FOR CONTRACT NO.: 01-478504

INFORMATION HANDOUT

WATER QUALITY

YUROK TRIBE WATER QUALITY CONTROL PLANPLAN NO. YTWQP-09-005

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY CONDITIONAL CLEAN WATER ACT; 401 CERTIFICATION OF THE 2007 NATIONWIDE PERMITS FOR PROJECTS ON APPLICABLE TRIBAL LANDS

PERMITS

CALIFORNIA DEPARTMENT OF FISH AND GAME
NOTIFICATION NO. R1-09-0114

UNITED STATES ARMY CORPS OF ENGINEERS
NON-REPORTING NATIONWIDE 404 PERMIT

AGREEMENTS

NATIONAL MARINE FISHERIES SERVICES BIOLOGICAL ASSESSMENT CONCURRENCE

ROUTE: 01-Hum-169-VAR

YUROK TRIBE

190 Klamath Boulevard • Post Office Box 1027 • Klamath, CA 95548
Phone: (707) 482-1350 • Fax: (707) 482-1377

YTWQP-09-005

Gary Berrigan
Chief
North Region Environmental Planning Branch E1
CA Department of Transportation
PO BOX 3700
Eureka, CA 95502-3700

Subject: Yurok Tribe Water Quality Control Plan Section 401 Water Quality Certification for *Humboldt 169- Storm Damage Project PM 21.98/32.88 EA 47850*

Dear Mr. Berrigan:

The Yurok Tribe Environmental Program (YTEP) received the complete application for Yurok Tribe Water Quality Certification of the *Humboldt 169- Storm Damage Project PM 21.98 /32.88* under the Yurok Tribe Water Quality Control Plan Section 4.4 provisions on April 7, 2009. Thank you for providing a thorough and complete application. YTEP staff have reviewed the application and recently completed a site review with your staff.

Project Description

According to the project description and supporting documentation, the purpose of the project is for the California Department of Transportation to fix portions of State Route 169 due to storm damage that occurred during winter of 2005/2006 in between post miles 21.98 and 32.88.

Certification

We hereby grant Yurok Tribe Water Quality Control Plan Section 401 Certification for your project with the following conditions:

1. All work in and directly adjacent to waters of the United States directly associated with this project shall occur between May 15th and October 15th for calendar years 2010 and 2011. This permit is valid for this period only. Should the project need to be extended, early consultation with YTEP should be initiated.

2. All sites will be 'winterized' prior to seasonal work shut down. **An inspection by Yurok Tribe staff shall be requested at least 7 days in advance of seasonal work shut down**. The applicant may request seasonal extensions based on field review by YTEP and in conjunction with other permit and regulatory requirements (i.e. NOAA fisheries, U.S.

Army Corps).

3. You shall limit any excavation work in and adjacent to applicable waters to that necessary for the project.

4. No construction materials -- including cement, debris, oil or petroleum products, sand, sawdust, silt, slash, or soil -- shall be allowed to enter or be placed where it may enter the live channel of applicable waters in amounts that are considered to have adverse effects on the beneficial uses.

5. You shall not permanently dispose of any construction material, demolition wastes, wastewater, or any other pollutant within applicable waters or on any lands within the Yurok Reservation boundaries.

6. Water used in dust suppression shall contain no contaminants that could violate surface water or aquifer standards (see Yurok Tribe Water Quality Control Plan for water quality objectives).

7. All stationary machinery that uses gasoline or diesel fuel shall be placed within impermeable spill containment vessels capable of preventing migration of fuel in the event of a spill.

8. All contractors and subcontractors shall report, verbally and in writing, immediately upon discovery, any spills of chemical contaminants, including oil, gasoline, hydraulic fluid, or diesel fuel, during or after operations. Reports shall be submitted to EPA Region 9 and the Yurok Tribe. Appropriate cleanup of spills shall commence immediately. Within two weeks following cleanup, a summary report shall be submitted to EPA Region 9 and the Yurok Tribe that describes the reason for the spill, the spill duration and volume, steps taken to correct the problem, the remediation/clean up activities and steps taken to prevent a recurrence of the problem.

9. Best Management Practices (BMPs) for sediment and turbidity control shall be implemented in accordance with the project description provided in the permit application and in place prior to, during, and after construction in order to ensure that negligible discharges to applicable waters are ensured.

10. You shall revegetate the slope face that will be impacted for staging, equipment access, and construction with comparable vegetation types. Areas that are denuded of trees taller than 3 feet in height and greater than 2 inches in diameter will be replaced with saplings of the same species. Pre and post documentation of the revegetation work is required

11. Water discharged from the project site shall not contain settleable materials or suspended materials in concentrations that cause nuisance or adversely affect beneficial uses. The

project shall not violate any narrative and numeric criteria established in the Yurok Tribe Water Quality Control Plan (see Yurok Tribe Water Quality Control Plan for water quality objectives)

12. If, at any time, an unauthorized discharge to surface water occurs, or any water quality problem arises, the project shall cease immediately and you shall immediately notify EPA Region 9 and the Yurok Tribe.

13. Yurok Tribe shall be notified at least three business days in advance of construction in order to allow staff to be present during construction.

14. If there are any substantive changes in the proposed project that may affect water quality, you shall notify the Yurok Tribe Environmental Program, immediately. Failure to do so will result in revocation of this certification.

15. You shall provide a copy of this certification to all contractors and subcontractors. You also shall review the conditions of this certification with all such contractors and subcontractors.

16. You shall request written permission for any activities related to water withdrawal and or water drafting prior to commencement of this activity. Written requests for water withdrawal shall be submitted to YTEP.

Please note that the California Department of Transportation will also need to apply for USEPA's CWA 401 certification because the project involves the issuance of a US Army Corps of Engineers CWA 404 permit and discharges to waters of the United States.

The point of contact at the Yurok Tribe is Ken Fetcho. Please contact Mr. Fetcho at (707) 954-1523 or at kfetcho@yuroktribe.nsn.us the point of contact for the proposed project at EPA Region 9 is Melissa Scianni. Please contact Ms. Scianni at (415) 972-3821 or at scianni.melissa@epa.gov.

Sincerely,

Kathleen Sloan
Director
Yurok Tribe Environmental Program

e-copy:

Carol Heidsiek, U.S. Army Corps of Engineers, Eureka

Melissa Scianni, U.S. Environmental Protection Agency
David Hillemeier, Yurok Tribe Fisheries, Klamath
Maria Tripp, Chair, Yurok Tribe
Ralph Simon, Executive Director, Yurok Tribe
Robert McConnell, Yurok Tribe Historic Preservation Officer
Rain Marshall, Staff Attorney, Yurok Tribe
Javier Kinney, Transportation Manager, Yurok Tribe
Ken Fetcho, Assistant Director, Yurok Tribe Environmental Program

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

JAN 1 7 2007

General John McMahon
Division Engineer, South Pacific Division
U.S. Army Corps of Engineers
333 Market St.
San Francisco, CA 94105

Subject: Conditional Clean Water Act (CWA) §401 certification of the 2007 Nationwide Permits (NWPs) for projects on applicable tribal lands

Dear General McMahon:

EPA Region 9 has reviewed the Corps' 26 September 2006 Federal Register notice *Proposal to Reissue and Modify Nationwide Permits* (FR Notice) pursuant to our roles and responsibilities under sections 401 and 404 of the CWA. The purpose of this letter is to provide conditional water quality certification of the NWPs for activities proceeding on tribal lands within Region 9. These conditions do not apply, however, to activities proceeding in the territories of the seven tribes within Region 9 which have been approved as certifying authorities—the Navajo Nation, Hualapai Nation, and White Mountain Apache Tribe in Arizona; and the Hoopa Valley Tribe, Bishop Paiute Tribe, Big Pine Paiute Tribe, and Twenty-Nine Palms Band in California.

As a general matter, we are concerned that the proposed changes to the NWP may lack adequate safeguards against degradation of aquatic resource functions and values, including protection of water quality and beneficial uses. A number of NWP characteristics may cause more than minimal adverse effects to aquatic resources including lack of maximum impact thresholds; authorization of broad, unrelated activities; and terminology that invites varying interpretation by permittees without Corps oversight. We believe the NWPs, as newly proposed, could weaken the program through relaxed reporting standards (*e.g.*, for applicants' explicit avoidance and minimization of discharges of pollutants), and by placing greater burdens on Corps staff to ensure permittees are in compliance.

In addition, EPA does not believe that the Corps has collected data sufficient to demonstrate that the NWP program results in minimal adverse impacts to the aquatic environment on an individual or cumulative basis. The lack of required Preconstruction Notifications (PCN)s, or any mandatory reporting for nearly half of the NWPs, is one of several factors which have precluded detailed programmatic analysis of the aerial extent, location, and type of aquatic resources impacted within a watershed context. These issues should be of paramount concern to the Corps given that Corps data indicate approximately 88% of the authorizations under the §404 program are implemented via General Permits—chiefly, the NWPs.

To protect water quality and beneficial uses of waters of the U.S. on tribal territories under the new NWP program, EPA Region 9 hereby institutes the attached general and permit-specific conditions pursuant to section 401 of the Clean Water Act. In summary, we are programmatically certifying thirty of the NWPs with general conditions, and certifying fifteen of the NWPs with permit-specific conditions (including new NWPs A, E and F). In addition, we are requiring that all permittees submit notification to EPA Region 9 when proceeding under any of the NWPs on tribal lands.

With the implementation of the enclosed general and permit-specific conditions, we are also reducing the number of NWPs denied certification (previously twelve, we are now denying certification for four permits: NWP 43, and new NWPs B, C and D). Applicants proposing activities on tribal lands under NWPs for which certification has been denied should preferably pursue alternative forms of authorization from the Corps (*e.g.*, individual permit, Letter of Permission, etc.). If this is not practical, these applicants must pursue individual project certification from EPA. A summary table at the end of the attached certifications and conditions is provided for easy reference to the status of all NWPs on tribal lands.

This conditional certification of the NWP program will remain in effect for the authorization period of the new NWPs, and will be revisited and potentially revised when the NWPs are next revisited and potentially revised by the Corps (*i.e.*, 2011). If you have any questions regarding our conditional certification of the NWPs for activities on tribal lands, you may contact me at 415-972-3572, or Jason Brush of my staff at 415-972-3483.

Sincerely,

Alexis Strauss 17 January 2007

Alexis Strauss
Director, Water Division

Cc:
Jane Hicks, Regulatory Branch Chief, San Francisco District
Michael Jewel, Regulatory Branch Chief, Sacramento District
David Castanon, Regulatory Branch Chief, Los Angeles District
Donald Borda, Regulatory Branch Chief, Albuquerque District

General Conditions

01. Classes of Aquatic Resources

Jurisdictional aquatic resources of all hydrological regimes are explicitly included in all general and permit-specific conditions to follow. In recognition of the importance of seasonal, ephemeral and intermittent waters for the protection and maintenance of water quality and other ecosystem services in the arid southwest, this certification hereby adopts the Corps' proposed inclusion of ephemeral and intermittent streams in the impact limitations listed throughout the 2007 NWPs. If any of the final NWPs assign impact limitations differently by hydrological regime (*e.g.*, allowing ¼ acre impacts to perennial systems and ½ acre to intermittent or ephemeral under the same NWP), the more protective standard shall apply under this certification universally to all covered waters (in the example above, therefore, no more than ¼ acre of impacts would be authorized to either perennial or ephemeral/intermittent waters).

02. Notification

To improve the government's ability to demonstrate whether the NWP program has minimal adverse impacts to the aquatic environment, individually and cumulatively, all NWP-authorized projects proceeding on tribal lands within Region 9 shall submit a form of notification to EPA Region 9.[1]

Under existing NWP rules, for the purposes of PCN notification, projects proposing to use a given NWP will fall under one of the following four categories:

1. The Corps requires a PCN, subject to criteria in the Corps' General Condition 27, because the project proposes use of an NWP that requires a PCN for <u>any</u> activities authorized by the NWP.
2. The Corps requires a PCN, subject to criteria in the Corps' General Condition 27, because the project proposes to exceed impact thresholds triggering a PCN under the NWP.
3. The Corps does <u>not</u> require a PCN, because proposed impacts <u>fall below thresholds</u> identified in the NWP for a PCN.
4. The Corps does <u>not</u> require a PCN for <u>any</u> activities authorized under the NWP the applicant is proposing to use.

To be eligible for any NWP under this certification, applicants under any of the above categories are required to submit a notice to EPA. However, **no response or approval is required from EPA for the project to proceed under the NWP.** For categories 1 and 2 above, applicants must simply forward a second copy of the PCN already required by the Corps to EPA Region 9. For applicants in categories 3 and 4, a modified PCN (MPCN) must be submitted to EPA Region 9 subject to the following criteria:

1) ***Timing.*** Applicants shall submit an MPCN to EPA Region 9 as early as possible, and in advance of any authorization letter from the Corps allowing the applicant to proceed under a given NWP. However, upon review, EPA reserves the right to make

[1] NOTE: this requirement does not modify or eliminate existing Corps requirements regarding PCNs for projects proceeding on tribal lands (or elsewhere).

after-the-fact assessments of likely direct and indirect impacts to water quality and may require mitigation. EPA shall make any such determinations, in writing, within 45 days of receipt of the MPCN.

2) ***Content.*** MPCNs must be in writing (electronic mail submittal is acceptable) and include the following information:
   a) Name, address and telephone numbers of the applicant and any agents or representatives. If available, the electronic mail address and fax numbers for these persons.
   b) Location of the proposed project.
   c) A description of the proposed project and impacts including
      i) the project's purpose;
      ii) direct and indirect adverse environmental effects the project would cause, including the proposed acreages of waters impacted, avoided, and, where applicable, created or otherwise mitigated;
      iii) any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity; and
      iv) a list of other state, tribal and federal permits or authorizations necessary for the project.

      The description should be sufficiently detailed to determine compliance with NWP and EPA 401 conditions and the need for appropriate compensatory mitigation. Maps, drawings and/or photographs of the project area and aquatic resources are not mandatory, but usually help to clarify the project and allow for faster review. At minimum, a narrative description of any special aquatic sites and other waters of the United States on the project site must be included.
   d) A statement describing impact avoidance and minimization measures, as required by EPA General Condition 03 of the CWA §401 certification of the 2007 NWP program.
   e) To the extent not covered by d) above, a statement describing how the project will protect, and where practicable improve, water quality.
   f) 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.
   g) 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.

03. Mitigation

Mitigation begins with the avoidance and minimization of adverse impacts to waters, followed by compensatory measures if a loss of aquatic function or acreage is unavoidable. Proposed modifications to the NWP program include the removal of explicit reference to avoidance, minimization and compensation in the body of several permits in favor of generally less explicit, less protective language in General Condition 20. For example, in many of the proposed NWPs, mitigation activities that had been required of the permittee would become discretionary on the part of the District Engineer (and for nearly half of the NWPs, the DE does not receive a PCN from the permittee and is thus precluded from exercising this discretion).

To protect water quality and beneficial uses of U.S. waters on tribal lands, all projects using NWPs must avoid discharges to the maximum extent practicable, and utilize the best available and practicable means of minimizing the adverse impact of discharges that cannot be avoided. A statement documenting the project's avoidance and minimization methodology will be provided to EPA and the Corps with each PCN (pursuant to Corps General Condition 27, paragraphs (a)(3) and (a)(5)), or MPCN. To the extent practicable, impact sites will be returned to pre-construction contours and, if necessary, banks shall be reseeded or replanted with native vegetation. Maintenance and monitoring activities will include regular and post-storm event inspections, on a schedule determined by the applicant's discretion, but no less frequent than once per year. Inspections should include photographs of culvert conditions after any heavy rainfall as well as conditions pre- and post-construction. Any adverse impacts to water quality resulting from the gradual or immediate failure of project or mitigation components shall be reported to EPA and the Corps immediately.

In some cases, compensatory mitigation may be required in addition to the avoidance and minimization measures outlined above. When required, compensatory mitigation will be implemented on a minimum 2:1 basis (acres created and/or enhanced: acres impacted) for impacts to special aquatic sites, and 1:1 (no net loss) for all other waters of the U.S. Except under unusual circumstances as approved by EPA, upland buffers, vegetated where practicable, shall be maintained around impacted and restored, created or enhanced waters, and will extend a minimum of 50 feet laterally from the Ordinary High Water Mark of each bank, or perimeter of a jurisdictional wetland. Representatives of EPA and the Corps must be allowed access to the site to inspect the project area and any mitigation areas upon reasonable notice.

Should EPA determine that compensatory measures are required, said determination shall not delay a project proceeding under a NWP, nor is a determination on this matter in response to an applicant's MPCN required to begin work (see General Condition 02. Notification, above). When they are appropriate, these determinations for compensatory mitigation will therefore likely be after-the-fact, but nevertheless will remain a condition of water quality certification and thus a condition of the Corps' permit. Failure to address an EPA mitigation requirement would therefore place a permittee out of compliance with their NWP and potentially subject to a range of Corps and EPA enforcement actions.

04. Prohibition on Multiple Use of One NWP for a Single Project

Permittees may not use the same NWP multiple times for one single and complete project; to do so effectively eliminates acreage limitations of the NWPs and may result in more than minimal adverse impacts to water quality and other ecosystem services. For example, under this certification, linear transportation projects on tribal lands must sum the impacts of each proposed crossing of individual waters of the U.S. and use that total to determine eligibility for NWP 14 (Linear Transportation Projects). If the acreage or linear foot impacts exceed the thresholds of the applicable NWP (or combination of applicable *different* NWPs), minimal adverse impacts to water quality may be exceeded and 401 certification is automatically denied without prejudice. In this event, the NWP in question is not available to the applicant on tribal lands. Applicants in these circumstances may need to apply to the Corps for authorization under a different General Permit, a Letter of Permission, or Individual Permit as appropriate and

determined by the Corps. EPA would review these other proposed permit actions for case-by-case certification. However, EPA may waive this requirement and allow the use of multiple NWPs on a case-by-case basis if the applicant so appeals, and demonstrates in their PCN or MPCN that authorization under the NWP will result in minimal and/or completely mitigated impacts to the aquatic environment, individually and cumulatively. EPA's discretionary waiver of this requirement may be accomplished informally via electronic mail to the Corps and applicant.

05. Use of Appropriate Fill Material

To the extent practicable, local, native materials should be used as fill material. (*e.g.*, soil, sand, or rock from the site or near the site; clean building materials or clean imported earthen fill). Inappropriate and unauthorized fill materials include, but are not limited to: tires, junked or abandoned vehicles, appliances, or other equipment; garbage; debris; oil drums or other chemically contaminated vessels; artificial turf; non-native vegetation; etc. If an applicant has any doubts or questions about the suitability of a proposed fill material, they should consult with the Corps and/or EPA prior to discharging into waters of the U.S. Such consultation may be via phone, or written letter, fax or electronic mail.

06. Dewatered Conditions

In-channel work will not be performed proximate in time to high flow events or rainy periods; discharges must occur and be completed prior to a minimum 5-day clear weather forecast. To the extent practicable, discharges below the ordinary high water mark or within jurisdictional wetlands should occur when the discharge site is naturally dewatered (*e.g.*, seasonally dry), or artificially dewatered by the permittee, thereby avoiding direct discharge of pollutants into the water column. If the site is artificially dewatered, permittees shall, to the extent practicable, avoid dewatering techniques that require additional temporary or permanent discharges of fill material within jurisdictional waters (*e.g.* coffer dams) in favor of temporary, structural techniques (*e.g.*, sheet pile or "porta-dams").

07. Fills Within 100-Year Floodplains

Projects requiring NWP authorization for discharges of fill material within 100-year floodplains shall comply with Executive Order 11988 (Floodplain Management). Such projects shall include a statement of compliance in the PCN. However, discharges within the FEMA-mapped 100-year floodplain that would result in permanent, above-grade structures are not certified for use under the NWP program on tribal lands.

08. Best Management Practices

Any excess material from construction, demolition wastes, wastewater, or any other pollutant must be appropriately disposed of outside jurisdictional waters. Water used in dust suppression shall not contain contaminants that could violate surface water or aquifer standards. Permittees and their contractors shall take necessary steps to minimize channel and bank erosion within waters of the United States during and after construction. Silt fences, straw wattles, and other techniques shall be employed as appropriate to protect waters of the U.S. from sedimentation and other pollutants. A copy of these permit conditions shall be provided to all contractors and subcontractors, and will be posted visibly at project construction sites.

09. Transportation Projects

Permittees shall implement State transportation agencies' guidelines for construction sites to protect water quality and aquatic habitat. In California, CALTRANS has guidance in the *CALTRANS Storm Water Quality Manuals and Handbooks*[2]; in Nevada, NDOT has guidance in their *NDOT 2006 Water Quality Manuals*[3]; and in Arizona, ADOT has guidance in their *Erosion and Pollution Control Manual.*

10. Utility Line Projects

Permittees shall implement BMPs established by the Office of Pipeline Safety and recommended for permit streamlining of pipeline maintenance and repair projects.[4] Projects include below and above grade utility installation and maintenance and repair.

Specific Nationwide Permits

NWP-01 Aids to Navigation

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

NWP-02 Structures in Artificial Canals

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

NWP-03 Maintenance

"Existing serviceable structures" which may be maintained under this permit do not include undersized culverts or structures that cause or exacerbate channel incision, bank destabilization, and/or prevent fish passage due to inadequate design or construction standards. Such structures continuously impair the hydrologic, sediment transport, and habitat functions of waters by remaining in place, and their maintenance under this NWP would discourage applicants from replacing inappropriately designed structures that require frequent maintenance and degrade water quality. Certification of this permit is granted only if the existing structure proposed to be maintained demonstrably preserves (via design, flow modeling or other information in the PCN) the natural functions of the affected aquatic resource when the structure is fully operational. Otherwise, an alternative permit should be utilized as appropriate (*e.g.*, NWP 13 Bank Stabilization). Where bank stabilization structures are to be maintained, bioengineered structures shall be utilized to the extent practicable in lieu of "rip-rap" or other hardscape engineered materials. This permit shall not authorize the enlargement of, or increase in, the footprint of a structure within waters of the U.S., unless that enlargement consists of the replacement of existing artificial channel armoring materials (*e.g,* rip-rap, soil cement, etc.) with low-impact bioengineered natural channel design structures (*e.g.*, log revetments, geotextile rolls/mats, root wads, brush mattresses, willow wattling, etc.[5]).

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[2] http://www.dot.ca.gov/h1/construc/stormwater/manuals.htm

[3] http://www.nevadadot.com/reports_pubs/Water_Quality/

[4] http://environment.ops.dot.gov

[5] See, *e.g.*, Allen, H. A., and Leech, J. R. (1997). "Bioengineering for Streambank Erosion Control-Report 1: Guidelines," Technical Report EL-97-8, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.

NWP-04 Fish and Wildlife Harvesting, Enhancement and Attraction

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

NWP-05 Scientific Measurement Devices

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

NWP-06 Survey Activities

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

NWP-07 Outfall Structures and Maintenance

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

NWP-08 Oil and Gas Structures

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

NWP-09 Structures in Fleeting and Anchorage Areas

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

NWP-10 Mooring Buoys

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

NWP-11 Temporary Recreational Structures

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

NWP-12 Utility Line Activities

According to the cumulative impact analysis in the Corps' Draft Environmental Assessment (DEA), this permit is the second most commonly used of the Nationwides, and use of this permit results in a net loss of aquatic resources (estimated at 684 acres/year with zero acres of compensation). Proposed changes to this NWP include the removal of PCN requirements for a broad range of activities. In compliance with EPA General Condition 02. Notification above, applicants will provide a PCN for all activities under this NWP, and will clearly indicate the impacts proposed to be temporary, permanent, or secondary (*e.g.*, conversion of one type of aquatic resource to another). No more than ½ acre or 300 linear feet of permanent loss of waters is authorized under this certification.

NWP-13 Bank Stabilization

The Corps provides no rationale for the proposed 500-foot limitation on this permit (the programmatic standard is otherwise 300 feet). Under this certification, the 300-foot limit is retained. The proposed modification to allow use of NWP-13 in special aquatic sites is counter to the purposes of the permit (bank protection), as it would contribute to losses of riparian fringe wetlands important for maintenance of natural channel geomorphology, flood attenuation, and water filtration services. Under this certification, this permit is not available for projects in special aquatic sites. Traditionally, this NWP, used multiple times at the same site or in combination with other NWPs, has frequently resulted in the armoring of many miles of streambank. However, with adherence to EPA general condition 04. above, this problem should be reduced or eliminated. Bank stabilization must incorporate use of planting and/or seeding of

native vegetation; bioengineered solutions should be employed to the maximum extent practicable. Hard channel armoring is discouraged under this certification, and is more likely to require compensatory mitigation. In their PCN, applicants should pay particular attention to describing avoidance, minimization and/or compensation measures.

NWP-14 Linear Transportation Projects

According to the DEAs, this NWP authorizes activities that result in a net loss of aquatic resources. The Corps' proposed removal of language in the permit regarding compensatory mitigation will exacerbate these losses, especially given the lack of a linear foot limitation and lack of any programmatic estimate of indirect and secondary effects or mitigation for those impacts. In our experience, many permittees use multiple NWP-14 permits for one project, thus impacting substantially more than a ½ acre of waters in sum. Due to the significant secondary adverse effects often caused by culverts (*e.g.*, upstream deposition and bank erosion, downstream bed and bank erosion) lower-impact techniques (*e.g.*, bottomless and embedded culverts) are encouraged. Consistent with other NWPs, this permit is limited under this certification to the lesser of ½ acre or 300 linear feet of impacts. Applicants' PCNs or MPCNs should specifically address sequencing avoidance and minimization of impacts in project design, and address potential indirect effects up and downstream of the proposed discharges.

NWP-15 U.S. Coast Guard Approved Bridges

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

NWP-16 Return Water from Upland Contained Disposal Areas

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

NWP-17 Hydropower Projects

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

NWP-18 Minor Discharges

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

NWP-19 Minor Dredging

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

NWP-20 Oil Spill Cleanup

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

NWP-21 Surface Coal Mining Activities

We are concerned that the lack of impact limitations under this NWP results in a net loss of aquatic resources (the Corps' cumulative impact analysis in the DEA indicates this permit results in 81 acres of impact per year without compensation). A review of activities authorized by this permit would likely show that many of these impacts are permanent and occur in important and sensitive headwater streams. Consistent with other NWPs, impacts authorized by this permit shall be limited to the greater of ½ acre or 300 linear feet of waters under this certification. Before an applicant may use this permit, EPA must approve a compensatory

mitigation plan meeting all of the criteria set forth in the national *Mitigation Action Plan*[6] including a minimum replacement-to-impact ratio of one-to-one (minimum two-to-one for special aquatic sites). Similar plans which may be required by the Interior Department's Office of Surface Mining under the Surface Mining Control and Reclamation Act may be presented for EPA approval as functionally equivalent.

NWP-22 Removal of Vessels

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

NWP-23 Approved Categorical Exclusions

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

NWP-24 Indian Tribe or State Administered Section 404 Program

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

NWP-25 Structural Discharges

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

NWP-26 --Reserved--

This NWP is no longer in use. No certification is necessary.

NW-27 Aquatic Habitat Restoration, Establishment, and Enhancement Activities

We are concerned that the lack of reporting, impact limits, and clear language in this permit contribute to its misuse and authorization of more than minimal adverse impacts to the aquatic ecosystem. Corps data indicate this permit accounts for the greatest level of impacts in the entire program, exceeding the next highest permit's impacts by a factor of 2.5, and experience has shown that permittees may use this permit for activities that are not truly restoration projects and/or do not result in a net benefit to aquatic functions. Recreational aquatic features are not authorized under this NWP (*e.g.*, water parks such as kayak courses). This permit may not be used to authorize stormwater control structures for the purpose of reducing downstream erosion, water quality degradation or flooding, and grade control structures may not exceed one linear foot vertical drop unless it is clearly demonstrated that a greater drop is necessary to restore aquatic resource functions. Concrete and grout are not acceptable fill materials under this NWP and certification. Any structures placed within waters will allow the passage of aquatic organisms and preserve existing human navigational needs, unless removal of such existing navigational uses is part of the project purpose.

Consistent with other NWPs, use of this permit shall be limited to the lesser of ½ acre or 300 linear feet of waters under this certification. This requirement may frequently be waived upon petition in the applicant's PCN, but these limits will ensure the added level of scrutiny required to eliminate misuse of this permit and greatly reduce the impact of the program as a whole.

NWP-28 Modification of Existing Marinas

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

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[6] http://www.mitigationactionplan.gov/

NWP-29 Single-family Housing

Much of NWP 39's residential components are proposed to be moved to NWP 29. EPA does not believe the activities currently authorized under NWP-29 are similar enough to multi-unit commercial/residential development to warrant this combination. This move would combine relatively modest activities, such as expanding a single-family home or constructing attendant features (*e.g.*, a garage, driveway, storage shed, septic field) with much larger residential developments that are generally new, include a change in land-use, and are much larger in scope and purpose. If these permits are combined as proposed, then the impact threshold for single-family homes shall remain ¼ acre under this certification (not increase to ½ acre, as proposed).

In addition to avoidance and minimization requirements explained above under EPA General Condition 03., paragraph "f" from NWP-39 shall also attach under this certification, explaining that compensatory mitigation will "normally" be required for unavoidable losses. Existing text regarding maintenance of vegetated buffers shall remain. Finally, "recreational facilities such as playgrounds, playing fields, and golf courses" are not authorized under this certification. These projects are separate and distinct from housing, are not required to be included in a housing project for it to be practicable, and their construction within waters is normally avoidable. This NWP shall not authorize the channelization or relocation of any stream or wetland, regardless of size or rate of flow.

NWP-30 Moist Soil Management for Wildlife

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

NWP-31 Maintenance of Existing Flood Control Facilities

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

NWP-32 Completed Enforcement Actions

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

NWP-33 Temporary Construction, Access and Dewatering

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

NWP-34 Cranberry Production Activities

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

NWP-35 Maintenance Dredging of Existing Basins

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

NWP-36 Boat Ramps

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

NWP-37 Emergency Watershed Protection and Rehabilitation

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

NWP-38 Cleanup of Hazardous and Toxic Waste

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

NWP-39 Residential, Commercial, and Institutional Developments

As with NWP 29 above, existing requirements for "avoidance and minimization," "single and complete project," "maintenance of buffers," and "compensatory mitigation," which the Corps now proposes to remove, shall be retained for purposes of this certification. This NWP shall not authorize the channelization or relocation of any stream or wetland, regardless of size or rate of flow.

NWP-40 Agricultural Activities

We are concerned that the text of NWP-40 and proposed modifications will cause more than minimal impacts to aquatic resources. Consistent with the other NWPs, ephemeral and intermittent waters shall not be subject to waiver of the 300 foot limitation under this certification. Activities authorized by this NWP, such as construction of drainage tiles, ditches, and relocation of existing serviceable structures, may be used to convert wetlands to uplands in preparation for future development. These activities could have a considerable indirect impact on aquatic resources that would go undetected under the proposed NWP terms. Under this certification, no discharges are authorized which would impact hydrological connectivity between jurisdictional waters to such an extent as to convert waters of the U.S. to uplands, or otherwise isolate waters to eliminate federal regulatory jurisdiction.

NWP-41 Reshaping Existing Drainage Ditches

We are concerned that the text of this NWP and proposed modifications will result in more than minimal impacts to aquatic resources. The cumulative impact analysis provided in the DEA suggests that this permit results in a net loss of waters. Consistent with other NWPs, impacts under this certification are limited to the lesser of ½ acre or 300 feet of waters. As with NWP-C below, allowing sidecasting of dredged material into waters of the United States will cause and contribute to degradation of water quality as sediment is re-suspended in the water column. Sediment problems are among the most common water quality problems in the nation. This NWP assumes that returning a drainage ditch to its original configuration will improve water quality, but lacks guidance or standards that describe methods for demonstrating an improvement in water quality. All "sidecast" materials from excavation must be stored and/or disposed of within non-jurisdictional uplands under this certification. A statement must be included in the notification as to how the applicant's activities will improve water quality.

As with NWP-40 above, we are concerned that this NWP will have significant indirect adverse affects on waters of the U.S. by draining wetlands upstream in an attempt to convert large wetland areas to developable uplands through relatively small regulated discharges. These activities could have a considerable indirect impact on aquatic resources that would go undetected under the NWP terms. Under this certification, no discharges are authorized which would impact hydrological connectivity between jurisdictional waters to such an extent as to convert waters of the U.S. to uplands, or otherwise isolate waters to eliminate federal regulatory jurisdiction.

NWP-42 Recreational Facilities

As a general matter, recreational facilities such as those listed by the Corps in discussion of this NWP (FR Notice p. 56272-3) are not water-dependent (*e.g.*, golf courses, playing fields, basketball courts), and impacts to waters of the U.S. should be avoidable. This is especially true in the most common cases (according to the Corps) where "the proposed project area is predominantly uplands." However, given the notification requirements herein, and subject to a 300 foot or ½ acre limit, this NWP is hereby programmatically certified. Under this certification, waiver of the impact limits for ephemeral streams is not permitted.

NWP-43 Stormwater Management Facilities

NWP authorization of constructing stormwater facilities within waters of the U.S. discourages applicants from using practicable construction options that locate stormwater retention and detention facilities "off line" from streams. For example, retention facilities are often built as sediment (or debris) basins within a stream. This practice includes constructing a dam in the stream, excavating out a basin, and regular sediment removal to maintain the structure. These facilities cause considerable and unnecessary damages to stream functions as retention facilities can be located "off line" by constructing a high flow diversion channel above the ordinary high water mark. If applicants can continue to use the traditional, more damaging practices that are sanctioned by this NWP, there is no incentive for these management practices to improve. Although maintenance of existing facilities may be necessary, we do not believe NWP-43 for new facilities complies with the CWA Section 404(b)(1) Guidelines.

CWA section 401 Water Quality certification for this proposed NWP is denied without prejudice. Applicants for projects on tribal lands must apply, via MPCN, to EPA for individual certification if this NWP is proposed to be used.

NWP-44 Mining Activities

We are concerned that activities authorized by this NWP will have a more than minimal adverse effect on aquatic resources. As proposed, this NWP could authorize in-stream mining operations impacting more than a mile of a 4-foot wide stream, exacerbated by indirect effects up and downstream of the discharges such as headcutting and downcutting. This permit is certified only for impacts up to 300 linear feet or ½ acre, consistent with other NWPs. When used for in-stream aggregate mining activities, compensatory mitigation is likely to be required due to extensive indirect impacts and temporal losses typical of this type of impact.

Proposed New Permits

NWP-A Emergency Repair Activities

This permit as proposed places no limits on project scale or scope of impacts, discharge or excavation volumes, or length of banks that may be "reconstructed." The ambiguous language of the proposed permit may be read to authorize repeated excavation activities within waters and permanent stabilization of stream banks, both of which will frequently entail more

than minimal adverse impacts to the aquatic resource. The proposed permit may be used following "recent storms, floods, or other discrete events." Clearly, the lack of a definition of "other discrete events" invites wide and varying interpretation. Flashy events with significant flows are routine in much of the arid southwest. Under this permit, regular invasive hydrological modification of ephemeral or intermittent streams could be authorized after each of these normal storm events. We believe this NWP is inappropriate and should not be issued; in our experience, "Emergency Repairs" are best handled via Regional General Permits through local Corps Districts.

Under this certification, impacts shall be limited to 300 linear feet or ½ acre, consistent with other NWPs, and the permittee's MPCN must contain a description of the CWA permitting history of the site. We understand that certain emergencies (*e.g.* rapidly eroding banks during a storm event) may require the immediate placement of hard materials such as riprap into waters of the U.S. to protect public safety or property. However, if these materials are placed on an immediate emergency basis in lieu of bioengineered structures that maintain natural channel geomorphology (see NWP 13 and footnote 5 for examples), applicants are required to submit a restoration plan for the project site, to ensure that the aquatic functions and values of the site are ultimately restored.[7] This permit does not authorize the permanent discharge, retention or maintenance of riprap or other hardscape bank armoring, unless the applicant clearly demonstrates that these materials are appropriate and protect biological and hydrological functions. The MPCN must include an analysis explaining the reasons for site failure (i.e., the "emergency" situation). If restoration is impracticable, the MPCN must include documentation that the proposed repair is an appropriate long-term solution for the project site.

NWP-B Discharges in Ditches and Canals

From the discussion in the FR Notice (p. 56274), the purpose of this NWP is to "allow a landowner to return his or her land to its prior condition" if the ditches in question are "(1) constructed in uplands; (2) receive water from another water of the United States; and (3) divert water to another water of the United States." Thus, restoration to the "prior condition" is to convert a water of the U.S. to non-jurisdictional uplands (per criterion one), and eliminate hydrological connectivity and/or isolate down- and up-stream waters (per criteria two and three). As with NWPs 40 and 41 above, we believe it prudent to apply the same conditions that such effects are prohibited, but as they appear to be the purpose of the permit, it is difficult to place appropriate conditions on this permit outside the context of a specific project proposal.

CWA section 401 Water Quality certification for this proposed NWP is denied without prejudice. Applicants for projects on tribal lands must apply, via MPCN, to EPA for individual certification if this NWP is proposed to be used.

NWP-C Pipeline Safety Program Designated Time-Sensitive Inspections and Repairs

According to the DEA, Corps' surveys suggest that this permit would result in the loss of ~320 acres of waters of the United States over the next 5 years. There is no anticipated compensation for these losses. It is unclear how this NWP advances the programmatic "no net loss/net gain" goals or results in minimal impacts, individually or cumulatively. Criteria "b" allows material from trench excavation to be temporarily sidecast, threatening water quality for

[7] Additional permit authorization (*e.g.*, NWP 27) may be required.

at least three months. The Corps is not requiring PCNs for this permit, thereby preventing the Corps from determining how often it is used, what its impacts are, and when or if sidecast material has been removed. It is not clear that Corps will have access to the Pipeline Repair and Environmental Guidance System (PREGS) that records post construction reports. This NWP is also unique in that it proposes a prohibition on issuance of regional conditions, but there is no explanation or data supporting this dramatic policy change.

CWA section 401 Water Quality certification for this proposed NWP is denied without prejudice. Applicants for projects on tribal lands must apply, via MPCN, to EPA for individual certification if this NWP is proposed to be used.

NWP-D Commercial Shellfish Aquaculture Activities

As proposed, this permit would deviate from existing NWPs 4, 19, and 36 which prohibit activities in Submerged Aquatic Vegetation (SAV), with no explanation as to why this deviation would not result in minimal adverse impacts to SAV. The nature and types of discharges covered by this permit are not defined, inviting completely unrestricted use of the permit. Similarly, limits such as "existing project area" can be interpreted many ways and it is not clear from the proposed NWP text how the Corps intends the regulated public to understand the phrase.

CWA section 401 Water Quality certification for this proposed NWP is denied without prejudice. Applicants for projects on tribal lands must apply, via MPCN, to EPA for individual certification if this NWP is proposed to be used.

NWP-E Coal Remining Activities

Although efforts to restore lands disturbed by mining are encouraged, limiting impacts authorized under NWP 21 is preferable to creating a new NWP for remining and restoring these areas. Indeed, the perceived necessity of NWP-E suggests that NPW 21 may have more than minimal adverse effects on aquatic resources as proposed. If this permit is issued, its use is limited under this certification to ½ acre or 300 feet of waters, and limited to application at abandoned mine sites. Applicants must provide information in the PCN illustrating that activities authorized under NWP-E will result in a net increase in aquatic resource functions.

NWP-F Underground Coal Mining Activities

The lack of impact limits under this proposed NWP is likely to result in a net loss of aquatic resources. The cumulative impact estimate in the DEA indicates that NWP-F would result in 97 acres of impact per year and 11 acres of compensatory mitigation per year. A review of activities authorized by this permit would likely show that many of these impacts are permanent and occur in important and sensitive headwater streams. A 300 linear foot and ½ acre impact limit is required under this certification, consistent with other NWPs. A compensatory mitigation plan meeting all of the criteria set forth in the national *Mitigation Action Plan*, including a minimum replacement-to-impact ratio of one-to-one, is also required under this certification.

Summary Table – EPA §401 Certification of NWPs for projects on tribal lands				
NWP	**Certification Status**	**Notification required?***	**Impact Limits**	**Notes**
1	Certified, general conditions only	YES – MPCN	None	
2	Certified, general conditions only	YES – MPCN	None	
3	**Certified, permit conditions**	YES – (M)PCN	Generally no increase in fill footprint.	No maintenance of undersized structures; bioengineering used whenever practicable.
4	Certified, general conditions only	YES – MPCN	None	
5	Certified, general conditions only	YES – MPCN	25 yrd^3	
6	Certified, general conditions only	YES – MPCN	25 yrd^3	
7	Certified, general conditions only	YES – PCN	None	
8	Certified, general conditions only	YES – PCN	None	
9	Certified, general conditions only	YES – MPCN	None	
10	Certified, general conditions only	YES – MPCN	None	
11	Certified, general conditions only	YES – MPCN	None	
12	**Certified, permit conditions**	YES – (M)PCN	½ acre or 300'	Identify temporary impacts.
13	**Certified, permit conditions**	YES – (M)PCN	300' and <1 yrd^3 / running ft.	No use in special aquatic sites; bioengineered stabilization whenever practicable.
14	**Certified, permit conditions**	YES – (M)PCN	½ acre or 300'	Address indirect impacts.
15	Certified, general conditions only	YES – MPCN	None	
16	Certified, general conditions only	YES – MPCN	None	
17	Certified, general conditions only	YES – PCN	None	
18	Certified, general conditions only	YES – (M)PCN	1/10 acre or 25 yrd^3	
19	Certified, general conditions only	YES – MPCN	25 yrd^3	
20	Certified, general conditions only	YES – MPCN	None	
21	**Certified, permit conditions**	YES – PCN	½ acre or 300'	EPA approves mitigation plan before work.
22	Certified, general conditions only	YES – (M)PCN	None	
23	Certified, general conditions only	YES – (M)PCN	None	
24	Certified, general conditions only	YES – MPCN	None	
25	Certified, general conditions only	YES – MPCN	None	
26	N/A	N/A	N/A	N/A
27	**Certified, permit conditions**	YES – (M)PCN	½ acre or 300'	Fill material, project purpose limitations.
28	Certified, general conditions only	YES – MPCN	Authorized marina	
29	**Certified, permit conditions**	YES – PCN	¼ acre or 300'	No impact limit waivers, no recreational.
30	Certified, general conditions only	YES – MPCN	None	
31	Certified, general conditions only	YES – PCN	Corps-approved	
32	Certified, general conditions only	YES – MPCN	5 acres non-tidal, or 1 acre tidal wetlands	
33	Certified, general conditions only	YES – PCN	None	
34	Certified, general conditions only	YES – PCN	10 acres	No net loss of acreage permitted.
35	Certified, general conditions only	YES – MPCN	Lesser of previously authorized or controlling depths	
36	Certified, general conditions only	YES – (M)PCN	50 yrd^3; 20'-wide ramp	
37	Certified, general conditions only	YES – PCN	None	
38	Certified, general conditions only	YES – PCN	None	
39	**Certified, permit conditions**	YES - PCN	½ acre or 300'	
40	**Certified, permit conditions**	YES - PCN	½ acre or 300'	
41	**Certified, permit conditions**	YES – (M)PCN	½ acre or 300'	Water quality assessments in notification; sidecast material to uplands only.
42	**Certified, permit conditions**	YES – PCN	½ acre or 300'	No impact limit waivers.
43	**DENIED**	YES – (M)PCN	N/A	Must apply to EPA for individual cert.
44	**Certified, permit conditions**	YES – PCN	½ acre or 300'	
A	**Certified, permit conditions**	YES - PCN	½ acre or 300'	Site permit history, restoration plan required
B	**DENIED**	YES – (M)PCN	N/A	Must apply to EPA for individual cert.
C	**DENIED**	YES - MPCN	N/A	Must apply to EPA for individual cert.
D	**DENIED**	YES – (M)PCN	N/A	Must apply to EPA for individual cert.
E	**Certified, permit conditions**	YES – PCN	½ acre or 300'	
F	**Certified, permit conditions**	YES – PCN	½ acre or 300'	Compensatory mitigation plan required.

* "PCN" = Corps-required notification; "MPCN" = EPA-required notification, "(M)PCN" = either, depending on impact limits.

California Natural Resources Agency
DEPARTMENT OF FISH AND GAME
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Northern Region
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ARNOLD SCHWARZENEGGER, Governor
DONALD KOCH, Director

NOTIFICATION NO. R1-09-0114
(8 encroachments)

AGREEMENT REGARDING PROPOSED LAKE OR STREAMBED ALTERATION

THIS AGREEMENT, entered into between the State of California, Department of Fish and Game, hereinafter called DFG, and **Mr. Frank Demling, representing the California Department of Transportation (Caltrans)**, hereinafter jointly and severally called the Entity (Responsible Party), is as follows:

WHEREAS, pursuant to Division 2, Chapter 6 of California Fish and Game Code (Code), the Responsible Party, on **April 8, 2009**, notified DFG of the intention to divert or obstruct the natural flow of, or change the bed, channel, or bank of, or use material from the streambed of, the following waters: **Unnamed Tributaries to the Klamath River, tributary to the Pacific Ocean**, in the County of **Humboldt.** These waters are located in **Section 3, 4, 5, 11, 12, 13, Township 10 North, Range 3 East, Humboldt Base and Meridian,** in the **Johnsons, French Camp Ridge, and Weitchpec U.S. Geological Survey 7.5-minute quadrangles.**

WHEREAS, DFG has determined that without implementation of the conditions contained within this Agreement, such operations may substantially adversely affect existing fish and wildlife resources including, but not limited to: **Chinook salmon (*Oncorhynchus tshawytscha*), coho salmon (*O. kisutch*), steelhead (*O. mykiss*),** other non-game and game fishes, amphibians, reptiles, aquatic invertebrates, mammals, birds, and other aquatic and riparian species.

THEREFORE, DFG hereby proposes measures to protect fish and wildlife resources during the Responsible Party's work. The Responsible Party hereby agrees to accept and conduct all activities in accordance with the following:

ADMINISTRATIVE PROVISIONS:

1) If the Responsible Party's work changes from that stated in the notification specified above, this Agreement is no longer valid and a new notification shall be submitted to DFG. Failure to comply with the provisions of this Agreement and with other pertinent Code sections, including but not limited to Code sections 5650, 5652, 5901, 5937, and 5948, may result in prosecution.

2) Nothing in this Agreement authorizes the Responsible Party to trespass on any land or property, nor does it relieve the Responsible Party of responsibility for compliance with applicable federal, state, or local laws or ordinances. A consummated Agreement does not constitute DFG endorsement of the proposed operation, or assure DFG's concurrence with permits required from other agencies.

3) The provisions contained in this Agreement constitute the limit of activities agreed to and resolved by this Agreement. The signing of this Agreement does not imply that the Responsible

Party is precluded from doing other activities at the site. However, activities not specifically agreed to and resolved by this Agreement shall be subject to separate notification pursuant to Code sections 1600 *et seq.*

4) In accordance with Code section 1605, the Responsible Party may request one extension of this Agreement, provided that the request is made in writing prior to the expiration of its original term. DFG shall grant the extension if the appropriate extension fee is paid unless it determines that the Agreement requires modification because the measures contained in the Agreement no longer protect the fish and wildlife resources that the activity may substantially adversely affect. If the Responsible Party fails to request the extension prior to the Agreement's termination then the Responsible Party shall submit a new notification with fees and required information to DFG. Any activity conducted under an expired Agreement is a violation of Code section 1600 *et seq.*

5) The Responsible Party shall provide a copy of this Agreement to all contractors, subcontractors, and the Responsible Party's project supervisors. Copies of the Agreement and any amendment thereto shall be readily available at work sites at all times during periods of active work and must be presented to any DFG personnel, or personnel from another agency upon demand.

6) DFG reserves the right to enter the project site at any time to ensure compliance with measures and/or monitoring of this agreement, provided DFG: a) provides 24 hours advance notice; and b) allows the Responsible Party or representatives to participate in the inspection and/or monitoring. This condition does not apply to DFG enforcement personnel.

7) All provisions of this Agreement remain in force throughout the term of the Agreement. Any provisions of the Agreement may be amended or the Agreement may be terminated at any time provided such amendment and/or termination are agreed to in writing by both parties. Mutually-approved amendments become part of the original Agreement and are subject to all previously negotiated provisions.

8) It is understood DFG will enter into this Agreement for purposes of establishing protective features for fish and wildlife. The decision to proceed with the project is the sole responsibility of the Responsible Party. It is further agreed all liability and/or incurred cost related to or arising out of the Responsible Party's project and the fish and wildlife protective measures of this Agreement, remain the sole responsibility of the Responsible Party. The Responsible Party agrees to hold harmless the State of California and DFG against any related claim made by any party or parties for personal injury or any other damages.

9) This Agreement is not intended as an approval of a project or of specific project features by DFG. Independent review and recommendations will be provided by DFG as appropriate on those projects where local, state, or federal permits or other environmental reports are required.

10) Suspension and Cancellation. DFG may suspend or cancel this Agreement if DFG determines that circumstances warrant suspension or cancellation. The circumstances that might warrant suspension or cancellation include, but are not limited to, the following:

a) Failure by the Responsible Party, or his/her employees, agents, representatives, contractors, and/or subcontractors, to comply with any of the terms and measures of this Agreement.

b) DFG determines that the information the Responsible Party provided to DFG to develop this Agreement, or the information contained in a notification, is incomplete or inaccurate.
c) DFG obtains new information that shows the work authorized by this Agreement could substantially adversely affect fish and wildlife resources, notwithstanding Responsible Party's compliance with the Agreement.

d) DFG determines that measures to protect fish and wildlife resources different from those included in this Agreement are necessary to protect those resources.

e) There is a substantial change in conditions. For purposes of this Agreement, "substantial change in conditions" shall mean one or more of the following: 1) the work described in this Agreement is substantially changed; 2) conditions affecting fish and wildlife resources substantially change; and/or 3) the work conducted under this Agreement have adversely affected, or will adversely affect, fish and wildlife resources, notwithstanding that Responsible Party has complied, or will comply with, the terms and measures of this Agreement.

Scope of Suspension. At the discretion of DFG, any action to suspend this Agreement may be limited in scope to address the specific problem or problems resulting in the suspension. Hence, DFG may limit the suspension to specified work or specified areas. DFG shall notify Responsible Party of any suspension of the Agreement, or any part thereof, in writing. Any suspension shall take effect immediately upon receipt of such notice by Responsible Party, or in accordance with the instructions contained in the notice. Such notice will identify the reason or reasons for the suspension, the actions necessary to correct the problem, and the scope of the suspension.

Reinstatement Following Suspension. DFG may lift any suspension when it has determined that Responsible Party has adequately addressed the problem or problems resulting in the suspension and that reinstatement of the Agreement will not cause harm to fish and wildlife resources.

Other Laws Regarding Habitat and Species Protection.

11) No direct or indirect impacts shall occur to any threatened or endangered species as a result of implementing the project or the project's activities. If any threatened or endangered species could be impacted by the work proposed, the Responsible Party shall obtain the required state and federal permits. This Agreement does not authorize the take of any federal or state threatened or endangered species.

12) The California Endangered Species Act (CESA) (Code Sections 2050 to 2097) is administered by DFG and prohibits the take of plant and animal species designated by the Fish and Game Commission as either threatened or endangered in the state of California.

13) If the project could result in the "take" of a state listed threatened or endangered species, the Responsible Party has the responsibility to obtain from DFG, a California Endangered Species Act Permit (CESA 2081 Permit). DFG may formulate a management plan that will avoid or mitigate take. If appropriate, contact the DFG CESA coordinator at (530) 225-2300.

14) The U.S. Army Corps of Engineers (Corps) has permitting requirements for certain instream projects under Section 404 of the Federal Clean Water Act. If this project features the placement of dredged or fill materials into the channels of streams (below the ordinary high water mark) that are waters of the United States, a permit may be required by the Corps. If your project needs a permit from the Corps, you will also need to obtain a Water Quality Certification pursuant to Section 404 of the Federal Clean Water Act from the Regional Water Quality Control Board (Regional Water Board). In addition, if your project will involve disturbance within or discharges of pollutants to waters of the State of California, the Regional Water Boards may require a permit, whether or not the Corps requires a permit. If there is any question regarding the possibility of the project meeting the above limitations, the Responsible Party should contact the Corps and the Regional Water Board prior to beginning work. This Agreement in no way represents permitting requirements by the Corps or the Regional Water Board. It is the responsibility of the Responsible Party to contact the Corps, and to comply with the provisions of any Section 404 permit issued, if required by the Corps. Similarly, it is the responsibility of the Responsible Party to contact the Regional Water Board and to comply with the provisions of any Section 401 Certification, Regional Water Board Waste Discharge Requirements or waiver of Waste Discharge Requirements issued by the Regional Water Board.

15) The Responsible Party may have certain other responsibilities pursuant to the Federal Endangered Species Act resulting in mitigative project features required by the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service.

16) The Responsible Party shall comply with all litter and pollution laws. All contractors, subcontractors and employees shall also obey these laws and it shall be the responsibility of the Responsible Party to ensure compliance.

OPERATIONAL PROVISIONS

NOTIFICATION MATERIALS AND PROJECT DESCRIPTION:

17) The Responsible Party's notification (notification of lake or streambed alteration, received April 8, 2009) together with all maps, plans, photographs, drawings, and all other supporting documents submitted with notification to describe the activity, are hereby incorporated by reference into this Agreement. Responsible Party shall conduct project activities within the work areas and using the mitigative features described in the notification and supporting documents, unless such project activities, work areas or mitigative features are modified by the provisions of this Agreement, in which case the activities shall be conducted as described in this Agreement.

18) The work under this Agreement is limited to *activities at stream crossings at eight locations including post miles (PM) 21.1, 22.1, 22.21, 23.93, 25.49, 26.31, 30.49, and 32.88. These include but are not limited to replacing existing culverts, placing rock slope protection (RSP), and installing drop inlets.*

PROJECT TIMING AND COORDINATION:

19) The Responsible Party shall contact DFG within the 7-day period preceding the beginning of work permitted by this Agreement. Information to be disclosed shall include Agreement number, and the anticipated start date. The Responsible Party shall contact DFG within thirty days of

completion of the work permitted by this Agreement. Information to be disclosed shall include Agreement number.

20) All work shall be confined to the period June 15 through October 15 of each year.

GENERAL CONDITIONS FOR ALL ENCROACHMENTS

21) Equipment shall not operate in a live (flowing) stream or wetted channel except as may be necessary to construct and remove in-stream structures to catch and contain water (i.e. cofferdams) to divert stream flow and isolate the work site, or as otherwise specifically provided for in this Agreement.

22) No fill material shall be placed within a stream except as specified in this Agreement. Pit-run rock may be used as bedding material for permanent culverts. No native fill shall be placed in a live stream. Any fill material used shall be placed and/or removed in such a manner that it shall cause no sediment discharge or siltation in the stream.

23) All heavy equipment that will be entering the live stream shall be cleaned of materials deleterious to aquatic life including oil, grease, hydraulic fluid, soil and other debris. Cleaning of equipment shall take place outside of the riparian area and prior to entering the water.

24) Adequate and effective erosion and siltation control measures shall be used to prevent sediment or turbid or silt-laden water from entering streams. Where needed, the Responsible Party shall use native vegetation or other treatments including jute netting, straw wattles, and geotextiles to protect and stabilize soils. Geotextiles, fiber rolls, and other erosion control treatments shall not contain plastic mesh netting.

25) All bare mineral soil exposed in conjunction with crossing construction, deconstruction, maintenance or repair, shall be treated for erosion prior to the onset of precipitation capable of generating run-off or the end of the yearly work period, whichever comes first. Restoration shall include the seeding and mulching of all bare mineral soil exposed in conjunction with encroachment work. Erosion control shall consist of at least 2 to 4 inches straw mulch and 100 lbs/acre equivalent barley seed. No annual, or Italian, ryegrass (*Lolium multiflorum*) shall be used.

26) Encroachments and associated structures, fills, and other exposed soils shall be armored as needed to protect fill, abutments, and the stream channel and banks from erosion. Armoring shall be comprised of rock riprap, large woody debris (LWD), or other non-polluting materials and shall be constructed to remain in place during periods of high flow events. When used on permanent culverts, armoring shall extend at least as high as the top of the culvert, and shall prevent bank erosion by extending a sufficient distance upstream and downstream along the banks.

27) Encroachments shall be constructed, deconstructed, and maintained in a manner that minimizes to the extent feasible headcutting or downcutting of the stream channel by installing grade control such as riprap, woody debris, or through other effective measures.

28) Disturbance or removal of vegetation shall not exceed the minimum necessary to complete operations.

29) The Responsible Party shall provide site maintenance including, but not limited to, re-applying erosion control to minimize surface erosion and ensuring drainage structures, streambeds and banks remain sufficiently armored and/or stable.

30) Structures and associated materials not designed to withstand high seasonal flows shall be removed to areas above the ordinary high water mark before such flows occur or the end of the yearly work period, whichever comes first.

31) Refueling of equipment and vehicles and storing, adding or draining lubricants, coolants or hydraulic fluids shall not take place within riparian areas or within stream beds, banks or channels. All such fluids and containers shall be disposed of properly.

32) No debris, soil, silt, sand, bark, slash, sawdust, rubbish, cement or concrete washings, oil or petroleum products, or other organic or earthen material from any logging, construction, or associated activity of whatever nature shall be allowed to enter into or be placed where it may be washed by rainfall or runoff into Waters of the State. When operations are completed, any excess materials or debris shall be removed from the work area.

SITE-SPECIFIC CONDITIONS

33) Permanent culverts shall extend lengthwise completely beyond the toe of fill. Permanent culverts and their outfall structures shall be aligned with the stream channel, as wide as or wider than the channel width, and shall be placed with the bottom set at or slightly below the natural streambed elevation to the maximum extent feasible. If permanent culverts cannot be set to grade, they shall have downspouts and/or energy dissipators below the outfall as needed to effectively control erosion. If half-round downspouts (flumes) are used, they shall be placed in line with the culvert, sized larger than the culvert and of sufficient size to accommodate entire anticipated stream flow. Downspouts shall be securely attached to the culvert and staked or otherwise anchored to the fill slope.

34) At PM 21.1, Caltrans shall notify DFG to replace the existing failing culvert within one year of the effective date of this Agreement. The notification package shall include 100-year storm event calculations (including debris), propose the installation of a properly sized culvert, propose installation of RSP on eroding streambanks upstream of the culvert inlet, and include installation of a downspout and/or rock energy dissipater at the culvert outlet.

35) At PM 22.21, the inboard ditch draining a perennial spring into the culvert inlet shall be excavated and armored to the maximum extent practicable to prevent water from flowing across the road surface.

36) At PM 25.49, the inboard ditch draining a spring into the culvert inlet shall be excavated and armored to the maximum extent practicable to prevent water from flowing across the road surface. A rock energy dissipater shall be constructed at the outlet to prevent further channel incision.

37) At PM 26.31, RSP shall be placed at the existing culvert outlet. The inboard ditch may be excavated to prevent the spring from flowing across the road prism.

38) At PM 30.49, the inboard ditch may be excavated to prevent inboard ditch drainage from flowing across the road. The inboard ditch shall be rock armored from the point where it discharges into the stream to approximately 20-feet upslope.

This Agreement becomes effective on the date of DFG's signature and terminates 2 years from the effective date.

CONCURRENCE

RESPONSIBLE PARTY

(Signature)

FRANK DEMLING
(Print Name)

PROJECT MANAGER
(Title/Organization)

15 DECEMBER 2009
(Date)

CALIFORNIA DEPARTMENT OF FISH AND GAME

for Kenneth C. Moore
Habitat Conservation Program Manager
Northern Region

1/11/10
(Date)

Prepared by: Environmental Scientist Scott Bauer, July 29, 2009

DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
1455 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94103-1398

DEC 0 3 2009

Recieved 12/16/2009

Regulatory Division (1145b)

SUBJECT: File No. 2009-00183N

Ms. Denise Walker-Brown
California Department of Transportation
District 1
Post Office Box 3700
Eureka, California 95502

Dear Ms. Walker-Bown:

This letter responds to your submittal of April 2, 2009, concerning Department of the Army authorization to complete storm damage restoration at seven locations on route 169 (PM 21.98 and 32.88), Humboldt County, California. The project sites are located within the Johnsons, French Camp Ridge and Weitchpec Quadrangles (APN's: 53413213, -3223, -5234, -8211, 53108401, and 53008118). Caltrans requests authorization to repair damage caused by 2005 and 2006 winter storms that resulted in impairment of the roadway.

About 0.143 acre of wetlands and other potentially jurisdictional waters occur within the project area. They may be impacted by construction. These features will likely not be directly impacted but some will be temporarily or permanently filled due to construction activities. Impacts are expected from the following activities: placement of a dike and RSP at site number 8; culvert repairs at sites 5, 6, and 9; and road widening or drainage filling along the north-bound shoulder at sites 1, 2, 4, 5, 6, 8, and 9. Project construction work will be performed in general accordance with the plans and drawings entitled: "Project Plans for Construction on State Highway from 1.9 miles west of Cappell Creek Bridge to 0.9 mile west of the 169/96 Junction" and "Location Map," dated March 1, 2007 and May 2008, respectively.

Based on a review of the information you submitted and an inspection of the project site conducted by Corps personnel, your project qualifies for authorization under Department of the Army Nationwide Permit (NWP) 14 for *Linear Transportation Projects* and NWP 33 for *Temporary Construction, Access, and Dewatering* (72 Fed. Reg. 11092, Mar. 12, 2007), pursuant to Section 404 of the Clean Water Act (33 U.S.C. § 1344). Section 404 generally regulates the discharge of dredged and fill material below the plane of ordinary high water in non-tidal waters of the United States, below the high tide line in tidal waters of the United States, and within the lateral extent of wetlands adjacent to these waters.

The project must be in compliance with the Terms and General Conditions of the NWPs cited in Enclosure 1 and any Special Conditions specified in this letter for the NWP authorization to remain valid. Non-compliance with any Term or Condition could result in the revocation of the NWP authorization for your project, thereby requiring you to obtain an Individual Permit

from the Corps of Engineers (Corps). Upon completion of the project and all associated mitigation and monitoring requirements, you shall sign and return the statement cited in Enclosure 2, certifying all work complies with the Terms and Conditions of the NWPs. Project authorization under the NWPs does not obviate any requirement to obtain other Federal, State, or local approvals necessitated by law.

Project authorization will remain valid for a period of two (2) years from the date of this letter, unless the NWPs are modified, suspended, or revoked. If the project has commenced or is under contract to commence construction prior to any modification, suspension, or revocation of the NWPs and the project could not comply with any newly issued NWP, you shall have twelve (12) months from that expiration date to complete the project under the present Terms and Conditions of this NWP authorization.

Project authorization will not be effective until you have obtained Section 401 water quality certification from the Regional Water Quality Control Board (RWQCB), North Coast Region and a coastal zone consistency concurrence from the California Coastal Commission (CCC). You shall submit a copy of the certification and consistency concurrence to the Corps prior to the commencement of work. You shall comply with any condition of certification and consistency concurrence required by RWQCB and CCC, and you shall consider such conditions to be an integral part of the NWP authorization for your project. If the RWQCB fails to act on a valid request for certification within two (2) months after receipt of a complete application, the Corps may a waiver of water quality certification has been obtained. If the CCC fails to act on a valid request for a consistency concurrence within six (6) months after receipt of a complete application, the Corps may presume a consistency concurrence has been obtained.

To ensure compliance with the NWP authorization and to further minimize adverse impacts to water quality and other aquatic resources, the project is subject to implementation of the following special conditions:

1. All minimization measures identified on pages 6 through 8 of the permit application, dated April 13, 2009, shall be implemented.

2. Best Management Practices shall be implemented to minimize turbidity and downstream sedimentation.

You may refer any questions on this matter to Carol Heidsiek of our Regulatory staff by telephone at 707-443-0855. All correspondence should be addressed to the Regulatory Division, Eureka Field Office, 601 Startare Drive, Box14, Eureka, California 95501, referencing the File Number at the head of this letter. If you would like to provide comments on our permit review process, please complete the Customer Survey Form available online at our website: http://www.per2.nwp.usace.army.mil/survey.html.

Sincerely,

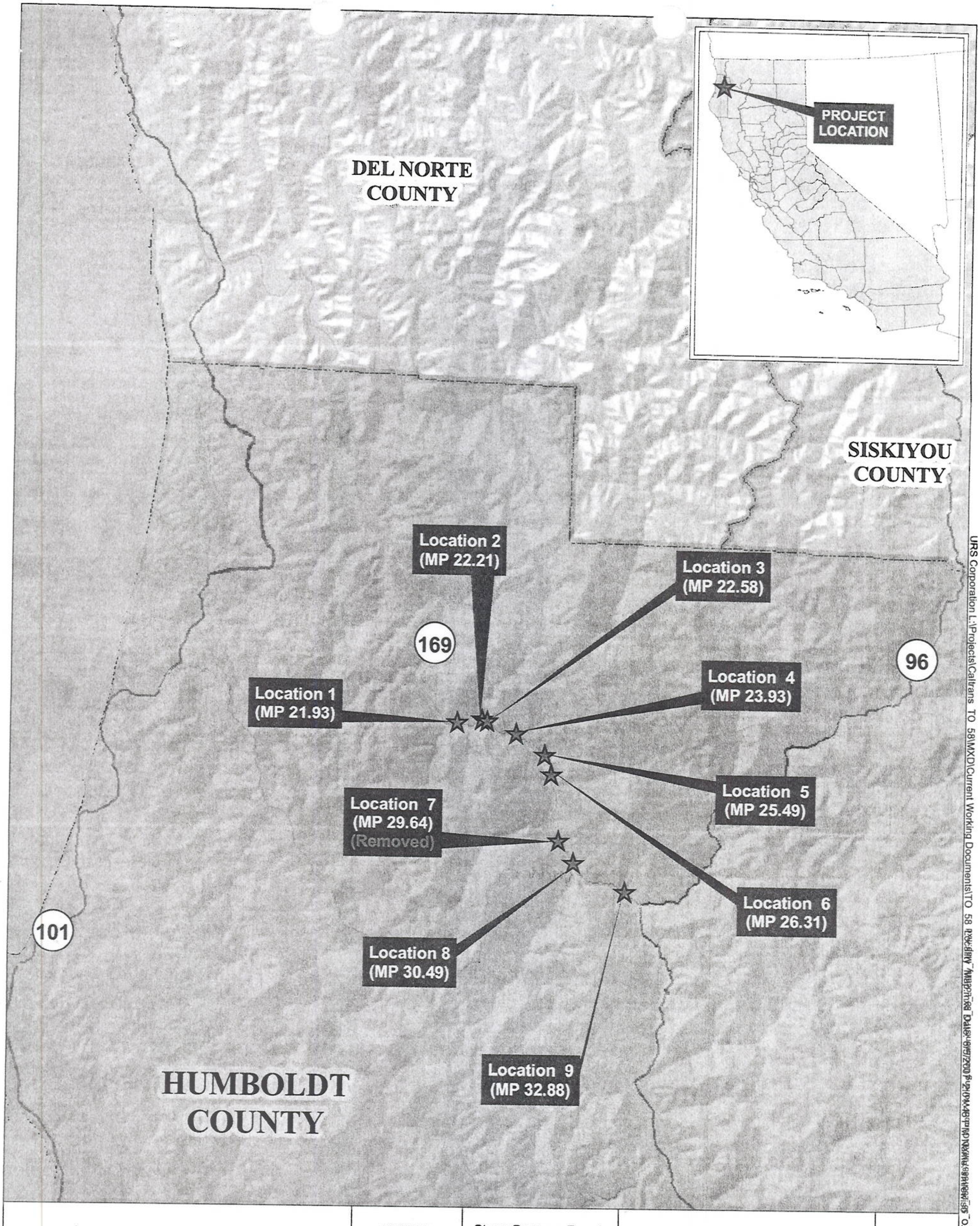
for

Jane M. Hicks
Chief, Regulatory Division

Enclosures

Copies Furnished (w/o encls):

US NMFS, Arcata, CA
CA CC, Eureka, CA
CA DFG, Eureka, CA
CA RWQCB, Santa Rosa, CA



Caltrans

Storm Damage Repair on Highway 169

EA - 478501

TO 58 Location Map

Figure 1

Mar 2008

URS Corporation L:\Projects\Caltrans TO 58\MXD\Current Working Documents\TO 58

L:\Projects\Caltrans_TO_

2009-0018

Enclosure 2

Permittee: Denise Walker-Brown, Caltrans

File Number: 2009-00183N

Certification of Compliance
for
Nationwide Permit

"I hereby certify that the work authorized by the above referenced File Number and all required mitigation have been completed in accordance with the terms and conditions of this Nationwide Permit authorization."

_____ _____

PERMITTEE DATE

Return to:

Carol Heidsiek
Eureka Field Office
U.S. Army Corps of Engineers
601 Startare Drive Box 14
Eureka, CA 95501

Nationwide Permit Summary

U S Army Corps of Engineers
Sacramento District

33 CFR Part 330; Issuance of Nationwide Permits – March 19, 2007 includes corrections of May 8, 2007 and addition of regional conditions December 2007

23. Approved Categorical Exclusions. Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where:

(a) That agency or department has determined, pursuant to the Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (40 CFR part 1500 et seq.), that the activity is categorically excluded from environmental documentation, because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment; and

(b) The Office of the Chief of Engineers (Attn: CECW-CO) has concurred with that agency's or department's determination that the activity is categorically excluded and approved the activity for authorization under NWP 23.

The Office of the Chief of Engineers may require additional conditions, including pre-construction notification, for authorization of an agency's categorical exclusions under this NWP.

Notification: Certain categorical exclusions approved for authorization under this NWP require the permittee to submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letters. (Sections 10 and 404)

Note: The agency or department may submit an application for an activity believed to be categorically excluded to the Office of the Chief of Engineers (Attn: CECW-CO). Prior to approval for authorization under this NWP of any agency's activity, the Office of the Chief of Engineers will solicit public comment. As of the date of issuance of this NWP, agencies with approved categorical exclusions are the: Bureau of Reclamation, Federal Highway Administration, and U.S. Coast Guard. Activities approved for authorization under this NWP as of the date of this notice are found in Corps Regulatory Guidance Letter 05-07, which is available at: http://www.usace.army.mil/inet/functions/cw/cecwo/reg/rglsindx.htm. Any future approved categorical exclusions will be announced in Regulatory Guidance Letters and posted on this same web site.

A. Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as appropriate, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP.

☐ **1. Navigation.**

☐ (a) No activity may cause more than a minimal adverse effect on navigation.

☐ (b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

☐ (c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

☐ **2. Aquatic Life Movements**. No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions.

☐ **3 Spawning Areas.** Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

☐ **4. Migratory Bird Breeding Areas.** Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

☐ **5. Shellfish Beds.** No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWPs 4 and 48.

☐ **6. Suitable Material.** No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

☐ **7. Water Supply Intakes.** No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

☐ **8. Adverse Effects From Impoundments.** If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or

restricting its flow must be minimized to the maximum extent practicable.

☐ **9. Management of Water Flows**. To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization and storm water management activities, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

☐ **10. Fills Within 100-Year Floodplains**. The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

☐ **11. Equipment**. Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

☐ **12. Soil Erosion and Sediment Controls**. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow.

☐ **13. Removal of Temporary Fills**. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

☐ **14. Proper Maintenance**. Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety.

☐ **15. Wild and Scenic Rivers**. No activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).

☐ **16. Tribal Rights**. No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

☐ **17. Endangered Species**.

☐ (a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

☐ (b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

☐ (c) Non-federal permittees shall notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. The district engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have "no effect" on listed species or critical habitat, or until Section 7 consultation has been completed.

☐ (d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific regional endangered species conditions to the NWPs.

☐ (e) Authorization of an activity by a NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the U.S. FWS or the NMFS, both lethal and non-lethal "takes" of protected species are in violation of the ESA. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. FWS and NMFS or their world wide Web pages at http://www.fws.gov/ and http://www.noaa.gov/fisheries.html respectively.

☐ **18. Historic Properties**.

☐ (a) In cases where the district engineer determines that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

☐ (b) Federal permittees should follow their own procedures for complying with the requirements of Section 106 of the National Historic Preservation Act. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

☐ (c) Non-federal permittees must submit a pre-construction notification to the district engineer if the authorized activity may have the potential to cause effects to any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties may be affected by the proposed work or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of or potential for the presence of historic resources can be sought from the State Historic Preservation Officer or Tribal Historic Preservation Officer, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted and these efforts, the district engineer shall determine whether the proposed activity has the potential to cause an effect on the historic properties. Where the non-Federal applicant has identified historic properties which the activity may have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed.

☐ (d) The district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA Section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR §800.3(a)). If NHPA section 106 consultation is required and will occur, the district engineer will notify the non-Federal applicant that he or she cannot begin work until Section 106 consultation is completed.

☐ (e) Prospective permittees should be aware that section 110k of the NHPA (16 U.S.C. 470h-2(k)) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, explaining the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

☐ **19. Designated Critical Resource Waters.** Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, state natural heritage sites, and outstanding national resource waters or other waters officially designated by a state as having particular environmental or ecological significance and identified by the district engineer after notice and opportunity for public comment. The district engineer may also designate additional critical resource waters after notice and opportunity for comment.

☐ (a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, and 50 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

☐ (b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with general condition 27, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

☐ **20 Mitigation.** The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that adverse effects on the aquatic environment are minimal:

☐ (a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site).

☐ (b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

☐ (c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10 acre and require pre-construction notification, unless the district engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement. For wetland losses of 1/10 acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in minimal adverse effects on the

aquatic environment. Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, wetland restoration should be the first compensatory mitigation option considered.

☐ (d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation, such as stream restoration, to ensure that the activity results in minimal adverse effects on the aquatic environment.

☐ (e) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2 acre, it cannot be used to authorize any project resulting in the loss of greater than 1/2 acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that a project already meeting the established acreage limits also satisfies the minimal impact requirement associated with the NWPs.

☐ (f) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the establishment, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, riparian areas may be the only compensatory mitigation required. Riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

☐ (g) Permittees may propose the use of mitigation banks, in-lieu fee arrangements or separate activity-specific compensatory mitigation. In all cases, the mitigation provisions will specify the party responsible for accomplishing and/or complying with the mitigation plan.

☐ (h) Where certain functions and services of waters of the United States are permanently adversely affected, such as the conversion of a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse effects of the project to the minimal level.

☐ **21. Water Quality.** Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA Section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

☐ **22. Coastal Zone Management**. In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

☐ **23. Regional and Case-By-Case Conditions**. The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

☐ **24. Use of Multiple Nationwide Permits**. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3-acre.

☐ **25. Transfer of Nationwide Permit Verifications**. If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

> "When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below."
>
> ---
>
> (Transferee)
>
> ---
>
> (Date)

☐ **26. Compliance Certification**. Each permittee who received an NWP verification from the Corps must submit a signed certification regarding the completed work and any required mitigation. The certification form must be forwarded by the Corps with the NWP verification letter and will include:

☐ (a) A statement that the authorized work was done in accordance with the NWP authorization, including any general or specific conditions;

☐ (b) A statement that any required mitigation was completed in accordance with the permit conditions; and

☐ (c) The signature of the permittee certifying the completion of the work and mitigation.

☐ **27. Pre-Construction Notification.**

☐ (a) **Timing**.. Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, as a general rule, will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

☐ (1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

☐ (2) Forty-five calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 17 that listed species or critical habitat might affected or in the vicinity of the project, or to notify the Corps pursuant to general condition 18 that the activity may have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that is "no effect" on listed species or "no potential to cause effects" on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or Section 106 of the National Historic Preservation (see 33 CFR 330.4(g)) is completed. Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee cannot begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

☐ (b) Contents of Pre-Construction Notification: The PCN must be in writing and include the following information:

☐ (1) Name, address and telephone numbers of the prospective permittee;

☐ (2) Location of the proposed project;

☐ (3) A description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity. The description should be sufficiently detailed to allow the district engineer to determine that the adverse effects of the project will be minimal and to determine the need for compensatory mitigation. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the project and when provided result in a quicker decision.);

☐ (4) The PCN must include a delineation of special aquatic sites and other waters of the United States on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters of the United States, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many waters of the United States. Furthermore, the 45 day period will not start until the delineation has been submitted to or completed by the Corps, where appropriate;

☐ (5) If the proposed activity will result in the loss of greater than 1/10 acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

☐ (6) If any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, for non-Federal applicants the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work. Federal applicants must provide documentation demonstrating compliance with the Endangered Species Act; and

☐ (7) For an activity that may affect a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, for non-Federal applicants the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic

property. Federal applicants must provide documentation demonstrating compliance with Section 106 of the National Historic Preservation Act.

☐ (c) Form of Pre-Construction Notification: The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is a PCN and must include all of the information required in paragraphs (b)(1) through (7) of this general condition. A letter containing the required information may also be used.

☐ (d) Agency Coordination:

☐ (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

☐ (2) For all NWP 48 activities requiring pre-construction notification and for other NWP activities requiring pre-construction notification to the district engineer that result in the loss of greater than 1/2-acre of waters of the United States, the district engineer will immediately provide (e.g., via facsimile transmission, overnight mail, or other expeditious manner) a copy of the PCN to the appropriate Federal or state offices (U.S. FWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Office (THPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the district engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

☐ (3) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by Section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

☐ (4) Applicants are encouraged to provide the Corps multiple copies of pre-construction notifications to expedite agency coordination.

☐ (5) For NWP 48 activities that require reporting, the district engineer will provide a copy of each report within 10 calendar days of receipt to the appropriate regional office of the NMFS.

☐ (e) In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If the proposed activity requires a PCN and will result in a loss of greater than 1/10 acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for projects with smaller impacts. The district engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, after considering mitigation, the district engineer will notify the permittee and include any conditions the district engineer deems necessary. The district engineer must approve any compensatory mitigation proposal before the permittee commences work. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the district engineer to be minimal, the district engineer will provide a timely written response to the applicant. The response will state that the project can proceed under the terms and conditions of the NWP.

If the district engineer determines that the adverse effects of the proposed work are more than minimal, then the district engineer will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period. The authorization will include the necessary conceptual or specific mitigation or a requirement that the applicant

submit a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level. When mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan.

☐ **(a) 28. Single and Complete Project.** The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

B. Regional Conditions:

I. Sacramento District (All States, except Colorado)

1. When pre-construction notification (PCN) is required, the prospective permittee shall notify the Sacramento District in accordance with General Condition 27 using either the South Pacific Division Preconstruction Notification (PCN) Checklist or a completed application form (ENG Form 4345). In addition, the PCN shall include:

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

b. Drawings, including plan and cross-section views, clearly depicting the location, size and dimensions of the proposed activity. The drawings shall contain a title block, legend and scale, amount (in cubic yards) and size (in acreage) of fill in Corps jurisdiction, including both permanent and temporary fills/structures. The ordinary high water mark or, if tidal waters, the high tide line should be shown (in feet), based on National Geodetic Vertical Datum (NGVD) or other appropriate referenced elevation; and

c. Pre-project color photographs of the project site taken from designatedlocations documented on the plan drawing.

2. The permittee shall complete compensatory mitigation required by special conditions of the NWP verification before or concurrent with construction of the authorized activity, except when specifically determined to be impracticable by the Sacramento District. When project mitigation involves use of a mitigation bank or in-lieu fee program, payment shall be made before commencing construction.

3. The permittee shall record the NWP verification with the Registrar of Deeds or other appropriate official charged with the responsibility for maintaining records of title to or interest in real property against areas (1) designated to be preserved as part of mitigation for authorized impacts, including any associated covenants or restrictions, or (2) where structures such as boat ramps or docks, marinas, piers, and permanently moored vessels will be constructed in or adjacent to navigable waters (Section 10 and Section 404). The recordation shall also include a map showing the surveyed location of the authorized structure and any associated areas preserved to minimize or compensate for project impacts.

4. The permittee shall place wetlands, other aquatic areas, and any vegetative buffers preserved as part of mitigation for impacts into a separate "preserve" parcel prior to discharging dredged or fill material into waters of the United States, except where specifically determined to be impracticable by the Sacramento District. Permanent legal protection shall be established for all preserve parcels, following Sacramento District approval of the legal instrument.

5. The permittee shall allow Corps representatives to inspect the authorized activity and any mitigation areas at any time deemed necessary to determine compliance with the terms and conditions of the NWP verification. The permittee will be notified in advance of an inspection.

6. For NWPs 29, 39, 40, 42, 43, 44, and 46, requests to waive the 300 linear foot limitation for intermittent or ephemeral waters of the U.S. shall include an evaluation of functions and services provided by the waterbody taking into account the watershed, measures to be implemented to avoid and minimize impacts, other measures to avoid and minimize that were found to be impracticable, and a mitigation plan for offsetting impacts.

7. Road crossings shall be designed to ensure fish passage, especially for anadromous fisheries. Permittees shall employ bridge designs that span the stream or river, utilize pier or pile supported structures, or involve large bottomless culverts with a natural streambed, where the substrate and streamflow conditions approximate existing channel conditions. Approach fills in waters of the United States below the ordinary high water mark are not authorized under the NWPs, except where avoidance has specifically been determined to be impracticable by the Sacramento District.

8. For NWP 12, clay blocks, bentonite, or other suitable material shall be used to seal the trench to prevent the utility line from draining waters of the United States, including wetlands.

9. For NWP 13, bank stabilization shall include the use of vegetation or other biotechnical design to the maximum extent practicable. Activities involving hard-armoring of the bank toe or slope requires submission of a PCN per General Condition 27.

10. For NWP 23, the PCN shall include a copy of the signed Categorical Exclusion document and final agency determinations regarding compliance with Section 7 of the Endangered Species Act, Essential Fish Habitat under the Magnussen-Stevens Act, and Section 106 of the National Historic Preservation Act.

11. For NWP 44, the discharge shall not cause the loss of more than 300 linear feet of streambed. For intermittent and ephemeral streams, the 300 linear foot limit may be waived in writing by the Sacramento District. This NWP does not authorize discharges in waters of the United States supporting anadromous fisheries.

12. For NWPs 29 and 39, channelization or relocation of intermittent or perennial drainage, is not authorized, except when, as determined by the Sacramento District, the relocation would result in a net increase in functions of the aquatic ecosystem within the watershed.

13. For NWP 33, temporary fills for construction access in waters of the United States supporting fisheries shall be accomplished with clean, washed spawning quality gravels where practicable as determined by the Sacramento District, in consultation with appropriate federal and state wildlife agencies.

14. For NWP 46, the discharge shall not cause the loss of greater than 0.5 acres of waters of the United States or the loss of more than 300 linear feet of ditch, unless this 300 foot linear foot limit is waived in writing by the Sacramento District.

15. For NWPs 29, 39, 40, 42, and 43, upland vegetated buffers shall be established and maintained in perpetuity, to the maximum extent practicable, next to all preserved open waters, streams and wetlands including created, restored, enhanced or preserved waters of the U.S., consistent with General Condition 20. Except in unusual circumstances, vegetated buffers shall be at least 50 feet in width.

16. All NWPs except 3, 6, 20, 27, 32, 38, and 47, are revoked for activities in histosols and fens and in wetlands contiguous with fens. Fens are defined as slope wetlands with a histic epipedon that are hydrologically supported by groundwater. Fens are normally saturated throughout the growing season, although they may not be during drought conditions. For NWPs 3, 6, 20, 27, 32, and 38, prospective permittees shall submit a PCN to the Sacramento District in accordance with General Condition 27.

17. For all NWPs, when activities are proposed within 100 feet of the point of groundwater discharge of a natural spring, prospective permittees shall submit a PCN to the Sacramento District in accordance with General Condition 27. A spring source is defined as any location where ground water emanates from a point in the ground. For purposes of this condition, springs do not include seeps or other discharges which lack a defined channel.

II. California Only

1. In the Lake Tahoe Basin, all NWPs are revoked. Activities in this area shall be authorized under Regional General Permit 16 or through an individual permit.

2. In the Primary and Secondary Zones of the Legal Delta, NWPs 29 and 39 are revoked. New development activities in the Legal Delta will be reviewed through the Corps' standard permit process.

III. Nevada Only

1. In the Lake Tahoe Basin, all NWPs are revoked. Activities in this area shall be authorized under Regional General Permit 16 or through an individual permit.

IV. Utah Only

1. For all NWPs, except NWP 47, prospective permittees shall submit a PCN in accordance with General Condition 27 for any activity, in waters of the United States, below 4217 feet mean sea level (msl) adjacent to the Great Salt Lake and below 4500 feet msl adjacent to Utah Lake.

2. A PCN is required for all bank stabilization activities in a perennial stream that would affect more than 100 linear feet of stream.

3. For NWP 27, facilities for controlling stormwater runoff, construction of water parks such as kayak courses, and use of grout or concrete to construct in-stream structures are not authorized. A PCN is required for all projects exceeding 1500 linear feet as measured on the stream thalweg, using in stream structures exceeding 50 cubic yards per structure and/or incorporating grade control structures exceeding 1 foot vertical drop. For any stream restoration project, the post project stream sinuosity shall be appropriate to the geomorphology of the surrounding area and shall be equal to, or greater than, pre project sinuosity. Sinuosity is defined as the ratio of stream length to project reach length. Structures shall allow the passage of aquatic organisms, recreational water craft or other navigational activities unless specifically waived in writing by the District Engineer.

V. Colorado Only

1. Final Regional Conditions Applicable to Specific Nationwide Permits within Colorado.

a. Nationwide Permit Nos. 12 and 14, Utility Line Activities and Linear Transportation Projects. In the Colorado River Basin, utility line and road activities crossing perennial water or special aquatic sites require notification to the District Engineer in accordance with General Condition 27 (Pre-Construction Notification).

b. Nationwide Permit No. 13 Bank Stabilization. In Colorado, bank stabilization activities necessary for erosion prevention in streams that average less than 20 feet in width (measured between the ordinary high water marks) are limited to the placement of no more than 1/4 cubic yard of suitable fill* material per running foot below the plane of the ordinary high water mark. Activities greater than 1/4 cubic yard may be authorized if the permittee notifies the District Engineer in accordance with General Condition 27 (Pre-Construction Notification) and the Corps determines the adverse environmental effects are minimal. [* See (g) for definition of Suitable Fill]

c. Nationwide Permit No. 27 Aquatic Habitat Restoration, Establishment, and Enhancement Activities.

(1) For activities that include a fishery enhancement component, the Corps will send the Pre-Construction Notification to the Colorado Division of Wildlife (CDOW) for review. In accordance with General Condition 27 (Pre-Construction Notification), CDOW will have 10 days from the receipt of Corps notification to indicate that they will be commenting on the proposed project. CDOW will then have an additional 15 days after the initial 10-day period to provide those comments. If CDOW raises concerns, the applicant may either modify their plan, in coordination with CDOW, or apply for a standard individual permit.

(2) For activities involving the length of a stream, the post-project stream sinuosity will not be significantly reduced, unless it is demonstrated that the reduction in sinuosity is consistent with the natural morphological evolution of the stream (sinuosity is the ratio of stream length to project reach length).

(3) Structures will allow the upstream and downstream passage of aquatic organisms, including fish native to the reach, as well as recreational water craft or other navigational activities, unless specifically waived in writing by the District Engineer. The use of grout and/or concrete in

building structures is not authorized by this nationwide permit.

(4) The construction of water parks (i.e., kayak courses) and flood control projects are not authorized by this nationwide permit.

d. Nationwide Permits Nos. 29 and 39; Residential Developments and Commercial and Institutional Developments. A copy of the existing FEMA/locally-approved floodplain map must be submitted with the Pre-Construction Notification. When reviewing proposed developments, the Corps will utilize the most accurate and reliable FEMA/locally-approved pre-project floodplain mapping, not post-project floodplain mapping based on a CLOMR or LOMR. However, the Corps will accept revisions to existing floodplain mapping if the revisions resolve inaccuracies in the original floodplain mapping and if the revisions accurately reflect pre-project conditions.

2. Final Regional Conditions Applicable to All Nationwide Permits within Colorado

e. Removal of Temporary Fills. General Condition 13 (Removal of Temporary Fills) is amended by adding the following: When temporary fills are placed in wetlands in Colorado, a horizontal marker (i.e. fabric, certified weed-free straw, etc.) must be used to delineate the existing ground elevation of wetlands that will be temporarily filled during construction.

f. Spawning Areas. General Condition 3 (Spawning Areas) is amended by adding the following: In Colorado, all Designated Critical Resource Waters (see enclosure 1) are considered important spawning areas. Therefore, In accordance with General Condition 19 (Designated Critical Resource Waters), the discharge of dredged or fill material in not authorized by the following nationwide permits in these waters: NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, and 50. In addition, in accordance with General Condition 27 (Pre-Construction Notification), notification to the District Engineer is required for use of the following nationwide permits in these waters: NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37 and 38".

g. Suitable Fill. In Colorado, use of broken concrete as fill material requires notification to the District Engineer in accordance with General Condition 27 (Pre-Construction Notification). Permittees must demonstrate that soft engineering methods utilizing native or non-manmade materials are not practicable (with respect to cost, existing technology, and logistics), before broken concrete is allowed as suitable fill. Use of broken concrete with exposed rebar is prohibited in perennial waters and special aquatic sites.

h. Invasive Aquatic Species. General Condition 11 is amended by adding the following condition for work in perennial or intermittent waters of the United States: If heavy equipment is used for the subject project that was previously working in another stream, river, lake, pond, or wetland within 10 days of initiating work, one the following procedures is necessary to prevent the spread of New Zealand Mud Snails and other aquatic hitchhikers:

(1) Remove all mud and debris from equipment (tracks, turrets, buckets, drags, teeth, etc.) and keep the equipment dry for 10 days. OR

(2) Remove all mud and debris from Equipment (tracks, turrets, buckets, drags, teeth, etc.) and spray/soak equipment with either a 1:1 solution of Formula 409 Household Cleaner and water, or a solution of Sparquat 256 (5 ounces Sparquat per gallon of water). Treated equipment must be kept moist for at least 10 minutes. OR

(3) Remove all mud and debris from equipment (tracks, turrets, buckets, drags, teeth, etc.) and spray/soak equipment with water greater than 120 degrees F for at least 10 minutes.

3. Final Regional Conditions for Revocation/Special Notification Specific to Certain Geographic Areas

i. Fens: All Nationwide permits, except permit Nos. 3, 6, 20, 27, 32, 38 and 47, are revoked in fens and wetlands adjacent to fens. Use of nationwide permit Nos. 3, 20, 27 and 38, requires notification to the District Engineer, in accordance with General Condition 27 (Pre-Construction Notification), and the permittee may not begin the activity until the Corps determines the adverse environmental effects are minimal. The following defines a fen:

> Fen soils (histosols) are normally saturated throughout the growing season, although they may not be during drought conditions. The primary source of hydrology for fens is groundwater. Histosols are defined in accordance with the U.S. Department of Agriculture, Natural Resources Conservation Service publications on Keys to Soil Taxonomy and Field Indicators of Hydric Soils in the United States (http://soils.usda.gov/technical/classification/taxonomy).

j. Springs: Within the state of Colorado, all NWPs, except permit 47 (original 'C'), require preconstruction notification pursuant to General Condition 27 for discharges of dredged or fill material within 100 feet of the point of groundwater discharge of natural springs. A spring source is defined as any location where groundwater emanates from a point in the ground. For purposes of this regional condition, springs do not include seeps or other discharges which do not have a defined channel.

4. Additional Information

The following provides additional information regarding minimization of impacts and compliance with existing general Conditions:

a. Permittees are reminded of the existing General Condition No. 6 which prohibits the use of unsuitable material. Organic debris, building waste, asphalt, car bodies, and trash are not suitable material. Also, General Condition 12 requires appropriate erosion and sediment controls (i.e. all fills must be permanently stabilized to

prevent erosion and siltation into waters and wetlands at the earliest practicable date). Streambed material or other small aggregate material placed along a bank as stabilization will not meet General Condition 12. Also, use of erosion control mates that contain plastic netting may not meet General Condition 12 if deemed harmful to wildlife.

b. Designated Critical Resource Waters in Colorado. In Colorado, a list of designated Critical Resource Waters has been published in accordance with General Condition 19 (Designated Critical Resource Waters). This list will be published on the Albuquerque District Regulatory home page (http://www.spa.usace.army.mil/reg/)

c. Federally-Listed Threatened and Endangered Species. General condition 17 requires that nod-federal permittees notify the District Engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project. Information on such species, to include occurrence by county in Colorado, may be found at the following U.S. Fish and Wildlife Service website: http://www.fws.gov/mountain%2Dprairie/endspp/name_county_search.htm

C. Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

3. NWPs do not grant any property rights or exclusive privileges.

4. NWPs do not authorize any injury to the property or rights of others.

5. NWPs do not authorize interference with any existing or proposed Federal project.

D. Definitions

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

Compensatory mitigation: The restoration, establishment (creation), enhancement, or preservation of aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Currently serviceable: Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

Discharge: The term "discharge" means any discharge of dredged or fill material.

Enhancement: The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Ephemeral stream: An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Establishment (creation): The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

Historic Property: Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

Independent utility: A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

Intermittent stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the linear feet of stream bed that is filled or excavated. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities eligible for exemptions under Section 404(f) of the Clean Water Act are not considered when calculating the loss of waters of the United States.

Non-tidal wetland: A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands

contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

Open water: For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of standing or flowing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of "open waters" include rivers, streams, lakes, and ponds.

Ordinary High Water Mark: An ordinary high water mark is a line on the shore established by the fluctuations of water and indicated by physical characteristics, or by other appropriate means that consider the characteristics of the surrounding areas (see 33 CFR 328.3(e)).

Perennial stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

Preservation: The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area.

Rehabilitation: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Restoration: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a course substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

Riparian areas: Riparian areas are lands adjacent to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects waterbodies with their adjacent uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 20.)

Shellfish seeding: The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (i.e., spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

Single and complete project: The term "single and complete project" is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete project must have independent utility (see definition). For linear projects, a "single and complete project" is all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or improve the quality (i.e., by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream's course, condition, capacity, or location that causes more than minimal

interruption of normal stream processes. A channelized stream remains a water of the United States.

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a wetland (i.e., water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b) and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line, which is defined at 33 CFR 328.3(d).

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: For purposes of the NWPs, a waterbody is a jurisdictional water of the United States that, during a year with normal patterns of precipitation, has water flowing or standing above ground to the extent that an ordinary high water mark (OHWM) or other indicators of jurisdiction can be determined, as well as any wetland area (see 33 CFR 328.3(b)). If a jurisdictional wetland is adjacent--meaning bordering, contiguous, or neighboring--to a jurisdictional waterbody displaying an OHWM or other indicators of jurisdiction, that waterbody and its adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of "waterbodies" include streams, rivers, lakes, ponds, and wetlands.

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southwest Region
501 West Ocean Boulevard, Suite 4200
Long Beach, California 90802-4213

AUG 19 2008

In response refer to:
2008/04546

Mr. James McIntosh
Environmental Planner
California Department of Transportation
North Region Environmental Branch E-1
P.O. Box 3700
Eureka, California 95502

Dear Mr. McIntosh:

On June 23, 2008, NOAA's National Marine Fisheries Service (NMFS) received your June 20, 2008, letter and Biological Assessment, requesting consultation on the California Department of Transportation's (Caltrans) proposed State Route (SR) 169 storm damage repair project (hereinafter referred to as Project) pursuant to section 7(a)(2) of the Endangered Species Act (ESA), as amended (16 U.S.C. 1531 *et seq.*) and its implementing regulations, 50 CFR 402.

This letter constitutes completion of informal consultation on the Project for Southern Oregon/Northern California Coast (SONCC) coho salmon (*Oncorhynchus kisutch*) Evolutionarily Significant Unit (ESU; June 28, 2005, 70 FR 37160) under the ESA. This letter also serves as consultation under the authority of and in accordance with the provisions of the Fish and Wildlife Coordination Act of 1934 (FWCA). Consultation on essential fish habitat for Pacific Coast salmon was not requested. The action area is within Tribal lands, which were not included in the designation of critical habitat for SONCC coho salmon (May 5, 1999, 64 FR 24049); therefore, consultation on SONCC coho salmon critical habitat is not warranted.

General Description of the Proposed Action

Caltrans is planning to repair storm damage resulting from heavy rains of the winter storms of 2005-2006 on State Route (SR) 169 in Humboldt County, California. CalTrans is the designated non-federal representative for the United States Department of Transportation's Federal Highway Administration (FHWA) for this consultation. SR 169 begins at the town of Johnsons, CA, running southeast to the town of Weitchpec, California and includes the following project locations:

Location 1 (MP 21.10)- northern most location
Location 2 (MP 22.21)
Location 3 (MP 22.58)
Location 4 (MP 23.93)

Location 5 (MP 25.49)
Location 6 (MP 26.31)
Location 7 (MP 29.64)
Location 8 (MP 30.49)
Location 9 (MP 32.88)- southernmost location

The original project was comprised of nine locations, but Location 7 was dropped from the list because it had stabilized. Most of the damage at the project locations is due to the steep hill slopes slipping out (or sinking) which causes cracks in the road. Damaged areas will be excavated using heavy equipment such as excavators or front end loaders. Where small streams and ditches cross SR 169, 24-inch culverts will replace dysfunctional culverts in order to improve drainage and prevent future hillside failures. Rock Slope Protection (RSP) using one-half-ton RSP will be used to rebuild, reshape and fortify hill slopes at many of the repair sites. RSP material will then be covered with well compacted native soils. SR 169 will also be repaved at most project locations following bank and road stabilization activities. For a more detailed description of the damage and repair plans for each site, see Caltrans (2008).

Effects of the Action

Although some culverts at the sites convey active streams, coho salmon do not utilize the waterways because of downstream barriers, insufficient flows, and stream gradient greater than 30 percent. Many of the migration barriers are vertical drops of greater than 10 feet in which the water falls onto bare rock or very shallow water (no pools). Due to the steepness of the hill slope in the project areas, and several migration barriers, coho salmon are not known to utilize any of the small tributary streams that run through the project locations; therefore, SONCC coho salmon would not be directly affected by the Project

Project activities may temporarily increase erosion into the Klamath River. Any effects of increased sediment or turbidity on coho salmon will be temporary and limited as the use of Best Management Practices BMPs will reduce erosion and sedimentation during and after project activities. Additionally, any project-related sediment delivered to the Klamath River is expected to be diluted to insignificant levels. At some locations, coho salmon are not likely to be affected by increased sedimentation into the Klamath River because any fillslope erosion would be transmitted to a road below the project location, not directly to the river. Therefore, loss of instream habitat, riparian habitat, mortality, disruption of spawning, or loss of migratory corridors is not expected to occur.

NMFS believes that the effects analysis provided by Caltrans in the Biological Assessment was sufficient, and that no other information is necessary to concur with the not likely to adversely affect determination by Caltrans.

ESA Effects Determination

Based on our review of the documents provided by Caltrans, and based on our review of site conditions within the action area, NMFS concurs with Caltrans' determination that the Project is not likely to adversely affect SONCC coho salmon.

This concludes informal consultation for the Project. Reinitiation of consultation may be necessary where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered, (2) the action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered, or (3) a new species is listed or critical habitat designated that may be affected by the action.

FWCA Consultation

The purpose of the FWCA is to ensure that wildlife conservation receives equal consideration, and is coordinated with other aspects of water resources development (16 U.S.C. 661). The FWCA establishes a consultation requirement for Federal departments and agencies that undertake any action that proposes to modify any stream or other body of water for any purpose, including navigation and drainage [16 U.S.C. 662(a)]. Consistent with this consultation requirement, NMFS may provide recommendations and comments to Federal action agencies for the purpose of conserving fish and wildlife resources. The FWCA allows the opportunity to offer recommendations for the conservation of species and habitats beyond those currently managed under the ESA and the Magnuson-Stevens Fishery Conservation and Management Act. NMFS has no additional recommendations under the FWCA as the proposed Project is not likely to affect the conservation of fish species and habitats.

Please contact Mr. Seth Naman at (707) 825-5180, or via email at seth.naman@noaa.gov, if you have any questions regarding these consultations.

Sincerely,

Mark Helvey

for Rodney R. McInnis
Regional Administrator

Copy to file – ARN 151422SWR2008AR00254

References

Caltrans. 2008. Biological Assessment-Storm damage repair at nine locations, Humboldt County, State Route 169 north of Weitchpec, California. California Department of Transportation, North Region Environmental Branch E-1. June. EA No. 01-478501