation in a manner that achieves a quality of water that maintains the chemical, physical, and biological integrity of the waters within the jurisdiction of the Tribe in order to preserve and enhance the environment within the Reservation and on the lands immediately surrounding the Reservation.

- d. A description of proposed construction best management practices (BMPs) to be used during construction of the proposed activities. If no BMPs are proposed, the notification shall include a description of why their use is not practicable or necessary;
- e. For activities proposed for the purpose of temporary access and construction which would result in the placement of dredged or fill material into the waters of the U.S., provide:
 - i. The reason(s) why avoidance of temporary fill is not practicable;
 - ii. A description of the proposed temporary fill, including the type and amount (in cubic yards) or material to be placed;
 - iii. The area (in acres) and length (in linear feet) of waters where the temporary fill is proposed to be placed; and
 - iv. A proposed plan for restoration of the temporary fill area to pre-project contours and conditions'
- f. Consistent with this Certification General Condition 2 *Waivers*, a written demonstration that any proposed impact limit waiver that may be allowable under this certification will result in minimal impacts to aquatic resource functions;
- g. The name(s) of any species listed as endangered or threatened under the Endangered Species Act which may be adversely affected by the proposed work, either directly or by impacting designated critical habitat;
- h. Identification of any cultural or historic properties listed in, or eligible for listing in, the National Register of Historic Places that may be adversely affected by the proposed work.

Correspondence should be submitted to:

Morongo Band of Mission Indians
Environmental Protection Department
12700 Pumarra Road
Banning, CA 92220
Email: epd@morongo-nsn.gov

2. *Waivers*

For Certain NWP, Corps District Engineers may waive impact thresholds by making written documentation that that the discharges will result in minimal adverse effects. To ensure that tribal waters receive an adequate level of protection, and to prevent the NWP Program from having more than minimal adverse impacts to the aquatic environment, all proposed impact limit waivers are denied under this certification unless the Tribe approves a written determination that the waiver will not exceed minimal impacts to aquatic resource functions. Tribal waiver review is consistent with the avoidance of "substantial" impacts required in Morongo Ordinance 39 and will allow for compliance with all tribal laws relating to water quality impacts.³ Without tribal waiver review, there is not sufficient information that the discharge from the NWP activity will comply with water quality requirements.

³ Morongo Band of Mission Indians Surface Water Protection Ordinance 39 states "Any activity shall not cause substantial alteration of hydroperiod, flows, groundwater or surface water quality, or fish and wildlife habitat. All activities shall comply with all applicable federal and Morongo Band of Mission Indian laws, including those related

The Tribe will act within 30 days of receiving a complete PCN or modified notification as outlined in General Condition 1 *Notification* when tribal approval is required for a waiver.

3. Retention of 300 Foot Linear Limit

The Corps' 2020 NWP eliminates the 300 linear foot (LF) limit for streambed losses that currently applies to 10 NWPs. The 300 LF limit helps ensure that using these 10 NWPs results in no more than minimal individual and cumulative adverse environmental effects as required by the CWA.

The 2017 NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 include a two-part threshold for use: impacts can't exceed 1/2-acre or 300 LF of a streambed loss. The two-part threshold ensures that adverse impacts covered by these NWPs are no more than minimal.

The existing process to assess stream impacts is an efficient and defensible two-part threshold to estimate the magnitude of impact. Looking at area alone (1/2-acre threshold) does not provide a reliable measure of the extent of impact. Many tribal waters are narrow and a 1/2-acre threshold may result in thousands of feet of impact that could potentially exceed minimal adverse effects and no longer comply with water quality requirements such as limits on sediment and suspended solids as outlined in Morongo Ordinance 39.⁴ Tribal law requires the avoidance of substantial impacts including but not limited to flow, surface water quality, and fish habitat.⁵ In many of the narrow, headwater streams that exist on the Reservation, impacted stream length will affect the aquatic function along the longitudinal gradient.⁶

To ensure that they will cause no more minimal adverse environmental effects individually and cumulatively, 300 LF limits are included in the conditions for NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52.

Specific Nationwide Permits

1. Aids to Navigation

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

2. Structures in Artificial Canals

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

to sediment control, pollution control, floodplain restrictions, storm water management, and on-site wastewater disposal. All activities that could potentially cause a discharge shall follow all appropriate best management practices associated with that activity or required by the applicable permit.

⁴ Morongo Band of Mission Indians Surface Water Protection Ordinance Section V(A).

⁵ Morongo Band of Mission Indians Surface Water Protection Ordinance Section VI(A).

⁶ The linear or longitudinal gradient along streams is important in maintaining functions such as organic carbon and detrital biomass export, particulate retention, biogeochemical processes, and habitat interspersions and connectivity.

3. Maintenance

Subject to the General Conditions above, this NWP is hereby programmatically certified.

4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

5. Scientific Measurement Devices

Subject to the General Conditions above, this NWP is hereby programmatically certified.

6. Survey Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

7. Outfall Structures and Associated Intake Structures

Subject to the General Conditions above, this NWP is hereby programmatically certified.

8. Oil and Gas Structures on the Outer Continental Shelf

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

9. Structures in Fleeting and Anchorage Areas

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

10. Mooring Buoys

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

11. Temporary Recreational Structures

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

12. Oil or Natural Gas Pipeline Activities

Use of this NWP is not covered by this programmatic certification, and prospective users on tribal lands must seek individual project certification from the Tribe in all cases. There is insufficient information to ensure that projects proposed under this NWP will comply with water quality requirements.

This NWP is denied due to the potential for discharges to violate the Tribe's turbidity standard of "waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses."⁷ Oil and natural gas pipeline activities may need to cross a waterbody multiple times, have access roads created, and require linear excavation. These activities have the potential to discharge sediment to waterbodies in quantities that may exceed minimal impacts and could create an adverse effect to beneficial uses. Additionally, Hathaway Creek, Potrero Creek, and Deep Creek are all streams with headwaters in the Reservation and are listed on California's 2018 303(d) list for turbidity.⁸ While the listing does not apply to waters on the Reservation, the off-Reservation portions have been listed as impaired for turbidity and total maximum daily loads (TMDLs) will be required. There is insufficient information in the NWP to determine if discharges from the activities will be protective of downstream waters as required by 33 U.S.C. §1313 and meet criteria protective of the State's water quality standards as required by 40 CFR 131.10(b).⁹ Activity types, existence of multiple crossings, temporary impacts, access roads, potential for water drainage, and extent of pipeline trenches will need to be known prior to determining if discharges will comply with water quality requirements.

CWA section 401 certification for this NWP is denied without prejudice. Applicants for projects on tribal lands must apply to the Tribe for individual certification if this NWP is proposed to be used.

13. Bank Stabilization

Subject to the General Conditions above, this NWP is hereby programmatically certified.

14. Linear Transportation Projects

Subject to the General Conditions above, this NWP is hereby programmatically certified.

15. U.S. Coast Guard Approved Bridges

Subject to the General Conditions above, this NWP is hereby programmatically certified.

16. Return Water from Upland Contained Disposal Areas

Subject to the General Conditions above, this NWP is hereby programmatically certified.

17. Hydropower Projects

Subject to the General Conditions above, this NWP is hereby programmatically certified.

18. Minor Discharges

Subject to the General Conditions above, this NWP is hereby programmatically certified.

19. Minor Dredging

⁷ Morongo Band of Mission Indians Surface Water Protection Ordinance Section V(A)(15).

⁸ 2018 California Integrated Report (Clean Water Act Section 303(d) List and 305(b) Report)

⁹ Pursuant to sections 303 and 101(a) of the Clean Water Act, the federal regulation at 40 CFR 131.10(b) requires that "In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters."

Subject to the General Conditions above, this NWP is hereby programmatically certified.

20. Response Operations for Oil or Hazardous Substances

Subject to the General Conditions above, this NWP is hereby programmatically certified.

21. Surface Coal Mining Activities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

22. Removal of Vessels

Subject to the General Conditions above, this NWP is hereby programmatically certified.

23. Approved Categorical Exclusions

Subject to the General Conditions above, this NWP is hereby programmatically certified.

24. Indian Tribe or State Administered Section 404 Programs

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

25. Structural Discharges

Subject to the General Conditions above, this NWP is hereby programmatically certified.

26. [Reserved]

This NWP is not used and does not require section 401 water quality certification.

27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

28. Modifications of Existing Marinas

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

29. Residential Developments

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

30. Moist Soil Management for Wildlife

Subject to the General Conditions above, this NWP is hereby programmatically certified.

31. Maintenance of Existing Flood Control Facilities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

32. Completed Enforcement Actions

Subject to the General Conditions above, this NWP is hereby programmatically certified.

33. Temporary Construction, Access, and Dewatering

Subject to the General Conditions above, this NWP is hereby programmatically certified.

34. Cranberry Production Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

35. Maintenance Dredging of Existing Basins

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

36. Boat Ramps

Subject to the General Conditions above, this NWP is hereby programmatically certified.

37. Emergency Watershed Protection and Rehabilitation

Subject to the General Conditions above, this NWP is hereby programmatically certified.

38. Cleanup of Hazardous and Toxic Waste

Subject to the General Conditions above, this NWP is hereby programmatically certified.

39. Commercial and Institutional Developments

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

40. Agricultural Activities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

41. Reshaping Existing Drainage Ditches

Subject to the General Conditions above, this NWP is hereby programmatically certified.

42. Recreational Facilities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

43. Stormwater Management Facilities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

44. Mining Activities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

45. Repair of Uplands Damaged by Discrete Events

Subject to the General Conditions above, this NWP is hereby programmatically certified.

46. Discharges in Ditches

Subject to the General Conditions above, this NWP is hereby programmatically certified.

47. [Reserved]

This NWP is not used and does not require section 401 water quality certification.

48. Commercial Shellfish Mariculture Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

49. Coal Remining Activities

Subject to the General Conditions above, this NWP is hereby programmatically certified.

50. Underground Coal Mining Activities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

51. Land-Based Renewable Energy Generation Facilities

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

52. Water-Based Renewable Energy Generation Pilot Projects

Subject to the General Conditions above, and the following permit-specific conditions, this NWP is hereby programmatically certified.

Impacts under this permit are limited to either of 1/2 acre or 300 linear feet of waters of the U.S. The discharge must not cause the loss of more than 300 linear feet of stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

53. Removal of Low-Head Dams

Subject to the General Conditions above, this NWP is hereby programmatically certified.

54. Living Shorelines

Subject to the General Conditions above, this NWP is hereby programmatically certified.

A. Seaweed Mariculture Activities

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

B. Finfish Mariculture Activities

Does not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States.

C. Electric Utility Line and Telecommunications Activities

Use of this NWP is not covered by this programmatic certification, and prospective users on tribal lands must seek individual project certification from the Tribe in all cases. There is insufficient information to ensure that projects proposed under this NWP will comply with water quality requirements.

This NWP is denied due to the potential for discharges to violate the Tribe's turbidity standard of "waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses."¹⁰ Electric utility lines and telecommunications activities may need to cross a waterbody multiple times, have access roads created, and require linear excavation. These activities have the potential to discharge sediment to waterbodies in quantities that may exceed minimal impacts and could create an adverse effect to beneficial uses. Additionally, Hathaway Creek, Potrero Creek, and Deep Creek are all streams with headwaters in the Reservation and are listed on California's 2018 303(d) list for turbidity.¹¹ While the listing does not apply to waters on the Reservation, the off-Reservation portions have been listed as impaired for turbidity and total maximum daily loads (TMDLs) will be required. There is insufficient information in the NWP to determine if discharges from the activities will be protective of downstream waters as required by 33 U.S.C. §1313 and meet criteria protective of the State's water quality standards as required by 40 CFR 131.10(b). Activity types, existence of multiple crossings, temporary impacts, access roads, potential for water drainage, and extent of pipeline trenches will need to be known prior to determining if discharges will comply with water quality requirements.

CWA section 401 certification for this NWP is denied without prejudice. Applicants for projects on tribal lands must apply to the Tribe for individual certification if this NWP is proposed to be used.

D. Utility Line Activities for Water and Other Substances

Use of this NWP is not covered by this programmatic certification, and prospective users on tribal lands must seek individual project certification from the Tribe in all cases. There is insufficient information to ensure that projects proposed under this NWP will comply with water quality requirements.

This NWP is denied due to the potential for discharges to violate the Tribe's turbidity standard of "waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses."¹⁰ Electric utility lines and telecommunications activities may need to cross a waterbody multiple times, have access roads created, and require linear excavation. These activities have the potential to discharge sediment to waterbodies in quantities that may exceed minimal impacts and could create an adverse effect to beneficial uses. Additionally, Hathaway Creek, Potrero Creek, and Deep Creek are all streams with headwaters in the Reservation and are listed on California's 2018 303(d) list for turbidity.¹¹ While the listing does not apply to waters on the Reservation, the off-Reservation portions have been listed as impaired for turbidity and total maximum daily loads (TMDLs) will be required. There is insufficient

¹⁰ Morongo Band of Mission Indians Surface Water Protection Ordinance Section V(A)(15).

¹¹ 2018 California Integrated Report (Clean Water Act Section 303(d) List and 305(b) Report)

information in the NWP to determine if discharges from the activities will be protective of downstream waters as required by 33 U.S.C. §1313 and meet criteria protective of the State's water quality standards as required by 40 CFR 131.10(b). Activity types, existence of multiple crossings, temporary impacts, access roads, potential for water drainage, and extent of pipeline trenches will need to be known prior to determining if discharges will comply with water quality requirements.

CWA section 401 certification for this NWP is denied without prejudice. Applicants for projects on tribal lands must apply to the Tribe for individual certification if this NWP is proposed to be used.

E. Water Reclamation and Reuse Facilities

Subject to the General Conditions above, this NWP is hereby programmatically certified.



**PALA BAND OF
MISSION INDIANS**

PMB 50, 35008 Pala Temecula Road
Pala, CA 92059
Phone 760-891-3500 | Fax 760-742-1411

December 14, 2020

(b) (6)

U.S. Army Corps of Engineers
Chief, Regulatory Division
Los Angeles District
915 Wilshire, Suite 930
Los Angeles, CA 90013

Re: Pala Band of Mission Indians – Conditional Section 401 Water Quality Certification 2020
Nationwide Permits

Dear **(b) (6)**:

The Pala Band of Mission Indians (PBMI) is a federally recognized Native American Tribe authorized to implement the Section 401 water quality certification requirements of the Clean Water Act (CWA) under the CWA's "treatment as a state" provisions. In accordance with that authority, PBMI has reviewed the proposed reissuance of Nationwide Permits (NWP) by the United States Army Corps of Engineers (Corps) under CWA Section 404 as published in the Federal Register on September 15, 2020. PBMI provides the following programmatic water quality certification for all the proposed NWP subject to the conditions described below, which shall be binding requirements for work on the Pala Reservation in San Diego County, California.

PBMI has adopted the water quality standards established by the State of California applicable to those watercourses that are located on or flow through the Pala Reservation. This is a link to the Regional Board's website which specifies the standards for those watercourses.

<https://www.waterboards.ca.gov/sandiego/waterissues/programs/basinplan/docs/R9BasinPlan.pdf> Based on the information on the NWP that has been provided, PBMI cannot conclude that the discharges authorized by the NWP discharges will comply with applicable provisions of the CWA and PBMI's water quality standards as required under 40 C.F.R. § 121.7(f). Consequently, PBMI has determined that specific conditions are required under Section 401 to ensure that the Tribe's water quality standards are not violated and to protect the (1) public health and welfare of PBMI and its members and other residents of its Reservation, and (2) present and future use of surface water and groundwater on the Reservation for public, domestic, fish and wildlife, recreation, agricultural, cultural, commercial, industrial, and other uses.

As part of this certification, PBMI requires that any authorized project that cannot comply with these general conditions is denied Section 401 certification without prejudice and the applicant must apply to the PBMI Environmental Department (PED) for an individual water quality certification. If an individual certification is required, PED will use its best efforts to issue, deny, or waive certification within 60 days of receipt of complete project information.

PBMI's Section 401 water quality certification applies only to projects that are eligible for coverage under the NWP, as limited by any Regional Conditions applicable in the Corps'

Los Angeles District. This certification also does not apply to any project that requires an individual CWA Section 404 permit. Any project that qualifies for an NWP but fails to meet the conditions described in this certification will not be eligible for coverage under this programmatic certification and must obtain individual project certification from PBMI. This conditional certification will remain in effect for the authorization period of the reissued 2020 NWPs.

Condition 1: Notification

The applicant for any NWP-authorized project on the Pala Reservation shall provide notification to PED when the application for an NWP is submitted to the Corps. If an NWP requires a pre-construction notice (PCN), the applicant can satisfy this condition by providing a copy of the PCN to PED as its 401 notification in advance of any authorization letter from the Corps allowing the applicant to proceed under an NWP. If an NWP does not require a PCN, the applicant still must notify PED prior to receipt of an authorization letter from the Corps allowing the applicant to proceed under an NWP. In either situation, submittals shall be written, may be electronic, and shall be made to:

Pala Environmental Department
35008 Pala Temecula Road
Pala, CA 92059
Attn: Section 401 Group

All submittals for projects using one of the conditionally certified NWPs shall include the following information:

- a) The name, address, telephone numbers, and e-mail addresses of the applicant and any of its agents, representatives or contact persons
- b) The purpose of the proposed project
- c) The location and dimensions of the project, including the area of any temporary and/or permanent fill in WUS
- d) The best management practices (BMPs) to be used during construction, and if BMPs are not proposed, why their use is not practicable or necessary
- e) The source and quality of any fill to be used in the project
- f) Any proposed compensatory mitigation for project impacts.

PBMI has determined that this condition is necessary to assure that the Tribe is aware of any activities that are covered by an NWP or which the Corps approves that will occur within the PBMI Reservation, an area over which PBMI has jurisdiction as a sovereign nation. This condition also is required to assure compliance with PBMI's strict water quality standards. For example, the water quality standards PBMI has adopted for the San Luis Rey River and all its tributaries on the PBMI Reservation are 500 mg/l for total dissolved solids (TDS) and 20 NTU for turbidity. These water quality standards, and those for other water quality criteria, could easily be exceeded in Tribal watercourses by projects that involve discharges into WUS. Requiring notice of work to be conducted within the boundaries of the Pala Reservation also is authorized by PBMI's sovereign authority over its Reservation lands and all activities on those lands and by its authority to enforce PBMI Ordinance No. 15, which prohibits the discharge of any pollutant into any waters on the PBMI Reservation.

Condition 2: Best Management Practices

Except as allowed by the applicable NWP, no debris, silt, sand, cement, concrete, oil or petroleum, organic material, or other construction materials or wastes shall enter any WUS or be stored where it may be washed by runoff into any WUS. Silt fences, straw wattles, and other techniques shall be employed as appropriate to protect WUS from such discharges. Permittees and their contractors shall minimize channel and bank erosion within the WUS.

PBMI has determined that this condition is necessary to assure compliance with PBMI's strict water quality standards. For example, the water quality standards for the San Luis Rey River and all its tributaries on the PBMI Reservation are 500 mg/l for TDS and 20 NTU for turbidity. These water quality standards, and those for other water quality criteria, could easily be exceeded in Tribal watercourses by projects that involve discharges into WUS. This condition also is authorized by PBMI's sovereign authority over its Reservation lands and all activities on those lands and by its authority to enforce PBMI Ordinance No. 15, which prohibits the discharge of any pollutant into any waters on the PBMI Reservation.

Condition 3: Inspections

The permittee shall allow PED to inspect the authorized activity and any mitigation areas at any reasonable time that PED deems necessary to determine if the project complies with the terms and conditions of the NWP and this certification or any project-specific certification.

PBMI has determined that this condition is necessary to assure compliance with PBMI's strict water quality standards. For example, the water quality standards adopted by PBMI for the San Luis Rey River and all its tributaries on the PBMI Reservation are 500 mg/l for TDS and 20 NTU for turbidity. These water quality standards, and those for other water quality criteria, could easily be exceeded in Tribal watercourses by projects that involve discharges into WUS. This condition also is authorized by PBMI's sovereign authority over its Reservation lands and all activities on those lands and by its authority to enforce PBMI Ordinance No. 15, which prohibits the discharge of any pollutant into any waters on the PBMI Reservation.

With these conditions, PBMI hereby conditionally certifies the 2020 NWPs under its Section 401 authority. Please contact Shasta Gaughen, Pala Environmental Director, at (760) 891-3515 or sgaughen@palatribe.com if you have any questions concerning this conditional certification.

Sincerely,



Robert Smith, Chairman
Pala Band of Mission Indians

Cc: Shasta Gaughen, Environmental Director

SUPPLEMENTAL DOCUMENT FOR NATIONWIDE PERMIT 55

This document is a supplement to the national decision document for Nationwide Permit (NWP) 55, and addresses the regional modifications and conditions for this NWP in the State of California. In the State of California, the Sacramento District (SPK) is the lead district, and the San Francisco (SPN) and Los Angeles (SPL) Districts also implement the NWP program in this state (collectively referred to as the California Districts). This supplemental document is prepared for the purposes of 33 CFR 330.5(c)(1)(iii). The South Pacific Division Engineer has considered the potential individual and cumulative adverse environmental effects that could result from the use of this NWP in the State of California, including the need for additional modifications of this NWP by imposing regional conditions to ensure that those individual and cumulative adverse environmental effects are no more than 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 jurisdictional waters and wetlands. 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 and cumulative adverse environmental effects. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should have regional conditions or be excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that have more than minimal individual and cumulative adverse environmental effects.

1.0 Background

In the September 15, 2020, issue of the Federal Register (85 FR 57298), the U.S. Army Corps of Engineers (Corps) published its proposal to reissue 52 existing NWPs and issue five new NWPs. To solicit comments on its proposed regional conditions for these NWPs, SPK issued a public notice on September 21, 2020, SPN on September 18, 2020, and SPL on September 22, 2020. On January 13, 2021, the Corps published a final rule in the Federal Register (86 FR 2744) announcing the reissuance of 12 existing nationwide permits (NWPs) and issuance of four new NWPs, as well as the reissuance of NWP general conditions and definitions with some modifications. After the issuance of the final NWPs, the California Districts considered the need for regional conditions for this NWP. The South Pacific Division's findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

In a letter dated October 27, 2020, the Environmental Protection Agency (EPA)

recommended retaining SPN's 2017 NWP Regional Condition requiring a Pre-Construction Notification (PCN) for activities in the Santa Rosa Plain. They reasoned that though federal jurisdiction has changed with the new Navigable Waters Protection Rule (NWPR), the NWPR does not automatically preclude vernal pool complexes as waters of the U.S.

USACE Response: Though the NWPR does not preclude vernal pool complexes, the majority of these wetlands will no longer be considered jurisdictional under the NWPR, and the PCN requirement for the Santa Rosa Plain was based upon the need to protect these seasonal wetland habitats and the federally-listed species they support. Therefore, SPN no longer considers it appropriate to require a PCN for all activities in Santa Rosa Plain. Furthermore, a PCN is still required under General Condition (GC) 18 for any activities proposed by non-federal permittees "if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat." Therefore, where jurisdictional waters may be present, a PCN will still be required for activities affecting valuable vernal pools and other seasonal wetland habitats in the Santa Rosa Plain.

In letters dated October 27, 2020, and November 5, 2020, EPA recommended adding a Regional Condition requiring federal permittees, including state agencies with NEPA responsibilities, to submit a PCN for any regulated activity, in intermittent and perennial waterbodies and special aquatic sites, that would result in a loss of waters of the U.S.

USACE Response: The proposal to exempt federal permittees from PCN requirements was not carried forward in the final 2021 NWP. Therefore, the recommendation is unnecessary.

In a letter dated October 27, 2020, the EPA recommended requiring compensatory mitigation at a minimum ratio of 1:1 if streambed loss exceeds 1/10 acre or 100 linear feet. Also, EPA recommended a requirement that if a proposed NWP activity would result in the loss of stream bed plus other types of waters of the U.S., such as non-tidal wetlands, the losses of waters of the United States would be quantified in acres and subjected to the 1/2-acre limit.

USACE Response: Comment noted. The recommended conditions are addressed in the final 2021 NWP General Conditions. Specifically, General Condition 23(d) requires compensatory mitigation at a minimum one-for-one (1:1) ratio for all losses of stream bed that exceed 3/100-acre, and for all wetland losses exceeding 1/10-acre, that require a PCN, unless the district engineer determines that some other form of mitigation would be more environmentally appropriate. In accordance with general condition 23 and 33 CFR 330.1(e)(3), for activities that require a PCN, the district engineer will determine on a case-by-case basis whether specific activities authorized by the NWP should require compensatory mitigation or other forms of mitigation to ensure the authorized activities result in no more than minimal individual and cumulative adverse

environmental effects. Additionally, the California Districts do not have sufficient information to determine, on a regional basis, that further restricting compensatory mitigation over what is required by General Condition 23 is necessary to ensure effects are not more than minimal, individually or cumulatively. Therefore, the South Pacific Division has not adopted this language.

In a letter dated October 27, 2020, the EPA recommended adding a Regional Condition requiring a PCN for all waterbodies designated by the California State Water Resources Control Board as 303(d)-impaired surface waters, within 1600 meters (or 1 mile) upstream and/or 800 meters (1/2 mile) downstream of a designated impaired surface water, and on tributaries to impaired waters within 1600 meters of the impaired water.

USACE Response: The States are responsible for developing their own water quality standards and designating impaired waters in conjunction with EPA. Adopting a regional condition for the State of California does not appear warranted and would not further facilitate the State's ability to issue 401 water quality certifications for activities within areas subject to their authority. On December 9, 2020, the California State Water Resources Control Board (SWRCB) granted certification, with conditions, for NWP's 12, 57, and 58, and denied certification for NWP's 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, 56. Based on the information provided, the California Districts determined that the certification does not comply with the requirements of Section 401 of the Clean Water Act or with 40 CFR Part 121, and is not a valid certification. An explanation on why the certification does not comply with 40 CFR Part 121 is included in Appendix A. Therefore, individual certification, or waiver thereof, will be required for all 2021 NWP's. Furthermore, General Condition 25 requires 401 water quality certification for the proposed discharge be obtained or waived, in order for the activity to be authorized by an NWP. Therefore, adopting this requirement within the state of California is not warranted.

In a letter dated November 3, 2020, The Pew Charitable Trusts (PEW) recommended that the San Francisco and Los Angeles Districts add a Regional Condition for all NWP's that holistically implements NOAA Fisheries' California Eelgrass Mitigation Policy (CEMP) recommendations and guidelines in order to ensure no more than minimal individual and cumulative adverse effects. The CEMP recommends compensatory mitigation for the loss of existing eelgrass habitat function across all of California, including guidelines on how to define and survey eelgrass habitat, to the extent that avoidance and minimization of effects to eelgrass have already been pursued to the maximum extent practicable.

USACE Response: General Condition 23 already requires activities permitted by NWP to avoid and minimize both temporary and permanent adverse effects to waters of the U.S., including eelgrass beds, to the maximum extent practicable at the project site. Furthermore, General Condition 32 dictates that mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource

losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal. While SPN and SPL recognize the importance of eelgrass beds to species managed by NOAA Fisheries and may require compensatory mitigation for the unavoidable loss of existing eelgrass habitat functions, a blanket compensatory mitigation requirement for any level of adverse effects to eelgrass beds is not necessary to ensure not more than minimal individual and cumulative adverse environmental effects and is inconsistent with the USACE 1/10-acre and 3/100-acre guidelines for requiring compensatory mitigation for impacts to wetlands and streams, respectively. Also, NMFS would be consulted on any activities that may affect eelgrass beds pursuant to Section 7 of the Endangered Species Act and/or the Magnuson-Stevens Fishery Conservation and Management Act, thereby providing NMFS with the opportunity to impose CEMP requirements upon the applicant. Therefore, this Regional Condition is not warranted.

In a letter dated November 3, 2020, PEW recommended that the San Francisco and Los Angeles Districts add a Regional Condition similar to the Portland District's Regional Condition requiring a PCN for all activities within aquatic resources of special concern, including eelgrass beds.

USACE Response: The term "aquatic resources of special concern" is not defined in USACE regulations, so it is not clear what PEW means, exactly. One possibility is "Designated Critical Resource Waters" described in General Condition 22 to the NWP. General Condition 22 allows districts to designate, after notice and opportunity for public comment, additional critical resource waters or additional waters officially designated by a state as having particular environmental or ecological significance. The San Francisco and Los Angeles Districts have not designated any Critical Resource Waters pursuant to General Condition 22. The Corps recognizes that designating additional critical resource waters for certain habitats, such as EFH Habitats of Particular Concern (HAPC), including eelgrass, may be beneficial. However, doing so would require a separate public notice and comment process and is therefore outside the scope of this process to issue regional conditions to the 2021 NWPs.

In a letter to SPN dated November 3, 2020, the Citizens Committee to Complete the Refuge (CCCR) stated that SPN's public notice for the proposed NWP regional conditions did not provide adequate information to assess impacts of the NWP program on waters of the U.S., and, therefore, the public is unable to provide substantive comments.

USACE Response: Information regarding impacts of the proposed NWP program on waters of the U.S. was provided in the draft decision documents for each proposed NWP that were written by Corps Headquarters. These documents were referenced in the SPN public notice for the proposed regional conditions. The draft decision documents along with the proposed regulation that the Corps published in the Federal Register (85 FR 57298) on September 15,

2020, provided adequate information for the public to provide substantive comments on the proposed NWP program.

In a letter to SPN dated November 3, 2020, the CCCR stated that the Corps has not provided evidence that the Nationwide Permits would result in no more than minimal cumulative adverse environmental effects.

USACE Response: The State of California supplemental documents include a regional cumulative effects analysis that is based upon the number of times the NWP is anticipated to be used in the region, the quantity and quality of waters of the United States anticipated to be impacted as a result of the activities authorized, and the anticipated compensatory mitigation required to offset impacts to waters of the U.S. The South Pacific Division believes that this regional cumulative effects analysis is adequate to demonstrate that the NWPs would result in no more than minimal adverse effects.

The supplemental documents are provided on the Corps' websites as soon as these documents are finalized. Furthermore, decision documents from past NWP program authorizations are available upon request through the Freedom of Information Act.

In a letter to SPN dated November 3, 2020, the CCCR stated their objection to the proposal to remove PCN requirements for other Federal agencies; however, CCCR noted that SPN would probably not be able to require PCNs to be submitted by other agencies if a statutory change was made.

USACE Response: This comment is noted and does not warrant a response. The proposal to exempt federal permittees from PCN requirements was not carried forward in the final 2021 NWPs.

In a letter to SPN dated November 3, 2020, the CCCR urged the District to prohibit use of all NWPs in the Santa Rosa Plain and other jurisdictional vernal pools.

USACE Response: The South Pacific Division does not believe that prohibiting use of all NWPs in the Santa Rosa Plain and other jurisdictional vernal pools in SPN is appropriate or necessary to ensure no more than individual and cumulative adverse environmental effects. The majority of vernal pools will no longer be subject to the Corps' regulatory authority under the NWPR, and any impacts to jurisdictional vernal pools that are permitted by NWP would be mitigated in accordance with General Condition 23.

In a letter to SPN dated November 3, 2020, the CCCR stated that the District should revoke use of NWPs in eelgrass beds, recovery units, and critical habitat for federally listed species.

USACE Response: The South Pacific Division disagrees with the premise that any effects to eelgrass beds, recovery units, or critical habitat for listed species

would result in more than minimal adverse environmental effects in SPN. Under General Condition 18 and Regional Condition 1.d., a PCN would be required for any projects permitted by NWP that might affect these resources, thereby ensuring that the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service are consulted regarding the individual and cumulative effects of these project and appropriate mitigation is required in accordance with General Condition 23.

In a letter to SPN dated November 3, 2020, the CCCR stated that the District should revoke use of NWPs for the placement of above grade fills in the 100-year floodplain.

USACE Response: General Condition 10 states, “The activity must comply with applicable FEMA-approved state or local floodplain management requirements.” The final 2021 NWP general conditions did not propose any changes to General Condition 10. General Condition 10 was last modified in the final rule for the 2007 NWPs published on March 12, 2007 (72 FR 11092). According to the comments section of the 2007 NWP program preamble, “requiring documentation of compliance with FEMA-approved standards is unnecessary for the purposes of the NWPs, because such requirements are more appropriately addressed through state and local construction authorizations.” (see 72 FR 11157). The South Pacific Division agrees that decisions regarding development within the floodplain are more appropriately made by FEMA, state, and local agencies. Therefore, elevation of all projects occurring within the 100-year floodplain to Standard Permits would not improve review of the project or reduce development within the 100-year floodplain.

In a letter to SPN dated November 3, 2020, the CCCR argues that the purpose of compensatory mitigation under the Nationwide Permit Program is to “buy-down” adverse impacts to minimal levels, and impacts are not actually minimized through compensatory mitigation because mitigation projects are largely unsuccessful at restoring aquatic resource functions and values. Therefore, the District should require mitigation be successfully completed before project construction to ensure functions and values are replaced and to avoid temporal losses of functions and values.

USACE Response: The South Pacific Division disagrees that the NWP Program relies solely upon compensatory mitigation to “buy-down” adverse impacts to minimal levels. The terms and conditions of the NWP Program holistically serve to ensure that adverse environmental impacts resulting from permitted activities are no more than minimal. Each NWP describes specific activities that would generally be considered to result in minimal impacts while providing the district engineer with the discretion to determine that some activities do not meet this minimal impact standard. Furthermore, independent of any requirements for compensatory mitigation, General Condition 23 requires activities permitted by NWP to avoid and minimize both temporary and permanent adverse effects to waters of the U.S. to the maximum extent practicable at the project site. General Condition 23 further dictates that mitigation is all its forms

(avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal. Therefore, compensatory mitigation is only one element of the NWP Program's strategy to ensure permitted activities result in no more than minimal adverse environmental effects.

The South Pacific Division also disagrees that it is necessary or prudent to require the full replacement of lost functions and values prior to project construction. The 2008 compensatory mitigation rule (33 CFR Part 332) requires the implementation of compensatory mitigation projects to be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts. For permittee-responsible mitigation, the permittee cannot commence work in waters of the United States until the district engineer approves the final mitigation plan with specific performance criteria that must be achieved. To account for the time lag between resource impacts and the replacement of lost functions and values, the 2008 rule indicates that the district engineer shall require, to the extent appropriate and practicable, additional compensatory mitigation to offset temporal losses of aquatic functions that will result from the permitted activity. Therefore, the requirement to fully replace lost functions and values prior to construction would constitute an undue and unnecessary regulatory burden on the permittee.

In a letter to SPN dated November 3, 2020, the CCCR recommended that the San Francisco District require mitigation for impacts to less than 1/10 acre of stream bed and revoke the proposal to "allow the district engineer to waive the requirement to provide compensatory mitigation for losses of greater than 1/10 acre of steam bed.

USACE Response: The South Pacific Division believes that it is appropriate to retain the discretionary authority of the district engineer to determine compensatory mitigation requirements for each individual project. General Condition 23 (Mitigation) of the final rule has been amended to require compensatory mitigation at a minimum one-for-one ratio for all losses of stream bed that exceed 3/100-acre and require preconstruction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. The mitigation required to achieve no more than minimal adverse effects depends upon the specifics of the proposed project, including the nature of the impacted stream bed.

In a letter to SPN dated November 3, 2020, the CCCR recommended that the San Francisco District revoke 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. They cite the lack of specific guidelines for what constitutes "riparian areas."

USACE Response: The South Pacific Division does not believe that it is necessary or prudent to prohibit the exclusive use of riparian compensatory mitigation. The San Francisco District and South Pacific Division have developed standard operating procedures for evaluating the ability of any given compensatory mitigation proposal to replace aquatic functions and services that would be lost or adversely affected by proposed project impacts. This evaluation includes an assessment of resource type, uncertainty of mitigation outcome, and temporal loss, among other factors (<http://www.spd.usace.army.mil/Missions/Regulatory/Public-Notices-and-References/Article/558934/final-regional-compensatory-mitigation-and-monitoring-guidelines/>). Though unlikely, SPN may determine on a case-by-case basis that the exclusive use of riparian compensatory mitigation effectively compensates for impacts to streams or open waters. Landscaping-type activities would not provide suitable compensatory mitigation for impacts to aquatic resources.

In a letter to SPN dated November 3, 2020, the CCCR recommended that the San Francisco District revoke changes to the NWP that propose removal of the PCN requirement for certain NWPs.

USACE Response: The South Pacific Division has added regional conditions that specify additional activities requiring a PCN in SPN, and we believe these additional PCN requirements are sufficient to account for specific resource concerns in the region. CCCR did not specify which changes to the PCN requirements of the NWPs concern them or suggest any specific regional conditions that require PCN notifications. The South Pacific Division does not believe it is appropriate or necessary to revoke all changes to the NWPs that alter PCN requirements.

In a letter to SPN dated November 3, 2020, the CCCR recommended that the San Francisco District add a regional condition requiring the applicant to provide evidence of avoidance and minimization and a discussion of the cumulative impacts of the project.

USACE Response: General Condition 32 already requires the applicant to provide a description of any proposed mitigation measures in the PCN, so a regional condition requiring evidence of avoidance and minimization would be redundant. Also, the district engineer, not the applicant, is responsible for evaluating the cumulative impacts of the project based upon the information required in the PCN.

In a letter to SPN dated November 3, 2020, the CCCR recommended that the San Francisco District prohibit the use of riprap in areas adjacent to endangered species populations, refuges, special aquatic sites, and wetland areas that support woody vegetation.

USACE Response: The South Pacific Division does not believe it is necessary to prohibit the use of riprap in areas adjacent to endangered species populations, refuges, special aquatic sites, and wetland areas that support woody vegetation for the purpose of ensuring minimal impacts. Riprap can be an essential component of stream stabilization efforts in areas with altered hydrology where solely relying upon biotechnical approaches is infeasible. Therefore, completely prohibiting riprap could actually result in adverse environmental effects.

In a letter to SPN dated November 3, 2020, the CCCR recommended that the San Francisco District adopt a regional condition proposed by SPK in 2017 that required the applicant to delineate the limits of the authorized activity prior to initiation of construction.

USACE Response: The South Pacific Division believes that such a regional condition is unnecessary. First of all, delineating the limits of a construction site is a standard operating procedure for any construction contractor. Secondly, any construction beyond that approved in the NWP would be a violation of the permit terms and conditions, and the Corps would require appropriate corrective measures to remedy the situation. This provides a strong disincentive to conduct activities outside of the defined permit limits.

In a letter to SPN dated November 3, 2020, the CCCR recommended that the San Francisco District adopt a regional condition proposed by SPK in 2017 that required (a) the use of spawning quality gravel for temporary fill in waters of the U.S. supporting fisheries; (b) the placement of a horizontal marker to delineate the existing bottom elevation of waters to be temporarily filled; and (c) the restoration of waters temporarily filled to pre-project contours and conditions within 30 days of completing construction.

USACE Response: The South Pacific Division believes that General Condition 13, "Removal of Temporary Fill," is sufficient to ensure that impacts to aquatic resources from temporary fill are minimized and restored. Under General Condition 13, all project proponents are required to remove temporary fill in their entirety and return the site to pre-construction conditions. It is not necessary to prescribe how applicants can comply with such basic requirements of their NWP.

In a letter to SPN dated November 3, 2020, the CCCR recommended that the San Francisco District publish pre-construction notification to our website and provide a quarterly report that outlines data on specific NWP authorizations.

USACE 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, and there is no procedure for handling comments provided by the public in regard to general permit decisions. Summary information on the use of NWPs and their cumulative impacts to waters of the U.S. is provided in National and District decision

documents which are made available on Corps' websites as soon as these documents are finalized.

In a letter to SPL dated November 3, 2020, the Gila River Indian Community recommended the term "affecting" be defined as follows: "Affecting" means causing a physical change to occur on tribal lands, including, but not limited to, changing the quantity, frequency, velocity, or quality of stormwater or surface water flows entering tribal lands; altering drainage patterns on tribal lands; or causing fill, sediment, or other materials to be transported onto tribal lands. Regulated activities occurring within 500 feet of a tribal boundary or within 1 river mile upstream of where a waterway or water body enters tribal lands, are presumed to affect tribal lands, and therefore require a PCN.

USACE response: In order to establish a clear and consistent approach across Corps districts, the South Pacific Division has determined the scope of a mandatory PCN requirement for tribal lands be limited to activities on tribal lands. Although the suggested modifications would improve the specificity of the term *affecting* tribal lands, applying these criteria to the complex and varied landscape and aquatic resources across the South Pacific Division would likely create more confusion in terms of how these criteria would apply. Applying this PCN requirement to activities *on* tribal lands provides a much clearer approach for applicants. The Corps makes every effort to consider potential effects of regulated activities on tribes during the permit review process. Additionally, actions requiring individual 401 Water Quality Certifications must also be reviewed by EPA to determine if any neighboring jurisdictions may be affected, which may provide an opportunity to address activities near tribal lands.

2.2 General Comments on Nationwide Permit 55

In a letter dated November 3, 2020, the CCCR recommended that the San Francisco District revoke NWP A (now NWP 55) because a determination of minimal effects cannot be made due to the many environmental complexities and potential far-reaching harm that could result from seaweed mariculture projects.

USACE Response: At this time, the South Pacific Division does not believe it is necessary to revoke NWP 55 because the proposed NWP terms and conditions and SPN Regional Conditions already effectively ensure that only minimal adverse effects on the aquatic environment, individually or cumulatively, are authorized by the NWP. The district engineer would review all proposed uses of this NWP and, when appropriate, would impose conditions to ensure no more than minimal adverse effects or would require project review under a Standard Permit. Revoking this NWP at the regional level would not effectively safeguard against more than minimal impacts and would lead to increased SPN workload, less timely evaluation of proposals, and increased regulatory burden for the applicant.

2.3 Proposed Regional Conditions Applicable to NWP 55

2.3.1 SPK Proposed Regional Conditions

B. Activities Requiring Pre-Construction Notification

1. The permittee must submit a pre-construction notification (PCN) in accordance with General Condition 32, in the following circumstances:
 - e. For activities in waters of the U.S. that have the potential to adversely affect essential fish habitat (EFH), as designated by the Pacific Fishery Management Council, and for which there is no applicable National Marine Fisheries Service issued General Concurrence or Programmatic Consultation. The PCN shall include an EFH assessment and analysis of the effects of the action on EFH, in accordance with 50 C.F.R. § 600.920 (e). For Federal permittees, if a PCN is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the Magnuson-Stevens Fishery Conservation and Management Act.

2.3.1.1 Comments on SPK Proposed Regional Conditions

In a letter dated November 3, 2020, the Western States Petroleum Association (WSPA) and the American Petroleum Institute (API) recommended that proposed Regional Condition requiring a PCN for activities with “the potential to adversely affect” EFH (Regional Condition B.1.e.) be revised to require a PCN for activities that “would result in an adverse effect” to EFH.

USACE Response: The Magnuson-Stevens Fishery Conservation and Management Act requires federal agencies to consult with NOAA Fisheries with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that *may adversely affect* any essential fish habitat (EFH) identified under the Act. Given that it is the responsibility of the federal agency to determine whether the federal action may adversely affect EFH, it is essential that the federal agency be provided with the opportunity to evaluate any activities with the potential to adversely affect EFH, not just those that the applicant determines would result in an adverse effect to EFH. Therefore, the proposed language stands.

2.3.2 SPN Proposed Regional Conditions

B. Activities Requiring Pre-Construction Notification:

2. Activities that have the potential to adversely affect Essential Fish Habitat (EFH), as designated by the Pacific Fishery Management Council. *The PCN*

shall include an EFH assessment and analysis of effects of the action on EFH, in accordance with 50 C.F.R. § 600.920 (e). For Federal permittees, if a PCN is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the Magnuson-Stevens Fishery Conservation and Management Act.

2.3.2.1 Comments on SPN Proposed Regional Conditions

In a letter dated November 3, 2020, the Western States Petroleum Association (WSPA) and the American Petroleum Institute (API) recommended that the proposed Regional Condition requiring a PCN for activities with “the potential to adversely affect” EFH (Regional Condition B.2.) be revised to require a PCN for activities that “would result in an adverse effect” to EFH.

USACE Response: The Magnuson-Stevens Fishery Conservation and Management Act requires federal agencies to consult with NOAA Fisheries with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that *may adversely affect* any essential fish habitat (EFH) identified under the Act. Given that it is the responsibility of the federal agency to determine whether the federal action may adversely affect EFH, it is essential that the federal agency be provided with the opportunity to evaluate any activities with the potential to adversely affect EFH, not just those that the applicant determines would result in an adverse effect to EFH. Therefore, the proposed language stands.

2.3.3 SPL Proposed Regional Conditions

5. The permittee must submit a pre-construction notification (PCN) in accordance with General Condition 32 in the following circumstances:
 - a. All perennial waterbodies and special aquatic sites throughout the Los Angeles District as well as intermittent waters within the State of Arizona for any regulated activity that would result in a loss of waters of the United States.
 - b. All areas designated as Essential Fish Habitat (EFH) by the Pacific Fishery Management Council (PFMC). For non-federal permittees, if the NWP activity might have the potential to adversely affect EFH as designated by the PFMC, the PCN must include an EFH assessment and analysis of the effects of the action on EFH, in accordance with 50 C.F.R. § 600.920 (e). If the site is in estuarine or marine waters and contains eelgrass (*Zostera marina* or *Z. pacifica*) the EFH assessment shall also include an eelgrass survey according to the methods described in the most recent version of the California Eelgrass Mitigation Policy published by the National Marine Fisheries Service. For NWP activities that require pre-construction notification, Federal permittees must provide the documentation demonstrating compliance with the Magnuson-Stevens Fishery Conservation and Management Act. Adverse effects to EFH are defined at 50

C.F.R. § 600.910 (a).

2.3.3.1 Comments on SPL Proposed Regional Conditions

In a letter dated November 5, 2020, the National Marine Fisheries Service recommended revising proposed Regional Condition 5a (PCN for losses in perennial streams and special aquatic sites) be amended to include all intermittent waters within designated critical habitat for steelhead trout (*Oncorhynchus mykiss*).

USACE Response: General Condition 18 (Endangered Species) requires non-federal permittees to submit a PCN if any listed species or designated critical habitat might be affected or is in the vicinity of the activity. Federal permittees are expected to follow their own procedures for complying with the requirements of the ESA. Therefore, the recommended modification to the proposed Regional Condition 5a to include areas within designated critical habitat for steelhead trout is unnecessary.

In a letter dated October 26, 2020, the EPA recommended expanding SPL's proposed Regional Condition 5a, requiring submission of a PCN for any proposed losses of perennial streams and special aquatic sites, and for losses of any intermittent waters in AZ, to include intermittent waters in all of SPL.

USACE Response: The expansion of the 2017 SPL Regional Condition 4a from the 2012 version to include pre-construction notification for losses of intermittent waters within AZ continues to be sufficient to ensure the effects of the use of the 16 revised NWPs would be minimal, both individually and cumulatively.

Much of the Los Angeles District is contained within an arid to semi-arid ecoregion where special aquatic sites and perennial waters are limited in extent yet provide important benefits for wildlife, water quality and recreation among other functions. This has direct implications on the values associated with the area's aquatic resources. There is a direct correlation between the aquatic resource value and the hydrology. The higher aquatic values and diversity are typically associated with a hydrological source of increased frequency, duration and reliability. Other factors such as soil characteristics, topography and human influences have implications on aquatic resource values, but in most instances, the resources with closer proximity to surface and/or ground water possess the higher and more diverse values. In recognition of this, the Los Angeles District has determined, both in 2017 and now, additional protection is necessary for the limited aquatic resources possessing permanent or semi-permanent hydrology, to include perennial waters and special aquatic sites. Furthermore, the loss of approximately 90% of wetland resources within California and the general scarcity of special aquatic sites in California's southern coastal, inland, and desert regions in particular indicate the need for review of regulated activities that may impact these resources and to possibly require compensatory mitigation to ensure adverse impacts are no more than minimal, both individually and

cumulatively.

The terms and conditions of the NWP's at the national level are designed to ensure a baseline level of constraints on the program to ensure minimal impacts, but it is not axiomatic that those conditions will adequately address regional differences in aquatic resource functions and services across the United States, which vary widely. Therefore, division engineers may suspend, modify or revoke certain NWP's through regional conditions to ensure that, on a regional basis, the NWP's do not result in more than minimal impacts, both individually and cumulatively. Through the mandatory PCN process, the Los Angeles District would review the proposed discharges of dredged or fill material into special aquatic sites and perennial streams 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 reduce impacts to the minimal effects threshold, or exercise discretionary authority and require an individual permit for those activities that may result in more than minimal individual and cumulative adverse effects.

The Corps recognizes the need to balance protection of aquatic resources with the need to manage the regulatory program in an efficient and effective manner that is not unduly burdensome to the regulated public. With final Regional Condition 5d, the Los Angeles District has recognized the importance of these resources and the need to provide an enhanced level of protection through PCN review, while acknowledging that not all activities require such review. Regional Condition 5d excludes actions which do not result in a loss of waters and characteristically have minimal impacts. Unless required to comply with other regional or general conditions, such actions may proceed without notification. The proposed regional condition will maintain the benefit of avoiding excessive permit review for actions with clearly minimal impacts, while ensuring these important aquatic resources are adequately protected.

3.0 Alternatives

3.1 No Regional Conditions

The regional conditions serve to ensure that the NWP's only authorize activities that result in no more than minimal individual and cumulative adverse environmental effects within a given region. Also, the regional conditions ensure compliance with all applicable federal laws and regulations. Without regional conditions, Districts may be forced to prohibit all uses of certain NWP's, thereby unnecessarily increasing regulatory burdens and applicant costs.

The specific outcomes of not imposing the Final Regional Conditions for the State of California are described in *italics* under each regional condition in the below text.

1. The permittee shall submit a pre-construction notification (PCN) for all 2021 NWP's, in accordance with General Condition 32, in the following circumstances:
 - d. Activities that have the potential to adversely affect Essential Fish Habitat (EFH), as designated by the Pacific Fishery Management Council. The PCN shall include an EFH assessment and analysis of effects of the action on EFH, in accordance with 50 C.F.R. § 600.920 (e). For Federal permittees, if a PCN is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the Magnuson-Stevens Fishery Conservation and Management Act.

Without this regional condition, the California Districts would be unable to ensure compliance with the Magnuson-Stevens Fishery Conservation and Management Act, which requires the Corps to consult with the National Marine Fisheries Service for activities that may adversely affect EFH.

5. In the *Los Angeles District*, the permittee shall submit a pre-construction notification (PCN) for all 2021 NWP's, in accordance with General Condition 32, in the following circumstances:
 - d. Activities that would result in a loss of waters of the United States within all perennial waterbodies and special aquatic sites.

Without Regional Condition 5d there could be more than minimal impacts to these resources within the Los Angeles District. Regional Condition 5d applies only to the Los Angeles District area within California. Much of the Los Angeles District is contained within an arid to semi-arid ecoregion where special aquatic sites and perennial waters are limited in extent yet provide important benefits for wildlife, water quality and recreation among other functions. This has direct implications on the values associated with the area's aquatic resources. There is a direct correlation between the aquatic resource value and the hydrology. The higher aquatic values and diversity are typically associated with a hydrological source of increased frequency, duration and reliability. Other factors such as soil characteristics, topography and human influences have implications on aquatic resource values, but in most instances, the resources with closer proximity to surface and/or ground water possess the higher and more diverse values. In recognition of this, the Los Angeles District has determined, both in 2017 and now, additional protection is necessary for the limited aquatic resources possessing permanent or semi-permanent hydrology, to include perennial waters and special aquatic sites. Furthermore, the loss of approximately 90% of wetland resources within California and the general scarcity of special aquatic sites in California's southern coastal, inland, and desert regions in particular indicate the need for review of regulated activities that may impact these resources and to possibly require compensatory mitigation to ensure adverse impacts are no more than minimal, both individually and cumulatively.

3.2 Alternative or Additional Regional Conditions

The South Pacific Division considered imposing additional or alternative PCN requirements and NWP revocations for specific categories of activities and geographic areas. Where specific recommendations for additional or alternative regional conditions were received, it was almost always determined that the final NWP terms and conditions and the final regional conditions effectively ensure that only minimal individual and cumulative adverse effects on the environment are authorized (see Section 2.0). Further conditioning use of the NWPs would lead to increased District workload, less timely evaluation of proposals, and increased regulatory burden for the applicant without a corresponding increase in resource protection.

Many of the regional conditions applied to the 2017 NWPs were not carried forward with the 2021 NWPs. Additionally, some of the regional conditions initially proposed for inclusion in the 2021 NWPs were eliminated from the final regional conditions because they were no longer considered justified, were redundant with the NWP General Conditions, or consisted of blanket information requirements that are more appropriate to require on a case-by-case basis.

The South Pacific Division has simplified the regional conditions where possible so that the NWPs can be implemented more consistently, with lower costs, and with no decline in environmental protection. Additional regional conditions, beyond those described above, were not recommended for any of the NWPs. The South Pacific Division believes the current general and regional conditions provide the appropriate safeguards to ensure the 2021 NWPs do not authorize activities with more than minimal adverse effects on the aquatic environment. In addition, the submittal of a PCN in certain circumstances will allow the California Districts to review activities to ensure the effects are no more than minimal.

4.0 Section 7 of the Endangered Species Act

4.1 General Considerations

General Condition 18 of the NWP program ensures that all activities authorized by NWP are in compliance with the Endangered Species Act (ESA). Section 7 of the ESA requires federal agencies to consult with the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) on any federal actions which “may affect” species listed under the ESA or their designated critical habitat. No activity may be authorized by NWP until this consultation process is completed. Under General Condition 18, non-federal permittees are required to submit a PCN if any listed species or designated critical habitat might be affected or is in the vicinity of the activity or if the activity is located in designated critical habitat; the Corps is then able to complete any required consultation with the appropriate Service (USFWS or NMFS) pursuant to Section 7. Federal permittees are required to provide the Corps with the appropriate

documentation to demonstrate compliance with Section 7 of the ESA. This process for fulfilling Section 7 obligations for projects authorized by NWP has successfully safeguarded federally-listed species within the California Districts and no changes are believed to be necessary.

Each California District coordinated with the USFWS and NMFS in their area of responsibility as part of the 2021 NWP reissuance process. Each District's coordination process is described below:

- SPK: SPK sent letters to the USFWS, Pacific Southwest Region, and NMFS, West Coast Region, on October 5, 2020, requesting comments on the proposed 2021 NWPs, including SPKs regional conditions, the potential for revocation or prohibition of the NWPs in specific geographic areas, and the development of coordination and/or consultation procedures for NWP PCNs. No responses or comments were received.
- SPN: SPN sent letters to the regional offices of the USFWS and NMFS on September 18, 2020, requesting coordination to determine whether there are new or modified regional conditions that should be added in SPN to protect listed species. None of the offices requested additional regional conditions or expressed any concerns with the NWP program.
- SPL: SPL sent letters to regional offices of the USFWS and NMFS on September 24, 2020. The Ventura Fish and Wildlife Office responded in an email dated October 20, 2020 requesting additional information on the commenting process and whether streams could be identified for regional conditions. The Ventura FWO was unable to provide specific comments following an email exchange attempting to schedule a more detailed discussion.

Two separate teleconferences were held with staff from the Protected Resources Division of the NMFS Long Beach Office to discuss the proposed rule and opportunities for NMFS input regarding steelhead trout and Essential Fish Habitat (EFH), respectively. NMFS followed up the former discussion with comment letter to the public notice issued by SPL, which is addressed in Section 2 of this supplement. As a follow up to the discussion on EFH, NMFS staff provided recommendations in emails dated November 16 and November 19 (following closure of the PN comment period) recommending modifying proposed regional conditions or adopting new regional conditions to expand the information requirements that should accompany projects affecting EFH and other NMFS-managed protected resources. With regard to EFH, NMFS recommended including the following language in SPL's regional conditions:

- *For NWP activities that require pre-construction notification, Federal permittees must provide the documentation demonstrating compliance with the Magnuson-Stevens Fishery Conservation and Management Act. Adverse effects to EFH are defined at 50 C.F.R. § 600.910 (a).*

- *If the project involves bottom disturbing activities in subtidal waters within any bay, harbor, estuary, or lagoon south of Point Conception, then a *Caulerpa taxifolia* survey should be conducted and reported as described in the most current version of the *Caulerpa Control Protocol (CCP)*, unless otherwise exempted by the CCP.*
- *If the project site is in estuarine or marine waters and may support eelgrass (*Zostera marina* or *Z. pacifica*), the EFH assessment shall also include an eelgrass survey according to the guidelines described in the most recent version of the *California Eelgrass Mitigation Policy* published by the *National Marine Fisheries Service*. If adverse effects to eelgrass are expected to occur due to project activities, the EFH assessment should also include a mitigation plan to ensure no net loss in eelgrass function.*
- *If the project site is in marine waters in the vicinity of rocky reef and/or kelp habitat, the EFH assessment shall also include a map delineating the project boundary and associated effects in relation to these habitats. In addition, the EFH assessment should include any proposed mitigation to address anticipated effects.*

Separately, NMFS provided the following recommended regional condition regarding protected abalone species:

- *If the NWP activity may affect ESA-listed abalone (black abalone; white abalone) and/or designated critical habitat for black abalone, then the PCN must include an ESA assessment and analysis of the effects of the action on ESA-listed abalone and/or designated critical habitat for black abalone.*
- *If the project involves activities with potential effects on intertidal to shallow subtidal rocky habitat, then the ESA assessment shall include a survey of black abalone and evaluation of black abalone critical habitat according to the guidance provided by the *National Marine Fisheries Service*.*
- *If the project site is in the vicinity of rocky intertidal and/or shallow subtidal habitat, the ESA assessment shall include a map delineating the project boundary and associated effects in relation to these habitats.*
- *If the project involves bottom disturbing activities in subtidal waters in the vicinity of rocky reef and/or kelp habitat south of Point Conception, then the ESA assessment shall include a survey of hard substrates for white abalone according to the guidance provided by the *National Marine Fisheries Service* and a map delineating the project boundary and associated effects in relation to these habitats.*

After considering these recommendations, SPL concluded the statewide regional condition requiring submission of a PCN for activities affecting EFH, including provisions for providing an EFH assessment and analysis of effects, was the appropriate means to address EFH within the context of the 2021 NWPs.

Because the specific issues raised by NMFS extend beyond the NWP program, they would be more appropriate to address these issues through other means such as the development of Standard Local Operating Procedures between SPL and NMFS or the development of EFH programmatic concurrence(s).

4.2 Local Operating Procedures for Section 7 of the Endangered Species Act

No specific local operating procedures for ESA consultations have been developed by the California Districts. However, the California Districts have several programmatic ESA consultations with the USFWS and NMFS. A list of active programmatic Section 7 consultations is provided in Tables C-1 and C-2 of the January 2, 2021, *Biological Assessment for the Proposed Issuance and Reissuance of the 2021 Nationwide Permits*, which is available on the Corps Headquarters Regulatory Program website.

The California Districts will ensure that activities authorized by NWP comply with the ESA by reviewing all PCNs for possible effects to federally listed species and designated critical habitat. Information on federally listed species in the California Districts is available through the California Natural Diversity Database, county species lists, reports provided by the applicant, recovery plans, biological opinions, and institutional knowledge. If the District determines that a proposed activity will have “no effect” on a federally listed species, species proposed for listing, or critical habitat, then the District is not required to initiate consultation with the USFWS or NMFS and will proceed to complete the PCN evaluation. If the District determines that a proposed project “may affect but is not likely to adversely affect” a federally listed species, species proposed for listing, or critical habitat and that the Corps is the lead federal agency, then the District will initiate informal consultation in writing with the appropriate Service and request a written concurrence with the District’s determination. If the District determines that a proposed project “may affect” or “may affect and is likely to adversely affect” a federally listed species, species proposed for listing, or critical habitat and that the Corps is the lead federal agency, then the District initiates formal consultation with the appropriate Service. Where a project-specific informal or formal consultation is required, the District will notify the applicant that construction may not proceed until ESA consultation is completed and the District issues a written authorization. If the District determines that a proposed project is covered under an existing programmatic ESA consultation, the District implements any procedures for confirming that the programmatic consultation satisfies the Corps’ consultation requirements for the project prior to providing written authorization to the applicant. If another federal agency is the lead for complying with Section 7 of the ESA, no authorization is issued until the District reviews the lead agency’s compliance documentation to ensure that it is sufficient to confirm Section 7 compliance for the Corps’ action and additional consultation is not necessary.

SPK utilizes their March 2018, *ESA Information Guidelines for the Regulatory Program*, which provides instructions to permittees on the information that is necessary to ensure compliance with the ESA. This information is available on SPK’s website and is provided to permittees when necessary.

5.0 Section 106 of the National Historic Preservation Act

5.1 General Considerations

General Condition 20 of the NWP program ensures that all activities authorized by NWP are in compliance with the National Historic Preservation Act (NHPA). Section 106 of the NHPA requires federal agencies to consult with the appropriate consulting parties identified under 36 C.F.R. § 800.2(c) on any federal action that may have the potential to cause effects to properties listed or eligible for listing in the National Register of Historic Places (NRHP). No activity may be authorized by NWP until this consultation process is completed. Under General Condition 20, non-federal permittees are required to submit a PCN if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the NRHP, including previously unidentified properties; the Corps is then able to complete any required consultation with the appropriate consulting parties (e.g., the State Historic Preservation Officer (SHPO)) pursuant to Section 106. Federal permittees are required to provide the Corps with the appropriate documentation to demonstrate compliance with Section 106 of the NHPA. This process for fulfilling Section 106 obligations for projects authorized by NWP has successfully safeguarded historic properties within the California Districts and no changes are believed to be necessary.

5.2 Local Operating Procedures for Section 106 of the National Historic Preservation Act

No specific local operating procedures for National Historic Preservation Act (NHPA) consultations have been developed by the California Districts. In accordance with Appendix C of 33 C.F.R. Part 325 and 36 C.F.R. Part 800, implementing procedures for complying with Section 106 of the NHPA, as amended, 54 U.S.C. § 306101, the California Districts ensure that activities authorized by NWP comply with the NHPA by reviewing all applications for possible effects on historic properties, including previously unidentified historic properties. If the project is determined to have no potential to affect historic properties, the Section 106 process is complete. If the project might have the potential to affect historic properties, including previously unidentified properties, then the permittee is required to provide a cultural resources inventory. At a minimum, the inventory is required to include a records search of the California Historical Resources Information System and a pedestrian site survey of the permit area by a qualified archaeologist. Any cultural resources identified in the permit area are required to be recorded and evaluated for eligibility to the NRHP. If the resources are eligible to the NRHP, an effects analysis is required, and any adverse effects must be minimized and mitigated.

The California Districts complete a Section 106 consultation with the SHPO and any other consulting parties for all projects that may have the potential to cause effects to

properties listed or eligible for listing. The applicant is notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied. As part of the Section 106 consultation process, the California Districts request a Sacred Lands File search and Native American contacts list from the Native American Heritage Commission (NAHC), and inquiry letters are sent to all of the tribal contacts identified. Any recommendations for mitigation measures received from the tribes are considered and incorporated as special conditions to the NWP authorization, if appropriate.

If the Corps makes a determination of “no historic properties affected” or “no adverse effects to historic properties”, the consulting parties are asked to provide written concurrence with the finding of no effect or no adverse effect to historic properties for the proposed undertaking. If adverse effects to historic properties are identified, the California Districts work with the consulting parties to development measures to minimize and mitigate those effects, and the permittee is required to implement the measures as a special condition of the NWP authorization. Any Memorandum of Agreement (MOA) or Programmatic Agreement (PA) required for mitigation of adverse effects to historic properties is included as a special condition of any associated NWP verification. Alternatively, the district engineer may assert discretionary authority to require an individual permit for the proposed activity and conduct Section 106 consultation through the individual permit process.

SPK utilizes their March 24, 2014, *Guidelines for Compliance with Section 106 of the National Historic Preservation Act*, which provides instructions to permittees on the necessary minimal information required in a PCN to ensure compliance with the NHPA. This information is available on SPK’s website and is provided to permittees when necessary.

6.0 Government-to-Government Consultation with Tribes

6.1 Consultation Summary

On September 24, 2020, the Deputy Commanding General for Civil and Emergency Operations issued guidance for conducting government-to-government consultation with tribes on the proposed 2021 NWPs. Each District sent letters to the federally recognized tribes in their area of responsibility to initiate consultation on the 2021 NWPs, including regional conditions, the potential for suspension or revocation of the NWP in specific geographic areas, and the development of coordination or consultation procedures for NWP PCNs. The following government-to-government consultations occurred in the California Districts:

- SPK:
 - By letter of September 28, 2020, received via email by Regional Permit Specialist (b) (6), Mr. James Kinter, THPO for the Yocha Dehe Wintun Nation, notified SPK that they have a cultural interest in the “project” and would like to continue to receive updates as the “project”

progresses. No specific comments on the proposed 2021 NWP were received. As requested, on January 13, 2021, SPK sent a public notice, via email, to Ms. Kristin Jensen, Administrative Assistant for the Yocha Dehe Wintun Nation, announcing the publication of the Final 2021 NWPs in the Federal Register. No further responses have been received from the tribe to date.

- By letter of October 22, 2020, received via email by SPK Tribal Liaison (b) (6), Mr. Daniel Fonseca, THPO for the Shingle Springs Band of Miwok Indians replied that the tribe would like to be added as a consulting party in identifying any Tribal Cultural Properties (TCPs) that may exist within the “projects” Area of Potential Effect, and requested any and all completed records searches and/or surveys that were done in/around the “project” area, including any archaeological and cultural reports. As a follow-up, SPK held a virtual meeting with the tribes Site Protection Manager, Kara Perry, to discuss the tribe’s comments and/or concerns with proposed 2021 NWPs and associated regional conditions. Ms. Perry explained that she was not familiar with the Corps’ NWP Program and would like more information about it so that she could review it and comment, if necessary. Ms. Perry also requested to be added to the SPK public notice list so that she would receive future notices regarding the 2021 NWPs. SPK added Ms. Perry to their public notice recipient list and sent her additional information regarding the NWP Program, including a copy of the Federal Register notice and proposed regional conditions. No further responses have been received from the tribe to date.
- By email of November 5, 2020, received by SPK Tribal Liaison (b) (6), United Auburn Indian Community, Cultural Regulatory Specialist, Ms. Anna Starkey, replied that the tribe would like to consult and comment on the Corps’ NWP Program and would review the documents SPK provided. No further comments were received; thus, on January 14, 2021, (b) (6) followed-up with the tribe, via email, to deliver additional information, including the Federal Register notice of the final 2021 NWPs. Ms. Anna Starkey responded, via email, stating they would review the Federal Register notice and keep it in their files. No further responses have been received from the tribe to date.
- SPN:
 - By email of October 8, 2020, Ms. Janet Eidsness, Tribal Historic Preservation Officer (THPO) for Blue Lake Rancheria, requested government-to-government consultation on behalf of her tribe, Bear River Band, and Wiyot Tribe. In response to this request, a virtual meeting was held on November 4, 2020. Meeting attendees included the Lt. Col. (b) (6) (b) (6) (District Engineer), Major (b) (6) (Deputy District Engineer), (b) (6) (Regulatory Chief), (b) (6) (San Francisco District Tribal Liaison), (b) (6) (Regulatory North Branch

Chief, (b) (6) (Regulatory Project Manager), (b) (6) (Regulatory Project Manager), Chairperson Ted Hernandez (Wiyot Tribe), and Janet Eidsness. A presentation was provided to give an overview of the Regulatory program, the NWP program, and compliance with Section 106 and tribal trust responsibilities under the NWP program. Ms. Eidsness expressed concerns regarding the Regulatory Division's technical expertise in the field of archaeology and the limited scope of the Corps-defined APE. We discussed SPN's authority to draft regional conditions and how the tribes could provide suggested regional conditions to influence SPN's implementation of the NWP program. The meeting ended with our agreeing to send the proposed District regional conditions and the presentation to the tribes, and the tribes would then provide recommendations back to us. No response has been received from the tribes to date.

- By email of October 15, 2020, Mr. Don Barnes, Director of the Office of Self-Governance for the Yurok Tribe, requested government-to-government consultation with SPN. The email contained an official letter signed by Chairman Joseph James, dated October 14, 2020. Ms. (b) (6), San Francisco District Tribal Liaison, contacted Mr. Barnes to schedule a meeting between SPN and the Yurok Tribe. Following ongoing attempts to schedule a meeting, Mr. Barnes confirmed that the Tribe was foregoing their request for consultation on the NWP reissuance in conservation with (b) (6) on November 24, 2020.
- By letter of November 16, 2020, submitted via email to Regulatory Chief (b) (6), Ms. Sally Peterson, Tribal Council Vice-Chairwoman and THPO for the Middletown Rancheria of Pomo Indians of California, requested government-to-government consultation with SPN. The letter outlined the Tribe's concerns with the short comment period provided on the "Proposal to Reissue and Modify Nationwide Permits," the proposed changes to General Condition 17, and the removal of the definition of protected tribal resources. They objected to the removal of terms defining tribal rights, protected tribal resources, and tribal lands, and stated that replacing "no more than minimal adverse effects" with "will not impair" diminishes the clarity of the condition. SPN attempted to schedule a meeting with Ms. Peterson without success. After some initial correspondence to select a meeting date, Ms. Peterson stopped responding to SPN's emails and phone calls. After multiple attempts to contact Ms. Peterson, SPN considered the consultation request withdrawn.
- SPL:
 - By letter of October 16, 2020, Stephen Roe Lewis, Governor of the Gila River Indian Community (GRIC) requested government-to-government consultation with SPL. A virtual meeting was held on November 20, 2020

with members of the tribe, their internal and external legal counsel, SPL Regulatory Division staff and the District Commander. As a tribe with recently granted 401 certification authority, and in light of the new 401 rule, the tribe requested clarification of the process for certifying the 2021 NWP. Additionally, GRIC expressed concerns about being notified of actions that may affect tribal interests and highlighted a recent example of highway project that required last-minute changes to address tribal concerns. GRIC approved of the proposed SPL regional condition for projects affecting tribal lands and requested additional clarification to define the term *affecting*. Additionally, GRIC recommended all tribes be provided copies of PCNs for projects affecting their tribal lands (see response to comments section 2.3.3.1).

- By letter dated October 12, 2020, the Rincon Band of Luiseño Indians requested government-to-government consultation. Following a discussion with the SPL Regulatory Division Chief, (b) (6), the tribe determined government-to-government consultation was not necessary and provided an email requesting clarification of specific elements of the 2021 NWP and proposed regional conditions. The tribe was provided strikethrough versions of the proposed NWP and regional conditions indicating changes from the 2017 versions of each. An additional exchange of emails responding to questions from the tribe occurred on November 9 and 13, 2021. The tribe did not request further information or government-to-government consultation regarding the 2021 NWP.

6.2 Local Operating Procedures for Protecting Tribal Rights

No specific local operating procedures for the protection of tribal rights have been developed by the California Districts. SPK utilizes their December 12, 2014, *Tribal Nation Communication and Coordination Procedures (QMS# 12972-SPK)*, to instruct project managers on the necessary procedures in which tribal consultations are performed to ensure consistency across SPK. Regional Condition 1.b. requires the submission of a PCN for all activities resulting in a discharge of dredged or fill material in waters of the U.S. on Tribal Lands, thereby allowing the California Districts to ensure the protection of tribal rights.

7.0 Essential Fish Habitat

Regional Condition 1.d. requires the submission of a PCN, including an Essential Fish Habitat (EFH) assessment and analysis of effects of the action on EFH, for all activities that have the potential to adversely affect EFH, thereby ensuring that the District is provided with the opportunity to conduct any required consultations with the NMFS pursuant to Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. § 1855(b). If the District determines that a proposed

project is covered under an existing programmatic EFH consultation, the District implements any procedures for confirming that the programmatic consultation satisfies the Corps' consultation requirements for the project prior to providing written authorization to the applicant. If a PCN is required, Regional Condition 1.d. also requires the Federal permittees to provide the District with the appropriate documentation to demonstrate compliance with the MSA. The California Districts also utilize the South Pacific Division's, January 13, 2015, *Regulatory Program Essential Fish Habitat (EFH) Procedures* (QMS# 12504-SPD), to instruct project managers on the necessary procedures in which EFH consultations are performed to ensure consistency across the Division. These procedures guarantee that the NMFS is consulted regarding any activities that may adversely affect EFH and provided with the opportunity to offer EFH Conservation Recommendations. The California Districts generally require permittees to implement EFH Conservation Recommendations as a special condition of the NWP authorization unless the Corps does not have the regulatory authority to require the recommendations.

8.0 Supplement to the Analyses in the National Decision Document

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

In addition to the discussion in the national decision document for this NWP, the California Districts have considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: 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.
- (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.
- (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.

8.2 Regional Cumulative Effects Analysis

This section discusses the anticipated cumulative effects of the use of NWP 55 in California during the period this NWP is in effect.

The cumulative effects of this NWP are dependent upon the number of times the NWP is anticipated to be used in the region and the quantity and quality of waters of the United States anticipated to be impacted as a result of the activities authorized by this NWP (see 40 CFR 230.7(b)). The cumulative effects of this NWP are also dependent on compensatory mitigation that may be required during the period this NWP is in effect, when compensatory mitigation offsets impacts to waters of the United States authorized by this NWP.

Based on reported past use, NWP 55 has never been used in California. However, California does have the potential for seaweed mariculture activities. Therefore, NWP 55 could potentially be used approximately 1 time per year, resulting in permanent impacts to approximately 0.1 acre of jurisdictional waters.

In California, we anticipate that compensatory mitigation will be required for any loss of waters of the United States greater than 0.1 acre. The verified activities that do not require compensatory mitigation will have been determined by District Engineers to result in no more than minimal individual and cumulative adverse environmental effects without compensatory mitigation. The demand for these types of activities could

increase or decrease over the five-year duration of this NWP.

Based on these annual estimates, we estimate that up to 5 activities could be authorized over a five-year period until this NWP expires, resulting in permanent impacts to approximately 0.5 acre of jurisdictional waters in California. Approximately 0.5 acre of compensatory mitigation would be required to offset those impacts. Compensatory mitigation is the restoration (re-establishment or rehabilitation), establishment, enhancement, and/or preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved. [33 CFR 332.2]

Given the cumulative effects discussed above, the South Pacific Division has determined that the terms and conditions for NWP 55, including State of California specific regional conditions as described in Section 9.1 below, will ensure adverse environmental effects are no more than minimal, individually, and cumulatively.

9.0 List of Final Corps Regional Conditions for California:

To simplify the readability of the regional conditions for the regulated public, the California Districts have made a broad statement that the regional conditions cover all 2021 NWP activities, rather than listing out which NWPs they specifically apply to. Regional conditions not applicable to the NWP will not be used.

1. The permittee shall submit a pre-construction notification (PCN) for all 2021 NWPs, in accordance with General Condition 32, in the following circumstances:
 - a. Activities involving new bank stabilization that do not incorporate bioengineering techniques. Bioengineering techniques include using live plants alone or in combination with dead or inorganic materials, including rock, sand, or gravel;
 - b. Activities resulting in a discharge of dredged or fill material in waters of the U.S. on Tribal Lands;
 - c. Activities involving the permanent channelization, realignment, or relocation of streams; and,
 - d. Activities that have the potential to adversely affect Essential Fish Habitat (EFH), as designated by the Pacific Fishery Management Council. The PCN shall include an EFH assessment and analysis of effects of the action on EFH, in accordance with 50 C.F.R. § 600.920 (e). For Federal permittees, if a PCN is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the Magnuson-Stevens Fishery Conservation and Management Act.

2. In the desert regions of Los Angeles District (*USGS Hydrologic Unit Code accounting units: Lower Colorado -150301, Northern Mojave-180902, Southern Mojave-181001, and Salton Sea-181002*), the use of NWP 12, 21, 29, 39, 40, 42, 43, 44, 50, 51, 52, 57 and 58 resulting in greater than 0.10-acre loss of wetlands, mudflats, vegetated shallows, or riffle and pool complexes, as defined at 40 CFR Part 230.40-45, is prohibited.
3. In the Los Angeles District, all 2021 NWP's are revoked within the Murrieta Creek and Temecula Creek watersheds in Riverside County, California, resulting in a loss of waters of the United States greater than 0.25 acre.
4. In the Los Angeles District, all 2021 NWP's are revoked within the San Diego Creek Watershed and San Juan Creek/Western San Mateo Creek Watersheds in Orange County, California.
5. In the *Los Angeles District*, the permittee shall submit a pre-construction notification (PCN) for all 2021 NWP's, in accordance with General Condition 32, in the following circumstances:
 - a. Activities that would result in a loss of waters of the United States within the Murrieta and Temecula Creek watersheds in Riverside County, California; and,
 - b. Activities that would result in a loss of waters of the United States within Santa Clara River watershed in Los Angeles and Ventura County, California, including but not limited to Aliso Canyon, Agua Dulce Canyon, Sand Canyon, Bouquet Canyon, Mint Canyon, South Fork of the Santa Clara River, San Francisquito Canyon, Castaic Creek, Piru Creek, Sespe Creek and the main-stem of the Santa Clara River; and,
 - c. Activities that would result in a loss of waters of the United States within all watersheds in the Santa Monica Mountains in Los Angeles and Ventura County, California, bounded by Calleguas Creek on the west, by Highway 101 on the north and east, and by Sunset Boulevard and Pacific Ocean on the south; and,
 - d. Activities that would result in a loss of waters of the United States within all perennial waterbodies and special aquatic sites.
6. In the *San Francisco District*, the use of NWP 29 and 39 is prohibited within the San Francisco Bay diked baylands (undeveloped areas that are currently behind levees and are within the historic margin of the Bay, i.e., areas on the Nichols and Wright map below the 5-foot contour line, National Geodetic Vertical Datum (NGVD) (Nichols and Wright, 1971)).

7. In the *San Francisco District*, the permittee shall submit a pre-construction notification (PCN), in accordance with General Condition 32, for all 2021 NWP activities that will take place in waters or wetlands of the U.S. that are within the San Francisco Bay diked baylands.
8. In the *Sacramento District*, the use of any 2021 NWP authorizing the discharge of dredged or fill material in peatlands containing histosols, including bogs and fens, is prohibited.

10.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

10.1 Water Quality Certifications

Pursuant to Section 401 of the Clean Water Act, a water quality certification issued by the certifying authority (state, authorized tribe, or EPA), or a waiver thereof, is required for activities authorized by NWPs that may result in a discharge of dredged or fill material into waters of the United States. The procedures to ensure that the NWPs comply with this law are described in 33 C.F.R. § 330.4(c). NWPs 55 & 56 authorize structures in marine and estuarine waters only pursuant to Section 10 of the RHA; therefore, they will never require 401 certification.

10.2 Coastal Zone Management Act consistency determinations

NWPs that authorize activities within or affecting the coastal zone in SPN and SPL must be certified by the California Coastal Commission (CCC) or the San Francisco Bay Conservation and Development Commission (BCDC) as consistent with the State's approved management program pursuant to Section 307(c)(1) of the Coastal Zone Management Act (CZMA). Alternatively, concurrence may be presumed to have occurred. The procedures to ensure that the NWPs comply with this law are described in 33 C.F.R. § 330.4(d). The CZMA does not apply to SPK since there are no coastal zones in the district area of responsibility.

SPN and SPL determined that the activities authorized by the proposed NWPs would be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the State's approved management program. By letter of September 23, 2020, SPL requested CZMA consistency concurrence from the CCC for the proposed reissuance of the NWPs on behalf of both SPN and SPL, and the CCC responded by letter of November 12, 2020, stating their objection to the Corps' consistency determination and finding that the proposed reissuance of the NWPs is not consistent with Section 30233 of the California Coastal Act (Cal. Pub. Res. Code 30233). By letter of September 22, 2020, SPN requested CZMA consistency concurrence from the BCDC for the proposed reissuance of the NWPs, and the BCDC responded by letter of December 18, 2020, concurring with SPN's consistency determination subject to the condition that the Corps adopt a regional condition stating

that the NWP's will not become effective until BCDC, or a local governmental entity administering a BCDC-approved local protection plan in the Suisun Marsh, has issued a permit authorizing the activity. However, SPN declined to include BCDC's condition in NWP authorizations since it does not advance the goal of the NWP program to streamline the permit process for proposals that have no more than minimal impacts to the human environment, 33 U.S.C. 1344(e). Therefore, applicants would be required to seek individual consistency concurrence from the CCC or BCDC for NWP's that authorize activities within or affecting the coastal zone.

11.0 Measures to Ensure No More Than Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 9.0 of this document, will ensure that this NWP authorizes only activities with no more than minimal individual and cumulative adverse environmental effects. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, SPK, SPN, and SPL will review certain activities on a case-by-case basis to ensure that those activities result in no more than minimal adverse environmental effects, individually and cumulatively. Through the pre-construction notification review process, the district engineer can add special conditions to an NWP authorization to ensure that the NWP activity results in no more than minimal adverse environmental effects, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for a proposed activity that will result in more than minimal individual and cumulative adverse environmental effects.

The South Pacific Division has also developed several QMS procedures which, where applicable, will help to ensure no more than minimal environmental effects result from the NWP program within the California Districts. When compensatory mitigation is required to ensure minimal impacts, the California Districts would apply the QMS procedure for determining appropriate mitigation ratios, which considers factors such as the relative functional loss at the impact site vs. functional gain at the mitigation site, the type of mitigation proposed and its relative proximity to the impact site, the likelihood of mitigation success, and any temporal losses. This procedure ensures that the appropriate amount of compensatory mitigation is required based on a clearly documented process. Additionally, the QMS procedures for uniform performance standards will help to ensure the success of compensatory mitigation when required to ensure minimal impacts for NWP authorizations. This procedure ensures consistency between project managers, offices, and districts in determining compensatory mitigation performance standards and incorporates current scientific understanding of mitigation concepts and appropriate metrics.

The South Pacific Division has also developed Regional Compensatory Mitigation and Monitoring Guidelines to provide instruction to the regulated public on selecting

appropriate compensatory mitigation sites and preparing mitigation plans to compensate for unavoidable impacts to aquatic resources authorized by Corps permits. These instructions cover a wide range of aquatic resource types and regions and would be applicable to NWP authorizations requiring permittee-responsible mitigation to ensure minimal effects, both individually and cumulatively.

Functional assessment tools such as the California Rapid Assessment Method (CRAM) are also available to assess impacts for activities authorized under the NWP program and may also serve to ensure minimal impact by providing a more accurate assessment of functions and services at both the impact and mitigation sites.

The California Districts currently have several active mitigation banks and in-lieu fee (ILF) programs available to provide compensatory mitigation to offset losses of aquatic and other resources for NWP-authorized activities. By providing compensatory mitigation on a larger, consolidated scale in ecologically appropriate areas, these mitigation banks and ILF programs simplify the process of providing compensatory mitigation for permittees, improve the likelihood of mitigation success, and, in the case of mitigation banks, reduce temporal losses. In doing so, they serve to ensure the NWP program within the California Districts will have minimal impacts on an individual and cumulative basis.

Special conditions may also be added to the NWP verification to ensure the proposed activities will result in no more than minimal adverse environmental effects, including those related to the use of Best Management Practices (BMPs) and erosion control, preservation of avoided resources in perpetuity, compliance with the terms and conditions of any Biological Opinion and/or Letter of Concurrence from the Services, compliance with an MOA or Programmatic Agreement with the SHPO/THPO, or any other avoidance and minimization measures deemed necessary. In addition, compensatory mitigation requirements for the loss of waters, determined through completion of the *South Pacific Division's Mitigation Ratio Setting Checklist* and in compliance with 33 CFR 332 and the *SPD Mitigation and Monitoring Guidelines*, will ensure no net loss of aquatic resource functions and services.

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

12.0 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, as well as these regional conditions, will authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects.

13.0 References

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SUPPLEMENTAL DOCUMENT FOR NATIONWIDE PERMIT 56

This document is a supplement to the national decision document for Nationwide Permit (NWP) 56, and addresses the regional modifications and conditions for this NWP in the State of California. In the State of California, the Sacramento District (SPK) is the lead district, and the San Francisco (SPN) and Los Angeles (SPL) Districts also implement the NWP program in this state (collectively referred to as the California Districts). This supplemental document is prepared for the purposes of 33 CFR 330.5(c)(1)(iii). The South Pacific Division Engineer has considered the potential individual and cumulative adverse environmental effects that could result from the use of this NWP in the State of California, including the need for additional modifications of this NWP by imposing regional conditions to ensure that those individual and cumulative adverse environmental effects are no more than 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 jurisdictional waters and wetlands. 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 and cumulative adverse environmental effects. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should have regional conditions or be excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that have more than minimal individual and cumulative adverse environmental effects.

1.0 Background

In the September 15, 2020, issue of the Federal Register (85 FR 57298), the U.S. Army Corps of Engineers (Corps) published its proposal to reissue 52 existing NWPs and issue five new NWPs. To solicit comments on its proposed regional conditions for these NWPs, SPK issued a public notice on September 21, 2020, SPN on September 18, 2020, and SPL on September 22, 2020. On January 13, 2021, the Corps published a final rule in the Federal Register (86 FR 2744) announcing the reissuance of 12 existing nationwide permits (NWPs) and issuance of four new NWPs, as well as the reissuance of NWP general conditions and definitions with some modifications. After the issuance of the final NWPs, the California Districts considered the need for regional conditions for this NWP. The South Pacific Division's findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

In a letter dated October 27, 2020, the Environmental Protection Agency (EPA) recommended retaining SPN's 2017 NWP Regional Condition requiring a Pre-Construction Notification (PCN) for activities in the Santa Rosa Plain. They reasoned that though federal jurisdiction has changed with the new Navigable Waters Protection Rule (NWPR), the NWPR does not automatically preclude vernal pool complexes as waters of the U.S.

USACE Response: Though the NWPR does not preclude vernal pool complexes, the majority of these wetlands will no longer be considered jurisdictional under the NWPR, and the PCN requirement for the Santa Rosa Plain was based upon the need to protect these seasonal wetland habitats and the federally-listed species they support. Therefore, SPN no longer considers it appropriate to require a PCN for all activities in Santa Rosa Plain. Furthermore, a PCN is still required under General Condition (GC) 18 for any activities proposed by non-federal permittees "if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat." Therefore, where jurisdictional waters may be present, a PCN will still be required for activities affecting valuable vernal pools and other seasonal wetland habitats in the Santa Rosa Plain.

In letters dated October 27, 2020, and November 5, 2020, EPA recommended adding a Regional Condition requiring federal permittees, including state agencies with NEPA responsibilities, to submit a PCN for any regulated activity, in intermittent and perennial waterbodies and special aquatic sites, that would result in a loss of waters of the U.S.

USACE Response: The proposal to exempt federal permittees from PCN requirements was not carried forward in the final 2021 NWPs. Therefore, the recommendation is unnecessary.

In a letter dated October 27, 2020, the EPA recommended requiring compensatory mitigation at a minimum ratio of 1:1 if streambed loss exceeds 1/10 acre or 100 linear feet. Also, EPA recommended a requirement that if a proposed NWP activity would result in the loss of stream bed plus other types of waters of the U.S., such as non-tidal wetlands, the losses of waters of the United States would be quantified in acres and subjected to the 1/2-acre limit.

USACE Response: Comment noted. The recommended conditions are addressed in the final 2021 NWP General Conditions. Specifically, General Condition 23(d) requires compensatory mitigation at a minimum one-for-one (1:1) ratio for all losses of stream bed that exceed 3/100-acre, and for all wetland losses exceeding 1/10-acre, that require a PCN, unless the district engineer determines that some other form of mitigation would be more environmentally appropriate. In accordance with general condition 23 and 33 CFR 330.1(e)(3), for

activities that require a PCN, the district engineer will determine on a case-by-case basis whether specific activities authorized by the NWP should require compensatory mitigation or other forms of mitigation to ensure the authorized activities result in no more than minimal individual and cumulative adverse environmental effects. Additionally, the California Districts do not have sufficient information to determine, on a regional basis, that further restricting compensatory mitigation over what is required by General Condition 23 is necessary to ensure effects are not more than minimal, individually or cumulatively. Therefore, the South Pacific Division has not adopted this language.

In a letter dated October 27, 2020, the EPA recommended adding a Regional Condition requiring a PCN for all waterbodies designated by the California State Water Resources Control Board as 303(d)-impaired surface waters, within 1600 meters (or 1 mile) upstream and/or 800 meters (1/2 mile) downstream of a designated impaired surface water, and on tributaries to impaired waters within 1600 meters of the impaired water.

USACE Response: The States are responsible for developing their own water quality standards and designating impaired waters in conjunction with EPA. Adopting a regional condition for the State of California does not appear warranted and would not further facilitate the State's ability to issue 401 water quality certifications for activities within areas subject to their authority. On December 9, 2020, the California State Water Resources Control Board (SWRCB) granted certification, with conditions, for NWPs 12, 57, and 58, and denied certification for NWPs 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, 56. Based on the information provided, the California Districts determined that the certification does not comply with the requirements of Section 401 of the Clean Water Act or with 40 CFR Part 121, and is not a valid certification. An explanation on why the certification does not comply with 40 CFR Part 121 is included in Appendix A. Therefore, individual certification, or waiver thereof, will be required for all 2021 NWPs. Furthermore, General Condition 25 requires 401 water quality certification for the proposed discharge be obtained or waived, in order for the activity to be authorized by an NWP. Therefore, adopting this requirement within the state of California is not warranted.

In a letter dated November 3, 2020, The Pew Charitable Trusts (PEW) recommended that the San Francisco and Los Angeles Districts add a Regional Condition for all NWPs that holistically implements NOAA Fisheries' California Eelgrass Mitigation Policy (CEMP) recommendations and guidelines in order to ensure no more than minimal individual and cumulative adverse effects. The CEMP recommends compensatory mitigation for the loss of existing eelgrass habitat function across all of California, including guidelines on how to define and survey eelgrass habitat, to the extent that avoidance and minimization of effects to eelgrass have already been pursued to the maximum extent practicable.

USACE Response: General Condition 23 already requires activities permitted by

NWP to avoid and minimize both temporary and permanent adverse effects to waters of the U.S., including eelgrass beds, to the maximum extent practicable at the project site. Furthermore, General Condition 32 dictates that mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal. While SPN and SPL recognize the importance of eelgrass beds to species managed by NOAA Fisheries and may require compensatory mitigation for the unavoidable loss of existing eelgrass habitat functions, a blanket compensatory mitigation requirement for any level of adverse effects to eelgrass beds is not necessary to ensure not more than minimal individual and cumulative adverse environmental effects and is inconsistent with the USACE 1/10-acre and 3/100-acre guidelines for requiring compensatory mitigation for impacts to wetlands and streams, respectively. Also, NMFS would be consulted on any activities that may affect eelgrass beds pursuant to Section 7 of the Endangered Species Act and/or the Magnuson-Stevens Fishery Conservation and Management Act, thereby providing NMFS with the opportunity to impose CEMP requirements upon the applicant. Therefore, this Regional Condition is not warranted.

In a letter dated November 3, 2020, PEW recommended that the San Francisco and Los Angeles Districts add a Regional Condition similar to the Portland District's Regional Condition requiring a PCN for all activities within aquatic resources of special concern, including eelgrass beds.

USACE Response: The term "aquatic resources of special concern" is not defined in USACE regulations, so it is not clear what PEW means, exactly. One possibility is "Designated Critical Resource Waters" described in General Condition 22 to the NWPs. General Condition 22 allows districts to designate, after notice and opportunity for public comment, additional critical resource waters or additional waters officially designated by a state as having particular environmental or ecological significance. The San Francisco and Los Angeles Districts have not designated any Critical Resource Waters pursuant to General Condition 22. The Corps recognizes that designating additional critical resource waters for certain habitats, such as EFH Habitats of Particular Concern (HAPC), including eelgrass, may be beneficial. However, doing so would require a separate public notice and comment process and is therefore outside the scope of this process to issue regional conditions to the 2021 NWPs.

In a letter to SPN dated November 3, 2020, the Citizens Committee to Complete the Refuge (CCCR) stated that SPN's public notice for the proposed NWP regional conditions did not provide adequate information to assess impacts of the NWP program on waters of the U.S., and, therefore, the public is unable to provide substantive comments.

USACE Response: Information regarding impacts of the proposed NWP program on waters of the U.S. was provided in the draft decision documents for

each proposed NWP that were written by Corps Headquarters. These documents were referenced in the SPN public notice for the proposed regional conditions. The draft decision documents along with the proposed regulation that the Corps published in the Federal Register (85 FR 57298) on September 15, 2020, provided adequate information for the public to provide substantive comments on the proposed NWP program.

In a letter to SPN dated November 3, 2020, the CCCR stated that the Corps has not provided evidence that the Nationwide Permits would result in no more than minimal cumulative adverse environmental effects.

USACE Response: The State of California supplemental documents include a regional cumulative effects analysis that is based upon the number of times the NWP is anticipated to be used in the region, the quantity and quality of waters of the United States anticipated to be impacted as a result of the activities authorized, and the anticipated compensatory mitigation required to offset impacts to waters of the U.S. The South Pacific Division believes that this regional cumulative effects analysis is adequate to demonstrate that the NWPs would result in no more than minimal adverse effects.

The supplemental documents are provided on the Corps' websites as soon as these documents are finalized. Furthermore, decision documents from past NWP program authorizations are available upon request through the Freedom of Information Act.

In a letter to SPN dated November 3, 2020, the CCCR stated their objection to the proposal to remove PCN requirements for other Federal agencies; however, CCCR noted that SPN would probably not be able to require PCNs to be submitted by other agencies if a statutory change was made.

USACE Response: This comment is noted and does not warrant a response. The proposal to exempt federal permittees from PCN requirements was not carried forward in the final 2021 NWPs.

In a letter to SPN dated November 3, 2020, the CCCR urged the District to prohibit use of all NWPs in the Santa Rosa Plain and other jurisdictional vernal pools.

USACE Response: The South Pacific Division does not believe that prohibiting use of all NWPs in the Santa Rosa Plain and other jurisdictional vernal pools in SPN is appropriate or necessary to ensure no more than individual and cumulative adverse environmental effects. The majority of vernal pools will no longer be subject to the Corps' regulatory authority under the NWPR, and any impacts to jurisdictional vernal pools that are permitted by NWP would be mitigated in accordance with General Condition 23.

In a letter to SPN dated November 3, 2020, the CCCR stated that the District should revoke use of NWPs in eelgrass beds, recovery units, and critical habitat for federally

listed species.

USACE Response: The South Pacific Division disagrees with the premise that any effects to eelgrass beds, recovery units, or critical habitat for listed species would result in more than minimal adverse environmental effects in SPN. Under General Condition 18 and Regional Condition 1.d., a PCN would be required for any projects permitted by NWP that might affect these resources, thereby ensuring that the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service are consulted regarding the individual and cumulative effects of these project and appropriate mitigation is required in accordance with General Condition 23.

In a letter to SPN dated November 3, 2020, the CCCR stated that the District should revoke use of NWPs for the placement of above grade fills in the 100-year floodplain.

USACE Response: General Condition 10 states, “The activity must comply with applicable FEMA-approved state or local floodplain management requirements.” The final 2021 NWP general conditions did not propose any changes to General Condition 10. General Condition 10 was last modified in the final rule for the 2007 NWPs published on March 12, 2007 (72 FR 11092). According to the comments section of the 2007 NWP program preamble, “requiring documentation of compliance with FEMA-approved standards is unnecessary for the purposes of the NWPs, because such requirements are more appropriately addressed through state and local construction authorizations.” (see 72 FR 11157). The South Pacific Division agrees that decisions regarding development within the floodplain are more appropriately made by FEMA, state, and local agencies. Therefore, elevation of all projects occurring within the 100-year floodplain to Standard Permits would not improve review of the project or reduce development within the 100-year floodplain.

In a letter to SPN dated November 3, 2020, the CCCR argues that the purpose of compensatory mitigation under the Nationwide Permit Program is to “buy-down” adverse impacts to minimal levels, and impacts are not actually minimized through compensatory mitigation because mitigation projects are largely unsuccessful at restoring aquatic resource functions and values. Therefore, the District should require mitigation be successfully completed before project construction to ensure functions and values are replaced and to avoid temporal losses of functions and values.

USACE Response: The South Pacific Division disagrees that the NWP Program relies solely upon compensatory mitigation to “buy-down” adverse impacts to minimal levels. The terms and conditions of the NWP Program holistically serve to ensure that adverse environmental impacts resulting from permitted activities are no more than minimal. Each NWP describes specific activities that would generally be considered to result in minimal impacts while providing the district engineer with the discretion to determine that some activities do not meet this minimal impact standard. Furthermore, independent of any requirements for

compensatory mitigation, General Condition 23 requires activities permitted by NWP to avoid and minimize both temporary and permanent adverse effects to waters of the U.S. to the maximum extent practicable at the project site. General Condition 23 further dictates that mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal. Therefore, compensatory mitigation is only one element of the NWP Program's strategy to ensure permitted activities result in no more than minimal adverse environmental effects.

The South Pacific Division also disagrees that it is necessary or prudent to require the full replacement of lost functions and values prior to project construction. The 2008 compensatory mitigation rule (33 CFR Part 332) requires the implementation of compensatory mitigation projects to be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts. For permittee-responsible mitigation, the permittee cannot commence work in waters of the United States until the district engineer approves the final mitigation plan with specific performance criteria that must be achieved. To account for the time lag between resource impacts and the replacement of lost functions and values, the 2008 rule indicates that the district engineer shall require, to the extent appropriate and practicable, additional compensatory mitigation to offset temporal losses of aquatic functions that will result from the permitted activity. Therefore, the requirement to fully replace lost functions and values prior to construction would constitute an undue and unnecessary regulatory burden on the permittee.

In a letter to SPN dated November 3, 2020, the CCCR recommended that the San Francisco District require mitigation for impacts to less than 1/10 acre of stream bed and revoke the proposal to "allow the district engineer to waive the requirement to provide compensatory mitigation for losses of greater than 1/10 acre of stream bed.

USACE Response: The South Pacific Division believes that it is appropriate to retain the discretionary authority of the district engineer to determine compensatory mitigation requirements for each individual project. General Condition 23 (Mitigation) of the final rule has been amended to require compensatory mitigation at a minimum one-for-one ratio for all losses of stream bed that exceed 3/100-acre and require preconstruction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. The mitigation required to achieve no more than minimal adverse effects depends upon the specifics of the proposed project, including the nature of the impacted stream bed.

In a letter to SPN dated November 3, 2020, the CCCR recommended that the San

Francisco District revoke 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. They cite the lack of specific guidelines for what constitutes “riparian areas.”

USACE Response: The South Pacific Division does not believe that it is necessary or prudent to prohibit the exclusive use of riparian compensatory mitigation. The San Francisco District and South Pacific Division have developed standard operating procedures for evaluating the ability of any given compensatory mitigation proposal to replace aquatic functions and services that would be lost or adversely affected by proposed project impacts. This evaluation includes an assessment of resource type, uncertainty of mitigation outcome, and temporal loss, among other factors (<http://www.spd.usace.army.mil/Missions/Regulatory/Public-Notices-and-References/Article/558934/final-regional-compensatory-mitigation-and-monitoring-guidelines/>). Though unlikely, SPN may determine on a case-by-case basis that the exclusive use of riparian compensatory mitigation effectively compensates for impacts to streams or open waters. Landscaping-type activities would not provide suitable compensatory mitigation for impacts to aquatic resources.

In a letter to SPN dated November 3, 2020, the CCCR recommended that the San Francisco District revoke changes to the NWP that propose removal of the PCN requirement for certain NWPs.

USACE Response: The South Pacific Division has added regional conditions that specify additional activities requiring a PCN in SPN, and we believe these additional PCN requirements are sufficient to account for specific resource concerns in the region. CCCR did not specify which changes to the PCN requirements of the NWPs concern them or suggest any specific regional conditions that require PCN notifications. The South Pacific Division does not believe it is appropriate or necessary to revoke all changes to the NWPs that alter PCN requirements.

In a letter to SPN dated November 3, 2020, the CCCR recommended that the San Francisco District add a regional condition requiring the applicant to provide evidence of avoidance and minimization and a discussion of the cumulative impacts of the project.

USACE Response: General Condition 32 already requires the applicant to provide a description of any proposed mitigation measures in the PCN, so a regional condition requiring evidence of avoidance and minimization would be redundant. Also, the district engineer, not the applicant, is responsible for evaluating the cumulative impacts of the project based upon the information required in the PCN.

In a letter to SPN dated November 3, 2020, the CCCR recommended that the San

Francisco District prohibit the use of riprap in areas adjacent to endangered species populations, refuges, special aquatic sites, and wetland areas that support woody vegetation.

USACE Response: The South Pacific Division does not believe it is necessary to prohibit the use of riprap in areas adjacent to endangered species populations, refuges, special aquatic sites, and wetland areas that support woody vegetation for the purpose of ensuring minimal impacts. Riprap can be an essential component of stream stabilization efforts in areas with altered hydrology where solely relying upon biotechnical approaches is infeasible. Therefore, completely prohibiting riprap could actually result in adverse environmental effects.

In a letter to SPN dated November 3, 2020, the CCCR recommended that the San Francisco District adopt a regional condition proposed by SPK in 2017 that required the applicant to delineate the limits of the authorized activity prior to initiation of construction.

USACE Response: The South Pacific Division believes that such a regional condition is unnecessary. First of all, delineating the limits of a construction site is a standard operating procedure for any construction contractor. Secondly, any construction beyond that approved in the NWP would be a violation of the permit terms and conditions, and the Corps would require appropriate corrective measures to remedy the situation. This provides a strong disincentive to conduct activities outside of the defined permit limits.

In a letter to SPN dated November 3, 2020, the CCCR recommended that the San Francisco District adopt a regional condition proposed by SPK in 2017 that required (a) the use of spawning quality gravel for temporary fill in waters of the U.S. supporting fisheries; (b) the placement of a horizontal marker to delineate the existing bottom elevation of waters to be temporarily filled; and (c) the restoration of waters temporarily filled to pre-project contours and conditions within 30 days of completing construction.

USACE Response: The South Pacific Division believes that General Condition 13, "Removal of Temporary Fill," is sufficient to ensure that impacts to aquatic resources from temporary fill are minimized and restored. Under General Condition 13, all project proponents are required to remove temporary fill in their entirety and return the site to pre-construction conditions. It is not necessary to prescribe how applicants can comply with such basic requirements of their NWP.

In a letter to SPN dated November 3, 2020, the CCCR recommended that the San Francisco District publish pre-construction notification to our website and provide a quarterly report that outlines data on specific NWP authorizations.

USACE 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, and there is no procedure for handling comments provided by the public in regard to general permit decisions. Summary information on the use of NWP's and their cumulative impacts to waters of the U.S. is provided in National and District decision documents which are made available on Corps' websites as soon as these documents are finalized.

In a letter to SPL dated November 3, 2020, the Gila River Indian Community recommended the term "affecting" be defined as follows: "Affecting" means causing a physical change to occur on tribal lands, including, but not limited to, changing the quantity, frequency, velocity, or quality of stormwater or surface water flows entering tribal lands; altering drainage patterns on tribal lands; or causing fill, sediment, or other materials to be transported onto tribal lands. Regulated activities occurring within 500 feet of a tribal boundary or within 1 river mile upstream of where a waterway or water body enters tribal lands, are presumed to affect tribal lands, and therefore require a PCN.

USACE response: In order to establish a clear and consistent approach across Corps districts, the South Pacific Division has determined the scope of a mandatory PCN requirement for tribal lands be limited to activities on tribal lands. Although the suggested modifications would improve the specificity of the term *affecting* tribal lands, applying these criteria to the complex and varied landscape and aquatic resources across the South Pacific Division would likely create more confusion in terms of how these criteria would apply. Applying this PCN requirement to activities *on* tribal lands provides a much clearer approach for applicants. The Corps makes every effort to consider potential effects of regulated activities on tribes during the permit review process. Additionally, actions requiring individual 401 Water Quality Certifications must also be reviewed by EPA to determine if any neighboring jurisdictions may be affected, which may provide an opportunity to address activities near tribal lands.

2.2 General Comments on Nationwide Permit 56

In a letter dated November 3, 2020, the CCCR recommended that the San Francisco District revoke NWP B because a determination of minimal effects cannot be made due to the many environmental complexities and potential far-reaching harm that could result from finfish mariculture projects.

USACE Response: At this time, the South Pacific Division does not believe it is necessary to revoke NWP B in the San Francisco District. The proposed NWP terms and conditions and Regional Conditions for SPN already effectively ensure that only minimal adverse effects on the aquatic environment, individually or cumulatively, are authorized by the NWP. The district engineer would review all proposed uses of this NWP and, when appropriate, would impose conditions to ensure no more than minimal adverse effects or would require project review

under a Standard Permit. Revoking this NWP at the regional level would not effectively safeguard against more than minimal impacts and would lead to increased SPN workload, less timely evaluation of proposals, and increased regulatory burden for the applicant.

2.3 Proposed Regional Conditions Applicable to NWP 56

2.3.1 SPK Proposed Regional Conditions

B. Activities Requiring Pre-Construction Notification

1. The permittee must submit a pre-construction notification (PCN) in accordance with General Condition 32, in the following circumstances:

e. For activities in waters of the U.S. that have the potential to adversely affect essential fish habitat (EFH), as designated by the Pacific Fishery Management Council, and for which there is no applicable National Marine Fisheries Service issued General Concurrence or Programmatic Consultation. The PCN shall include an EFH assessment and analysis of the effects of the action on EFH, in accordance with 50 C.F.R. § 600.920 (e). For Federal permittees, if a PCN is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the Magnuson-Stevens Fishery Conservation and Management Act.

2.3.1.1 Comments on SPK Proposed Regional Conditions

In a letter dated November 3, 2020, the Western States Petroleum Association (WSPA) and the American Petroleum Institute (API) recommended that proposed Regional Condition requiring a PCN for activities with “the potential to adversely affect” EFH (Regional Condition B.1.e.) be revised to require a PCN for activities that “would result in an adverse effect” to EFH.

USACE Response: The Magnuson-Stevens Fishery Conservation and Management Act requires federal agencies to consult with NOAA Fisheries with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that *may adversely affect* any essential fish habitat (EFH) identified under the Act. Given that it is the responsibility of the federal agency to determine whether the federal action may adversely affect EFH, it is essential that the federal agency be provided with the opportunity to evaluate any activities with the potential to adversely affect EFH, not just those that the applicant determines would result in an adverse effect to EFH. Therefore, the proposed language stands.

2.3.2 SPN Proposed Regional Conditions

B. Activities Requiring Pre-Construction Notification:

2. Activities that have the potential to adversely affect Essential Fish Habitat (EFH), as designated by the Pacific Fishery Management Council. *The PCN shall include an EFH assessment and analysis of effects of the action on EFH, in accordance with 50 C.F.R. § 600.920 (e). For Federal permittees, if a PCN is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the Magnuson-Stevens Fishery Conservation and Management Act.*

2.3.2.1 Comments on SPN Proposed Regional Conditions

In a letter dated November 3, 2020, the Western States Petroleum Association (WSPA) and the American Petroleum Institute (API) recommended that the proposed Regional Condition requiring a PCN for activities with “the potential to adversely affect” EFH (Regional Condition B.2.) be revised to require a PCN for activities that “would result in an adverse effect” to EFH.

USACE Response: The Magnuson-Stevens Fishery Conservation and Management Act requires federal agencies to consult with NOAA Fisheries with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that *may adversely affect* any essential fish habitat (EFH) identified under the Act. Given that it is the responsibility of the federal agency to determine whether the federal action may adversely affect EFH, it is essential that the federal agency be provided with the opportunity to evaluate any activities with the potential to adversely affect EFH, not just those that the applicant determines would result in an adverse effect to EFH. Therefore, the proposed language stands.

2.3.3 SPL Proposed Regional Conditions

5. The permittee must submit a pre-construction notification (PCN) in accordance with General Condition 32 in the following circumstances:

a. All perennial waterbodies and special aquatic sites throughout the Los Angeles District as well as intermittent waters within the State of Arizona for any regulated activity that would result in a loss of waters of the United States.

b. All areas designated as Essential Fish Habitat (EFH) by the Pacific Fishery Management Council (PFMC). For non-federal permittees, if the NWP activity might have the potential to adversely affect EFH as designated by the PFMC, the PCN must include an EFH assessment and analysis of the effects of the action on EFH, in accordance with 50 C.F.R. § 600.920 (e). If the site is in estuarine or marine waters and contains eelgrass (*Zostera marina* or *Z. pacifica*) the EFH assessment shall also include an eelgrass survey according to the methods described in the most recent version of the California Eelgrass Mitigation Policy

published by the National Marine Fisheries Service. For NWP activities that require pre-construction notification, Federal permittees must provide the documentation demonstrating compliance with the Magnuson-Stevens Fishery Conservation and Management Act. Adverse effects to EFH are defined at 50 C.F.R. § 600.910 (a).

2.3.3.1 Comments on SPL Proposed Regional Conditions

In a letter dated November 5, 2020, the National Marine Fisheries Service recommended revising proposed Regional Condition 5a (PCN for losses in perennial streams and special aquatic sites) be amended to include all intermittent waters within designated critical habitat for steelhead trout (*Oncorhynchus mykiss*).

USACE Response: General Condition 18 (Endangered Species) requires non-federal permittees to submit a PCN if any listed species or designated critical habitat might be affected or is in the vicinity of the activity. Federal permittees are expected to follow their own procedures for complying with the requirements of the ESA. Therefore, the recommended modification to the proposed Regional Condition 5a to include areas within designated critical habitat for steelhead trout is unnecessary.

In a letter dated October 26, 2020, the EPA recommended expanding SPL's proposed Regional Condition 5a, requiring submission of a PCN for any proposed losses of perennial streams and special aquatic sites, and for losses of any intermittent waters in AZ, to include intermittent waters in all of SPL.

USACE Response: The expansion of the 2017 SPL Regional Condition 4a from the 2012 version to include pre-construction notification for losses of intermittent waters within AZ continues to be sufficient to ensure the effects of the use of the 16 revised NWPs would be minimal, both individually and cumulatively.

Much of the Los Angeles District is contained within an arid to semi-arid ecoregion where special aquatic sites and perennial waters are limited in extent yet provide important benefits for wildlife, water quality and recreation among other functions. This has direct implications on the values associated with the area's aquatic resources. There is a direct correlation between the aquatic resource value and the hydrology. The higher aquatic values and diversity are typically associated with a hydrological source of increased frequency, duration and reliability. Other factors such as soil characteristics, topography and human influences have implications on aquatic resource values, but in most instances, the resources with closer proximity to surface and/or ground water possess the higher and more diverse values. In recognition of this, the Los Angeles District has determined, both in 2017 and now, additional protection is necessary for the limited aquatic resources possessing permanent or semi-permanent hydrology, to include perennial waters and special aquatic sites. Furthermore, the loss of approximately 90% of wetland resources within California and the general scarcity of special aquatic sites in California's southern

coastal, inland, and desert regions in particular indicate the need for review of regulated activities that may impact these resources and to possibly require compensatory mitigation to ensure adverse impacts are no more than minimal, both individually and cumulatively.

The terms and conditions of the NWP's at the national level are designed to ensure a baseline level of constraints on the program to ensure minimal impacts, but it is not axiomatic that those conditions will adequately address regional differences in aquatic resource functions and services across the United States, which vary widely. Therefore, division engineers may suspend, modify or revoke certain NWP's through regional conditions to ensure that, on a regional basis, the NWP's do not result in more than minimal impacts, both individually and cumulatively. Through the mandatory PCN process, the Los Angeles District would review the proposed discharges of dredged or fill material into special aquatic sites and perennial streams 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 reduce impacts to the minimal effects threshold, or exercise discretionary authority and require an individual permit for those activities that may result in more than minimal individual and cumulative adverse effects.

The Corps recognizes the need to balance protection of aquatic resources with the need to manage the regulatory program in an efficient and effective manner that is not unduly burdensome to the regulated public. With final Regional Condition 5d, the Los Angeles District has recognized the importance of these resources and the need to provide an enhanced level of protection through PCN review, while acknowledging that not all activities require such review. Regional Condition 5d excludes actions which do not result in a loss of waters and characteristically have minimal impacts. Unless required to comply with other regional or general conditions, such actions may proceed without notification. The proposed regional condition will maintain the benefit of avoiding excessive permit review for actions with clearly minimal impacts, while ensuring these important aquatic resources are adequately protected.

3.0 Alternatives

3.1 No Regional Conditions

The regional conditions serve to ensure that the NWP's only authorize activities that result in no more than minimal individual and cumulative adverse environmental effects within a given region. Also, the regional conditions ensure compliance with all applicable federal laws and regulations. Without regional conditions, Districts may be forced to prohibit all uses of certain NWP's, thereby unnecessarily increasing regulatory burdens and applicant costs.

The specific outcomes of not imposing the Final Regional Conditions for the State of California are described in *italics* under each regional condition in the below text.

1. The permittee shall submit a pre-construction notification (PCN) for all 2021 NWP's, in accordance with General Condition 32, in the following circumstances:

d. Activities that have the potential to adversely affect Essential Fish Habitat (EFH), as designated by the Pacific Fishery Management Council. The PCN shall include an EFH assessment and analysis of effects of the action on EFH, in accordance with 50 C.F.R. § 600.920 (e). For Federal permittees, if a PCN is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the Magnuson-Stevens Fishery Conservation and Management Act.

Without this regional condition, the California Districts would be unable to ensure compliance with the Magnuson-Stevens Fishery Conservation and Management Act, which requires the Corps to consult with the National Marine Fisheries Service for activities that may adversely affect EFH.

5. In the *Los Angeles District*, the permittee shall submit a pre-construction notification (PCN) for all 2021 NWP's, in accordance with General Condition 32, in the following circumstances:

d. Activities that would result in a loss of waters of the United States within all perennial waterbodies and special aquatic sites.

Without Regional Condition 5d there could be more than minimal impacts to these resources within the Los Angeles District. Regional Condition 5d applies only to the Los Angeles District area within California. Much of the Los Angeles District is contained within an arid to semi-arid ecoregion where special aquatic sites and perennial waters are limited in extent yet provide important benefits for wildlife, water quality and recreation among other functions. This has direct implications on the values associated with the area's aquatic resources. There is a direct correlation between the aquatic resource value and the hydrology. The higher aquatic values and diversity are typically associated with a hydrological source of increased frequency, duration and reliability. Other factors such as soil characteristics, topography and human influences have implications on aquatic resource values, but in most instances, the resources with closer proximity to surface and/or ground water possess the higher and more diverse values. In recognition of this, the Los Angeles District has determined, both in 2017 and now, additional protection is necessary for the limited aquatic resources possessing permanent or semi-permanent hydrology, to include perennial waters and special aquatic sites. Furthermore, the loss of approximately 90% of wetland resources within California and the general scarcity of special aquatic sites in California's southern coastal, inland, and desert regions in particular indicate the need for review of regulated activities that may impact these resources and to possibly require compensatory

mitigation to ensure adverse impacts are no more than minimal, both individually and cumulatively.

3.2 Alternative or Additional Regional Conditions

The South Pacific Division considered imposing additional or alternative PCN requirements and NWP revocations for specific categories of activities and geographic areas. Where specific recommendations for additional or alternative regional conditions were received, it was almost always determined that the final NWP terms and conditions and the final regional conditions effectively ensure that only minimal individual and cumulative adverse effects on the environment are authorized (see Section 2.0). Further conditioning use of the NWPs would lead to increased District workload, less timely evaluation of proposals, and increased regulatory burden for the applicant without a corresponding increase in resource protection.

Many of the regional conditions applied to the 2017 NWPs were not carried forward with the 2021 NWPs. Additionally, some of the regional conditions initially proposed for inclusion in the 2021 NWPs were eliminated from the final regional conditions because they were no longer considered justified, were redundant with the NWP General Conditions, or consisted of blanket information requirements that are more appropriate to require on a case-by-case basis.

The South Pacific Division has simplified the regional conditions where possible so that the NWPs can be implemented more consistently, with lower costs, and with no decline in environmental protection. Additional regional conditions, beyond those described above, were not recommended for any of the NWPs. The South Pacific Division believes the current general and regional conditions provide the appropriate safeguards to ensure the 2021 NWPs do not authorize activities with more than minimal adverse effects on the aquatic environment. In addition, the submittal of a PCN in certain circumstances will allow the California Districts to review activities to ensure the effects are no more than minimal.

4.0 Section 7 of the Endangered Species Act

4.1 General Considerations

General Condition 18 of the NWP program ensures that all activities authorized by NWP are in compliance with the Endangered Species Act (ESA). Section 7 of the ESA requires federal agencies to consult with the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) on any federal actions which “may affect” species listed under the ESA or their designated critical habitat. No activity may be authorized by NWP until this consultation process is completed. Under General Condition 18, non-federal permittees are required to submit a PCN if any listed species or designated critical habitat might be affected or is in the vicinity of the activity or if the activity is located in designated critical habitat; the Corps is then able to complete any

required consultation with the appropriate Service (USFWS or NMFS) pursuant to Section 7. Federal permittees are required to provide the Corps with the appropriate documentation to demonstrate compliance with Section 7 of the ESA. This process for fulfilling Section 7 obligations for projects authorized by NWP has successfully safeguarded federally-listed species within the California Districts and no changes are believed to be necessary.

Each California District coordinated with the USFWS and NMFS in their area of responsibility as part of the 2021 NWP reissuance process. Each District's coordination process is described below:

- SPK: SPK sent letters to the USFWS, Pacific Southwest Region, and NMFS, West Coast Region, on October 5, 2020, requesting comments on the proposed 2021 NWPs, including SPKs regional conditions, the potential for revocation or prohibition of the NWPs in specific geographic areas, and the development of coordination and/or consultation procedures for NWP PCNs. No responses or comments were received.
- SPN: SPN sent letters to the regional offices of the USFWS and NMFS on September 18, 2020, requesting coordination to determine whether there are new or modified regional conditions that should be added in SPN to protect listed species. None of the offices requested additional regional conditions or expressed any concerns with the NWP program.
- SPL: SPL sent letters to regional offices of the USFWS and NMFS on September 24, 2020. The Ventura Fish and Wildlife Office responded in an email dated October 20, 2020 requesting additional information on the commenting process and whether streams could be identified for regional conditions. The Ventura FWO was unable to provide specific comments following an email exchange attempting to schedule a more detailed discussion.

Two separate teleconferences were held with staff from the Protected Resources Division of the NMFS Long Beach Office to discuss the proposed rule and opportunities for NMFS input regarding steelhead trout and Essential Fish Habitat (EFH), respectively. NMFS followed up the former discussion with comment letter to the public notice issued by SPL, which is addressed in Section 2 of this supplement. As a follow up to the discussion on EFH, NMFS staff provided recommendations in emails dated November 16 and November 19 (following closure of the PN comment period) recommending modifying proposed regional conditions or adopting new regional conditions to expand the information requirements that should accompany projects affecting EFH and other NMFS-managed protected resources. With regard to EFH, NMFS recommended including the following language in SPL's regional conditions:

- *For NWP activities that require pre-construction notification, Federal permittees must provide the documentation demonstrating compliance*

with the Magnuson-Stevens Fishery Conservation and Management Act. Adverse effects to EFH are defined at 50 C.F.R. § 600.910 (a).

- *If the project involves bottom disturbing activities in subtidal waters within any bay, harbor, estuary, or lagoon south of Point Conception, then a *Caulerpa taxifolia* survey should be conducted and reported as described in the most current version of the *Caulerpa Control Protocol (CCP)*, unless otherwise exempted by the CCP.*
- *If the project site is in estuarine or marine waters and may support eelgrass (*Zostera marina* or *Z. pacifica*), the EFH assessment shall also include an eelgrass survey according to the guidelines described in the most recent version of the *California Eelgrass Mitigation Policy* published by the *National Marine Fisheries Service*. If adverse effects to eelgrass are expected to occur due to project activities, the EFH assessment should also include a mitigation plan to ensure no net loss in eelgrass function.*
- *If the project site is in marine waters in the vicinity of rocky reef and/or kelp habitat, the EFH assessment shall also include a map delineating the project boundary and associated effects in relation to these habitats. In addition, the EFH assessment should include any proposed mitigation to address anticipated effects.*

Separately, NMFS provided the following recommended regional condition regarding protected abalone species:

- *If the NWP activity may affect ESA-listed abalone (black abalone; white abalone) and/or designated critical habitat for black abalone, then the PCN must include an ESA assessment and analysis of the effects of the action on ESA-listed abalone and/or designated critical habitat for black abalone.*
- *If the project involves activities with potential effects on intertidal to shallow subtidal rocky habitat, then the ESA assessment shall include a survey of black abalone and evaluation of black abalone critical habitat according to the guidance provided by the *National Marine Fisheries Service*.*
- *If the project site is in the vicinity of rocky intertidal and/or shallow subtidal habitat, the ESA assessment shall include a map delineating the project boundary and associated effects in relation to these habitats.*
- *If the project involves bottom disturbing activities in subtidal waters in the vicinity of rocky reef and/or kelp habitat south of Point Conception, then the ESA assessment shall include a survey of hard substrates for white abalone according to the guidance provided by the *National Marine Fisheries Service* and a map delineating the project boundary and associated effects in relation to these habitats.*

After considering these recommendations, SPL concluded the statewide regional condition requiring submission of a PCN for activities affecting EFH, including

provisions for providing an EFH assessment and analysis of effects, was the appropriate means to address EFH within the context of the 2021 NWP. Because the specific issues raised by NMFS extend beyond the NWP program, they would be more appropriate to address these issues through other means such as the development of Standard Local Operating Procedures between SPL and NMFS or the development of EFH programmatic concurrence(s).

4.2 Local Operating Procedures for Section 7 of the Endangered Species Act

No specific local operating procedures for ESA consultations have been developed by the California Districts. However, the California Districts have several programmatic ESA consultations with the USFWS and NMFS. A list of active programmatic Section 7 consultations is provided in Tables C-1 and C-2 of the January 2, 2021, *Biological Assessment for the Proposed Issuance and Reissuance of the 2021 Nationwide Permits*, which is available on the Corps Headquarters Regulatory Program website.

The California Districts will ensure that activities authorized by NWP comply with the ESA by reviewing all PCNs for possible effects to federally listed species and designated critical habitat. Information on federally listed species in the California Districts is available through the California Natural Diversity Database, county species lists, reports provided by the applicant, recovery plans, biological opinions, and institutional knowledge. If the District determines that a proposed activity will have “no effect” on a federally listed species, species proposed for listing, or critical habitat, then the District is not required to initiate consultation with the USFWS or NMFS and will proceed to complete the PCN evaluation. If the District determines that a proposed project “may affect but is not likely to adversely affect” a federally listed species, species proposed for listing, or critical habitat and that the Corps is the lead federal agency, then the District will initiate informal consultation in writing with the appropriate Service and request a written concurrence with the District’s determination. If the District determines that a proposed project “may affect” or “may affect and is likely to adversely affect” a federally listed species, species proposed for listing, or critical habitat and that the Corps is the lead federal agency, then the District initiates formal consultation with the appropriate Service. Where a project-specific informal or formal consultation is required, the District will notify the applicant that construction may not proceed until ESA consultation is completed and the District issues a written authorization. If the District determines that a proposed project is covered under an existing programmatic ESA consultation, the District implements any procedures for confirming that the programmatic consultation satisfies the Corps’ consultation requirements for the project prior to providing written authorization to the applicant. If another federal agency is the lead for complying with Section 7 of the ESA, no authorization is issued until the District reviews the lead agency’s compliance documentation to ensure that it is sufficient to confirm Section 7 compliance for the Corps’ action and additional consultation is not necessary.

SPK utilizes their March 2018, *ESA Information Guidelines for the Regulatory Program*, which provides instructions to permittees on the information that is necessary to ensure

compliance with the ESA. This information is available on SPK's website and is provided to permittees when necessary.

5.0 Section 106 of the National Historic Preservation Act

5.1 General Considerations

General Condition 20 of the NWP program ensures that all activities authorized by NWP are in compliance with the National Historic Preservation Act (NHPA). Section 106 of the NHPA requires federal agencies to consult with the appropriate consulting parties identified under 36 C.F.R. § 800.2(c) on any federal action that may have the potential to cause effects to properties listed or eligible for listing in the National Register of Historic Places (NRHP). No activity may be authorized by NWP until this consultation process is completed. Under General Condition 20, non-federal permittees are required to submit a PCN if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the NRHP, including previously unidentified properties; the Corps is then able to complete any required consultation with the appropriate consulting parties (e.g., the State Historic Preservation Officer (SHPO)) pursuant to Section 106. Federal permittees are required to provide the Corps with the appropriate documentation to demonstrate compliance with Section 106 of the NHPA. This process for fulfilling Section 106 obligations for projects authorized by NWP has successfully safeguarded historic properties within the California Districts and no changes are believed to be necessary.

5.2 Local Operating Procedures for Section 106 of the National Historic Preservation Act

No specific local operating procedures for National Historic Preservation Act (NHPA) consultations have been developed by the California Districts. In accordance with Appendix C of 33 C.F.R. Part 325 and 36 C.F.R. Part 800, implementing procedures for complying with Section 106 of the NHPA, as amended, 54 U.S.C. § 306101, the California Districts ensure that activities authorized by NWP comply with the NHPA by reviewing all applications for possible effects on historic properties, including previously unidentified historic properties. If the project is determined to have no potential to affect historic properties, the Section 106 process is complete. If the project might have the potential to affect historic properties, including previously unidentified properties, then the permittee is required to provide a cultural resources inventory. At a minimum, the inventory is required to include a records search of the California Historical Resources Information System and a pedestrian site survey of the permit area by a qualified archaeologist. Any cultural resources identified in the permit area are required to be recorded and evaluated for eligibility to the NRHP. If the resources are eligible to the NRHP, an effects analysis is required, and any adverse effects must be minimized and mitigated.

The California Districts complete a Section 106 consultation with the SHPO and any other consulting parties for all projects that may have the potential to cause effects to properties listed or eligible for listing. The applicant is notified that the activity cannot be verified under the NWP until all Section 106 requirements have been satisfied. As part of the Section 106 consultation process, the California Districts request a Sacred Lands File search and Native American contacts list from the Native American Heritage Commission (NAHC), and inquiry letters are sent to all of the tribal contacts identified. Any recommendations for mitigation measures received from the tribes are considered and incorporated as special conditions to the NWP authorization, if appropriate.

If the Corps makes a determination of “no historic properties affected” or “no adverse effects to historic properties”, the consulting parties are asked to provide written concurrence with the finding of no effect or no adverse effect to historic properties for the proposed undertaking. If adverse effects to historic properties are identified, the California Districts work with the consulting parties to development measures to minimize and mitigate those effects, and the permittee is required to implement the measures as a special condition of the NWP authorization. Any Memorandum of Agreement (MOA) or Programmatic Agreement (PA) required for mitigation of adverse effects to historic properties is included as a special condition of any associated NWP verification. Alternatively, the district engineer may assert discretionary authority to require an individual permit for the proposed activity and conduct Section 106 consultation through the individual permit process.

SPK utilizes their March 24, 2014, *Guidelines for Compliance with Section 106 of the National Historic Preservation Act*, which provides instructions to permittees on the necessary minimal information required in a PCN to ensure compliance with the NHPA. This information is available on SPK’s website and is provided to permittees when necessary.

6.0 Government-to-Government Consultation with Tribes

6.1 Consultation Summary

On September 24, 2020, the Deputy Commanding General for Civil and Emergency Operations issued guidance for conducting government-to-government consultation with tribes on the proposed 2021 NWPs. Each District sent letters to the federally recognized tribes in their area of responsibility to initiate consultation on the 2021 NWPs, including regional conditions, the potential for suspension or revocation of the NWP in specific geographic areas, and the development of coordination or consultation procedures for NWP PCNs. The following government-to-government consultations occurred in the California Districts:

- SPK:
 - By letter of September 28, 2020, received via email by Regional Permit Specialist (b) (6), Mr. James Kinter, THPO for the Yocha Dehe

Wintun Nation, notified SPK that they have a cultural interest in the “project” and would like to continue to receive updates as the “project” progresses. No specific comments on the proposed 2021 NWP were received. As requested, on January 13, 2021, SPK sent a public notice, via email, to Ms. Kristin Jensen, Administrative Assistant for the Yocha Dehe Wintun Nation, announcing the publication of the Final 2021 NWPs in the Federal Register. No further responses have been received from the tribe to date.

- By letter of October 22, 2020, received via email by SPK Tribal Liaison (b) (6), Mr. Daniel Fonseca, THPO for the Shingle Springs Band of Miwok Indians replied that the tribe would like to be added as a consulting party in identifying any Tribal Cultural Properties (TCPs) that may exist within the “projects” Area of Potential Effect, and requested any and all completed records searches and/or surveys that were done in/around the “project” area, including any archaeological and cultural reports. As a follow-up, SPK held a virtual meeting with the tribes Site Protection Manager, Kara Perry, to discuss the tribe’s comments and/or concerns with proposed 2021 NWPs and associated regional conditions. Ms. Perry explained that she was not familiar with the Corps’ NWP Program and would like more information about it so that she could review it and comment, if necessary. Ms. Perry also requested to be added to the SPK public notice list so that she would receive future notices regarding the 2021 NWPs. SPK added Ms. Perry to their public notice recipient list and sent her additional information regarding the NWP Program, including a copy of the Federal Register notice and proposed regional conditions. No further responses have been received from the tribe to date.
- By email of November 5, 2020, received by SPK Tribal Liaison (b) (6), United Auburn Indian Community, Cultural Regulatory Specialist, Ms. Anna Starkey, replied that the tribe would like to consult and comment on the Corps’ NWP Program and would review the documents SPK provided. No further comments were received; thus, on January 14, 2021, (b) (6) followed-up with the tribe, via email, to deliver additional information, including the Federal Register notice of the final 2021 NWPs. Ms. Anna Starkey responded, via email, stating they would review the Federal Register notice and keep it in their files. No further responses have been received from the tribe to date.
- SPN:
 - By email of October 8, 2020, Ms. Janet Eidsness, Tribal Historic Preservation Officer (THPO) for Blue Lake Rancheria, requested government-to-government consultation on behalf of her tribe, Bear River Band, and Wiyot Tribe. In response to this request, a virtual meeting was held on November 4, 2020. Meeting attendees included the Lt. Col. (b) (6) (District Engineer), Major (b) (6) (Deputy District

Engineer), (b) (6) (Regulatory Chief), (b) (6) (San Francisco District Tribal Liaison), (b) (6) (Regulatory North Branch Chief), (b) (6) (Regulatory Project Manager), (b) (6) (Regulatory Project Manager), Chairperson Ted Hernandez (Wiyot Tribe), and Janet Eidsness. A presentation was provided to give an overview of the Regulatory program, the NWP program, and compliance with Section 106 and tribal trust responsibilities under the NWP program. Ms. Eidsness expressed concerns regarding the Regulatory Division's technical expertise in the field of archaeology and the limited scope of the Corps-defined APE. We discussed SPN's authority to draft regional conditions and how the tribes could provide suggested regional conditions to influence SPN's implementation of the NWP program. The meeting ended with our agreeing to send the proposed District regional conditions and the presentation to the tribes, and the tribes would then provide recommendations back to us. No response has been received from the tribes to date.

- By email of October 15, 2020, Mr. Don Barnes, Director of the Office of Self-Governance for the Yurok Tribe, requested government-to-government consultation with SPN. The email contained an official letter signed by Chairman Joseph James, dated October 14, 2020. Ms. (b) (6), San Francisco District Tribal Liaison, contacted Mr. Barnes to schedule a meeting between SPN and the Yurok Tribe. Following ongoing attempts to schedule a meeting, Mr. Barnes confirmed that the Tribe was foregoing their request for consultation on the NWP reissuance in conservation with (b) (6) on November 24, 2020.
- By letter of November 16, 2020, submitted via email to Regulatory Chief (b) (6), Ms. Sally Peterson, Tribal Council Vice-Chairwoman and THPO for the Middletown Rancheria of Pomo Indians of California, requested government-to-government consultation with SPN. The letter outlined the Tribe's concerns with the short comment period provided on the "Proposal to Reissue and Modify Nationwide Permits," the proposed changes to General Condition 17, and the removal of the definition of protected tribal resources. They objected to the removal of terms defining tribal rights, protected tribal resources, and tribal lands, and stated that replacing "no more than minimal adverse effects" with "will not impair" diminishes the clarity of the condition. SPN attempted to schedule a meeting with Ms. Peterson without success. After some initial correspondence to select a meeting date, Ms. Peterson stopped responding to SPN's emails and phone calls. After multiple attempts to contact Ms. Peterson, SPN considered the consultation request withdrawn.
- SPL:
 - By letter of October 16, 2020, Stephen Roe Lewis, Governor of the Gila

River Indian Community (GRIC) requested government-to-government consultation with SPL. A virtual meeting was held on November 20, 2020 with members of the tribe, their internal and external legal counsel, SPL Regulatory Division staff and the District Commander. As a tribe with recently granted 401 certification authority, and in light of the new 401 rule, the tribe requested clarification of the process for certifying the 2021 NWP. Additionally, GRIC expressed concerns about being notified of actions that may affect tribal interests and highlighted a recent example of highway project that required last-minute changes to address tribal concerns. GRIC approved of the proposed SPL regional condition for projects affecting tribal lands and requested additional clarification to define the term *affecting*. Additionally, GRIC recommended all tribes be provided copies of PCNs for projects affecting their tribal lands (see response to comments section 2.3.3.1).

- By letter dated October 12, 2020, the Rincon Band of Luiseño Indians requested government-to-government consultation. Following a discussion with the SPL Regulatory Division Chief, (b) (6), the tribe determined government-to-government consultation was not necessary and provided an email requesting clarification of specific elements of the 2021 NWP and proposed regional conditions. The tribe was provided strikethrough versions of the proposed NWP and regional conditions indicating changes from the 2017 versions of each. An additional exchange of emails responding to questions from the tribe occurred on November 9 and 13, 2021. The tribe did not request further information or government-to-government consultation regarding the 2021 NWP.

6.2 Local Operating Procedures for Protecting Tribal Rights

No specific local operating procedures for the protection of tribal rights have been developed by the California Districts. SPK utilizes their December 12, 2014, *Tribal Nation Communication and Coordination Procedures (QMS# 12972-SPK)*, to instruct project managers on the necessary procedures in which tribal consultations are performed to ensure consistency across SPK. Regional Condition 1.b. requires the submission of a PCN for all activities resulting in a discharge of dredged or fill material in waters of the U.S. on Tribal Lands, thereby allowing the California Districts to ensure the protection of tribal rights.

7.0 Essential Fish Habitat

Regional Condition 1.d. requires the submission of a PCN, including an Essential Fish Habitat (EFH) assessment and analysis of effects of the action on EFH, for all activities that have the potential to adversely affect EFH, thereby ensuring that the District is provided with the opportunity to conduct any required consultations with the NMFS

pursuant to Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. § 1855(b). If the District determines that a proposed project is covered under an existing programmatic EFH consultation, the District implements any procedures for confirming that the programmatic consultation satisfies the Corps' consultation requirements for the project prior to providing written authorization to the applicant. If a PCN is required, Regional Condition 1.d. also requires the Federal permittees to provide the District with the appropriate documentation to demonstrate compliance with the MSA. The California Districts also utilize the South Pacific Division's, January 13, 2015, *Regulatory Program Essential Fish Habitat (EFH) Procedures* (QMS# 12504-SPD), to instruct project managers on the necessary procedures in which EFH consultations are performed to ensure consistency across the Division. These procedures guarantee that the NMFS is consulted regarding any activities that may adversely affect EFH and provided with the opportunity to offer EFH Conservation Recommendations. The California Districts generally require permittees to implement EFH Conservation Recommendations as a special condition of the NWP authorization unless the Corps does not have the regulatory authority to require the recommendations.

8.0 Supplement to the Analyses in the National Decision Document

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

In addition to the discussion in the national decision document for this NWP, the California Districts have considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

- (a) Conservation: Same as discussed in the national decision document.
- (b) Economics: Same as discussed in the national decision document.
- (c) Aesthetics: Same as discussed in the national decision document.
- (d) General environmental concerns: 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.
- (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.
- (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.

8.2 Regional Cumulative Effects Analysis

This section discusses the anticipated cumulative effects of the use of NWP 56 in California during the period this NWP is in effect.

The cumulative effects of this NWP are dependent upon the number of times the NWP is anticipated to be used in the region and the quantity and quality of waters of the United States anticipated to be impacted as a result of the activities authorized by this NWP (see 40 CFR 230.7(b)). The cumulative effects of this NWP are also dependent on compensatory mitigation that may be required during the period this NWP is in effect, when compensatory mitigation offsets impacts to waters of the United States authorized by this NWP.

Based on reported past use, NWP 56 has never been used in California. However, California does have the potential for finfish mariculture activities. Therefore, NWP 56 could potentially be used approximately 1 time per year, resulting in permanent impacts to approximately 0.1 acre of jurisdictional waters.

In California, we anticipate that compensatory mitigation will be required for any loss of waters of the United States greater than 0.1 acre. The verified activities that do not

require compensatory mitigation will have been determined by District Engineers to result in no more than minimal individual and cumulative adverse environmental effects without compensatory mitigation. The demand for these types of activities could increase or decrease over the five-year duration of this NWP.

Based on these annual estimates, we estimate that up to 5 activities could be authorized over a five-year period until this NWP expires, resulting in permanent impacts to approximately 0.5 acre of jurisdictional waters in California. Approximately 0.5 acre of compensatory mitigation would be required to offset those impacts. Compensatory mitigation is the restoration (re-establishment or rehabilitation), establishment, enhancement, and/or preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved. [33 CFR 332.2]

Given the cumulative effects discussed above, the South Pacific Division has determined that the terms and conditions for NWP 56, including State of California specific regional conditions as described in Section 9.1 below, will ensure adverse environmental effects are no more than minimal, individually, and cumulatively.

9.0 List of Final Corps Regional Conditions for California:

To simplify the readability of the regional conditions for the regulated public, the California Districts have made a broad statement that the regional conditions cover all 2021 NWP activities, rather than listing out which NWPs they specifically apply to. Regional conditions not applicable to the NWP will not be used.

1. The permittee shall submit a pre-construction notification (PCN) for all 2021 NWPs, in accordance with General Condition 32, in the following circumstances:
 - a. Activities involving new bank stabilization that do not incorporate bioengineering techniques. Bioengineering techniques include using live plants alone or in combination with dead or inorganic materials, including rock, sand, or gravel;
 - b. Activities resulting in a discharge of dredged or fill material in waters of the U.S. on Tribal Lands;
 - c. Activities involving the permanent channelization, realignment, or relocation of streams; and,
 - d. Activities that have the potential to adversely affect Essential Fish Habitat (EFH), as designated by the Pacific Fishery Management Council. The PCN shall include an EFH assessment and analysis of effects of the action on EFH, in accordance with 50 C.F.R. § 600.920 (e). For Federal permittees, if a PCN is required for the proposed activity, the Federal

permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the Magnuson-Stevens Fishery Conservation and Management Act.

2. In the desert regions of Los Angeles District (*USGS Hydrologic Unit Code accounting units: Lower Colorado -150301, Northern Mojave-180902, Southern Mojave-181001, and Salton Sea-181002*), the use of NWP 12, 21, 29, 39, 40, 42, 43, 44, 50, 51, 52, 57 and 58 resulting in greater than 0.10-acre loss of wetlands, mudflats, vegetated shallows, or riffle and pool complexes, as defined at 40 CFR Part 230.40-45, is prohibited.
3. In the Los Angeles District, all 2021 NWP's are revoked within the Murrieta Creek and Temecula Creek watersheds in Riverside County, California, resulting in a loss of waters of the United States greater than 0.25 acre.
4. In the Los Angeles District, all 2021 NWP's are revoked within the San Diego Creek Watershed and San Juan Creek/Western San Mateo Creek Watersheds in Orange County, California.
5. In the *Los Angeles District*, the permittee shall submit a pre-construction notification (PCN) for all 2021 NWP's, in accordance with General Condition 32, in the following circumstances:
 - a. Activities that would result in a loss of waters of the United States within the Murrieta and Temecula Creek watersheds in Riverside County, California; and,
 - b. Activities that would result in a loss of waters of the United States within Santa Clara River watershed in Los Angeles and Ventura County, California, including but not limited to Aliso Canyon, Agua Dulce Canyon, Sand Canyon, Bouquet Canyon, Mint Canyon, South Fork of the Santa Clara River, San Francisquito Canyon, Castaic Creek, Piru Creek, Sespe Creek and the main-stem of the Santa Clara River; and,
 - c. Activities that would result in a loss of waters of the United States within all watersheds in the Santa Monica Mountains in Los Angeles and Ventura County, California, bounded by Calleguas Creek on the west, by Highway 101 on the north and east, and by Sunset Boulevard and Pacific Ocean on the south; and,
 - d. Activities that would result in a loss of waters of the United States within all perennial waterbodies and special aquatic sites.
6. In the *San Francisco District*, the use of NWP 29 and 39 is prohibited within the San Francisco Bay diked baylands (undeveloped areas that are currently behind levees and are within the historic margin of the Bay, i.e., areas on the Nichols

and Wright map below the 5-foot contour line, National Geodetic Vertical Datum (NGVD) (Nichols and Wright, 1971)).

7. In the *San Francisco District*, the permittee shall submit a pre-construction notification (PCN), in accordance with General Condition 32, for all 2021 NWP activities that will take place in waters or wetlands of the U.S. that are within the San Francisco Bay diked baylands.
8. In the *Sacramento District*, the use of any 2021 NWP authorizing the discharge of dredged or fill material in peatlands containing histosols, including bogs and fens, is prohibited.

10.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

10.1 Water Quality Certifications

Pursuant to Section 401 of the Clean Water Act, a water quality certification issued by the certifying authority (state, authorized tribe, or EPA), or a waiver thereof, is required for activities authorized by NWPs that may result in a discharge of dredged or fill material into waters of the United States. The procedures to ensure that the NWPs comply with this law are described in 33 C.F.R. § 330.4(c). NWPs 55 & 56 authorize structures in marine and estuarine waters only pursuant to Section 10 of the RHA; therefore, they will never require 401 certification.

10.2 Coastal Zone Management Act consistency determinations

NWPs that authorize activities within or affecting the coastal zone in SPN and SPL must be certified by the California Coastal Commission (CCC) or the San Francisco Bay Conservation and Development Commission (BCDC) as consistent with the State's approved management program pursuant to Section 307(c)(1) of the Coastal Zone Management Act (CZMA). Alternatively, concurrence may be presumed to have occurred. The procedures to ensure that the NWPs comply with this law are described in 33 C.F.R. § 330.4(d). The CZMA does not apply to SPK since there are no coastal zones in the district area of responsibility.

SPN and SPL determined that the activities authorized by the proposed NWPs would be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the State's approved management program. By letter of September 23, 2020, SPL requested CZMA consistency concurrence from the CCC for the proposed reissuance of the NWPs on behalf of both SPN and SPL, and the CCC responded by letter of November 12, 2020, stating their objection to the Corps' consistency determination and finding that the proposed reissuance of the NWPs is not consistent with Section 30233 of the California Coastal Act (Cal. Pub. Res. Code 30233). By letter of September 22, 2020, SPN requested CZMA consistency

concurrence from the BCDC for the proposed reissuance of the NWP, and the BCDC responded by letter of December 18, 2020, concurring with SPN's consistency determination subject to the condition that the Corps adopt a regional condition stating that the NWP will not become effective until BCDC, or a local governmental entity administering a BCDC-approved local protection plan in the Suisun Marsh, has issued a permit authorizing the activity. However, SPN declined to include BCDC's condition in NWP authorizations since it does not advance the goal of the NWP program to streamline the permit process for proposals that have no more than minimal impacts to the human environment, 33 U.S.C. 1344(e). Therefore, applicants would be required to seek individual consistency concurrence from the CCC or BCDC for NWPs that authorize activities within or affecting the coastal zone.

11.0 Measures to Ensure No More Than Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 9.0 of this document, will ensure that this NWP authorizes only activities with no more than minimal individual and cumulative adverse environmental effects. High value waters will be protected by the restrictions in general condition 22, the regional conditions discussed in this document, and the pre-construction notification requirements of the NWP. Through the pre-construction notification process, SPK, SPN, and SPL will review certain activities on a case-by-case basis to ensure that those activities result in no more than minimal adverse environmental effects, individually and cumulatively. Through the pre-construction notification review process, the district engineer can add special conditions to an NWP authorization to ensure that the NWP activity results in no more than minimal adverse environmental effects, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for a proposed activity that will result in more than minimal individual and cumulative adverse environmental effects.

The South Pacific Division has also developed several QMS procedures which, where applicable, will help to ensure no more than minimal environmental effects result from the NWP program within the California Districts. When compensatory mitigation is required to ensure minimal impacts, the California Districts would apply the QMS procedure for determining appropriate mitigation ratios, which considers factors such as the relative functional loss at the impact site vs. functional gain at the mitigation site, the type of mitigation proposed and its relative proximity to the impact site, the likelihood of mitigation success, and any temporal losses. This procedure ensures that the appropriate amount of compensatory mitigation is required based on a clearly documented process. Additionally, the QMS procedures for uniform performance standards will help to ensure the success of compensatory mitigation when required to ensure minimal impacts for NWP authorizations. This procedure ensures consistency between project managers, offices, and districts in determining compensatory mitigation performance standards and incorporates current scientific understanding of mitigation concepts and appropriate metrics.

The South Pacific Division has also developed Regional Compensatory Mitigation and Monitoring Guidelines to provide instruction to the regulated public on selecting appropriate compensatory mitigation sites and preparing mitigation plans to compensate for unavoidable impacts to aquatic resources authorized by Corps permits. These instructions cover a wide range of aquatic resource types and regions and would be applicable to NWP authorizations requiring permittee-responsible mitigation to ensure minimal effects, both individually and cumulatively.

Functional assessment tools such as the California Rapid Assessment Method (CRAM) are also available to assess impacts for activities authorized under the NWP program and may also serve to ensure minimal impact by providing a more accurate assessment of functions and services at both the impact and mitigation sites.

The California Districts currently have several active mitigation banks and in-lieu fee (ILF) programs available to provide compensatory mitigation to offset losses of aquatic and other resources for NWP-authorized activities. By providing compensatory mitigation on a larger, consolidated scale in ecologically appropriate areas, these mitigation banks and ILF programs simplify the process of providing compensatory mitigation for permittees, improve the likelihood of mitigation success, and, in the case of mitigation banks, reduce temporal losses. In doing so, they serve to ensure the NWP program within the California Districts will have minimal impacts on an individual and cumulative basis.

Special conditions may also be added to the NWP verification to ensure the proposed activities will result in no more than minimal adverse environmental effects, including those related to the use of Best Management Practices (BMPs) and erosion control, preservation of avoided resources in perpetuity, compliance with the terms and conditions of any Biological Opinion and/or Letter of Concurrence from the Services, compliance with an MOA or Programmatic Agreement with the SHPO/THPO, or any other avoidance and minimization measures deemed necessary. In addition, compensatory mitigation requirements for the loss of waters, determined through completion of the *South Pacific Division's Mitigation Ratio Setting Checklist* and in compliance with 33 CFR 332 and the *SPD Mitigation and Monitoring Guidelines*, will ensure no net loss of aquatic resource functions and services.

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

12.0 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, as well as these regional conditions, will authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects.

13.0 References

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